THE PERSONAL QUESTION DOCTRINE

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* UCLA School of Law, J.D. 2021; Washington University in St. Louis, B.A. 2016. I am grateful to Professor Jennifer Chacon. Her insights and encouragement were invaluable to this project and to me. I am especially grateful to my father and mother, both of whose love and guidance carried me to today. I am also grateful to my student editors, whose herculean efforts improved this article immensely. Each error I made in writing this was a portal of discovery. Those, and those errors yet undiscovered, are my own. I hope you enjoy reading as much as I enjoyed writing.

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ABSTRACT

With the unprecedented leak of Justice Alito's draft opinion in Dobbs v. Jackson Women's Health Organization, the Court appears ready once again to abort Roe v. Wade. Underpinning Justice Alito's draft opinion is a vision of the Constitution's architecture of power: if it is not for the federal government to decide, it must be for the states—the Dual Sovereignty doctrine. A careful examination reveals the dilemma to be false, and reveals Dual Sovereignty to be little more than a partisan, ideological fabrication told and retold. An honest accounting of the history of the Tenth Amendment and its animating principle, Popular Sovereignty, reveals a path forward to securing for individual women the ability to decide whether to bear or beget a child: the Personal Question doctrine. The Personal Question doctrine is not particular to reproductive rights; rather it extends to decisions implicating individual sovereignty the Tenth Amendment reserves to the People.

INTRODUCTION

On January 18, 1892, thirty years before a woman would sit opposite the United States Senate lectern, Elizabeth Cady Stanton there delivered a speech entitled "Solitude of Self":

> Talk of sheltering woman from the fierce storms of life is the sheerest mockery, for they beat on her from every point of the compass, just as they do on man, and with more fatal results, for he has been trained to protect himself, to resist, to conquer. Such are the facts in human experience, the responsibilities of individual sovereignty. . . .
>
> Whatever the theories may be of woman's dependence on man, in the supreme moments of her life he cannot bear her burdens. Alone she goes to the gates of death to give life to every man that is born into the world. No one can share her fears, no one can mitigate her pangs; and if her sorrow is greater than she can bear, alone she passes beyond the gates into the vast unknown. . . .
>
> We may have many friends, love, kindness, sympathy and charity to smooth our pathway in everyday life, but in the tragedies and triumphs of human experience each mortal stands alone.[1]

In her speech, Cady Stanton spoke in support of women's suffrage about "self-sovereignty." Denying a woman the right to vote, Stanton argued, denied her any role in the government of her own destiny, denied her all choice, and so all freedom. Stanton's argument evokes the same argument Abraham Lincoln made against enslavement in Peoria, Illinois in 1854:

> When the white man governs himself that is self-government; but when he governs himself, and also governs *another* man, that is *more* than self-government—that is despotism. If the n[***]o is a *man*, why then my ancient faith teaches me that "all men are created equal;" and that there can be no moral right in connection with one man's making a slave of another.[2]

1 Elizabeth Cady Stanton, Solitude of Self, Address Before the Committee of the Judiciary of the United States Congress (Jan. 18, 1892), *reprinted in* SERIES V: PRINTED MATERIALS, 1850–1972, at 1–8.

2 Abraham Lincoln, Speech on the Kansas Nebraska Act at Peoria, Illinois (Oct. 16, 1854) (transcript available at POLITICAL SPEECHES AND DEBATES OF ABRAHAM LINCOLN & STEPHEN A. DOUGLAS 1854–1861, at 1 (Scott, Foresman, & Company 1896)).

Lincoln's ancient faith was in the timeless principles that the Framers forged during the Revolution.[3] Those principles' central concern was to keep the Revolution from its own undoing, to keep dissonant factions from dissolving the Union, to establish a republic worthy of ascent to empire across a continent, without setting into motion its descent into tyranny.[4]

The Framers' challenge was to scale their single political understanding across dispersed space. The Framers met that challenge by setting faction against faction, government against government, locked in a perpetual struggle, a static serenity.[5] Equipoise promised individual freedom, but depended on an antecedent proposition from which the Framers' precepts flow: the wellspring of ultimate power resides in the People, diffused among representative governments—Popular Sovereignty.[6] That power joins us in a dialogue across time with the Framers of the Constitution. It declares that in light of our lived experience, to realize the Constitution's original principles, the Constitution itself must change.[7] The Framers' generation enshrined that proposition in the Bill of Rights' Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[8]

Or to the people.

Sovereign power is obvious in moments so vast—Revolution, Reconstruction, World War—they bend a whole nation's arc away from

3 I write this article to propose the Personal Question Doctrine. In the course of articulating that proposition, I rely on history—certain figures, narratives and ideas. Throughout, I present history honestly and, insofar as I can, objectively. I do so with few illusions. No bias is acceptable, but some is inevitable. The Framers, Cady Stanton, Lincoln, and every Supreme Court Jurist to whom I cite are human, prejudiced, and therefore cannot be wholly innocent in this regard. The same goes for the principles. "Individual freedom" for decades meant, indeed still means, freedom for some, not all. The Framers' "timeless principles" relied, in part, on a pervasive system of peculiar subjugation of segments of society, Black people and women especially. My purpose here is not to scrutinize and deconstruct all of the history I bring to bear to my argument, or even most of it. My purpose here is to sketch landscapes of history and to propose a concept within the confines of a single article. To that end, I invite you to traverse with me arduous, divisive terrain in hopes of further extending Sovereignty and tilting history toward liberation. At moments, moral judgment is necessary. Elsewhere, I made the editorial choice—right or wrong—to withhold it. Where I fall short, I consider it part of my own intellectual journey and moral education.

