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I. INTRODUCTION

“Corporations are people, my friend.” So claimed Mitt Romney from a soapbox at the Iowa State Fair in the summer of 2011.¹ When hecklers in the audience shouted “No, they’re not,” Romney, who was then a candidate for the Republican presidential nomination confidently responded, “Of course they are.”² Romney’s confidence was most certainly inspired or at least shored up by the January 2010 decision, <i>Citizens United v. Federal Election Commission</i>.³ In <i>Citizens United</i>, the

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² Id.
Supreme Court invalidated a federal statute that limited a corporation’s ability to pay for political advertising out of its general treasury funds.\(^4\) Those limits, it ruled, violated the corporation’s right to freedom of speech.\(^5\) The case has become notorious for the widely held belief that, in doing so, the Court declared that corporations are “persons,” possessing the same constitutional rights as flesh and blood human beings.\(^6\)

Four years later the Court seemed to expand on this conclusion when it ruled in *Burwell v. Hobby Lobby*\(^7\) that a general for-profit corporation had the right to claim an exemption from the requirements of the Affordable Care Act on the basis of its religious convictions.

Whatever the Court said about corporate personhood, there is no doubt that the *Citizens United* and *Hobby Lobby* decisions have instigated—or reinvigorated—debate over the extent to which corporations have constitutional rights. The question of whether corporations are “persons” in the same sense and with the same rights as flesh and blood human beings comes into play primarily because of idiosyncrasies of legal reasoning. Nevertheless, corporate personhood has become the flash point in the modern debate about corporate rights.

The purpose of this article is to demonstrate that the tendency of critics to focus on the concept of corporate personhood is misguided and potentially counterproductive. It is misguided because the history of cases involving corporate constitutional rights reveals that the Court has never settled on any one theory of the nature of corporations, much less the idea that corporations are persons in the same sense as flesh and blood human beings. Notwithstanding that fact, the Court has from its earliest times recognized that corporations have rights under the Constitution. Thus, the focus on corporate personhood has the potential to be counterproductive by drawing attention away from the real issues in *Citizens United* and *Hobby Lobby*. The actual questions these cases raise are: what is the underlying rationale for giving constitutional rights to corporations and what are the limits of those rights? The answer to both of these questions, I suggest, lies in a rule that might be described as the principle of confiscation. Growing out of early Contract Clause cases, this principle holds that the Constitution prohibits government

\(^4\) *Id.*

\(^5\) *Id.*


\(^7\) 134 S. Ct. 2751 (2014).
from confiscating corporate property or depriving a corporation of the essential object of its franchise.

Taking a historical approach, Part II of this article will begin with the 1886 case, *Santa Clara County v. Southern Pacific Railroad.* Santa Clara is generally thought to be the seminal precedent for the proposition that corporations are “persons” and therefore protected by the Fourteenth Amendment guarantee that no state shall deny any person equal protection of the law. It is thus viewed as the starting point for the development of a doctrine of corporate personhood that eventually gave corporations many of the rights held by natural persons. In this article, I will discuss the circumstances and legal traditions surrounding Santa Clara to demonstrate that the claim that this case gave birth to the corporate person is more myth than reality.

Part III will discuss the three main theories of the legal status of corporations, which I will refer to as the grant theory, the association theory, and the unique entity theory. Of these, only the last is compatible with the idea that a corporation is a person as a matter of constitutional law. Yet up to this day—*Citizens United* and *Hobby Lobby* included—the Supreme Court has never settled on one theory to establish the legal status of corporations. With this in mind, I will then demonstrate that, while there is a long tradition of treating corporations as persons for purposes of law, the Court has never held that corporations are “persons” entitled to the same rights and privileges the Constitution guarantees to flesh and blood human beings.

Part IV will turn to the issue of corporate rights. While noting that there is also a long tradition of recognizing that corporations have rights under the Constitution, it will recall that tradition limited corporate constitutional rights in a specific and important way. Traditional constitutional doctrine held that government could not confiscate corporate property or deprive a corporation of the essential object of its franchise. This concept provided the rationale for granting rights to corporations, but also defined the limits of those rights. Prior to the Civil War this principle of confiscation was a standard interpretation of the Article I, Section 10 provision that no state shall pass any law impairing the obligation of contract. Ratification of the Fourteenth Amendment in 1868 shifted the source of corporate rights from the Contract Clause to the Fourteenth Amendment guarantees that no state shall deny any person of life, liberty, or property without due process of law, nor deprive any person of the equal protection of the law. This shift allowed

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8 118 U.S. 394 (1886).
the constitutional rights of corporations to expand over time. The principle of confiscation, however, remained as a limitation on corporate constitutional rights. It remained constitutional doctrine at least until the Court rejected it in *First National Bank v. Bellotti* in 1978 and then rejected it again in *Citizens United*. *Citizens United* was controversial not in the sense that it recognized the corporate person, but rather in the sense that it rejected this traditional and fundamental limit on the constitutional rights of corporations.

The article will conclude by suggesting how this traditional view of corporate constitutional rights might be applied to modern corporations, and why its approach would be preferable to the technique of trying to equate corporations to human beings.

II. **SANTA CLARA COUNTY v. SOUTHERN PACIFIC RAILROAD: THE MYTHICAL BIRTH OF THE CORPORATE PERSON**

*Santa Clara County v. Southern Pacific Railroad* was one of a group of cases challenging a provision of the California Constitution of 1878–1879 that created the formula for assessing property values for purposes of taxation. Under this new formula, taxes for most kinds of property were based on the property’s actual value less the amount of any mortgages held against the property. Railroads “and other quasi public corporations” were assessed differently. Their property taxes were based on the actual value of the property—without any deduction for the amount of mortgages held against the property.10

As might have been expected, railroads filed a number of lawsuits challenging the formula. These worked their way into the federal circuit court where U.S. Supreme Court Justice Stephen Field, who was riding circuit in California, joined U.S. Circuit Judge Lorenzo Sawyer to hold the trial. Speaking for the circuit court, Field declared that, because the California property tax treated certain corporations differently than natural persons, it violated the Fourteenth Amendment guarantee that no state shall deny any person equal protection of the law. The tax formula, he concluded, was unconstitutional.11

Field maintained that adoption of the Fourteenth Amendment meant that all persons within a state’s jurisdiction could claim equal protection under the law. He emphasized that this means “equal security to every

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one in his private rights—in his right to life, to liberty, to property, and to the pursuit of happiness.” 12 It may be difficult to imagine how a corporation pursues happiness, but that did not matter to Field. The important point to him was that the guarantee of equal protection meant that a state could subject no one, corporation or natural person, “to any greater burdens or charges than such are imposed upon all others in like circumstances.” 13 With characteristic flair for which he was renown, Field declared that the Constitution serves as a perpetual shield against all unequal legislation by the states, “whether directed against the most humble or the most powerful; against the despised laborer from China, or the envied master of millions.” 14

When several counties appealed the circuit court’s decisions, the U.S. Supreme Court focused on one case, Santa Clara County v. Southern Pacific Railroad. 15 Ultimately, the full Court invalidated the tax law, confirming the result reached by Field and the circuit court. 16 The Court, however, did so on the basis of a technicality and peculiarity in the California law. 17 The majority of the Supreme Court conspicuously refused to address sweeping constitutional theories of corporate rights, and ignored the idea of corporate equal protection upon which Field had based his circuit court opinions.

Santa Clara would thus have gone down in history as a relatively unimportant tax case except for an exchange of memos between Chief Justice Waite and Bancroft Davis, the court reporter in charge of preparing the Court’s opinions for publication. Recalling instructions that the Chief Justice had given to the attorneys arguing the case, Davis wrote,

In opening the Court stated that it did not wish to hear argument on the question whether the Fourteenth Amendment applies to such corporations as are parties in these suits. All the judges were of the opinion that it does. Please let me know whether I correctly caught your words and oblige. 18

Waite gave the following reply,

I think your [memo] in the California Rail Road Tax cases expresses with

12 Santa Clara, 18 F. at 398.
13 Id.
14 San Mateo, 13 F. at 741.
15 118 U.S. 394 (1886).
16 Id.
17 Id. at 416.
sufficient accuracy what was said before the arguments began. I leave it to you to determine whether anything need be said about it in the report inasmuch as we avoided meeting the constitutional question in the decision.19

Davis used his discretion to insert the following statement into the official published report,

Mr. Chief Justice Waite said: The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a state to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does.20

The narrative of the Santa Clara case, and the way that corporate personhood found its way into the published court reports, has been the subject of criticism for more than a century. At one level, critics simply argue that this comment included by the court reporter is not legitimate precedent.21 As one recent article states, “[I]t allowed corporate personhood to be established without argument, without justification, without explanation, and without dissent.”22 Other critics, both in the legal profession and among the general public, go further, arguing that Santa Clara was part of a conspiracy.

Over time, the conspiracy charge has taken several forms. One implies that the court reporter, perhaps with Waite’s involvement, attached corporate personhood to the Constitution through chicanery.23 Another, which arose and was subsequently discredited during the Progressive Era, maintained that railroad attorney Roscoe Conkling hoodwinked the Court into accepting corporate personhood. Conkling, a former senator, had been a member of the congress that wrote the Fourteenth Amendment. At oral argument in another case involving the California tax, Conkling is said to have produced a secret journal of the congressional committee that promulgated the language of the Fourteenth Amendment that proved the framers had always intended its

19 Id. at 224.
20 Santa Clara, 118 U.S. at 396.
23 Id. at 666.
protections should apply to corporations. A third conspiracy theory focuses on Justice Stephen Field. First, Field had emphasized a theory of corporate personhood in his circuit court opinion. Then, as some critics point out, following the Supreme Court’s *Santa Clara* decision, Field persistently, purposefully, and often inappropriately, cited the case as precedent for the proposition that corporations are persons.

It is not my intention here to analyze these critiques of the history of *Santa Clara*. Rather, I want to point out that most everyone today assumes that, for better or worse, *Santa Clara* is seminal precedent for a doctrine of corporate personhood. Supporters and critics of this doctrine agree that *Santa Clara* changed the law and set us on a course towards recognizing the anthropomorphic corporation—one having human attributes and, therefore, human rights.

One thing that is troubling about the narrative of *Santa Clara* is that the exchange between Court Reporter Davis and Chief Justice Waite does not seem like the language of conspiracy. It seems more like the language of frustration—perhaps frustration over being asked to listen to argument on a subject that was already well settled. Moreover, there is absolutely nothing in Waite’s background to suggest that he would be a part of a conspiracy or that he would let a radically new doctrine surreptitiously slip into the body of constitutional doctrine. It is more likely that he thought he was being asked to address a question that was established and standard doctrine. There was, after all, a long history of corporations being treated as persons under the law.

Recognizing that Waite did not think that the dispute in *Santa

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26 E.g., Harkins, supra note 25, at 258–71.


Clara raised a new or unusual question about whether corporations were protected under the Constitution offers an opportunity to take a fresh look at the narrative of corporate personhood that has engulfed the debate surrounding Citizens United. With this in mind, the next section will begin by reviewing the major theories of the nature and status of corporation. It will then trace the application of these theories in some representative cases leading up to, through, and beyond Santa Clara. It will reveal that, although doctrine defining the nature and status of corporations has changed over time, it has not evolved in the sense of steadily maturing or expanding. The Court has not slowly marched in the direction of recognizing corporations as “persons” entitled to all the rights and privileges of a flesh and blood human being. If there has been any trend over time, it is one of persistent ambivalence about the constitutional status of corporations. Even Citizens United and Hobby Lobby did not break from that trend.

III. THE CONSTITUTIONAL STATUS OF CORPORATIONS

Writing for a majority of the Court in 1879, Justice Samuel Miller described the Union Pacific Railroad Corporation in the flowery rhetoric common to his time:

In the feeble infancy of this child of its creation, when its life and usefulness were very uncertain, the government, fully alive to its importance, did all that it could to strengthen, support, and sustain it. Since it has grown to a vigorous manhood, it may not have displayed the gratitude which so much care called for. If this be so, it is but another instance of the absence of human affections which is said to characterize all corporations.29

In one breath, it seems, Miller took the idea of corporate personhood to its ultimate limit. Only a reference to the corporation’s escape from the womb could have made the image of the anthropomorphic corporation more vivid. In the next breath, however, Miller rejected altogether the idea that a corporation is a person. Meanwhile, he made clear his understanding that a corporation is the creation of the state or, in the case of the Union Pacific Railroad, a creation of the federal government.30

Miller was undoubtedly writing metaphorically. But his metaphor included images that have since become formalized theories about the nature of the corporation. In addition, it reflected ambivalence or

30 See KENS, supra note 27, at 108–09.
confusion about the nature of the corporation; ambivalence and confusion that existed before Miller wrote and continues through the *Citizens United* case in 2010.

The practice of describing corporations as persons for purposes of the law is not the least bit unusual, and was not unusual in Miller’s time. As a matter of convenience courts often drew analogies treating corporations as persons for specific legal purposes. In order to determine the proper jurisdiction of a diversity suit, for example, federal courts recognized corporations as “citizens” of the state in which they were incorporated.\(^3\) Obviously corporations were not actually citizens. Rather, courts used the concept of citizens as an analogy, and judges indulged in a legal fiction as a matter of convenience.

Defining a corporation as a “person” or “citizen” for convenience or legal fiction is a relatively benign practice. Defining the status of corporations for purposes of determining corporate rights, powers, and duties, however, is a more complex and problematic matter. This is true as a matter of business law, where views about the nature of a corporation affect day-to-day relationships among shareholders, management, lenders, customers, and anyone else who has business with the company. For this reason, discussion of the nature of the corporation for purposes of business law tends to be nuanced and continuous.\(^3\) It also overflows into the area of constitutional law. This article is concerned only with constitutional rights, where the debate about the constitutional status of corporations has revolved around three major theories of the nature of the corporation.

The first of these, the grant theory, has also been called the concession theory, or artificial personality theory of the corporation. It holds that a corporation is nothing more than a creation of the state.\(^3\) The state grants a charter to a corporation for the purpose of enhancing the public welfare. The corporation, in turn, is said to possess only those rights, duties, and powers that the state had granted in its charter.\(^3\)

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\(^3\) E.g., Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. OF FIN. AND ECON. 305 (1976); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201; see also Margaret M. Blair, *Corporate Personhood and Corporate Persona*, 2013 U. ILL. L. REV. 785 (describing corporations as having a corporate persona and implying that corporations are something more than a nexus of contracts but less than a person).

\(^3\) Ron Harris, *The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business*, 63 WASH. & LEE L. REV 1421, 1424 (2006).

classic expression of the grant theory, as it relates to constitutional law, is Chief Justice Marshall’s description in the 1819 *Dartmouth College Case*:

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being a mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created.\(^{35}\)

The second theory of the nature of the corporation, the association theory, has been called the partnership theory, or the aggregate theory. It views the corporation as an aggregate of its shareholders or members. It holds that a corporation is a business made up of individual owners united and cooperating in a common undertaking, and who, for convenience, conduct business through the corporate form. In terms of legal rights, this view tends to think of corporate rights as an extension of the rights of the individual owners.\(^{36}\)

The third theory is the unique entity theory, which has been called the natural entity theory or the real entity theory of the corporation. It holds that a corporation is neither a creature of the state nor an extension of its owners. Rather, it is a separate and unique entity.\(^{37}\) Morton Horwitz maintains that this theory blossomed in the early part of the twentieth century when, in a flood of articles, “legal writers continued to reinforce the notion that a group must be treated as an organic whole . . . which cannot be analyzed as the sum of its parts.”\(^{38}\)

With respect to constitutional rights commentators tend to treat these three theories as links in a chain of evolution that begins with the grant, runs through the association, and finally matures into the unique entity theory. Morton Horwitz and Gregory Mark observe that the legal status of corporations evolved over time as the nature of the corporation as a business entity changed. They, and most commentators, agree that


\(^{36}\) Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 Geo. L.J. 1593, 1640–49 (1998); see also Elizabeth Pollman, *Reconceiving Corporate Personhood*, 4 Utah L. Rev. 1629 (2011) (offering a variation and stating that the roots of the corporate person doctrine are based in concerns about the property and contract interests of shareholders and arguing that the constitutional rights of corporations should be understood as limited to those rights designed to protect the rights of the humans involved in them); Mark, *supra* note 28, at 1455–64 (referring to the theory as “partnership analysis”).


\(^{38}\) Horwitz, *supra* note 28, at 220.
the unique entity theory had triumphed by the first part of the twentieth century. Of course, “unique entity” and “person” are not synonymous. Nevertheless, some modern observers have not been hesitant to make the link. Carl J. Mayer, for example, maintains, “[T]he corporation was fully personalized in 1910 . . . .”40 Liam Seamus O’Melinn takes this theory to its most extreme conclusion: “The corporation is far better viewed as an immortal being with a soul, its existence and its entitlements based neither on sovereign grace nor on contracts entered into by rugged individuals, but on a moral personality distinct from that of both the individual and the state.”41

This depiction of evolution implies that our understanding of the nature of the corporation has matured over time with the courts ultimately settling on the unique entity theory and tending more and more to treat the corporation as a person entitled to all the constitutional rights of a human being. It is not necessary to dig very far, however, to determine that this is not true. The Supreme Court in *Santa Clara* did not settle on any one of the three theories of the nature of the corporation, and it has not done so since.

Morton Horwitz maintains that the Court could not have adopted the unique entity view of the corporation in *Santa Clara* because that theory was not anywhere to be found in American legal thought at the time the case was decided.42 Furthermore, he and Mark note that the most ardent proponents of the idea that a corporation was entitled to rights under the Fourteenth Amendment relied not on a unique entity theory, but rather on the association theory to support their position.43 Justice Stephen Field, for example, wrote in his circuit court opinion that led to *Santa Clara* that a corporation consists of an association of individuals united for some lawful purpose.44 “Whatever affects the property of the corporation . . . necessarily affects their interests.”45 He continued, “It is impossible to conceive of a corporation suffering an injury or reaping a benefit except through its members.”46

Although Horwitz and Mark convincingly make the point that

39 Id. at 217–23; Mark, supra note 28, at 1455–56, 1477–78.
42 Horwitz, supra note 28, at 174.
43 Id. at 182, 223; see also Mark, supra note 28, at 1459–61.
45 Id. at 403.
46 Id.
Santa Clara reflected the association theory rather than the unique entity theory, they overlook other nuances in the Court’s debates about the nature of the corporation that continued right up to the Santa Clara case. Specifically, it fails to recognize that the grant theory was also alive and well in the years immediately preceding Santa Clara and in the arguments in the case itself.

More significantly, Chief Justice Waite, who supposedly let the concept of the corporate person slip into constitutional doctrine in Santa Clara, remained steadfastly attached to the idea that a corporation was an artificial creation of the state. Seven years earlier, speaking of the Union Pacific Railroad in the Sinking Fund Cases he said, “This corporation is a creature of the United States. It is a private corporation created for public purposes.”47 Because its property was, for the most part, devoted to public uses, Waite continued, “it is, therefore, subject to legislative control so far as its business affects the public interest.”48 Furthermore, Waite observed that the corporation is not sentient. It does not have a mind of its own; managers make the decisions for it.49 Then, just two years before Santa Clara, in Spring Valley Water-Works, Waite reiterated that, “The Spring Valley Company is an artificial being, created by or under the authority of the legislature of California.”50

The idea that the Santa Clara opinion stands as precedent for a theory of expansive corporate personhood also ignores the fact that the debate about the extent of corporate rights continued in the years immediately following. Corporations continued to press the idea of corporate equal protection with mixed results. In several cases in the late 1880s and 1890s the court rejected claims that state laws treating corporations differently either from natural persons or other corporations violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment.51

Justice Stephen Field continued to advocate expanded constitutional protection for corporations, but even he was ambivalent about the nature of the corporation. In Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania, for example, Field insisted that

47 Union Pac. R.R. Co. v. United States (Sinking Fund Cases), 99 U.S. 700, 719 (1878).
48 Id.
49 See id. at 722.
corporations were persons entitled to the guarantees of the Fourteenth Amendment. Yet he once again justified this proposition with the rationale that a corporation was nothing more than an association of individuals. More revealing, he recognized in *Pembina* that an out-of-state corporation is a creature of the state that had created it.

As if to carry on a family tradition, Field’s nephew, Justice David Brewer, also favored constitutional protections to corporations but was ambivalent about defining a corporation as a person. In *Gulf, Colorado & Santa Fe Railway Co. v. Ellis*, Brewer wrote an opinion holding that state law requiring railroads to pay the attorneys’ fees of people who won small claims against them violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment. “It is well settled that corporations are persons within the provisions of the [F]ourteenth [A]mendment of the [C]onstitution of the United States,” he wrote. Yet, in the same paragraph, he further explained, “The rights and securities guaranteed to persons by [the Fourteenth Amendment] cannot be disregarded in respect to these artificial entities called ‘corporations’ any more than they can in respect to the individuals who are the equitable owners of the property belonging to such corporations.”

Seven years later, concurring in *Northern Securities Co. v. United States*, Brewer made his attitude toward corporate personhood more evident. “A corporation, while by fiction of law recognized for some purposes as a person, and, for purposes of jurisdiction, as a citizen, is not endowed with the inalienable rights of a natural person.”

It is true that later judges would use the preface to the *Santa Clara* opinion as the seminal precedent for a doctrine that a corporation is a person for purposes of the Fourteenth Amendment. In the 1898 case *Smyth v. Ames*, for example, Justice Harlan accepted the proposition without hesitation. Citing *Santa Clara*, he wrote, “That corporations are persons within the meaning of [the Fourteenth] [A]mendment is well settled.” As significant as this was, it still defined corporations as persons only for the limited purpose of extending to them the guarantees

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52 *Pembina*, 125 U.S. at 189.
53 Id.
54 See id.
56 Id. at 154.
57 Id.
58 193 U.S. 197 (1904).
59 Id. at 362 (Brewer J., concurring).
60 169 U.S. 446 (1898).
61 Id. at 522.
of due process and equal protection under the Fourteenth Amendment.

The first case to extend to corporations a constitutional right other than the Fourteenth Amendment was *Hale v. Henkel*, a 1906 case that grew out of a federal antitrust investigation. The Court’s decision, which extended the Fourth Amendment guarantee against unreasonable search and seizure to corporations but refused to apply the Fifth Amendment guarantee against self-incrimination, will be treated in more detail in the next section of this article. What is important here is how the Court’s opinion viewed the nature of the corporation.

Morton Horwitz chooses *Hale* as the moment when the Supreme Court first recognized the unique entity view of the corporation. It is not unreasonable to conclude that the theory is present in the opinion. The very fact that the Court decided to extend a guarantee of the Bill of Rights to a corporation signifies some notion of the corporation as a unique entity. Nevertheless, the decision did not entirely rely on this theory. Quite to the contrary, its discussion of a corporation’s rights under the Fourth Amendment begins with a reference to the grant theory. “[T]he corporation is a creature of the state,” Justice Henry B. Brown wrote for the majority. “It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter.” The state, he reasons, can require production of documents to assure that the corporation is complying with duties under the franchise.

Shifting gears, Brown concluded that a corporation was nevertheless protected under the Fourth Amendment guarantee against unreasonable searches and seizures. To reach this conclusion he relied on the association theory. “A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity,” Brown reasoned. “In organizing itself as a collective body it waives no constitutional immunity appropriate to such body.”

All three theories of the nature of the corporation were present in *Hale*. It is undoubtedly possible to ferret out the unique entity theory in

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62 201 U.S. 43 (1906).
63 See infra notes 154–163 and accompanying text.
64 Horwitz, supra note 28, at 182.
65 *Hale*, 210 U.S. at 74.
66 Id.
67 Id. at 75.
68 Id. at 76.
69 *Hale*, 210 U.S. at 76.
70 Id.
the decision, but the case clearly does not recognize the corporation as having a constitutional status equivalent to a human being. In fact, it may be more reasonable to conclude that the Court’s reasoning leans more heavily on the idea that a corporation is a creation of the state and the idea that it is an association of individuals. Certainly the two older theories of the nature of a corporation had not been replaced. They were alive and well in Hale, and a look at a few well-known cases dealing with the constitutional rights of corporations will demonstrate that they have been alive and well since.

Although the grant theory—the idea that a corporation is nothing other than a creation of the state—does not predominate today’s thinking, it has not been banished from the Supreme Court’s discussion of the nature of corporations. CTS Corporation v. Dynamics Corporation, for example, was a 1987 case where the Court rejected a claim that a state statute was preempted by federal law and violated the Dormant Commerce Clause.71 What is most interesting about the case, however, is that Justice Lewis Powell, who is sometimes portrayed as the Court’s most ardent champion of corporate rights,72 authored a majority opinion that clearly reflected the grant theory.

“We think the Court of Appeals failed to appreciate the significance . . . of the fact that state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law,” Powell wrote.73 He then went on to quote Chief Justice Marshall’s famous statement in the Dartmouth College Case that a corporation is an artificial being, invisible, intangible, and existing only in contemplation of state law.74

In more recent times, this view of the nature of the corporation is more often found in dissents. Chief Justice Rehnquist subscribed to it in his dissent in First National Bank of Boston v. Bellotti;75 Justice Stevens referred to it in his dissent in Citizens United,76 as did Justice O’Connor in her separate opinion in Browning-Ferris Industries v. Kelco Disposal.77

72 See, e.g., Rubin, supra note 21, at 581.
73 CTS Corp., 481 U.S. at 89. The elided portion reads “for purposes of Commerce Clause analysis.” Id.
74 Id.
But if the grant theory is today found mostly in minority opinions, the association theory is everywhere. To demonstrate this one has to look only as far as *Citizens United*. That contentious case is generally understood to stand for the proposition that the First Amendment guarantee of freedom of speech prohibits government from limiting the amount of campaign expenditures paid from a corporation’s general fund. Although the excitement surrounding this case has led to the general belief that the Court thus equated corporations with natural persons, none of the five separate opinions in the case actually subscribed to that idea, and the majority did not rely upon it. Instead, the majority took another route to reach its conclusion that the First Amendment protected corporate political speech, or more particularly in this case, corporate campaign expenditures.

The idea for this route actually took form thirty-two years earlier in *First National Bank of Boston v. Bellotti*. Writing the majority opinion in *Bellotti*, Justice Powell used a judicial sleight of hand to avoid the question of whether a corporation is a person. He accomplished this by maintaining that the First Amendment was not just an individual right, it was also a societal right:

> The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations “have” First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the statute in question] abridges expression that the First Amendment was meant to protect.

Justice Kennedy, who wrote the majority opinion in *Citizens United*, followed the same course. Like Powell, he avoided the question of whether corporations are persons. His opinion did not guarantee free speech to corporations on the theory that corporations have the same rights as flesh and blood human beings. Rather he concluded that the government may not suppress political speech “simply because its source is a corporation.”

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78 *Citizens United*, 558 U.S. at 311.
79 *E.g.*, Schiff, *supra* note 6.
80 *Bellotti*, 435 U.S. at 777.
identity of the speaker,” he wrote.82 “No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”83

Despite having first skirted the issue, Kennedy did not stay out of the debate over the nature of the corporation.84 Nor did the other justices who wrote separate opinions.85 None of them relied on the idea that a corporation is a person. Reuven S. Avi-Yonah closely analyzes the *Citizens United* case and concludes that all of the justices who wrote opinions in the case adopted the unique entity view of the corporation.86 The dissenters differ, he says, only in emphasizing that corporations, despite being unique entities, are different from natural persons and thus may be more heavily regulated.87 Of course, a unique entity is not necessarily a person. And, even though he insists that *Citizens United* relies on the unique entity theory of the corporation, Avi-Yonah does not claim the majority ruled that corporations are natural persons or even that they have the same rights as flesh and blood human beings. Moreover, despite his strong argument, it is just as easy to see that the other theories of the nature of the corporation appear in the various opinions in *Citizens United*.

Reflecting the association theory, for example, Justice Kennedy’s majority opinion explained that corporations or other associations should not be treated differently under the First Amendment simply because such associations are not “natural persons.”88 His attachment to the association theory is reinforced by his argument that shareholders “through the procedures of corporate democracy,” can correct any abuses of the use of a corporation’s general funds in political campaigns.89 Whatever this may mean, it clearly treats the corporation as an association of individuals rather than a real entity. Justice Scalia’s concurring opinion makes the link even clearer. He maintained that freedom of speech includes the freedom to speak in association with other individuals, “including association in the corporate form.”90

Despite his insistence that his opinion does not turn on any theory

82 *Citizens United*, 558 U.S. at 364.
83 Id. at 365.
84 See infra notes 88–89 and accompanying text.
85 Id. at 386 (Scalia, J., concurring); id. at 427–29 (Stevens, J., concurring).
86 Avi-Yonah, *supra* note 37, at 1040, 1043.
87 Id. at 1041.
88 *Citizens United*, 558 U.S. at 343.
89 Id. at 362.
90 Id. at 386 (Scalia, J., concurring).
of the corporation, the association theory of the corporation flows throughout Justice Stevens’ dissent as well, and it is even possible to detect a nod to the grant theory. Stevens notes that corporations are different from natural persons in numerous ways: they have limited liability for their owners and managers, perpetual life, and enhanced ability to attract capital. “Unlike other interest groups,” he says, “they have been effectively delegated responsibility for ensuring society’s economic welfare.”

A corporation cannot vote or run for office. It may be managed and controlled by nonresidents. These, among other characteristics, lead Stevens to observe that the “the financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process.” He concludes that lawmakers have a constitutional basis and democratic duty “to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.”

Upon reading all of the opinions in the case, it is obvious that Citizens United is not the culmination of a supposed line of evolution. It is plain to see that the Supreme Court has never settled on one theory of the nature of the corporation, and thus it has never agreed that a corporation is a person with all the constitutional rights of a flesh and blood human being. This conclusion is made even more evident by Justice Alito’s opinion for the Court in Burwell v. Hobby Lobby. Discussing the section of the Religious Freedom Restoration Act that includes corporations within the definition of “persons,” Alito writes:

But it is important to keep in mind that the purpose of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the people (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to

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91 See infra note 93.
92 Citizens United, 558 U.S. at 465 (Stevens, J., concurring in part and dissenting in part).
93 Id. In footnote 72, Stevens states that his position does not depend upon the advantages of a corporation being “state-conferred.” Avi-Yonah argues that Stevens refers to the artificial entity theory only in a purely historical context. Avi-Yonah, supra note 37, at 1042.
94 Citizens United, 558 U.S. at 394 (Stevens, J., concurring in part and dissenting in part).
95 Id.
96 Id.
97 Id.
If the Court’s approach to explaining the nature of a corporation for purposes of determining corporate constitutional rights seems confused, it may be because it is. One possible implication that might be drawn from this realization comes from John Dewey’s famous 1926 article on corporate legal personality. “‘Person’ is a legal conception,” he writes, “‘person’ signifies what the law makes it signify.” The same could be said about “corporation,” that it is whatever the law says it is. But a slightly different implication takes us back to Justice Miller’s obvious use of metaphor to describe the Union Pacific Railroad in 1879, and to the conclusion that the Court has continued to use the concept of corporate person as a metaphor, fiction, or convenience. Its decision to use the metaphor, apply the fiction, or indulge in the convenience depends entirely on the agreement of at least five justices.

Citizens United and Hobby Lobby really did not change much with respect to efforts of judges to define the status and nature of corporations. What has changed is the rationale for extending constitutional rights to corporations. And, as we shall see in the next section, that change began in 1978 with First National Bank of Boston v. Bellotti.

IV. CORPORATE CONSTITUTIONAL RIGHTS: THE PRINCIPLE OF CONFISCATION

Just as there is a long history of corporations being treated as persons for certain circumstances, so too there is a long history of corporations having certain rights under the Constitution. That history traces back to 1819 where, in the Dartmouth College Case, the Supreme Court ruled that franchises and acts of incorporation were considered a contract between the state and the corporation it had created. Reasoning that corporations were thus protected by the prohibition of Article I, Section 10 that no state shall pass any law impairing the obligation of contract, the Court invalidated a New Hampshire law that

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99 Id. at 2768 (emphasis original). There was considerable disagreement among the circuit court judges about the nature of a corporation and whether Free Exercise rights inhere. See Harkins, supra note 25, at 300–01.

100 John Dewey, The Historic Background of Corporate Legal Personality, 35 Yale L.J. 655, 655 (1926).

101 See supra note 29 and accompanying text.

changed the makeup of Dartmouth’s board of overseers. By defining a
corporate charter as a contract, the court opened the door for giving
corporations constitutional rights. In doing so, however, the Court also
set the stage for limiting those rights. Chief Justice Marshall’s opinion
emphasized that, by changing the makeup of the board of overseers,
New Hampshire intended to bring the private college under state
control. In Marshall’s words, the statute violated the Contract Clause
because it amounted to a violent alteration in the “essential terms” of
Dartmouth’s charter.

The doctrine that evolved from Dartmouth College provided
significant constitutional protection to corporations in the early
nineteenth century. Nevertheless, Contract Clause doctrine included
several exceptions to the inviolability of the corporate franchise. Most
importantly, Dartmouth College and later cases conceded that states had
the right to include a provision in a corporate grant reserving to itself the
power to later revise the agreement. A corporation’s rights under its
charter were also limited by the doctrine that a legislature could not
bargain away the attributes of a state’s sovereignty. Thomas M.
Cooley, one of the mid-nineteenth century’s most renowned
constitutional scholars, pointed out,

The State could not barter away, or in any manner abridge or weaken, any of
those essential powers which are inherent in all governments, and the existence
of such in full vigor is important to the well being of organized society; and
that any contracts to that end, being without authority, cannot be enforced
under the provisions of the [Contract Clause].

Among those essential powers Cooley listed the police power, the power
of eminent domain, and the taxing power.

This idea, that the state could not barter away its sovereign taxing
and police powers, left the door open for regulation of corporations
through generally applicable laws. However, these limitations on the

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103 Id. at 650–54.
104 Id. at 652–53.
105 Id. at 651.
106 Trustees of Dartmouth Coll., 17 U.S. at 712 (Story, J., concurring).
107 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH
REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 280–83
108 Id. at 283.
109 Id. at 280; see also Stephen A. Siegel, Understanding the Nineteenth Century Contract
Clause: The Role of the Property-Privilege Distinction and ‘Takings’ Clause Jurisprudence,
60 S. CAL. L. REV. 1, 41–45 (1986) (explaining that elements of this principle of inalienability
were controversial and became even more so toward the end of the century).
inviolability of the corporate charter were themselves subject to limitations. Under standard Contract Clause doctrine of the time, neither a reserve clause nor the taxing and police powers gave a state the authority to defeat or substantially impair the essential object of the grant or any rights vested under it.\textsuperscript{110}

Under traditional doctrine the notion of what constituted “the essential object of the grant” was broad enough to make the Contract Clause a useful tool for protecting existing corporations.\textsuperscript{111} A corporation might turn to the Contract Clause to claim its franchise was exclusive and the state could not offer a new grant to a competitor.\textsuperscript{112} It might claim exemption from taxation, or from subsequent state regulation.\textsuperscript{113} It was so useful in this regard that some contemporary observers noted that the Contract Clause, more than any other provision of the Constitution, was a source of excessive and angry controversy.\textsuperscript{114} Others charged that the Contract Clause was the bastion of corporate privilege and a shield for corporate power.\textsuperscript{115}

That shield was not as invincible as these criticisms imply, however. Contract Clause doctrine did not prohibit states from exercising its police powers in ways that regulated a corporation’s activities. Rather, it held that the state’s power to do so was subject to the principle of confiscation. Writing in 1858, Isaac Redfield observed, “The power of the legislature to impose new burdens, depends, of course, upon the inquiry whether the burden will impair the essential object of the grant.”\textsuperscript{116}

\textsuperscript{110} \textit{E.g.}, Holyoke Co. v. Lyman, 82 U.S. (15 Wall.) 500, 522 (1872) ("[T]he legislature under the reserved power to amend, alter, or repeal the charter, may pass laws to enforce that duty, as such a law does not impair any contract created by the charter or infringe any right vested in the corporation.").


\textsuperscript{112} \textit{See id.} at 451.

\textsuperscript{113} Gordon v. Appeal Tax Court, 44 U.S. (3 How.) 133, 149 (1845).

\textsuperscript{114} COOLEY, supra note 107, at 273.


\begin{quote}
It is under the protection of the decision in the Dartmouth College Case that the most enormous and threatening powers in our country have been created; some of the great and wealthy corporations actually having greater influence in the country at large, and upon the legislation of the country, than the States to which they owe their corporate existence. Every privilege granted or right conferred—no matter by what means or on what pretense—being made inviolable by the Constitution, the government is frequently found stripped of its authority in very important particulars, by unwise, careless, or corrupt legislation....
\end{quote}

COOLEY, supra note 107, at 179 n.2.
obligation of the contract in the charter of the corporation.”116 A decade later Thomas M. Cooley similarly observed,

The limit to the exercise of police power in these cases must be this: the regulations must have a reference to the comfort, safety or welfare of society; they must not be in conflict with any of the provisions of the charter and they must not, under pretence [sic] of regulation, take from the corporation any of the essential rights and privileges which the charter confers.117

In the mid-nineteenth century, two changes in the law combined to produce a subtle but important variation on the rule that a state cannot deprive a corporation of the essential object of its grant or confiscate corporate property. First was a gradual change in the terms of corporate charters.118 Prior to the Civil War, states typically granted corporate charters to accomplish a single specified public purpose such as allowing a private company to build a bridge or toll road.119 The link between this type of grant and the Contract Clause, which prohibited states from passing any law impairing the obligation of contract, was fairly self-evident. By the end of the Civil War, these special incorporation laws fell out of favor and were replaced by general incorporation acts.120 When corporations thus became simply a form of business organization, not necessarily organized for a specific purpose, the link to the Contract Clause became more tenuous.

The second change began with ratification of the Fourteenth Amendment in 1868. Corporations and other companies would eventually employ the new amendment to claim that state regulations deprived them of their liberty or property without due process of law or that taxes or regulation deprived them of equal protection of the law.

One of the earliest expressions of the variation of the rule that a state was prohibited from depriving a corporation of the essential object of its grant or confiscating corporate property is seen in Peik v. Chicago

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116 ISAAC F. REDFIELD, A PRACTICAL TREATISE UPON THE LAW OF RAILWAYS 549 (2d ed., Arno Press 1972) (1858), Redfield discusses this subject in detail in § 232, which begins on page 549; see also EDWARD L. PIERCE, AMERICAN RAILROAD LAW 40–46 (New York, John S. Voorhies 1857).

117 THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES 577 (1st ed., Boston, Little, Brown, and Co. 1868). Both Redfield and Cooley provide extensive lists of citations for this rule, which, at this stage of development, all came from state courts.

118 Millon, supra note 32, at 206 (“Increasingly during the latter half of the 19th century, states began to replace special chartering with general incorporation law.”).

119 See supra note 34 and accompanying text.

120 See Millon, supra note 32, at 206.
and Northwestern Railroad Company.\textsuperscript{121} In \textit{Peik}, one of the 1877 Granger Cases, attorneys for the railroad claimed that a Wisconsin law setting maximum rates the railroad could charge violated the Contract Clause.\textsuperscript{122} To make their case the railroad attorneys proposed a new theory. This act was unconstitutional, they argued, because it “takes the income, and thus deprives the company of the beneficial use of its property, and the means of performing its engagements with its creditors, \textit{as if the road was confiscated}.”\textsuperscript{123}

Only Justice Stephen Field seemed to agree.\textsuperscript{124} The majority of the Court rejected the Chicago & Northwestern claim, but a seed was planted. The railroads’ tactic of equating rate regulation with confiscation in this fashion blended the Contract Clause argument with the idea that regulation of rates effectively took the railroad’s private property without due process of law and therefore violated the Fourteenth Amendment.\textsuperscript{125}

That theme was continued in another of the Granger Cases, \textit{Munn v. Illinois}, where attorneys John N. Jewett and William G. Goudy also argued that a maximum rate law violated the Due Process Clause of the Fourteenth Amendment.\textsuperscript{126} To explain why maximum rate laws constituted a type of government activity that violated their clients’ rights to liberty and property, the attorneys again tried to convince the Court that regulation of rates amounted to confiscation. Citing an 1871 case that held that a government-sponsored canal project that had flooded an individual’s adjacent land violated the Fifth Amendment; they offered the principle that destroying the value of property constituted confiscation.\textsuperscript{127} Rate regulation, they said, had the same

\textsuperscript{121} 94 U.S. 164 (1877).
\textsuperscript{122}  \textit{Id.} at 175.
\textsuperscript{123}  \textit{Id.} at 168 (emphasis added). Although it is common today to think of the constitutional protection of property as including protection of its title, possession, use, and value, nineteenth century jurists extended the constitutional protection only to possession. Siegel, supra note 109, at 76–77.
\textsuperscript{124}  Field expressed his dissent to all the Granger cases involving corporations in \textit{Stone v. Wisconsin}, 94 U.S. 181 (1877). I say he seemed to agree because Field actually claimed that the majority missed an opportunity to define the limits of the power of the states over corporations. \textit{Id.} at 184 (Field, J., dissenting). He definitely rejected the Court’s rationale in \textit{Munn} and thus its application to the cases involving the Contract Clause. \textit{Id.} at 186.
\textsuperscript{125}  \textit{Peik}, 94 U.S. at 167. The railroad also argued that it violated the Fifth Amendment provision that property shall not be taken for public use without just compensation. \textit{Id.}
\textsuperscript{126}  \textit{Munn v. Illinois}, 94 U.S. 113 (1877). Note that \textit{Munn} involved a partnership rather than a corporation.
\textsuperscript{127}  Brief for the Plaintiffs in Error (Goudy) at 31–33, \textit{Munn}, 94 U.S. 113 (citing \textit{Pumpelly v. Green Bay Co.}, 80 U.S. (13 Wall.) 166 (1871)), reprinted in 7 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 513–
effect. John Jewett best captured their argument: “It is not merely the title and possession of property that the Constitution is designed to protect, but along with this, the control of the uses and income, the right of valuation and disposition, without which property ceases to be profitable, or even desirable.”128

The Court rejected the argument again in Munn, but thirteen years later in Chicago, Milwaukee & St. Paul Railway v. Minnesota, the idea that rate regulation amounted to confiscation gained a foothold.129 Writing for the majority, Justice Samuel Blatchford observed,

If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States.130

Then in the 1898 case, Smyth v. Ames, the Court added force to the idea that regulation could amount to confiscation when it ruled that the Due Process Clause of the Fourteenth Amendment guaranteed that businesses receive a fair rate of return on the value of property they employ for the public convenience.131 At the same time, the Court began to hone the theory of “liberty of contract,” which subjected all regulation, not just rate making, to the challenge that it violated the Due Process Clause of the Fourteenth Amendment.132

The same concept was eventually applied in cases where companies claimed that state tax plans deprived them of equal protection of the law. This was the constitutional claim in Santa Clara. Santa Clara was decided on a technicality and the Supreme Court did not rule on the equal protection claim, but in 1910 it ruled that state law that taxed out-of-state corporations differently from in-state corporations violated the Equal Protection Clause.133 In a similar case that same term, the Court

15 (Philip B. Kurland & Gerhard Casper eds., 1975).
128 Brief for the Plaintiffs in Error (Jewett) at 23, Munn, 94 U.S. 113, reprinted in LANDMARK BRIEFS, supra note 127, at 557.
129 See 134 U.S. 418 (1890).
130 Id. at 458; see also James W. Ely, Jr., The Railroad Question Revisited: Chicago, Milwaukee & St. Paul Railway v. Minnesota and Constitutional Limits on State Regulations, 12 GREAT PLAINS Q. 121 (1992).
133 So. Ry. Co. v. Greene, 216 U.S. 400 (1910). The confiscatory nature of the tax was particularly relevant to the Court. Once railroad property is placed into service within a state, it cannot be withdrawn. Thus, such a tax is an impairment of the value of the investment. See
looked to the Due Process Clause to invalidate a state law that specially taxed taxicabs owned by corporations.\textsuperscript{134} Justice Edward Douglass White explained the rationale. The tax is repugnant to the Constitution of the United States, he wrote, because it is wanting in due process and is therefore confiscatory in character.\textsuperscript{135}

By equating regulation with confiscation these late nineteenth and early twentieth century cases greatly expanded corporate rights under the Constitution and set the stage for even more expansion of those rights. Nevertheless, the principle of confiscation continued to have a limiting effect. Justice Stephen Field, the Court’s most ardent champion of corporate rights, clearly explained both the principle of confiscation and its limits in his circuit court opinion in \textit{San Mateo County v. Southern Pacific Railroad Co}.\textsuperscript{136} Focusing on the Fifth Amendment, he began the explanation by stating that there are certain rights that can apply only to natural persons.

No others can be witnesses; no others can be twice put in jeopardy of life or limb, or compelled to be witnesses against themselves; and therefore it might be said with much force that the word ‘person,’ there used in connection with the prohibition against the deprivation of life, liberty, and property without due process of law, is in like manner limited to a natural person. But such has not been the construction of the courts. A similar provision is found in nearly all of the state constitutions; and everywhere, and at all times, and in all courts, it has been held, either by tacit assent or express adjudication, to extend, \textit{so far as their property is concerned}, to corporations.\textsuperscript{137}

Thus, he concluded that all the guarantees and safeguards of the Constitution for the protection of property possessed by individuals might also be invoked for the protection of the property of corporations.\textsuperscript{138}

Since the \textit{Santa Clara} case the Court has extended many, but not all, rights under the Constitution to corporations. It has, for example, ruled that corporations are guaranteed the right of free speech in cases involving commercial speech.\textsuperscript{139} It has applied to corporations the

\textit{id.} at 414; see also Gulf, Colo. & Santa Fe Ry. Co v. Ellis, 165 U.S. 150 (1897) (requirement that railroads pay attorney’s fees in lawsuits over stock killed); Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389 (1928) (special tax on corporations operating taxies).
\textsuperscript{134} See \textit{W. Union Tel. Co. v. Kansas}, 216 U.S. 1 (1910).
\textsuperscript{135} \textit{id.} at 49 (White, J., concurring).
\textsuperscript{136} 13 F. 722 (C.C.D. Cal. 1882).
\textsuperscript{137} \textit{id.} at 746–47 (emphasis added).
\textsuperscript{138} \textit{id.} at 748.
\textsuperscript{139} Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557 (1980); see also Mayer, supra note 40, at 664. The appendix in Mayer’s article provides a useful list
Fourth Amendment right against unreasonable search and seizure, the Fifth Amendment Takings Clause, the Sixth amendment right to prosecution in the district in which the crime was committed. But it has also ruled that the privilege against self-incrimination is unavailable, while the law regarding a corporate right of privacy is unsettled.

Ruth H. Bloch and Naomi R. Lamoreaux provide one means of explaining why corporate rights might be recognized in one situation but not in another. Seizing on Field’s comment, they maintain,

During the late nineteenth and early twentieth centuries, the Supreme Court drew careful distinctions among the various clauses of the Fourteenth Amendment. Some parts it applied to corporations, in particular the phrases involving property rights; but other parts, such as privileges and immunities clause and due-process protections for liberty, it emphatically did not.

Bloch and Lamoreaux offer a significant number of opinions reflecting the idea that constitutional rights of corporations were limited to property rights while liberty rights applied only to natural persons. They thus convincingly demonstrate that the idea of drawing a distinction between property and liberty was alive in the minds of some judges of the era.

Although the distinction between property rights and liberty rights was undoubtedly in circulation in the early twentieth century, the predominant doctrine regarding constitutional limitations on governmental regulation of business was liberty of contract. This
doctrine, based upon the Fourteenth Amendment guarantee that no state shall deprive any person of liberty without due process of law, blurred any distinction between property and liberty beyond detection. Its earliest manifestations came in cases involving individuals and partnerships\(^\text{147}\) but, once developed, the Court applied liberty of contract to corporations without hesitation.\(^\text{148}\) Cases involving state prohibitions on “yellow dog contracts” that required employees to promise that they would not join a union,\(^\text{149}\) as well as one case involving a law standardizing the weight of a loaf of bread\(^\text{150}\) serve as some convenient examples. Even Stephen Field was willing to employ an early version of liberty of contract rationale to a case in which both parties were corporations.\(^\text{151}\)

Although the principle of confiscation is similar to drawing a distinction between property rights and liberty rights, it offers distinct advantages as the means of determining the limits of corporate constitutional rights. Because the very existence of corporate constitutional rights emerged from the idea that government cannot deprive a corporation of its property or the essential objects of its franchise, the principle of confiscation directly links the limits on corporate constitutional rights to the underlying rationale for giving constitutional rights to corporations at all. It does not depend on the legal fiction of corporate personhood. It thus avoids the confusion and risks associated with treating corporations and natural persons in the same manner. The addition of the guarantee that a corporation cannot be deprived of the essential object of its grant might result in a wider range of corporate rights being recognized in certain circumstances, but it also places a limit on those rights and provides a way to treat corporations and natural persons differently. In addition, the validity of any corporation’s claim of constitutional protection would be based upon the purpose of that corporation. In cases not directly involving property rights, like both \textit{Citizens United} and \textit{Hobby Lobby}, a court could decide that an individual corporation was deprived of the essential object of its

\(^{147}\) E.g., Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); Munn v. Illinois, 94 U.S. 113 (1877).
\(^{148}\) E.g., Allgeyer v. Louisiana, 165 U.S. 578 (1897).
\(^{149}\) E.g., Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908); State v. Jurlow, 129 Mo. 163 (1895).
\(^{151}\) See Butchers Union Slaughter-House and Live-Stock Landing Co. v. Crescent City Live-Stock Landing and Slaughter-House Co., 111 U.S. 746, 756–57 (1884) (Field, J., concurring) (invoking the right to pursue any lawful business or vocation).
franchise without, at the same time, creating sweeping claims of new rights to corporations in general.

Explicit use of the principle of confiscation remains alive in Contract Clause cases today.\(^{152}\) By the mid-nineteenth century, however, the Equal Protection and Due Process Clauses, and provisions of the Bill of Rights replaced the Contracts Clause as the primary source of constitutional rights of corporations.\(^{153}\) As the Court used these other provisions to add to the collection of constitutional rights enjoyed by corporations, the connection to the principle of confiscation that was so self-evident in Contract Clause cases is sometimes less so. Nevertheless, it does not take much effort to see that, even then, the process of granting additional constitutional rights to corporations continued to be guided by the same underlying principle.

*Hale v. Henkel*\(^{154}\) provides a poignant example. As we have seen in the prior section, some commentators point to *Hale* as a key moment in the evolution of corporate personhood.\(^{155}\) In addition, however, many treat *Hale* as the case that started the trend of adding to the list of constitutional rights applied to corporations. The 1906 decision grew out of the government’s investigation of the American Tobacco Company and MacAndrews & Forbes Company for violation of the Sherman Antitrust Act. The government was demanding that agents of the companies testify before a grand jury and that they turn over most of the internal documents of the companies. Edwin F. Hale, secretary treasurer of MacAndrews & Forbes Company, refused both demands.\(^{156}\)

Hale justified his refusal to testify before the grand jury by claiming the Fifth Amendment right against self-incrimination. Because a provision of federal law exempted him from criminal prosecution on the basis of his testimony, however, he had no personal claim to the right against self-incrimination.\(^{157}\) Thus, the issue became whether the Fifth Amendment right against self-incrimination applied to the corporation of which he was the agent and representative. Writing for the majority, Justice Henry Billings Brown observed that the guarantee against self-incrimination is a personal right limited to a person who shall be

\(^{152}\) The most recent use of the explicit language that I have found is *Bennett v. Lonoke Bancshares, Inc.*, 356 Ark. 371, 381 (2004).


\(^{154}\) 201 U.S. 43 (1906).

\(^{155}\) See *supra* note 64 and accompanying text.

\(^{156}\) *Hale*, 210 U.S. at 44–46.

\(^{157}\) Id. at 66.
compelled to be a witness against himself. An agent of the corporation could refuse to testify on the basis that through his testimony he might incriminate himself, but the company official could not refuse to testify on the basis that his testimony might incriminate the corporation.\footnote{Id. at 69–70.}

Regardless of whether that person is an agent, he cannot set up the privilege for a third person, Brown reasoned, and he certainly cannot set up the privilege of a corporation.\footnote{Id.}

The court did, however, accept Hale’s claim that the government’s demand for virtually all of the company’s books and papers violated Fourth amendment guarantee against unreasonable search and seizure. Interestingly, Justice Brown began his analysis of the Fourth Amendment claim by stating that a corporation does not have a general right to refuse to submit its books and papers for examination related to a suit by the state: “[T]he corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter.”\footnote{Hale, 201 U.S. at 74.}

But, although the corporation was not generally exempt from turning over its papers, it was protected against unreasonable searches and seizures.\footnote{Id. at 76.}

For Brown the principle of confiscation weighed heavily in the determination of why this subpoena was unreasonable. “If the writ has required the production of all the books, papers, and documents found in the office of the MacAndrew & Forbes Company, it would scarcely be more universal in its operation or more completely put a stop to the business of that company,” he wrote.\footnote{Id. at 77.} “Indeed, it is difficult to say how its business could be carried on after it had been denuded of this mass of material.”\footnote{Id.}

In the wake of Hale, the Court has applied other provisions of the Bill of Rights to corporations. Nevertheless, for almost a century the principle of confiscation continued to be the key factor to determining what rights applied to corporations and what rights do not. One graphic example of the connection occurred in a 1986 case where the Court invalidated a state law that required utility companies to allow ratepayer advocacy groups to include inserts in the company’s billing envelopes.\footnote{Pac. Gas & Elec. v. Pub. Util. Comm’n, 475 U.S. 1, (1986).} Although the Court ruled that the requirement violated the
First Amendment because it infringed on the company’s right not to associate with speech it opposed, the majority was swayed by the belief that the plan amounted to a government grant of access to private property.\textsuperscript{165}

The underlying principle that government cannot confiscate corporate property or deprive a corporation of the essential object of its grant dates back to the Dartmouth College Case.\textsuperscript{166} For 159 years it stood virtually unquestioned as the rationale for granting constitutional rights to corporations and as a limit on the rights granted to corporations. Then, in 1978, the Court casually dismissed it in a case written by Justice Lewis Powell in First National Bank of Boston v. Bellotti.\textsuperscript{167}

Bellotti sprang from a referendum on a proposed amendment to the Massachusetts Constitution that would authorize the legislature to enact a graduated income tax. First National Bank of Boston, which opposed the income tax, challenged a state law prohibiting corporations from making contributions or expenditures to influence the vote on referenda submitted to the voters, other than ones materially affecting the property, business, or assets of the corporation.\textsuperscript{168}

The first appellate decision in the case came from the Supreme Judicial Court of Massachusetts. Displaying a keen awareness of the historical underpinnings of corporate constitutional rights, the state high court reaffirmed the confiscation principle and upheld the law. “It seems clear to us that a corporation does not have the same First Amendment rights of free speech as those of natural persons,” the Massachusetts Court reasoned, “but, whether its rights are designated ‘liberty’ rights or ‘property’ rights, a corporation’s property and business interests are entitled to [constitutional] protection.”\textsuperscript{169} Continuing, it concluded that the First Amendment rights of a corporation are limited to issues that materially affect its business, property, or other assets.\textsuperscript{170} Furthermore, the court assigned a burden on the corporation to prove that the statute materially affected, not just general business interests, but its business interest in particular.\textsuperscript{171}

First National Bank then appealed its case to the United States Supreme Court which, reversing the state court’s decision, invalidated the limitation on corporate campaign spending. Writing for the majority

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{165} Id. at 16–17 (1986); see also Mayer, supra note 40, at 617.
\item \textsuperscript{166} Trustees of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).
\item \textsuperscript{167} 435 U.S. 765 (1978).
\item \textsuperscript{168} Id. at 767–69.
\item \textsuperscript{170} Id. at 785.
\item \textsuperscript{171} Id. at 786.
\end{enumerate}
\end{footnotesize}
of the U.S. Supreme Court, Justice Lewis Powell disagreed with the Massachusetts Court’s conclusion that a corporation’s constitutional rights are limited to issues that materially affect its business property or other assets. More precisely, describing the Massachusetts court’s reasoning as “novel,” Powell simply ignored it. Refusing to address the issue of whether the confiscation principle placed a limit on corporate constitutional rights, Powell instead focused on the speech itself. “The question in this case, simply put, is whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection.”