4 John L. Gaddis, On Grand Strategy 173 (2018).

5 *Id.*

6 *See* The Federalist No. 10 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Equipoise also depended, in practice, upon subordination of whole swaths of society, though a comprehensive account is beyond the parameters of this article.

7 *See* Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction (2000).

8 U.S. Const. amend. X.

imperfect jurisprudence towards unalloyed justice. Sovereign power is less obvious in moments unknown and unrecorded. These are intimate moments which beg grave personal questions, whose answers constitute the threads of our moral identities, and whose answers' crushing burdens we each carry alone.

Consider the decision whether to bear or beget a child. A question fraught as it is estranging. A decision schismatic as war and seminal as revolution. Were it answered for you, you would be denied self-government at the moment it would matter most. The Tenth Amendment allocates to individuals the power to decide the question. Yet the prerogative to answer does not belong to the individual who bears the child. State legislatures all but decide.[9]

This article proposes a concept, the Personal Question Doctrine, to remand the decision of whether to bear or beget a child to whom it rightly belongs: the individual. The Personal Question Doctrine extends the Framers' experiment of distilling unity from faction, harmony from discord, to moments where politics and law fail to guarantee a woman's ability to stand in relation to men and to society as equal.[10]

Arriving at that long forestalled conclusion requires exposition of how individuals became alienated from reserved, sovereign power.[11] This

9 Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022), https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473.

10 *See* Ruth B. Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985). Throughout this article, I refer to individuals capable of bearing children as women. That is not to suggest that individuals who identify as women are the only ones among us who are capable of bearing children. The phrase is meant not to exclude, and to the extent possible, should be read to include.

11 Theories of old that have sought to do the same falter for want of workable criteria for discerning ordinary from extraordinary decisions. Some propose we follow the general pattern of the Framers' mandates, or their penumbras and emanations. *See* Griswold v. Connecticut, 381 U.S. 479 (1965). Others propose we follow the First Amendment's injunction that church and state remain separate—that religion and conscience so thoroughly pervade these decisions that the First Amendment must be invoked to keep a civil government from entangling itself with ecclesiastical questions. Laurence H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 11 (1973). Each fails to withstand criticism, for example, that were a given right to trump all limits, then lawless force would prevail over the force of law, Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1938 n.174 (2004) [hereinafter Lawrence v. Texas]; Jamal Greene, *Rights as Trumps?*,132 HARV. L. REV. 28, 1 (2018), or even if a government affords individuals a *choice* it might yet withhold the means to *decide*. *See, e.g.*, Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 1, 333 (1985). When the well thought out formulae of the past fail to provide the answer to a case which raises

article traces ideas' threads across time to show how, despite each successive generation of Supreme Court Justices' efforts at bending the Constitution to ideology, the impulses that animate our most hallowed precepts—Popular Sovereignty, Liberty, Equality, and Dignity—that sparked the Revolution and course still through our Constitution's text persevere.

Part I traces how Popular Sovereignty began as a creation myth and was reinvented into an altogether new species of institutional sovereignty. Part II then describes the Supreme Court's abandonment of Popular Sovereignty and turn to Due Process to protect individual freedoms. Part III recounts the rise of Human Dignity from the ashes of World War. Part IV invites the reader to examine that history in a new light. Part V offers a preliminary sketch of the Personal Question Doctrine, its meaning, and its contours. Tempting though it is to look past familiar history, careful observation of generations of Justices' tinkering reveals the grand designs long at work upon these precepts. Tracing these threads, our nation's intellectual sinews, reveals their beauty, complexity, and potential to remand Personal Questions to the People, and at long last to make real the idea of the Constitution.

I. Evolution of Popular Sovereignty

Popular Sovereignty in the United States began as a story about how the Union came into being. Over decades, the idea assumed various semblances, and was set to various purposes. After it had shed its usefuleness as an explanation of the metaphysical perplexities of Union, Popular Sovereignty became a mediator of the relationships between sovereign entities. After the Civil War all but proved the idea's uselessness as a binding agent among the Union's sections and as a protector of individual rights, Popular Sovereignty was consigned to desuetude, only to be revived once more.

A. *Creation Myth*

Popular Sovereignty began as a creation myth, a constitutive fiction. Popular Sovereignty explained how thirteen separate peoples were bound up into one common People. It explained the reason the Constitution was legitimate. It explained consent.[12] The word "sovereignty" derives from

problems of such fundamental importance, a woman's individual right to choose whether to terminate a pregnancy, it is time to pause and search for fresh concepts. Norman Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U. L. Rev. 787, 795 (1962).

12 Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 324–25 (1816) (reaffirming

old French "sovrain" and Latin "super," both meaning supreme.[13] British lore consolidated ultimate authority, legal and political, in the person of a monarch, the Crown.[14] In contrast to their British ancestors, Americans did not believe that providence placed any King or Queen at the center of the political universe. Americans believed that they, the People, by their consent, were the origin of political power. Although the phrase, "sovereignty" never appears in the Declaration of Independence or the Constitution, its presence permeates throughout.[15] Popular Sovereignty unites two rival ideas that undergird our system of government: self-government, and the few ruling the many.[16] Popular Sovereignty binds these two impulses in equipoise.