William Rehnquist, then an associate justice, was not nearly so eager to dismiss the principle of confiscation. Borrowing from the Massachusetts Supreme Judicial Court’s opinion, he emphasized that a corporation’s right to engage in political speech was limited to situations in which a political issue materially affects the corporation’s business, property, or assets. Even Powell’s majority opinion did not completely foreclose on the possibility of limiting corporate rights. “We need not survey the outer boundaries of the Amendment’s protection of corporate speech, or address the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment,” he wrote. Yet, by casually dismissing the principle of confiscation he rejected both the most significant limitation on corporate constitutional rights and the underlying rationale for giving corporations constitutional rights in the first place.

Thus entered the actual change in the doctrine governing corporate constitutional rights. Justice Powell’s rejection of the confiscation principle had the potential to change the landscape of corporate rights much more fundamentally than did Chief Justice Waite’s supposed recognition of the corporate person. But Justice Powell’s opinion led a relatively muted existence for thirty-two years until it was revived in *Citizens United v. Federal Elections Commission*. *Citizens United*, which invalidated a law limiting corporate expenditures in national elections, brought the issue of corporate constitutional rights to the forefront of American politics and law. Relying heavily on *Bellotti*, Justice Kennedy’s majority opinion repeated Powell’s conclusion that political speech does not lose its First

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172 *Bellotti*, 435 U.S. at 777.
173 Id. at 778.
174 Id. at 828 (Rehnquist, J., dissenting).
175 Id. at 777 (majority opinion).
Amendment protection simply because its source is a corporation.\textsuperscript{177} What is more significant is that, like Powell, he reached that conclusion without giving even a glancing nod to the idea that the constitutional rights of a corporation are limited to issues that materially affect its business, property, or other asset.

As both opinions point out, the list of constitutional rights extended to corporations has grown over time and includes freedom of speech.\textsuperscript{178} But until \textit{Bellotti}, additions to the collection could be traced back, without unduly straining logic, to the principle of confiscation. The actual problem with the \textit{Citizens United} decision is that—following the lead of \textit{Bellotti}—it ignores the fact that the entire history of granting constitutional rights to corporations is rooted in protecting them from state action that would take their property or make it impossible for them to accomplish the essential purpose for which they were created.

Neither Powell in \textit{Bellotti}, nor Kennedy in \textit{Citizens United}, offers a rationale for rejecting the principle of confiscation. Other than Powell’s remark that the principle is “novel,”\textsuperscript{179} neither Justice so much as addresses it. Yet, both have provided a tool that might be used to silently dismantle the traditional limitation on the constitutional rights of corporations.

V. Conclusion

The \textit{Citizens United} decision has caused a major stir in American politics and law. In his 2010 State of the Union Address, President Obama accused the Court of opening the floodgates for special interests and called on Congress to correct the problem.\textsuperscript{180} The President did not directly state that the Court had created the corporate person, but political activists, pundits, and government officials have. Writing for FreeSpeechforPeople.org, for example, Jeff Clements argues that the “personification of corporate entities pervades the case.”\textsuperscript{181} FreeSpeechforPeople.org is just one of many grass roots groups that have organized around opposition to corporate personhood and proposed

\textsuperscript{177} \textit{Id.} at 342.
\textsuperscript{178} \textit{Citizens United}, 558 U.S. at 340–43; \textit{Bellotti}, 435 U.S. at 778–79.
\textsuperscript{179} \textit{Bellotti}, 435 U.S. at 777.
\textsuperscript{180} President Barack Obama, Remarks by the President in State of the Union Address (Jan. 27, 2010), available at http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address.
a constitutional amendment stating that rights protected by the Constitution are the rights of natural persons. On December 8, 2011, Senator Bernie Sanders of Vermont introduced in the United States Senate a resolution calling for such an amendment. The decision has also produced a wealth of political satire. In March 2010, for example, a Maryland corporation declared that it would run in the Republican primary for a seat in Congress. In July 2012, a Seattle area woman married a corporation, although the county quickly retracted the couple’s marriage license.

Given the outcome, it is easy to understand why grass roots organizations, pundits, and politicians criticize Citizens United for having created the anthropomorphic corporation, with all the constitutional rights of a flesh and blood human being. As the second part of this article demonstrates, however, this focus on the corporate person misses the mark. The Supreme Court has never settled on one theory of the nature of a corporation, much less a theory that creates an anthropomorphic corporation.

The actual problem with Citizens United stems from Justice Kennedy’s reasoning that a corporation should not be treated differently under the First Amendment simply because they are not “natural persons.” Thus the challenge posed by Kennedy’s majority opinion is

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to demonstrate why corporations should be treated differently regardless of whether they are defined as persons. Legal scholars have begun to take on that challenge. Noting that the corporate person metaphor hinges on drawing similarities between the corporate person and an embodied human person, Saru M. Matambanadzo maintains that it should also take into account the vast differences.\textsuperscript{187} Elizabeth Pollman uses a version of the association theory to explain when a corporation should be afforded a right of privacy and when it should not. “[C]orporations do not receive rights because the characteristics of the entity so closely resemble a natural human so as to merit granting the right;” she writes, “rather corporations receive rights because, as forms of organizing human enterprise, they have natural persons involved in them, and sometimes it is necessary to accord protection to the corporation to protect their interests.”\textsuperscript{188} Richard Schragger and Micah Schwartzman reason that the process of determining rights of corporations should turn on a consideration of the moral and political values that might be served by attributing legal rights and responsibilities to groups.\textsuperscript{189} Ruth H. Bloch and Naomi R. Lamoreaux have shown that in the early twentieth century there was a vibrant constitutional tradition that distinguished property rights, which applied to corporations, from liberty rights, which did not.\textsuperscript{190}

The principle of confiscation reinforces these ideas. But it goes a step farther and stands on its own. From our earliest constitutional history this principle was the traditional source of limitations on corporate constitutional rights. More importantly, first expressed as the guarantee that the state cannot confiscate corporate property or deprive a corporation of the essential object of its franchise, it provided the underlying rationale for giving constitutional rights to corporations at all.

The principle of confiscation emerged in the early nineteenth century when most corporations received a franchise to carry out a specific purpose and the grant theory of the nature of a corporation was dominant.\textsuperscript{191} The principle, however, is not solely dependent on the belief that a corporation possesses only those rights, duties, and powers that the state had granted in its charter. It is, at its heart, a method for linking a corporation’s constitutional rights to its purpose. The idea that

\begin{footnotesize}
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\item \textsuperscript{188} Pollman, \textit{supra} note 144, at 51.
\item \textsuperscript{190} Bloch and Lamoreaux, \textit{supra} note 145, at 2–3.
\item \textsuperscript{191} \textit{See supra} notes 33–35 and accompanying text.
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the existence of and limits to a corporation’s constitutional rights should be determined by that specific corporation’s purpose is just as valid today as it was then.

Analyzing the *Hobby Lobby* case from a corporate law perspective, Brett McDonnell provides valuable insight about how the principle of confiscation could be applied to modern corporations. The threshold question in *Hobby Lobby* was whether the corporations claiming that certain provisions of the Affordable Care Act violated their religious freedom had standing under the Religious Freedom Restoration Act (RFRA).192 McDonnell suggests that in this case the answer lies in determining whether a corporation is enough engaged in religious exercise to appropriately invoke the protection of the RFRA.193 To determine this he considers two dimensions of the corporation’s character: ownership and organization.194 In this case, ownership looks to the number and concentration of shareholders and the degree to which they share strongly held religious beliefs.195 Organization, which is the most important dimension, looks to the various ways in which the corporation as an organization has formally or informally committed to, in this case, following a religious purpose.196

McDonnell uses the law related to corporate structure and governance to determine whether the corporation’s organization reflects a sufficient commitment to religious purpose. The most persuasive evidence of a corporation’s commitment would be the corporate charter along with by-laws and shareholder agreements that are subject to shareholder approval.197 Less persuasive, but still relevant, would be rules and practices or policy values statements that could be enacted by the board of directors alone.198 Other factors might be the corporation’s choice of goods and services it sells, how it markets itself, and whether it enters into agreements that reflect religious values.199

McDonnell’s immediate focus is on *Hobby Lobby*, a case that involves only a corporation’s claim to religious freedom and one where

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193 See id. at 781; see also Alan J. Meese and Nathan B. Oman, *Hobby Lobby, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations are RFRA Persons*, 127 Harv. L. Rev. F. 273 (2014) (providing a view of how corporate law could be applied in *Hobby Lobby*).
194 McDonnell, supra note 192, at 781.
195 Id.
196 Id.
197 Id. at 796–97.
198 McDonnell, supra note 192, at 797.
199 Id.
that claim technically grows out of a statute.\textsuperscript{200} Nevertheless, the framework he suggests could be applied whenever a corporation makes a claim that it should receive the protection of a constitutional right. He has demonstrated a way for the law to determine whether the constitutional right is sufficiently linked to the corporation’s purpose. Put another way, he has demonstrated a modern method for determining whether a law or regulation has denied the corporation the object of its franchise.

Determining the constitutional rights of corporations in terms of the principle of confiscation rather than in terms of the metaphor of corporate personhood might not fully satisfy critics of the \textit{Citizen’s United} and \textit{Hobby Lobby}.\textsuperscript{201} Given the facts of those cases it is easy to suspect that the outcomes would have been the same.\textsuperscript{202} Nevertheless, the principle of confiscation provides a superior framework for determining the nature and limits of corporate constitutional rights. It requires a corporation to demonstrate that its property has been confiscated or it had been deprived of the essential object of its franchise. It follows that the extension of a constitutional right would be limited to a particular corporation rather than to corporations in general. This would allow courts more flexibility in distinguishing the rights of corporations from those of flesh and blood human beings. Furthermore, recognizing the principle of confiscation would be more historically accurate than ignoring it.

\textsuperscript{200} McDonnell points out that the RFRA claim, though statutory, should be understood in the context of the Free Exercise Clause because the statute was enacted to protect religious liberties. \textit{Id.} at 788.

\textsuperscript{201} Cf. Berea Coll. v. Kentucky, 211 U.S. 45 (1908) (holding that a Kentucky law making it unlawful to operate a school where persons of the white and negro races are both pupils for instruction does not defeat or substantially impair the charter of Berea College, even though its charter provided that its object was the education of all persons who may attend its institution of learning).

\textsuperscript{202} See McDonnell, supra note 192, at 802–09 (explaining that the majority decision in \textit{Hobby Lobby} fits well into the proposed framework).
I. INTRODUCTION

Customary international law ("CIL") forms the foundation of international law.1 According to Article 38 of the Statute of the International Court of Justice, international custom is "evidence of a general practice accepted as law."2 CIL is regarded as "the oldest and the original source of international law."3 Its formulation is simple enough:

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1 As Professor Henkin stated: "The core of traditional international law and its principal assumptions and foundations have been unwritten ‘customary law,’ made over time by widespread practice of governments acting from a sense of legal obligation.” LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 33 (2d ed. 1979); see also HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 438 (Robert W. Tucker ed., 2d ed. 1966) ("Custom is the older and the original source of international law, of particular as well as of general international law.").


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CIL “results from the general and consistent practice of states followed by them from a sense of legal obligation.” One of the early, influential commentators described CIL as “[c]ertain rules and customs, consecrated by long usage and observed by Nations as a sort of law, constitute the customary Law of Nations, or international custom.”

CIL has two components: it must (1) be followed as a general practice—states adhere to the general practice because they believe they have a legal obligation to do so—an objective element), and (2) be accepted as law. The second of these components is viewed as a subjective or psychological element, known as opinio juris. In sum, the widely accepted view among scholars is that CIL is the product of implicit state consent, and CIL rules “form because states engage in or acquiesce in particular practices and eventually recognize them as obligatory.”

Despite centuries of study and reflection, commentators still struggle with identifying how CIL originated and developed. An influential observer once noted that the development of CIL is shrouded in “mystery and illogic.” Part of the problem undoubtedly results from the fact that the making of CIL may be “informal, haphazard, not

INTERNATIONAL LAW 42 (4th ed. 2003) [hereinafter “JANIS INTRO”] (noting that until the 1900s, CIL was the principal form of international law); Curtis A. Bradley & Mitu Gulati, Withdrawing from International Custom, 120 YALE L.J. 202, 208 (2010).

EMMERICH DE VATTEL, 3 THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS 8 (Charles G. Fenwick trans., Carnegie Inst. of Wash. 1916) (1758) (emphasis original). “In 19th century, governments, particularly the United States government, viewed Vattel’s treatise as the primary authority on the law of nations.” Kelly, supra note 4, at 510.

DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 16 (3d ed. 2010); Jack L. Goldsmith & Eric A. Posner, A Theory of Customary International Law, 66 U. CHI. L. REV. 1113, 1116 (1999); see also STEINER ET AL., supra note 3, at 240 (describing a view of CIL that includes four criteria: “(1) ‘concordant practice’ by a number of states relating to a particular situation; (2) continuation of that practice over a ‘considerable period of time’; (3) a conception that the practice is required by or consistent with international law; and (4) general acquiescence in that practice by other states.”).

BEDERMAN, supra note 6, at 17; Goldsmith & Posner, supra note 6, at 1116.


deliberate, even partly unintentional and fortuitous." It is likely that the origins of particular principles of CIL were not contemporaneously recorded, and only became recorded after long-standing usage. Under such circumstances, the historical record may not reflect when a custom began or which ruler initiated the custom.

One of the oldest rules of CIL illustrates this situation. Rulers of states have, for the most part, abided for centuries by the principle that foreign diplomats must be protected by the ruler of the country in which they are stationed—the principle of diplomatic immunity. The genesis of this rule is not entirely known. The most plausible explanation may be that “some particular powerful prince early asserted sovereign or diplomatic immunity, and his lawyers provided conceptual underpinning for it.” This may be as far as scholarship can go in tracing the source. But again, what is missing from this narrative are several facts, such as: (1) the time when this occurred; (2) the identity of the ruler; (3) the willingness or unwillingness of other rulers to abide by this principle; and (4) the amount of time it took for this custom to rise to the level of CIL.

These missing facts are the unknowns. This observation by Professor Henkin, however, does state certain (or, at least, highly plausible) knowns. In the beginning, there must have been a ruler with sufficient power to impose and enforce this principle. From there, it is likely that there were a variety of responses from other rulers. Some weaker rulers must have acquiesced because they were unable to resist pressure from the powerful ruler, while other weaker rulers refused to honor the rule and were punished. Other rulers may have adopted the rule because it also served their self-interest. These responses may not have been mutually exclusive. For example, a weaker ruler may have acquiesced to diplomatic immunity not out of weakness, but because it served her or his interest.

Along these lines, the development of CIL may be described in the following manner:

[When one examines the emergence of such universally applicable customary rules and principles as those relating to diplomatic immunities, the prohibition

10 HENKIN, supra note 1, at 34.
11 See, e.g., Respublica v. De Longchamps, 1 U.S. (1 Dal.) 111, 116 (Pa. Oyer & Terminer, 1784) (“[The assault on a French consul] is an infraction of the law of Nations . . . . The person of a public minister is sacred and inviolable. Whoever offers any violence to him, not only affronts the Sovereign he represents, but also hurts the common safety and well being of nations; he is guilty of a crime against the whole world.”).
12 HENKIN, supra note 1, at 35.
of piracy and privateering, and sovereign rights over the continental shelf, it is impossible to show that every State positively consented to the emergence of the rule in question. Yet it is virtually unanimously accepted that these rules have come to bind all States.\(^\text{13}\)

The real nature of the process by which these customary rules emerged seems to be more along the following lines. Some States actively created the practice, either by initiating it or by imitating it, and others, who were directly affected by the (express or implied) claims in question, by acquiescing in them. This initiation, imitation and acquiescence may plausibly be described in terms of will. But others still, who were not directly affected, sat by and did nothing, and in due course found themselves bound by the emerging rule.\(^\text{14}\)

What underlies this discussion is the fact that power was crucial to the initiation of the custom. Some ruler necessarily had to possess sufficient power to impose or influence the development of the law.\(^\text{15}\)


\(^{15}\) This article’s use of the term “power” is borrowed from Professor Byers, who describes power as “the ability, either directly or indirectly, to control or significantly influence how actors – in this case States – behave.” MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW 5 (1999). Two common sources of national power are military strength and wealth. Id.

\(^{16}\) MALCOLM N. SHAW QC, INTERNATIONAL LAW 79 (6th ed. 2008).
close linkages that exist between custom and treaty and the ever increasing role of institutional and multilateral forums in norm development; (4) the power to shape the context or background against which customary norms emerge . . . ; or the capacity of the United States to navigate successfully within transnational civil society and to exploit the role of civil society in norm development to its own advantages; and (5) the power over the complex processes of coercive socialization by which weaker actors in the system come to accept and to internalize norms originating elsewhere in the system. Coercive socialization represents a political reality that has always threatened to destabilize or dilute the formal concept of consent in international law.17

This article focuses on one particular form of power in the development of CIL, and suggests that it may be the historically most important and influential factor: naval power. As stated by Professor D.P. O’Connell in his classic work, The Influence of Law on Sea Power: “[S]ea power can express and sustain legal decisions that could not be represented even remotely credibly in any other way; and it has revealed the peculiar capacity of navies to manifest the concept of law and order among nations.”18

He added: “[A]nd since navies, alone of the armed services, operate essentially in an international environment their connection with international law has always been obvious.”19 Throughout history, the shape of CIL has been determined, or at least heavily influenced, by the ruler or state with the most powerful navy.

As a historical fact, the great body of customary international law was made by remarkably few States. Only the States with navies – perhaps 3 or 4 – made most of the law of the sea. Military power, exercised on land and sea, shaped the customary law of war and, to a large degree, the customary rules on territorial rights and principles of State responsibility. ‘Gunboat diplomacy’ was only the most obvious form of coercive law-making.20

Professor O’Connell noted this theme:

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17 See Andrew Hurrell, Comments on Chapter Ten and Eleven, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 352, 352–53 (Michael Byers & Georg Nolte eds., 2003) [hereinafter “U.S. HEGEMONY”].
19 Id. In this article, naval or sea power will be defined as “force and threat of force on the oceans. It is usually embodied in a national navy composed of vessels most of which are armed and capable of striking at other ocean craft and at targets on land” and in the air. MARK W. JANIS, SEA POWER AND THE LAW OF THE SEA xiii (1976) [hereinafter JANIS SEA POWER].
The law has never been static. Its pliable character has meant that it has been made to serve the purposes of sea power, and so has become a weapon in the naval armoury. Just how it has played this role has depended on the issues that occasioned resort to naval force, but it has always been prominent in giving form and character to the issues as well as in influencing the conduct of those who have sought their resolution.\footnote{O’Connell, supra note 18, at 16.}

CIL and naval power are intertwined to the point that it may not be possible to draw a boundary between them. “Just as strategic objectives influenced what the law had to say, so the law, if it could be made to prevail, influenced the means of attaining those objectives.”\footnote{Id. at 17.}

Despite the relationship between naval power and CIL, only a minority of international law professors in the United States (and perhaps elsewhere) appear to demonstrate interest in, or examination of, the subject.\footnote{One notable exception is Professor Janis. See Janis Sea Power, supra note 19.} There also appears to be little interest in explaining this relationship to students. A rough survey of the indices of the leading casebooks on International Law reveals no mention of “Navy” or “Naval Power.”\footnote{See, e.g., Barry E. Carter et al., International Law 1156 (4th ed. 2003); Lori Fisler Damrosch & Sean D. Murphy, International Law: Cases and Materials 1524 (6th ed. 2014); Mark Weston Janis & John E. Noyes, International Law: Cases and Commentary 1168 (5th ed. 2014).} Perhaps naval power does not merit its own mention in an index, but references to “Navy” or “Naval Power” are also missing from the sub-listings under “Law of the sea” in the indices.\footnote{Carter et al., supra note 24; Damrosch & Murphy, supra note 24; Janis & Noyes, supra note 24.} This article contends that the relationship of naval power and CIL merits continued examination, and attempts to re-introduce the study of the role of naval power in the development of CIL and to show how it may influence emerging legal norms.

Part II of this article begins with a brief summary of the law of the sea during the period of European colonization (and before), and the legal clashes between the ocean trading European nations.\footnote{This article uses the terms “law of the sea” and “maritime law” interchangeably. Even though they are not identical in meaning, any difference in meaning is not material for purposes of this article.} At that time and “[u]ntil the twentieth century, almost all of the law of the sea consisted of customary law that was premised on freedom of the sea.”\footnote{Carter et al., supra note 24, at 836.} The open and highly contentious question that was unresolved as the European powers aggressively opened and pursued trade with Asia and
the Americas in the 16th and 17th centuries was whether, or to what extent, a state could claim exclusive jurisdiction over the oceans and restrict the navigation rights of other states. Much of today’s law on this issue is traceable to the work of Hugo Grotius, whose role is also examined in Part II. Part III discusses the role of naval power through the period of European colonization and the post-colonial period, and the dispositive role it played in settling unresolved legal issues. The navies of Portugal, Spain, Holland, and England shaped the development of the law during this era of colonialism, and, as the article jumps to the post-WWII era, the role of the United States Navy will emerge. Part IV examines why naval power is unique in its power and ability to shape and influence customary international law. Navies can act (lawfully) in ways that other military branches cannot, and powerful navies operate, for the most part, in international waters. Thus, naval operations and international law are, to a large extent, inseparable.

There are emerging legal norms in human rights law, and though it may seem counter-intuitive to discuss naval power in this context, this article asserts that the two are linked. In particular, Part V examines the relationship between naval power and the right to use force to address humanitarian crises. Contemporary international law prohibits use of force by states, except in situations where the U.N. Security Council authorizes use of force or in cases of self-defense. There is, however, recognition that use of force may be legal in order to address or avert catastrophic humanitarian crises. There has also been recent discussion whether states have a responsibility to protect populations from grave violations of international law such as genocide. In such situations, if states are to act in response to such crises, naval power will be necessary to address or avert them. In this sense, naval power will play a crucial role in determining whether international law develops to the point where the responsibility to protect against humanitarian disasters becomes widely-accepted law. Part VI concludes this article. In doing so, this article will also touch upon instances in which naval power has been used to violate international law or norms, and instances in which it has been ineffective in the face of violations of international law.

II. A BRIEF SUMMARY OF MARITIME LAW DURING THE PERIOD OF EUROPEAN COLONIZATION (AND BEFORE)

Maritime law refers to “the entire body of laws, rules, legal concepts and processes that relate to the use of marine resources, ocean
commerce, and navigation.” Maritime law arose out of the practical needs of the first merchants who set sail from their shores to engage in commerce. Given its origins and purpose, maritime law is inherently international in nature. Indeed, maritime law is one of the earliest forms of international law and may be the quintessential international law. Early forms of maritime law are found in the Code of Hammurabi from around 1800 B.C. The Phoenicians, and later the island of Rhodes, dominated maritime activity and law, and Rhodes is reputed to have developed the Rhodian Sea Code around 900 B.C. (although there is considerable dispute as to whether Rhodes did in fact develop such a code). The imperial Romans adopted and further developed the maritime law of the ancient Greeks, and this law became part of the Jus Gentium, the law governing all within the Roman Empire. Following the fall of the Western Roman Empire, the Italian city-states (starting around the year 1000) dominated maritime activity in the Mediterranean and further developed the Roman maritime law. In the latter part of the 13th century, trade between Aquitaine, England and Flanders resulted in

28 THOMAS J. SCHOENBAUM, 1 ADMIRALTY AND MARITIME LAW, PRACTITIONER TREATISE SERIES 2 (4th ed. 2004). Although commonly used as synonyms, admiralty law is distinct from maritime law in that admiralty law is about the law of ships and shipping. Id. at 1. This article refers to maritime law, or law of the sea, because of its wider scope. See id. 29 Id. at 2. A 19th century American scholar described maritime law’s relationship to commerce in the following manner: Commerce naturally and necessarily followed upon navigation. To regulate the multiform transactions of the former, and to encourage the latter, soon required the attention of the early commercial States. Maritime laws were adopted, appropriate to the limited wants of an infant trade, but containing nevertheless the elements of the expanded system, that now comprehends the commerce of the world, and prescribes the rule of decision, in all contested cases arising out of it. HENRY FLANDERS, A TREATISE ON MARITIME LAW 3 (Boston, Little, Brown and Co. 1852); see also GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 11 (1957) (“Maritime law was secreted in the interstices of business practice. It arose and exists to deal with problems that call for legal solution, arising out of the conduct of the sea transport industry . . . .”). 30 SCHOENBAUM, supra note 28, at 2. Schoenbaum adds, “Although its rules are a part of the internal legal order of each country and, consequently, important national differences persist, the essential concepts and institutions of maritime law are remarkably similar all over the world.” Id. 31 See JANIS INTRO, supra note 3, at 216 (“Long the most important international jurisdiction and long, too, one of the most elaborate parts of international law in general has been the law of the sea.”). 32 SCHOENBAUM, supra note 28, at 3 (provisions relating to marine collisions and ship leasing). 33 Id. at 3–5; see also JOSHUA S. FORCE & STEVEN FRIEDELL, 1 BENEDICT ON ADMIRALTY § 3 (LexisNexis 2015). 34 SCHOENBAUM, supra note 28, at 4, 7. 35 Id. at 7.
the Rolls of Oleron, the most important and influential of the medieval sea codes, which was derived from Roman and Italian sources. 36 “[T]he Rolls became the basis of the common maritime law of the North Sea and Atlantic Ocean”, and also served as the chief early authority for the English Admiralty. 37 The Maritime Court in Barcelona produced the *Libro del Consulat del Mar*, which was first printed in 1494, and the court provided the model for the Admiralty of England. 38 After gaining its independence, the United States’ maritime laws were influenced (but not restricted) by England’s experience, and the United States “received” the traditional body of maritime law (subject, of course, to its particular needs and circumstances). 39 It is the 17th century, however, that deserves particular emphasis.

A. The Influence of Hugo Grotius

The name Hugo Grotius (1583–1645) is undoubtedly familiar to anyone with even a casual interest in international law. Some have described him as the founder of modern international law.

In the seventeenth century, the Dutch jurist Hugo Grotius argued that the law of nations also established legal rules that bound the sovereign states of Europe, then just emerging from medieval society, in their relations with one another. Grotius’ classic of 1625, *The Law of War and Peace*, is widely acknowledged, more than any other work, as founding the modern discipline of the law of nations, a subject that, in 1789, the English philosopher Jeremy Bentham renamed as “international law.” 40

More modestly, he has been described as “the best known of an important school of international jurists guided by the philosophy of natural law.” 41

For purposes of this article, Grotius plays a key role because he,

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36 Id. at 9.
37 Id. at 9–10.
38 *Schoenbaum, supra* note 28, at 11; see also *Benedict on Admiralty, supra* note 33, § 9.
40 *Jenis Intro, supra* note 3, at 1.
41 *Damrosch & Murphy, supra* note 24, at xxi. By any measure, Grotius lived an atypical life. He was born into a powerful family, graduated from college at the age of 11, was sent to meet the King of France at the age of 15, and became a barrister. *Bill Hayton, The South China Sea: The Struggle for Power in Asia* 38 (2014). For the last ten years of his life, he was the ambassador of Sweden in Paris. *Damrosch & Murphy, supra* note 24, at xxi.
probably more than anyone else, is credited with establishing the customary international legal principle of freedom of the high seas. To put this into context, it is necessary to briefly examine the trade competition between Holland, on the one hand, and Portugal and Spain, on the other, during the 16th and 17th centuries.

In the 16th century, Portugal and Spain began highly lucrative trade with and via Asia, and by the end of that century, the united Spanish-Portuguese Empire dominated European trade with Asia. Vast amounts of silk, gold, silver, porcelain, and spices flowed between the regions. This Asian trade route also generated spectacular profits for Spain from silver mined in Latin America. In 1570, China suffered a financial crisis which forced the ruler to decree that all taxes must be paid in silver, but there was not enough silver to meet demand, so prices skyrocketed. The solution to China’s financial crisis and silver shortage was a Spanish-controlled silver mine in the Andes Mountains.

For more than a century [after 1571], [Spanish] galleons shipped around 150 tons of silver a year across the Pacific from Mexico to Manila where it was traded for gold, silks and ceramics from China. Similarly large amounts of silver travelled eastwards from Potosi [in the Andes], via Europe. The price of silver in China – as measured against gold – was double that in Europe. Simply by shipping Andean silver to China, exchanging it for gold and selling that gold in Europe, the Spanish Empire was able to make vast profits – and pay for its wars in Europe. At the same time the European elite rapidly developed a taste for the luxuries of Chinese silk and porcelain.

The profits generated by the Spanish-Portuguese traders understandably attracted the attention of the Dutch. The Portuguese and Spanish argued, however, that they had exclusive rights to trade in Asia and navigate the routes because they had discovered the sailing routes to it. The matter came to a head in 1603 when the Spanish ship, the Santa Catarina, was attacked and seized by Dutch ships owned by the Vereenigde Oostindische Compagnie (“VOC”) in the region that is today Singapore. The VOC was the Dutch East India Company, an arm of the Dutch state, licensed to pursue trade in Asia and contest

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42 HAYTON, supra note 41, at 35–36.
43 Id. at 35.
44 Id.
45 Id.
46 HAYTON, supra note 41, at 35.
47 Id.
48 Id. at 36; DAMROSCH & MURPHY, supra note 24, at xxi–xxii.
49 HAYTON, supra note 41, at 37.
Portugal’s claims to exclusive rights.\textsuperscript{50} When the cargo of the *Santa Catarina* was auctioned off in the Netherlands, it generated 3.5 million guilders—half of the total capital of the VOC.\textsuperscript{51}

In order to provide legal legitimacy and authority to its claim that it had the right to navigate the seas in Asia, the VOC hired Grotius in 1604.\textsuperscript{52} In contrast to Portugal’s argument that it had the right to decide who could sail the seas in its domain, Grotius argued that the sea, like the air, could not be occupied by any one power and was therefore free for all states to use.\textsuperscript{53} These arguments were designed to “defend the right of the VOC to sign contracts with Asian rulers. Grotius [later argued] that these contracts could legitimately exclude everyone else and justify the use of force against anyone who tried to impede shipping or renege on contracts.”\textsuperscript{54} Grotius’ arguments on behalf of the VOC became public when they were published anonymously in *Mare Liberum (The Free Sea).*\textsuperscript{55}

In *Mare Liberum*, Grotius advanced what became a widely accepted fundamental principle: that the high seas, that is, oceans apart from narrow coastal zones, should be open to the ships of all states, an argument he based on the “most specific and unimpeachable axiom of the Law of Nations, called a primary rule or first principle, the spirit of which is self-evident and immutable, to wit: Every nation is free to travel to every other nation, and to trade with it.”\textsuperscript{56}

One recent news article observed that “[o]ver the following centuries [*Mare Liberum*] was used by global powers as justification to sail merchant vessels where they liked, often with gunboats sailing alongside to enforce their authority.”\textsuperscript{57} Grotius’ publication was perfectly suited to support Dutch interests because the Dutch became the dominant force in the South China Sea for most of the 17th century, as

\textsuperscript{50} Id. at 36.

\textsuperscript{51} Id. at 37.

\textsuperscript{52} Id. at 38.

\textsuperscript{53} HAYTON, supra note 41, at 38.

\textsuperscript{54} Id. In his own colorful way, Hayton has a less than charitable view of Grotius, calling him a “spin doctor” for Dutch interests, and adding: “Grotius was a lobbyist for the VOC and a determined advocate of Dutch commercial and political rights. He chose his arguments to suit the occasion, misconstrued the positions of others and relied on shaky references. Nonetheless, his writings have had a lasting impact.” Id. at 38–39.

\textsuperscript{55} Id. at 38. Grotius was 26 years old at the time of publication of *Mare Liberum*.

\textsuperscript{56} JANIS INTRO, supra note 3, at 216 (quoting HUGO GROTIUS, THE FREEDOM OF THE SEAS 7 (Magoffin trans. 1916) (1609)).

traders and middlemen in voyages between Asian destinations. With superior naval power the Dutch forced the Portuguese out of the Japanese silver trade and most of the spice ports.58

Despite Mare Liberum and the rise of the Dutch navy, the issue whether navigation of the high seas was open to all or could be restricted by states remained an open issue. A leading English lawyer, John Selden (1584–1654) opposed Grotius’ arguments for open seas and published a defense of closed or restricted seas called Mare Clausum Sive De Dominio Maris (Mare Clausum) in 1635.59 King James I hired Selden to rebut the open sea argument because he strongly objected to Dutch fishing fleets sailing along the Scottish and English coasts to harvest the annual migration of herring.60 Selden argued that states had the right to restrict access and claim specific areas of the high seas as sovereign territory; this view of the law was designed to protect the English herring fishermen.61

Selden was clearly in favour of drawing imaginary lines through waves but ultimately even Grotius conceded that bays, gulfs and straits could be possessed. However, although they both concluded that it was possible and right to draw lines through the sea, they disagreed about exactly where these lines should be drawn. By the end of the seventeenth century, European states had reached a compromise, sometimes called the ‘cannon shot’ rule, allowing a country to control the waters up to three or four nautical miles from its coast [—the distance a cannon ball could fly from a coastal battery].62

As matters stood in the 17th century, it appears that England and Selden were on the wrong side of history, and England’s attempt to impose a closed sea regime on Holland failed.63 Tides turned, however, and England came to a different view of the issue. England emerged as the globe’s dominant naval power, and it saw that its national interest was best served by open seas where its navy could operate without interference.64 England, then, made sure that open seas became

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58 HAYTON, supra note 41, at 41.
59 DAMROSCH & MURPHY, supra note 24, at xxi.
60 HAYTON, supra note 41, at 39.
61 Id. at 40; see also DAMROSCH & MURPHY, supra note 24, at xxi–xxii (“The rejection of the freedom of the seas by Selden corresponded to the interests of England, at that time navally inferior to Holland. The work of Grotius served to vindicate the interests of the Netherlands as a rising maritime and colonial power not only against England, but also against Spain and Portugal, states which claimed the right to control navigation on distant oceans and trade with the East Indies.”).
62 HAYTON, supra note 41, at 40.
63 Id.
64 Id.
customary international law.  

65 DAMROSCH & MURPHY, supra note 24, at xxi. The law of the sea is now generally governed by the 1982 United Nations Convention on the Law of the Sea, which came into effect on November 16, 1994. DEP’T OF THE NAVY, NAVAL WARFARE PUBLICATION 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 1-1 (July 2007) [hereinafter “NWP 1-14M”]; see generally United Nations Convention on the Law of the Sea—Final Act, U.N. Doc. E.83.V.5 (Nov. 1982) [hereinafter “UNCLOS”], available at http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm. UNCLOS was the result of the Third United Nations Conference on the law of the sea. See NWP 1-14M, supra note 65, at 1-1. The need for this conference was precipitated by the emergence of new concepts such as claims to exclusive economic zones, which expanded the jurisdictional claims of littoral states. Id. The United States is not a party to UNCLOS. Id. The United States, however, does view the navigation and overflight provisions of UNCLOS as an accurate reflection of customary law, and thus acts in accordance with the Convention, except for the deep seabed mining provisions. Id.

The United Nations Convention on the Law of the Sea lays down a comprehensive regime of law and order in the world’s oceans and seas establishing rules governing all uses of the oceans and their resources. It enshrines the notion that all problems of ocean space are closely interrelated and need to be addressed as a whole.

The Convention was opened for signature on 10 December 1982 in Montego Bay, Jamaica. This marked the culmination of more than 14 years of work involving participation by more than 150 countries representing all regions of the world, all legal and political systems and the spectrum of socio/economic development. At the time of its adoption, the Convention embodied in one instrument traditional rules for the uses of the oceans and at the same time introduced new legal concepts and regimes and addressed new concerns. The Convention also provided the framework for further development of specific areas of the law of the sea.

The Convention entered into force in accordance with its article 308 on 16 November 1994, 12 months after the date of deposit of the sixtieth instrument of ratification or accession. Today, it is the globally recognized regime dealing with all matters relating to the law of the sea.


- Some of the key features of the Convention include the following: Coastal States exercise sovereignty over their territorial sea which they have the right to establish its breadth up to a limit not to exceed 12 nautical miles; foreign vessels are allowed “innocent passage” through those waters;
- Ships and aircraft of all countries are allowed “transit passage” through straits used for international navigation; States bordering the straits can regulate navigational and other aspects of passage; . . .
- Coastal States have sovereign rights in a 200-nautical mile exclusive economic zone (EEZ) with respect to natural resources and certain economic activities, and exercise jurisdiction over marine science research and environmental protection; . . .
- Coastal States have sovereign rights over the continental shelf (the national area of the seabed) for exploring and exploiting it; the shelf can extend at least 200 nautical miles from the shore, and more under specified circumstances; . . .
- All States enjoy the traditional freedoms of navigation, overflight, scientific research and fishing on the high seas; they are obliged to adopt, or cooperate
III. THE ROLE OF NAVAL POWER IN DEVELOPING CUSTOMARY INTERNATIONAL LAW

There is a school of thought based on the observation that “successive hegemons have shaped the foundations of the international legal system,”—from Spain in the 16th century, Holland in the 17th century, France in the 18th century, Britain in the 19th century, to the United States today.66 This theme is amplified by a widespread view of how CIL is made. Only a few nations participate in the development of CIL, and (not surprisingly) those few nations are the militarily and politically powerful nations.67

Although all States are equally entitled to participate in the customary process, in general, it may be easier for more ‘powerful’ States to behave in ways which will significantly influence the development, maintenance or change of customary rules. . . .

Among other things, powerful States generally have large, well-financed diplomatic corps which are able to follow international developments globally across a wide spectrum of issues. This enables those States to object, in a timely fashion, to developments which they perceive as being contrary to their interests. If more than oral or written objection is required, powerful States also have greater military, economic and political strength which enables them to enforce jurisdictional claims, impose trade sanctions and dampen or divert international criticism.68

In light of this view of international law-making, more attention should be devoted to one particular attribute of power that enable states to dominate the creation of CIL—naval power.

Power manifests itself in numerous forms, but historically naval

with other States in adopting, measures to manage and conserve living resources . . . .

Id. 66 Michael Byers, Introduction to U.S. HEGEMONY supra note 17, at 1.
67 See Kelly, supra note 4, at 453 (“Few nations participate in the formation of norms said to be customary. The less powerful nations and voices are ignored.”). Other commentators have expressed similar views:

But it is inescapable that some states are more influential and powerful than others and that their activities should be regarded as of greater significance. This is reflected in international law so that custom may be created by a few states, provided those states are intimately connected with the issue at hand, whether because of their wealth and power or because of their special relationship with the subject-matter of the practice, as for example maritime nations and sea law. Law cannot be divorced from politics or power and this is one instance of that proposition.

MALCOLM N. SHAW, INTERNATIONAL LAW 68 (5th ed. 2003).
68 BYERS, supra note 15, at 37.
power has played a unique role in the development of CIL. Although it is difficult to ascribe exact weight to any single factor that determines a nation’s influence when it comes to making international law, the CIL-making states have shared a common attribute—dominant naval power. It has been a consistent theme over time. According to one prominent naval historian, the dominant nation in world affairs since the time of the Romans has been whichever nation commanded naval superiority.  

As Hayton observed: “In each era, the global hegemon—the Netherlands, then Britain and today the United States—has argued in favour of freedom of navigation and used military force to prevent others challenging that freedom.”

The disagreement between the colonial European powers over freedom of the seas was not settled by reasoned discussion around a conference table or in court. It may seem odd today to think of a regime where the right to sail the seas would be controlled by one country. Portugal and Spain, however, claimed control over the ocean. Their claims were abandoned due to the superior naval power of first the Dutch, then the British. The CIL principle of freedom of the seas was imposed on the Iberian states by England and Holland “whose cannon[s] shattered Spain’s claim to oceanic sovereignty.” Similarly, the difference in opinion between Grotius and Selden was not resolved by discussion. It was resolved when Great Britain became the dominant naval power in the world.

From then on, London’s interests were better served by Grotius’ arguments than Selden’s. The British Empire was based on the presumed right of countries—and one country in particular—to trade freely around the world. Rather than arguing for wider territorial waters to save the herring, Britannia now argued for narrower ones so that it could rule more of the waves. That required minimizing other rulers’ rights to limit navigation. The Royal Navy could usually be relied upon to resolve any major disagreements over this point.

69 See BERNARD SEMMEL, LIBERALISM AND NAVAL STRATEGY 3 (1986).
70 HAYTON, supra note 41, at 40.
72 Id.
73 Until World War II, the Royal Navy was the most powerful in the world. The Royal Navy, ENCYCLOPAEDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/511494/The-Royal-Navy (last visited Mar. 30, 2015). Britain’s development as an empire between 1714 and 1837 had an important international and military dimension, based on commerce, sea power and naval dominance. Kenneth Morgan, Overview: Empire and Sea Power 1714-1834, BRITISH BROADCASTING CORP. (Feb. 17, 2011), http://www.bbc.co.uk/history/british/empire_seapower/overview_empire_seapower_01.shtml.
of legal principle with the application of its own version of the 'cannon shot' rule.74

Great Britain’s motivations were obvious; as the world’s greatest trading nation, it needed to defend access to the empire’s far-flung ports.75 Britain accomplished its goals by using its superior naval strength to create “an international maritime regime based on the freedoms of the high seas, freedoms to travel and to fish without coastal state regulation outside a 3-mile territorial sea.”76 This new era of CIL was not the product of formal treaties or conventions; these rules, however, were “remarkably effective [and] respected by most states in times of peace from the end of the Napoleonic Wars in 1815 to the end of World War II in 1945.”77

The dominance of the Royal Navy came to an end with the conclusion of World War II in 1945, and the United States Navy emerged as the dominant global power.78 World War II cemented America’s status as the most powerful naval force in the world, and it has remained the largest and most powerful naval force since then.79 The

74 See HAYTON, supra note 41, at 40.
76 See JANIS SEA POWER, supra note 19, at xiii–xiv.
77 Id. As a result, for over a century, civil and military vessels could sail freely on seas covering some 70 percent of the earth’s surface. Only within a narrow three mile buffer—the territorial sea—did coastal states impose some legal limits on the mobility of naval forces. Id.; see also Morgan, supra note 73, at 5 (“British oceanic enterprise provided the shipping, commerce, settlers and entrepreneurs that held these far-flung territories together. In the Indian Ocean, the English India Company dominated trade with India, Southeast Asia and China... Trade was backed by naval power and by efficient handling of private and public credit, including substantial borrowing via the Bank of England.”).
78 See JANIS SEA POWER, supra note 19, at xiv.

Though it did not become the dominant naval power until 1945, America established itself as a global naval power before the Civil War. The American imperial project in Asia began with Commodore Perry’s exemplary display of gunboat diplomacy in Tokyo harbour in 1853: plenty of gunpowder but no casualties. Rather than resist, as the Qing court had done, the Japanese elite embraced modernisation and, within half a century, were to join in the dismemberment of China. American success in Japan led to greater ambitions. In 1890, the president of the US Naval War College, Alfred Mahan, published The Influence of Sea Power upon History, 1660–1783—analysing Britain’s success in creating a global empire. Mahan argued that for the United States to prosper, it
United States wasted little time in exercising its new role as the world’s naval superpower after the end of World War II in August 1945. This (peaceful) exercise of naval power was demonstrated one month later in September 1945, when President Truman issued a proclamation extending the United States’ control over its seabed resources from 12 nautical miles to the edge of the continental shelf.  

With the stroke of a pen, President Truman upended well-established CIL regarding jurisdiction over coastal waters. “At the time it was made, this claim was inconsistent with pre-existing international law.” Furthermore, “[n]o State had ever made a general claim to control over all of the seabed resources of its continental shelf beyond twelve nautical miles, nor had anything approaching such a claim appeared in any treaty.” What was the purpose of this proclamation? It was to assert control over seabed resources, particularly offshore oil. Why was the United States able to unilaterally assert such a right? Because it was the world’s dominant naval power.

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needed to secure new markets abroad and protect trade routes to them through a network of naval bases. His argument resonated with a new generation of politicians. The opportunity came eight years later. By the end of the Spanish-American War, the US had truly become a Pacific power, annexing the Philippines, Hawaii and Guam.

Id. at 49.  

Proclamation No. 2667, 10 Fed. Reg. 12,305 (Sept. 28, 1945). The Truman Proclamation declared in pertinent part:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to the natural resources of the subsoil and sea bed of the continental shelf. Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as high seas of the water above the continental shelf and the right to their free and unimpaired navigation are in no way thus affected.

Id.

BYERS, supra note 15, at 91.  

Id.  

See JANIS INTRO, supra note 3, at xiv. (The Truman Proclamation “asserted United States ownership of the oil and gas beneath the offshore continental shelf, an underwater plateau extending, in many places, hundreds of miles out to sea.”). To put the Proclamation into historical context, the Truman administration was concerned that the United States was “about to become a net importer of oil, and its dependence on foreign sources of petroleum would swell in the years ahead.” DANIEL YERGIN, THE PRIZE: THE EPIC QUEST FOR OIL, MONEY & POWER 407 (1991).
The Truman Proclamation follows the hypothesis that CIL principles were formed by powerful rulers who established a practice that was then adopted by other rules. Just as England and the Royal Navy used their dominance to ensure that freedom of the high seas became CIL, the United States used its navy to ensure that control of offshore resources became CIL. 84 In both instances, scores of weaker countries enthusiastically embraced the new CIL. 85

Yet notwithstanding the initial inconsistency between the United States’ claim and pre-existing international law, the claim rapidly acquired the status of customary international law as other States followed the lead of the United States and made similar claims to jurisdiction over their own continental shelves. . . .

Why was the Truman Proclamation so successful in promoting the development of a rule of customary international law? One important factor was undoubtedly the position of the United States. In 1945 the United States was by far the world’s most powerful State, having emerged victorious and relatively unscathed from the Second World War. 86

The passage of the Truman Proclamation legitimized and provided cover for other, even weaker, littoral states to exercise the same right. 87 As a result, other countries advantageously expanded their jurisdiction further and further into their coastal waters. 88 While these other nations may not have been powerful enough to establish the practice themselves, the powerful nation’s proclamation opened the door for other nations to follow in its wake. 89

The law of the sea is the creature of international order, reflecting patterns of compromise and consensus, insofar as they exist, among the competing and complementary interests of states. Since security interests are vital to every country, it is only reasonable to expect that states will consider sea power when devising ocean policy. It would be remarkable if a workable legal order for the oceans did not accommodate national naval interests.

Sea power influences the development of the law of the sea not only by imposing the need to reconcile naval interests in international negotiations, but when naval force is used to advance national claims to international law of the sea. The law of the sea can be developed both by convention and by custom. Outside of the development of the law of the sea in the Third United Nations Law of the Sea Conference and in other diplomatic meetings, states attempt to

84 See JANIS INTRO, supra note 3, at 216–17.
85 See id.; see also BYERS, supra note 15, at 91.
86 BYERS, supra note 15, at 91–92.
87 See JANIS INTRO, supra note 3, at 216–17.
88 See id.
89 See ILA Report, supra note 3, at 39.
develop customary law of the sea, making claims and counterclaims in their actual maritime practice. Navies often have a role in this process of customary law making.\footnote{JANIS SEA POWER, supra note 19, at xvii.}

The Truman Proclamation is one notable illustration of how naval power has been especially effective and necessary in forming CIL. States are rightly concerned about the law of the sea; it raises issues of territorial sovereignty, control of natural resources, and access to trading routes. These issues directly affect national prestige, security, commerce, and wealth. Naturally, states strive to assert maximum self-interest in staking out their positions on such issues.\footnote{See A.O. Sykes, International Law, in \textit{1 Handbook of Law and Economics} 764 (Polinsky & Shavell, eds. 2007).} Against such interests, law assumes a lesser priority (assuming there is governing law in the first place).\footnote{See O'CONNELL, supra note 18, at 12–13.} At the time he wrote his book, Professor O’Connell made this observation of the state of the law of the sea:

\begin{quote}
Government departments everywhere have produced instant experts on the law of the sea, usually without legal training, whose anxiety appears to be to ‘beat the gun’ by staking out a claim in advance of the [Law of the Sea] conference so as to present other delegations with a \textit{fait accompli}. No element of \textit{opinio juris} is discernible in this activity; no consideration is given to the elements of effectiveness and consent which are the concomitants of customary law; and, because it becomes impossible to raise the level of analysis above the mere anecdotal, the notion of State practice has become devoid of any significant content. In this intellectual morass, where opinions and views are a substitute for law, the occasions for controversy, dispute and violence become ever more numerous and frequent. The law of the sea has thus become the stimulus to sea power and not its restraint.\footnote{Id. at 13.}
\end{quote}

In situations where there is no governing law or where competing claims are made without principled legal bases, the resolution of issues will ultimately be decided by the naval power that is able to advance and establish the governing regime.\footnote{See JANIS INTRO, supra note 3, at 75.} In this way, “[s]tates may use their navies to demonstrate and enforce their perceptions of the proper law of the sea. If such naval operations are consistent, effective, and accepted, customary law of the sea may develop.”\footnote{Id. at 75.}

As Professor Janis summed it up: “In the customary process, naval operations and the exercise of sea power may play a vital role because
Naval activities are an authoritative and forceful expression of state interest and policy. 96

IV. THE UNIQUE ATTRIBUTES OF NAVAL POWER TO MAKE CUSTOMARY INTERNATIONAL LAW

Naval power is unique among the forms of military power in its ability to shape CIL, and much of that uniqueness is due to Grotius’ prevailing argument that the high seas are international waters that are freely navigable by all navies. 97 Because navies are able to operate with freedom—without interference by other states on the high seas—naval power possesses advantages and capabilities that land-based military powers do not. 98 Simply put, navies are able to act in ways that armies and land-based air forces cannot.

Although all armed forces function, to some extent, as an arm of foreign policy, there are several advantages to sea power. Its principal advantage is flexibility. Since naval forces operate in an international medium—the high seas—they can be moved into an area without the necessity of obtaining overflight or diplomatic clearances. Another classical advantage of sea power is its “universality” or “pervasiveness,” meaning that the sea permits naval vessels to reach distant countries independent of nearby bases. Moreover, sea-based forces are not subject to host-country employment restrictions, a problem encountered by United States land-based forces during the 1973 Middle East conflict. Further, the use of ground troops generally signifies strong resolve and a long-term commitment that tends to escalate rather than de-escalate a conflict. The decision to use ground forces almost always results

96 Id. at 76–77. This view was also shared by the Soviet navy. See Scott C. Truver, The Law of the Sea and the Military Use of the Oceans in 2010, 45 LA. L. REV. 1221, 1233 (1985) (“The Soviet navy has also recognized the possibilities of the use of sea power to influence foreign leaders and support Moscow’s foreign policies. Indeed, Soviet doctrine has accepted the classical concept of seapower . . . .”). Soviet Admiral Gorshkov has written:
Owing to the high mobility and endurance of its combatants, the navy possesses the capability to vividly demonstrate the economic and military might of a country beyond its borders during peacetime. This quality is normally used by the political leadership of the imperialist states to show their readiness for decisive actions, to deter or suppress the intentions of potential enemies, as well as to support “friendly states.” . . . Consequently, the role of a navy is not limited to the execution of important missions in armed combat. While representing a formidable force in war, it has always been an instrument of policy of the imperialist states and an important support for diplomacy in peacetime owing to its inherent qualities which permit it to a greater degree than other branches of the armed forces to exert pressure on potential enemies without the direct employment of weaponry.

Id. (footnote omitted).

97 See JANIS INTRO, supra note 3, at 216.

98 See O’CONNELL, supra note 18, at 3–4.
in a violation of the territorial integrity of another nation, whereas naval forces can remain outside but near territorial waters for long periods, thereby allowing for much greater flexibility in terms of a final decision to commit the forces. Finally, naval forces enjoy an important operational advantage since a significant part of the Navy’s support is organic to the combat unit, thus simplifying communications and logistics. Taken together, these features have made naval forces, in the words of former Chief of Naval Operations Elmo Zumwalt, the “relevant factor” in almost all crises that have occurred since World War II. 99

Returning to Professor O’Connell:

Navies alone afford governments the means of exerting pressure more vigorous than diplomacy and less dangerous and unpredictable in its results than other forms of force, because the freedom of the seas makes them locally available while leaving them uncommitted. They have the right to sail the seas and the endurance to do so for requisite periods, while land-based forces cannot present a credible level of coercion without overstepping the boundaries of national sovereignty.100

He added:

The sea, then, is the only area where armed forces can joust with more or less seriousness in order to promote political objectives; the only area where they can be concentrated, ready for intervention but not overtly threatening to intervene. An army that crosses a frontier represents a use of force altogether different from a navy that crosses the seas.101

“Blue water” navies, then, are able to sail the globe without violating territorial sovereignty, have freedom of movement in international waters, and are designed for flexibility in movement.102 This is why naval power is so intertwined with international law.

Special attributes and broad options inherent in the use of naval forces have made them particularly well suited for the purposes of the defense of sea lines of communication (SLOC) and the projection of power into regions of importance to the state. Naval units have the capability to respond quickly to crisis situations and contingencies world-wide with the precise type and

100 O’CONNELL, supra note 18, at 3–4.
101 Id. at 8.
102 “Blue water” navies are ones that can operate in high seas far from their home country, as opposed to navies whose capabilities are limited to coastal operations. JANIS SEA POWER, supra note 19, at xiii.
magnitude of force necessary to achieve the stated objective. The naval forces of the major maritime powers have the capability to apply military power deftly across the entire spectrum of armed force: from the maintenance of unobtrusive presence, to the deliberate show of force for political purpose, to limited war, to general conventional war, to a launch of a strategic nuclear attack. Naval force, then, is flexible and possesses wide geographical reach. As Hedley Bull has described these special qualities:

As an instrument of diplomacy, sea power has long been thought to possess certain classical advantages vis-à-vis land power and, more recently, air power. The first of these advantages is its flexibility: a naval force can be sent and withdrawn, and its size and activities varied, with a higher expectation that it will remain subject to control than is possible when ground forces are committed. The second is its visibility: by being seen on the high seas or in foreign ports a navy can convey threats, provide reassurance, or earn prestige in a way that troops or aircraft in their home bases cannot do. The third is universality or pervasiveness: the fact that the seas, by contrast with the land and the air, are an international medium allows naval vessels to reach distant countries independently of nearby bases and makes a state possessed of sea power the neighbor of every other country that is accessible by sea.

Inherent in the peacetime use of navies, however, is the ability to travel freely upon the oceans of the world. Without the free use of international ocean space, these special attributes of naval force for the exercise of sea power in peacetime can provide little benefit to the nation with great power ambitions.103

Thus, though it may not be apparent to casual observers, naval power and international law are, in fact, intertwined and inseparable. Moreover, naval power has been instrumental in forming and/or enforcing international law. This fact has been demonstrated throughout history, and continues to hold force.104

A. A Brief Description of the United States Navy

Because naval power occupies such a crucial role in international law-making and enforcement, this article will briefly describe the status of the United States Navy. The United States Navy is, by far, the largest in the world.105

103 Truver, supra note 96, at 1228–29 (footnote omitted).
104 See Schachter, supra note 20, at 536–37.
In 2010, then Secretary of Defense, Robert M. Gates, provided this summary of the status of the U.S. Navy:

- The U.S. operates 11 large carriers, all nuclear powered. In terms of size and striking power, no other country has even one comparable ship.
- The U.S. Navy has 10 large-deck amphibious ships that can operate as sea bases for helicopters and vertical-takeoff jets. No other navy has more than three, and all of those navies belong to [our] allies or friends. Our Navy can carry twice as many aircraft at sea as all the rest of the world combined.
- The U.S. has 57 nuclear-powered attack and cruise missile submarines – again, more than the rest of the world combined.
- Seventy-nine Aegis-equipped combatants carry roughly 8,000 vertical-launch missile cells. In terms of total missile firepower, the U.S. arguably outmatches the next 20 largest navies.
- All told, the displacement of the U.S. battle fleet – a proxy for overall fleet capabilities – exceeds, by one recent estimate, at least the next 13 navies combined, of which 11 are our allies or partners.
- And, at 202,000 strong, the Marine Corps is the largest military force of its kind in the world and exceeds the size of most world armies.106

Secretary Gates affirmed that “the United States stands unsurpassed on, above, and below the high seas.”107 He also noted the historical roots of the Navy’s importance:

But we must always be mindful of why America built and has maintained a Navy, Marine Corps, and Coast Guard. Indeed, it was an Army general, Ulysses Grant, who said that “[m]oney expended in a fine navy, not only adds to our security and tends to prevent war in the future, but is very material aid to our commerce with foreign nations in the meantime.” And in fact, this country learned early on, after years of being bullied and blackmailed on the high seas, that it must be able to protect trade routes, project power, deter potential adversaries, and, if necessary, strike them on the oceans, in their ports, or on their shores.108

The Navy is charged with four missions: (1) Control of the Sea; (2) Projection of Power Ashore; (3) Strategic Deterrence; and (4) Naval Presence.109

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107 Id.
108 Id.

The first mission, “sea control,” is that role historically associated with navies and still considered the fundamental function of the U.S. Navy. It involves keeping open sea lanes of communication for U.S. and allied purposes while denying their
The foreign policy or political use of naval power differs from other applications of military power in that its use is continuous. Routine naval activities, or “preventive deployments,” contribute in several ways to the overall American foreign policy goal of conflict avoidance. First, preventive deployments demonstrate the United States’ military and political commitment to particular states or groups of states. The continuous presence of the Sixth Fleet in the Mediterranean is an example. Preventive deployments also demonstrate to foreign governments the capability of U.S. naval forces to act, if required, in support of our interests. And, naval presence forces confirm, on a routine basis, our political commitments to others. . . .

A second type of deployment supporting foreign policy is the “reactive deployment” in response to a crisis. Such deployments may simply signal American interest in the outcome of the crisis; alternatively, the presence of naval forces on scene may be intended to induce a preferred course of action.\footnote{108}

The United States has relied upon its naval power in numerous instances to advance foreign policy interests.

A study by the Brookings Institution found that the United States employed its armed forces 215 times for political purposes between 1946 and 1975. Naval forces participated in 80% of these instances, and more than 100 incidents involved only naval forces. If the period surveyed were narrowed to include only political uses since 1955, the Navy was involved in nine of every ten incidents. These figures clearly support President Warren G. Harding’s assessment that “the Navy is rather more than a mere instrumentality of warfare. It is the right arm of the State Department.”\footnote{111}

The Navy, in one of its Commander’s Handbooks, recognizes the importance of international law and its role.

\footnote{International law is defined as that body of rules that nations consider use to the enemy. . . . “Projection of power ashore” describes the attainment of military objectives on land by the use of Marine Corps amphibious forces. Although this mission is also largely war-related, the frequent peacetime use of Marine Corps forces to support foreign policy broadens its political dimension. . . . The third mission of the Navy, “strategic deterrence,” involves the use of naval forces—principally ballistic missile submarines—to discourage adversaries from launching a nuclear attack. . . . The term “naval presence” simply means the use of naval forces short of war to achieve political objectives. The broad aims of naval presence are to encourage actions in the best interests of the United States or her allies, and to deter actions inimical to those interests by projecting a stabilizing influence into an area of crisis.}

\footnote{Id. (footnotes omitted).}
\footnote{Id. at 87–88 (footnotes omitted).}
\footnote{Id. at 81–82 (footnotes omitted).}
binding in their relations with one another. International law derives from the practice of nations in the international arena and from international agreements. International law provides stability in international relations and an expectation that certain acts or omissions will effect predictable consequences. If one nation violates the law, it may expect that others will reciprocate. Consequently, failure to comply with international law ordinarily involves greater political and economic costs than does observance. In short, nations comply with international law because it is in their interest to do so. Like most rules of conduct, international law is in a continual state of development and change.\(^{112}\)

In light of the multi-faceted roles of naval power, it is inaccurate to view naval power as simply one form of military power to be utilized when violent force is required (usually when legal processes or diplomacy fail). It is also an integral arm of foreign policy, and is uniquely capable of making and enforcing law. Any study of the development of CIL without examination of its role would be incomplete.\(^{113}\)

\(^{112}\) NWP 1-14M, supra note 65, at 20.

\(^{113}\) See Truver, supra note 96, at 1226–1228. Truver went on to note:

As important as the civil maritime assets are, however, this discussion is concerned solely with the present and future uses of naval power, especially in the legal-politico-military context of the future law of the sea. That is, why do states want navies and what purpose does sea power serve in a “peacetime” environment? Second, what are the special attributes of sea power which permit states to pursue their politico-military objectives by relying upon naval force? And finally, what are the roles of naval power as an instrument of foreign policy in situations short of war?

The U.S. Navy publication, Strategic Concepts of the U.S. Navy, NWP-1, provides a clear statement of the importance of sea power to the United States. America’s geographical position, the location of major allies, America’s great dependence on international seaborne trade, and the increasing importance of the oceans as sources of food, energy and minerals offer compelling rationales for the missions, structure, and size of the U.S. Navy. The central importance of the seas to continued American prosperity and national security is evident in this excerpt from NWP-1:

The United States is a maritime nation with only two international frontiers and thousands of miles of coastline bordering on two of the world’s largest oceans. . . . Unlike its potential adversaries, the United States is heavily involved in the interdependent world economy. Should the sea lines of communication be interdicted for any length of time, the welfare of U.S. citizens would be radically impaired. The majority of U.S. allies are overseas and even more dependent [on] free use [of] the seas than we are. The critical support required by them in time of war is that which can be projected across the seas. All U.S. international relations, be they economic, political, or military, are influenced by this heavy dependence on free and unimpeded passage on the oceans of the world. The dependence on the seas impacts directly on any consideration of national strategy.
V. THE CONTINUING ROLE OF NAVAL POWER TO SHAPE CUSTOMARY INTERNATIONAL LAW

Though it may seem indelicate to discuss matters of force and violence in academic discussions, it is an inescapable fact that navies (and all military branches) exist to engage in use of force, if necessary. This fact is juxtaposed alongside the driving theme and first principle of international law: Avoidance of use of force. Indeed, in listing the purposes of the United Nations, the Charter starts:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.114

The Charter reinforces this point in Article 2. Paragraph 3 provides: “All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”115

Paragraph 4 provides: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”116

The Charter provides only two exceptions to the prohibition of use

The doctrinal foundation for this statement was expressed at the end of the nineteenth century in the writings of Admiral Alfred Thayer Mahan, whose conception of the close relationships among national power, foreign policy, and sea power provided a cardinal thesis for the use of sea power to further national objectives. Mahan perceived the sea as “a great highway” or “a wide common” providing countries having access to it with an easier and cheaper means of transportation than across land. Using Great Britain as an example and citing the effective use of the sea for both commercial and military transport which brought Great Britain tremendous wealth and international prestige, Mahan argued that no nation that aspired to great power status could ignore the importance of sea power. Navies, the tools with which to forge great power, had two purposes in Mahan’s scheme. The first was to protect commerce, so that no country could interfere with the free use of the oceans as an avenue for international trade. The second purpose was to carry out “aggression” or combat.

Id. (footnotes omitted).

114 U.N. Charter art. 1, ¶ 1.
of force: (1) use of force is authorized if approved by the Security Council; and (2) self-defense.\textsuperscript{117}

In light of these fundamental principles, an air of illegitimacy may seem to surround the idea of naval power influencing the development of CIL. The notion that force or the (express or implied) threat of force is involved in making law runs counter to the aspirations of a world governed by law. This article contends, however, that naval power has a legitimate role to play in developing CIL, even when it comes to advancing human rights law (which may seem counter-intuitive). To develop this contention, this article looks to the legal and factual events relating to the bombing of Kosovo by NATO forces in 1999.

The disintegration of the former Yugoslavia resulted in violent conflict among the various ethnic groups in the region. In particular, violence escalated between ethnic Serbs and ethnic Albanians. In 1998, the U.N. Security Council condemned “the excessive and indiscriminate use of force by Serbian security forces and the Yugoslav army” against the ethnic Albanians.\textsuperscript{118} Despite the violence, the Security Council failed to authorize the use of force to protect the ethnic Albanians. In early 1999, ethnic Serbian forces killed dozens of ethnic Albanian civilians in a village in Kosovo.\textsuperscript{119} These events led NATO to intervene with force to end the violence.\textsuperscript{120} In March 1999, NATO began a bombing campaign against Serbia with the purpose of protecting the ethnic Albanians from the ethnic Serbs.\textsuperscript{121} It is important to note that this use of force was not authorized by the Security Council, and no NATO member could plausibly claim self-defense. In other words, there was no legal basis for this use of force under the U.N. Charter. Russia denounced the bombing as a “flagrant violation” of the U.N. Charter.\textsuperscript{122} The United Kingdom denied Russia’s claim, and asserted its justification for the use of force: “We are in no doubt that NATO is acting within international law and our legal justification rests upon the accepted principle that force may be used in extreme circumstances to avert a humanitarian catastrophe.”\textsuperscript{123}

The problem with Britain’s position was that it was arguable whether the use of force was based on an “accepted” principle. Russia certainly did not agree, and the principle is found nowhere in the U.N.

\textsuperscript{117} U.N. Charter arts. 39, 51.
\textsuperscript{118} S.C. Res. 1199 (Sept. 23, 1998).
\textsuperscript{119} DAMROSCH & MURPHY, supra note 24, at 1154.
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} DAMROSCH & MURPHY, supra note 24, at 1155.
Charter. After the fact, an independent international commission concluded that NATO’s use of force was “illegal, yet legitimate.”

Kofi Annan, the Secretary-General, commented:

> To those for whom the Kosovo action heralded a new era when States and groups of States can take military action outside the established mechanisms for enforcing international law, one might ask: is there not a danger of such interventions undermining the imperfect, yet resilient, security system created after the Second World War, and of setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents, and in what circumstances?

Despite the ambiguities regarding the legality of NATO’s use of force against Serbia, this use of force has given rise to a possible third exception to the prohibition of use of force: Use of force is now arguably legal to avert a humanitarian catastrophe. This exception was discussed in a legal memorandum dated March 7, 2003, from British Attorney-General Goldsmith to Prime Minister Tony Blair in the build-up to the invasion of Iraq in 2003. In that memorandum, Goldsmith identifies three bases for the legal use of force: “(a) self-defence (which may include collective self-defence); (b) exceptionally, to avert overwhelming humanitarian catastrophe; and (c) authorization by the Security Council acting under Chapter VII of the UN Charter.”

Goldsmith goes on to observe that subpart (b) “has been emerging as a further, and exceptional, basis for the use of force. It was relied on by the UK in the Kosovo crisis and is the underlying justification for the No-Fly Zones. The doctrine remains controversial, however.”

Since then, there has been discussion in diplomatic circles about State responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. The responsibility to protect has not risen to the level of binding international law; it is merely

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127 Id.
128 Id.
aspirational at this time. If it ever becomes accepted as law, however, it will only have effect so long as a State possesses the power to enforce it against the violators. This is why naval power matters.

The bombing of Kosovo confirmed the advantage of naval power over land-based attacking options. In 2001, the General Accounting Office ("GAO") published a review of the operational challenges in conducting the campaign. The GAO made several recommendations addressing a variety of operational challenges that emerged during the campaign. The challenges related to issues such as: (a) “working with the host countries and U.S. embassies to obtain permission to base aircraft in specific locations;” (b) “conducting extensive site visits to determine what improvements must be made to foreign airfields and arranging for the improvements to be completed;” (c) “ensuring that U.S. aircraft have adequate ramp space, hangars, and fuel;” and (d) “obtaining all the logistics services necessary to sustain and house the personnel who will be deployed at foreign airfields.” The use of naval aircraft carriers does not raise these issues. The aircraft carriers sail in international waters, and may engage in operations without the logistical challenges faced by land-based aircraft. Naval power provides flexibility and independence that is not provided by other military branches. Crises (humanitarian, or otherwise) may occur anywhere, and only a naval power has the ability to respond without raising additional complications of territorial sovereignty and cooperation by other states.

A more recent example of the U.S. Navy’s ability to address humanitarian crises occurred in 2014. That summer, thousands of Yazidis were trapped on Mt. Sinjar in Iraq by Islamic State of Iraq and the Levant (ISIL) forces, who sought to kill or enslave the Yazidis. In

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130 See id. at 514.
133 Id. at 7.

As you know, yesterday, we announced that a team of U.S. military personnel accompanied by USAID conducted an assessment on the situation on Mount Sinjar and the impact of U.S. military actions to date. The team assessed that there are far fewer Yazidis trapped on Mount Sinjar than previously feared, and that’s largely because of our successful humanitarian air drops and U.S. airstrikes on ISIL targets. These are the kinds of missions, as you know, that the military trains for all the
response to the threats posed by ISIL, the United States engaged in 
airstrikes against ISIL. The strikes were initiated by the launching of 47 
missiles from U.S. warships operating in international waters. 135

Though it may seem that discussion of military power, including 
naval power, is somehow inconsistent with human rights, the opposite 
may be true. Events like genocide and ethnic cleansing are violent 
exercises of power by those with power over those without. If human 
rights law is to advance to the point where it becomes universally (or, at 
least, widely) accepted that use of force is lawful in order to address or 
avert such grave violations of international law, enforcement will depend 
on states with the willingness and capability to stop or remedy such 
violations. The states with the greatest capacity to do so will be the ones 
with dominating naval power.

These efforts enabled the Peshmerga to assist thousands of Yazidis in 
evacuating from the mountain each night over the last several days. Those who 
remain on Mount Sinjar are in better condition than we previously thought they 
might be, and they continue to have access to the food and water that we have 
airdropped. And as you may know, we did yet another airdrop last night.

The secretary is very proud that we’ve been able to effect this kind of change 
around Mount Sinjar, and in particular thanks to the skill and professionalism of 
our military personnel.

While this assessment has led us to conclude that an evacuation mission is far 
less likely, we’re not taking our eye off the ball with respect to the humanitarian 
crisis in Iraq. We continue to assess the needs of the Yazidi people, as well as 
others who have been displaced in northern Iraq. We will conduct additional 
humanitarian airdrops, if needed, and we appreciate the assistance of the British, 
the French, and other countries, as well as our interagency partners, working with 
us to provide assistance to the Iraqi people.

Meanwhile, as Secretary Hagel reiterated last night, the situation in Iraq 
remains dangerous and our efforts there are not over. The president has been clear 
about our limited military objectives in Iraq. They are, one, to protect American 
citizens and facilities; two, to provide advice and assistance to Iraqi forces as they 
battle ISIL; and, three, to join with international partners to address the 
humanitarian crisis.

U.S. military remains ready to conduct—or continue, I’m sorry, airstrikes to 
protect U.S. personnel and facilities in and around Erbil and to protect the Yazidi 
people. However, while our airstrikes and our humanitarian aid have had an impact 
on the situation in northern Iraq, there is still no American military solution to the 
larger crisis in Iraq. The only lasting solution is for the Iraqis to come together and 
form an inclusive government that represents the legitimate interests of all Iraqi 
citizens and unifies the country in its fight against ISIL.

Id.

Conduct Airstrikes Against ISIL in Syria (Sept. 23, 2014), available at 
VI. CONCLUSION

Naval power has played a key role in the development of CIL, and will no doubt continue to do so. It may also play a role in the advancement of human rights (though its primary purpose will always remain defense and projection of force). The purpose of this article, however, is not to extol the unquestioned virtue of naval power or to assert that it always plays a positive, beneficial role in international law. Indeed, the discussion would be incomplete without an examination of the role of naval power in violating laws or norms. Professor O’Connell acknowledged this fact: “But navies can play the part of the criminals as well as of maritime regional crime squads, and it is sometimes difficult to know which of the two roles they are in fact playing . . . .”

One example of the (mis)use of naval power was displayed by the Royal Navy (the most powerful navy in the world at the time) in the First Opium War in 1839 to 1842. At that time, British traders imported large amounts of opium into China, generating large-scale profits for the traders and widespread addiction in the Chinese population. Alarmed by the rates of addiction, the Chinese emperor attempted to restrict the import of opium. China’s attempt to suppress the import of opium by British traders triggered a massive response by the Royal Navy. Britain’s response “introduced ‘gunboat diplomacy’ to Asia in raw and undiluted form.” After a few early battles in 1839 and early 1840, Britain dispatched a fleet to wage war on China.

“The fleet consisted of 48 ships—16 warships mounting 540 guns, four armed steamers, 27 transports and a troop ship . . . .” China’s attempt to shut down the opium trade was forcefully defeated. The Royal Navy was the instrument to promote and maintain unrestricted drug trade by the Western powers, particularly Britain.

Another example of the failure of naval power in matters of international law also involved the Royal Navy and its relationship to the slave trade. Britain outlawed the British slave trade in 1807. Prior to

136 O’Connell, supra note 18, at 1.
138 Id. at 2–4.
139 Id. at 11.
140 Id. at 31.
141 Perdue, supra note 137, at 32–35.
142 Id. at 35.
143 Huw Lewis-Jones, The Royal Navy and the Battle to End Slavery, BRITISH BROADCASTING CORP. (Feb. 17, 2011),
1807, however, the Royal Navy was itself involved in the slave trade.\textsuperscript{144} It had its own enslaved Africans in parts of the Caribbean, and escorted slave ships down the African coast.\textsuperscript{145} Up to three million Africans were transported in British ships from 1650 to 1807, and at the end of the 18th century Britain dominated the slave trade, with an average of more than 150 slave ships leaving English ports each year.\textsuperscript{146} Britain was the pre-eminent slave trading nation during the 18th century, and illegal British slave trading continued after 1807.\textsuperscript{147} Prior to 1807, all of this was done, of course, under the protection of the Royal Navy. Even after Britain made slave trading illegal, a quarter of all Africans who were enslaved in the period from 1500 to 1870 were transported across the Atlantic after 1807.\textsuperscript{148}

After 1807, the Royal Navy began patrols of the African coast in an attempt to stop the slave trade.

The Royal Navy began an anti-slavery patrol in 1808 following Britain’s decision to abolish its slave trade in 1807. In 1819, the Navy created a naval station in West Africa, an independent command under a Commodore (prior to this the ships were on “particular service”).

Between 1808 and 1860, the Royal Navy, West Africa Squadron seized approximately 1600 ships involved in the slave trade and freed 150,000 Africans who were aboard these vessels.

Although the Royal Navy is estimated to have captured no more than 10 percent of the ships involved in the slave trade, the consistent role of the West Africa Squadron can be argued to have exerted considerable pressure on the nations that continued to trade in slaves after 1807.

There were few benefits to serving on the West Africa squadron. Daily life was tedious, there were little chances of promotion and disease was common. The dangers of the coastal climate were exacerbated by the operational necessity of the men traveling through rivers and swamps in boats, and many suffered from fevers. Moreover, the ships of the squadron were unsuited to their task and often easily out-run by the slavers.\textsuperscript{149}

Britannia ruled the waves, yet its ships were outrun by the slave

\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Lewis-Jones, supra note 143.
\textsuperscript{148} Id.
traders, and the trade remained robust.\textsuperscript{150} So how was it that the most powerful navy in the world was powerless to stop the slave trade? Perhaps the Royal Navy was unable to commit sufficient resources to the task due to its conflicts with other European powers and the newly freed colonies in America, or perhaps it was unwilling. Why did the slave trade remain so active after 1807? Why was the Royal Navy insufficiently equipped to deter the slave trade in a meaningful way? Why did the Royal Navy provide so little career incentive to its officers to combat the trade? Whatever the situation may have been, the Royal Navy was unable or unwilling to devote maximum effort to ending the slave trade, notwithstanding Britain’s abolition.

These are two examples where naval power was used to engage in efforts that would be considered illegal today (the Opium Wars) or where there was less than full commitment—and perhaps a lack of enthusiasm—to stop illegal activity (the slave trade). Like anything else, naval power may be misused to promote illegal activity or it may be used to develop and promote beneficial international law. On a more positive and hopeful note, the United States Navy recognizes its role to uphold international law:

U.S. naval forces constitute a key and unique element of our national military capability. The mobility of forces operating at sea combined with the versatility of naval force composition—from units operating individually to multicarrier strike group formations—provide the President and the Secretary of Defense with the flexibility to tailor U.S. military presence as circumstances may require.

Naval presence, whether as a showing of the flag during port visits or as forces deployed in response to contingencies or crises, can be tailored to exert the precise influence best suited to U.S. interests. Depending on the magnitude and immediacy of the problem, naval forces may be positioned near areas of potential discord as a show of force or as a symbolic expression of support and concern. Unlike land-based forces, naval forces may be so employed without political entanglement and without the necessity of seeking littoral nation consent. So long as they remain in international waters and international airspace, U.S. warships and military aircraft enjoy the full spectrum of high seas freedoms of navigation and overflight, including the right to conduct naval maneuvers, subject only to the requirement to observe international standards of safety, [and] to recognize the rights of other ships and aircraft that may be encountered . . . .

\textsuperscript{150}See Lewis-Jones, \textit{supra} note 143 (“Patrolling the coast was arduous, unpleasant and frustrating, and the vessels employed on the station were often too old, too slow, and too few in number to catch the slave ships.”).
illustrations of the use of U.S. naval forces in peacetime to deter violations of international law and to protect U.S. flag shipping.\textsuperscript{151}

Given the historical and continuing role of naval power in developing and influencing customary international law, this role merits a place in the study of international law. Naval power possesses the potential to advance international law in positive ways, but it can also be misused. If it is to be employed to achieve aspirational goals, policymakers must first be aware of its role and why that role is so important. This is why any student of international law should take naval power into account.

\textsuperscript{151} NWP 1-14M, supra note 65, at 4-3 (emphasis added). NWP 1-14M states its purpose as:

This publication is intended for the use of operational commanders and supporting staff elements at all levels of command. It is designed to provide officers in command and their staffs with an overview of the rules of law governing naval operations in peacetime and during armed conflict. The explanations and descriptions in this publication are intended to enable the naval commander and his staff to comprehend more fully the legal foundations upon which the orders issued to them by higher authority are premised and to understand better the commander’s responsibilities under international and domestic law to execute his mission within that law.

Id. at 19.
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I. INTRODUCTION

Following the 2010 elections, when Republicans took over, or increased their majorities, in a number of state legislatures, and also won a number of state Governor races, a spate of new abortion restricting laws have increased abortion rights litigation. Many government actions have been held unconstitutional by courts. A number of these cases have involved direct challenges to the *Roe v. Wade* and *Planned Parenthood v. Casey* doctrine that viability is a critical point in terms of state ability to regulate abortion.¹ Not surprisingly, courts have found these regulations unconstitutional.²

A number of other cases have involved challenges to statutes requiring abortion clinics to have admitting privileges at a local hospital, ostensibly to facilitate transfer of patients from the clinic to a hospital in the event of a medical emergency arising during the abortion procedure,

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¹ See *Roe v. Wade*, 410 U.S. 113, 163 (1973) ("With respect to the State’s important and legitimate interest in potential life, the ‘compelling’ point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother’s womb. State regulation protective of fetal life after viability thus has both logical and biological justifications."); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 870 (1992) (plurality opinion) ("[T]he concept of viability, as we noted in *Roe*, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman.").

² See, e.g., *Isaacson v. Horne*, 716 F.3d 1213 (9th Cir. 2013) (holding that Arizona law *prohibiting* abortions where the probable gestational age is at least 20 weeks is unconstitutional, as viability is usually thought to occur between the 23rd and 24th weeks of pregnancy), *cert. denied*, 134 S. Ct. 2841 (2014); *MKB Mgmt. Corp. v. Burdick*, 16 F. Supp. 3d 1059 (D.N.D. 2014) (invalidating North Dakota House Bill 1456, which *prohibited* abortions following detection of heartbeat, which occurs many weeks before viability).
and to improve care once admitted.\(^3\) In reality, most hospitals choose not to grant abortion clinics admitting privileges, and thus the effect of the regulation, if enforced, would be to shut down the abortion clinic.\(^4\) In the event of a medical emergency, the emergency room would be required to admit and treat the patient, so the admitting privilege requirement serves little legitimate state purpose.\(^5\)

Most courts confronting this issue have recognized that to follow the doctrine laid down in *Planned Parenthood v. Casey* requires a two-step analysis, so that: (1) even if the regulation, in the language of *Casey*, is not a “substantial obstacle” to abortion choice, and thus not an “undue burden,” (2) the regulation still must be, in the language of *Casey*, a “reasonable measure” to advance a legitimate interest.\(^6\) Some courts have stated this reasonableness test reflects mere minimum rationality review.\(^7\) Others have recognized it is a higher form of reasona-

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\(^3\) See, e.g., Planned Parenthood of Greater Tex. Surgical Health Services v. Abbott, 951 F. Supp. 2d 891, 899–900 (W.D. Tex. 2013) (“The State argues that when an abortion provider has privileges at a local hospital, the provider is more likely to effectively manage patient complications by providing continuity of care and decreasing the likelihood of medical errors. . . . The state also argues that . . . [the requirement] would improve treatment, once an abortion patient is at the hospital.”), rev’d in part, 748 F.3d 583 (2014), cert. granted sub nom, Whole Woman’s Health v. Cole, No. 15-274 (Nov. 13, 2015), discussed infra notes 166–67.

\(^4\) See, e.g., Miss. Jackson Women’s Health Org. v. Currier, 760 F.3d 448, 450 (5th Cir. 2014) (“[Doctors] sought admitting privileges at seven of the Jackson-area hospitals [Jackson, Mississippi, having the only abortion clinic in the state of Mississippi], but no hospital was willing to grant either of the doctors these privileges. The hospitals maintained this stance despite the doctors’ request that they reconsider. The State subsequently denied [their] request for a waiver . . . .”); Abbott, 951 F. Supp. 2d at 900–01 (“Each hospital’s bylaws are unique, thereby causing variability in hospital-privilege application requirements, such as: physician residency, board certification, threshold number of surgical procedures, threshold numbers of annual hospital admissions, among others . . . . [T]he vast majority of abortion providers are unable to ever meet the threshold annual hospital admissions, because the nature of the physicians’ low-risk abortion practice does not generally yield any hospital admissions. Clinic physicians are similarly unable or unlikely to meet the threshold surgery numbers because they simply do not perform the qualifying surgeries.”).

\(^5\) Abbott, 951 F. Supp. 2d at 899–900 (“A lack of admitting privileges on the part of an abortion provider is of no consequence when a patient presents at a hospital emergency room. By law, no hospital can refuse to provide emergency care. See 42 U.S.C. § 1395dd. . . . [A]n emergency-room physician at Ben Taub Hospital in Houston, Texas, testified that she has never had an occasion to consider whether an incoming patient’s physician has admitting privileges at the hospital. Additionally, she would not have treated any patient differently if she were aware of that fact.”).

\(^6\) Casey, 505 U.S. at 878 (plurality opinion) (“[R]egulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden.”); id. at 883 (considering whether an informed consent regulation is a “reasonable measure to ensure an informed choice”).

\(^7\) See, e.g., Planned Parenthood of Greater Tex. Surgical Health Services v. Abbott, 748 F.3d 583, 593–96 (5th Cir. 2014) (finding a Texas regulation requiring physicians performing
bleness balancing where the “feeblest the medical grounds, the likelier the burden, even if slight, to be ‘undue’ in the sense of disproportionate or gratuitous. It is not a matter of the number of women likely to be affected.”

Similar confusion regarding what is required to follow Planned Parenthood v. Casey is mirrored in other recent cases involving a range of post-2010 abortion regulations. In deciding these cases, some courts have viewed the inquiry demanded by Casey as a simple dichotomy between what they view as undue burdens because they impose a substantial obstacle to abortion choice, which are categorically unconstitutional, versus what they view as not undue burdens, which are categorically constitutional. In contrast, most courts have viewed Casey as requiring a reasonableness analysis, in addition to the undue burden analysis. Similar to the courts in the admitting privileges cases, some courts have applied minimum rationality review as the second step in the analysis. Other courts applying the reasonableness inquiry have focused more on reasonableness balancing.

8 See, e.g., Planned Parenthood of Wisc., Inc. v. Van Hollen, 738 F.3d 786, 798 (7th Cir. 2013) (granting preliminary injunction against Wisconsin law requiring physicians performing abortions to have admitting privileges at a hospital within 30 miles of their clinic), discussed infra notes 171–72. See also Planned Parenthood Se., Inc. v. Bentley, 951 F. Supp. 2d 1280, 1285–88 (M.D. Ala. 2013) (granting preliminary injunction by applying two-part reasonable relation and “undue burden” test with respect to Alabama law requiring admitting privileges at a local hospital).

9 See, e.g., McCormack v. Hiedeman, 694 F.3d 1004, 1014–18 (9th Cir. 2012) (finding an Idaho law prohibiting a person from seeking an abortion in any place other than a hospital, doctor’s office, or clinic unconstitutional as applied to a woman who terminated her pregnancy by taking an abortion-inducing drug prescribed by a physician and lawfully purchased over the Internet).

10 See, e.g., Comprehensive Health of Planned Parenthood of Kan. and Mid-Mo., Inc. v. Templeton, 954 F. Supp. 2d 1205, 1221–1223 (D. Kan. 2013) (holding an “informed consent” provision requiring a physician to provide a woman seeking an abortion with information about the capacity of the fetus to feel pain at specific gestational ages constitutional as not a “substantial obstacle” to abortion choice and thus not an “undue burden.”).

11 See, e.g., Planned Parenthood Minn., N.D., S.D. v. Rounds, 686 F.3d 889, 902–06 (8th Cir. 2012) (holding a South Dakota law requiring physicians to provide patients seeking abortion with written disclosure of a correlation, but not necessarily a causal link, between persons who have obtained abortions and an increased risk of suicide constitutional as truthful, non-misleading, and relevant to the patient’s decision, by adopting rational basis review deference to legislative judgment, stating “the state legislature, rather than a federal court, is in the best position to weigh the divergent results and come to a conclusion about the best way to protect its populace”).

12 Planned Parenthood Ariz., Inc. v. Humble, 753 F.3d 905, 911–18 (9th Cir. 2014) (holding that the district court abused its discretion in denying a preliminary injunction against an Arizona statute requiring that medications used to induce abortions be administered in
In many cases, this difference in analysis has not resulted in a difference in case outcomes, as less-than-undue burdens typically are viewed as not only satisfying minimum rationality review but satisfying reasonableness balancing as well.\footnote{See, e.g., Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 881–83, 885–97 (1992) (finding that informed consent requirements about the “nature of the procedure, the attendant health risks and those of childbirth, and the ‘probable gestational age’ of the fetus” and “24-hour waiting period” prior to obtaining an abortion with a “medical emergency” exception are “reasonable”).} In cases involving closer calls, however, like the recent admitting privileges cases, it can make a real difference if the burden on abortion rights does not pose such a substantial obstacle to choice as to be an undue burden, but the state’s interests in regulation are weak. Such weak reasons may be enough to satisfy a minimum rationality review test, but not reasonableness balancing.\footnote{Compare Planned Parenthood of Greater Tex. Surgical Health Services v. Abbott, 748 F.3d 583, 589–96 (5th Cir. 2014) (finding that admitting privileges regulation was constitutional under minimum rationality review) with Planned Parenthood of Wisc., Inc. v. Van Hollen, 738 F.3d 786, 798 (7th Cir. 2013) (granting a preliminary injunction against admitting privileges regulation using a reasonableness balancing test).}

In deciding what the correct approach is to abortion regulation after\textit{ Roe v. Wade} and \textit{Planned Parenthood v. Casey}, Part II of this article discusses the legal doctrine adopted by the Supreme Court in\textit{ Roe} and\textit{ Casey}. That discussion will show that the best reading of\textit{ Casey} is that it adopted a doctrine whereby an “undue burden” on abortion choice, defined as a “substantial obstacle to a woman seeking an abortion,”\footnote{Casey, 505 U.S. at 878.} triggers\textit{ Roe}’s strict scrutiny approach, while a less-than-undue burden on abortion choice triggers a reasonableness balancing approach higher than minimum rationality review. Part III of this article supports this analysis by paying careful attention to the application of the undue burden analysis in\textit{ Casey} to the spousal notification, informed consent, and 24-hour waiting period regulations at issue in the case.

Part IV of this article expands on this discussion to note how the joint opinion’s reference in\textit{ Casey} to its “undue burden” analysis tracking the Supreme Court’s doctrine in the ballot access cases, like\textit{ Anderson v. Celebrezze},\footnote{See\textit{ Casey}, 505 U.S. at 873–74 (citing Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)).} strongly supports use of a reasonableness balancing
test higher than minimum rationality review. Part IV also notes how this *Casey/Celebrezze* approach is mirrored in a range of other fundamental rights cases, where substantial burdens trigger strict scrutiny, and less-than-substantial burdens trigger a reasonable balancing test higher than minimum rationality review. Part V discusses how *Gonzales v. Carhart*, the Supreme Court’s last major abortion rights case, is consistent with this analysis and does nothing to change the *Casey/Celebrezze* reasonableness balancing doctrine.

In light of this doctrinal structure, Part VI of this article analyzes a number of recent district court and court of appeals cases involving abortion rights. Part VII places this *Casey/Celebrezze* reasonableness balancing approach in the context of the Supreme Court’s general doctrinal approach to individual rights adjudication. Part VIII provides a brief conclusion.

II. **ABORTION RIGHTS DOCTRINE IN **PLANNED PARENTHOOD V. CASEY

A. Background to Planned Parenthood v. Casey: Roe v. Wade and Its Progeny

As is well known, the United States Supreme Court held in 1973 in *Roe v. Wade* that under the Fourteenth Amendment’s concept of personal liberty a woman has a fundamental right to end a pregnancy by abortion. Under *Roe v. Wade*, any burden on that woman’s fundamental right triggered a strict scrutiny approach, requiring the government to justify any regulation by showing the regulation was narrowly tailored to advance a compelling government interest. Even under strict scrutiny review, the Court held in cases decided after *Roe* that all abortions after the first trimester could be required to be performed in a licensed hospital, where “hospital” included outpatient surgical clinics, and a second physician could be required at the abortion of a viable fetus to attempt to save its life when no delay occurs from that requirement that would increase the risk to the mother’s health.  

19 *Id.* at 155–56, 162–64 (noting that the state’s legitimate interest in maternal health becomes compelling for purposes of strict scrutiny review at the end of the first trimester, while the state’s legitimate interest in protecting pre-natal life becomes compelling when the fetus is viable).
20 See, e.g., Simopoulos v. Virginia, 462 U.S. 506, 519 (1983) (finding Virginia’s statute requiring second-trimester abortions be performed in licensed clinics constitutional); Planned
On the other hand, the Supreme Court held many state laws unconstitutional under a strict scrutiny standard. Regarding the surgical procedure itself, these included: abortion must be approved by more than one physician; saline amniocentesis cannot be used after the first 12 weeks of pregnancy; physicians must use the same care to preserve fetal life as if a live birth was intended, even before viability; abortions after the first trimester must be in a full-service hospital; doctors must use an abortion technique that favors the fetus, unless it would pose significantly greater risk to maternal health; and a second-physician requirement when viability is possible, with no exception for the mother’s health when a second physician is delayed. Regarding related matters of abortion regulation, the Court held it was unconstitutional: to require a wife to inform her husband before having an abortion; to require parental consent to a minor’s abortion, unless a medical emergency exists; to require a 24-hour waiting period after consent; to require the physician to tell the women that “an unborn child is a human life from the moment of conception;” to require that certain information must be provided in all cases regardless of whether in the physician’s judgment the information is relevant to the patient’s personal decision or whether certain risks are nonexistent for a particular patient; and to require physicians to file information in public records from which patients might be identi-
During this period, the Court upheld some laws relating to abortion under minimum rationality review because the Court viewed those laws as neutral—not burdening abortion rights. Ordinarily, laws that do not burden a fundamental right are treated as standard social or economic regulations triggering only minimum rationality review under the Due Process Clause or Equal Protection Clause. Examples of abortions laws triggering only minimum rationality review included: only physicians may perform abortions, women must provide written consent to an abortion, routine hospital records must be kept, states and the federal government can fund normal childbirth expenses, but refuse to reimburse for the cost of an abortion, and exempt abortion from laws reimbursing other medical costs; and all removed tissue from the abortion must be sent to a pathologist.

With respect to minors, the Court appeared to apply intermediate scrutiny, rather than strict scrutiny, for burdens on abortion rights for three reasons: “the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.” Thus, laws that would be unconstitutional if applied to adults, like requiring notification or consent of another person, may be constitutional if applied to minors if there is a “significant state interest”—under intermediate review this requires a “sufficient justification”—for the difference in treatment. Under this analysis, the Court held a state law requiring parental consent constitutional as long as it assured a prompt judicial hearing where the minor could avoid the requirement by demonstrating: “(1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents’ wishes;
or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.”

With respect to possible application of criminal laws to physicians performing abortions, the Court held void for vagueness a statute requiring physicians to attempt to preserve the life of an aborted fetus if there is “a sufficient reason to believe that the fetus may be viable.” The Court is very skeptical about imposing any criminal liability for aborting a viable fetus unless a doctor knows it is viable or in bad faith ignores facts regarding viability. The Court also held void a criminal statute which required physicians to dispose of fetal remains in a “humane and sanitary manner” because the statute was too vague.

B. The Court’s Decision in Planned Parenthood v. Casey

In 1989, the Court was faced with an opportunity to overrule or dramatically limit Roe v. Wade in Webster v. Reproductive Health Services. In Webster, a three-Justice plurality opinion of Chief Justice Rehnquist, joined by Justices White and Kennedy, criticized Roe and stated that Roe’s “trimester framework has left this Court to serve as the country’s ‘ex officio medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States.’” Justice Scalia indicated his willingness to overturn Roe in its entirety.

In contrast, Justice O’Connor decided that it was not necessary in Webster to consider the broader implications of Roe. She concluded that even under the Roe framework the substantive regulations at issue in this case—a ban on use of public employees, facilities, or funds for performance or assistance with nontherapeutic abortions (i.e., those abortions not needed for the mother’s health), and physicians being required to perform reasonable viability tests on a fetus believed to be of 20 weeks

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41 Bellotti, 443 U.S. at 643–44. See also Ashcroft, 462 U.S. at 490–93 (holding one-parent consent with judicial bypass option constitutional); Hodgson v. Minnesota, 497 U.S. 417, 480–82 (1990) (Kennedy, J., concurring in the judgment in part and dissenting in part); id. at 458–61 (O’Connor, J., concurring in part and concurring in the judgment in part) (stating two-parent notification requirement with judicial bypass option constitutional).
43 See id. at 396–97 (refusing to decide whether a finding of bad faith or some other type of scienter would be required before a physician could be held criminally liable for an erroneous determination of viability).
46 Id. at 518–19 (1989) (plurality opinion) (citation omitted).
47 Id. at 532 (Scalia, J., concurring in part and concurring in the judgment).
or more gestational age—were constitutional. Laws banning public funds or facilities for abortions have routinely been viewed as constitutional under *Roe*. Regarding viability testing, while in 1973 the point of viability was typically viewed as around the 28th week of pregnancy, advances in medical technology by 1989 had moved viability back to typically the 24th week of pregnancy, where it remains today.

The legacy of *Roe* as a precedent was squarely faced three years later, in 1992, in *Planned Parenthood v. Casey*. There, in a 5-4 decision, the Court decided not to overrule *Roe v. Wade* in its entirety. Justice Scalia, joined by Chief Justice Rehnquist, and Justices White and Thomas, dissented on that matter. Justice Scalia said that the Constitution does not protect a fundamental liberty to abort an unborn child because of two facts: “(1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.” The same Justices also joined in a dissent by Chief Justice Rehnquist which said that the Court in *Roe* read earlier opinions much too broadly, noting, “Unlike marriage, procreation, and contraception, abortion ‘involves the purposeful termination of a potential life.’”

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49 See, e.g., Harris v. McRae, 448 U.S. 297, 325–26, 325 n.27 (1980); see also supra note 37 and accompanying text.

50 See, e.g., Issacson v. Horne, 716 F.3d 1213, 1225 (9th Cir. 2013) (“The parties here agree that no fetus is viable at twenty weeks gestational age. The district court so recognized, declaring it undisputed that viability usually occurs between twenty-three and twenty-four weeks gestation.”), cert. denied, 134 S. Ct. 905 (2014). Based on fetal lung capacity, that point is not likely to change much in the future, although in rare cases fetuses believed to be 20 weeks or older gestational age have survived premature births. Particularly since the parties might be confused as to the time of conception, the statute’s requirement in *Webster* to perform a reasonable viability test on a fetus believed to be in the 20th week of pregnancy was constitutional. See *Webster*, 492 U.S. at 522–31 (1989) (O’Connor, J., concurring in part and concurring in the judgment). Of the approximately 1.3 million abortions performed in the United States each year, approximately 9 in 10 occur within the first 13 weeks, and approximately one percent are performed after 20 weeks. Some 300–600 abortions a year—or up to five one-hundredths of one percent—are performed after 26 weeks. Almost inevitably, these are done in the context of substantial health risks to the mother or fetal defects not diagnosed until late in the pregnancy. See generally *Reproductive Health*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/reproductivehealth/data_stats (last visited Sept. 30, 2015) (“The majority of abortions in 2011 took place early in gestation. In 2011, most abortions (91.4%) were performed [before or] at 13 weeks’ gestation; a smaller number of abortions (7.3%) were performed at 14–20 weeks’ gestation, and even fewer (1.4%) were performed at [or after] 21 weeks’ gestation.”); *Abortion Statistics*, ORLANDO WOMEN’S CENTER, http://womenscenter.com/abortion_stats.html (last visited Oct. 16, 2015).


52 Id. at 980 (Scalia, J., concurring in the judgment in part and dissenting in part).

53 Id. at 952 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).
In contrast to this dissent, Justice Blackmun would have had the Court not disturb Roe’s holding and trimester framework in any respect.\footnote{Id. at 923–25 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).} Justice Stevens, also supporting Roe, said that it protected a woman’s freedom to decide matters of the most personal nature.\footnote{Casey, 505 U.S. at 911–13 (Stevens, J., concurring in part and dissenting in part).} Thus, they would have continued the Roe doctrine of any burden on the right to choose an abortion triggering strict scrutiny.

The outcome of the case thus depended on the views of Justices O’Connor, Kennedy, and Souter. These three Justices joined in a rare joint opinion, parts of which were likely authored by each of the three Justices, but the opinion was not specifically authored by any one Justice.\footnote{This may have been done, in part, because, although Roe v. Wade was a 7-2 opinion when decided, the fact that Justice Blackmun authored the majority opinion meant that he received more than his share of hate mail and death threats concerning the case over the years. Mark A. Davis, Becoming Justice Blackmun: Harry Blackmun’s Supreme Court Journey, 10 N.C. St. B.J. 27, 28 (2005).} This joint opinion reaffirmed what it regarded as Roe’s essential holding of the fundamental right to abortion choice before viability, i.e., the point at which the unborn life can survive outside of the womb.\footnote{Casey, 505 U.S. at 869–71 (plurality opinion). As a theoretical matter, even after viability, a woman has a fundamental right to abortion choice under Roe, requiring the government to satisfy strict scrutiny to justify abortion regulation. But, as the Court stated in Roe, “For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.” Roe v. Wade, 410 U.S. 113, 164–65 (1973). Thus, after viability, whether or not a strict scrutiny approach is applied under Roe, the result is the same: governments may “regulate, and even proscribe, abortion” as long as a medical emergency exception exists. The joint opinion in Casey expressly reaffirmed this medical emergency exception language of Roe. Casey, 505 U.S. at 879 (quoting Roe, 410 U.S. at 164–65). The “medical necessity” exception is required under Roe because the state’s interest in maternal health, which becomes “compelling” at the end of the first trimester when the abortion procedure on average becomes less safe than childbirth, becomes “compelling” earlier in pregnancy than the state’s interest in protecting pre-natal life, which only becomes “compelling” at viability, and the interest in maternal health remains more “compelling” throughout the pregnancy. Roe, 410 U.S. at 150, 163–64. For cases discussing a medical emergency exception, see Planned Parenthood Cincinnati Region v. Taft, 444 F.3d 502, 511–14 (6th Cir. 2006) (upholding district court’s preliminary injunction, which held likely unconstitutional a law restricting use of RU-486 pill to uses approved by the Food and Drug Administration, because no adequate medical emergency exception existed if surgical abortion would pose significantly greater health risk to the mother); Women’s Med. Prof’l Corp. v. Voinovich, 130 F.3d 187, 209–10 (6th Cir. 1997) (holding an Ohio law that prohibited post-viability abortions unconstitutional because it did not provide an exception for the pregnant woman’s mental health), cert. denied, 523 U.S. 1036 (1998). Justice Thomas, along with two other justices, disagreed with the denial of certiorari in Voinovich arguing that no prior court ruling supported the proposition that a mental health excep-}
The opinion then altered *Roe*’s strict scrutiny analysis for all burdens on abortion choice. The joint opinion stated that government may not impose an undue burden on abortion choice, defined as a regulation that has “the purpose or effect of placing a substantial obstacle” to a woman’s choice.\(^{58}\)

In defending use of the undue burden standard, the joint opinion noted:

> For the most part, the Court’s early abortion cases adhered to this view. In *Maher v. Roe*, the Court explained: “*Roe [v. Wade]* did not declare an unqualified ‘constitutional right to an abortion,’ as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy.”\(^{59}\)

As this quote suggests, where such an undue burden exists, defined in *Casey* as a substantial obstacle to abortion choice, the *Roe* doctrine should still continue to apply. That doctrine is not that every undue burden is unconstitutional, but rather that such undue burdens should be subjected to *Roe*’s strict scrutiny approach. To be sure, the joint opinion in *Roe* included language that stated, “In our considered judgment, an undue burden is an unconstitutional burden.”\(^{60}\) As discussed in Part III, however, when considering the joint opinion’s analysis in *Casey* of a spousal notification provision,\(^{61}\) and in Part IV when considering *Casey*’s place in the Court’s fundamental rights doctrine generally,\(^{62}\) concluding that an undue burden triggers strict scrutiny, not an automatic finding of unconstitutionality, is more faithful to the *Casey* joint opinion taken as a whole and to fundamental rights doctrine generally. The statement in *Casey* that an “undue burden” is an “unconstitutional burden”\(^{63}\) reflects the notion that strict scrutiny, while “strict in theory, is fatal in fact,” is a conclusion that the Court since *Casey* has been at pains to reject.\(^{64}\)

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\(^{58}\) *Casey*, 505 U.S. at 877 (plurality opinion).

\(^{59}\) *Id.* at 874 (quoting *Maher v. Roe*, 432 U.S. 464, 473–74 (1977)).

\(^{60}\) *Id.* at 877.

\(^{61}\) *See infra* Part III.

\(^{62}\) *See infra* Part IV.

\(^{63}\) *Casey*, 505 U.S. at 877 (plurality opinion).

Where no such undue burden exists, the joint opinion added,

Unless it has that effect [substantial obstacle] on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal. Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.65

In deciding on whether a less-than-substantial obstacle is reasonably related to a legitimate interest, the joint opinion analogized their approach in *Casey* to the approach adopted in the ballot access cases. The joint opinion stated:

As our jurisprudence relating to all liberties save perhaps abortion has recognized, not every law which makes a right more difficult to exercise is, ipso facto, an infringement of that right. An example clarifies the point. We have held that not every ballot access limitation amounts to an infringement of the right to vote. Rather, the States are granted substantial flexibility in establishing the framework within which voters choose the candidates for whom they wish to vote.66

As discussed below, the structure of the ballot access cases,67 as well as most other unenumerated fundamental rights cases,68 is that substantial burdens or substantial obstacles on those rights trigger strict scrutiny, while less-than-substantial burdens trigger a reasonableness balancing test where the government will prevail unless the challenger is able to show the law is an unreasonable, excessive, or too onerous burden.

This test is a more vigorous form of review than minimum rationality review, which is used for burdens on standard social and economic activity not involving fundamental rights. The difference between the two approaches is the following. First, under minimum rationality review, the legislation must (1) advance legitimate government ends, (2) be rationally related to advancing these ends (not be irrationally underinclusive), and (3) not impose irrational burdens (not be irrationally overinclusive).69 This test ensures that the government is not engaged in ille-

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65 *Casey*, 505 U.S. at 878 (plurality opinion) (emphasis added).
66 *Id.* at 873–74 (citing Anderson v. Celebrezze, 460 U.S. 780, 788 (1983); Norman v. Reed, 502 U.S. 279 (1992)).
67 See infra Part IV.A.
68 See infra Part IV.B–D.
gitimate or arbitrary/irrational action. As the Court described minimum rationality review in *Heller v. Doe*:

[A] classification “must be upheld [under minimum rationality review] . . . if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” . . . “[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.” A statute is presumed constitutional, and “[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,” whether or not the basis has a foundation in the record. . . . A classification does not fail rational-basis review because it “is not made with mathematical nicety or because in practice it results in some inequality.” . . . “[O]n the other hand[,] even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation.”

In contrast, under reasonableness balancing, the Court makes its own independent judgment on the strengths of the government’s legitimate interests and the burden on the individual, and then weighs the two to determine if the burden, even if not irrational, is nevertheless unreasonable or excessive because the burden is too great given the minimal interests supporting the regulation. As phrased in the fundamental right to vote/ballot access case of *Burdick v. Takushi*:

A court . . . must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiff’s rights.”

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70 *Heller v. Doe*, 509 U.S. 312, 320–21 (1993) (citations omitted). The term “rational basis review” is often used to refer to this *Heller v. Doe* level of review. Because of its strong presumption of constitutionality and substantial deference to government action, the term “minimum rationality review” is used in this article to refer to this level of review. See generally ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 694 (4th ed. 2015) (“The rational basis test is the minimal level of scrutiny that all government actions challenged under equal protection must meet.”); Michael Klarman, Brown and Lawrence (and Goodridge), 104 Mich. L. Rev. 431, 437 (2005) (“[I]nvalidating the law under minimum rationality review is difficult to justify, given the extreme deference the Court has traditionally shown when applying that standard.”). The term “rational basis review” or “rational basis test” could have been used in this article wherever “minimum rationality review” appears, and nothing would change in the analysis.

Despite the Court determining for itself the extent to which the alleged governmental interests are actually supported by fact, some deference to governmental judgment is still given under reasonableness balancing. For example, in \textit{Thornburgh v. Abbott}, reviewing the less-than-substantial burden on a prisoner’s fundamental right to marry, the Court acknowledged that “[i]n the volatile prison environment, it is essential that prison officials be given broad discretion to prevent . . . disorder,” and adopted the \textit{Turner v. Safley}’s reasonableness standard for determining marriage rights of prisoners because it “is not toothless [i.e., not minimum rationality review].” Further, under the \textit{Burdick} kind of reasonableness balancing the challenger still has the burden to prove the regulation is unconstitutional. Under the \textit{Burdick} reasonableness balancing test, however, to determine whether a law exceeds constitutional boundaries, a court, not a legislature, must assess the “state interests which justify the burden.”

Reasonableness balancing reflects that, when dealing with a fundamental right, minimum rationality review is not appropriate, as it does not take into account that a fundamental right is at stake. As Justice Scalia noted in \textit{District of Columbia v. Heller}, whatever level of review might be appropriate for minor burdens on the Second Amendment right “to keep and bear arms,” it has to be higher than minimum rationality review. Where a fundamental right is involved, minimum rationality review is never appropriate, unless that fundamental right is not being burdened at all, in which case minimum rationality review is appropriate.

\footnotesize{\textsuperscript{72} Thornburgh v. Abbott, 490 U.S. 401, 413–14 (1989) (citing \textit{Turner v. Safley}, 482 U.S. 78, 89 (1987)). In the Procedural Due Process context, the Court has also applied a reasonableness balancing test in which “substantial weight [will] be given to the good-faith judgments of the individuals charged by Congress with the administration of . . . programs.” \textit{Mathews v. Eldridge}, 424 U.S. 319, 349 (1976).

\footnotesize{\textsuperscript{73} \textit{Id.} at 448 (Kennedy, J., dissenting). \textit{See also} Gonzales v. Carhart, 550 U.S. 124, 165 (2007) (“[T]he Attorney General urges us to uphold the Act on the basis of the congressional findings alone. Although we review congressional factfinding under a deferential standard, we do not in the circumstances here place dispositive weight on Congress’ findings. The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.” (citing \textit{Crowell v. Benson}, 285 U.S. 22, 60 (1932) (“In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function”))); \textit{Randall v. Sorrell}, 548 U.S. 230, 249 (2006) (plurality opinion) (noting a court must make an “independent examination of the whole record” (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285 (1964))).

\footnotesize{\textsuperscript{75} \textit{Heller}, 554 U.S. at 628 n.27.}}
even under Roe, as noted above.\(^76\)

The importance of the undue burden analysis in the joint opinion in Casey was to ensure that not every abortion regulation triggered strict scrutiny, and thus the Court did not act as a super-legislature second-guessing every aspect of abortion regulation. Rather, the strict scrutiny analysis was restricted in Casey to protecting the core principle of personal liberty from undue burdens. This has allowed states wider latitude than they had under Roe to pass various kinds of regulation of abortion procedures, and not have to face a strict scrutiny analysis as they did under Roe, as long as the regulations do not place, in the language of Casey, a “substantial obstacle in the path of a woman seeking an abortion.”\(^77\)

III. APPLICATION OF THE UNDUE BURDEN STANDARD IN PLANNED PARENTHOOD V. CASEY

A. Finding of an Undue Burden in Casey

Given the isolated text of some passages in Casey, such as the language cited above that “[i]n our considered judgment, an undue burden is an unconstitutional burden,”\(^78\) or “[r]egulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden,”\(^79\) it could be argued that once something is viewed as an undue burden, it is automatically unconstitutional. As suggested in the previous section,\(^80\) however, the better analysis of Casey, consistent with the general structure of fundamental rights analysis, is that when the joint opinion stated it was upholding the essential holding of Roe, that meant a court should apply Roe’s strict scrutiny analysis to an undue burden/substantial obstacle on abortion rights. This would mean that where the state has a compelling interest to regulate, which under Roe could occur to protect maternal health prior to viability,\(^81\) a narrowly tai-

\(^76\) See supra notes 33–38 and accompanying text; see also Planned Parenthood v. Casey, 505 U.S. 833, 966, 971–76 (1992) (Rehnquist, J., concurring in the judgment in part and dissenting in part) (rejecting Roe and the Casey joint opinion’s finding of a fundamental right to an abortion, and thus applying to the spousal notification provision standard non-fundamental right, social or economic legislation minimum rationality review).

\(^77\) Casey, 505 U.S. at 877–78 (plurality opinion).