To Americans, the British mistook the majesty of the monarchy for the rationality of popular governance. Instead, Americans thought of Popular Sovereignty differently, rejecting the linkage of social rank with political power.[17] James Wilson, one of six individuals who signed both the Declaration of Independence and the Constitution, and a preeminent Founding-era American legal theorist, likened British notions of Popular Sovereignty to legends about the source of the Nile River. The Nile's majesty was everyone's to behold, yet its origin eluded even the greatest of monarchs. So enduring was its mystery that with each retelling, it thickened with fantasy. In time, humanity discovered the River's true source: "a collection of springs small, indeed, but pure."[18] Stripped of its veil of fantasy, Wilson taught, the true wonder of Popular Sovereignty becomes plain: ". . . the streams of power running in different directions, in different dimensions, and at different heights watering, adorning, and fertilizing the fields and meadows

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the Constitution's Preamble's fiction: that the "people of the United States" ably delegated sovereign authority as they deemed necessary and proper, and suggesting that there were specific "sovereign authorities" the People reserved to themselves).

13 Hugh Evander Willis, *The Doctrine of Sovereignty Under the United States Constitution*, 15 VA. L. REV. 437, 437 (1929).

14 Wilson R. Huhn, *Constantly Approximating Popular Sovereignty: Seven Fundamental Principles of Constitutional Law*, 19 WM. & MARY BILL RTS. J. 291, 297 (2010).

15 In his speech in Peoria, Illinois, President Lincoln alluded to this principle, calling it the "sheet anchor of American republicanism." Lincoln, *supra* note 2.

16 Sanford Levinson, *Popular Sovereignty and the United States Constitution*, 123 YALE L.J. 2644, 2653 (2014) (discussing the declaration of independence and the constitution).

17 *See* EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 306 (1988).

18 JAMES WILSON, *Lectures on Law Delivered in the College of Philadelphia in the Years One Thousand Seven Hundred and Ninety, and One Thousand Seven Hundred and Ninety One*, *reprinted in* THE WORKS OF JAMES WILSON 67, 80–81 (Robert Green McCloskey ed., 1967); *see also* Jeremy M. Sher, Note, *A Question of Dignity: The Renewed Significance of James Wilson's Writings on Popular Sovereignty in the Wake of* Alden v. Maine, 61 N.Y.U. ANN. SURV. AM. L. 591, 599–600 (2005).

. . . originally flow from one abundant fountain. In this [C]onstitution, all authority is derived from THE PEOPLE."[19]

Enlivening that American myth required destroying its British precursor. As the origin of power, the British Crown intertwined human and institution as sovereign. In relocating that origin, Americans disentangled human from institution, breeding an altogether new species of governmental sovereignty. Americans crafted their founding political papers in the image of British colonial charters, licenses to form and operate business corporations under the British crown (e.g., the Massachusetts Bay Company Charter).[20] Americans' analogy of corporate charter to political compact giving society organization based on consent suggests this new species' key characteristic: that it is sovereign on certain terms. It can be bound, checked, divided, and diffused.[21] It is sovereign only in a derivative sense and within bounds. Outside them, true and natural sovereignty, indivisible and ultimate, resided in the People.

To make myth reality, Americans invented a ritual: the People assembled in conventions to consent to delegating sovereignty on certain terms, to ratify the Constitution. Virtual embodiments of the People, conventions wield sovereignty's full measure of power.[22] The question a convention answers is about the first of first principles: whether to "alter or abolish" a form of government.[23] The question marks simultaneous rupture and continuity: the Constitution not only guides conventions' procedure, it also submits to those conventions' decisions. Legislatures craft positive law, law for everyday life. Conventions craft ultimate law, law against which all positive law is measured. The convention ritual embodies James Wilson's idea of power's origin. Constitutions control legislatures. The People control constitutions.[24]

19 James Wilson, Speech Delivered at the Convention of Pennsylvania (Nov. 26, 1787), *in* THE WORKS OF JAMES WILSON VOLUME II, 772 (Robert Green McCloskey ed., 1967).

20 Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1432–60 (1987).

21 *Id.*

22 *Id.* at 1459–60.

23 *Id.* at 1441, 1459 n.148 (Whereas Amar interprets the right to "alter or abolish" as a sort of legalized and channeled version of a more lawless-sounding right to revolution, I suggest it can be interpreted more broadly as a power to decide over questions of an ultimate nature. Whether a convention alters or abolishes a government belongs to this category of constitutive question, whether to meet one's imminent demise on one's own terms may be another.).

24 Sher, *supra* note 18, at 593, 596 (As Wilson explained to the Constitutional Convention of Pennsylvania in 1787: "the people may change the constitutions, whenever and however they please. This is a right, of which no positive institution can ever deprive them.").

At the threshold of being, Americans conceived of Popular Sovereignty as a creation myth, made real by ritual, that explained the extraordinary decision to constitute thirteen separate polities and their populations as single People. Once that liminal moment had passed, so too did Americans' early understanding of Popular Sovereignty.