\(^78\) Id. at 877.

\(^79\) Id. at 878.

\(^80\) See supra notes 57–64 and accompanying text.

\(^81\) See Roe v. Wade, 410 U.S. 113, 163 (1973) (noting a “compelling interest” to protect material health at the end of the first trimester, long before viability); see also supra note 57.
lored statute directly related to advancing that interest and employing the least burdensome effective alternative would be constitutional even if it did place a substantial obstacle in the path of that woman obtaining an abortion. That would not be true if a finding of an undue burden automatically triggered a finding of unconstitutionality, as is suggested by the passages in *Casey* cited directly above.

The Court’s discussion of a spousal notification provision in *Casey* supports this analysis. In *Casey*, the Court reviewed § 3209 of Pennsylvania’s abortion law, which provided:

[E]xcept in cases of medical emergency . . . no physician shall perform an abortion on a married woman without receiving a signed statement from the woman that she has notified her spouse that she is about to undergo an abortion. The woman has the option of providing an alternative signed statement certifying that her husband is not the man who impregnated her; that her husband could not be located; that the pregnancy is the result of spousal sexual assault which she has reported; or that the woman believes that notifying her husband will cause him or someone else to inflict bodily injury upon her. A physician who performs an abortion on a married woman without receiving the appropriate signed statement will have his or her license revoked, and is liable to the husband for damages.82

In deciding whether this law, in operation, would constitute a substantial obstacle to a married woman’s choice to have an abortion, the joint opinion cited to the “detailed findings of fact regarding the effect of this statute,” which had been made by the district court.83 Faced with

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82 *Casey*, 505 U.S. at 887–88 (plurality opinion).
83 The joint opinion noted:
These [findings of fact] included: “273. The vast majority of women consult their husbands prior to deciding to terminate their pregnancy. . . . 279. The ‘bodily injury’ exception could not be invoked by a married woman whose husband, if notified, would, in her reasonable belief, threaten to (a) publicize her intent to have an abortion to family, friends or acquaintances; (b) retaliate against her in future child custody or divorce proceedings; (c) inflict psychological intimidation or emotional harm upon her, her children or other persons; (d) inflict bodily harm on other persons such as children, family members or other loved ones; or (e) use his control over finances to deprive of necessary monies for herself or her children. . . . 298. Because of the nature of the battering relationship, battered women are unlikely to avail themselves of the exceptions to section 3209 of the Act, regardless of whether the section applies to them.”

This information and the District Court’s findings reinforce what common sense would suggest. In well-functioning marriages, spouses discuss important intimate decisions such as whether to bear a child. But there are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands. Should these women become pregnant, they may have very good reasons for not wishing to inform their husbands of their decision to ob-
these findings, the joint opinion concluded that:

The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle. We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.84

If the Casey doctrine held that an undue burden/substantial obstacle automatically renders the regulation unconstitutional, the joint opinion would have stopped at this point. Instead, consistent with a strict scrutiny approach, the joint opinion proceeded to consider whether there were any compelling government interests that could be used to make the regulation constitutional. The joint opinion thus engaged in an elaborate discussion of whether the pregnant woman’s husband had a strong enough interest in continuing the pregnancy of his child that the state could claim a strong enough interest to validate the spousal notification provision.85 While acknowledging that “[w]ith regard to the children he has fathered and raised, the Court has recognized [the father’s] ‘cognizable and substantial’ interest in their custody.”86 The joint opinion noted that:

Id. at 888–93 (citation omitted).

84 Id. at 893–94.
85 Id. at 895–98.
86 Casey, 505 U.S. at 895 (quoting Stanley v. Illinois, 405 U.S. 645 (1972)).
Before birth, however, the issue takes on a very different cast. It is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother’s liberty than on the father’s. The effect of state regulation on a woman’s protected liberty is doubly deserving of scrutiny in such a case, as the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman.87

For this reason, consistent with a strict scrutiny approach, the state did not have a sufficient interest in protecting the husband’s interests to justify the substantial obstacle to abortion choice represented by the spousal notification provision.88 The joint opinion concluded:

In keeping with our rejection of the common-law understanding of a woman’s role within the family, the Court held in Danforth that the Constitution does not permit a State to require a married woman to obtain her husband’s consent before undergoing an abortion. The principles that guided the Court in Danforth should be our guides today.89

The principles that guided the Court in Danforth in 1976, of course,

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87 Id. at 896. The joint opinion continued:
The Court has held that “when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.” This conclusion rests upon the basic nature of marriage and the nature of our Constitution: “[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” The Constitution protects individuals, men and women alike, from unjustified state interference, even when that interference is enacted into law for the benefit of their spouses.

Id. (emphasis in original) (citations omitted).

88 Id. 896–98. The joint opinion added:

For the great many women who are victims of abuse inflicted by their husbands, or whose children are the victims of such abuse, a spousal notice requirement enables the husband to wield an effective veto over his wife’s decision. Whether the prospect of notification itself deters such women from seeking abortions, or whether the husband, through physical force or psychological pressure or economic coercion, prevents his wife from obtaining an abortion until it is too late, the notice requirement will often be tantamount to the veto found unconstitutional in Danforth. The women most affected by this law—those who most reasonably fear the consequences of notifying their husbands that they are pregnant—are in the gravest danger.

Casey, 505 U.S. at 897.

89 Id. at 897 (citation omitted).
were *Roe v. Wade*’s strict scrutiny approach to abortion regulation.  

**B. Less-than-Undue Burdens in *Casey***

In contrast to striking down the requirement of spousal notification in *Casey*, the joint opinion of Justices O’Connor, Kennedy, and Souter upheld as not undue burdens the requirements of written consent, providing certain information to the patient as a matter of informed consent, a 24-hour waiting period after registering for an abortion before the procedure could be done, required record keeping, and a parental consent provision for women under 18, with a judicial bypass.  

Some of these provisions, like written consent, required record-keeping, and parental consent with a judicial bypass, had already been upheld as constitutional under *Roe*, as noted above. Other provisions, such as a 24-hour waiting period or informed consent requirement, had been viewed as unconstitutional under *Roe*’s strict scrutiny approach. Now they were upheld as less-than-undue burdens on abortion rights. Regarding the informed consent provision, the joint opinion stated:

> A requirement that the physician make available information similar to that mandated by the statute here was described in *Thornburgh* as “an outright attempt to wedge the Commonwealth’s message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician.” We conclude, however, that informed choice need not be defined in such narrow terms that all considerations of the effect on the fetus are made irrelevant. As we have made clear, we depart from the holdings of *Akron I* and *Thornburgh* to the extent that we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion. In short, requiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion. This requirement cannot be considered a substantial obstacle to obtaining an abortion, and, it follows, there is no undue burden.

As this discussion indicated, because there was no substantial ob-

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91 *Casey*, 505 U.S. at 874–901.
92 See, e.g., *Danforth*, 428 U.S. at 67–71 (holding parental consent with judicial bypass constitutional).
94 *Casey*, 505 U.S. at 883 (emphasis added) (citation omitted).
stacle, there was no undue burden. Given a less-than-substantial obstacle, the joint opinion concluded that the regulation was “a reasonable measure.” There would have been no need to discuss the reasonableness of the measure if the lack of a substantial obstacle/undue burden were conclusive on the issue of constitutionality. As noted above, such a reasonableness inquiry is not mere minimum rationality review, but, consistent with the ballot access cases discussed more fully below, a balance of relative benefits and burdens of the provision to determine whether the burden imposed is reasonable or excessive given the benefits advanced by the regulation. Regarding the 24-hour waiting period, the joint opinion did blur the lines between the substantial obstacle/undue burden inquiry and the reasonableness inquiry, which takes place in the event of a less-than-substantial burden. The joint opinion started properly with considering whether the 24-hour waiting period did create a substantial obstacle/undue burden to abortion choice. The joint opinion stated:

Whether the mandatory 24-hour waiting period is nonetheless invalid because in practice it is a substantial obstacle to a woman’s choice to terminate her pregnancy is a closer question. The findings of fact by the District Court indicate that because of the distances many women must travel to reach an abortion provider, the practical effect will often be a delay of much more than a day because the waiting period requires that a woman seeking an abortion make at least two visits to the doctor. The District Court also found that in many instances this will increase the exposure of women seeking abortions to “the harassment and hostility of anti-abortion protesters demonstrating outside a clinic.” As a result, the District Court found that for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the 24-hour waiting period will be “particularly burdensome.”

These findings are troubling in some respects, but they do not demonstrate that the waiting period constitutes an undue burden. We do not doubt that, as the District Court held, the waiting period has the effect of “increasing the cost and risk of delay of abortions,” but the District Court did not conclude that the increased costs and potential delays amount to substantial obstacles. Rather, applying the trimester framework’s strict prohibition of all regulation designed to promote the State’s interest in potential life before viability, the District Court concluded that the waiting period does not further the state “interest in maternal health” and “infringes the physician’s discretion to exercise sound

95 Id.
96 See supra notes 65–77.
97 See infra Part IV.A.
98 Casey, 505 U.S. at 885–86.
Given that there was no substantial obstacle/undue burden, the question becomes, under a proper understanding of Casey, whether the regulation is reasonably related to legitimate state interests. In undertaking this inquiry, governments can use any legitimate interest, not merely the interests identified in Roe v. Wade as compelling, i.e., the interest in maternal health after the first trimester, and the interest in protecting prenatal life after viability. As the joint opinion phrased this point:

The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision. The statute, as construed by the Court of Appeals, permits avoidance of the waiting period in the event of a medical emergency and the record evidence shows that in the vast majority of cases, a 24-hour delay does not create any appreciable health risk. In theory, at least, the waiting period is a reasonable measure to implement the State’s interest in protecting the life of the unborn, a measure that does not amount to an undue burden.

It would have been clearer had the final sentence of this paragraph read “the waiting period is a reasonable measure to implement the State’s interest in protecting the life of the unborn, a measure that does not amount to an unreasonable burden,” rather than using the phrase “undue burden.” That, however, is the import of the analysis. This is especially true since under the reasonableness balancing test applied in ballot access and other fundamental rights cases, the challenger has the burden to prove the regulation is unreasonable or excessive; it is only at higher standards of review, like intermediate review or strict scrutiny, that the burden is imposed on the government to justify its action.

99 Id. (citations omitted).
101 Casey, 505 U.S. at 885 (plurality opinion) (emphasis added).
102 As this quote indicates, the issue involves considering whether the waiting period “is a reasonable measure to implement the State’s interest in protecting the life of the unborn.” Id.; see also id. at 900–01 (balancing the State’s legitimate interest in collecting patient information—which the Court deemed a vital element of medical research—against the only slight increase in cost of abortions, and therefore upholding the challenged recordkeeping and reporting requirements).
104 See Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2419 (2012) (“Strict scrutiny is a searching examination, and it is the government that bears the burden to prove . . . [its] classifications are constitutional . . . [by proving that] they are narrowly tailored to further compelling governmental interests.” (citation omitted)); United States v. Virginia, 518 U.S. 515, 533 (1996) (discussing intermediate review used for gender discrimination, the Court
IV. PLANNED PARENTHOOD V. CASEY IN CONTEXT WITH OTHER SUPREME COURT PRECEDENTS

A. Casey’s Reference to Anderson v. Celebrezze and Other Voting Rights Cases

As noted above, the joint opinion in Casey analogized the undue burden analysis to the ballot access cases which involve the fundamental constitutional right to vote, sometimes in the context of the fundamental freedom of association.\(^{105}\) In a trilogy of cases between 1983 and 1997, the Court explored how to phrase the relevant test for analyzing burdens on the fundamental right to vote and fundamental freedom of political association in cases where strict scrutiny would not be applied.

The first case, Anderson v. Celebrezze, in 1983, involved a March filing date for candidates to run for President, which a 5-4 Court found unreasonable when applied to independent candidates, as “several important third-party candidacies in American history were launched after the two major parties staked out their positions and selected their nominees at national conventions . . . .”\(^{106}\) The Court reasoned:

[The state’s] important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions. . . . [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by the rule. In passing judgment, the Court . . . also must consider the extent to which those interests make it necessary to burden the plaintiff’s rights.\(^{107}\)

The use of the word “important” was not indicative of intermediate review, as the Court noted later in its opinion, “If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.”\(^{108}\) Use of the term “legitimate” interest reflects less than the intermediate scrutiny requirement of an important, significant, or

\(^{105}\) See supra note 66 and accompanying text.


\(^{107}\) Id. at 788–89.

\(^{108}\) Id. at 806 (emphasis added) (quoting Kusper v. Pontikes, 414 U.S. 51, 59 (1973)).
substantial interest.109

The second case in the trilogy of cases was Burdick v. Takushi, decided in 1992, where a 6-3 Court upheld Hawaii’s ban on write-in voting.110 The Court stated,

[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently. Accordingly, the mere fact that a State’s system “creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny.” . . . A court considering a challenge to a state election law must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiff’s rights.”111

109 For the requirement of an important/significant/substantial interest at intermediate review, higher than a mere legitimate/permissible interest at minimum rationality review or reasonableness balancing, see United States v. Virginia, 518 U.S. 515, 533 (1996) (discussing intermediate review used for gender discrimination, the Court noted, “The State must show ‘at least that the [challenged] classification serves “important governmental objectives and that the discriminatory means employed” are “substantially related to the achievement of those objectives.”’” (emphasis added) (citations omitted)). See also Clark v. Cnty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (discussing intermediate review applicable to content-neutral time, place, or manner regulations under the First Amendment free speech doctrine, the Court noted, “[R]estrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.” (emphasis added)); id. at 294 (“Symbolic expression of this kind may be forbidden or regulated if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech.” (emphasis added)); Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm’n, 447 U.S. 557, 566 (1980) (discussing the intermediate review level of interest necessary in commercial speech cases, the Court stated, “[W]e ask whether the asserted governmental interest is substantial.” (emphasis added)). Of course, this intermediate requirement of an important/significant/substantial interest is less than the strict scrutiny requirement of a compelling/overriding interest to justify the regulation. See e.g., Fisher, 133 S. Ct. at 2419 (“Strict scrutiny is a searching examination, and it is the government that bears the burden to prove . . . [its] ‘classifications are constitutional . . . [by showing that] they are narrowly tailored to further compelling governmental interests.’” (citations omitted) (emphasis added)); Loving v. Virginia, 388 U.S. 1, 11 (1967) (applying strict scrutiny to a ban on interracial marriage, the Court noted, “There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.” (emphasis added)).


111 Id. at 433–34 (first quoting Bullock v. Carter, 405 U.S. 134, 143 (1972); and then quoting Anderson, 460 U.S. at 788–89).
In *Burdick*, the Court placed the burden of proof on the challenger to prove the regulation was an unreasonable or excessive burden.112 A dissent in *Burdick* concluded that the ban on write-in voting was a “substantial burden” on voting rights, and failed any level of scrutiny that could be applied.113

The third case, in 1997, was *Timmons v. Twin Cities Area New Party*. *Timmons* involved a Minnesota antifusion law that prohibited a candidate from appearing on the ballot as the candidate of more than one political party.114 For example, a Republican candidate could not appear on both the Republican and Libertarian party lines, or a Democratic candidate could not appear on both the Democratic and Green party lines. In *Timmons*, a 6-3 Court stated, “Regulations imposing severe burdens on plaintiff’s rights must be narrowly tailored and advance a compelling government interest. Lesser burdens, however, trigger less exacting review, and a State’s ‘important regulatory interests’ will usually be enough to justify ‘reasonable, nondiscriminatory restrictions.’”115 The Court held, “[T]he burdens Minnesota’s fusion ban imposes on the New Party’s associational rights are justified by ‘correspondingly weighty’ valid state interests in ballot integrity and political stability.”116

In *Timmons*, both the majority and the two dissenting opinions agreed that for “severe” burdens on an individual’s First Amendment political association rights strict scrutiny is appropriate.117 For less severe burdens, Justice Souter’s dissent opted for intermediate review, and Justice Stevens’ dissent, joined by Justice Ginsburg and Souter, also appeared to adopt an intermediate form of review.118 Because of its willingness to consider any legitimate government interests, the majority opinion in *Timmons* is best viewed, like *Celebrezze* and *Burdick*, as a reasonableness balancing approach. As in *Anderson*, the majority’s lan-

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112 See id. at 438.
113 Id. at 444–48 (Kennedy, J., dissenting) (arguing the write-in ban constitutes a “significant burden” on voting rights similar to *Reynolds v. Sims*, 377 U.S. 533 (1964), rendering presumption of constitutionality an error and noting, “[I]t is useful to remember that until the late 1800’s, all ballots cast in this country were write-in ballots. The system of state-prepared ballots . . . was introduced in this country in 1888.”). While the dissent did not adopt any specific level of scrutiny, the majority opinion in *Burdick* accused the dissent of adopting strict scrutiny review, *Burdick*, 504 U.S. at 440 n.10, which under Court doctrine would be the appropriate level of scrutiny for severe/substantial burdens on voting rights. See *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).
114 *Timmons*, 520 U.S. at 353–54.
115 Id. at 358 (quoting *Burdick*, 504 U.S. at 434).
116 Id. at 369–70.
117 Id. at 358; id. at 374 (Stevens, J., dissenting); *Timmons*, 520 U.S. at 382 (Souter, J., dissenting).
118 Id. at 383 n.1; id. at 377–78 (Stevens, J., dissenting).
guage in *Timmons* about the government needing “important” interests to regulate\(^{119}\)—an intermediate requirement regarding government interests—appears to be unnecessary to the case. Indeed, when cataloguing the state’s interests, the majority noted that “[s]tates certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes,”\(^{120}\) without any further finding that those interests were important or substantial.\(^{121}\)

Each of these cases involved some level of review higher than minimum rationality review, as each involved the Court undertaking a real weighing of the benefits and burdens of the regulation against a backdrop of less burdensome alternatives, not the substantial deference to government under minimum rationality review as described in *Heller v. Doe*.\(^{122}\) In each case, legitimate government interests could be used to justify the regulation, despite the occasional use of the word “important.” Each case therefore represents a reasonableness balancing approach, which is higher than minimum rationality review.

The Court returned to the issue of voting rights in 2008. In *Crawford v. Marion County Election Bd.*, the Court upheld an Indiana voter identification law that required citizens voting in person on Election Day, or casting a ballot in person with the clerk prior to Election Day, to present government-issued photo identification.\(^{123}\) Voters who did not have proper identification could cast a provisional ballot, and then meet the statute’s requirement within 10 days following the election.\(^{124}\) Justice Stevens announced the decision of the Court and delivered an opinion joined by Chief Justice Roberts and Justice Kennedy.\(^{125}\) Without attempting to characterize the extent of the burden that a state might impose, Stevens said that however slight the burden may appear, “it must

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\(^{119}\) *Id.* at 358 (majority opinion).

\(^{120}\) *Timmons*, 520 U.S. at 364.

\(^{121}\) In addition to these cases, the Court had earlier held that a New York law requiring voters to register 8 months prior to a presidential primary, or 11 months prior to a nonpresidential primary, to vote in the primary was not an “unconstitutionally onerous burden.” *See Rosario v. Rockefeller*, 410 U.S. 752, 760–62 (1973). *Rosario* is also an example of the Court conducting reasonableness balancing review. *See id.* Four Justices dissented, noting that only one other state had similarly burdensome regulations. *Id.* at 763–64 (Powell, J., dissenting). In another ballot access case, this one involving an Illinois law dealing with the number of signatures required in order to be placed on the ballot, the Court phrased the issue as whether the law “unduly burdens [plaintiffs’] right to run for those seats under the Party name.” *Norman v. Reed*, 502 U.S. 279, 295 (1992).

\(^{122}\) *See supra* note 70.


\(^{124}\) *Id.* at 186.

\(^{125}\) *Id.* at 185.
be justified by . . . legitimate state interests ‘sufficiently weighty to justify the limitations.’”126 Underscoring that these right to vote/voter ID cases were not minimum rationality review, the plurality opinion noted the hard judgment that these cases entail.127

This language in Crawford is consistent with Burdick v. Takushi, whereby substantial burdens on voting rights trigger strict scrutiny, but less-than-substantial burdens trigger a balancing of the benefits and burdens to determine whether the regulation is unreasonable or excessively burdensome. Applying such an approach, Stevens concluded in Crawford that the state’s interest in deterring and detecting voter fraud, modernizing voting procedures, and safeguarding voter confidence justified the photo requirement,128 and that given the evidence presented by the challengers in the case, it was not “excessively burdensome” on any class of voters.129 The opinion did imply, however, that new facts might call for a different balancing of benefits and burdens of voter ID laws in the future.130

The three Justices in dissent also applied a reasonableness balancing approach, not minimum rationality review, when analyzing the Indiana regulations as a less-than-substantial burden on voting rights.131 As an aside, since 2010, a number of states have passed various versions of photo ID laws, some without the provisional ballot aspect of the Indiana law in Crawford, and some denying certain kinds of photo IDs, such a college or university IDs, from being used, as in Wisconsin and Texas.132 This issue regarding the constitutionality of these voter ID laws is

126 Id. at 191 (quoting Norman, 502 U.S. at 288–89).
127 Crawford, 553 U.S. at 190.
128 Id. at 191–197.
129 Id. at 202.
130 Id. at 200. At least two circuits follow the holding and rationale of Crawford. See, e.g., ACLU of N.M. v. Santillanes, 546 F.3d 1313, 1325 (10th Cir. 2008) (upholding Albuquerque city ordinance requiring a photo ID to vote); Common Cause/Ga. v. Billups, 554 F.3d 1340, 1345 (11th Cir. 2009) (upholding Georgia state law requiring a voter ID).
131 Crawford, 553 U.S. at 209–37 (Souter, J., dissenting) (concluding that the state interests failed to justify the practical limitations placed on the right to vote by the travel costs and fees needed for acquiring a photo, particularly for the poor or the elderly); id. at 237–240 (Breyer, J., dissenting) (balancing the voting interests that the state law affects, asking whether the statute burdens any one such interest in a manner out of proportion to the statute’s salutary effects on the state’s interests, and concluding that the statute was unconstitutional for imposing a disproportionate burden on eligible voters who lack a driver’s license or other statutorily valid forms of photo ID).
132 See, e.g., Frank v. Walker, 768 F.3d 744, 745–48 (7th Cir. 2014) (upholding Wisconsin voter ID law based on Crawford), reh’g en banc denied, 773 F.3d 783 (7th Cir. 2014) (5-5 decision), cert. denied, 135 S. Ct. 1551 (2015). In his dissent to the denial of the rehearing en banc, Judge Posner stated that he believed the Wisconsin voter ID law was unconstitutional by applying Crawford’s “reasonableness balancing” approach to facts concerning benefits and
likely to come before the Supreme Court before too long.

B. Fundamental Right to Marry Cases

The same structure of substantial obstacles/undue burdens triggering strict scrutiny, but less-than-substantial obstacles/undue burdens triggering a reasonableness balancing test higher than minimum rationality review, applies to burdens on the fundamental right to marry. As indicated in Zablocki v. Redhail, a government regulation that interferes “directly and substantially” with the right to marry triggers strict scrutiny. On the other hand, as the Court noted in Zablocki, by reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.134

burdens of voter ID laws developed since 2008, including empirical support concluding that there is virtually no problem of voter fraud caused by persons faking identification in voting, and real burdens exist for tens of thousands of individuals—many poor, some elderly, some college students—who do not have a driver’s license or other regularized government-issued photo ID. Frank, 773 F.3d at 783–797 (Posner, J., dissenting). Even if the photo ID itself is provided by the state free of charge, getting the required documentation, such as a copy of a birth certificate, will require some expenditure of money, certainly an amount more than a $1.50 poll tax ($10 today adjusted for inflation) which was ruled unconstitutional in Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966). Such voter restrictions will be tested both under the Crawford analysis, and under § 2 of the Voting Rights Act, as creating an unlawful disparate impact on voting participation based on race. See Shelby County v. Holder, 133 S. Ct. 2612, 2631 (2013) (noting that a § 2 Voting Rights Act challenge still remains despite striking down § 5); see also Claire Foster Martin, Note, Block the Vote: How a New Wave of State Election Laws is Rolling Unevenly Over Voters & The Dilemma of How to Prevent It, 43 CUMB. L. REV. 95 (2012) (discussing the Supreme Court’s role in determining the constitutionality of voter ID law). For further information on the particular requirements of each state’s voter ID laws, see Wendy Underhill, Voter Identification Requirements, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx (last visited Oct. 3, 2015).

134 Id. (emphasis added) (citing Califano v. Jobst, 434 U.S. 47, 55 (1977)). In Zablocki, the Court distinguished its holding from the holding of Califano where the Court upheld sections of the Social Security Act provision that provide for continuation of a child’s insurance benefits for a disabled dependent child who marries someone eligible for social security benefits, but discontinues benefits if that child marries a person who is ineligible to receive social security benefits because that law was not “a direct legal obstacle in the path of persons desiring to get married . . . .” Id at 387 n.12. The Court continued, “The statutory classification at issue here [banning a person from getting married until child support obligations had been paid], however, clearly does interfere directly and substantially with the right to marry.” Id. at 387. The Court in Zablocki then applied “strict scrutiny” and held that the Wisconsin statute
Later cases involving the fundamental right to marry have followed the distinction in Zablocki between substantial and less-than-substantial burdens. For example, in Turner v. Safley, the Court considered a ban on the right to marry of a prisoner.135 Because the law recognizes that prisoners forfeit many rights that law-abiding citizens enjoy, this ban was not viewed as a substantial burden on the right to marry triggering strict scrutiny.136 Instead, the Court applied a reasonableness test.137 Even under this test, the absolute ban on marriage was declared unconstitutional as unreasonably broad.138 In contrast, standard administrative regulations surrounding marriage are routinely upheld under a reasonableness analysis.139

The Court has made it clear that the Turner kind of review for reasonableness is a higher standard of review than mere minimum rationality review. Instead of applying substantial deference to legislative or administrative judgment, as under a minimum rationality approach, the Court considered in Turner several factors that were viewed as relevant to a reasonableness inquiry.140 As summarized in Thornburgh v. Abbott:

The Court in Turner identified several factors that are relevant to, and that serve to channel, the reasonableness inquiry. . . .

The first Turner factor is multifold: we must determine whether the governmental objective underlying the regulations at issue is legitimate and neutral, and that the regulations are rationally related to that objective. . . .

A second factor the Court in Turner held to be “relevant in determining the reasonableness of a prison restriction . . . is whether there are alternative means of exercising the right that remain open to prison inmates.” . . .

The third factor to be addressed under the Turner analysis is the impact that accommodation of the asserted constitutional right will have on others . . . .

Finally, Turner held: “[T]he existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an ‘exaggerated response’ to prison concerns. . . . But if an inmate claimant can point to an alternative that fully accommodates the prisoner’s rights at de minimis cost to valid penological interests, a court may consider that as evidence that the regulation does

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136 See id. at 95.
137 See id. at 89–91, 94–99.
138 Id. at 98.
139 See, e.g., Greenberg v. Kimmelman, 99 N.J. 552 (1985) (upholding a ban on casino employment by “any member of the immediate family of any State officer or employee, or [member of the judiciary]” under the reasonableness” test).
140 Turner, 482 U.S. at 89–91.
not satisfy the reasonable relationship standard.”

C. Fundamental Right to Travel Cases

In 1969, in Shapiro v. Thompson, the Court held that a one-year durational residency requirement for welfare applicants to receive welfare penalized the exercise of a fundamental right to travel and, thus, triggered strict scrutiny. The state interest in keeping out poor migrants was held to be illegitimate as a penalty on migration. Budgetary and administrative justifications were held not compelling, and, furthermore, were not sufficient because less burdensome means were available.

In subsequent cases, substantial or severe burdens on the right to travel have continued to trigger the Shapiro strict scrutiny approach. Thus, in Memorial Hospital v. Maricopa County, in the course of invalidating a durational residence requirement on state payment for non-emergency hospital service under a state welfare program, the Court noted that the strict scrutiny of Shapiro applied only where there had

141 Thornburgh v. Abbott, 490 U.S. 401, 414–18 (1989) (citations omitted). For application of this reasonableness balancing in the context of burdens on fundamental free speech rights in the non-public forum of prisons, see Beard v. Banks, 548 U.S. 521, 528-30 (2006) (plurality opinion) (citing Turner v. Safley, 482 U.S. 78, 89 (1987)). Beard involved burdening a prisoner’s access to newspapers, magazines, and photographs while the prisoner was in the prison’s long-term segregation unit. Id. at 524–25. The reasonableness review involved balancing: (1) the government’s legitimate interest in effective prison management (Turner factor one); (2) the manner in which the regulation achieved its benefits for prison guards and other inmates, including considering less burdensome alternatives (Turner factors three and four), and (3) the burdens imposed on the prisoner, including alternative means of exercising First Amendment rights (Turner factor two), with the ultimate burden on the prisoner to establish that the government’s regulation was unreasonable. See id. at 528–30. For discussion of this reasonableness analysis being applied to any non-viewpoint based discrimination in a non-public forum, whether a prison, military base, or aspects of a school’s curriculum or regulations at school-sponsored events, see R. Randall Kelso, The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and “Reasonableness” Balancing (Oct. 1, 2015) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2668321 (concluding non-viewpoint discrimination in a non-public forum—either subject-matter regulation or content-neutral time, place or manner regulation—triggers reasonableness balancing; viewpoint-based discrimination always triggers strict scrutiny, whether in a public or non-public forum, or even for speech, like “fighting words,” not otherwise protected by the First Amendment, as held in R.A.V. v. St. Paul, 505 U.S. 377, 391–92 (1992)).


143 Id. at 627–29.

144 Id. at 634–38. Justice Harlan dissented in Shapiro, stating that it was a return to the “super-legislature” days of due process review in Lochner v. New York, 198 U.S. 45 (1905), and adding, “I must reiterate that I know of nothing which entitles this Court to pick out particular human activities, characterize them as ‘fundamental,’ and give them added protection under an unusually stringent equal protection test.” Id. at 661–62 (Harlan, J., dissenting).
been a denial of a “basic necessity of life,” or a “vital” government benefit, and that medical care qualified as such a “vital” government benefit. In *Dunn v. Blumstein*, the Court said that there is no need to show actual deterrence of travel; it is enough that a law penalizes the exercise of the right. A one-year durational residence law on voting “completely bar[s]” exercise of the fundamental right to vote. Even if the goal were compelling, such as preventing fraud in voting, the state must choose “less drastic means” for reaching it, and a one-year residency requirement is not “necessary to meet the State’s goal of stopping fraud.”

On the other hand, in cases after *Shapiro*, less-than-substantial or less-than-severe burdens on the fundamental right to travel have triggered reasonableness review analysis. In some cases, the regulations were upheld. For example, in *Vlandis v. Kline*, the Court indicated *in dicta* that a one-year durational residence requirement for lower tuition at a state university would be constitutional, because such a requirement did not impose the kind of burden as found in *Shapiro*, which involved the immediate and pressing need for preservation of life and health of persons unable to live without public assistance. In *Sosna v. Iowa*, the Court held that Iowa could impose a one-year durational residence requirement for obtaining a divorce, a requirement many states had at the time. Justice Rehnquist explained that this law “may reasonably be justified” on grounds other than budget or administrative convenience, i.e., avoiding officious intermeddling in matters in which another state (where the parties lived when married) may have a greater interest, and protecting judgments from collateral attack. Justice Rehnquist added that unlike the situation in *Shapiro, Dunn*, and *Memorial Hospital*, the plaintiff was not “irretrievably foreclosed” from obtaining some part of what she sought. In *Jones v. Helms*, the Court allowed a state to transform the misdemeanor of parental abandonment into a felony if the parent left the state. Justice Stevens explained that the criminal conduct engaged in by the individual in the first state “necessarily qualified” the

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147 Id. at 336.
148 Id. at 343, 354.
151 Id. at 406–07.
152 Id. at 406.
right to travel to another state.\textsuperscript{154} Justice Stevens also noted the case did not involve disparate treatment of residents and non-residents or new and old residents.\textsuperscript{155}

In other cases, the Court found the state action unconstitutional, concluding the regulation violated rationality review, without specifying whether this was minimum rationality review or reasonableness balancing. This lack of specificity may have been because the law was seen as violating even minimum rationality review in any event. For example, in \textit{Williams v. Vermont}, the Court invalidated the failure by Vermont in a “vehicle purchase and use tax” to give a credit for sales tax paid in another state on the purchase of a car by a person who, at that time, was not a resident of Vermont.\textsuperscript{156} Such a credit was given if the buyer was a resident of Vermont at the time of purchase.\textsuperscript{157} The Court said that residence at the time of purchase bears no rational relation to the purpose of the tax, i.e., to improve and maintain Vermont highways.\textsuperscript{158} In \textit{Zobel v. Williams}, the Court said that distinctions between new and old residents in payments from Alaska’s mineral fund violated the Equal Protection Clause, as it was not rational to give pre-enactment residents more cash to create incentives for living in Alaska or to encourage more prudent management of the fund.\textsuperscript{159} Further, a purpose to reward citizens for past contributions is not legitimate because it could open the door to apportioning other rights according to length of residence.\textsuperscript{160} In \textit{Hooper v. Bernalillo}, the Court struck down a tax exemption for veterans who resided in the state before May 8, 1976.\textsuperscript{161} Applying rational basis scrutiny, the Court held that it was illegitimate for laws to create permanent distinctions among residents based on the length or timing of their residence in the state.\textsuperscript{162}

In \textit{Attorney General of New York v. Soto-Lopez}, the Court split on whether it should apply strict scrutiny or only rational basis review.\textsuperscript{163} The law in \textit{Soto-Lopez} involved a civil service preference for resident veterans who lived in the state when they entered military service.\textsuperscript{164}

\textsuperscript{154} \textit{Id.} at 421.
\textsuperscript{155} \textit{Id.} at 422.
\textsuperscript{157} \textit{Id.} at 15.
\textsuperscript{158} \textit{Id.} at 23–24.
\textsuperscript{160} \textit{Id.} at 63–64.
\textsuperscript{162} \textit{Id.} at 623.
\textsuperscript{164} \textit{Id.} at 900.
Justice Brennan, with Justices Marshall, Blackmun, and Powell, said that because the law penalized those persons who had exercised their right to migrate, strict scrutiny should be used. Justice Brennan noted that “even temporary deprivations of very important benefits and rights can operate to penalize migration.” Once strict scrutiny was triggered, it was easy for Justice Brennan to conclude that none of the interests advanced by New York could satisfy strict scrutiny review. Chief Justice Burger and Justice White, in separate concurrences, found that the law failed even rational basis review, as in Zobel and Hooper. Justice O’Connor, dissenting with Justices Rehnquist and Stevens, said that more than a minimal effect on the right to travel or migrate should be required to trigger heightened scrutiny.

As in Zobel and Hooper, the Court failed to make clear in Soto-Lopez whether the rational basis review was simply minimum rationality review, which for the concurring Justices the legislation failed to meet, or a kind of reasonableness balancing. To the extent there is a fundamental right to travel implicated, the proper level of review should be reasonableness balancing. This conclusion is supported by the results in cases like Soto-Lopez, Zobel, and Hooper, which found the regulations unconstitutional. It is also supported by Chief Justice Rehnquist, who joined Justice O’Connor’s dissent in Soto-Lopez. In 1999, dissenting in Saenz v. Roe, Chief Justice Rehnquist analogized these right to travel cases to voting rights cases like Rosario v. Rockefeller, which applied an “onerous burden” standard in a right to vote case, consistent with reasonableness balancing.

Admittedly, the majority opinion in Saenz v. Roe departed from this Shapiro line of analysis, and seemed to adopt a categorical rule that any burden, whether substantial or not, on what the Court called the “third aspect of the right to travel,” would perhaps trigger, under the Fourteenth Amendment Privileges or Immunities Clause, strict scrutiny, and more likely, an absolute categorical bar. The scope of the Saenz theo-

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165 See id. at 904.
166 Id. at 907.
167 Soto-Lopez, 472 U.S. at 907–12.
168 See id. at 912–16 (Burger, C.J., concurring in the judgment); id. at 916 (White, J., concurring in the judgment).
169 Id. at 921 (O’Connor, J., dissenting).
171 Soto-Lopez, 476 U.S. at 918–925 (O’Connor, J. dissenting).
172 410 U.S. 752.
174 Saenz, 526 U.S. at 502–04 (majority opinion).
ry remains unclear. In any event, the majority in *Saenz* viewed the statute which limited maximum welfare benefits available to newly arrived residents to the amount payable by the state of the residents’ prior residence as similar to the one-year residency requirement of *Shapiro*, and thus ruled it unconstitutional on, *inter alia*, the strength of *Shapiro*. In later cases, perhaps the best response to *Saenz* would be to merely follow the *Shapiro* line of cases, and view the resort to a categorical bar based on the Fourteenth Amendment Privileges and Immunities Clause as unnecessary *dicta* in *Saenz*, not required to decide the case.

**D. Fundamental Access to Court Cases**

Cases involving the fundamental access to courts follow a similar structure of substantial burdens on access triggering strict scrutiny, while less-than-substantial burdens trigger a reasonableness balancing test. In *M.L.B. v. S.L.J.*, a case involving a more than $2,000 fee for record preparation in order for a party to appeal from a termination of parental rights, the Court noted:

> Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as “of basic importance in our society,” rights sheltered by the Fourteenth Amendment against the State’s unwarranted usurpation, disregard, or disrespect. M.L.B.’s case, involving the State’s authority to sever permanently a parent-child bond, demands the close consideration the Court has long required when a family association so undeniably important is at stake. We approach M.L.B.’s petition mindful of the gravity of the sanction imposed on her and in light of two prior decisions most immediately in point: *Lassiter v. Department of Social Servs. of Durham Cty.*, and *Santosky v. Kramer*.

In contrast, less-than-substantial burdens on the right of access to courts trigger reasonableness review. For example, in 1996 in *Lewis v. Casey*, the Court considered a case involving complaints by prisoners that the prison law library was not adequately maintained. Indicating the minimal injury suffered by the prisoners, the Court noted that the proper standard of review was whether the prison practice was “reasonably related to legitimate penological interests.”

175 *Id.* at 506–07.
177 *Id.* at 116–17 (footnote omitted) (citations omitted).
179 *Id.* at 361 (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)). For discussion of reasonableness balancing in *Turner*, see supra notes 135–141 and accompanying text.
The same year *Lewis v. Casey* was decided, the Court in *M.L.B.*, relying on two cases from 1973—*United States v. Kras*[^180] and *Ortwein v. Schwab*[^181]—indicated that in cases involving access to courts which did not involve some other fundamental right (like the termination of the fundamental right to rear one’s child in *M.L.B.*), only minimum rationality review would be applied, as no fundamental right was implicated.[^182] This *dicta* in *M.L.B.* is in error. In *Kras* and *Ortwein*, while there is no fundamental right to bankruptcy (*Kras*)[^183] or to receive welfare benefits (*Ortwein*)[^184] (thus a modest fee requirement to file a case is not a substantial burden on access to courts in these cases) there is still some burden on the fundamental right of access to courts. Thus, under standard fundamental rights analysis, *Kras* and *Ortwein* should have triggered a “reasonableness balancing” approach, not minimum rationality review.

Language in both the *Kras* and *Ortwein* opinions support this analysis. In *Kras*, the Court stated:

> [T]he *reasonableness* of the structure Congress produced, and congressional concern for the debtor, are apparent from the provisions permitting the debtor to file his petition without payment of any fee, with consequent freedom of subsequent earnings and of after-acquired assets (with the rare exception specified in § 70(a) of the Act) from the claims of then-existing obligations. These provisions, coupled with the bankrupt’s ability to obtain a stay of all debt enforcement actions pending at the filing of the petition or thereafter commenced, enable a bankrupt to terminate his harassment by creditors, to protect his future earnings and property, and to have his new start with a minimum of effort and financial obligation. They serve also, as an incidental effect, to promote and not to defeat the purpose of making the bankruptcy system financially self-sufficient.[^185]

Similarly, in *Ortwein*, the Court balanced the extent of the burden on the individual against the state’s interests in defraying some of the costs of administering the system by the imposition of modest fees:

Each of the present appellants has received an agency hearing at which it was determined that the minimum level of payments authorized by law was being provided. . . . In *Kras*, the Court also stressed the existence of alternatives, not conditioned on the payment of the fees, to the judicial remedy. The Court has held that procedural due process requires that a welfare recipient be given a

[^182]: *M.L.B.*, 519 U.S. at 115–16.
[^184]: *Ortwein*, 410 U.S. at 659.
[^185]: *Kras*, 409 U.S. at 448-49 (emphasis added) (citations omitted).
pretermination evidentiary hearing. These appellants have had hearings. The hearings provide a procedure, not conditioned on payment of any fee, through which appellants have been able to seek redress.\footnote{Ortwein, 410 U.S. at 659–60 (citations omitted).}

This language from \textit{Ortwein}, like the “reasonableness” language cited above from \textit{Kras}, indicates a sensitive balancing of the benefits and burdens of the fee requirement, not minimum rationality review deference to legislative judgment. Where the burden on access to courts is more substantial, like burdening access to courts in a case involving some other fundamental right—such as the right to bear children in \textit{M.L.B.},\footnote{519 U.S. at 116–17.} or the right to marry/divorce in \textit{Boddie v. Connecticut}\footnote{401 U.S. 371, 381–82 (1971).}—the Court should apply the strict scrutiny approach.

\section*{V. \textit{Gonzales v. Carhart} and the Undue Burden Standard}

In \textit{Stenberg v. Carhart}, a 5-4 Court ruled that a Nebraska statute banning partial-birth abortions was unconstitutional as not having a sufficient exception for the life or health interests of the mother, as required by \textit{Roe} and \textit{Casey}, and was an undue burden on a woman’s right to abortion choice.\footnote{Stenberg v. Carhart, 530 U.S. 914, 920–22, 929–30 (2000). For discussion on the need for a medical emergency exception under \textit{Roe} and \textit{Casey}, see supra note 57.} In dissent, Justice Kennedy, joined by Chief Justice Rehnquist, concluded that the law was a less-than-undue burden on abortion choice and sufficient to meet the health exception of \textit{Casey}.\footnote{Stenberg, 530 U.S. at 963–68 (Kennedy, J., dissenting).} Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, wrote a dissent calling for \textit{Roe} and \textit{Casey} to be overruled.\footnote{Id. at 980–82 (Thomas, J., dissenting).}

Justices Scalia and Thomas had voted to uphold the Nebraska ban in *Stenberg*, and the jurisprudential philosophy of Chief Justice Roberts and Justice Alito tended to suggest that they each would join with Justices Scalia and Thomas in favor of upholding the congressional partial-birth abortion ban in *Gonzales*, as they did. Justice Kennedy therefore held the critical fifth vote in *Gonzales*.

Consistent with his *Stenberg* dissent, Justice Kennedy concluded in *Gonzales* that the congressional ban on partial-birth abortions, like the Nebraska ban at issue in *Stenberg*, was a less-than-undue burden on abortion rights, since it only limited one occasionally used means of abortion (so-called partial-birth abortions where part of the fetus is pulled intact through the cervix before being dismembered, rather than the standard abortion where the fetal embryo is vacuumed out or the fetus is dismembered into pieces in the uterus behind the cervix before being removed). Four Justices dissented in *Gonzales* viewing the regulation as creating a substantial obstacle/undue burden to abortion choice. Reflecting the closeness of the case, Justice Kennedy noted in *Gonzales* that the case involved a facial challenge to the statute, and thus his conclusion of no “undue burden” was based on the fact that, for a “large fraction of relevant cases” of women seeking an abortion, the statute was not a “substantial obstacle” to abortion choice. As Justice Kennedy acknowledged, this left open the possibility of an as-applied challenge by a woman to whom the ban would be a “substantial obsta-

196 See *Gonzales*, 550 U.S. at 130; *Stenberg*, 530 U.S. at 980 (Thomas, J., dissenting).
197 Compare *Gonzales*, 550 U.S. at 150–60, with *Stenberg*, 530 U.S. at 956–67 (Kennedy, J., dissenting). In *Gonzales*, Justice Kennedy was joined by Justices Scalia and Thomas, who previously stated that they reject the entire *Roe/Casey* view of abortion rights, *Stenberg* 530 U.S. at 980–82 (Thomas, J., dissenting), and by Chief Justice Roberts and Justice Alito, whose jurisprudential philosophy tends to suggest skepticism of the entire *Roe/Casey* view of abortion rights. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting) (stating that courts should not create constitutional rights not explicitly in the Constitution, rather leave decisionmaking to the people); id. at 2640–2643 (Alito, J., dissenting) (stating that if right is not part of “history and tradition” courts should not create such rights). To the extent one is prepared to overrule *Roe* and *Casey*, and hold that there is no fundamental right to abortion choice, then regulations of abortion under the Due Process Clause and Equal Protection Clause would trigger just the minimum rationality review approach described in *Heller v. Doe*, 509 U.S. 312 (1993).
198 *Gonzales*, 550 U.S. at 169–89 (Ginsburg, J., dissenting).
199 See id. at 167–68 (majority opinion).
cle” given her medical condition.200 Once the ban on partial-birth abortion was held not to be a “substantial obstacle” to abortion choice, the question then became, under the analysis of Roe and Casey presented in Parts II–IV, whether the regulation is “reasonable.” As Justice Kennedy’s opinion noted:

When standard medical options are available, mere convenience does not suffice to displace them; and if some procedures have different risks than others, it does not follow that the State is altogether barred from imposing reasonable regulations. The Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman’s health, given the availability of other abortion procedures that are considered to be safe alternatives.201

In deciding on whether the regulation was reasonable, or whether it created too great health risks for women seeking an abortion, Justice Kennedy rejected the kind of substantial deference to legislative judgment typical of minimum rationality review:

[T]he Attorney General urges us to uphold the Act on the basis of the congressional findings alone. Although we review congressional factfinding under a deferential standard, we do not in the circumstances here place dispositive weight on Congress’ findings. The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.202

On the other hand, typical of reasonableness balancing, the Court does give some deference to legislative judgment, as indicated above.203 It is this kind of deference reflected in Gonzales when, after discussing

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200 See id. at 168. As Justice Kennedy noted:

We note that the statute here applies to all instances in which the doctor proposes to use the prohibited procedure, not merely those in which the woman suffers from medical complications. It is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop. [I]t would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation. For this reason, [a]s-applied challenges are the basic building blocks of constitutional adjudication. The Act is open to a proper as-applied challenge in a discrete case. No as-applied challenge need be brought if the prohibition in the Act threatens a woman’s life because the Act already contains a life exception.

Id. (citations omitted). In response, the four Justices in dissent stated their belief that the option of an as-applied challenge would often be unrealistic in practice. Gonzales, 550 U.S. at 189–90 (Ginsburg, J., dissenting).

201 Id. at 166–67 (emphasis added).

202 Id. at 165 (citations omitted).

203 See supra notes 71–74 and accompanying text.
different views on relative safety risks to women of banning the partial-birth abortion procedure, Justice Kennedy concluded:

The question becomes whether the Act can stand when this medical uncertainty persists. The Court’s precedents instruct that the Act can survive this facial attack. The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty. This traditional rule is consistent with Casey, which confirms the State’s interest in promoting respect for human life at all stages in the pregnancy. Physicians are not entitled to ignore regulations that direct them to use reasonable alternative procedures. The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community.\(^\text{204}\)

Despite this understanding of Gonzales, in two places in the opinion Justice Kennedy indicated that the relevant question was whether the State “has a rational basis to act, and it does not impose an undue burden”\(^\text{205}\) and “[c]onsiderations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends.”\(^\text{206}\) This isolated language might be used to suggest that once no substantial obstacle/undue burden is found, the court should only apply a minimum rationality review approach.

In opposition to such a conclusion, Justice Kennedy made clear in Gonzales that his intent was to follow the approach to abortion rights adopted by the joint opinion in Casey, not to alter it.\(^\text{207}\) Given the analysis of Casey discussed in Part II of this article, application in Casey of its approach to undue burdens and less-than-undue burdens discussed in Part III, Casey’s reference to its approach being consistent with the fundamental rights analysis in the ballot access, like Anderson v. Celebrezze, and other fundamental rights cases discussed in Part IV, and the “reasonableness” and “independent constitutional duty to review” language in Gonzales itself, it should be clear that Gonzales, like Casey, involves a reasonableness balancing test. Indeed, given the widespread use of strict scrutiny for substantial burdens on fundamental rights, and reasonableness balancing for less-than-substantial burdens on fundamental rights discussed in Part IV, it would be anomalous to create a special

\(^{204}\) Gonzales, 550 U.S. at 163 (emphasis added).
\(^{205}\) Id. at 158 (emphasis added).
\(^{206}\) Id. at 166 (emphasis added).
\(^{207}\) Id. at 146 (“Casey, in short, struck a balance. The balance was central to its holding. We now apply its standard to the cases at bar.”).
VI. Differing Approaches in Federal District Courts and the Courts of Appeals

Two recent Court of Appeals opinions—one from the Fifth Circuit and one from the Seventh Circuit—provide insight into how lower courts have been applying the undue burden test following Casey and Gonzales.

A. The Fifth Circuit Approach: Where No Undue Burden Exists, Apply Minimum Rationality Review

In 2014, the Fifth Circuit Court of Appeals denied an injunction against a Texas law requiring physicians performing abortions to have admitting privileges at a hospital within 30 miles of their clinic. In reaching this conclusion, the Fifth Circuit stated in Planned Parenthood of Greater Texas Surgical Health Services v. Abbott:

In Casey, the Court reaffirmed what it regarded as Roe’s “essential holding,” the right to abort before viability, the point at which the unborn life can survive outside of the womb. Before viability, the State may not impose an “undue burden,” defined as any regulation that has the purpose or effect of creating a “substantial obstacle” to a woman’s choice. In Gonzales, the Court added that abortion restrictions must also pass rational basis review.

In stating what standard of review to apply to determine whether

\[\text{References:}\]

208 As the joint opinion noted in Casey, consistency with related doctrines is an important consideration in deciding whether to follow or overrule a case. See Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 857 (1992) (“No evolution of legal principle has left Roe’s doctrinal footings weaker than they were in 1973. . . . [S]ubsequent constitutional developments have neither disturbed, nor do they threaten to diminish, the scope of recognized protection accorded to the liberty relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child.”); see also Arizona v. Gant, 556 U.S. 332, 358 (2009) (Alito, J., dissenting) (“Relevant factors identified in prior cases [on whether to follow or overrule a precedent] include whether the precedent has engendered reliance, whether there has been an important change in circumstances in the outside world, whether the precedent has proved to be unworkable, whether the precedent has been undermined by later decisions, and whether the decision was badly reasoned.”) (citations omitted)); see generally R. Randall Kelso & Charles D. Kelso, How the Supreme Court is Dealing with Precedents in Constitutional Cases, 62 Brook. L. Rev. 993, 1001–1007 (1996) (discussing the importance to the Supreme Court of whether the precedent creates an inconsistency or incoherence in the law).


210 Id. at 590.
the state “has a rational basis to act,” the Fifth Circuit applied the minimum rationality review test applicable to ordinary economic and social regulation under the Due Process and Equal Protection Clauses. The Court noted:

Nothing in the Supreme Court’s abortion jurisprudence deviates from the essential attributes of the rational basis test, which affirms a vital principle of democratic self-government. It is not the courts’ duty to second guess legislative factfinding, “improve” on, or “cleanse” the legislative process by allowing relitigation of the facts that led to the passage of a law. Under rational basis review, courts must presume that the law in question is valid and sustain it so long as the law is rationally related to a legitimate state interest. As the Supreme Court has often stressed, the rational basis test seeks only to determine whether any conceivable rationale exists for an enactment. Because the determination does not lend itself to an evidentiary inquiry in court, the state is not required to “prove” that the objective of the law would be fulfilled. Most legislation deals ultimately in probabilities, the estimation of the people’s representatives that a law will be beneficial to the community. Success often cannot be “proven” in advance. The court may not replace legislative predictions or calculations of probabilities with its own, else it usurps the legislative power.211

In his concurrence in the Seventh Circuit case, Planned Parenthood of Wisconsin, Inc. v. Van Hollen, Judge Manion discussed the appropriate inquiry in similar language.212 He stated:

“Where it has a rational basis to act, and it does not impose an undue burden, the State may” regulate the provision of abortions. Thus, legislation regulating abortions must pass muster under rational basis review and must not have the “practical effect of imposing an undue burden” on the ability of women to obtain abortions.

At the first step, we must presume that the admitting-privileges requirement is constitutional, and uphold it so long as the requirement is rationally related to Wisconsin’s legitimate interests. Wisconsin asserts that its admitting-privileges requirement furthers its legitimate interests in protecting the health of mothers and in maintaining the professional standards applicable to abortion doctors. The question, then, is whether Wisconsin’s adoption of the admitting-privileges requirement is rationally related to these interests. “Under rational basis review, ‘the plaintiff has the burden of proving the government’s action

211 Id. at 594 (citations omitted). The Abbott court continued, “A law ‘based on rational speculation unsupported by evidence or empirical data’ satisfies rational basis review. The fact that reasonable minds can disagree on legislation, moreover, suffices to prove that the law has a rational basis. Finally, there is no least restrictive means component to rational basis review,” Abbott, 748 F.3d at 594 (citations omitted).

212 Planned Parenthood of Wis., Inc. v. Van Hollen, 738 F.3d 786, 799–800 (7th Cir. 2013) (Manion, J., concurring in part and in the judgment).
irrational,’ and ‘[t]he government may defend the rationality of its action on
any ground it can muster, not just the one articulated at the time of deci-

Judge Manion continued:

The court suggests that Wisconsin must come forward with medical evi-
dence that the admitting-privileges requirement furthers the State’s legitimate
interests. But, under rational basis review, Wisconsin’s legislative choice “may
be based on rational speculation unsupported by evidence or empirical data.”
States have “broad latitude” to regulate abortion doctors, “even if an objective
assessment might suggest that” the regulation is not medically necessary.214

B. The Seventh Circuit Approach: Casey Requires a
Reasonableness Balancing Test

In contrast to this approach, the Seventh Circuit Court of Appeals in
Planned Parenthood of Wisconsin, Inc. v. Van Hollen, upheld a prelimi-
nary injunction against a Wisconsin law that required physicians per-
forming abortions to have admitting privileges at a hospital within 30
miles of their clinic.215 In reaching this conclusion, the court stated:

The cases that deal with abortion-related statutes sought to be justified on
medical grounds require not only evidence (here lacking as we have seen) that
the medical grounds are legitimate but also that the statute not impose an un-
due burden on women seeking abortions. The feebler the medical grounds, the
likelier the burden, even if slight, to be “undue” in the sense of disproportio-
ate or gratuitous. It is not a matter of the number of women likely to be affect-
ed. “[A]n undue burden is a shorthand for the conclusion that a state regulation
has the purpose or effect of placing a substantial obstacle in the path of a
woman seeking an abortion of a nonviable fetus.” In this case the medical
grounds thus far presented (“thus far” being an important qualification given
the procedural setting—a preliminary-injunction proceeding) are feeble, yet
the burden great because of the state’s refusal to have permitted abortion pro-
viders a reasonable time within which to comply.216

213 Id. (citations omitted).
214 Id. at 800 (citations omitted). Judge Manion continued:
   Thus, the Supreme Court has rejected as misguided arguments that an abortion law
   is unconstitutional because the medical evidence contradicts the claim that the law
   has any medical basis. In sum, Wisconsin need offer only “a ‘conceivable state of
   facts that could provide a rational basis’ for requiring abortion physicians to have
   hospital admission privileges.”

   Id. (citations omitted).
215 Van Hollen, 738 F.3d at 799.
216 Id. at 798 (emphasis added) (citations omitted). The Van Hollen court added:
In his dissent from the Fifth Circuit’s decision denying rehearing in Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, Judge Dennis similarly noted that a reasonableness balancing test was required by Casey and Gonzales. He noted:

I respectfully but emphatically dissent from the court’s refusal to rehear this case en banc. In upholding Texas’s unconstitutional admitting-privileges requirement for abortion providers and medication-abortion restrictions, the panel opinion flouts the Supreme Court’s decision in Planned Parenthood of Southeastern Pennsylvania v. Casey, by refusing to apply the undue burden standard expressly required by Casey. Instead, the panel applied what effectively amounts to a rational-basis test—a standard rejected by Casey—under the guise of applying the undue burden standard. The panel’s assertion that it applies Casey is false because it does not assess the strength of the state’s justifications for the restrictive abortion laws or weigh them against the obstacles the laws place in the path of women seeking abortions, as required by Casey. A correct application of the Casey undue burden standard would require that the admitting-privileges provision and medication-abortion restrictions be stricken as undue burdens because the significant obstacles those legal restrictions place in the way of women’s rights to previability abortions clearly outweigh the strength of their purported justifications.

Judge Dennis continued:

While approving of Roe’s central premises, the controlling Casey plurality rejected a strict-scrutiny standard of review that cases following Roe had adopted and applied to challenges to abortion regulations, and for which Justice Blackmun argued in his partial dissent. The Casey plurality likewise rejected

And so the district judge’s grant of the injunction must be upheld. But given the technical character of the evidence likely to figure in the trial—both evidence strictly medical and evidence statistical in character concerning the consequences both for the safety of abortions and the availability of abortion in Wisconsin—the district judge may want to reconsider appointing a neutral medical expert to testify at the trial, as authorized by Fed.R.Evid. 706, despite the parties’ earlier objections. Given the passions that swirl about abortion rights and their limitations there is a danger that party experts will have strong biases, clouding their judgment. They will still be allowed to testify if they survive a Daubert challenge, but a court-appointed expert may help the judge to resolve the clash of the warring party experts. And the judge may be able to procure a genuine neutral expert simply by directing the party experts to confer and agree on two or three qualified neutrals among whom the judge can choose with confidence in their competence and neutrality. If either side’s party experts stonewall in the negotiations for the compilation of the neutral list, the judge can take disciplinary action; we doubt that will be necessary.

Id. at 798–99.


218 Id. at 331–332 (citations omitted).
mere rational-basis review—the standard urged by Chief Justice Rehnquist in dissent. The controlling *Casey* plurality read Roe as acknowledging both the importance of a woman’s right to make the ultimate decision of whether to terminate her pregnancy previability, as well as the State’s legitimate interests in protecting fetal life and preserving the health of the pregnant woman. In light of these competing interests, and in an effort to strike a balance between them, the *Casey* plurality announced the undue burden standard, which functions as a reconciliatory standard between strict scrutiny and rational-basis review. As the Court has emphasized, the undue burden test “struck a balance. The balance was central” to the *Casey* Court’s holding.

*Casey* thus adopted a compromise position, between the strict-scrutiny review endorsed by Justice Blackmun and the rational-basis review urged by Chief Justice Rehnquist. However, the *Casey* plurality did not adopt ordinary, intermediate scrutiny. Rather than apply one of the recognized tiers of scrutiny, the Court adopted the undue burden test, and in so doing, pointed to two ballot-access cases—namely *Anderson v. Celebrezze*, and *Norman v. Reed*—that similarly applied a standard of review that does not squarely fit into the established tiers of scrutiny. The ballot access cases apply a flexible balancing test that provides the State with leeway to regulate for a valid purpose, where such regulation does not unnecessarily infringe upon individuals’ voting rights. The Court explained that the “abortion right is similar” in that courts must weigh the individual woman’s right against the State’s legitimate interests. Therefore, we may look to the ballot access cases for guidance on how to apply the undue burden standard.\(^{219}\)

After quoting the language from *Anderson v. Celebrezze* cited above in Part IV,\(^{220}\) Judge Dennis concluded:

> The *Casey* plurality’s comparison to *Anderson* and *Norman* as it explained the competing interests at stake in challenges to abortion regulations reveals that, like the standard the Court applied in the ballot-access cases, the undue burden test requires a court to consider “the character and magnitude of the asserted injury,” and determine “whether the corresponding interest [is] sufficiently weighty to justify the limitation.” Thus, the undue burden test necessarily contains a proportionality principle: if a regulation has the effect of imposing a particularly severe obstacle upon a woman’s right to an abortion, then the government’s justification must be correspondingly strong.\(^{221}\)

As both the Seventh Circuit and Judge Dennis in dissent indicated, consistent with the analysis of *Casey* and *Gonzales* discussed in Parts II–V, this inquiry requires weighing the magnitude of the burden imposed against the extent and strength of the State’s justification for the law. It would be clearer if the Seventh Circuit in *Van Hollen* had explicitly stat-

\(^{219}\) *Id.* at 335-36 (footnote omitted) (citations omitted).

\(^{220}\) *See supra* note 107 and accompanying text.

\(^{221}\) *Abbott*, 769 F.3d at 337 (citations omitted).
ed that the *Casey* analysis requires a two-step inquiry: (1) whether the government’s regulation is a “substantial obstacle to a woman seeking an abortion,” which, in a facial challenge, is more about determining the number of women likely to be affected, but then (2) if that number is less than substantial, the court applies the *Anderson v. Celebrezze* reasonableness balancing test to determine if the burden, even if not a substantial obstacle, is nonetheless unreasonable, or excessive, or undue based on the Seventh Circuit’s acknowledgment that “[t]he feeblest the medical grounds, the likelier the burden, even if slight, to be ‘undue’ in the sense of disproportionate or gratuitous.”

C. Analyzing District Court and Court of Appeals Cases After *Casey* and *Gonzales*

1. Cases Finding Abortion Regulations Unconstitutional Applying Undue Burden or Reasonableness Balancing

The same split in approaches to abortion rights present in the Fifth Circuit and Seventh Circuit cases involving admitting privileges of hospitals, discussed above, are replicated in a number of other recent cases. In some cases, abortion regulations have been held unconstitutional as undue burdens. Other cases have held regulations unconstitutional under reasonableness balancing, rejecting minimum rationality review. Other cases have involved other doctrines, either constitutional

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222 See *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007). Of course, in an as-applied challenge, the issue would be whether the regulation is a substantial obstacle to the specific litigant in the case, as Justice Kennedy indicated in *Gonzalez*. See supra notes 199–200 and accompanying text.

223 *Van Hollen*, 738 F.3d at 798. If the regulation is a substantial obstacle to abortion choice, under the analysis in Parts II–V of this article, that should trigger a strict scrutiny approach, not an automatic finding of unconstitutionality. See supra notes 57–64, 78–90, 105–188 and accompanying text.

224 See supra Part VI.A–B.

225 See, e.g., *McCormack v. Hiedeman*, 694 F.3d 1004, 1016–18 (9th Cir. 2012) (holding Idaho law prohibiting person from seeking an abortion in any place other than a hospital, doctor’s office, or clinic unconstitutional as an undue burden, as applied to a woman who terminated pregnancy by taking abortion-inducing drug prescribed by physician and lawfully purchased over the Internet).

226 See, e.g., *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 911–18 (9th Cir. 2014) (holding district court abused discretion in denying preliminary injunction against Arizona statute requiring that medications used to induce abortions be administered in compliance with on-label regimen, when no evidence existed of medical justification for that requirement, focusing on the “independent constitutional duty to review” language in *Gonzales v. Carhart*, 550 U.S. 124, 165–66 (2007), to underscore that undue burden analysis is not min-
doctrines, like freedom of speech objections to required disclosure of services provided or required communication of information about an ultrasound performed on a pregnant woman, or resolved as a matter of statutory interpretation when dealing with the interaction between state and federal laws.

2. Cases Upholding Abortion Regulations as Constitutional Applying Only Undue Burden Analysis or Minimum Rationality Review

Some government regulations have been upheld using undue burden analysis alone. Others have applied mere minimum rationality review after concluding the law was not a substantial obstacle to abortion choice. Other laws have been upheld after facing other constitutional objections, like freedom of speech objections to required communication of information about an ultrasound, or after facing statutory objections.

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227 See, e.g., Evergreen Ass’n, Inc. v. City of New York, 740 F.3d 233, 237–38 (2d Cir. 2014) (holding required disclosure whether “pregnancy center” provides emergency contraceptive, abortion services, or pre-natal care likely violates free speech rights of center; but holding required disclosure whether center has licensed medical provider on staff likely constitutional); Stuart v. Loomis, 992 F. Supp. 2d 585, 588 (M.D.N.C. 2014) (holding North Carolina law requiring abortion providers to perform ultrasound and describe images to women violates free speech rights of providers).

228 See, e.g., Planned Parenthood Ariz., Inc. v. Betlach, 727 F.3d 960, 962–63 (9th Cir. 2013) (holding Arizona’s attempt to defund abortion providers likely violates Medicaid’s “free choice” provisions); Planned Parenthood of Ind., Inc. v. Comm’r of the Ind. State Dep’t of Health, 699 F.3d 962 (7th Cir. 2012) (holding Indiana’s defunding abortion providers likely violates Medicaid’s “free choice provider” provisions, but provision involving block grant of funds for monitoring sexually transmitted diseases likely not preempted).

229 See, e.g., Planned Parenthood Sw. Ohio Region v. DeWine, 696 F.3d 490, 513–18 (6th Cir. 2012) (McKeague, J., concurring in part and writing the majority as to Part VI) (holding Ohio law criminalizing the distribution of mifepristone, also known as RU-486, unless the distribution mirrored certain protocols and gestational time limits identified by the FDA when mifepristone was first approved in 2000, constitutional as not an undue burden on abortion); Comprehensive Health of Planned Parenthood of Kan. and Mid-Mo., Inc. v. Templeton, 954 F. Supp. 2d 1205, 1222–24 (D. Kan. 2013) (holding “informed consent” provision requiring a physician to provide a woman seeking an abortion with information about the capacity of the fetus to feel pain at specific gestational ages likely constitutional, and not an undue burden).

230 See, e.g., Planned Parenthood Minn., N.D., S.D. v. Rounds, 686 F.3d 889, 902–06 (8th Cir. 2012) (en banc) (holding South Dakota law requiring physicians to provide patients seeking an abortion with written disclosure of a correlation, but not necessarily a causal link, between persons who have obtained abortions and an increased risk of suicide constitutional as truthful, non-misleading, and relevant to the patient’s decision, adopting minimum rationality review deference to legislative judgment, stating “the state legislature, rather than a federal court, is in the best position to weigh the divergent results and come to a conclusion about the best way to protect its populace”).

231 See, e.g., Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570,
D. Reverse or Remand to Lower Courts: Fisher v. University of Texas at Austin Analogy

Given the analysis in Parts II–V above, those courts that have applied only a minimum rationality review approach after concluding a regulation does not pose a substantial obstacle to a woman choosing an abortion, including the Fifth Circuit’s opinion in Planned Parenthood of Greater Texas Surgical Health Services v. Abbott, or the Eighth Circuit’s opinion in Planned Parenthood Minn., N.D., S.D. v. Rounds are in error. The Supreme Court has granted certiorari to the Fifth Circuit in the Abbott case under the name Whole Woman’s Health v. Cole. In resolving the issues presented in the case, the court could take four different courses.

First, the Fifth Circuit overturned the district court’s conclusion that the Texas law did create a substantial obstacle to abortion choice. If the law is viewed as a substantial obstacle, that should lead to a finding that the law is unconstitutional under a strict scrutiny approach. Under standard procedural rules, a court of appeals should only overrule factual decisions of a district court if they are “clearly erroneous.” The Fifth Circuit concluded in Abbott that the district court’s decision on whether the law was a substantial obstacle was clearly erroneous. On appeal, the Supreme Court could find that decision in error, based on the evidence of the effect of the law discussed in the district court’s opinion.

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232 See, e.g., Planned Parenthood of Kan. and Mid-Mo. v. Moser, 747 F.3d 814, 822–838 (10th Cir. 2014) (holding state receiving federal funds as a block grant under Title X of the Public Health Service Act can restrict funds to abortion providers).
233 748 F.3d 583, 590–94 (5th Cir. 2014).
234 686 F.3d 889, 902–06 (8th Cir. 2012) (en banc).
236 Abbott, 748 F.3d at 597–600.
237 See, e.g., Voting for Am., Inc. v. Steen, 732 F.3d 382, 386 (5th Cir. 2013) (“[T]he district court’s findings of fact are subject to a clearly-erroneous standard of review . . . .”); Okpalobi v. Foster, 190 F.3d 337, 342, 357 (5th Cir. 1999) (reviewing a challenge to an abortion regulation and applying the clearly erroneous standard of review to the district court’s factual findings).
238 Abbott, 748 F.3d at 599–600.
239 This was the conclusion of Judge Dennis’ dissent in Abbott. He observed: We are obliged to review the district court’s findings of fact for clear error.
Second, even if that decision is not reversed, for a less-than-substantial obstacle, the law should be subjected to reasonableness balancing, not mere minimum rationality review. The Fifth Circuit clearly applied a minimum rationality review standard. \(^{240}\) Faced with that error, the Court could state the proper standard as reasonableness balancing and then apply that standard and conclude as a matter of law that the regulation is an unreasonable burden on plaintiff’s abortion rights, as did Judge Dennis in his dissent in \textit{Abbott}. \(^{241}\) Likewise, the Court could find that the regulation is, in fact, reasonable. \(^{242}\)

Third, in the case of \textit{Fisher v. University of Texas at Austin}, the Supreme Court decided the Fifth Circuit had not applied the proper stand-

\(^{240}\) \textit{Abbott}, 748 F.3d at 594.
\(^{241}\) \textit{Abbott}, 769 F.3d at 356–60 (Dennis, J., dissenting).
\(^{242}\) Given the weak interests supporting a requirement that doctors at abortion clinics have admitting privileges at local hospitals, but the significant burden it imposes, a conclusion that such a law is reasonable would not be likely, but it is at least possible. Judge Dennis noted in his dissent:

\[\text{[T]he district court correctly found that the justifications for [the] admitting-privileges provision is virtually nonexistent because the evidence shows that requiring abortion doctors to have admitting privileges would not increase the competence of those doctors, the safety of abortions, or the quality of hospital care given to the few abortion patients who are treated in hospital emergency care facilities. In light of the heavy burden imposed upon a woman’s constitutionally protected right and the weak, if any, justifications for the law, the district court properly concluded that the law amounts to an undue burden on a woman’s liberty interest in obtaining an abortion and must be facially invalidated. The enormous flaw in the [Fifth Circuit] panel’s spurious undue burden analysis is that it nowhere assesses the strength of the justification that the State names for its legislation, nor does it weigh the weakness of the State’s justifications against the extent of the burden imposed upon women. Instead, it simply assumes that the legislation will result in what the State says it is seeking and, as explained directly below, erroneously minimizes the extent of the burden imposed upon women actually restricted by the admitting-privileges provision. The \textit{Abbott} panel’s failure to consider the strength of the State’s justifications or to conduct the balancing required by \textit{Casey} alone warrants \textit{en banc} reconsideration.}\]

\textit{Id.} at 360.
ard of review to determine the constitutionality of an affirmative action admissions program at the University of Texas at Austin. Because the Fifth Circuit had not applied the “demanding burden” of strict scrutiny, but a “good-faith,” deferential form of strict scrutiny, the Court remanded Fisher to the Fifth Circuit to apply the correct standard of review in the first instance. Prudence suggests this might also be the better course in Abbott, rather than the Court deciding the “reasonableness balancing” on the merits in the first instance.

On the other hand, Fisher was decided based on a summary judgment motion without development of facts at a full trial. Here, there has already been a full trial and factual development, and thus the Court could more easily decide the case on the merits, as suggested in the second option above, rather than remand the case. In addition, after the remand in Fisher, the Fifth Circuit reached the same result upholding the constitutionality of the University of Texas-Austin affirmative action program under “demanding” strict scrutiny as they had under their initial, erroneous “good-faith,” deferential strict scrutiny, prompting the Court to grant certiorari again to consider that result. The Court may not want to go through that extra level of process again. Still, a remand of the case to give the Fifth Circuit first crack at a reasonableness balancing analysis, just as the Court in Fisher remanded the case to the Fifth Circuit, is probably the more prudent course of action.

Fourth, the Court could decide that if a less-than-substantial obstacle on abortion choice exists, a court should only apply a minimum rationality review approach, and not reasonableness balancing. This, however, would be inconsistent with the analysis of Roe, Casey, and

243 Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2415 (2013).
244 Id. at 2415, 2420–21.
245 See id. at 2421 (“[F]airness to the litigants and the courts that heard the case requires that it be remanded so that the admissions process can be considered and judged under a correct analysis.”); see also Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (“[W]e think it best to remand the case to the lower courts for further consideration in light of the principles we have announced.”).
246 Fisher, 133 S. Ct. at 2417.
248 Fisher v. Univ. of Tex. at Austin, 758 F.3d 633 (5th Cir. 2014), reh’g en banc denied, 771 F.3d 274 (5th Cir. 2014), cert. granted, 135 S. Ct. 2888 (2015).
249 See supra note 244 and accompanying text.
Gonzales discussed in Parts II–V of this article,250 but it could be done. Under that approach, the Court could still, in theory, reverse the Fifth Circuit decision on the ground that the admitting privileges regulation is not even “rationally related to the state’s legitimate interest,” which is what the district court in Abbott concluded as an alternative holding to the conclusion that the law was an undue burden.251 But given the deferential nature of minimum rationality review, the law might well survive a principled application of that level of review, as the Fifth Circuit held in Abbott.252

VII. REASONABLENESS BALANCING IN LIGHT OF SUPREME COURT PRECEDENTS

Considering constitutional law generally, there are not only the four standards of scrutiny discussed in Parts II–V of this article—minimum rationality review, reasonableness balancing, intermediate review, and strict scrutiny—but seven levels of scrutiny and an eighth level of a categorical approach where an automatic finding of unconstitutionality is made. This section will place the reasonableness balancing approach in the context of these eight kinds of Court doctrine.

The reasonableness balancing approach is used by the Court not only for less-than-substantial burdens on fundamental rights, as discussed in Part IV, but in a number of other constitutional doctrines. For example, the Court uses a similar reasonableness balancing test in deciding whether a burden is: (1) “clearly excessive” under the Pike v. Bruce Church, Inc. test for Dormant Commerce Clause review;253 (2) “grossly excessive” burden under the BMW v. Gore test for unconstitutionality of punitive damage awards;254 (3) not “reasonable and necessary” under the U.S. Trust v. New Jersey for Contract Clause review of government reg-

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250 See supra Parts II–V.  
251 See Abbott, 951 F. Supp. 2d. at 897–900.  
252 Abbott, 748 F.3d at 590–96.  
253 Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). Under Pike, the Court considers: (1) the state’s “legitimate local public interest”; (2) the means by which the statute achieves these ends, including whether the benefits of the statute could be promoted “as well with a lesser impact on interstate activities”; and (3) given this, whether the “burden” on interstate commerce is “clearly excessive” given the statute’s benefits. Id.  
254 BMW v. Gore, 517 U.S. 559, 575–85 (1996). Under BMW, the Court considers: (1) the degree of reprehensibility of the conduct; (2) the ratio between the punitive damage award and the compensatory damage award; and (3) sanctions for comparable misconduct in the law, to determine whether the challenger can show the punitive damage award is “grossly excessive.” Id.
ulations burdening the government’s own contracts; or (4) goes “too far” and thus is not “reasonable” under the Penn Central test for Takings Clause review. Reasonableness balancing is thus an established feature of constitutional adjudication generally. Reasonableness balancing also applies in other areas, such as procedural due process balancing under Mathews v. Eldridge.

Sometimes under reasonableness balancing the burden shifts to the government to justify its action. For example, in cases under the dormant commerce clause, where the regulation facially discriminates against interstate commerce, such as Maine v. Taylor, the Court balances (1) the state’s legitimate interest in the regulation; (2) whether the benefits could be achieved as well by available non-discriminatory alternatives; and (3) the burden on interstate commerce, but the burden shifts to the government to establish the constitutionality of its regulation. The

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255 U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 22, 31 (1977). Under U.S. Trust, the challenger has the burden of showing—given a three-part factor balancing of the state’s “legitimate” interest; the statute’s means, including whether the benefits of the statute could be served “equally well” by an “evident and more moderate course”; and the “burden” on individual contract rights—that the burden was not “reasonable and necessary” given the statute’s benefit. Id. This reasonableness balancing test only applies under the Contract Clause for cases involving the state’s own contracts, as in U.S. Trust, or where a narrow range of contract actors are being regulated. See e.g., Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 243–44, 249–51 (1978). In standard Contract Clause cases, minimum rationality review applies. See Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 412–13, 412 n.14 (1983) (“[A]s is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.”) (citation omitted).

256 Penn Cent. Transp., Co. v. City of New York, 438 U.S. 104, 138 (1978) (holding no taking because zoning law permitted “reasonable beneficial use” of the property). The challenger thus has to show the regulation goes “too far” in the language of Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922), or was “unreasonable” in the modern phrasing in Penn Central. Under Penn Central, the Court balances the burden on the individual in terms of the economic impact of the regulation, its interference with reasonable investment backed expectations, and whether it leaves the individual with a reasonable rate of return on the investment against the benefits of the government action. Penn Cent., 438 U.S. at 124–25, 136–37.


258 Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976). Under Mathews, the Court considers: (1) “the private interest” that will be burdened by the governmental action; (2) the means by which existing procedures achieve the government’s ends, including “the risk of an erroneous deprivation through present procedures and the probable value, if any, of additional or substitute procedures”; and (3) “the Government’s interest” or ends in the case. Id. at 335; see also T. Alexander Aleinikoff, Constitutional Law in an Age of Balancing, 96 YALE L.J. 943, 965–66 (1987) (discussing Mathews procedural due process doctrine as a kind of balancing approach).

Fifth Amendment Takings Clause test in Dolan v. City of Tigard requires the government to establish a “rough proportionality” between the government’s burden on the individual and the individual’s burden on society.\textsuperscript{260} As the Court noted in Dolan, this test is similar to the balancing done in search and seizure cases under the Fourth Amendment, where the government has the burden to show any search and seizure is reasonable under the circumstances.\textsuperscript{261} Under the First Amendment, when considering the right of government workers to speak on matters of public concern, the government has the burden to establish in cases like Pickering v. Board of Education of Will County, Illinois that: (1) the government’s legitimate ends in “promoting the efficiency of the public services it performs through its employees”; (2) prevails in a balance against “the interests of the [employee]” in free speech; (3) including whether the government could act with more “narrowly drawn grievance procedures.”\textsuperscript{262}

These cases all represent a higher level of review than the cases previously discussed. Under reasonableness balancing in the fundamental rights cases discussed in Part IV, or under Pike v. Bruce Church, BMW v. Gore, U.S. Trust, or Penn Central, the burden is on the challenger to prove the regulation is unreasonable, excessive, undue, or goes too far,\textsuperscript{263} while under Maine v. Taylor, Dolan, and Pickering the burden is on the government.\textsuperscript{264}

Certain members of the Court, and some commentators, have used the phrase “second-order” rational review to describe a level of scrutiny higher than minimum rationality review but less than strict scrutiny.\textsuperscript{265} Other members of the Court have referred to “reasonableness” or “proportionality” balancing.\textsuperscript{266} Perhaps the best terminology would be to

\textsuperscript{260} Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

\textsuperscript{261} See id. at 392. See also Aleinikoff, supra note 258, at 965 (describing cases in modern doctrine that use balancing under Fourth Amendment search and seizure doctrine).


\textsuperscript{263} See supra notes 73, 103, 253–258 and accompanying text.

\textsuperscript{264} See supra notes 259–262 and accompanying text.


\textsuperscript{266} See, e.g., District of Columbia v. Heller, 554 U.S. 570, 689–90 (2008) (Breyer, J., dis-
acknowledge minimum rationality review as the “basic rational review” test, but use the term “second-order reasonableness balancing” for the higher *Casey/Celebrezze* kind of reasonableness balancing where the burden of proof remains on the challenger to prove unconstitutionality, and use the term “third-order reasonableness balancing” when the burden shifts to the government to justify its action as reasonable, as in *Dolan/Pickering*. That is the terminology used in Tables 1 & 2 in the Appendix to this article summarizing the Court’s doctrines in constitutional law generally (Table 1), and under the First Amendment (Table 2).

Such an understanding would create five levels of scrutiny: minimum rationality review, second-order reasonableness balancing; third-order reasonableness balancing, intermediate review, and strict scrutiny review. In addition to these levels of review, in a few cases the Supreme Court has adopted two levels of review higher than standard intermediate review, but less strict than strict scrutiny. These two additional levels track elements of strict scrutiny and intermediate review under Equal Protection and Due Process Clause doctrine. Under intermediate review, the legislation must (1) advance important/significant/substantial government ends, (2) be substantially related to advancing these ends, and (3) not be substantially more burdensome than necessary to advance these ends.\(^2\)\(^\text{267}\) Under strict scrutiny the statute must (1) advance compelling/overriding government ends, (2) be directly and substantially related to advancing these ends, and (3) be the least restrictive effective means to advance the ends.\(^2\)\(^\text{268}\) The Court often phrases the last two parts of

\(^2\)\(^\text{267}\) See Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 687 (4th ed. 2011) (“Under intermediate scrutiny, a law is upheld if it is substantially related to an important government purpose. . . . The means used need not be necessary, but must have a ‘substantial relationship’ to the end being sought.”); see also *supra* notes 104, 109 (discussing government interests and burdens under intermediate review).

\(^2\)\(^\text{268}\) See Chemerinsky, *supra* note 267, at 687 (“Under strict scrutiny a law is upheld if it is proved necessary to achieve a compelling government purpose. The government . . . must show that it cannot achieve its objective through any less discriminatory alternative.”). See also *supra* notes 104, 109 and accompanying text (discussing government interests and burdens under strict scrutiny). Because the regulation must be “necessary” to advance the government’s ends, this means that any “unnecessary” underinclusiveness or overinclusiveness will render the regulation unconstitutional. Phrased in the affirmative, this means the regulation must adopt, to the extent possible, means that “directly advance” the government ends, not merely “substantially advance” those ends, as at intermediate review. See *supra* note 267 and accompanying text. Otherwise, the regulation is not “precisely tailored” enough. It is clear that this requirement of a “direct relationship” exists at strict scrutiny. Commercial speech
strict scrutiny as requiring the statute be “precisely tailored” or “necessary.” The last two prongs of intermediate review are often phrased as the regulation must be “narrowly drawn.” But, sometimes, the Court has used the phrase “narrowly drawn” under strict scrutiny.

The first additional level of review continues the intermediate level of scrutiny for the substantial government interest and not substantially too burdensome elements of the analysis, but increases the level of scrutiny under the second prong from the intermediate level of substantial relationship to the strict scrutiny level of direct relationship. This is the test used to determine the constitutionality of commercial speech regulations. As the Court stated in Central Hudson Gas & Electric Corp. v. Public Service Commission, “[W]e ask whether the asserted governmental interest is substantial. . . . [Next] we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.”

Because it adds one strict scrutiny component (direct relationship) to an otherwise intermediate test, this level of review can be called “intermediate review with bite.”

A second additional level of review adopts the strict scrutiny requirement of a compelling government interest and a direct relationship, but continues the intermediate level of scrutiny only requiring the regulation not be substantially too burdensome, rather than the strict scrutiny requirement of using the “least restrictive effective alternative.” Because this level adopts two of the three levels of strict scrutiny, but waters down the third element to an intermediate level of inquiry, this addition-

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270 See, e.g., Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989) (describing the third prong as requiring the regulation to be “narrowly drawn”).


272 Cent. Hudson Gas & Elec. Corp., 447 U.S. at 566. The Court clarified in Fox, 492 U.S. at 476–77, that the final prong of this test is the intermediate “narrowly drawn” analysis, and not the “least restrictive means” of strict scrutiny.
al level can be called “loose strict scrutiny.” Use of this standard of review occurred in the Equal Protection challenge to racial redistricting in *Bush v. Vera.* In that case, although generally applying strict scrutiny to a case of race discrimination, the controlling plurality “reject[ed], as impossibly stringent, the District Court’s view of the narrow tailoring requirement, that ‘a district must have the least possible amount of irregularity in shape, making allowances for traditional districting criteria.’” Instead, the Court adopted the intermediate requirement that the racial redistricting only not be “substantially more [burdensome] than is ‘reasonably necessary.’” This kind of “loose strict scrutiny” was also used by four Justices in dissent in *Parents Involved in Comm. Schools v. Seattle School District No. 1.*

The addition of “intermediate review with bite” and “loose strict scrutiny” creates four clearly defined levels of heightened scrutiny, each one more rigorous than the preceding standard of review on only one element of the three-pronged standard of review test. Thus, there is basic intermediate review (with requirements of a substantial government interest, substantial relationship, and the regulation not substantially more burdensome than necessary); intermediate review with bite (substantial government interest and not substantially more burdensome than necessary, but the strict scrutiny requirement of a direct relationship); loose strict scrutiny (compelling government interest and direct relationship, but only that the regulation not be substantially more burdensome than necessary); and traditional strict scrutiny (compelling government interest, direct relationship, least burdensome effective alternative required). These levels of scrutiny provide a step-ladder approach toward standards of review, with each higher level of scrutiny clearly more rigorous than the preceding level.

There appears to be some movement to get rid of the tests denominated above as “intermediate review with bite” and “loose strict scrutiny,” and to replace them with traditional strict scrutiny. That would get the Supreme Court’s level of scrutiny down to the 3 basic tiers of review (minimum rationality review, intermediate review, and strict scru-

274 *Id.* at 977 (citation omitted).
275 *Id.* at 979.
277 Justice Thomas has specifically rejected these additional strata of review. See, e.g., *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 377 (2002) (Thomas, J., concurring) (stating *Central Hudson Gas* test should not be used, and regular content-based strict scrutiny analysis should apply); *Bush*, 517 U.S. at 1000 (Thomas, J., concurring in the judgment) (reaffirming the principle that all racial classifications should be governed by strict scrutiny, even in *Bush*).
tiny) and 2 reasonableness balancing tests (burden on challenger in one; burden on the government in the other). On the other hand, there is some benefit in having “intermediate review with bite” and “loose strict scrutiny,” as they are logically consistent stepping stones in the level of review between intermediate review and strict scrutiny, and one can agree with the current approach that because commercial speech is more hearthy it does not need strict scrutiny protection,278 and that state governments should be given greater flexibility than allowable under traditional strict scrutiny in making their political redistricting decisions.279

Taken together, this discussion suggests there are seven different tests used by the Supreme Court in various cases to determine whether government interests are strong enough to make a government statute, regulation, or other government action constitutional. Justice Breyer has phrased the levels of scrutiny between minimum rationality review and strict scrutiny as reflecting one general interest balancing or proportionality approach. As Justice Breyer noted in dissent in District of Columbia v. Heller:

I would simply adopt such an interest-balancing inquiry explicitly. The fact that important interests lie on both sides of the constitutional equation suggests that review of gun-control regulation is not a context in which a court should effectively presume either constitutionality (as in rational-basis review) or unconstitutionality (as in strict scrutiny). Rather, “where a law significantly implicates competing constitutionally protected interests in complex ways,” the Court generally asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests. Any answer would take account both of the statute’s effects upon the competing interests and the existence of any clearly superior less restrictive alternative. Contrary to the majority’s unsupported suggestion that this sort of “proportionality” approach is unprecedented the Court has applied it in various constitutional contexts, including election-law cases, speech cases, and due process cases.280

Despite this listing of “balancing” or “proportionality” tests, the

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279 See, e.g., Bush, 517 U.S. at 977 (plurality opinion) (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 291 (1986) (“[S]tate actors should not be ‘trapped between the competing hazards of liability’ by the imposition of unattainable requirements under the rubric of strict scrutiny.”)).

balancing tests used in these cases cited by Justice Breyer are not all the same. *Burdick* represents what is called here “second-order reasonableness balancing.” Because the burden of proof is on the government to justify its action, *Pickering* represents “third-order reasonableness balancing.” Commercial speech cases, like *Thompson*, involve a slightly higher than intermediate standard of review, what is called here “intermediate review with bite.” *Nixon v. Shrink Missouri Government* also indicated its standard was somewhere between intermediate review and strict scrutiny, and applied something on the order of what this article calls “loose strict scrutiny.” The model of standards of review presented here, and summarized in Tables 1 and 2 in the Appendix to this article, takes this into account.

It is true that, in many other countries around the world, their constitutional courts do use one “proportionality” standard of review to determine the constitutionality of all legislation. A comparison of United States constitutional review versus constitutional review around the world from the perspective of the levels of review discussed here does show many commonalities in concerns about means/end reasoning, relative burdens on rights, and reasonableness balancing.

It is also true that the international standard of “proportionality” analysis is perhaps best seen as an approach somewhere between what is called in this article “third-order reasonableness balancing” and “intermediate review.” There are arguably advantages of simplicity and ease of application in such a single standard of review approach, but such an approach may not sufficiently distinguish different kinds of cases and provide lower courts with enough guidance as to how skeptical to be about various kinds of regulations.

A single standard approach is more consistent with civil law, deductive ways of reasoning, but perhaps not surprisingly the common-law inductive approach of deciding cases from the ground up has evolved a

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281 *See supra* notes 110–122, 253–258 and accompanying text.
282 *See supra* notes 259–264 and accompanying text.
283 *See supra* notes 272, 277 and accompanying text.
284 *See Nixon*, 528 at 386–89 (stating scrutiny of campaign contribution limitations should be higher than intermediate review, but less stringent than strict scrutiny).
287 *Id.* at 496–97.
288 *Id.* at 494–95.
more fact-specific list of standards of review for different cases. For this reason, the international single-standard “proportionality analysis” is not consistent with United States Supreme Court doctrine. Both approaches, however, make possible vigorous protection of individual rights for judges predisposed to adopt such approaches, and not defer to governments under a literal interpretation, customs and traditions, or strong deference-to-government approach. 

In addition to these seven levels of review, sometimes the Court adopts an absolute categorical approach whereby once the criteria are met the government action is automatically unconstitutional. This constitutes an eighth, and highest, level of review.

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289 See id. at 487–93 (discussing civil law versus common-law ways of reasoning, and summarizing the history behind development of the seven standards of review discussed here).


291 See Convergence and Symmetry, supra note 286, at 498–503 (discussing differences between (1) more “positivist” theories of constitutional interpretation, focusing on literal interpretation, with some deference to customs and traditions (an approach seen in decisions by Justices Scalia, Thomas, and Alito), along with strong deference-to-government under Justice Holmes’ and Professor James Thayer’s views, as represented in James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 HARV. L. REV. 129, 144 (1893), that courts should defer to government unless the unconstitutionality of the action is “so clear that it is not open to rational question” (an approach seen in decisions by Chief Justice Roberts) versus (2) more “normative” theories willing to see in constitutional provisions broad protection of fundamental natural rights (an approach more often seen in decisions of Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan)). For a discussion of how reasonable balancing and proportionality analysis fit into emerging trends of moral reasoning, both in the United States and around the world, based on equal concern and respect for others, see R. Randall Kelso, Modern Moral Reasoning and Emerging Trends in Constitutional and Other Rights Decision-Making Around the World, 29 QUINNIPIAC L. REV. 433, 451–62 (2011).


For many criminal defendants’ constitutional rights, there are also categorical barriers. For example, under the Fifth Amendment persons accused of crimes cannot be put in double jeopardy or have their privilege against self-incrimination rights violated. Sixth Amendment rights to trial by an impartial jury, right to confront witnesses under the Confrontation Clause, or compulsory process for obtaining witnesses in defense, and Eighth Amendment rights that
All these eight levels of scrutiny are summarized in the two Tables presented in an Appendix to this article. Basic constitutional doctrines are presented in Table 1. The various doctrines used in the context of the First Amendment are presented in Table 2.

VIII. CONCLUSION

As noted in the Introduction, following the 2010 elections, a spate of new abortion restricting laws were passed. Many government actions have been held unconstitutional by courts. A number of these cases have involved challenges to statutes requiring abortion clinics to have admitting privileges at local hospitals. In deciding what the correct approach is to abortion regulation, Part II of this article discussed the legal doctrine adopted by the Supreme Court in Roe and Casey. That discussion showed that the best reading of Casey is that it adopted a doctrine whereby an undue burden on abortion choice, defined as a “substantial obstacle to a woman seeking an abortion,” triggers Roe’s strict scrutiny approach, while a less-than-undue burden on abortion choice triggers a reasonableness balancing approach higher than minimum rationality review. Part III of this article supported this analysis by careful attention to the application of the undue burden analysis in Casey to the spousal notification, informed consent, and 24-hour waiting period regulations at issue in the case.

Part IV of this article expanded on this discussion to note how the joint opinion’s reference in Casey to its undue burden analysis tracking the Supreme Court’s doctrine in the ballot access cases, like Anderson v. Celebrezze, strongly supported use of a reasonableness balancing test higher than minimum rationality review. Part IV also noted how this Casey/Celebrezze approach is mirrored in a range of other fundamental rights cases, where substantial burdens trigger strict scrutiny, and less-than-substantial burdens trigger a reasonable balancing test higher than minimum rationality review. Part V discussed how Gonzales v. Carhart,

excessive bail shall not be required, nor excessive fines be imposed, nor cruel or unusual punishment inflicted, are phrased as absolute categorical barriers. For discussion of these provisions, see generally CHARLES D. KELSO & R. RANDALL KELSO, THE PATH OF CONSTITUTIONAL LAW § 23.2 (2007), available at http://libguides.stcl.edu/kelsomaterials.

While the Court has considered no cases under the Third Amendment, presumably its language that “[n]o Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law,” U.S. CONST. amend. III, reflects a categorical rule. See KELSO & KELSO, supra, note 257 at § 23.1.2. The Seventh Amendment preservation of the right to trial by jury at common law is also a categorical rule. See id at § 23.1.3.

the Supreme Court’s last major abortion rights case, is consistent with this analysis and does nothing to change the Casey/Celebrezze reasonableness balancing doctrine. In light of this doctrinal structure, Part VI of this article analyzed a number of recent district court and court of appeals cases involving abortion rights. Part VII placed this Casey/Celebrezze reasonableness balancing approach in the context of the Supreme Court’s general doctrinal approach to individual rights adjudication, with a brief comparison of this approach to analysis used in many constitutional courts around the world of proportionality review.
TABLE 1: STANDARD CONSTITUTIONAL LAW DOCTRINE

LEVELS OF REVIEW OF GOVERNMENT ACTION: THE “BASE PLUS SIX” MODEL

<table>
<thead>
<tr>
<th>LEVEL OF SCRUTINY</th>
<th>GOV’T ENDS OR INTERESTS TO BE ADVANCED</th>
<th>STATUTORY MEANS TO ENDS: RELATIONSHIP TO BENEFITS</th>
<th>STATUTORY MEANS TO ENDS: RELATIONSHIP TO BURDENS</th>
<th>TYPICAL AREAS WHERE USED</th>
</tr>
</thead>
</table>

Balance government interests and availability of less burdensome alternatives v. burden on persons (some deference to government, see supra notes 71–74).
Third-Order Reasonableness Review: Burden on Government

Takings Clause: Dolan v. Tigard |
<table>
<thead>
<tr>
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<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Intermediate Review with Bite</td>
<td>Substantial/Important/Significant</td>
<td>Directly Related</td>
<td>Not Substantially More Burdensome Than Necessary</td>
<td>Commercial Speech:</td>
<td>Central Hudson Gas</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Strict Scrutiny Standards (Three Requirements are Separate Elements to Meet)</th>
<th>Loose Strict Scrutiny</th>
<th>Compelling/Overriding</th>
<th>Directly Related</th>
<th>Not Substantially More Burdensome Than Necessary</th>
<th>Racial Redistricting: Bush v. Vera</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strict Scrutiny Review</td>
<td>Compelling/Overriding</td>
<td>Directly Related</td>
<td>Least Restrictive Effective Alternative</td>
<td>Race, Ethnicity, National Origin; Aliens: State Regulation of Lawful Aliens Not Involving Self-Gov’t Substantial Burden on Unenumerated Fundamental Right</td>
<td></td>
</tr>
</tbody>
</table>

III. Categorical Barrier to Constitutionality (see supra note 292),
**TABLE 2: FIRST AMENDMENT DOCTRINE***


<table>
<thead>
<tr>
<th>LEVEL OF SCRUTINY</th>
<th>GOV’T ENDS OR INTERESTS TO BE ADVANCED</th>
<th>STATUTORY MEANS TO ENDS: RELATIONSHIP TO BENEFITS</th>
<th>STATUTORY MEANS TO ENDS: RELATIONSHIP TO BURDENS</th>
<th>TYPICAL AREAS WHERE USED</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. “Base” Minimum Rational Review (Three Requirements are Separate Elements to Meet)</td>
<td>Minimum Rational Review: Burden on challenger to prove unconstitutionality</td>
<td>Legitimate (substantial deference to government)</td>
<td>Rational (substantial deference to government)</td>
<td>Not Irrational (substantial deference to government)</td>
</tr>
</tbody>
</table>

** Government funding own speech or enlisting private parties to convey government message, or non-viewpoint discrimination involving advocacy of illegal conduct, true threats, fighting words, obscenity, or child pornography.

II. The “Plus Six” Standards of Increased Scrutiny

<table>
<thead>
<tr>
<th>Heightened Rational Review (Reasonableness Balancing of Means and Ends, Not Separate Elements)</th>
<th>Second-Order Reasonableness Review: Burden on challenger to prove unconstitutionality</th>
<th>Legitimate Ends Reasonable Given Means (no substantial deference to government)</th>
<th>Legitimate Ends Reasonable Given Means (no substantial deference to government)</th>
<th>Legitimate Ends Reasonable Given Means (no substantial deference to government)</th>
<th>Non-Public Forum; Subject-Matter or Content-Neutral Regs. Of Speech; Government Grants or Subsidies; Defamation and other Related Torts; Less-than-substantial Burdens on Freedom of Assembly/Association</th>
</tr>
</thead>
<tbody>
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<tr>
<td>Balance government interests and availability of less burdensome alternatives v. burden on persons (some deference to government, see supra notes 71–74),</td>
<td></td>
<td></td>
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</tr>
</tbody>
</table>

Third-Order Reasonable- |

| Same as Second-Order Review, except the burden shifts to the government | Government Employ- |
Burden on Government to justify its action. Burden remains on government for all higher levels of review.

**Intermediate Review Standards (Three Requirements are Separate Elements to Meet)**

<table>
<thead>
<tr>
<th>Intermediate Review</th>
<th>Substantial/Important/Significant</th>
<th>Substantially Related</th>
<th>Not Substantially More Burdensome Than Necessary</th>
<th>Public Forum: Content-Neutral Regulations of Speech; Content-Based Regulations of Broadcast TV and Radio; Red Lion v. FCC</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intermediate Review with Bite</td>
<td>Substantial/Important/Significant</td>
<td>Directly Related</td>
<td>Not Substantially More Burdensome Than Necessary</td>
<td>Commercial Speech: Central Hudson Gas</td>
</tr>
</tbody>
</table>

**Strict Scrutiny Standards (Three Requirements are Separate Elements to Meet)**

<table>
<thead>
<tr>
<th>Loose Strict Scrutiny</th>
<th>Compelling/Overriding</th>
<th>Directly Related</th>
<th>Not Substantially More Burdensome Than Necessary</th>
<th>Content-Based Regulations of Cable/Satellite TV and Radio</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strict Scrutiny Review</td>
<td>Compelling/Overriding</td>
<td>Directly Related</td>
<td>Least Restrictive Effective Alternative</td>
<td>Public Forum: Content-Based Regulations of Speech; All Viewpoint Discrimination; Campaign Finance: Citizens United; Substantial Burdens on Freedom of Assembly/Association</td>
</tr>
</tbody>
</table>

***Strict Scrutiny also applies to Free Exercise: Strict Scrutiny for discrimination against religion; for hybrid cases involving Free Exercise and other fundamental rights; or cases involving the precise facts concerning unemployment in Sherbert v. Verner, as held in Employment Division v. Smith.***

**III. Categorical Barrier to Constitutionality:** Establishment Clause Doctrine.
I. INTRODUCTION

On January 7, 1894, the New York Times declared that Connecticut Governor Luzon B. Morris’s appointment of Superior Court Judge William Hamersley to the Connecticut Supreme Court ensured that the Court “will become Democratic for the first time in thirty years . . . .”1 The article related that both Democrats and Republicans hastened to support Hamersley as one of Hartford’s finest citizens and a brilliant lawyer as well.2 “For twenty years,” the author wrote, “Judge Hamersley was State’s Attorney here, and was pitted against the ablest lawyers in the country in the great Charter Oak Life conspiracy case in 1878. . . . The energy which he displayed as a Public Prosecutor was phenomenal.”3

For a case that the New York Times deemed “great,” there has been hardly anything written about the “Great Charter Oak Life” criminal conspiracy. The only record of the whole affair appeared in 1897 as a chapter in P. Henry Woodward’s Insurance in Connecticut.4 It is striking

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1 Connecticut’s Supreme Court. It Becomes Democratic by the Appointment of Judge William Hamersley, N.Y. TIMES, Jan. 7, 1894, at 17 [hereinafter Appointment of Judge Hamersley]. Hamersley was a Superior Court judge for approximately one year when he was appointed to the Supreme Court in 1894. James P. Andrews, Obituary Sketch of William Hamersley, 120 Conn. 704, 705 (1936).
2 Appointment of Judge Hamersley, supra note 1, at 17.
3 Id.
4 P. HENRY WOODWARD, INSURANCE IN CONNECTICUT 82–89 (1897). As of 1901, Woodward was a vice president of the Connecticut General Life Insurance Company and a member of the Connecticut Historical Society. See Frederick A. Betts, The Origin and Development of Connecticut Insurance, 7 Conn. Mag., no. 1, Mar.-Apr. 1901, at 33; Conn. Historical Soc’y, Annual Report 11 (1909); see also SHARON ANN MURPHY, INVESTING IN LIFE: INSURANCE IN ANTEBELLUM AMERICA 8 (2010). Murphy relates that the
that the history books are virtually silent on a trial in Hartford Superior Court, reported on by national newspapers and lasting over twenty days. The trial pitted Hamersley as prosecutor against Leonard Swett—a world-renowned attorney and one of Abraham Lincoln’s closest friends.\(^5\)

This article traces the history of that trial and the surrounding events from its origins in 1877 to its conclusion in January 1879. The trial is important not only for its personalities, but for its influence on the regulation of the insurance industry in the “city of insurance.”

II. THE CHARTER OAK LIFE INSURANCE COMPANY—RISE AND FALL

According to Woodward, the Charter Oak Life Insurance Company (hereinafter “Charter Oak”) held the “promise of a brilliant career.”\(^6\) Gideon Welles, a Hartford resident who was to become Secretary of the Navy under President Lincoln and President Johnson, was Charter Oak’s first president when it commenced business on August 3, 1850.\(^7\) Its corporate stock was immediately taken up throughout the 1850’s and 1860’s.\(^8\) The stock paid an excellent dividend in 1867.\(^9\) Charter Oak’s best year was 1869 when over 7,200 new policies were added and it had revenue of $18 million.\(^10\) The company was cautious in its insured risks, employing a physician who carefully screened policy applications.\(^11\) In 1871, the company moved into a home office at the corner of Main and Athenaeum Streets, built at a reported cost of $844,380.\(^12\)

During those years of prosperity, however, the foundation was already rotting. After Welles resigned as president in 1852, James C. Walkley became the controlling force of the company, first as secretary and then as president in 1855.\(^13\) According to Woodward, “As from the walls of a reservoir too flimsy to resist the pressure from within, all at

1870’s were a time of crisis for the insurance industry. Firms were accused of fraud and some were forced into bankruptcy. The industry was successfully re-invented in the late 1800’s. \(\text{Id.}\)


\(^6\) Woodward, supra note 4, at 82.

\(^7\) Id.

\(^8\) Id.

\(^9\) Woodward, supra note 4, at 83.

\(^10\) Id.

\(^11\) Id. at 82.

\(^12\) Id. at 84.

\(^13\) Woodward, supra note 4, at 82–83. James Walkley’s last name is spelled “Walkeley” in some documents, but appears most frequently as “Walkley.”
once both patrons and the public saw the contents of the treasury pouring to waste through several bad breaks.”14 In 1875, a banking house called Allen, Stephens & Co. failed, owing Charter Oak $944,816.15 Additional debts “grew out of a joint interest in a silver mine in Utah, and other ill-defined speculations.”16 President Walkley also took some ill-advised actions.

Early in the seventies the Valley Railway was built from Hartford to Saybrook on the west bank of the Connecticut. Mr. Walkley, who lived down the river . . . [arranged for] Charter Oak [to carry the excess costs as] . . . floating debt to the extent of $1,177,564. For convenience this, including, perhaps, other items, was funded in second mortgage bonds to the amount of $1,250,000 . . . .

As the railway, coming eight months out of twelve in competition with a navigable river, was earning little, if anything, above current expenses, the outlook for the junior bonds was extremely dismal.

To build up business for the road $235,874 were loaned to a manufacturing concern in Higanum [sic], and $75,000 upon a summer hotel in Saybrook, with $25,000 additional on the furniture. Mining property in West Virginia absorbed another half million of cash, and the returns from this also have come chiefly in the form of bills and worry.17

In 1875, the matter of Charter Oak’s financial status came to the attention of the state insurance commissioner, John W. Stedman.18

III. REGULATION OF INSURANCE COMPANIES–THE CONNECTICUT INSURANCE DEPARTMENT

As the insurance industry grew in the United States, states began to regulate it. In 1851, New Hampshire became the first state to establish an insurance department.19 Connecticut’s insurance department was created by an act of the General Assembly in 1865.20 The governor, William Buckingham, appointed Benjamin Noyes, an expert on bank regulation, as the first commissioner on August 23, 1865.21

The 1875 statutes provided that every life insurance company was

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14 Id.
15 Id. at 84.
16 Id.
17 WOODWARD, supra note 4, at 84.
18 Id.
20 In 1875, the 1865 act was codified in the Connecticut General Statutes. See CONN. GEN. STAT. tit. III, ch. I. Part IX (1875).
21 WOODWARD, supra note 4, at 71.
required, on or before the first day of March annually, to submit a detailed report of its assets and liabilities, the amount and character of business transacted, moneys received and expended, a descriptive list of all policies and contracts of insurance, and such other information as the commissioner may deem necessary. On receipt of the report, the commissioner was to make a valuation of the company’s policies and determine the amount of re-insurance reserve to be held on account. The commissioner, once every three years, was to visit each company, thoroughly examine its financial condition, and ascertain whether it had complied with all the provisions of law. The statute granted the commissioner free access to all of the company’s books and papers. The company was not to issue any policies until examined by the commissioner, nor was any person to issue any policy from an unlicensed insurance company.

The commissioner had the powers and duties to “see that all the laws respecting insurance companies [were] faithfully executed.” He was authorized to employ clerical staff, to furnish each company with printed forms of the statements required by law, to pay over all fees received from the companies to the treasurer, and to administer oaths. He was to receive ten dollars for annual reports and, for valuation of life insurance policies, one cent per one thousand dollars of insurance valued. While no insurance company was required to report to the General Assembly, the commissioner was required to submit an annual report of: (1) his official acts; (2) the condition of all insurance companies; (3) a summary of the reports made to the commissioner; and (4) a statement of the fees paid by the companies to the commissioner and forwarded to the treasurer.

Some years later, in 1897, the department was praised as “well conducted and a credit to the great insurance industry of the State of Connecticut.” This praise, however, was an over-simplification for the period of 1874 to 1880—the years John Stedman was commissioner.

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22 CONN. GEN. STAT. tit. XVII, ch. II. Part VII, art. III, § 1 (1875).
23 Id. § 2.
24 Id. § 4.
25 Id. § 6.
26 CONN. GEN. STAT. tit. XVII, ch. II. Part VII, art. III, § 7 (1875).
27 Id § 9.
29 Id.
30 Id. § 3.
31 Id. § 4.
32 Betts, supra note 4, at 42.
Stedman was born in Enfield, Connecticut, in 1820 and moved with his parents to Hartford while he was an infant.\textsuperscript{34} He was trained as a printer and later became a publisher for a newspaper in Norwich.\textsuperscript{35} At the same time, he was one of Connecticut's bank examiners.\textsuperscript{36} In 1874, he was appointed insurance commissioner.\textsuperscript{37} In January 1875, Stedman praised the Connecticut life insurance companies, declaring his doubt that their suspected indiscretions "actually exist[ed]."\textsuperscript{38}

The \textit{Insurance Times} subsequently attacked Stedman for ignoring that "it was well-known throughout the United States that the Charter Oak was at the time rotten to the core."\textsuperscript{39} Apparently, after his January remarks, Stedman realized the seriousness of Charter Oak's financial state. In Stedman's first annual report to the legislature, he noted that Charter Oak had only paid up ten dollars per share on its capital stock and "[t]he remaining ninety dollars were paid in dividends."\textsuperscript{40} He further observed:

Certainly nothing of this kind could have been contemplated by the legislature in granting the charter of the company, and I think it wholly unwarranted . . . . I have thus made a full and fair presentation of the embarrassments of this company. There has been a weakness of judgment in its confidences, and a carelessness in loaning its money and scattering it in gratuities, amounting to a moral delinquency.\textsuperscript{41}

By 1876, Stedman ordered the company to add further securities to its reserves.\textsuperscript{42} Woodward explains what happened next:

Great alarm followed the official disclosure of this condition, and a lively hunt for some mode of relief. At this juncture an officer of the New York Chamber of Insurance, and an expert in the business, brought the agents of the company into relations with Henry J. Furber, vice-president of the Universal

\begin{footnotes}
\item[34] Id. at 37.
\item[35] Id. at 38.
\item[36] Id. at 39.
\item[37] Casey, \textit{supra} note 33, at 39.
\item[38] \textit{Connecticut Mutual Life: Mr. Stedman's Value as an Endorser}, \textit{INS. TIMES}, April 1880, at 246 (quoting \textit{HARTFORD EVENING POST}, Jan. 13, 1875).
\item[39] \textit{John W. Stedman}, \textit{INS. TIMES}, August 1880, at 470. The Insurance Times was not in agreement with Stedman in other matters. In its February, 1876 issue, at page 117, the magazine declared that the insurance department under Stedman was "useless" and "pernicious" and should be abolished. \textit{The Abolition of the Insurance Department in Conn.}, \textit{INS. TIMES}, Feb. 1876, at 117.
\item[40] Woodward, \textit{supra} note 4, at 84 (quoting 1875 \textit{CONN. INS. COMM'R ANN. REP. pt. 2}, at 154).
\item[41] Id.
\item[42] \textit{Connecticut Mutual Life, supra} note 38, at 246.
\end{footnotes}
Life of New York, who had already taken a hand in winding up the affairs of several [insurance companies] that in the wild extravagance of the time had been driven into close corners.43

IV. CHARTER OAK UNDER HENRY J. FURBER

Henry Jewett Furber was born in Great Falls, New Hampshire, on July 17, 1840.44 In 1857, he studied at Bowdoin College in Maine, majoring in mathematics.45 While studying at Bowdoin, he taught math at a local school to support himself. In 1860, he traveled to Green Bay, Wisconsin, where he became a superintendent of the public schools.46 In 1862, he married the daughter of an attorney, postmaster, and pioneer settler of Green Bay.47 In 1863, Furber was admitted to the Wisconsin bar.48

After a short term as a general agent for the Metropolitan Fire Insurance Company, Furber became vice president of the company in New York in October 1865.49 By 1874, he was elected president of North America Life Insurance Company, uniting the company with the Universal Life Insurance Company. His goal with the merger was to rescue North America Life from financial difficulty.50

A. Furber Takes Over

Furber’s reputation as an insurance company bailout expert made him a prime candidate to aid in reversing Charter Oak’s crisis. He “had recently won the good-will of the insurance department of New York, by saving for the North American Life a large line of bonds and mortgages, liable to forfeiture from taint of usury.”51 With Stedman’s blessing,

43 WOODWARD, supra note 4, at 84.
44 This biography is taken from the Sarah Orne Jewett Text Project. Jewett was distantly related to Furber. The project notes also state that Furber was a major collector of Gorham silver, which he began collecting in 1873. The value of the collection was placed in the 1890’s at $1 million. Furber, in 1876, endowed the Smyth Math Prize at Bowdoin. Terry Heller, A sketch of the lives of Henry Jewett Furber, Sr. and Jr., SARAH ORNE JEWETT TEXT PROJECT (June 2008, revised Dec. 2013), http://public.coe.edu/~theller/soj/unc/tame-indians/furber-fam.html.
45 Id.
46 Id.
47 Id.
48 Heller, supra note 44.
49 Id.
50 See id.
51 WOODWARD, supra note 4, at 84.
Furber burst on the scene at Charter Oak. After several interviews with the commissioner and other prominent citizens of Connecticut, and, with their approval, Mr. Furber purchased the stock of the Charter Oak in the name of himself and his friends.