B. *Chisholm Prelude*

The metaphysics of Union perplexed Americans. For all its grand rhetoric, the Federalist Constitution could not answer the most basic question: who among us can decide? Whom does the Constitution empower to answer these extraordinary, constitutive questions? In *Chisholm v. Georgia*,[25] the Supreme Court took up the question: who among us is sovereign?

Chisholm was a struggle over the Constitution that began as a squabble over a contract. In 1777, a merchant in South Carolina, Robert Farquhar, sold goods to the state of Georgia during the Revolutionary War. Georgia failed to pay the merchant before he died, and so the merchant's executor, Alexander Chisholm, sued in a federal trial court. The executor invoked the court's diversity jurisdiction in support of his claim in assumpsit, a type of breach of contract claim. Georgia defended that states are immune from suit in any court. Justice Iredell dismissed the executor's claim. Chisholm again filed suit, this time in the Supreme Court. Georgia refused to appear. The Court rejected Georgia's defense, that its status as sovereign gave it immunity, and thereby established the federal judiciary's power under Article III of the Constitution to hear controversies between states and citizens of other states.[26]

Chisholm was about far more than just a contract. In 1783, the Washington Administration sought to enforce a peace treaty with Great Britain.[27] The treaty assured British creditors of their power to collect debts that predated the Revolution.[28] In defiance of Britsh creditors and federal efforts, however, states enacted laws expropriating British debts to support their local currencies.[29] If states could not be compelled to appear in federal court, British creditors would have to seek relief in hostile state courts.[30] To reach the question of Georgia's immunity defense, the Court had to decide

25 *See* Chisholm v. Georgia, 2 U.S. 419 (1793).

26 Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 62 (1989).

27 *Id.* at 98.

28 *Id.*

29 *Id.*

30 Massey, *supra* note 26, at 98–101.

the question of sovereignty, and signal to the world that this new federal government could conduct its affairs.[31] Distinguishing American and British sovereignty, Chief Justice Jay, wrote in *Chisholm*:

> In Europe the sovereignty is generally ascribed to the Prince; here it rests with the people; there, the sovereign actually administers the Government; here, never in a single instance; our Governors are the agents of the people, and at most stand in the same relation to their sovereign, in which regents of Europe stand to their sovereigns.[32]

The People may occupy neither the legislator's seat nor the judge's bench. Still, the People are sovereign. Among the "great objects" which a national government is designed to pursue, he wrote, is to:

> [E]nsure justice to all: To the few against the many, as well as to the many against the few. It would be strange . . . that the joint and equal sovereigns of this country, should, in the very Constitution by which they professed to establish justice, so far deviate from the plain path of equality and impartiality.[33]

Assailing Georgia's defense, a governmental sovereign's attempt to don a cloak of immunity from suit by a natural sovereign, Chief Justice Jay expounded his conception of the Federalist Constitution's Popular Sovereignty:

> [T]he Constitution places all citizens on an equal footing, and enable[d] each and every of them to obtain justice without any danger of being overborne by the weight and number of their opponents; and, because it brings into action and enforces this great and glorious principle, that the people are the sovereign of this country, and consequently that fellow citizens and joint sovereigns cannot be degraded . . .[34]

31 *See* Chisholm v. Georgia, 2 U.S. 419 (1793).

32 *Chisholm*, 2 U.S. 419 at 472. Chief Justice Jay expounded on the differences between American and European permutations of Popular Sovereignty with distinct authority. Not only had served as ambassador to France and Spain, he had also presided over the Continental Congress. *See John Jay*, Britannica, https://www.britannica.com/biography/John-Jay (Dec. 8, 2021).

33 *Chisholm*, 2 U.S. at 477.

34 *Id.* at 479.

Chisholm was the first time the Supreme Court interpreted the text of the Constitution—yet *Chisholm* is not a case most law students read, much less for its Tenth Amendment holding.[35] Perhaps because history subsumed *Chisholm*'s examination of Popular Sovereignty, a quintessential Tenth Amendment undertaking, into another Amendment's story. In 1795, the states ratified the Eleventh Amendment, repudiating *Chisholm*.[36] Recognizing the financial and political toll the Court's assertion of supremacy would exact on them, states rebelled at *Chisholm*. Within days of the decision's announcement, state legislatures resolved to amend the federal Constitution to undo *Chisholm*; Georgia's House of Representatives passed legislation rendering any judgment upon itself on behalf of Alexander Chisholm a felony punishable by "death, without the benefit of the clergy, by being hanged."[37] By 1890, the Court's own account of this history in *Hans v. Louisiana* took *Chisholm*'s, all of *Chisholm*'s, undoing as gospel.[38] The Eleventh Amendment overruled *Chisholm*.

Or so the story goes.

C. *Reinvention of Popular Sovereignty as a Structural Principle—Federalism*

At the founding, Popular Sovereignty was a fiction that united dueling ideas of self-government and the few ruling the many; a fiction that gave meaning to representative democracy. *Chisholm* marked the passage of Popular Sovereignty from creation myth to instrument to chart the frontiers of power among governmental sovereigns: Federalism.

Sixteen years after *Chisholm*, the Supreme Court put Popular Sovereignty to a new use in *McCulloch v. Maryland*.[39] In 1816, Congress chartered the Second Bank of the United States.[40] In an attempt to raise revenue and wrangle federal authority, the state of Maryland taxed the Bank—a tax the Bank's Baltimore Cashier, James McCulloch, refused to pay.[41] Chief Justice Marshall concluded that the Constitution, without saying

35 Each Justice came close to invoking it, though none did. Sharon E. Rush, *Oh, What a Truism the Tenth Amendment Is: State Sovereignty, Sovereign Immunity, and Individual Liberties*, 71 FLA. L. REV. 1095, 1105 n.38 (2019).

36 The disagreement over *Chisholm*'s outcomes may explain why most first year Constitutional Law courses omit it entirely. *See* Randy Barnett, *The People or the State?:* Chisholm v. Georgia *and Popular Sovereignty*, 93 VA. L. REV. 1729, 1729–58 (2007).

37 Massey, *supra* note 26, at 111 (quoting AUGUSTA CHRON., Nov. 23, 1793) (reporting legislative action of Nov. 19, 1793).

38 *See* Hans v. Louisiana, 134 U.S. 1 (1890).

39 *See* M'Culloch v. Maryland, 17 U.S. 316 (1819).

40 *Id.* at 317.

41 *Id.* at 317–19.

so, empowered the federal government to charter a bank, and forbade states from taxing the federal government or its instrumentalities, that is, the Bank. Law students remember the case in short-hand to mean that federal power is expansive, that the Constitution gives Congress both enumerated and implied powers. This heuristic is ironic: Chief Justice Marshall relied on the Tenth Amendment as a *curb* on federal power, but whose distinction between the states and the People nevertheless compelled the conclusion that a state cannot tax the federal government.[42]

Under British imperial rule, all power had been consolidated in the Crown—this proved intolerable. Under the Articles of Confederation, little, if any power was consolidated in the national government—this proved unworkable. Chief Justice Marshall staked out a middleground in *McCulloch*: our Constitution employs Popular Sovereignty to ballast relationships among sovereign entities.[43]

The Court has likewise invoked Popular Sovereignty to ballast relationships among sovereign entities' organs. In *Luther v. Borden*, rival factions each claimed legitimate, democratic control of Rhode Island under Article IV, Section 4 of the Constitution, which requires that each states' government be a "republican form."[44] The Constitution's guarantee of a republican government, the Court held, cannot be enforced by the Court: the Court's "power begins after [the People's] ends."[45] Instead, that guarantee is political, and can only be enforced by a state's voters or the federal government's political branches, Congress or the President. "[I]f the people, in their distribution of powers under the constitution, should ever think of making judges supreme arbiters in political controversies . . . they will dethrone themselves . . . ."[46]

Although *Chisholm* and *McCulloch* appeared to portend the enduring dynamism of Popular Sovereignty, *Luther*'s conclusion of a hollow power that can be enforced only by fiat of politics, rather than by force of law, suggests what was to come for Popular Sovereignty, failure and desuetude.

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42 *Id.* at 429 ("The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States . . . . [T]he people of a single State cannot confer a sovereignty which will extend over them.").

43 Amar, *supra* note 20, at 1425, 1427, 1460–61.

44 Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849).

45 *Id.* at 52.

46 *Id.* at 52–53.

D. *A Spectacular Failure: Civil War*

If Popular Sovereignty's and the Tenth Amendment's purpose was to ballast, and to keep governmental sovereigns afloat through the turbulence of early nationhood, the maelstrom of Civil War marked a spectacular failure. The Civil War also exposed the limits of the Constitution and the Bill of Rights' efficacy as drafted to protect individual rights.

By the close of the Civil War, the Court had recognized the Tenth Amendment as Popular Sovereignty's home in the text of the Constitution. In *Gordon v. United States*, Justice Taney wrote that the Tenth Amendment and its principle of Popular Sovereignty prevented the federal government from encroaching on powers of the states or of the People that predated the Constitution.[47] In his view, the federal judiciary's role was to use the Tenth Amendment to protect the states and the People from the federal government.[48] Justice Taney's view aligned with his effort to stymie President Lincoln's prosecution of the Union's war effort by emergency measure, and with his gravely misconceived attempt to preserve the Union by siding with enslavers from the bench. In *Scott v. Sanford*, otherwise known as *Dred Scott*, Justice Taney wrote that the Missouri Compromise, a last-ditch effort at holding the line against sectional rupture by granting freedom to enslaved persons in federal territory, violated the Constitution; it deprived enslavers of "property" and therefore of Due Process under the Fifth Amendment.[49] Justice Taney's conclusion was abominable, but was supported by precedent. Recall in *Chisholm*, Chief Justice Jay wrote that the Revolution "devolved [sovereignty] on the people . . . but they are sovereigns without subjects (*unless the [enslaved] African[s] . . . among us may be so called*) and have none to govern but themselves . . . ."[50] To reach his Due Process conclusion, Justice Taney had first to establish that Black people were property. He reasoned that the Constitutions' Framers thought so little of enslaved Africans that a product of their handiwork, the Constitution, could afford such people no legal rights.[51] Justice Taney's grotesque logic degraded Black people to mere objects, depriving them of not only of citizenship, but of humanness, damning a freed person to servitude.[52]

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47 Gordon v. United States, 117 U.S. 697 (1864); Elizabeth Anne Reese, *Or to the People: Popular Sovereignty and the Power to Choose a Government*, 39 CARDOZO L. REV. 2051, 2069 (2018).