After conducting his own investigation, Insurance Commissioner Stedman “thought that a contribution of half a million of dollars in fresh funds would make good the impairment and restore technical solvency. Mr. Furber agreed to give that amount outright.” Furber was to be “indemnified” for five years by 7.5% on all premiums collected, and by one-half the salvage on all policies purchased. Charter Oak could—at its option—liquidate the contract at any time after Furber had received $500,000 in compensation. If the parties disagreed on the terms of liquidation, the matter would be resolved through binding arbitration.

A dispute arose over whether the $500,000 paid in by Furber should be labeled as a liability, because it was to be repaid gradually from the “loading of premiums.” Commissioner Stedman answered that question in the negative. A special legislative commission later appointed to investigate the life insurance companies considered Furber’s payment as an “immediate liability, and hence [it] did not technically help at all to repair the gap in the assets.” In the winter of 1875–76, “[t]he affairs of the [Charter Oak] company passed into the hands of the new management” when Edwin R. Wiggin was elected as director and president. The slate of officers included incumbents James C. Walkley (appointed advisory counsel) and S.H. White (vice president and treasurer). Nelson Hollister and Daniel Philips were also re-elected directors. Along with Wiggin, the new directors were A.H. Dillon, Jr. (second vice-president), Halsey Stevens (secretary), and William L. Squire (assistant secretary). Henry J. Furber became the financial manager.

The new management immediately found unexpected financial
problems. Woodward, writing many years later in 1897, took Furber’s side in his account: “Mr. Furber, whose ability no one ever questioned, went to work at once to introduce order and system, in the place of disorder and confusion. He soon found that he had been greatly deceived as to the condition of the company. Assets had been over-stated, and liabilities under-stated.”

Furber took several steps to address these problems: (1) he assigned two experts—one employed in the insurance industry, the other an actuary with the state insurance department—to report on the exact financial status of the company, who found that assets were $1 million less than claimed in the prior annual statement to the insurance department and made a correction to that annual statement; (2) he disclosed to investors the company’s large debts arising from investments in the Valley railroad, the Higganum shops, the Saybrook Hotel, and the West Virginia mines; (3) he arranged to resolve an $800,000 mortgage held by the company on eight parcels of New York City property; (4) he traded the Higganum mortgage for “productive” property in the heart of New York City; and (5) he arranged to borrow two hundred thousand dollars from the Aetna Life Insurance Company by mortgaging the Charter Oak Building.

Woodward praised Furber for his achievement, noting:

[T]he winter of 1876–7 was the most dismal part of the long period of depression which followed the great financial panic of 1873. An undecided contest for the presidency of the Republic was then piled on our other troubles. The New York property received in the trade is now [in 1897] estimated to be worth over eight millions. Instead of holding it for better times the company placed a price on each parcel, and sold as the market rose to its figures, the best going first. On the other hand the Valley bonds never yielded a dollar of revenue, and in the subsequent reorganization of the road were wiped out utterly.

B. The Revolt Against Furber

While years later Woodward attempted to justify Furber’s actions,
eleven prominent Charter Oak policyholders, in January 1877, took a different view by petitioning the General Assembly to commence an investigation.71

This [investigation] was but a symptom of the distrust that pervaded the community. . . . [Furber’s inducing] [t]housands of poor people . . . to sell or exchange policies for fractions of the reserve charged against them . . . was justly regarded in Connecticut, and especially in Hartford, as one of the most heartless and cruel contrivances ever devised for fattening the few at the expense of the many. Large local interests in the business had educated the people to regard the custody and management of life insurance funds as a most sacred trust.72

Adding fuel to the fire were rumors about Furber’s approach to administration of his New York companies. In March 1877, newspapers reported that the New York insurance superintendent began an “exhaustive examination of the Universal [Life Insurance Company].”73 The publisher and editor of the Hartford Courant, former governor Joseph Roswell Hawley, endorsed the policyholders’ petition calling for a legislative investigation.74

Appearing before the insurance committee of the legislature, Furber denied that he had violated the policy holders’ trust, and welcomed a prompt investigation.75 “As a result of the agitation a law was passed creating a special commission to investigate the life [insurance] companies of the state.”76 The commission was chaired by Judge Origen S. Seymour, previously a Supreme Court justice in Connecticut.77 Judge Seymour “was a man of sound judgment and unquestioned probity.”78

Woodward related the report of the special commission to Insurance Commissioner Stedman in neutral tones, stating that it found Charter Oak had a deficit of over $2 million.79 The commission had written down the value of Furber’s New York purchases from about $3 million and $800,000 to $1.8 million and $505,000 respectively.80

71 Id.
72 Id.
73 Id.
76 Woodward, supra note 4, at 86.
77 Id.
78 Id.
79 Id.
80 Woodward, supra note 4, at 87.
The special commission discovered nothing not already known to Mr. Stedman. But the point of view and animus differed. Mr. Stedman saw that the situation was desperate, and in his anxiety to save the institution from ruin and its patrons from loss, gave the management the benefit of every doubt. On the other hand, the special commission (and we may safely concede that both were equally sincere) drew its inspiration from prevalent distrust and hostility.  

_Hartford Courant_ and _New York Times_ articles in July 1877 mirrored this hostility.  

**Hartford Courant** and **New York Times** articles in July 1877 mirrored this hostility.  

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81 Id.  
82 Id.  
84 A Crisis in its Affairs, supra note 83, at 2.  
85 Id.  
86 Id.
Furber was “serene and unmoved through all the turmoil around him. He took me through the office and showed me the books of the concern . . . .” Regarding the $500,000, he stated that he would never take out any funds from the company that did not belong to him.

[ANY] time the people of Connecticut are ready to make up a pool and pay me the amount I have invested here, with interest, I'll take my carpet bag in hand and agree not to set foot in the State again for 25 years. This company is a magnificent institution and I want to set it right before the public. Beyond that I have no interest whatever.

The reporter also indicated that Insurance Commissioner Stedman so far agreed with Furber, but “[s]everal gentlemen express sentiments of opposite nature,” and there was indignation among the policyholders as the story was not over.

Hawley hit back with an editorial on July 7, 1877, observing that the commission had relied on experts in its conclusion that the New York real estate was overvalued by Furber. “No sounder judgment [could] be expected.” Furber had also entered into a shameless contract that allowed him to receive payments from the company and had destroyed “every possibility of his becoming a satisfactory manager of the company.” The Hartford Courant followed up with a story on July 14, 1877, entitled “Furber’s Latest Wreck.” The article set forth the dangerous financial position of Universal Life of New York, possibly heading to bankruptcy, emphasizing that Furber had acted as chief manager of Universal and this was “the fifth company that he will have accompanied into bankruptcy.” The New York commissioner of insurance had turned the matter over to the state attorney general.

On July 16, 1877, the Courant published a sample of other newspapers’ reactions to the commission’s report. According to the Hartford Times, there were insurance wreckers putting companies out of business throughout the country, skimming off the assets, and leading to millions

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87 The Feeling in Hartford, supra note 82, at 12.
88 Id.
89 Id.
90 Id.
92 Id.
93 Id.
94 Furber’s Latest Wreck, Hartford Daily Courant, July 14, 1877, at 1.
95 Id.
96 Id.
of dollars of losses suffered by policyholders. This was a great crime, more than robbing a bank, and the villains must be punished. The Times urged immediate action by Stedman.

The Courant had previously satirized Charter Oak President Edwin R. Wiggins as a railroad man who knew nothing about insurance. The Boston Herald mocked Wiggins—referring to him as “Judge Wiggins” as he was called locally in Connecticut. He had invested in a mismanaged company and now he was looking for public respect and “all the money he earns.”

Finally, the collection of articles concluded with a Bridgeport Post column. Until this point, Hartford gentlemen had expected the Charter Oak to be rehabilitated. Now, the best friends of the company realized that they had been deceived and its backers had abandoned it to its fate. “The recklessness with which the trust funds of this noble company appear to have been tossed about is simply astounding.”

Stedman could no longer resist the pressure to act. He left his home in Norwich for Hartford and, on Saturday, July 14, 1877, signed an application directed to Connecticut Supreme Court Justice Dwight W. Pardee seeking a temporary injunction. Prepared by attorney Charles E. Perkins, Stedman’s filing requested that Pardee place Charter Oak in receivership. Pardee signed the temporary order in Perkins’ office and scheduled a further hearing for Monday, July 16.

At 10 a.m. on July 16, Justice Pardee held a hearing on the appointment of a receiver for the Company. Hawley, “Judge” Wiggins, and former Insurance Commissioner Noyes were in the audience. Charles Perkins appeared as attorney for Commissioner Stedman, A.P. Hyde appeared for the Charter Oak officers, and John R. Buck appeared for the policyholders.

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98 Id.
99 Id.
100 Id.
102 The Press on The Charter Oak, supra note 97, at 2.
103 Id.
104 Id.
105 Id.
106 The Press on The Charter Oak, supra note 97.
108 Id.
109 Id.
111 Id.
The purpose of the receivership, according to Perkins, was to maintain the status quo while the investigation of Charter Oak continued, including reports on out-of-state investments by Charter Oak.\footnote{id} Perkins was not opposed to continuing the temporary order that Pardee had signed and continuing the hearing on the merits. There might not be a need for the receiver after all if negotiations proved fruitful.\footnote{id}

Furber told Justice Pardee that he would accept imprisonment if he had taken one dollar from the policyholders that he was not entitled to. On the other hand, if he was owed any amount, he demanded payment to end the matter.\footnote{Attempt to Appoint A Receiver, supra note 110, at 2.} Attorney Buck—for the policyholders—responded that Furber had already fraudulently extracted sums from the company.\footnote{id} A meeting of the policyholders was scheduled for the next day.\footnote{id}

Hawley’s response in the \textit{Courant} was that Charter Oak “is now under the protection of the court, and the policy-holders have the clear right to appear there with such and as many counsel as they choose; advocating whatever policy they prefer.”\footnote{The Charter Oak, HARTFORD DAILY COURANT, July 17, 1877, at 2.} In the midst of this, Hawley and his company, Hawley, Goodrich & Co.—the publisher of the \textit{Hartford Courant}—were sued for libel by Wiggin.\footnote{A Suit for Libel, supra note 101, at 2.} Wiggin claimed $100,000 damages for a Hawley editorial stating that Wiggin was Furber’s instrument and that a bank robber was a gentleman and a saint compared to them.\footnote{id}

Hawley responded publicly to the libel suit, expressing no regrets:

\begin{quote}
Mr. Wiggin disappointed us. He claims only one hundred thousand dollars. \textit{The Courant} flatters itself that it has assisted in saving more than one or two hundred thousand dollars for the policy-holders. Yet it is impossible to say how Furber and Wiggin would have divided profits if they had gone on unmolested.

We learn, too, that Furber has of late been sick of his bargain in getting Wiggin [who had some railroad experience but was ignorant of the insurance business]…

To \textit{The Courant}, Furber and Wiggin are A and B, John Doe and Richard Roe, of whom it knows nothing save in their official relations, and whom it attacks solely because they are the actors in a great wrong, and the former in a series of gigantic wrongs…. [W]hatever they do in resistance or counter-
\end{quote}
attack, is but as the idle wind.120

On July 17, 1877, the Courant reprinted supportive commentary from other newspapers. The Hartford Times noted that the Courant took the libel suit “with complacency.”121 If the Courant had to “pay a dollar on account of that suit, decent people ought to remove out of town.”122 The Boston Transcript wrote that the “shocking feature” of the matter was that the large sums at the disposal of the insurance “brokers” could be traded without any pretense of consulting the depositors.123 The New Haven Register called for less “smartness” by insurance managers and more “honesty.”124 The Worcester Gazette urged newspapers not to fear libel suits; the public would suffer if the newspapers reported more “gingerly” on current events.125 The Springfield Union charged Furber with squeezing the company and urging the policyholders to “keep quiet” about the operation.126 Finally, The New London Telegram placed Furber’s “exploits” well above criminal thefts and mistakes made by former Insurance Commissioner Noyes.127

The permanent injunction to appoint a receiver never issued. Instead, “plans were arranged for the transfer of the company to other hands.”128 The policyholders who met on July 17, 1877, were cool to a receiver.129 Attorney J.L. Bunce, speaking on behalf of out-of-state policyholders, said such action was premature in light of ongoing investigations.130 Insurance executive J.G. Batterson urged every officer of the company to resign to remove any “bad blood.”132 He believed every effort should be made to save the company, including revaluing Charter

120 Id.
121 Some Press Comments, HARTFORD DAILY COURANT, July 17, 1877, at 2.
122 Id.
123 Id.
124 Id.
125 Some Press Comments, supra note 121, at 2.
126 Id.
127 Id. Benjamin Noyes, Connecticut’s first Insurance Commissioner, later faced charges in New Jersey for insurance fraud relating to companies he directed in New Haven. Noyes’s Insurance Companies, N.Y. TIMES, July 30, 1879, at 1.
128 WOODWARD, supra note 4, at 87.
130 Id.
Oak’s policies and taking Furber’s stock into custody. Batterson also believed that, if Furber and his associates were at fault, they should be tried criminally, but if not at fault, they should be vindicated and paid what was due to them. Other policyholders that initially supported a receivership stated that they now agreed with Batterson.

This policyholders’ meeting was too tepid for Hawley’s taste. In his editorial of July 21, 1877, he called for “speedy punishment” if Furber or any of the other Charter Oak officers had violated the law. He demanded to know how the change in management to Furber occurred and what sums were paid to him. He also raised the possibility that Furber had received $161,000 of the $200,000 loaned by Aetna to Charter Oak. On July 28, Hawley called upon Charter Oak’s three main officers to resign, which would “vindicate” the course pursued by Attorney Buck and his policyholder clients who deserved “the thanks of all good citizens.”

The policyholders’ plans for the Charter Oak board and officers manifested on that same day. Woodward reported that on July 28, 1877, “the old directors resigned seriatim, and the vacancies were immediately filled by the election of Marshall Jewell, William W. Eaton, George P. Bissell, Robert E. Day and Elisha Johnson. George E. Hatch held over, and J.M. Allen was added later.” The new board promptly elected Marshall Jewell as president. “Marshall Jewell had a national reputation. He was not only successful in business, but had been governor of the state, minister to St. Petersburg, and postmaster general.” He purchased all of Furber’s shares in the company for $125,000. In an appearance before Justice Pardee on July 31, 1877, Stedman withdrew the insurance department’s application for receivership.

Hawley, however, did not back down, calling for justice in his July

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133 Id.
134 Id.
135 See id.
137 Id.
138 Id.
139 Personal and Impersonal, HARTFORD DAILY COURANT, July 28, 1877, at 2.
140 Woodward, supra note 4, at 87.
141 Id.
142 Id.
144 The Charter Oak Life: The Injunction Withdrawn, HARTFORD DAILY COURANT, July 31, 1877, at 2.
31 editorial. He attacked Commissioner Stedman for first using the special commissioners’ report to start the receivership process, only to drop the attempt a few weeks later with the change of management. Furber, the adventurer, was operating a “ring,” just like William “Boss” Tweed and had committed illegal acts. Could Stedman not realize this? Had Attorney Buck and others not acted on behalf of the policyholders, “the Charter Oak would be going to ruin [at] railroad speed.”

For the remainder of 1877, the new board and officers attempted to put the company on a successful course. A committee of experts from Connecticut Mutual, Aetna Life, Travelers Insurance, and Railway Passengers Insurance was expected to make recommendations to ensure Charter Oak’s solvency. The company struggled as business dropped off, many policyholders demanded paid-up insurance, and “death losses and expenses continued to pour in.”

Jewell called a meeting of the policyholders to give a positive report on July 31, 1877. Members of the committee of experts spoke to the approximately forty persons who attended. They were confident in the company’s future as it was paying its obligations and had some cash on hand. The new company had nothing to do with the prior “wrecker” management and had no relationship with Furber. One attendee, Jewell’s brother, stated that he would pay his $10,000 premium that was due that day as he had confidence in the new management, while another policyholder declared that he was dissatisfied with the company and would sell his policy for half of what he paid for it.

Troubles continued to mount for Charter Oak. On August 12, 1877, the New York superintendent of insurance revoked Charter Oak’s certificate to prevent the company from writing any future policies in that state. The deputy superintendent declared that, while there was a prospect for recovery, he could only deal with the fact that the company was at or near insolvency with a deficit of $3 million.
In September the directors voted to scale the capital forty per cent, and to pay no dividends on the balance for five years. They also asked policy-holders to scale the liability on that account forty per cent., also promising to restore the amount so relinquished, if possible, from gradual sales of unproductive property. Claims from deaths and endowments were scaled to the same extent.\(^{155}\)

Woodward relates that the Company’s efforts came too late.

Many policy-holders consented and many held back. Meanwhile demands upon the treasury far outran income. The gentlemen who had undertaken the work of rescue became discouraged. At their suggestion, commissioner Stedman in January, 1878, again applied for a receiver. The legislature was in session, and all parties in interest now united in asking for such amendments to the charter as would enable the policy-holders to re-organize on a purely mutual basis. The act was passed and approved March 15.

On the 18th of April the policy-holders met, accepted the amendments to the charter, and elected a board of twenty-one directors. After much persuasion, George M. Bartholomew took the presidency, June 3d.\(^{156}\)

### C. Furber and the Other Officers Post-Resignation

Woodward, twenty years later, had only praise for Furber after he resigned:

There is no evidence that Mr. Furber by word or deed ever tried to deceive either the commissioner or the special commission. His ways, avowedly dictated solely by self-interest, were bold and open. He did not pose as a Christian, or shed tears to be seen of men over the woes of deceived and defrauded policyholders. Masterful in resource, if let alone he would have saved the company because its rescue was clearly for his interest. Yet, whether it was to live or die, the part of the community who believe that life should be something higher and nobler than a game of grab, breathed more freely when this adept in the game departed.\(^{157}\)

Once again, the contemporary feeling was much more vocal than

\(^{155}\) Woodward, supra note 4, at 88.

\(^{156}\) Id.; see also The Charter Oak Life: A Move for a Receivership Temporarily Postponed, Hartford Daily Courant, Jan. 9, 1878, at 1 (describing Insurance Commissioner Stedman’s decision to move for a receiver and the Jewell management asking for additional time to consider their position); The Charter Oak, Hartford Daily Courant, Jan. 21, 1878, at 2 (discussing options such as scaling back policies or converting the company into a mutual insurance company); Life Insurance: Charter Oak and Continental Companies, Hartford Daily Courant, Feb. 27, 1878, at 1 (discussing Stedman’s report to the legislature detailing Furber’s contract in 1876 as well as valuation of the New York real estate).

\(^{157}\) Woodward, supra note 4, at 87.
Woodward portrayed. The New York Times carried a special dispatch on August 4, 1877, reporting that Furber had immediately departed for New York upon his resignation.\footnote{Mr. Furber’s Famous Contract: The Charter Oak Company Gives Him Property Valued at About Forty Thousand Dollars and He Leaves for New York–Doubtful Value of Some of the Securities–The New Managers of the Company Satisfied with the Bargain, N.Y. TIMES, Aug. 4, 1877, at 1.} He reportedly reached an agreement regarding his “famous contract” that allowed him to take certain assets of Charter Oak in exchange for his relinquishing all other claims against it.\footnote{Id.} The assets assigned to Furber included the Connecticut Valley Railroad bonds, at one time worth $1.25 million, but now worth little as the railroad had become debt-ridden.\footnote{Id.} He also gained possession of the West Virginia property, now leased by Furber at a profit.\footnote{Id.} The article concluded with a statement by a new Charter Oak director attesting to the accuracy of Furber’s accounting methods.\footnote{Mr. Furber’s Famous Contract, supra note 158, at 1.}

This report prompted President Jewell to ask the Charter Oak’s Baltimore agent to rebut some of the implications in the press about his relationship with Furber.\footnote{See The Charter Oak: An Official Letter from President Jewell, HARTFORD DAILY COURANT, Aug. 11, 1877, at 2.} Jewell stated that he had no prior relationship with Furber before becoming president. In addition, he represented that the railroad bonds and West Virginia land transferred to Furber during the change of power had no significant value. Jewell disavowed any intention of becoming receiver of the company, as the company would likely recover under the new management. He would not take a salary and was not eligible for a dividend until Charter Oak had a surplus in excess of four per cent.\footnote{Id.} 

A nastier turn occurred, as reported by the New York Times, on August 14, 1877. Charter Oak’s Chicago policyholders had sent a committee of three men, including former Governor of Illinois, William Bross, to investigate both the Walkley and the Furber administrations of Charter Oak.\footnote{The Charter Oak Frauds: Result of an Investigation by a Committee of Chicago Policy-Holders–Furber and Walkely Denounced in Bitter Terms–The New Management Indorsed, N.Y. TIMES, Aug. 14, 1877, at 1.} The committee reported at a meeting of policyholders held on August 13th. The committee concurred that the former officers of the company had engaged in “barefaced robbery, and indors[ed] the present
greatly improved condition of the company.” 166 They demanded that Hartford take steps to punish these scoundrels and send them “to the Penitentiary for their stupendous villainy.” 167 The policyholders passed a resolution to this effect. 168

Furber would no longer hold his silence. He wrote to the New York Times on reading about the Chicago meeting. 169 He had resigned with the condition that his actions be reviewed, and the review found no fault on his part. 170 The Chicago committee had no proof; the only evidence was that he had improved the condition of the company from the time he arrived in 1875. 171 Furber also produced a letter from the secretary of the committee of policyholders, H.C. Trumbull, Jr. of Baltimore, who declared that he had done a “great service” to the company and could not be “too highly commended.” 172 At the end of the New York Times article, Furber challenged the three Chicago committee members: “[T]hose gentlemen will now either have to ‘fish, cut bait, or go ashore.’” 173 The Times reporter explained: “In other words, they must either make their charges against him in legal form, or retract them entirely.” 174 The next day, the committee responded through the New York Times that Furber was uttering “falsehoods.” 175 And on August 17, 1877, Furber again wrote in the New York Times that he corrected the prior administration’s bookkeeping and there was no evidence of his alleged reckless management. 176 Even Commissioner Stedman and Alfred Burr—the Hartford Times publisher—had approved of his performance. 177

After about ten days of quiet in the press, the New York Times printed a new disclosure regarding Wiggin. Wiggin claimed he was due another $65,000 in commissions from Charter Oak under the contract he

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166 Id.
167 Id.
168 Id.
170 Id.
171 Id.
173 Id.
174 Id.
175 The Old Management: Mr. Furber’s Letter and What Members of the Chicago Committee Say About It—Mr. Sherwood Ready to Vouch for His Figures—Furber’s Statements Denounced as Utterly False, N.Y. TIMES, Aug. 16, 1877, at 1.
176 The Charter Oak Life: Second Statement By Mr. Furber—He Replies to Gov. Bross, or Ryder and Others—An Appeal to the Present Managers of the Company to Say Whether He is Justly Accused, N.Y. TIMES, Aug. 17, 1877, at 2.
177 Id.
signed upon succeeding James Walkley as president. Wiggin further claimed that Furber’s contract upon leaving the company contained undisclosed rights. The Times reporter demanded that both contracts be revealed in full to “give opportunity for satisfactory explanations, perhaps, even where the text of the contract has a bad look.” A few days later, the committee of experts, appointed when Jewell took over in July 1877, “resumed its investigations” and obtained a copy of Furber’s resignation contract. The Charter Oak board offered to settle with Wiggin for $50,000.

A week later, the New York Times reported that the special committee had obtained a copy of Furber’s contract and it probably would be released to the press. It was likely to show, according to the Times, that “Furber never put a dollar into the company, though he drew out over $800,000. The contract supplies a link which will make a complete history of Charter Oak affairs during the past two years.” In addition, Furber had just arrived in Hartford to consult with the new management; he was accompanied by a “prominent insurance attorney of New York.”

The next day, the New York Times published a letter of an “Ex-Policy-Holder.” He had written to the Connecticut insurance commissioner, who reassured him on the strength of the company; but the writer

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178 The Charter Oak Life Again: New Disclosures Concerning its Internal Management—How Contracts Were Made by the Officers of the Concern—The Amount of Commission Still Due Mr. Wiggin, N.Y. TIMES, Aug. 29, 1877, at 1.
179 Id.
180 Id.
182 Id.
184 The Charter Oak and Mr. Furber: The Contract Made with Furber at the Last Change—Securing $800,000 Without Paying a Dollar to the Company, N.Y. TIMES, Sept. 12, 1877, at 1. On September 14, 1877, in an article entitled “Charter Oak Life and Furber,” a special dispatch of the New York Times explained this $800,000 figure. According to the article, Furber had given the Charter Oak a mortgage that he had valued at $500,000 on assuming management of the company. He traded this mortgage for a property worth $800,000 and claimed to be able to purchase stock with the $300,000 exceeding the initial $500,000. He also had the ending contract with the Jewell management, as did Wiggin. See Charter Oak Life and Furber, supra note 183, at 2.
185 The Contract Made with Furber at the Last Change, supra note 184, at 1.
186 The Charter Oak Life Insurance Company and Mr. Furber, N.Y. TIMES, Sept. 15, 1877, at 4.
was not convinced. He called Furber a “rascal” who put nothing into Charter Oak except for a “bad name,” and believed Jewell was wrong to protect him. The ex-policyholder feared that, if the impetus for a full inquiry would only be a libel lawsuit filed by Furber against Bross, a member of the Chicago committee, the full extent of Mr. Furber’s duplicity would never be known.187

The only other newspaper story of 1877, from November, was about a rumor that policyholders of the North American Life Insurance Company sought to indict Furber for perjury.188 The assets of the company were exceeded by its liabilities.189 The matter had been referred to the New York insurance superintendent who was to investigate a criminal conspiracy to wreck the company.190 In fact, there was an indictment as 1878 broke, but it was not against the officers of North American; it was an indictment by a Connecticut grand jury targeting the former officers of Charter Oak.191

V. THE INDICTMENT

At 2:00 p.m. on January 3, 1878, a Connecticut grand jury returned a “True Bill” against “James C. Walkley of Haddam, formerly president of the company; Samuel H. White of Hartford, formerly vice-president and treasurer; E.R. Wiggin, now of Boston, the successor of Mr. Walkley; and Henry J. Furber of New York, financial manager.”192 The jury had deliberated over a two-day period, reviewing witnesses’ testimony and documents, “among the papers being the contract under which Furber gave up control of the company on release of his own liabilities and payments, in cash or otherwise, aggregating in amount to upwards

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187 Id.
189 The Great Insurance Financier, N.Y. Times, supra note 188, at 5.
190 Id.
191 A True Bill: The Charter Oak Case and the Grand Jury, Hartford Daily Courant, Jan. 4, 1878, at 2. The grand jury reported to Judge Moses Eugene Culver. Id. While the newspaper stated that the grand jury met for two days, id., the indictment was marked on one side showing that the grand jury had started its work in September 1877. Indictment at 19, State v. Wiggin (Conn. Super. Ct. Dec. 7, 1877), reprinted in Leonard Swett and Pliny N. Haskell, The Charter Oak Conspiracy Case at Hartford, Conn.: Objections to the Indictment and the Authorities Sustaining Them 19 (Chicago, Beach, Barnard & Co. 1878).
192 A True Bill, supra note 191, at 2.
of seven hundred thousand dollars.”¹⁹³

As soon as the true bill had been reported, the state’s attorney had a bench warrant issued to arrest the accused.¹⁹⁴ A sheriff found none of the men in the Hartford area. White had gone to New York for New Year’s Day and had not returned; Walkley lived in Haddam, but was thought to be in New York meeting with Furber and possibly Wiggin; Furber had a New York residence; and Wiggin had left his Hartford home and was boarding with his family at the Hotel Brunswick in Boston.¹⁹⁵ Initially, the Courant reported that the governor might issue a requisition, but all parties had agreed to return to Hartford and receive bail.¹⁹⁶

The New York Times carried the same story from a news wire, but made three additions.¹⁹⁷ The first concerned the prosecution of Walkley. “Considerable sympathy is expressed for ex-President Wakeley [sic], the belief prevailing that he has not realized any profits from the mismanagement of the company.”¹⁹⁸ Woodward had, on the contrary, placed much of the blame for Charter Oak’s downfall on Walkley.¹⁹⁹ The second point raised in the New York Times story was, despite the fact that the underlying facts had not yet been released, that:

[It] is certain that the action of State’s Attorney Hammersley [sic] in bringing the case before the courts is well founded. He has strong evidence in his possession showing dishonest and fraudulent mismanagement of the company, and the public demand is that the alleged conspirators shall be dealt with to the full extent of the law.²⁰⁰

The article concluded with a look at the attorneys retained by Furber and Charter Oak. These included Morris, Billings, and Cardozo, who handled financial transactions, and Alexander & Green, who appeared in Charter Oak’s court cases.²⁰¹ Each firm had received $40,000 in legal fees.²⁰²

Just a few days later, Wiggin issued a statement that the New York Times hailed as throwing a “good deal of light on several points of the

¹⁹³ Id.
¹⁹⁴ Id.
¹⁹⁵ Id.
¹⁹⁶ A True Bill, supra note 191, at 2.
¹⁹⁸ Id.
¹⁹⁹ Woodward, supra note 4, at 82–89.
²⁰⁰ Ex-Insurance Officers Indicted, supra note 197, at 1.
²⁰¹ Id.
²⁰² Id.
subject that have heretofore been somewhat befogged.\footnote{The Charter Oak Bargain, N.Y. TIMES, Jan. 11, 1878, at 2.} In fact, the statement contained nothing new. It described how fellow defendant White—then treasurer of Charter Oak—was convinced by Wiggin to involve Furber in the company in 1875.\footnote{Id.} Furber’s only interest throughout this time period was the welfare of Charter Oak.\footnote{Id.} With the consent of the insurance commissioner, Furber had lent Charter Oak $500,000, had received a contract for repayment, and the company was in better shape during the Furber administration than under the prior administration.\footnote{Id.}

The indictment itself contained eight counts.\footnote{Indictment, supra note 191, at 5–19.} The grand jury alleged that Wiggin, Walkley, White, and Furber “with force and arms, unlawfully and wickedly”:

1. Conspired on November 1, 1875, to obtain control of the Charter Oak Life Insurance Company for an amount under the company’s true value, defrauding the insurance commissioner and policyholders. Further, from November 30, 1875 to August 1, 1877, they carried on the business of the company, knowing that the company was insolvent, defrauding the policy-holders by obtaining salaries and contracts beyond the services rendered to the company.

2. Conspired to purchase the company to obtain salaries, commissions, and with regard to Furber, a contract on departure of at least $700,000.

3. Conspired to deprive the company of important assets by acquiring the New York real estate, through a loan to Edward A. Matthews secured by a mortgage, when the real estate secured by the mortgage was not worth as much as the loan given to Matthews.

4. Conspired to purchase real estate in New York, supposedly worth $3 million, when in fact it was worth $1.5 million.

5. Conspired to cheat the insurance commissioner by such acts as overvaluing the bonds of the Connecticut Valley Railroad, the New York real estate, claims against a New York company, and the assets of the company in general.

6. Conspired on or about November 18, 1875, by legerdemain started by Furber with his writing a check for $500,000 to the company that was cashed. The $500,000 became part of a loan scheme to Edward Matthews for $800,000 with $300,000 of the company’s assets given to Mat-
7. Conspired to exchange New York real estate, bonds of the Valley Railroad, and the Higganum Manufacturing Company mortgage for property that was without the value alleged, thereby deceiving the insurance commissioner, the public, and policyholders.

8. Conspired to cheat the insurance commissioner by false representations so that White and Walkley were not removed and the four defendants continued to operate the business. They obtained funds from the public and policyholders for the continuation of their policies, prevented exposure of prior management flaws, released Walkley from large indebtedness to the company, squandered assets, and paid commissions and fraudulent contracts to themselves and their friends. 208

A few days later, the attorneys for the state and the defendants appeared in the case. “For the state appeared William Hamersley, L.F.S. Foster and John R. Buck; for the defense, Leonard Swett, of Chicago, Governor Dorsheimer, of New York, Daniel Chadwick, of Lyme, Conn., with Charles E. Perkins, A.P. Hyde and Lewis E. Stanton, of Hartford.” 209

VI. THE ATTORNEYS

A. State’s Attorney Hamersley

William Hamersley was born on September 9, 1838. 210 He came from a distinguished Hartford family. 211 According to the Connecticut Reports Obituary Sketch, “his mother Laura Sophia, a daughter of Oliver Dudley Cook of Hartford, could readily trace her American lineage back to Puritan sources . . . [and she] was conspicuous in good works as well as in her social life.” 212

Former Connecticut historian, Christopher Collier, states the following about Hamersley’s father, who was also named William: “William J. Hamersley’s father was a leading Democratic partisan for much of the nineteenth century. The elder Hamersley was a Hartford bookseller, mayor, and editor of the American Mercury, a rabidly partisan and widely read newspaper.” 213 The Sketch states:

208 Id. at 5–18.
209 Woodward, supra note 4, at 88.
210 Andrews, supra note 1, at 704.
211 Id.
212 Id.
It may not be amiss to recall here the fact that the Hamersley family in Hartford had for years the unique distinction for sayings and doings of an odd, whimsical, and usually laughable, character, happily devoid of malice and ill-will, thus unconsciously enlarging the circle of their amused and delighted friends.214

“[O]ur own William,” the Sketch in the Connecticut Reports continues:

His education was gained in the public schools, plus one or more years of study at Trinity College, an abbreviated course in the Harvard Law School, and finally study in the law office of Welch and Shipman in Hartford. Admitted to the bar in 1859 he practiced independently; became a member of the city common council, its vice-president and president; was elected city attorney, and in 1868 resigned that post to accept the position of State’s Attorney for Hartford County. This office he filled for twenty years to the complete satisfaction of everybody except the criminal classes.215

Hamersley was considered part of the elite in Hartford and joined the Monday Evening Club.216 The Club’s members also included Hamersley’s father, Mark Twain, Hawley, and Judge Dwight Pardee.217

The Sketch relates that Hamersley was a beloved prosecutor in Hartford, serving until 1888.218 “Possessed of mental, as well as moral
honesty, high-minded and broad of view, he scorned pettiness of all kinds and had little patience with prosecutions actuated by local or personal prejudice. . . . His zeal and his sincerity impressed his hearers, and jurors seldom disappointed him in their verdicts.” Collier reports that he was an active Democrat and entertaining public speaker “on all sorts of subjects. He was neither a prolific nor a scholarly writer, but many of his speeches were published in Connecticut newspapers.”

Hamersley’s professional life was as one might expect for the time period. A typical task for Hamersley as a prosecutor is seen in a letter that he received, on August 8, 1877, from the firm of Mitchell and Hungerford in New Britain. One James Williams, a “colored,” had been bound over from police court on a charge of burglary. The evidence against Williams was that he had entered a store through an open window, but had taken only a dollar. He urged that the case be resolved as a simple trespass “so that no injustice may be done to the accused.” The letter also cited a case that Hamersley had just handled in the Supreme Court, State v. Ward, which also referred to the crime of burglary. Very likely, Hamersley was considering similar matters at the time that he was also preparing the indictment against the “insurance wreckers.” He was also serving on a committee of the Connecticut Bar Association to found a National Bar Association, which became the American Bar Association.

B. Leonard Swett

While each defendant had his own attorney, Leonard Swett was not

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219 Id.
220 Collier, supra note 213, at 65–66.
222 Id.
223 Id.
224 Id.
225 43 Conn. 489 (1876). In the case, the defense attorney argued in favor of a common law rule that one had to break into a dwelling house to commit burglary and that breaking out did not state an offense. The Supreme Court rejected the common law and ruled in Hamersley’s favor that the common law did not apply in Connecticut. The fact that the accused had entered through an open door and subsequently escaped by breaking a lock was irrelevant to the conviction. Id. at 493.
226 Mitchell Letter, supra note 221.
only Furber’s attorney, but also the lead attorney for the defense. Swett was born in Maine and educated at what is now known as Colby College, and, after an apprenticeship, joined the Maine bar. But his love of travel brought him first to the South (where he served in the Mexican War) and then to the Midwest. Swett became a member of the Illinois bar and settled in Bloomington, a town near Springfield, in rural Illinois.

Swett was one of the attorneys who traveled twice yearly through the Illinois Eighth Judicial Circuit. In his travels and courtroom appearances he met David Davis, who introduced Swett to Abraham Lincoln at the Mt. Pulaski Courthouse in 1848. After that, Lincoln and Swett would spar with each other in court at times, but they also cooperated on cases. In fact, Lincoln, Swett, and future U.S. Supreme Court Justice David Davis, had become known as the “Great Triumvirate” of the Illinois Eighth Circuit. Swett rode the circuit with Lincoln in 1859 as Lincoln wound down his legal career. In those years, Swett kept his weight down, was almost as tall as Lincoln, and had a beard; the public would occasionally confuse the two men on the street.

Swett also helped Lincoln as an informal advisor in the presidential campaigns of 1860 and 1864, and also served as an informational springboard for Lincoln’s decision-making during his presidency. In late 1862, Swett was present while Lincoln labored over the proper timing of the Emancipation Proclamation. Swett even accompanied Lincoln to Gettysburg in November 1863 for his famous address.
was disappointed that, despite the financial sacrifices he made to support Lincoln’s political career, he never received a patronage post from Lincoln.  

After Lincoln’s assassination in 1865, Swett relocated from downstate and began a private practice in Chicago. There, he became one of the most popular and successful attorneys in the United States. He was retained by criminal defendants throughout the country. Swett had begun to cultivate his reputation as an esteemed criminal defense advocate in his earlier days. In 1857, he had defended a client accused of murder in which Lincoln was serving as a temporary prosecutor. In that case, Swett developed an insanity defense with the assistance of a doctor from the Illinois Hospital for the Insane and obtained a verdict of not guilty with a requirement of institutionalization. In this pre-Civil War time, Swett’s achievement was a rarity; he succeeded by thorough study of then-available mental health research. As other cases involving a defendant’s mental health followed, he cemented his reputation as a specialist in the insanity defense, leading to multiple clients nationally after he moved to Chicago. In May 1875, equipped with this expertise, he assisted his friend, Robert Lincoln—the late president’s son—at a trial to have Mary Lincoln adjudged insane.

Swett had a wide variety of other cases, too. Two years prior to becoming Furber’s attorney, he appeared in Chicago federal court to defend a number of whiskey distillers charged with conspiring to avoid paying the liquor tax. The Chicago papers reported that Swett was able to resolve the matter under a reduced charge by entering into a deal with an attorney who was assisting the chief prosecutor. One of the defendants started a rumor that the distillers had paid money to this attorney to obtain the plea deal. There is no indication, however, that

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241 ECKLEY, supra note 229, at 93–94.
242 Id. at 155.
243 THE BENCH AND BAR OF CHICAGO: BIOGRAPHICAL SKETCHES 39 (Chicago, American Biographical Publishing Co.) (“He is a born orator; has a fine physique and commanding presence; an attractive delivery; is an entertaining speaker, an affable and genial gentleman, and is esteemed and honored as a citizen and a man.”).
244 See ECKLEY, supra note 229, at 155–86.
245 Id. at 46–47.
246 Id. at 46–50.
247 Id. at 46.
248 ECKLEY, supra note 229, at 182.
249 Id. at 174–75.
250 Id. at 178.
251 The Crooked Whisky Suits, HARTFORD DAILY COURANT, Jan. 17, 1876, at 3.
252 Id.
any ethical charge was ever raised against Swett.

In the midst of the lead up to Furber’s trial, on October 21, 1878, Swett argued an insurance case in the United States Supreme Court. At issue was the refusal of an insurance company to cover the loss of cotton in a fire worth $50,000. Swett, with Lincoln’s old friend Ward Hill Lamon on the brief, represented three partners who claimed to own the cotton. The insurance company took the position that the insurance contract extended only to one of the individual partners, not the full partnership. Swett convinced the Court, in an opinion by Justice Harlan, that the contract could be reformed to include the entire partnership, thereby reversing the Federal District Court’s decision in favor of the insurance company. Strangely, the insurance company did not send an attorney to argue; Swett presented his case alone.

Well-known in Chicago, Swett was the subject of a humorous article in the Chicago Tribune that also appeared in the Hartford Courant on January 15, 1877. The article was entitled “Scientific Interviewing,” and featured a reporter having an exchange with Swett over a rumor that he had died. Even when Swett positively denied the rumor, “[t]he reporter reflected. He knew Mr. Swett, and knew him to be a high-minded honorable gentleman.” But what about the “law that where there is a preponderance of evidence on one side it shall be assumed that the side presenting such preponderance shall be deemed to be correct?” In the end, with Swett declaring that he was alive and well, the reporter gave up, suggesting that Swett settle with those who started the rumor and wishing Swett a good night.

Swett was referred to the Charter Oak defendants by his former Chicago law partner, Van Higgins, who had taken a position as a financial agent with Charter Oak after the two men parted ways at the end of 1872. Based on Swett’s reputation, Furber had good reason to retain him. Not only was Swett a well-regarded, experienced attorney, he and Furber shared ties to Maine and both had migrated to the Midwest to

254 Id. at 86–87.
255 Id. at 85–86.
256 Id. at 88.
257 Snell, 98 U.S. at 88–92.
258 Id. at 87.
260 Id.
261 Id.
262 Id.
263 Scientific Interviewing, supra note 259, at 2.
264 See ECKLEY, supra note 229, at 185.
start their respective careers.265

VII. SWETT MOVES TO DISMISS THE INDICTMENT

Soon after the defendants appeared, Swett moved to dismiss the indictment and accompanied his motion with a legal brief nearly two hundred pages in length.266 In the fall of 1878, he published this brief as a book entitled The Charter Oak Conspiracy Case at Hartford, Conn. Objections to the Indictment and the Authorities Sustaining Them.267 Swett listed Pliny M. Haskell, his partner in his law firm, as a co-author.268 An obituary of Swett stated that he used the Furber filings for many years after the proceedings in Hartford as a teaching tool.269

The principal section of the brief was a point-by-point statement of the objections with each point followed by a full discussion of supporting authorities—both American and British—often ten or twenty in number.270 Each objection demanded the facts and circumstances “constituting the body of the offense must be set forth.”271 The defense claimed that the acts involving cheating and fraudulent conduct “must [be] aver[red]” within the indictment because sometimes this conduct is not criminal.272 In addition, the “purpose of the conspiracy must be set forth.”273

Swett then wrote that the “[f]acts averred have no greater weight on account of qualifying adjectives or adverbs, because the acts of the defendant, and not the epithets of the pleader, constitute the crime.”274 Further, he urged that legal conclusions were insufficient;275 rather, “[t]he material facts must be stated positively and not by way of recital, and nothing should be left to inference or induction.”276

In the next portion of the brief, Swett contends for over eleven pag-
es that the conspiracy itself is the crime, not the overt acts alleged.\footnote{Id. at 22–34.} His next point was that the prosecutor and any other person named in the indictment “must be described by his Christian and surname.”\footnote{See Objections, \textit{supra} note 266, at 34.} For six pages, he explained that a corporation had to be named in its own name, not by those “individuals who compose it.”\footnote{Id. at 34–41.}

Swett also attacked “surplusage and variance.”\footnote{Id. at 41.} In discussing surplusage, he gave the example of whether it was enough to allege that a horse has been stolen, as opposed to a black horse.\footnote{Objections, \textit{supra} note 266, at 45–46. In order to illustrate his point, Swett cited \textit{Commonwealth v. Kellog}, 61 Mass. (7 Cush.) 473 (1851). In that case, the indictment alleged that the defendants conspired to defraud a particular insurance company. \textit{Id.} at 474. At trial, however, it was shown that the defendants did not know who insured their property until after they had made overt acts in furtherance of the conspiracy. \textit{Id.} at 477–78. Thus, the evidence only showed an agreement to defraud generally, not an agreement to defraud a particular company. \textit{Id.} Thus, because the Commonwealth did not prove the allegations in the indictment, the Court set aside the verdict and remanded for a new trial. \textit{Kellog}, 61 Mass. at 478.} In contrast, Swett framed the doctrine of variance, in the context of conspiracy, as requiring the conspiracy proven at trial to correspond to the alleged conspiracy described in the indictment.\footnote{Id. at 45–46.} He finished his general analysis by spending over 52 pages quoting from American and British cases standing for the proposition that the criminal act of conspiracy must exist in the act itself or in the means used to effect an object not criminal.\footnote{Objections, \textit{supra} note 266, at 49–100.}

After another six-page summary of the points made above, Swett used his stated principles to more precisely attack each count of the indictment brought against the Charter Oak officers. The first count alleged that the defendants had conspired “to obtain control of a corporation, the means not being stated, and consequently not to be considered as criminal or unlawful.”\footnote{Id. at 101.} Swett argued that, under Connecticut law, there was nothing illegal in taking over an insurance company to obtain a profit.\footnote{See id. at 103.} Additionally, the fact of insolvency was not even alleged.\footnote{Id.}

The second count was characterized as alleging that the defendants had conspired to cheat and defraud “the policy holders” of the company “out of the assets belonging to them.”\footnote{Objections, \textit{supra} note 266, at 104.} Swett argued that this allegation was “repugnant, because, having set out the corporation, it is apparent
from the indictment, that the assets did not belong to the policy holders, but did belong to the corporation.”288 In addition, if the object was to defraud certain individuals, “such individuals must be described by their Christian and surnames, or an excuse given for not naming them. It is a universal rule of criminal pleading, that the party injured must be so described.”289 If the charge was that salaries and benefits were paid to the defendants that were exorbitant, the allegations of the indictment did not explain the means used to obtain these payments.290 Similarly, he argued that the third count—which alleged that the defendants had conspired to “cheat and defraud the Charter Oak Life Insurance Company, and the policy holders, and deprive them of the assets belonging to the company and the policy holders”—did not sufficiently describe the criminal or unlawful means taken.291

The fourth count alleged criminal activity in the defendants—mostly Furber—purchasing the properties in New York.292 But Swett belittled this allegation. He argued that there was no crime in obtaining real estate, even at an outlandish price.293 There had to be a further allegation that the purchase was made with an unlawful intent.294 Equally lambasted was the fifth count, which alleged fraud against the insurance commissioner in the reporting of the status of the company.295 No case had ever succeeded on this ground. What duty did these defendants have under law to disclose anything to the insurance commissioner? And what was his name? This was a pleading requirement.296 In the sixth count, it was claimed that the insurance commissioner and policy holders were deceived, presumably by the reports given by the defendants.297 But this reporting irregularity, if any, was no crime.298 Further, if the policyholders were deceived, they must be named specifically, not as a class.299

Swett analyzed the seventh and eighth counts together. He stated that both of these counts allege deception of the insurance commissioner, with the purpose of “rescuing” the reputations of White and Walkley and to cheat the policyholders and the public to obtain company mon-

288 Id. at 104.
289 See id. at 104.
290 Id. at 109–10.
291 Objections, supra note 266, at 110–11.
292 Id. at 113.
293 See id. at 113.
294 Id. at 111–13.
295 Objections, supra note 266, at 115.
296 Id. at 115.
297 See id. at 116.
298 Id.
299 See Objections, supra note 266, at 116.
ey.  “What was to be done to effect these various objects, or how it was to be done, is not set forth.”

He concluded the specific objections as follows:

Talleyrand said that language was given to conceal thoughts, and we may be pardoned for saying, if pleading in reference to the defendants is for the purpose of concealing the act of crime, this count and in fact this indictment is a success. It is for cheating, and yet by its context is plainly not for the crime of cheating. It is for obtaining things by false representations, but not for the crime of obtaining goods by false pretences [sic]. Not setting forth a conspiracy to commit a crime, or the criminal or unlawful means, the mind can take hold of no act covered by these general terms, or from the indictment from beginning to end can one tell what act the defendants conspired to perform, or how they were to perform it.

Swett made two more points. In a section that he called “Objections To The Indictment Generally,” he spent twenty-seven pages citing English and American cases in chronological order starting from the 14th century. He complained that the indictment never specifically declared that it was brought on behalf of the people of the State of Connecticut, that it was vague on the allegation of a crime or crimes, and that even if properly averred, no crime was alleged.

Swett ended with the following conclusion:

This review extends back more than five hundred years, and we have endeavored to present in every case the act conspired to be done, whatever might be its character and irrespective of the argument to be adduced from it.

It would be more than human, if a perusal of all these cases should not discover expressions, and even rulings out of line, but we submit that an overwhelming weight of authority establishes the conclusion that the word unlawful, when used as defining the object or means of a criminal conspiracy, does not embrace civil injuries and acts for which the law furnishes only civil redress, but only such as come within . . . conspiracy statutes [of Edwardian England] or the Common or Ecclesiastical law or general or special statutes enacted since those times.

In an addendum, he demanded a bill of particulars. Tracing both British and American law for 30 pages, he justified asking a prosecutor

\[\text{\textsuperscript{300}} \text{Id. at 117.} \]
\[\text{\textsuperscript{301}} \text{See id. at 117.} \]
\[\text{\textsuperscript{302}} \text{Id.} \]
\[\text{\textsuperscript{303}} \text{Objections, supra note 266, at 118–45.} \]
\[\text{\textsuperscript{304}} \text{Id.} \]
\[\text{\textsuperscript{306}} \text{Id. at 145–46.} \]
\[\text{\textsuperscript{308}} \text{Bill of Particulars, State v. Wiggin (Conn. Super. Ct. 1878) in SWETT, supra note 191.} \]
to specify the exact charges.\textsuperscript{307} This was true where, as here, the criminal charges were general in nature. Swett did not, however, pose any questions himself about the specifics.\textsuperscript{308}

VIII. PRETRIAL PROCEEDINGS

The Criminal Term of the Superior Court at Hartford commenced on March 1, 1878, with Judge Dwight W. Pardee presiding,\textsuperscript{309} less than a year after his involvement in the commissioner’s application for receivership.\textsuperscript{310} Swett’s motion to dismiss the indictment had been filed, but it had not been acted on. The \textit{Courant} reported that the parties came to court on March 8, 1878.\textsuperscript{311} “Judge Leonard Sweat [sic] of Chicago, a distinguished member of the western bar, appeared as attorney for Henry J. Furber, E.R. Wiggin and others, who have been indicted for conspiracy as ex-officers of the Charter Oak life insurance company.”\textsuperscript{312} Wiggin was also represented by L.E. Stanton (who was present) and Daniel Chadwick of Lyme.\textsuperscript{313} Alvan P. Hyde of Hartford and Jeremiah Hadley of Norwich were not present, but were expected to appear at trial.\textsuperscript{314} “After consultation the court postponed the trial till the second Tuesday of the June term.”\textsuperscript{315}

While the trial date was set for June, by agreement Swett’s motion to dismiss the indictment came before the court for argument in May 1878.\textsuperscript{316} The counsel for the defendants had raised the issue of the degree to which the indictment had pled unlawful acts or means in furthering the alleged conspiracy.\textsuperscript{317} This would also be the main issue at trial.

\textsuperscript{307} Id.
\textsuperscript{308} Id.
\textsuperscript{309} Criminal Proceedings: The Charter Oak Conspiracy–Wethersfield Rape Case–John Farris Again, etc., HARTFORD DAILY COURANT, Mar. 9, 1878, at 1.
\textsuperscript{310} See supra notes 107–114. Hon. Dwight Whitefield Pardee, a Trinity College graduate, class of 1840, had apprenticed with Isaac Toucey, who was later to become U.S. Attorney General. Pardee also had studied law at Yale. He became a Superior Court judge in 1863, and a Supreme Court Justice in 1873. He was hearing cases in the Superior Court in 1878, as well as sitting on the Supreme Court. See John Hooker, \textit{Obituary Sketch of Dwight W. Pardee}, 63 Conn. 607 (1893).
\textsuperscript{311} Criminal Proceedings, supra note 309, at 1.
\textsuperscript{312} Id. This report is incorrect as to the spelling of Swett’s name. Additionally, there is no record of Swett being a judge, so the title must have been honorific.
\textsuperscript{313} Id.
\textsuperscript{314} Id.
\textsuperscript{315} See Criminal Proceedings, supra note 309, at 1.
\textsuperscript{316} The Charter Oak Conspiracies: Hearing on the Case Next Week, HARTFORD DAILY COURANT, May 8, 1878, at 2.
\textsuperscript{317} Id. This time the Courant spelled Swett’s name as “Sweet.” See id.
As of May, “[t]he answers to the objections have not yet been fully prepared by the state attorney [Hamersley] and his associate, Mr. [John R.] Buck.”

The *New York Times* reported on May 12, 1878, that further discussions about the motion to dismiss had taken place on May 11. Judge Pardee would hear the motion on May 13th. Wiggin stated in an interview with the *New York Times* that the indictment was insufficient as a matter of law and that, even if a conspiracy could be proved, there was nothing to hold the defendants. The accused were “confident of success.” Hamersley replied that, even if the court’s decision were in the defendants’ favor, he was permitted under the Connecticut criminal statutes to file an information in lieu of an indictment, and that the trial would proceed under the information. The article concluded with a report that the new Charter Oak board of directors was considering bringing a civil suit against the defendants to recover “the misused funds of the company.”

On May 14, 1878, the *Courant* reported the outcome of the oral argument of May 13th, which “attracted a numerous attendance at the superior court chamber.” Because of the great “public interest,” the reporter set forth the grounds of Swett’s motion. He made an effort to summarize in a few paragraphs Swett’s objections to each of the eight counts in his “elaborate printed brief” of close to 200 pages. Swett’s majestic effort was not, however, the substance of the court hearing.

Rather, the lawyers bickered over whether the proceeding (then called a demurrer to the indictment) could be heard after the court’s March term had officially adjourned and whether oral argument was

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318 Id.
319 *Indicted Insurance Officers: The Old Officers of The Charter Oak Life Company—Their Case to be Heard on Monday—Their Counsel Confident of Success*, N.Y. TIMES, May 12, 1878, at 6.
320 Id.
321 Id.
322 Id.
324 Id. The statutes provided that “[t]he Superior Court may, when necessary, order a grand jury,” but only mandated one for a crime that carried a sentence of life imprisonment or the death penalty. CONN. GEN. STAT. tit. XX, ch. XIII, Part IV, § 3 (1875).
325 *The Charter Oak: One Phase of the Conspiracy Cases. Summary End of a Hearing Before Judge Pardee*, HARTFORD DAILY COURANT, May 14, 1878, at 2. This article and those that followed were most likely written by Hawley himself.
326 Id.
327 Id.
328 Id.
needed any longer. Attorney Hyde for the defense referred to a statement from prosecutor Hamersley that a new information would be filed. Hamersley said that he understood the parties wanted to be heard this day. Swett, however, wanted a procedurally legal resolution of his motion at an official session and was “very much disinclined to inflict upon the court an elaborate argument which could result in binding no one.” In Swett’s mind, there was no need for a presentation just for amusement.

At this point, Judge Pardee quietly pulled his cloak over his shoulders, took his hat, which was on a chair behind him, and placed it upon his head, and left the bench without saying a word. It was a very quiet, yet impressive and forcible, way of saying that the court was not a court, and as a resident of Hartford and citizen of the state of Connecticut he had other things of more consequence to attend to than holding court without any legal functions. The lawyers all smiled, and seemed to enjoy the exceptional proceedings of the judge in vacating the bench with so much silent emphasis.

The likelihood was that Hamersley would quash the indictment and file a new information, thereby extending the trial date beyond June 11th.

At the start of the June Term, the Courant reported that the demurrer to the original indictment would be argued and, if the indictment was ruled defective, a new information would be filed. This oral argument was held on June 12, 1878, before Judge Edward I. Sanford. The Hartford Courant reported “a large audience, many legal gentlemen being drawn together by the notoriety of the case and the social and business standing of the accused.”

Prosecutor Hamersley read the indictment into the record, and one

329 See One Phase of the Conspiracy Cases, supra note 325, at 2.
330 Id.
331 Id.
332 Id.
333 See One Phase of the Conspiracy Cases, supra note 325, at 2.
334 Id.
335 Id.
336 Superior Court, Criminal Term, HARTFORD DAILY COURANT, June 4, 1878, at 1.
337 Superior Court: The Charter Oak Conspiracy Case, HARTFORD DAILY COURANT, June 15, 1878, at 1. Hon. Edward I. Sanford was a descendant of a prominent Milford family, attended Yale College (class of 1847) and Yale Law School (class of 1849). He practiced law in New Haven and served in the State Senate before his appointment to the Superior Court in 1867. He was on the court for 24 years, serving until just two years before his death. He died July 13, 1893. Harold B. Harrison, Obituary Sketch of Edward I. Sanford, 63 Conn. 609, 609–10 (1893).
338 The Charter Oak Conspiracy Case, HARTFORD DAILY COURANT, June 13, 1878, at 1.
of Swett’s Connecticut associates, Lewis Stanton, read the demurrer.\footnote{Id.} Swett then spent the entire day, until almost five o’clock, arguing, as he stated in his brief, that there was no conspiracy to conduct illegal acts, rather only civil wrongs.\footnote{Id.} In his “very able” presentation, he also argued that the indictment was invalid in form.\footnote{Id.}

On June 13, 1878, the argument continued with “Hon. Lafayette Foster” giving the state’s reply in front of a “large attendance.”\footnote{Superior Court: The Charter Oak Conspiracy Case, HARTFORD DAILY COURANT, June 14, 1878, at 1.} Foster noted, referring to Swett’s brief, that seventeenth century scholar Sir Edward Coke had once lamented that attorneys sometimes avoid reaching the principles of a case by producing a mass of citations.\footnote{Id.} He compared this to the cuttle-fish, which “when pursued, throws out an inky fluid, and in the cloud thus raised, is enabled to escape observation.”\footnote{Id.} He continued by arguing that there were alarming instances of fraud these days and the public could only be protected by the courts of justice.\footnote{Id.} Moreover, he argued, certainly the eight counts alleging that the defendants had acted unlawfully and wickedly were legally sufficient; if one count should survive, then the trial could be allowed.\footnote{Id.}

Foster argued that the purpose of the indictment was to give sufficient facts to the defendants so that they might prepare.\footnote{Id.} Foster then gave the court citations from Connecticut, Massachusetts, New York, and New Jersey (where former Connecticut insurance commissioner Noyes had been indicted) to show that this indictment was sufficient.\footnote{Id.} The fact that the indictment did not mention that the case was brought in the name of the state, was in keeping with state practice.\footnote{Id.} The reporter declared that Foster’s argument showed eloquence, learning, and logic.\footnote{Superior Court: The Charter Oak Conspiracy, supra note 342, at 1.}

Lewis Stanton spoke again, demanding more facts, and Swett spoke for one hour rebutting Foster.\footnote{Id.} Hamersley concluded the day by explaining to the judge that the trial was to begin on June 11, and that the
demurrer had led to a delay.\textsuperscript{352} Reaching the merits, Hamersley declared that the indictment was sufficient to stand.\textsuperscript{353} The reporter praised Hamersley for his "marked and sustained ability."\textsuperscript{354}

Attorney Alva P. Hyde completed the argument for the defense on June 14, 1878.\textsuperscript{355} This continued for two hours as an "able and forceful argument."\textsuperscript{356} The defendants did not "shun" a trial, but asked to be tried on charges specific in their nature.\textsuperscript{357}

He strongly protested against any denunciation of the accused on account of their demurring instead of at once submitting to trial. In reply to what he called Judge Foster’s declamation against the defendants, he delivered a short declamation in their behalf, intimating that malice had originated and organized the attack made last year on the Charter Oak Life insurance company, and had created a feeling which had finally led to this prosecution.\textsuperscript{358}

He also rebutted Hamersley’s argument and further claimed that the omission of the names of the insurance commissioner and policy holders was a substantial defect as was the use of the expression “high crimes and misdemeanor.”\textsuperscript{359} The \textit{New York Times} reporter gave a report as well, concluding that the court adjourned to the following Monday, and “It is not known when Judge Sanford will render his decision as to the sufficiency of the indictments.”\textsuperscript{360}

Over a week later, Judge Sanford had not made his decision, although counsel had thought it would have been made by then.\textsuperscript{361} Sanford did indicate that he would announce his decision in open court and expected the defendants to be present.\textsuperscript{362} Whatever the outcome, the \textit{Hartford Courant} speculated that the trial would be continued to the August Term and perhaps even later than that.\textsuperscript{363}

On June 27, 1878, newspapers throughout the country carried an amazing story. At a court session the previous day with all defendants

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\textsuperscript{352} Id. \\
\textsuperscript{353} Id. \\
\textsuperscript{354} Superior Court: The Charter Oak Conspiracy Case, supra note 342, at 1. \\
\textsuperscript{355} Id. \\
\textsuperscript{356} Superior Court: The Charter Oak Conspiracy Case, \textit{HARTFORD DAILY COURANT}, June 15, 1878, at 1. \\
\textsuperscript{357} Id. \\
\textsuperscript{358} Id. \\
\textsuperscript{359} Superior Court: The Charter Oak Conspiracy Case, supra note 355, at 1. \\
\textsuperscript{360} \textit{The Charter Oak Indictments}, \textit{N.Y. TIMES}, June 15, 1878, at 1. \\
\textsuperscript{361} \textit{The Courts: The Charter Oak Cases}, \textit{HARTFORD DAILY COURANT}, June 24, 1878, at 2. \\
\textsuperscript{362} Id. \\
\textsuperscript{363} Id.
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present, Hamersley asked for a nolle of the indictment and immediately filed a new and more detailed information.\footnote{See, e.g., Charter Oak Conspiracy Cases: The Old Indictments Nolled—A New Information Filed and Case Put Over to August, HARTFORD DAILY COURANT, June 27, 1878, at 2; Telegraphic Summary, Etc., BALTIMORE SUN, June 27, 1878, at 2–3; New Evidence Against the Charter Oak Officers, CINCINNATI DAILY GAZETTE, June 27, 1878, at 5; Charter Oak Conspiracy, N.Y. HERALD, June 27, 1878, at 8; In Brief: New England News, WORCESTER DAILY SPY, June 27, 1878, at 4.} Hamersley conceded that these were unusual proceedings.\footnote{Id.} He had first sought an indictment by way of grand jury because some of the defendants might testify and because subsequent court procedure was complicated by other defendants residing out of state.\footnote{Id.} He had then contemplated filing an information, but had subsequently defended the original indictment for the sake of a speedy trial.\footnote{Id.} Now that there had been a series of postponements, he had decided to follow the regular practice and not rely on the hurriedly-drawn indictment.\footnote{Id.} Hamersley filed the information and asked the clerk to issue a bench warrant for the arrest of the defendants.\footnote{Id.}

The defendants were all present and the clerk served them with the bench warrant.\footnote{Id.} They were allowed to continue on their previous bond of $5,000.\footnote{Id.} Hamersley asked that they enter a plea, but the defendants’ lawyers objected to making a plea without having time to read the new information.\footnote{Id.} Hamersley replied that this was just another unnecessary delay as the information was essentially similar to the indictment.\footnote{Id.} Attorney Hyde stated that the information was just filed; all the defendants wanted was a reasonable time to review it.\footnote{Id.} The cause of the delay in the trial, Hyde argued, was merely an effort to obtain further information about the charges.\footnote{Id.}

Judge Sanford agreed with the defendants, because this attempt at advanced notice to the defendants of the day’s proceedings had failed.\footnote{Id.} “The [prosecutor] has seen fit, and I think wisely, to enter a nolle in the case pending, and file a new information.”\footnote{Id.} He believed, given the

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\footnote{Id.}
short notice, that the defendants were entitled to a careful review of the information. With the judge’s encouragement, it was agreed that the defendants would file a pleading by the first Monday in August. Swett later rosily described the result of the proceedings through June 26th:

Upon the argument of this case, it was stated by counsel that inasmuch as several of the defendants lived out of the State of Connecticut, if the court should conclude to sustain the demurrer, the defendants, upon notice, would come into court, at the announcement of the decision, to submit to a new arrest, upon an information, which it was understood the State’s Attorney would file. The court took the question under advisement, and near the close of the term, asked that the defendants, pursuant to this understanding, should be produced. Upon the day of the decision, all the defendants being present, the prosecuting attorney entered a *nolle prosequi*, and filed an information, before a decision was rendered. It is understood that the court would have sustained the demurrer, upon all the points raised.

The *New York Times* said about the new information:

[It gave] more particulars as to specific acts, in which were enumerated the contracts of Furber, Wiggin, and White to draw commissions; their employment of Charlton T. Lewis to influence the Insurance Commission to consent to the transfer of the company; the purchase of the New-York real estate of Edward Matthews, and other matters, which became notorious during the investigation into the company’s affairs last Winter and Spring by the special commission.

The *Times* article continued that Swett had asked for additional time to plead and was given until August 4, 1878 to file a demurrer or to plead to the “general issue.” Swett filed a demurrer on August 1st. “It covers about 20 pages legal cap, but is, in substance, the same as was filed in answer to the original indictment.” The *Courant* found the following to be the salient point of the demurrer:

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378 *Id.*  
379 *Id.*  
380 *Id.*  
381 SWETT, supra note 191, at 147.  
382 *The Charter Oak Indictments: A Demurrer Filed Yesterday–The Case to be Argued on Aug. 28, N.Y. TIMES, Aug. 6, 1878, at 1.*  
383 *Id.*  
384 Demurrer, State v. Wiggin (Conn. Super. Ct. Aug. 1, 1878); see also *A Demurrer Filed Yesterday, supra* note 382, at 1.  
385 *Id.*
As to each and all counts in the information the defendants say it is not averred that the defendants conspired to do any act with any intention on the part of the defendants to cheat and defraud the public or said corporation or its policy-holders, or the insurance commissioner, nor any person whatsoever; and the defendants say that in each and all the counts therein the information is uncertain, informal, defective and wholly insufficient, and this they are ready to verify. 386

The argument on the demurrer was scheduled for late August. 387 The newspapers noted that Hamersley was vacationing in Europe on August 4, when the demurrer was filed, and that Lafayette Foster and John Buck were acting in his absence. 388 A recently-appointed assistant state’s attorney, Wilbert Warren Perry389 was updating Hamersley as to developments.

On August 5, 1878, Perry wrote an informative letter to Hamersley:

Assuming that you would prefer not to be bothered with the details of business, and could like, for the first part of your vacation, at least, to be oblivious of the fact that you have an office, I have thought that I would not write to you until I should be able to give you some information on matters of importance. On the principle of the Horatian line, “Coelum, non animum mutant, qui tans mare currunt” [Those who hurry across the sea change the sky upon them, not their souls or state of mind], I presume that the conspiracy case is still much in your mind. You will probably be interested though not surprised to learn that a demurrer has just been filed by Mr. Swett and his colleagues. It is a long-winded document of twenty pages, and is set to the same music as the first, though not exactly the same in words. That the information does not contain any charge of a crime at law; that it does not aver in that portion of any count wherein the offense is charged, that the defendants conspired to commit any criminal or unlawful acts, or to commit any lawful acts by any criminal or unlawful means; that each and all of said counts aver conclusions of fact, instead of particular facts upon which the conclusions are based; that the facts alleged do not constitute a high crime and misdemeanor;—these are the most prominent of the general objections. The particular objections to the several counts are set out at great length, and are not very formidable. Here is an example:—“Nor does said count, in describing said alleged conspiracy aver x x what real estate owned by said company (the defendants) were to represent had cost

386 The Charter Oak Conspiracies: Demurrer to the New Information Against Furber, Wiggin et al., HARTFORD DAILY COURANT, Aug. 6, 1878, at 2.
387 Id.
388 Id.
389 Perry, valedictorian of his Yale College class, had taught at a well-regarded classical school in Morristown, New Jersey, before attending Columbia Law School. He had graduated in 1877 and became an assistant state’s attorney in Hartford just before the indictment against the Charter Oak defendants was filed. See DWIGHT LOOMIS & JOSEPH GILBERT CALHOUN, THE JUDICIAL & CIVIL HISTORY OF CONNECTICUT 225–26 (Boston, Boston History Co. 1895).
There has also been filed a motion to erase certain parts of the information, as “immaterial, irrelevant, impertinent, abusive, and scandalous, and unfit to appear upon the records of this court.” The parts referred to are those in which Furber is spoken of as ‘an efficient wrecker’ of insurance companies, and Wiggin, as “a person without Capital,” and “with no knowledge of the business of life insurance,” and two or three other places where reference is made to “fraudulent misconduct,” “schemes of plunder,” etc. This motion appears to have emanated from Mr. Perkins alone.

I rather want to take some part in the argument on the demurrer but, as Mr. Buck seems to take it for granted that he and Judge Foster are to manage the case in your absence, and that I have nothing to do with it, I do not like to push myself forward where I am not wanted.390

The revised demurrer came up for argument on August 28, 1878, before Judge Sidney Burr Beardsley.391 Assistant prosecutor Buck contended that the hearing should be held on the following Tuesday.392 The defendants objected because Swett would not be available at that time, with his Chicago responsibilities.393 They suggested that Judge Hovey, who was to preside in December, should rule on the demurrer, that way, the likely trial judge would also hear the preliminary motion.394 Buck again objected to any delay.395 Judge Beardsley refused to have a lengthy postponement, given the number of qualified attorneys available to present the defendants’ side.396 The argument was set for three days, beginning on Thursday, September 5, 1878.397 Beardsley stated that he would prefer to decide the demurrer himself, rather than “throw upon

390 Letter from Wilbert Warren Perry to William Hamersley (Aug. 5, 1878), in HAMERSLEY FAMILY PAPERS, 1876–1881 (on file with Connecticut Historical Society, Hartford, Connecticut). The letter continues with Perry receiving instructions from Judge Eggleston not to proceed with any murder trials until Hamersley returns from Europe so as not to risk the “unpleasant position [o]f any of the accused . . . escap[ing] the clutches of the law.” Id.

391 The Charter Oak Conspiracy, N.Y. TIMES, Aug. 29, 1878, at 1. Sidney Burr Beardsley was born in Monroe, Connecticut, in 1823. He attended Yale College, but did not graduate. He entered legal practice in 1843 in Fairfield County, mainly Bridgeport. He was appointed to the Superior Court in 1874 and the Supreme Court in 1887. According to the Obituary Sketch, he “was a man of strong intellect, characterized by sound judgment and vigorous common sense, rather than brilliancy.” Obituary Sketch of Sidney B. Beardsley, 58 Conn. 604, 604–05 (1891).

392 The Charter Oak Conspiracy, supra note 391, at 1.

393 Id.


395 Id.

396 Id.

397 Id.
Judge Hovey the burden of the hearing. 398  
Charles E. Perkins 399 was the main speaker for the defendants on September 5, 1878, based on his filing a “formidable” thirty-eight page printed document. 400 “Many prominent insurance men and lawyers were in attendance at the hearing.” 401 Perkins attacked the state’s allegation that the defendants could be convicted for acts of immorality or for acting unjustly. 402 This provided for no rule at all, he argued, further noting that the state constitution and bill of rights prohibited prosecution except where an offense was “clearly unwarranted by law.” 403 The information would fail even as a civil suit for damages, Perkins concluded. 404 Attorney Stanton followed with an objection to portions of the information as abusive, to which Buck countered that the motion itself was equally offensive. 405 At the judge’s suggestion, the defendants agreed to delete the troublesome portion of their motion. 406  
The next day, Buck replied for the state, arguing that the information strictly followed the pleadings that have been used in similar circumstances in other states, and gives enough facts to allow the defendants to respond to the charges. 407 It alleged a conspiracy to use Lewis, a New York insurance executive, to approach the Connecticut insurance commissioner, and acts by the defendants to appropriate the assets of Charter Oak, thereby harming both the commissioner and policyholders. 408 He described these as “high crimes and misdemeanors,” and argued that no further overt acts were needed. 409 Wilbert Perry, who had written to Hamersley in August about wishing to have an opportunity to argue in favor of the information, also addressed the court. He stated that

400 The Charter Oak Prosecutions, N.Y. TIMES, Sept. 6, 1878, at 1.  
401 Id.  
403 Id.  
404 Id.  
405 Id.  
408 Id.  
409 Id.
an allegation of illegal objects or means was not necessary to sustain the information.410

On Saturday, September 21, 1878, Judge Beardsley gave his ruling.411 He declared the second and third counts of the information insufficient, but allowed the first, fourth, and fifth counts.412 These three counts were noted by the Courant as essential, including allegations related to the obtaining control of Charter Oak by Furber; the bribery of a New York insurance association official, Charlton Lewis; the purchase of the New York real estate; the false data in the reports to the insurance commissioner; the false representations to the public; the diversion of assets of the company; and the illegal payment of salaries to Furber and others.413 The trial would commence on November 6, 1878, if it was not continued to December.414

One of the few existing official documents from the Superior Court, a docket sheet, also sets forth a summary of Judge Beardsley’s ruling. One column reads: “2nd & 3rd counts of [information] found insufficient and remainder sustained. Demurrer overruled.”415 A second column sets forth the ruling on the motion to strike portions of the information: “3rd request of motion to strike out granted–4th request–words ‘of plunder’ stricken out. Remainder of motion denied.”416

There were only two references to Charter Oak in the newspapers published in November. The first was an announcement that the parties decided not to proceed in November, but had agreed on a trial date of December 4, 1878.417 The second was a compendium of editorials in the Courant about who might be selected by the General Assembly in January 1879 for United States Senate. In these pre-Seventeenth Amendment times, the state legislature chose senators and the majority party controlled the choice.418 The list included Marshall Jewell, noted for “rescu-

410 Id.
411 The Charter Oak Conspiracy Cases: The Defendants to be Tried, HARTFORD DAILY COURANT, Sept. 23, 1878, at 2.
412 Id. There is no full report of the decision, so it is unclear what these counts alleged or why they did not survive.
413 Id.
416 Id.
418 U.S. CONST. art. I § 3 (“The Senate of the United States shall be composed of two Senators from each state, chosen by the legislature thereof, for six years; and each Senator shall have one vote.”), superseded in part by U.S. CONST. amend. XVII (“The Senate of the United States shall be composed of two Senators from each state, elected by the people there-
ing” the Charter Oak Life Insurance Company after the Furber revelations.419

IX. THE TRIAL

The trial420 was not delayed any further. In advance of its start, the New York Times commented:

The indicted persons are Henry J. Furber, Edwin R. Wiggin, James C. Walkley, and Samuel H. White. The trial is to be upon questions of fact as to the solvency of the company at different periods, and concerning transactions of the managers antecedent to the declaration of insolvency. A mass of testimony is to be offered, and it is expected that the trial will occupy a month at least. Some very interesting developments will probably be made.421

The trial began on December 4, 1878, with the reading of the information and the impaneling of the jurors.422 The Hartford Courant

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419 The Senatorial Question: Comments of All Sorts–Kind Words for O. H. Platt, HARTFORD DAILY COURANT, Nov. 30, 1878, at 2. In January 1879, when the Republican caucus for Senator was to take place, the Hartford Times criticized Jewell for sending a letter to the New York insurance commissioner regarding his efforts to save Charter Oak. On the Defensive: Marshall Jewell’s Campaign Circular–A Singular Letter to his Insurance Commissioner, HARTFORD DAILY COURANT, Jan. 22, 1879, at 2.

420 The record is unclear as to the location of the courtroom in which the trial was held. Prior to 1878, most state government bodies—including the Supreme Court and the Hartford County Superior Court, as well as the legislature—were located at the Old State House. During 1878, many state government bodies transitioned to other locations in Hartford, and the Old State House was turned over to the City of Hartford. See History Timeline, CONN. OLD STATE HOUSE, https://www.cga.ct.gov/osh/timeline.asp#1800s (last visited Jan. 22, 2016). In 1885, the Hartford County Courthouse opened on the corner of Trumbull and Allyn Streets. Hartford County Courthouse, STATE OF CONN. JUDICIAL BRANCH, https://www.jud.ct.gov/external/kids/history/postcards/Htfd-pre.htm (last visited Jan. 22, 2016). Precisely where the Hartford County Superior Court conducted its affairs in the intervening time is not clear. It is possible that the trial was held in a space at the Old State House; another possibility is that the trial was held at a temporary space at 300 Main Street.


422 The list of jurors, one of the few original documents of the case, preserved at the Connecticut State Library, gives their names as Leonard S. Harris, Charles A. Fowler, Reuben L. Hills, John P. Lewis, Wesley A. Miller, Uriah Nickerson, Joseph B. Latham, Henry A. Griswold, Amos B. Latham, William Spencer, Jr., George A. Badge, Jr., and Henry W. Ensign, Jr. Jury List, State v. Wiggin (Conn. Super. Ct. 1878). A survey of the jurors, in an internet search and the City Directory for Hartford, gave a more detailed result for four. Fowler was a salesman in Hartford. Joseph Latham was a master mechanic from Manchester and a long-time school board member, Wesley Miller was a church superintendent and in 1884 elected as a state representative, and Ensign was in the “gents clothing” trade with his son. All of the jurors were from Hartford County. See Charter Oak Life: The Alleged Conspirators on Trial, HARTFORD DAILY COURANT, Dec. 5, 1878, at 2 (noting Harris, Fowler, Spencer, and Badge
noted that “[t]he court room was thronged with spectators during the day, and no doubt much interest will be felt throughout.”423 The New York Times story of the first day noted that former New York Lieutenant Governor Dorsheimer had appeared as one of Furber’s attorneys.424

The presiding judge was James A. Hovey. Hovey, hailing from Windham County, had first interned with former Governor Chauncey Cleveland, and then became his partner in Norwich.425 In 1850, Hovey became a county judge and retained his law practice.426 After 1854, he left the bench, and became mayor of Norwich and a state representative.427 In 1876, he was appointed to the Superior Court.428 His official Obituary Sketch observes:

His mind was clear and discriminating, and he possessed an excellent memory. Lacking a collegiate education and many of the advantages with which others entered the profession, he relied upon industry and integrity as the means to attain success. The preparation of his cases was most thorough and laborious. In their trial he was apt to be technical.429

Hovey’s technical approach in his private practice also became a hallmark of his judicial style.430

The selection of the jury was the first matter taken up. Four potential jurors were dismissed: one because he was a former director of Charter Oak, a second because he was a Charter Oak policyholder, and two on peremptory challenges by the state.431 Defense counsel Hyde argued that, since there were four defendants, there should be additional peremptory challenges for the defense.432 The judge stated that he was not sure of this point, but to be fair, allowed eight challenges.433 The defense made use of several, requiring the sheriff to bring in more jurors until

lived in Hartford; Hills and Lewis in Farmington; Miller and Nickerson in Hartland; Joseph Latham and Griswold in Manchester; Amos Latham in Marlborough; and Ensign in Simsbury).

423 The Alleged Conspirators on Trial, supra note 422, at 2.
425 See John M. Thayer, Obituary Sketch of James A Hovey, 62 Conn. 603, 603 (1893).
426 Id. at 604.
427 Id.
428 Id.
429 Thayer, supra note 425, at 603.
430 See id. at 604 (“To the judicial office he brought the same industry and the same conscientiousness in the discharge of duty which characterized his professional life.”).
431 The Alleged Conspirators on Trial, supra note 422, at 2.
432 Id.
433 Id.
twelve were finally selected.434

The afternoon session began with a reading of the information, as sustained by Judge Beardsley.435 The essence of the operative information was explained by the Hartford Courant: (1) a conspiracy to obtain possession of Charter Oak, to pay out excessive dividends, and to buy the New York real estate; (2) a conspiracy to issue false reports to the insurance commissioner and to provide false advertisements in the newspapers; and (3) a conspiracy to bribe Charlton Lewis to influence the company and to obtain contracts for large payments in the final settlement with the company, including Furber’s $500,000.436 Each offense was alleged to be “a high crime and misdemeanor.”437 Charles Perkins for the defense tried to reargue the sufficiency of these remaining charges, but Judge Hovey refused, saying that he “could not possibly” reconsider Judge Beardsley’s carefully written opinion.438

Prosecutor Hamersley next addressed the jury. He explained that the defendants were charged with conspiracy, an alleged mutual undertaking to commit an offense prohibited by law; that they had committed “transaction after transaction” to defraud Charter Oak and to take its assets to enrich themselves; that they, as officers, had abused their positions to deceive the state and policyholders.439 Hamersley noted that it was rare to prove conspiracy directly; rather, the conspiracy would be proved by circumstantial evidence.440 The facts would show that Charter Oak was insolvent in 1875; that defendant Furber acquired the stock of the company and re-sold it to others; that Walkley—then president—had entered into a contract with Furber that allowed him to take a percentage of the revenues and reserves and that White and Wiggin had also entered into similar contracts; that Furber had obtained approximately $150,000 under the contract, claiming that he had made a gift to the company of $500,000; that the book value of the company was understated by the defendants in 1875 and 1876, deceiving the public; and finally, that Furber and the other defendants had, on their removal from the company, taken sums in settlement between $500,000 and $700,000.441

Because a juror had to leave, the remainder of the afternoon session

434 Id.
435 The Alleged Conspirators on Trial, supra note 422, at 2.
436 Id.
437 Id.
438 Id.
439 The Alleged Conspirators on Trial, supra note 422, at 2.
440 Id.
441 Id.
was brief.442 The first witness in the case, Edmond H. Stedman—an actuary with the insurance department—was called to testify from a statement as to the solvency of Charter Oak prior to 1875.443 Defense counsel Hyde objected on the grounds that the statement was insufficient to prove the condition of the company and, in any case, that the condition of the company prior to 1875 was irrelevant.444 Also the defense raised a legal point that the allegations were not “high crimes,” meaning that the statute of limitations had run.445 The court did not rule on these objections that day.

On the second day, the New York Times reported the presence of “a crowd of spectators.”446 Judge Hovey ruled in favor of the defense on the objection to the introduction of the 1874 Charter Oak statement, reasoning that there was then no connection to either the conspiracy or the Furber management.447 After the company charter was introduced into evidence, Swett launched into a long argument that the name of the company as incorporated differed from the name given in the information.448 Judge Hovey, ruling that counts two and three were manifestly defective and reserving judgment on count one, said that the prosecution could, in any event, ask for an amendment of the information, and Swett stated that he desired to be heard on an amendment at the appropriate time.449 The day concluded with further arguments on whether these were “high crimes” and whether the statute of limitations had run.450

In its coverage of the third day of the trial, the New York Times noted that there were still masses of spectators in the courtroom.451 The reporter also noted that very little progress was made on taking evidence and most time was spent in arguing legal points.452 Judge Hovey first ruled on the statute of limitations issue, which would determine whether evidence would be admissible beyond one year from the date in 1875.

442 Id.
443 The Alleged Conspirators on Trial, supra note 422, at 2.
444 Id.
445 Id.
446 Trying Charter Oak’s Officers: Defective Counts in the Indictment—A Question Under the Statute of Limitations, N.Y. TIMES, Dec. 6, 1878, at 1.
447 Id.
448 See id. The name of the company in the charter was “The Charter Oak Life Insurance Company of Hartford, Conn.” while in the first count of the information used “Connecticut,” instead of “Conn.” and other counts omitted “of Hartford, Connecticut.” Id.
449 Trying Charter Oak’s Officers, supra note 446, at 1.
450 Id.
452 Id.
when the conspiracy allegedly started. He declared that he was ready to sustain the defense’s position that although the charges of conspiracy were misdemeanors, they were not “high crimes” like murder or arson.\textsuperscript{453} The legislature had not placed conspiracy to defraud at such a level; the allegations were merely “private wrongs” not justifying imprisonment.\textsuperscript{454} He drew a laugh from the crowd, declaring: “What do the people know under sweeping charges of conspiracy; indeed what do the members of the bar know?”\textsuperscript{455}

Judge Hovey regretted that he might have to prohibit testimony at this stage of the proceedings.\textsuperscript{456} He paused to think for ten minutes and then decided that he would allow the testimony so that the Supreme Court would have the evidence in the record, in case of an appeal after the trial.\textsuperscript{457} This set off the attorneys as Hyde and Swett pushed the judge to allow an immediate reference to the Supreme Court on this point, while Hamersley resisted any delay.\textsuperscript{458} After lunch, Hamersley amended the information to correct minor defects, including the proper name of Charter Oak.\textsuperscript{459} The two sides also sparred over whether the acts alleged in 1877 and 1878 in a further amendment brought the allegation of a conspiracy starting in 1875 within the statute of limitations.\textsuperscript{460} The trial was put over until December 10, 1878.\textsuperscript{461}

On the fourth day of the trial, evidence was taken, so the matters of law and objections of the defense aimed at stopping the trial were apparently resolved in favor of the trial continuing. The New York Times found the day of little public interest.\textsuperscript{462} The state introduced documents that showed that Furber had contracted with Edward Matthews to transfer real estate, out of which came Furber’s contribution of $500,000 to the company.\textsuperscript{463} The state claimed that the New York real estate transactions occurred when the company was insolvent and while the defend-
The principal witness called on December 11th was Nelson Hollister, a Charter Oak director and treasurer of the Connecticut Valley Railroad. He first testified how, when he sold his stock to Furber at the beginning of the Furber era in 1875, he was paid for the stock by check in the amount of $22,000 which he later indorsed over to William A. Stephens & Co., bankers of New York.

The State questioned the witness very closely, evidently with the design of finding out whether the funds of the company were used in purchasing the stock; but Mr. Hollister’s memory was very defective. He was not sure that he did not indorse the check in blank, and could not say why he made it payable to Stephens & Co., with whom he had done no business, he said, unless it was because he wanted a deposit in New-York for investment purposes.

The check was written, Hollister testified, in the handwriting of defendant White and was given to him by White, but that he did not remember if he gave it back to White or if he sent it by mail to New York. The attorneys asked him to review books and memoranda and, if his memory was refreshed, to be prepared to answer “further inquiries.”

He was also “urgently pressed” on the indebtedness of the railroad in his capacity as treasurer, but he stated that Walkley, president of both Charter Oak and the railroad, chiefly managed the affairs of both companies. He had signed second mortgage bonds for the railroad as treasurer, and had given them to Walkley. He supposed that the bonds had gone into the assets of Charter Oak, but he had not sufficiently stud-
ied the statements of the insurance company to draw this conclusion.\footnote{Id.}

There were two other developments on this day. The state tried to introduce newspaper advertisements of Charter Oak to show that the accused sought to deceive the public by their representations of the company’s solvency.\footnote{Id.} The defense objected as the advertisements did not have a specific link to the accused, and the judge reserved decision.\footnote{Id.}

Secondly, the state began reading from Furber’s ledger account and had, near adjournment, completed reading a portion of the debt side.\footnote{Id.} The \textit{New York Times} reported:

\begin{quote}
The whole account will be finished to-morrow, and a statement of it can then be made. Mr. Furber’s counsel became a little confused on the admissibility of the account, and to the surprise of court and spectators, Mr. Furber rose and said, excitedly, that he desired the account to come in. This incident offered the only sensation of the day.\footnote{Id.}
\end{quote}

Then trial continued on December 12, 1878.\footnote{Charter Oak Life: Seventh Day of the Trial, HARTFORD DAILY COURANT, Dec. 13, 1878, at 2.} The judge ruled that the newspaper advertisements were not admissible into evidence.\footnote{Id.} The information had alleged that the conspiracy had been furthered by means of a claim of $14.5 million in assets, but the advertisements, however, had stated that the company had assets in the amount of $14 million.\footnote{Id.} Having alleged the higher sum, the prosecutor was required to prove it.\footnote{Id.} The prosecutor, according to the judge, should not have been specific on the means.\footnote{Id.}

Also on this date the judge ruled inadmissible testimony from a witness from Boston who was to recount defendant Wiggin’s January 1878 interview that was printed in Boston and New York newspapers.\footnote{Id.} The judge decided that this was evidence from only one of the conspirators before a conspiracy had been shown, and was also outside the dates of the conspiracy.\footnote{Id.} The oral argument on this point was lengthy, with Swett for the defense and Judge Foster for the prosecutor debating over
the objection. \footnote{Id.}

The trial proceeded with the reading of Furber’s account books. \footnote{Id.} They showed that the company had received the contribution of $500,000 by Furber, the mortgages he had arranged, Furber’s dealings with Edward Matthews’ New York real estate, and Furber’s dealings with the Mono Mine in West Virginia. \footnote{Id.} Former Judge O.S. Seymour, member of the special commission that had investigated Charter Oak in 1877, took the stand to repeat the findings of the commission. \footnote{Id.} This testimony was to serve as a basis for the allegations of overvaluation of real estate by the defendants. \footnote{Id.}

The Courant reported nothing on the next day of the trial, December 13, 1878. But perhaps worried about how the trial was progressing, Hawley, the Courant’s editor and publisher, reprinted the following from the Willimantic Journal: “The wreckers of the Charter Oak Life Insurance Company are now before the court, and the present prospect is that they will wreck the court, and swim ashore.” \footnote{Social and Political, HARTFORD DAILY COURANT, Dec. 14, 1878, at 2.}

On December 14, 1878, Judge Seymour continued with his testimony about the New York real estate valuation. \footnote{Charter Oak Investigation: The Company’s Real Estate Valuations–Furber’s Directions About Charges and Credits to Himself, N.Y. TIMES, Dec. 14, 1878, at 4.} He testified on direct examination that there was a discrepancy between the values of real estate shown to the special investigating commission and the values on a “blotter” maintained by the Charter Oak. The values shown to the commission were higher than the blotter. \footnote{Id.} On cross-examination, however, Seymour testified that the blotter figures were given to the commission. \footnote{Id.} He asserted that the books kept by the company were in excellent order and the officers of the Company were cooperative. \footnote{Id.}

The New York Times reported an “amusing incident” that morning:

\footnote{Id.}
The “principal witness” of the afternoon was James G. Batterson, the president of the Travelers Insurance Company. He testified that he was given a letter by defendant White written by Furber to White on November 30, 1875, just as Furber became the financial manager of the company. It showed that he had taken funds from a mortgage to Charter Oak to replace the $500,000 he had placed with Charter Oak initially. Batterson also testified that $5,000 was paid to Charlton T. Lewis to aid in negotiations for possession of the company. This testimony again went to the issue of whether Furber had legitimately withdrawn the $500,000.

On December 17, 1878, when the trial resumed, Judge Hovey ruled that the prosecution was authorized to introduce evidence “tending to show insolvency of the company in 1875 or 1878 . . . . This open[ed] the way to let in many matters heretofore excluded.” The day was spent, however, showing that the value of real estate on the books of the company, held as security for money loaned out as mortgages, was undervalued in terms of the amount loaned. For example, property in Hartford, along the line of the Connecticut Valley Railroad that Charter Oak had taken a mortgage upon and paid out $130,000 was only worth $12,700, according to appraiser F.P. Lepart of Hartford. Another witness, John McGoodin, a Hartford builder, put a value on the land of $11,322. There was evidence that the main building of the Charter Oak was worth $600,000 while it was carried on the books at cost, $844,000.

The prosecution argued that this evidence showed that there had been misrepresentation as to the worth of mortgages held by the compa-
ny; defense attorney Hyde replied that the insurance commissioner had only been informed of the gross value of the mortgages.\footnote{The Charter Oak: Tenth Day of the Trial—The Value of the Valley Railroad Mortgages, the Second Mortgage Bonds, the Higganum Property and Other Assets Explained—A Large Number of Witnesses Called, \textit{Hartford Daily Courant}, Dec. 18, 1878, at 2.} He also argued that anything that the state investigation committee had developed was outside the charges.\footnote{\textit{Id.}} Prosecutor Hamersley replied that the statement to the insurance commissioner that the “loans [were] secured by first liens on real estate” was deceptive because under the law each loan had to be secured by collateral worth double the loan, thus giving rise to the assumption that Charter Oak held the proper margin.\footnote{\textit{Id.}} Hyde replied that this was a criminal prosecution, not a civil suit for failure to give correct values, claiming that if the company reported five million of loans with thirteen millions of security, “none but a bigger fool than the judge takes him for, will assume that each loan is in the proportion of five to thirteen of security.”\footnote{\textit{Id.}} The judge ruled that the state was free to show each loan was made with an intent to deceive, so long as it was confined to the information, and Hamersley said that he would do so.\footnote{\textit{Tenth Day of the Trial, supra note 504, at 2.}} The day concluded with evidence concerning the worthlessness of the Connecticut Valley Railroad mortgage bonds and the overvaluation of the Higganum Manufacturing property.\footnote{\textit{Id.}}

The next day, December 18, 1878, began with testimony by Charles W. Dyar, a reporter for the Boston Globe. He had had an interview with defendant Wiggin on January 9, 1878, that had appeared in his and other newspapers on January 11, 1878.\footnote{Charter Oak’s Old Officers: Further Testimony in the Conspiracy Trials, \textit{N.Y. Times}, Dec. 19, 1878, at 1.} The \textit{New York Times} report of December 18, 1878, merely referred the reader back to that story as covered in its newspaper.\footnote{\textit{See id.}} The \textit{Hartford Courant} did not cover that day of the trial, but the \textit{Hartford Times}, an evening daily, in one of its infrequent articles about the trial, gave a detailed account of Dyar on the stand.

The \textit{Hartford Times} summarized the points Dyar made as he read his article.\footnote{The Charter Oak Conspiracy Trial: Tenth and Eleventh Days, \textit{Hartford Daily Times}, Dec. 18, 1878, at 3.} The treasurer of Charter Oak, defendant White, had approached Wiggin in September 1875, disclosing that the company had to
raise $500,000 as required by the insurance commissioner. \(^{513}\) The deficit arose through the company’s loan to the Valley Railroad. White urged Wiggin to look into raising funds. Wiggin stated that if he made an effort at this, he expected to be well paid and White agreed.\(^ {514}\) By October 1875, with Wiggin still not successful, White had alternatively made contact with Furber, who was viewed as an expert in the insurance business.\(^ {515}\) White, Wiggin, and Furber agreed that Furber would contribute $500,000 to the company; Wiggin would become president and Furber the financial manager of the company.\(^ {516}\) The defendants had under their administration improved the assets of the company by $2 million and given time would have paid the company’s debts in full.\(^ {517}\) Dyer further relayed from Wiggin’s statement that under his management, foreclosures immediately commenced on “whatever mortgaged property seemed necessary to be foreclosed.”\(^ {518}\) Additional security was required where necessary.

We also commenced taking account of the premium notes, in order that we might know exactly the amount of assets which the company held in that department. The board of directors also caused accurate appraisals to be made of the real estate owned by the company, and of all its mortgages. We opened an entirely new set of books, and placed around every officer and clerk of the company every safeguard and check that it was possible to place upon them. As a result of our investigations we found the company worse off than was anticipated, and in this, that there were very many investments which were injudicious, and that many loans had been made on which the interest was overdue.\(^ {519}\)

Furthermore, there had been “two or three clerks constantly at work” looking into the premium note account, and the conclusion was that actual assets in this important account had been overstated by a million dollars.\(^ {520}\) Finally, Dyar testified that the charges of conspiracy were absolutely false, made only to injure the defendants’ reputation or to divert the public from the company’s current financial condition.\(^ {521}\)

Next, the prosecution called Ex-Governor Jewell to testify that Wiggin and he had discussed his claim for commissions as he departed
the company. Wiggin “said that if he was treated right he would not press the claim until after the company became solvent, unless it might happen that bankruptcy became imminent.” The prosecution sought to have Jewell testify about Furber’s settlement when he left the company, but the defense objected, because this testimony concerned a new private agreement that, though based on Furber’s original contract between Charter Oak and Furber, was entered into with the new board of directors. The court sustained the objection.

The prosecution, moving on, called William J. Goodrich, one of the owners of the Hartford Courant, to prove that defendants used advertising to deceive policyholders. Goodrich submitted a “long card by Wiggin, printed in July, 1877, but after it had been read to the jury it was discovered that it was printed as a matter of news only, and not as an advertisement.”

The prosecution turned to the overvaluation issue again, this time regarding the New York real estate. A witness admitted, on questioning by the defense, that Furber “cheerfully” made a memorandum on the New York real estate available to the special commission. The day concluded with an appraiser from St. Louis, Marcus A. Wolff, testifying that a property reportedly valued at $500,000 was better appraised at $185,000. “On cross-examination he created some amusement by the admission that while loud claims of improvement in real estate and other affairs in St. Louis were made generally, he had been unable to discover anything of the kind, and doubted that there was.”

On December 19, 1878, the main witness of five hours was Halsey Stevens, the current secretary of the company who had also served as secretary during the Furber management. In a matter taken up first, Judge Hovey stepped back from a prior ruling and allowed introduction of the 1875 annual report of the company, ruling, over objection, that the report met the requirements for admissibility and had been properly

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522 Id.
522 Id.
522 Id.
522 Id.
522 Charter Oak’s Old Officers, supra note 522, at 1.
527 Id.
528 Id.
529 Id.
530 Charter Oak’s Old Officers, supra note 522, at 1.
signed. The 1876 report was also admitted into evidence. These reports showed a series of loans to people and businesses (including a church, a railroad passenger insurance company, a bank, and a sewing machine company) mostly in the New York and New Jersey area; Furber had given his guarantee of eight percent return on the loans. The transactions also included the transfer of mortgages relating to Edward’s New York property, loans on the Higganum property, the assumption of the debt by Furber of the Valley Railroad, and the opening of the Fenwick Hall property. Hamersley stated that he was trying to include all the transactions of the company during those years. The defense’s position on this material was that Wiggin and Furber had no knowledge of the content of the 1875 report and did not sign off on the 1876 report. Stevens also stated that, in 1875, he had given a note from Charlton Lewis to the insurance commissioner after the company and Furber agreed to his becoming the financial manager.

The New York Times found Stevens’ testimony about the original Furber contract, with his contribution of $500,000, the most significant of that day. Stevens was called to a meeting at the directors’ room, with Walkley, White, and Furber present. Furber read the contract, and as it was clear that the Board had approved, Stevens was about to give his signature as secretary. Furber declared that he wanted Stevens

[T]o consider the contract carefully, for if he did not approve it fully, [Furber] would have nothing more to do with the affair. Furber asked if [Stevens] observed anything objectionable. [Stevens] suggested that he did not quite like having no limit to the extra compensation that might be voted Furber for extra services and risks incurred. Furber satisfied his doubts by the explanation that this compensation would be passed upon by the Board of Directors, a majority always to be residents of Hartford.

There were additional discussions about raising new capital. Eventually Stevens agreed with the contract plan and gave his signature

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532 Id.
533 Id.
534 Id.
535 Id.
536 Twelfth Day of the Trial, supra note 531, at 2.
537 Id.
538 Id.
540 Id.
541 Id.
542 Id.
and full approval. 543

Before recessing for the day, the jury heard testimony from W.D. Thomas, a farmer and surveyor from West Virginia. 544 Thomas testified that the value of the Quinnimont Mine was $50,000. 545

The next day, December 20, the witness was cross-examined by attorney Hyde about the property. 546 The witness admitted that, not only had he not fully evaluated the production capacity of the active mines, but he had not even appraised the property as an operational mine, but rather as timber land. 547 The witness further conceded that he would not even sell his own land for the price at which he appraised the company’s land. 548

Another witness attempted to testify that an amount for interest on the company’s statement to the insurance commissioner in 1875 was shown twice. 549 Judge Hovey ruled that this evidence was not admissible as this bookkeeping error was not alleged in the information prepared by Hamersley. 550 Travelers Insurance President Batterson was asked about the values of real estate in New York City, but this evidence was postponed while a transcript of the Furber contract of purchase of the real estate was obtained. 551

Then, disaster struck for the prosecution as the morning session came to an end. As the New York Times reported, the prosecution “quite unexpectedly” concluded its testimony in chief. 552

[I]t had been anticipated that the State had in reserve much important evidence, to be offered next week, and the close to-day was a real surprise. The State lost valuable testimony through the absence to-day of witnesses who had acted as appraisers (so called) of New-York down-town property, which they valued at $1,085,000, against a valuation of $3,030,000 by the company in its annual statement. This difference was one of the principal grounds on which the special commission based its report in 1877, which led to the displacing of Furber

543 Furber’s Charter Oak Contract, supra note 539, at 1.
545 Id.
547 Id.
548 Id.
549 Id.
550 Thirteenth Day of the Trial, supra note 546, at 1.
551 Id.
552 Charter Oak Valuations: Unexpected Close of the Prosecution–Testimony as to Appraisals, N.Y. TIMES, Dec. 21, 1878, at 1.
and his associates from the control of the institution, and, therefore, was highly valuable.\footnote{553}

Prosecutor Hamersley asked that there be an afternoon recess and an adjournment.\footnote{554} Hamersley suggested that following the adjournment President Batterson could continue with his testimony and, along with the testimony of “one or two more witnesses from New York regarding the appraisal of the New York property, [Hamersley would be able to] conclude the testimony in chief for the state.”\footnote{555} The defense objected to any delay in the trial, arguing that a delay would increase expenses for both parties.\footnote{556} Judge Hovey agreed with the defense, rejecting any adjournment. He said that “it would be better to go on without any adjournment which [would result] in increasing the expenses of the state and of the defense.”\footnote{557}

Looking back on this development, historian Woodward declared: “A witness, whose testimony before the grand jury had been decisive, meanwhile had met with a change of heart and put himself beyond the reach of the court.”\footnote{558} Woodward did not disclose any more details, or give the witness’s name. The prosecution on this day was hopeful that the missing witness or witnesses could still be convinced to come to court and testify during rebuttal.\footnote{559} The defense presented one witness in the afternoon, who testified that the West Virginia valuation was correct.\footnote{560}

On the next day, December 23, 1878, Attorney Perkins for the defense stated that he did not intend to take unfair advantage of the state and deny it the opportunity to bring in its missing witnesses on the following Tuesday.\footnote{561} Hamersley replied that he was still unable to obtain the witnesses and might need until the next Friday to bring them in. Judge Hovey urged him to send a messenger.\footnote{562} Perkins said that Friday was too long of a postponement.\footnote{563}
The defense then resumed its case by calling General J.S. Fullerton, an appraiser from St. Louis, who testified that Charter Oak’s valuation of St. Louis real estate was accurate. Then the witness who, the previous day, had testified to the appraisal of the West Virginia property was cross-examined. There was also evidence about the value of the Fenwick Hotel that opened during Walkley’s presidency. A former partner of Swett’s, Van A. Higgins, who had some expertise on Chicago real estate values, testified that these values had been accurately given by the company. There was laughter in the court as Higgins was asked to produce an appraisal, now in company files. He said that “the company would probably let him have it; it would be unkind if they didn’t.”

The last witness of the day, an actuary with the insurance commissioner’s office, testified that, in connection with the submission of the 1876 report to the commissioner, Furber had asked him to examine the books of the company and had cooperated in this examination.

The New York Times made the following observation on the day’s proceedings:

The hearing will proceed tomorrow, but it is not known how far the defendants will go into the case. Probably they will make the most of valuations, but whether they themselves will testify in their own behalf is not yet decided. The question of their interest and the plans by which they managed the company may be brought before the jury.

The day before Christmas proved to be a routine day. The insurance commissioner’s actuary, still on the stand from the day before, testified on cross-examination by Hamersley that Furber had admitted that the premium note account was overestimated. Furber had also stated, however, that this error had occurred before he had become very much involved with the company and he was attempting to straighten out the books. The next defense witnesses were all related to valuation of real estate. Swett’s partner Higgins was cross-examined as to his testimony

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564 Id.
565 A Proposition from the Defense, supra note 561, at 2.
566 Id. Van Higgins was the same former partner that had originally referred the Charter Oak defendants to Swett. See supra note 264 and accompanying text.
567 A Proposition from the Defense, supra note 561, at 2.
568 Id.
571 Id.
on values in Chicago, a mining engineer gave evidence as to values in West Virginia, and two witnesses testified as to the value of the Higganum Manufacturing Company. The state was still hopeful that the missing New York witnesses would appear. The Courant declared that the trial “[a]djourned to Thursday at 2 p.m., when the state will probably produce, by agreement with the defense, witnesses to testify to the appraisal of Furber’s three million [dollar] purchase of New York real estate.”

The trial resumed on Thursday, December 26, 1878, at 2:00 p.m. with the tale of the missing witnesses. Hamersley told the court that the witnesses were still not present but that he had been advised that “they were on their way.” The defense had no objection to their testifying on the next day. The remainder of the day was taken up with defense witnesses. A Hartford insurance agent testified as to the value of the Higganum property. The insurance commissioner’s actuary testified that the company was technically solvent in 1876. Finally, a company representative related that Furber had found one of the accounts with an over-valuation and had required a write down of the value of the assets. The session adjourned with the defense requesting extra time on Friday or Saturday to put on witnesses who had come from New York and were unable to wait until the following week to testify.

The December 27, 1878, session began with a focus on the New York real estate. Furber had traded the Valley Railroad bonds with Edward Matthews for two parcels, one labeled “down-town” and the other “up-town.” First, the state was allowed to put its figures in on the value. The state’s three witnesses put the value for the downtown property.