48 Reese, *supra* note 47, at 2069.

49 Scott v. Sanford (Dred Scott Decision), 60 U.S. (19 How.) 393, 450–52 (1857).

50 Chisholm v. Georgia, 2 U.S. 419, 471–72 (1793) (emphasis added).

51 *Dred Scott Decision*, 60 U.S. at 411–12.

52 *Id.*

Perhaps it was Justice Taney's handiwork that rendered Popular Sovereignty and the Tenth Amendment ready tools for states' rights theorists, and advocates of the Confederacy and its heir, Jim Crow. Perhaps, too, it was the taint of Justice Taney's linkage of Popular Sovereignty with the Tenth Amendment that fated them both to modern scholarship's suspicion and scorn.[53]

E. *Consigned to Desuetude*

Although the Civil War settled the supremacy of one governmental sovereign over another, a question remained: could the People exercise sovereign power independent of a government? Popular Sovereignty's failure to stave off Civil War began a process of the idea's decline that quickened soon after the arrest of an anarchist.

In *United States ex. Rel. Turner v. Williams*, the Court upheld the federal government's decision to deport the anarchist because a governmental sovereign is entitled to a power of self-preservation.[54] Concurring in *Williams*, Justice Brewer lamented that the Court gave the Tenth Amendment and Popular Sovereignty "too little effect."[55] Justice Brewer critiqued the Court's decision to empower a governmental sovereign to the detriment of the People's ability to alter or abolish government—the original constitutive choice.[56] In *United States v. Sprague*, Justice Roberts foreclosed any other path to the People exercising sovereign power than Article V of the Constitution's process for amendment, that is, a vote of a state's legislature.[57] For expression, Popular Sovereignty depended on government.

Stripped of its role of protecting individuals, the Tenth Amendment entered the twentieth century consigned to desuetude as a sometimes enforceable principle that could mediate relationships between governments. In 1918, Congress passed a law protecting birds that migrate across state lines from hunters to enforce a treaty entered into with Great Britain. The state of Missouri challenged U.S. Game Warden Ray Holland's enforcement of

53 *See, e.g.*, Heather K. Gerken, *Foreword: Federalism All the Way Down,* 124 Harv. L. Rev. 4, 44 (2010).

54 *See* United States *ex rel.* Turner v. Williams, 194 U.S. 279 (1904).

55 *Id.* at 296 (Brewer, J., concurring) (In not so many words, Justice Brewer reasoned, first, that the Constitution grants the federal government certain powers by enumeration or by implication; second, that the Constitution reserves any additional powers to the people; and third, that those can be exercised only by, or upon further grant from "them.").

56 *Id.*

57 282 U.S. 716, 730 (1931) (holding Congress may choose the proper procedure for constitutional amendment).

the law and the underlying treaty, arguing that the federal government had acted beyond the scope of its power, in that the Tenth Amendment reserved the power to regulate migratory bird hunting to the states. In *Missouri v. Holland*, Justice Holmes applied the Tenth Amendment as a tool of mediating competition *between* two sovereigns: the federal and state governments.[58] Beyond demonstrating the Court's narrowed understanding of Popular Sovereignty as exclusively a structural principle, Justice Holmes described the extent of each sovereign entity's power as determined by the object of its authority.[59] The individual fell from analysis. Once the Tenth Amendment had failed to achieve Chief Justice Jay's noble objects of ensuring justice to all and protecting individual rights, the Court turned instead to Liberty under the Fourteenth Amendment.[60] Sovereignty belonging to contrived institutions became the only sovereignty.

As the United States passed from callow, continental republic to budding global power, Congress matured into a more vigorous regulator of American life.[61] For some time, Justices appointed by conservative-leaning presidents from Harding to Hoover resisted the administrative state's growth, citing to the Tenth Amendment.[62] Resistance proved futile. As the Court's composition changed toward the middle of the twentieth century, the Court empowered Congress by wresting Popular Sovereignty, reducing the Tenth Amendment to a mere "truism," consigning them both to desuetude.[63]

58 Missouri v. Holland, 252 U.S. 416, 433–34 (1920); United States v. Butler, 97 U.S. 1 (1936) (holding that agricultural subsidy coupled with mandated reduction in crop yields exceeded federal power, impinging on powers reserved to states by Tenth Amendment).

59 *Holland*, 252 U.S. at 433–34.

60 *See* Lochner v. New York, 198 U.S. 45, 73–74 (1905) (holding New York state law violated "liberty of contract" protected by the Due Process Clause of the Fourteenth Amendment).

61 *See* Nat'l Lab. Rels. Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding Congress' exercise of Commerce Power following a period of stiff judicial resistance).

62 *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918) (concluding The Keating-Owen Child Labor Act was outside the Commerce Power and the regulation of production was a power reserved to the states via the Tenth Amendment); *see also* Steward Mach. Co. v. Davis, 301 U.S. 548, 616 (1937) (Butler, J., dissenting) (asserting that the Social Security Act violated the Tenth Amendment).

63 *See* United States v. Darby, 312 U.S. 100, 123–24 (1941) (calling Tenth Amendment a mere "truism" which places no substantive limit on Congress' power); Wickard v. Filburn, 317 U.S. 111, 120 (1942) (holding that restraint on federal power was less a matter of textual interpretation, and more one of politics).