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572 Id.
573 Id.
575 Id.
577 Id.
578 Id.
579 Fifteenth Day of the Trial, supra note 574, at 2.
580 Charter Oak’s New-York Assets: Testimony by the Defense to its High Value—Probable End of the Trial Next Week, N.Y. TIMES, Dec. 28, 1878, at 1; see also supra note 67 and accompanying text.
581 It is not explicit in the newspaper reports whether the state’s witnesses were the ones that they had been trying for several days to present to the court. Given the context—direct examination of state witnesses during the defense’s case-in-chief—it is almost certain that these witnesses were the witnesses that the defense had previously promised to allow the state.
ty at about $2 million and the uptown property at about $550,000. 582

As the defense shifted back to its case-in-chief, it immediately endeavored to undermine the state’s long-awaited witnesses. To that end, the defense then called five witnesses to show that the values were, in fact, closer to $3 million and $700,000. 583 Next, the defense called current company president Bartholomew to testify that the exchange with Matthews and disposing of the Higganum property was a good financial arrangement for the company. 584 The last witness of the day, S.R. McNary, who had helped initiate the special investigation in the legislature and was now on the company’s board, also agreed with the valuation that Furber had given for the exchange with Matthews. 585

The defense’s evidence was significant, according to the New York Times reporter. He ended his report for the day by noting:

The court adjourned until 2 o’clock Monday afternoon, and it was said by counsel for the defendants that probably all their testimony would be got in on that day, so that probably the trial will close next week. The prevailing impression here is that the State has not made out a case, and that the accused men will be acquitted on the charge of conspiracy. 586

On Monday, December 30, 1878, the defense concluded its case with three witnesses. The first testified that Furber had prepared the transfer of real estate with the help of an attorney representing the company to ensure that the laws of New York were followed. 587 The second witness testified that the report to the insurance commissioner in 1875 was done without Furber’s input and was hampered by the books of the company kept by the former management. 588 The most important witness was Insurance Commissioner Stedman. He testified that he agreed to Furber’s taking over the financial side of the company with his contribution of the $500,000 mortgage. 589 He had conferred in making his decision with former Governor Hubbard and the owner of the Hartford Times, Alfred Burr. 590 He was not “fool enough” to believe that Furber

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583 Id.
584 Id.
585 Id.
588 Id.
589 Id.
590 Id.
would be giving the mortgage to the company without a repayment schedule.591

On cross-examination, Stedman was asked about Charlton T. Lewis, Secretary of the Chamber of Life Insurance. He admitted that Lewis was present at his first interview with Furber and that Lewis had “urged favorable consideration” of Furber.592 “Upon being asked if it would have changed his views with reference to the character of the transaction had he known that Lewis had been paid to intercede, he said it would not, because he was not influenced by Lewis at all.”593

December 31, 1878, featured the end of Commissioner Stedman’s testimony. He admitted under continued cross-examination that in 1875, there was concern about what effect drawing on the surplus earnings to compensate Furber would have on premium receipts.594 But he also agreed on re-direct with the defense that the company did have the funds in 1875 to meet the terms of Furber’s contract requiring a re-payment of the amount that he was intending to place with the company.595 Each side rested after this testimony, and Assistant State’s Attorney John Buck began his closing argument. He spoke until 1:00, there was a break for lunch, and at 2:00, with Judge Hovey declaring, “[y]ou may proceed, gentlemen,” Buck spoke again until 3:00.596

Buck first declared that there were honorable means of acquiring wealth—by honesty, prudence, and foresight.597 But some also sought to acquire riches by stealth.598 The worst kind of robbery, he declared, occurred when there was a combined effort to harm helpless people, and this was known as a “conspiracy.”599 Buck distilled the case down to the two wrongs alleged. The first was that Charter Oak was defrauded and its assets illegally taken, and the second was that the policyholders had been fooled into continuing to pay on their policies.600 In 1875 and 1876,

592 Id.
593 Id.
594 The Charter Oak Case: Nineteenth Day of the Trial–Close of the Testimony–Mr. Buck’s Opening Argument for the State–Mr. Perkins to Follow–Judge Foster Ill and the Court Adjourned to this Morning, HARTFORD DAILY COURANT, Jan. 1, 1879, at 2.
595 Id.
597 Nineteenth Day of the Trial, supra note 594, at 2.
598 Asking for a Verdict of Guilty, supra note 596, at 1.
599 Id.
600 Nineteenth Day of the Trial, supra note 594, at 2.
the defendants knew the company was insolvent, but had made misrepresentations about its condition in order to deceive the policyholders. 601 It was the state’s responsibility to guard the public from such actions. 602

Buck continued by asserting that the 1875 contract between Charter Oak and Furber was one providing no risk for Furber. 603 It was “only a piece of financial juggling, and that under the contract Furber was able to pay out of the funds of the company for the stock which put him in control.” 604 He was receiving $18,542 per month and would have received back in excess of $1 million over the five-year period under the contract. 605 Secretary Stevens honorably first raised an objection that the payments to Furber were unjustifiably large. 606 White and Wiggin also were entitled to payments, and, although they never took them, they were part of the conspiracy. 607

Shares of stock were issued to each of the defendants, although Walkley, founder of Charter Oak from its infancy, only received ten shares. 608 “God forgive him [for what he did],” Buck declared. 609 Furber knew of the insolvency of Charter Oak. 610 White likely knew because he was a long-time officer, and Wiggin likely knew from his conversations with the insurance commissioner. 611

The assets had been misrepresented in value as to the company’s own building, the Valley Railroad bonds, the West Virginia coal mine, and the St. Louis property, Buck continued. 612 Furber, in his infamous 1875 contract, had placed an $800,000 mortgage with the company, but had never actually given the $500,000 to the company. 613

Buck concluded:

But if Furber had a lame and impotent excuse for taking the funds of the company under the terms of the contract he made with it, Wiggin and White had none whatever, and there was not . . . the vestige of a rag or fig leaf to cover up the disgrace and nakedness of the latter two men in their connection with the

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601 Asking for a Verdict of Guilty, supra note 596, at 1.
602 Nineteenth Day of the Trial, supra note 594, at 2.
603 Asking for a Verdict of Guilty, supra note 596, at 1.
604 Id.
605 Id.
606 Nineteenth Day of the Trial, supra note 594, at 2.
607 Asking for a Verdict of Guilty, supra note 596, at 1.
608 Nineteenth Day of the Trial, supra note 594, at 2.
609 Morning’s Proceedings, supra note 596, at 3.
610 Id.
611 Id.
612 Nineteenth Day of the Trial, supra note 594, at 2.
613 Morning’s Proceedings, supra note 596, at 3.
alleged illegal transactions for which they had been informed against.614

The evidence was “irresistible,” he maintained, and it was the jury’s duty to convict each of the accused.615

The judge adjourned the trial to the next day, January 1, 1879, with the caution that the jurors “hold no conversation with any one about the case, not to allow persons to speak to them of it, and not to read the newspaper accounts of the trial.”616

The prosecution was to have another presentation on New Year’s Day by Judge Foster, but as he was too ill to participate further in the trial, the defense began its summation with Attorney Swett.617 As he began, he stated that he disliked beginning an argument with an apology, but he had been suffering from a “western chill that he had brought with him,” and was therefore unable to state his case as he otherwise would.618

According to Swett, the historic Charter Oak Insurance Company was in need of new capital.619 Two of the defendants, then officers, are charged with conspiracy in trying to save the company, and two defendants are new to the scene.620 The state statutes had rigid rules for reserves of the company, but it could pay its debts in 1875.621 The company required additional capital of only $500,000 under the state regulations.622 Furber supplied this by providing a mortgage in the amount of $800,000, splitting away the $500,000 for the company.623 He did not create a liability with the company, but made a contribution of an asset to protect the company from a charge of insolvency by the commissioner or creditors.624 Furber was allowed by his contract to take

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614 Id.
615 Asking for a Verdict of Guilty, supra note 596, at 1.
616 Morning's Proceedings, supra note 596, at 3.
617 The Charter Oak Case: Twentieth Day of the Trial: Mr. Swett's Opening Argument for the Defense, and Its Conclusion To-Day–Judge Foster not Able to Speak–Mr. Hamersley to Follow Mr. Swett and Mr. Hyde to Close, HARTFORD DAILY COURANT, Jan. 2, 1879, at 2.
618 Id.
619 Id.
620 Id.
622 Twentieth Day of the Trial, supra note 617, at 2.
623 Id.
624 Id. Swett distinguished this from a debt obligation. He explained to the jury that because Furber would be repaid through only the profits, the company was not liable for the obligation and therefore the $500,000 contribution was not considered a liability on the compa-
back the amount he contributed with interest and he only drew out, through twenty months of management, what he put in.625

Swett attacked the charge of deceiving the policyholders first as a matter of law. The charge was defective because no proof had been introduced regarding the names of the 20,000 policyholders.626 He urged the court to instruct the jury in keeping with the legal precedent that he then cited.627 In addition, factually, he told the jury, the representations of holdings in the report to the insurance commissioner could not be taken as an attempt to place a value on them.628 In addition, the defendants had nothing to do with preparing the 1875 report, the alleged “high crime and misdemeanor.”629

He concluded by stating:

[H]e was entertained yesterday by Mr. Buck’s panegyric of honest Halsey Stevens, and almost wished that he were Halsey Stevens himself; but this report was signed by honest Halsey Stevens, and he is responsible for it as he swore to it, and he had been an officer of the company for years. Yet the jury is asked to send Furber, Wiggin and others to the penitentiary for conspiracy for making out a report which they did not make and never saw until it was made, but which was made by Clench & Day, against whom there is not a word to be spoken and signed by Honest Halsey Stevens.630

The court adjourned to the following day, when Swett was to complete his argument. The New York Times observed that Swett’s address “was an exceedingly able one, and attracted the closest attention of a large number of spectators.”631

Swett concluded his argument on January 2, 1879.632 His argument turned on the definition of “conspiracy,” and he was reminded the previous afternoon by a “brother counsel” that he needed to discuss the definition more clearly.633 A conspiracy was not an act done, but an unlaw-
And where was the agreement here? There was no agreement in 1875 and it was impossible that any agreement was made in 1875 to state certain values in 1876. How did anyone know what those values were? When Furber found out that the premium note account was overstated in the 1875 report, he immediately informed the insurance commissioner. He could have deceived the commissioner, but did not. He had the company lower the value of this account in 1876 by $1 million. Values change with time; how can these defendants be blamed for the values that they placed on their books?

Furthermore, Swett argued that Furber’s contract was made after Wiggin and White had entered theirs with the company. Furber gave White and Wiggin “a knock on the head” for seeking to be paid under their contracts. “If Furber was in complicity with these two men, why was nothing paid to them under their respective contracts? You, gentlemen of the jury... are not to assume fraud in this regard—it must be proven.”

Regarding the New York real estate, he could not understand how the prosecution could argue that the Valley Railroad bonds were worthless, yet the company had made a mistake trading them for the New York properties. Furthermore, Bartholomew, the president of the company at the time of the trial, said the trade was beneficial. Swett asked “whether a misrepresentation as to the value of assets, about which testimony varies, is akin to burglary or murder? It is not a case of a jack-knife represented to be a million of dollars; but it is a case where men differ as to values.”

Swett concluded with an attack on the motives of the prosecution and the Hartford community: “Is there no fairness in the state of Connecticut? Is a man entitled to no rights? Should a man be pursued like a blood-hound for doing what Furber has done?” He contrasted the attitude toward these defendants with a prior warm response to Aetna Fire Insurance’s efforts to cover the losses in an 1835 New York fire, which

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634 Id.
635 Id.
636 For And Against Furber, supra note 632, at 1.
637 Id.
638 Charter Oak Conspiracy Trial: Continuation of Judge Swett’s Defense of Mr. H. J. Furber, HARTFORD DAILY TIMES, Jan. 2, 1879, at 3.
639 Id.
640 Id.
641 Twenty-First Day of the Trial, supra note 633, at 2.
642 Id.
643 Id.
644 Id.
was comparable to great Chicago fire.645 But, in this case, he added, “When these men came here to save the company, they were beset by hostilities, and it was declared that they could not get through, and under such a warfare no men could get through, for there was a constant and persistent effort to destroy public confidence and break down.”646 The *New York Times* reported that “Mr. Swett’s peroration was eloquent, and the crowd of spectators in the court-room seemed to be generally impressed with the logic and fervor of his whole address, which was one of the best, in point of legal oratory, ever made here.”647

State’s Attorney Hamersley began his reply in the afternoon by stating that he regretted that his colleague Judge Foster was ill and unable to address the jury. He then went after the “strong array of counsel” who raised technical defenses to shut out evidence to receive a favorable verdict.648 It was clear that the defendants were not of the common class of criminals. They had not committed “common and vulgar crimes,” but had led an honest life up to this point.649 They were not “faces in a rogue’s gallery,” and, therefore, they would go to any length to protect their reputations.650 They had, “with monstrous cheek,” argued that “what they had conspired to do did not make a crime.”651 He believed the jury would act to protect the trust funds of Charter Oak and would have a different view of “morals and law than would seem to be taken by the accused themselves.” 652

The defendants were accused of conspiracy, a combination to perform an act.

When two, three or four all combine to cheat a single man the law says it is not fair, that there is great danger, that it is a public evil, and then the law comes in and says it is crime. If one man falsely represents to another that a horse is worth a thousand dollars, when it is worth only $100, it is an immoral act; but if two or three others enter into the transaction to make it appear that the horse is worth as much as represented, then there is an unlawful combination and it is a crime.653

These men conspired to obtain the stock of Charter Oak with the ul-

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645 Twenty-First Day of the Trial, supra note 633, at 2.
646 Id.
647 For And Against Furber, supra note 632, at 1.
648 Twenty-First Day of the Trial, supra note 633, at 2.
649 Id.
650 Id.
651 Id.
652 Twenty-First Day of the Trial, supra note 633, at 2.
653 Id.
timate goal of cheating and defrauding its policyholders.\textsuperscript{654} The conspirators proposed to "put money into their own pockets by means which were immoral and not justified by the ordinary rules of business."\textsuperscript{655}

Hamersley then reviewed the efforts to take the great fund held by Charter Oak in trust for the benefit of the policyholders. Walkley had put the funds into the Valley Railroad and Commissioner Stedman had objected.\textsuperscript{656} "Walkley and White had nearly run their course, and Furber and Wiggin came in: 'out of this nettle danger I will pluck the flower safely.'\textsuperscript{657} Furber and Wiggin plotted in New York in 1875 to obtain the stock of the company.\textsuperscript{658} Hamersley pointed to the letter from Furber to White as proof that the stock was paid for out of company funds.\textsuperscript{659}

"All four were working together, and their plans were consummated before Mr. Stevens, the secretary, was notified."\textsuperscript{660} Furber presented the contract to Stevens, who did not like it, Hamersley reminded the jury.\textsuperscript{661} "The whole testimony of Stevens proves what had been going on between the accused before the contract was signed."\textsuperscript{662} In addition, the contracts of Wiggin and White were hidden from Stevens and the insurance commissioner.\textsuperscript{663} Walkley was a party to this, and signed off on the contracts, although the extent of his role initially did not appear.\textsuperscript{664} Hamersley argued that Walkley’s motive was a $4,000 per year salary as a consultant to the company.\textsuperscript{665}

These men must be punished for this conspiracy, he urged.\textsuperscript{666} Their contracts were issued against the Charter Oak fund that 25,000 people relied upon, with each person having an average claim of $528.\textsuperscript{667} Enormous sums were due to these men under their contracts.\textsuperscript{668} Even the chief justice of the state at $4,000 per year salary earns less than Wiggin and White were to take out under their contracts, and Furber was to receive twice as much.\textsuperscript{669} "Is this an honest business transaction, or is it an

\textsuperscript{654} Id.
\textsuperscript{655} Id.
\textsuperscript{656} Twenty-First Day of the Trial, supra note 633, at 2.
\textsuperscript{657} Id.
\textsuperscript{658} Id.
\textsuperscript{659} Id.
\textsuperscript{660} Twenty-First Day of the Trial, supra note 633, at 2.
\textsuperscript{661} Id.
\textsuperscript{662} Id.
\textsuperscript{663} Id.
\textsuperscript{664} Twenty-First Day of the Trial, supra note 633, at 2.
\textsuperscript{665} Id.
\textsuperscript{666} Id.
\textsuperscript{667} Id.
\textsuperscript{668} Twenty-First Day of the Trial, supra note 633, at 2.
\textsuperscript{669} Id.
unmitigated cheat? . . . No life insurance company on earth would enter into such contracts as these unless there was fraud at the bottom of it.” 670 He concluded the day’s argument with a declaration that Furber was the chief conspirator. 671 In Furber’s original payment, in late 1875, he placed part of a mortgage with Charter Oak ($500,000) and reserved $300,000 for himself. 672 Hamersley would continue this theme the next day.

Hamersley began his argument the next day, in front of a large number of spectators, with his attack on Furber. 673 Hamersley argued that Furber’s exhortations that he was working to save Charter Oak were not sincere; rather, it was a “design to deceive”. 674 Alluding to Shakespeare, Hamersley said, “He protested too much.” 675 Hamersley then brought up the insurance commissioner’s requirements for Charter Oak’s reserves. 676 The conspirators had violated those rules by taking assets from a portion of the reserves. 677 He turned to the approval given by the insurance commissioner for Furber’s entry into Charter Oak’s affairs. 678 The commissioner’s approval was based on Furber satisfying certain conditions that Furber had failed to carry out. 679 These conditions included a limitation on the amount of payments made to Furber and that the treasurer of the company must be a Hartford resident. 680 White was a Hartford resident but he was only nominally the treasurer while Furber held the real authority. 681

With regard to the failure to name every policyholder in count two, Hamersley replied that the information named three policyholders who were allegedly deceived. This was sufficient; any listing of all the names was “mere surplusage.” 682 Hamersley again accused the defendants of

670 Id.
671 Id.
672 Twenty-First Day of the Trial, supra note 633, at 2; For And Against Furber, supra note 632, at 1.
673 The Charter Oak Case: Twenty-Second Day of the Trial: Close of Mr. Hamersley’s Argument—Mr. Chadwick Speaks for Mr. Walkley—Mr. Hyde began the Closing Argument for the Defense—The Case not to be given to the Jury till Monday, HARTFORD DAILY COURANT, Jan. 4, 1879, at 2; Charter Oak Conspiracy Trial: Conclusion of Mr. Hamersley’s Argument, HARTFORD DAILY TIMES, Jan. 3, 1879, at 3.
674 Twenty-Second Day of the Trial, supra note 673, at 2.
675 Id.
676 Id.
677 Id.
678 Twenty-Second Day of the Trial, supra note 673, at 2.
679 Id.
680 Id.
681 Id.
682 Twenty-Second Day of the Trial, supra note 673, at 2.
purchasing their stock in Charter Oak with company funds, accused Furber of fraud in his initial splitting of the $800,000 mortgage between Charter Oak and himself, and charged that Furber had overvalued the New York real estate by $1 million.\textsuperscript{683} Hamersley further noted that Furber even obtained the Valley Railroad bonds back again from Mathews for $125,000.\textsuperscript{684} Additionally, Hamersley argued that the second count of the information—conspiracy to defraud the public—necessarily grew out of the first count; fraud against Charter Oak was fraud against its policyholders.\textsuperscript{685}

Hamersley concluded by telling the jury that there was no disputed evidence.\textsuperscript{686} The defendants had “put their heads together” to cheat and defraud Charter Oak knowing it was in a “crippled condition and needing the exercise of every economy.”\textsuperscript{687}

If you are satisfied of these facts I appeal to each one of you as a sworn juror, as a citizen, as a man, to stand firmly by your convictions and never consent that any man, no matter what influence he may exert, what position he may have held, what wealth he may control, shall escape punishment for such an offense.\textsuperscript{688}

The afternoon session started with argument on behalf of Walkley by his own attorney, Daniel Chadwick.\textsuperscript{689} It was surprising, said Chadwick speaking very rapidly, that Hamersley had tried to draw his client into the conspiracy, especially since the earlier address by Hamersley’s assistant Buck had not made a case out against him.\textsuperscript{690} The evidence showed no link to Walkley in any conspiracy.\textsuperscript{691} His consulting fee on retirement had been slight after years of service to Charter Oak.\textsuperscript{692} His unfortunate investments of company funds in the Valley Railroad and other placements had occurred during flush times with the approval of Charter Oak’s directors.\textsuperscript{693} The investments became more questionable

\textsuperscript{683} Id.
\textsuperscript{684} Furber’s Trial Nearly Ended: The Closing Argument for the State Finished and that for the Defense Begun, N.Y. TIMES, Jan. 4, 1879, at 1.
\textsuperscript{685} Conclusion of Mr. Hamersley’s Argument, supra note 673, at 3.
\textsuperscript{686} Twenty-Second Day of the Trial, supra note 674, at 2.
\textsuperscript{687} Id.
\textsuperscript{688} Id.
\textsuperscript{689} Charter Oak Conspiracy Trial: Arguments of Mr. Chadwick in Behalf of Mr. Walkley–The Closing Argument in the Case Made by Mr. Hyde, HARTFORD DAILY TIMES, Jan. 4, 1879, at 3.
\textsuperscript{690} Id.
\textsuperscript{691} Id.
\textsuperscript{692} Id.
\textsuperscript{693} Arguments of Mr. Chadwick in Behalf of Mr. Walkley, supra note 689, at 3.
in light of the panic of 1873.694 He had signed the Furber contract with the insurance commissioner’s approval after former Governor Hubbard and the *Hartford Times*’ Burr had also recommended to the commissioner that the Furber contract be approved.695 Why were these men not accused by the state’s attorney? Chadwick asserted that his client was “causelessly harassed.”696 He deserved the jury’s sympathy and a generous verdict.697 As Chadwick concluded, Mr. Walkley was deeply moved by the passion of his advocate; tears welled up in his eyes.698 The attorneys for the accused and their clients congratulated Chadwick after he finished speaking.699

The concluding address by Attorney Hyde for the defense occurred on the afternoon of January 3, 1879, and the morning of January 4, 1879.700 He began by stating that because the trial had lasted five weeks, he should have refrained from giving his remarks; however, since this trial was of such great importance, he deemed it his duty to give further facts bearing on the defendants’ guilt or innocence.701 In the fall of 1875, Hyde reminded the jury, the insurance commissioner had given warning that Charter Oak was impaired under the law for lack of appropriate reserves.702 Agents of rival companies were hounding Charter Oak, looking to force a receivership.703 It was about this time that White approached Wiggin about obtaining an investor to repair the impairment.704 Wiggin found Furber, who was willing to invest his funds only with the right to obtain them back and only with a change in management.705

“But then busy men began to charge Furber and Wiggin with being thieves and robbers.”706 Public confidence in Charter Oak had broken down and receipts fell off dramatically.707

One year ago to-day proceedings were begun in this court to indict the accused for conspiracy at the instance of the state’s attorney by the calling in of a grand jury to consider only evidence against these men. I have practiced law at this
bar since 1845, and I had never before known of a grand jury to be called in at
the instance of the state’s attorney to indict men for crime except in cases of
rape and murder; and I have asked men whose experience at the bar has cov-
ered a period of fifty years, and they inform me that they had never heard of
such a proceeding before. It would sound larger to have these men indicted in
this form.\footnote{Id.}

In addition, Hyde went on, the parties interested in the prosecution
had procured legislative approval for a special counsel to assist in pre-
paring the criminal case, all in keeping with an effort to give the pro-
ceedings added solemnity and an air of greater enormity.\footnote{Arguments of Mr. Chadwick in Behalf of Mr. Walkley, supra note 689, at 3.}
Indeed the presumption of innocence was reversed here, with the state’s attorney
poisoning the jurors’ minds by commenting on their failure to testify in
their own behalf.\footnote{Id.}
Prosecutor Buck interrupted: “You leave no right to
discuss that point.”\footnote{Id.}
Hyde insisted that he had this right under a statute
passed in 1860 disallowing a prosecutor from calling attention to an ac-
cused’s decision not to testify.\footnote{Id.}
In addition Hyde “also alluded to the high character of the witnesses who had testified in behalf of the defend-
ants in this case.”\footnote{Arguments of Mr. Chadwick in Behalf of Mr. Walkley, supra note 689, at 3.}

Hyde said that the essence of the allegations were that the defend-
ants conspired to get possession of a company in crippled condition, like
a dying man, and to keep it alive for a time in order that they might rob
it.\footnote{Id.}
The allegations related to the means of the conspiracy and the proof
must set forth the means; here the acts alleged were predicated on mere
suspicion alone.\footnote{Id.}
Charter Oak at the time of Furber’s contract was not
insolvent and Furber legitimately put his money into it.\footnote{Id.}
He was to be
properly compensated for incurring this level of risk.\footnote{Id.}
The contract was
submitted to the insurance commissioner and the commissioner asked
the advice of Governor Hubbard and newspaper man Burr, Hyde re-
minded.\footnote{Id.}

\footnote{If this transaction formed part of a general scheme to carry out the proposals of an agreement to cheat and defraud into which the defendants had entered,}

\footnote{Id.}
\footnote{Arguments of Mr. Chadwick in Behalf of Mr. Walkley, supra note 689, at 3.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id.}
\footnote{Arguments of Mr. Chadwick in Behalf of Mr. Walkley, supra note 689, at 3.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id.}
\footnote{Arguments of Mr. Chadwick in Behalf of Mr. Walkley, supra note 689, at 3.}
\footnote{See id.}
then it was the first time in the history of the world that four men had made a conspiracy to cheat and defraud others, and then in pursuance of such conspiracy had gone to the law officers of the state and asked their advice in regard to going on with the conspiracy.\footnote{719}{Id.}

Hyde insinuated that if the defendants were guilty of conspiracy, then so too were the officials who were consulted.\footnote{720}{Id.}

Then on January 4, 2014, at 9:30 a.m., Hyde finished his argument before a “small attendance.”\footnote{721}{Arguments of Mr. Chadwick in Behalf of Mr. Walkley, supra note 689, at 3.} Furber had made an honest bargain in taking a risk in putting his funds into Charter Oak and had received a reasonable, not excessive, return.\footnote{722}{Id.} Furber and Wiggin were not responsible for the weak investments made by the company up to 1875.\footnote{723}{Id.} In addition, the transfer of New York real estate had been advised by “Judge Green, one of the most eminent real estate lawyers in the country, and author of the book Brice’s \textit{Ultra Vires}.\footnote{724}{In fact, Green was the American editor of Seward Brice’s treatise on the doctrine of \textit{ultra vires}. \textit{See Seward Brice, Treatise on the Doctrine of Ultra Vires} 192 (2d ed., London, Stevens & Haynes 1877).} This trade of New York real estate was a good one, and likely to save Charter Oak. At one time, there was talk of putting the title to the real estate in Hyde’s own name.\footnote{725}{Id.} “It was only of God’s mercy that [Hyde] was not himself now on trial before the jury for being a conspirator, whose intention it was to cheat and defraud the policy-holders of the Charter Oak company.”\footnote{726}{Id.}

Hyde made two other points. The contract releasing Furber in 1877 was fair and approved by the new board, including preeminent Hartford men on the board who were chosen to protect the rights of policyholders.\footnote{727}{Id.} The charge that the defendants had deceived the policyholders through overvaluing assets was flawed as there was no proof; rather, the value of Charter Oak’s assets had improved by nearly $2 million under the Furber-Wiggin administration.\footnote{728}{Id.}

Hyde’s conclusion was forceful and biting.

The charge against the defendants was one calculated to ruin their reputation, if sustained, and the defendants had therefore stood upon their legal rights, and they were subjected to very great expense. But the state’s attorney had asked
that if there was a single juror who had a doubt in regard to the guilt or innocence of the accused that he would stand out and not yield. Why are we tried at all? His honor felt, as we all should have felt, had we been in his place, that, after all the sound of trumpets that had been made over this matter, it was better the trial should go on pro forma, although he was of the opinion that the acts charged did not constitute a high crime or misdemeanor.729

The defense had asked for a Supreme Court review, in sessions to be held the following week, but that had been denied.730 Now, Hyde claimed, the state asks that the “good old rule” of the common law be reversed and the state have the benefit, not the accused.731 Nevertheless, Hyde concluded, “I trust that you will give us justice under the law, and . . . give us a speedy verdict of acquittal.”732

The New York Times reporter, unlike the Hartford Courant and the Hartford Times, had been present for each day of the trial. Reporting on general perceptions after the close of summations, the New York Times reporter stated:

The court adjourned until 10 o’clock Tuesday morning, when Judge Hovey will deliver his charge. There is much discussion as to the verdict of the jury. Few expect a conviction, but it is thought possible that there may be a disagreement which will arise, if at all, over the contracts made by Wiggin and White to receive commissions. The Furber contract is considered to stand differently, because there is no question, it is asserted, that he gave a consideration for it. Much will depend, of course, upon the charge of the Judge, who, in the early stage of the trial came very near throwing the case out of court under the Statute of Limitations.733

On January 7, 1879, Judge Hovey charged the jury in a court room “thronged[] with spectators.”734 He told the jury first that the information was in two counts. The first count alleged that the Charter Oak Life Insurance Company in 1875 was insolvent and the defendants combined to cheat and defraud the company of its money and effects, and of the

729 Arguments of Mr. Chadwick in Behalf of Mr. Walkley, supra note 689, at 3.
730 Id. Hyde was referring to the fact that the defense had argued that the statute of limitations had run on the admission of certain evidence because the charges against the defendants were not “high crimes,” but Judge Hovey ruled against the defendants. The defendants then sought immediate appeal to the Supreme Court, which the judge denied. See supra notes 443, 448–458 and accompanying text.
731 Id.
732 Id.
734 The Charter Oak Case: Twenty-Fourth and Last Day of the Trial–Judge Hovey’s Charge to the Jury–A Verdict of Acquittal for all the Defendants, HARTFORD DAILY COURANT, Jan. 8, 1879, at 1.
moneys and effects held by it in trust for the policyholders. They had purchased the controlling shares of stock of Charter Oak, thus controlling the board of directors, its assets, and the conduct of business. Then, after obtaining control, they took large sums of money, appropriating these funds to their own use through contracts, made without adequate consideration, to obtain payment of commissions. They also sold Charter Oak’s real estate in violation of the company’s charter and offered the company’s mortgages on real estate and other property at prices largely in excess of their value. Having stated these allegations, the judge stated that the state failed to adduce any evidence in support of other allegations of means of accomplishing the conspiracy and the jury “will therefore have no occasion to trouble [themselves] with those allegations, but will lay them entirely out of the case.”

Continuing with his charge, the judge set forth the common law definition of a conspiracy as the “unlawful combination and agreement of the parties.” The offense occurred with the forming of the combination and the agreement. The state had to prove in this case, beyond a reasonable doubt, that two or more of the defendants did so combine to defraud the company by “one or more of the means set forth in that count.” Again ruling against the state, the judge charged that the means to accomplish the fraud, having been set forth, were more than mere surplusage, and had to be proved “as laid in the information.”

The proof of the state consisted first in the transfer of the stock to Furber, Wiggin, and White, as well as the directors electing Wiggin president, White vice-president and treasurer, Walkley advisory counsel, and Furber financial manager. Secondly, on November 18, 1875, Furber had received a contract under which for his $500,000 investment, he was to receive a percentage of the premiums and policy payments for a term of five years. On June 21, 1876, Furber was credited in his account with the company a sum of $121,537.50. Other contracts for payment of services were issued to White and Wiggin, although no

735 Id.
736 Id.
737 Id.
738 Twenty-Fourth and Last Day of the Trial, supra note 734, at 1.
739 Id.
740 Id.
741 Id.
742 Twenty-Fourth and Last Day of the Trial, supra note 734, at 1.
743 Id.
744 Id.
745 Id.
money was every paid by Charter Oak under these contracts. The judge noted that, regarding Furber’s contract dated November 18, 1875, the defense replied that the Furber contract was submitted to the insurance commissioner for his approval. In addition, there is no evidence that the contract was executed at the time of the conspiracy, but was issued by the old board of directors before Furber’s involvement with Wiggins and White.

The exchange of New York real estate was also given as proof that Furber had sold to the company real estate valued at no greater than $2.4 million for a total of $3.83 million. The judge noted that the defense introduced evidence that the exchange itself also had been approved by the insurance commissioner, and several witnesses—including the current president—had called the exchange “an exceedingly good one.” The state had also claimed that the company’s charter did not allow the exchange. The judge, however, while expressing some doubt, noted that the first section of the charter allowed for the transfer of property and the company had previously done so with the knowledge of the general assembly. Based on this analysis, the judge instructed the jury that the charter was not violated.

The second count set forth three policyholders by name as being deceived and mentioned “diverse other policy-holders.” The judge listed the state’s contentions that involved the disclosures to the insurance commissioner in its December 31, 1875, and December 31, 1876, reports: Charter Oak was solvent when in fact it was not, the Higganum property mortgage and the Allen, Stephens & Co. loan were worthless and their values were overstated, and Charter Oak had hidden liabilities and fewer assets than it claimed in the 1875 and 1876 reports.

Having summarized in detail the allegations of the information on the second count, the judge, later in his charge, endorsed completely the defense’s position:

We will now turn our attention to the second count, and see whether the allegations which it contains are sustained by the evidence... The charge,
therefore, is of a conspiracy to defraud those persons who are specially named and described as policy-holders of the company, and it cannot be sustained without proof that those persons at the time one or both of the reports were made to the insurance commissioner, were holders of policies in the company. No such proof has been made; and consequently the charge contained in the second count fails, and your verdict upon that count should be a verdict of acquittal.\textsuperscript{756}

Before concluding, the judge briefly returned to the matter of the distinction between Walkley and the other alleged conspirators:

I ought to say in justice to the claim made by counsel . . . that there may be a distinction arising out of the evidence between his case and that of the other defendants. It is for you to say whether there is or not. If there is, you will express it in your verdict.\textsuperscript{757}

The judge concluded his charge as follows: “I have referred only to a small portion of the evidence relied upon by the state in support of the first count of the information, but you will carefully examine the whole of it and give it such weight as it deserves.”\textsuperscript{758} Unlike civil cases, with its preponderance of evidence standard, in a criminal case there must be a “clear, undoubting and entirely satisfactory conviction of the defendants’ guilt. If the proof falls short of this, the jury should acquit.”\textsuperscript{759}

There is no graver or more responsible duty which a citizen can have devolved upon him than to sit in judgment upon his fellow-men. In the discharge of such a duty, we should examine ourselves and see that no prepossessions or prejudices be allowed to control or influence our judgment. We know the case only as it has been disclosed to us by the evidence produced and admitted upon the trial. Whatever may have been said in regard to it elsewhere, whether in favor of the state or of the defendants, is unfit to be considered here. Even those sympathies so honorable to our natures must not be permitted to influence us. Nothing but the law and the evidence given to us in court should govern you. You will have reasonable doubts of their guilt. But if such doubts have no place in your judgments, your verdict will be against the defendants or such of them as you may find to be guilty.\textsuperscript{760}

The jury “went out at 10:45 o’clock” and when at 12:30 p.m. no verdict was reached, Judge Hovey ordered the sheriff to adjourn until

\textsuperscript{756} Id.
\textsuperscript{757} Id.
\textsuperscript{758} Id.
\textsuperscript{759} Twenty-Fourth and Last Day of the Trial, supra note 734, at 1.
\textsuperscript{760} Id.
A few minutes after 2:00, the judge entered the courtroom. “At 2:45 there was a loud rap on the jury-room door, which was promptly answered by Constable Edwin J. Johnson, and the jury returned to their seats in the court-room.” The clerk of the court, Mr. Charles W. Johnson, conducted a roll call of the jurors and each responded as present. “A verdict of acquittal was then given in the individual case of each of the accused by the foreman, Mr. Henry W. Ensign.”

The Courant reported on taking the verdict:

The clerk then called the name of each defendant, and propounded the query whether the jury had found him guilty or innocent, and the foreman in each case responded “Not guilty.” The result was received with especial satisfaction by the defendants, who had risen and were standing while the verdict was being rendered.

Furber and Wiggin shook hands with the jurors, some of whom stated that they were glad of the result. Others in the courtroom joined in and “for a brief time there was a sort of ‘love feast’ in progress.”

An examination of the ballots in the jury room showed that Walkley was first unanimously acquitted. The next ballots on Furber, White, and Wiggin were 8-4 in favor of acquittal, 10-2 in favor of acquittal, and then finally unanimous in favor of the defendants. The two hold-out jurors had, after discussion, agreed with the majority to acquit. Judge Hovey thanked the jury for its extended labors over the period of several weeks and thought they needed a “respite” until 2:00 the following Monday, when “W.W. Perry, the assistant of State’s Attorney Hamersley, will conduct the prosecutions on behalf of the state next week.”

The Hartford Courant, with its publisher, Joseph R. Hawley promoting the trial, was concerned with the accusation that the trial was extremely expensive. At the end of its coverage, it noted that this was

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761 Charter Oak Conspiracy Trial, supra note 754, at 3.
762 Id.
763 Id.
764 Id.
765 Twenty-Fourth and Last Day of the Trial, supra note 734, at 1.
766 Id.
767 Id.
768 Charter Oak Conspiracy Trial, supra note 754, at 3.
769 Id.
770 Id.
771 Id.
772 See Twenty-Fourth and Last Day of the Trial, supra note 734, at 1.
untrue. The jury fees totaled $1,000; Hamersley was paid his usual salary, while his special assistants would receive reasonable remuneration of no more than $4,000; and the defendants would incur from private counsel an amount between $10,000 and $12,000. This was less than the figures being circulated with exaggerated speculations.

The New York Times concluded: “Public opinion here long ago settled into the conviction that there would be an acquittal because in the trial the rulings of Judge Hovey, who is perhaps the most technical Judge on the Bench in Connecticut, have favored the objections and points raised by the defense.”

The formal decision, one of the few official documents of the case still existing in the Connecticut State Library, reads:

December Term, 1878.
At a Criminal Term of the Superior Court holden at Hartford in and for the County of Hartford in the State of Connecticut on the 1st Tuesday of December in the year of our Lord one thousand eight hundred and seventy eight. Present.
Hon. James A. Hovey, Judge.

1. State vs. Wiggin Et. al.

[This paragraph sets forth the charge; and the pleas of not guilty, followed by the names of jurors sworn].

Said cause having been fully heard and committed to said jury they by their verdict find the said Edwin R. Wiggin, Henry J. Furber, James C. Walkley and Samuel H. White each severally not guilty. This court accepts said verdict and accordingly doth adjudge the said [defendants] each severally not guilty and that they each be discharged.

X. AN EPILOGUE AND A CONCLUSION

The trial’s end did not bring long-term relief to Charter Oak. Business initially appeared on track, with the New York Times in 1880 praising Charter Oak’s apparent successes under the Bartholomew presidency. The company’s new look was contrasted with a New York life insurance company, The Globe, that had tried to reorganize, but

773 Id.
774 Id.
775 Id.
778 Two Methods and Their Results, N.Y. TIMES, Aug. 20, 1880, at 4.
failed.\textsuperscript{779} Sadly for Charter Oak, claims for benefits constantly exceeded income.\textsuperscript{780} Properties were sold off to meet current demands.\textsuperscript{781} Bartholomew gave his personal guarantees to loans totaling over $2,250,000.\textsuperscript{782} A lengthy battle over a receivership ended inconclusively in 1885.\textsuperscript{783}

In September 1886, historian Woodward relates that “the final explosion came with a sudden and dreadful shock.”\textsuperscript{784} Bartholomew was president of a Manchester, Connecticut, company that had suffered a large embezzlement by its treasurer.\textsuperscript{785} He had become liable for his personal guarantees, but could not satisfy the demands.\textsuperscript{786} He was forced to resign from Charter Oak and without objection the company went into receivership.\textsuperscript{787} Judge Pardee again became involved in naming a receiver and a small final dividend was paid to the policyholders.\textsuperscript{788} Woodward concluded his article by stating that the reason that the company was “brought to the grave” was due to the lack of discretionary power in the insurance commissioner, when the Walkley-White reckless investments had come to light, to choose a competent management.\textsuperscript{789} Instead the policyholders received “beggarly driblets.”\textsuperscript{790}

Turning to the individual defendants, White, Walkley, and Wiggin were hardly heard from again. A newspaper report from 1881 indicated that White had died on June 19 of that year.\textsuperscript{791} It was reported that Walkley was living “down the [Connecticut] river,” was in poor health, and was seldom seen in Hartford.\textsuperscript{792} Wiggin was living in Boston and had success in constructing “elevated roads” in New York.\textsuperscript{793}

Furber’s name, in contrast, continued to appear frequently in newspaper accounts. He joined the Higgins law firm in Chicago in May 1879, shortly after the conclusion of the trial, and remained at the firm until

\begin{itemize}
\item \textsuperscript{779} Id.
\item \textsuperscript{780} Woodward, supra note 4, at 88.
\item \textsuperscript{781} Id.
\item \textsuperscript{782} Id.
\item \textsuperscript{783} Id. at 89.
\item \textsuperscript{784} Woodward, supra note 4, at 89.
\item \textsuperscript{785} Id.
\item \textsuperscript{786} Id.; see also Policy Holders Swindled: Insurance Mismanagement In Connecticut—A Review Of The Frauds Which Have Been Perpetrated During The Last Twelve Years, N.Y. Times, July 1, 1889, at 5 (noting that President Bartholomew fled to Canada to avoid his creditors).
\item \textsuperscript{787} Woodward, supra note 4, at 89.
\item \textsuperscript{788} Id.
\item \textsuperscript{789} Id.
\item \textsuperscript{790} Id.
\item \textsuperscript{791} Former Officers of the Charter Oak, N.Y. Times, June 24, 1881, at 2.
\item \textsuperscript{792} Id.
\item \textsuperscript{793} Id.
\end{itemize}
1893. 794 He also constructed a building that housed the largest jewelry trade in the city. 795 His silver collection was celebrated and was utilized during Furber’s grand Chicago dinner parties. 796 The collection was last used at a dinner party in 1899 for Lillian Russell, a well-known actress and singer. 797 He took long vacations in Maine, began an affair with a young actress, and let his wife leave suddenly for Florence, Italy. 798 He died in Chicago in 1916 at St. Luke’s hospital, after shooting himself, despondent over his long-term diabetes complications. 799 He left an estate of over $6 million. 800

As for the attorneys, State’s Attorney Hamersley, who had an unpleasant outcome in his major prosecution on January 7, 1879, received a note from his “friend” Lafayette Foster, one of his special assistants at the trial, on January 15, 1879. 801 Foster stated that he understood that John Buck was planning to submit his bill for services in the Furber trial for approval by the judges at the sitting of the Supreme Court. 802 Buck suggested that Foster “do the same.” 803 Foster asked what Hamersley thought would be “a proper charge to make under all the circumstances.” 804 Eventually Buck and Foster each received $2,500. 805

As that upsetting January came to an end, Hamersley received correspondence that surely raised his spirits. Attorney S. Sidney Smith of No. 59 Wall Street, New York City, sent Hamersley a letter on January 25, 1879. 806 Smith had received a copy of Hamersley’s proposed act “to simplify the Practice in your State.” 807 He had read it with “much interest.” 808 Smith congratulated Hamersley “on the thoroughness yet con-

794 See Heller, supra note 44.
795 Id.
796 See SUSAN O’CONNOR DAVIS, CHICAGO’S HISTORIC HYDE PARK 84 (2013). These grand dinner parties would comprise 15 courses and five different wines. Id.
797 Id. The silver was acquired by Gorham Silver in 1927 and was donated to the Rhode Island School of Design in Providence in 1991. Elaine Louie, School Acquires Large Silver Collection, N.Y. TIMES, Dec. 19, 1991, at C5.
798 Heller, supra note 44.
799 Id.
800 Id.
802 Id.
803 Id.
804 Id.
807 Id.
808 Id.
ciseness of the production. I wish that Mr. Throop who has lately afflicted us with a most elaborate attempt to improve our system might have taken a lesson from the Commission of which you are a member.\textsuperscript{809}

The development of the first Connecticut Practice Book was one of Hamersley’s great achievements.\textsuperscript{810}

Hamersley resigned his post as State’s Attorney in 1888, served in the Connecticut House of Representatives, and was the intellectual power behind the efforts of Luzon Morris to become governor in 1890.\textsuperscript{811} In 1893, he was named first to the Superior Court and then quickly to the Supreme Court of Errors.\textsuperscript{812} On the court, he authored the majority opinion in \textit{Norwalk Street Ry. Co.’s Appeal}, which overturned precedent on separation of powers.\textsuperscript{813} Wesley Horton calls the case “[t]he most important Connecticut constitutional decision of the nineteenth century.”\textsuperscript{814}

Christopher Collier, the former state historian, has summarized Hamersley on the Supreme Court as follows:

Hamersley’s ascension to the Connecticut Supreme Court was among the most important juridical events in the state between 1818 and 1964. His thinking was determinative of a change in philosophy and practice that separates the traditional and modern eras in Connecticut constitutional history. Behind the positions he would push upon his colleagues on the bench lay many years of thought and experience.\textsuperscript{815}

Hamersley’s defeat in the Charter Oak case, if mentioned at all by newspapers or historians after 1879, was related as an example of his determination as an able prosecutor.

Leonard Swett left Hartford in 1879 a clear victor and for the next ten years, until his death on June 8, 1889, continued to hold a reputation as one of the nation’s leading attorneys.\textsuperscript{816} He continued his usual practice that included murder trials. According to his obituary, his overall record on murder defense was outstanding; he had “never lost but one before a jury.”\textsuperscript{817} He also defended “the anarchists” in the 1886 Chicago

\textsuperscript{809} WESLEY W. HORTON, CONNECTICUT STATE CONSTITUTION 27 (2d ed. 2012).
\textsuperscript{810} Id.
\textsuperscript{811} Collier, \textit{supra} note 213, at 65–66.
\textsuperscript{812} Id. at 67–68.
\textsuperscript{813} Norwalk St. Ry. Co.’s Appeal, 69 Conn. 576 (1897).
\textsuperscript{815} Collier, \textit{supra} note 213, at 68.
\textsuperscript{816} \textit{Leonard Swett is Dead: Chicago Thus Loses a Citizen of National Reputation, CHICAGO DAILY TRIBUNE}, June 9, 1889, at 9.
\textsuperscript{817} Id.
Swett’s defense of the mentally-impaired also continued after 1879. At the trial of President Garfield’s assassin, Charles J. Guiteau, an insanity defense was raised by Guiteau’s attorneys, although Guiteau himself refused to endorse it. On a trial day, when a section of the late president’s backbone came into evidence, Guiteau, rambling, informed Judge Cox that “if it is possible for Mr. Swett to leave his business, he will [appear for him].” Swett did not take on this assignment.

Swett became a pillar of Chicago society and was much sought after for his remembrances of Lincoln. He helped William Herndon, Lincoln’s former law partner, with his biography of Lincoln, and he was the obvious choice in 1887 to be the principal speaker at the dedication of Augustus Saint-Gauden’s statue of Lincoln in Chicago’s Lincoln Park.

Did this lengthy prosecution accomplish anything? Hartford Courant editor Joseph R. Hawley answered with a resounding “yes” in his editorial of January 8, 1879, the day after the not-guilty verdicts. But first, Hawley made a few points about the trial, as he had lobbied for it. First, it was clear from the course of the trial that it would end as it did. But even with the limited amount of evidence permitted to the jurors, four jurors had initially voted to convict. Second, even the lim-

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820 Guiteau’s Trial: Dr. Bliss Testifies–The Victim’s Broken Vertebrae Exhibited–Guiteau Unmoved, HARTFORD DAILY COURANT, Nov. 21, 1881, at 3.
821 Leonard Swett is Dead, supra note 816, at 9.
823 An article in the New York Times, dated July 1, 1889, regretted that “the case has been in the main obliterated from the public mind.” Policy Holders Swindled, supra note 786, at 5.
824 See The Charter Oak Conspiracy Case, HARTFORD DAILY COURANT, Jan. 8, 1879, at 2 [hereinafter Jan. 8 Editorial]. When Hawley wrote the editorial, it was eight days away from the Republican caucus to choose a U.S. Senator and Hawley was considered the front-runner. KEVIN MURPHY, ‘FIGHTING JOE’ HAWLEY 172 (2013). Surprisingly, at the “midnight caucus” of January 16–17, 1879, Hawley and the other candidates lost to Orville Platt, although this occurred on the thirty-sixth ballot at 2:30 a.m. Id. at 173. Hawley ultimately won a Senate seat two years later. Id.
825 Jan. 8 Editorial, supra note 824, at 2.
826 Id.
ited evidence showed that the defendants had engaged in “gross mis-
management deserving the severest punishment.”\(^827\)

Third, the public was denied a full airing of the fraud of the defend-
ants by Judge Hovey who “stood bravely by the technical rules of evi-
dence, which the law establishes for the protection of the innocent. It is
putting it mildly to say that some of his decisions were surprising.”\(^828\)
The judge had rejected evidence of Furber’s half-million dollars of pay-
ment received from the company coffers, had not allowed the exaggerat-
ed reports of interest earned to be introduced, and had ruled out the tes-
timony on the advertisements about the company’s well-being.\(^829\)

How could the prosecution establish the “plunder” by the defend-
ants under these rulings? State’s Attorney Hamersley and his assistants
Judge Foster and John Buck were entitled to thanks for their vigorous
efforts to bring about justice.\(^830\) In addition the new management of the
company was on the right track and a new statement to the insurance
commissioner would show a much improved state of affairs.\(^831\)

Once Hawley had vented, he made the major point that one could
take away from the “Great Insurance Trial.” Insurance regulation by the
state was needed in the public interest. “[T]he exposure and prosecution
have done a great public service. Hartford will continue to be an unfavor-
able field for insurance wreckers.”\(^832\)

\(^{827}\) Id. In another editorial later that year, Hawley stated that the defendants had narrowly
escaped punishment through technicalities. Editorial, HARTFORD DAILY COURANT, Sept. 27,
1879, at 2. According to him, the Courant had exposed these “bloodsuckers.” Id.

\(^{828}\) Jan. 8 Editorial, supra note 824, at 2.

\(^{829}\) Id.

\(^{830}\) Id.

\(^{831}\) Id.

\(^{832}\) Jan. 8 Editorial, supra note 824, at 2.
The title of Jon Blue’s new book on litigation in seventeenth century New Haven Colony, The Case of the Piglet’s Paternity, is guaranteed to attract attention and is only slightly misleading. The fact is, the judges in that capital case actually did question whether the defendant’s having sex with a pig produced a deformed piglet; in any event both pig and man were executed (for having sex, not for producing the piglet).

The book, however, is much more than a titillating look at one ghastly case, which occupies only seven pages of a 273-page excursion through thirty-three cases, twenty or so of which are criminal, tried in the New Haven Colony courts from 1639 to 1663. What the book does, and does so well, is rescue from obscurity cases that vividly portray the customs and attitudes of the people who founded Connecticut.

I use “Connecticut” broadly to include both New Haven Colony and the separate Connecticut Colony that was based in Hartford because they were founded at approximately the same time by people who by and large shared similar Puritan backgrounds and views, and because one was shortly thereafter absorbed into the other. It is true that one of New Haven’s founders, Theophilus Eaton, was a wealthy London mer-
chant with no counterpart in Hartford, and it is also true that some of the cases placed New Haven in a harsher light than Hartford. Still, the book is relevant not only to the history of New Haven and its satellite towns of Branford, Guilford, Milford, Stamford, and Southold, Long Island, but also to the early history of Connecticut as a whole. The book is especially relevant to this point because no seventeenth century records exist in the Hartford court proceedings of Connecticut Colony that are remotely as edifying as those taken by the official reporter in New Haven.

The remarkably unbureaucratic reporter put lots of flesh on the bones, and we all must thank Judge Blue, a New Haven-based Superior Court judge, for bringing the reports of these 33 cases to our attention. It is a shame, on the point of preserving early Connecticut history, that Connecticut gobbled up New Haven in 1665, silencing that reporter.

The hand-written records on which Judge Blue’s book is based were preserved, unpublished, in New Haven for 200 years; in the 1850s, the Connecticut state librarian, Charles Hoadly, had the records printed and published in an edition of 250 volumes, mostly for official distribution. This published account excluded the reports of four trials deemed “unfit for publication.” The piglet’s paternity, surprisingly enough, is not one of them. So, for the first time, Judge Blue’s book is making thirty-three of the large number of cases in Hoadly’s publication available widely, and he is making four of them available, period.

A word of warning: Judge Blue is not simply reproducing verbatim what the manuscript says, as State Librarian Hoadly did, nor is he merely performing a light editing by filling out abbreviations, modernizing spellings and punctuations, correcting obvious mistakes, and adding footnotes to explain obscure meanings, as editors often do with seventeenth century English literature. Rather, he is retelling the stories of the trials. It is pure Blue throughout. Nothing wrong with this, although I rather think he underestimates our ability to understand seventeenth century writing. Indeed, we do it all the time with Shakespeare. Judge Blue’s claim that “[t]he difficulty is something like that of translating Chaucer

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5 Blue, supra note 1, at 4; Charles J. Hoadley, Records of the Colony or Jurisdiction of New Haven from May, 1653, to the Union (Hartford, Case, Lockwood, & Co. 1858).
6 The four cases found unfit for publication were cases involving sexual matters. Blue, supra note 1, at 4.
into modern English”\textsuperscript{7} strikes me as an exaggeration. Chaucer wrote 250 years earlier in Middle English, a different language. Perhaps if there is a well-deserved sequel, Judge Blue will report at least some of the trials in a lightly edited and footnoted version. The last trial in his book is substantially in this format for seven pages, and it makes for delightful and easy-to-follow reading.

The book starts with a twenty-five page survey of the history of New Haven Colony from its founding in 1637 to its end in 1665. It is as good and succinct a survey of this subject as I have seen. He does not mention by name the famous 1656 Blue Laws, the compilation of New Haven’s harsh statutes.\textsuperscript{8} As he points out, the judges hardly ever referred to statutes during the proceedings; the Bible was the law.

The main event is the thirty-three trials. Judge Blue is a thorough and lively commentator on each of these. He explains in detail what the legal procedures were and how they varied from today, and more remarkably how they varied, or not, from English procedure of the time. In fact, the book is an unexpected source for much seventeenth century and earlier English procedure. Moreover, as judges are wont to do, he makes judgments on the quality of the justice in New Haven: to Judge Blue, some of the justice was fair, perhaps fairer than today, but some of it was, in his words, “its bone-chilling worst.”\textsuperscript{9}

My review, like the book I am reviewing, has only a slightly misleading title. The cases run the gamut of criminal issues from what we would today consider serious crimes, such as murder and arson, to what we would consider not crimes at all, such as sodomy, consensual sex by the unmarried, and criticism of the theological views of the Puritan minister. The cases also run the gamut of civil issues from breach of contract, to defamation, to master-servant, to trusts and estates, to divorce.

We find frequent references to the Bible. Judge Blue commendably does not merely refer to, but also often quotes text from the Bible: Genesis to support the death penalty for murder,\textsuperscript{10} Leviticus to support the death penalty for sodomy,\textsuperscript{11} Proverbs to encourage the defendant to con-

\begin{footnotes}

\footnoteref{7}Id. at 23.
\footnoteref{9}Blue, supra note 1, at 9.
\footnoteref{10}“Whose sheddeth man’s blood, by man shall his blood be shed.” Genesis 9:16; Blue, supra note 1, at 31 (discussing the support of Genesis for the death penalty, the general applicability of Biblical law in the colony, and the colonial belief that the Scripture held “the perfect rule for the direction and government of all men”).
\footnoteref{11}“And if man lie with a beast, he shall surely be put to death: and ye shall slay the beast.” Leviticus 20:15; Blue, supra note 1, at 36 (discussing the book of Leviticus’s support-
\end{footnotes}
fess, "He that covers his sins shall not prosper, but who so confesses and forsakes them they shall have mercy." Proverbs 28:13; BLUE, supra note 1, at 145 (discussing how the defendant would confess if the allegations were true, but would adamantly claim innocence if they were not).

13 "But if the animal was stolen from the neighbor, restitution must be made to the owner." Exodus 22:12; BLUE, supra note 1, at 161 (discussing New Haven Colony laws following the more lenient Biblical law for punishment for theft).

14 "Likewise also these filthy dreamers defile the flesh, despite dominion, and speak evils of dignities." Jude 1:8; BLUE, supra note 1, at 216.

15 "But I say unto you, Swear not at all; neither by heaven; for it is God’s throne." Matthew 5:34; BLUE, supra note 1, at 39 (discussing how the book of Matthew may have contributed to Puritan colonists’ reluctance to use oaths).

16 BLUE, supra note 1, at 31.

17 Raleigh’s Case, 2 How. St. Tr. 1, 15–16, 24 (1603).

18 See BLUE, supra note 1, at 18–19.

19 Id. at 38–39.

20 Id. at 43–44.

21 Id. at 47–48.

22 BLUE, supra note 1, at 170, 220–221.

We also survey how New Haven decisions compare with the law today in admiralty, in impossibility of performance of a contract, in workplace safety, and in the duty of a common carrier. In many of the civil cases, Judge Blue commends the New Haven court for being far ahead of its time in some areas, such as the duty of the employer to provide a safe workplace, the duty of a seller to provide a safe product, or the duty of a common carrier to provide a safe carriage.

His commendation of the result in some of the civil cases contrasts with his condemnation of the harsh result in some of the criminal cases, especially in the areas where our views in 2015 are so radically different from those of 400 years ago, such as our views on premarital sex. This leads to a broader point I wish to make about Judge Blue’s book: he is a judge, so he is used to making judgments, and his book is full of them. He frequently finds results “appalling,” “chilling,” “callous,” “brutal,” “totalitarian,” and the like. I agree that some are, but his adjectives would have more impact if they were used sparingly. For example, I would distinguish between those cases where New Haven was simply acting within the mores of the seventeenth century and those where New Haven went beyond the pale in any age. Otherwise, American legal historians would spend their time being appalled and chilled at the Founding Fathers’ callous and brutal acceptance of slavery.

A good example of my point is a comparison of the case of the piglet’s paternity with the case of the suspected witch. The former case is an absolute outrage in any age. The case came about because the judges saw a resemblance between a still-born piglet and the defendant. The judges bullied him into confessing to sodomy based on that resemblance and then executed him. What a miscarriage of justice! Judge Blue properly describes the court as “at its medieval worst,” and I fully agree.

When he turns to the case of the suspected witch, however, he opines that many of the New Haven colonists “simply took leave of their senses.” Judge Blue is “profoundly disturbed at the court’s gullibility” for believing in witches. Judge Blue can temper his criticism only with “a tiny allotment of praise” because the court did not find the alleged witch to be a witch. To my mind, the court deserves much more praise

19, 2015).

25 BLUE, supra note 1, at 34.
26 Id. at 35–37.
27 Id. at 42.
28 Id. at 126.
29 BLUE, supra note 1, at 127.
30 Id. at 126.
than condemnation. As Judge Blue admits, belief in witches was common in the seventeenth century, 31 and a century later even William Blackstone was still hedging his bets. 32 So what happened in New Haven? The court heard lots of evidence about whether the litigant (who had actually brought a defamation case to clear her name—shades of Oscar Wilde 33) was a witch but held that the evidence merely was suspicious. Given what was going on in Salem and elsewhere, I would have taken a pass on criticizing this result.

Being a judge, Blue also offers a constant stream of excellent commentary on how the trials were run. At appropriate points he notes that it is “never a good idea to change your story during a trial,” 34 nor is it a good idea to keep talking after the judge says to stop. 35 He also notes that it is a myth that litigants merely want a chance to be heard—they want to win; 36 that it may be a good idea for the judge to bring in outside experts; 37 that judges are often tempted to cut the baby in half; 38 and that courts should be alert to ways to get the parties to settle their differences. 39

What I found most commendable about Judge Blue’s book, however, is how he so skillfully weaves all these points—courtroom procedure, old English law, present-day law, history, Biblical law, and his vigorous opinion on each result—into the narrative. The trials on their own are interesting enough. Judge Blue’s commentary puts them in all these contexts and truly brings them to life.

31 Id. For an overview of the belief of witches in seventeenth century New England, see generally Richard Weisman, Witchcraft and Puritan Beliefs, WITCHCRAFT, MAGIC, AND RELIGION IN 17TH-CENTURY MASSACHUSETTS (1985).

32 “[I]n general there has been such a thing as witchcraft, though one cannot give credit to any particular modern instance of it.” WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 60 (16th ed., London, Strahan 1825).

33 See generally RICHARD ELLMANN, OSCAR WILDE (1988).

34 BLUE, supra note 1, at 53.

35 Id. at 81.

36 Id. at 81–82.

37 Id. at 82–83, 94.

38 BLUE, supra note 1, at 30–31.

39 Id. at 199.