F. *Conservatives Revive our Popular Sovereignty*

Tectonic shifts in the American electorate and late-twentieth century conservative politicking proved how powerful and elusive a truism the Tenth Amendment could be.[64] Conservative jurisprudence followed its politics in reviving the Tenth Amendment. In the 1970s, moderate-to-liberal Republicans in Northeastern states and conservative Democrats in the South switched parties.[65] Thus began the electorate registering cultural sorting and partisan polarization.[66] Republican strategists perceived the gravity of the realignment, and saw that two key segments of voters were up for grabs: Catholics, and industrial Midwesterners.[67] The key moment occurred in 1971. Then Democratic grandee and presidential frontrunner, Edward Muskie, a Catholic senator from Maine, took an interview with David Frost, coming out against abortion.[68] On the advice of his advisors Charles Colson and Patrick Buchanan, President Richard Nixon struck back. President Nixon said that he, too, believed in the "sanctity of human life—including the life of the yet unborn." Abortion, President Nixon declared, was the "province of the states, not the Federal government. . . [because] that is where the decision should be made."[69]

As part of its late twentieth century conservative revival, Popular Sovereignty reprised its role as mediator among sovereigns. Only this time, the Court created a series of Tenth Amendment doctrines—Dual Sovereignty, anti-commandeering, Sovereign Immunity, and Equal Sovereignty—whose purpose was to define the characteristics of a governmental sovereign, and whose effect was to devolve power away from the federal government to the states.[70]

64 Rush, *supra* note 35, at 1113.

65 Drew Desilver, *The Polarized Congress of Today Has Its Roots in the 1970s,* Pew Rsch. Ctr. (Mar. 10, 2014), https://www.pewresearch.org/fact-tank/2014/06/12/polarized-politics-in-congress-began-in-the-1970s-and-has-been-getting-worse-ever-since/.

66 *Id.*

67 Daniel K. Williams, *The GOP's Abortion Strategy: Why Pro-Choice Republicans Became Pro-Life in the 1970s*, 23 J. Pol'y Hist. 513, 517 (2011).

68 James Reston, *Nixon and Muskie on Abortion*, N.Y. Times, Apr. 7, 1971.

69 Williams, *supra* note 67, at 536 n.13 (citing Richard Nixon, Statement on Abortion (Apr. 3 1971) (on file at Nixon Presidential Library)).

70 *See generally* Kathleen M. Sullivan, *From States' Rights Blues to Blue States' Rights: Federalism After the Rehnquist Court*, 75 Fordham L. Rev. 799, 799–800 (2006).

1. Dual Sovereignty

Popular Sovereignty's conservative revival began with its reinvention as *Dual* Sovereignty. Conservative jurists' doctrine of Dual Sovereignty dovetailed Justice Holmes' recasting of Popular Sovereignty as a mechanism of mediation between two entities, only. Conservative jurists were so effective at reinventing the concept that liberal jurists, perhaps unsuspectingly, adopted the reasoning.

In 1974, Congress amended the Fair Labor Standards Act of 1938 to apply its wage and hour regulations to state and local government employees.[71] State and local governments challenged the 1974 amendment as federal overreach. Two years later, the Supreme Court in *National League of Cities v. Usery* struck down that amendment, concluding that the Tenth Amendment reserved control over wage and hour rules to the states.[72] Thus began the conservative jurisprudential revival.

Writing in dissent in *National League of Cities*, Justice Brennan assailed the Court's majority for snubbing the Tenth Amendment's distinction between the People and the states.[73] Wage and hour regulation belonged to the province of Article I of the Constitution's Commerce Clause, and so could not be reserved to the states, he argued. Justice Brennan acknowledged that the Tenth Amendment distinguishes among three sovereign entities. Yet he argued that Congress exercising its commerce power under Article I is virtually the same as the People exercising sovereign authority. Justice Brennan's understanding of Popular Sovereignty elides the United States and the People.

Nine years later, Justice Brennan was in the majority as Popular Sovereignty's pendulum swung leftward. The San Antonio Metropolitan Transit Authority (SAMTA) claimed public transportation was a "traditional governmental function," and so it was exempt from the Fair Labor Standard Act's wage and hour rules under Court precedent. Joe Garcia, a SAMTA employee filed suit for overtime pay guaranteed by the Fair Labor Standard Act. In *Garcia v. San Antonio Metro Transit Authority*, a liberal majority overturned *National League of Cities*, holding states' sovereignty was guarded by the federal structure, rather than by any discrete limitation set out in any particular text of the Constitution, and that federal structure consisted of two sovereigns, only.[74]

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71 Nat'l League of Cities v. Usery, 426 U.S. 833, 835 (1976).

72 *Id.* at 852.

73 *Id.* at 868 n.9 (Brennan, J., dissenting).

74 Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 551–52 (1985) (overruling *Nat'l League of Cities*, 426 U.S. 833).

Writing in dissent in *San Antonio Metro Transit* Authority, Justice Powell rebuked the Court for paying lipservice to states' Sovereignty and treating the Tenth Amendment as if it were rhetorical froth rather than mandatory law.[75] To reinforce his point that the majority's conclusion marked a departure from the Constitution's text, Justice Powell cites a version of the Tenth Amendment: "That Amendment states explicitly that '[t]he powers not delegated to the United States . . . are reserved to the States.'"[76] In decrying his opposition's infidelity to the Constitution's text, Justice Powell inexplicably cites a version of the Tenth Amendment that omits "the People" entirely—a bewildering omission. While Justice Brennan elided the United States and the People in *National League of Cities*, Justice Powell elided the states and the People in *Garcia v. San Antonio Metro Transit Authority*.[77]

In 1986, just over a decade after President Nixon appointed William Rehnquist to the bench, President Reagan elevated Associate Justice Rehnquist to Chief Justice. Justice Rehnquist's promotion was part and parcel with Popular Sovereignty's revival. Popular Sovereignty had entered the twentieth century consigned to desuetude, Dual Sovereignty exited that century as a "defining feature of our Nation's constitutional blueprint."[78] For almost forty years, the federal government's political branches assumed there was no right in the Constitution that limited federal power.[79] Popular Sovereignty's revival upended that assumption. Though the revival originated with conservative jurists, liberals, too, joined in. Popular Sovereignty transformed into Dual Sovereignty.[80]

75 *Id.* at 559–60 (Powell, J., dissenting).

76 *Id.* at 574.

77 *Id.* at 574–76.

78 "Dual sovereignty," Justice Rehnquist wrote, "is a defining feature of our Nation's constitutional blueprint. States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government. Rather, they entered the Union 'with their sovereignty intact.'" Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 751 (2002) (quoting Blatchford v. Native Vill. of Nootak, 501 U.S. 775, 779 (1991) (internal citations omitted)).

79 H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 Va. L. Rev. 633–89 (1993).

80 Not to be confused with the *doctrine* of dual sovereignty, articulated in *Heath v. Alabama*, 474 U.S. 82, 88 (1985) (holding the Fifth Amendment's Double Jeopardy Clause does not prevent two separate states' prosecutors from trying an individual for the same crime, as opposed to state and federal prosecutors trying an individual for the same crime).

2. Anti-Commandeering

Dual Sovereignty narrowed the universe of sovereign entities to two, only, leaving the People elided, enfeebled. It follows from Dual Sovereignty that states entered the Union under the Federalist Constitution with their sovereignty intact, and a governmental sovereign cannot be told what to do.[81] The second doctrine derived from the Tenth Amendment, anti-commandeering, shields state governments from federal compulsion, and stops the federal government from commandeering state governments in service of federal ends.

In 1981, John Hinckley Jr. attempted to shoot and kill President Ronald Reagan.[82] Of six shots Hinckley fired before Secret Service agents subdued him, the first struck an assistant to President Reagan, James Brady. In 1993, Congress passed the Brady Handgun Violence Prevention Act, establishing federal background checks for gun buyers.[83] The Brady law contained an interim measure: it required local law enforcement to conduct background checks on prospective handgun buyers until the federal government established its own system of background checks. Jay Printz, a sheriff in Ravalli County, Montana, sued the federal government, arguing that the Brady law's interim measure violated the Tenth Amendment's anti-commandeering doctrine. In *Printz v. United States*, the Court struck the interim measure down.[84] Writing for the Court's majority, Justice Scalia reasoned from the Constitution's creation of two sovereigns, Dual Sovereignty, that neither a state nor its employees can be commandeered in service of a federal mandate. States could not be a proper "object" of federal authority.[85]

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81 Fed. Mar. Comm'n, 535 U.S. at 751.

82 Robert Pear, *Jury Indicts Hinckley on 13 Counts Based on Shooting of President*, N.Y. TIMES, Aug. 25, 1981, at A17.

83 *See* Brady Handgun Violence Prevention Act, Pub. L. No. 103–159, 107 Stat. 1536 (codified as amended in scattered sections of 18, 34, and 42 U.S.C.).

84 521 U.S. 898, 933–35 (1997).

85 *Id.* at 920 (citing THE FEDERALIST NO. 15, at 109 (Alexander Hamilton) (Clinton Rossiter ed., 1961)); *see also* New York v. United States, 505 U.S. 144 (1992) (In 1985, Congress amended the Low-Level Radioactive Waste Management Act to offer states financial carrots to encourage disposal of radioactive waste and to force states to take ownership of, and liability for, waste they could not dispose of at dump sites. The state of New York sued the federal government, arguing that regulation of waste management was a power belonging only to states. In *New York v. United States*, the Court struck down the second provision. Writing for the Court's majority, Justice O'Connor reasoned that the law would commandeer state governments, and would be inconsistent with the Constitution's division of authority between federal and state governments.).

In time, the anti-commandeering doctrine morphed from a bar against compulsion to an affirmation of states' decisionmaking authority. In 2011, the New Jersey legislature posed a question to voters: should New Jersey allow sports gambling? Yes, the voters said. Shortly thereafter, the New Jersey legislature passed an amendment to its state constitution and passed a law realizing the voters' will. The problem: in 1992, Congress passed the Professional and Amateur Sports Protection Act, which prohibited states from allowing sports gambling. Against a challenge brought by sports leagues, New Jersey defended that PASPA violated the anti-commandeering doctrine.[86] In *Murphy v. National Collegiate Athletics Association*, the Supreme Court held that Congress prohibiting states from authorizing sports gambling violated the anti-commandeering doctrine. Writing for the Court's majority, Justice Alito framed his analysis with Dual Sovereignty.[87] The choice of whether to authorize sports gambling was a choice of policy—a controversial and moral choice, which Justice Alito concluded, "is not ours to make."[88]

Within a universe whose parameters Dual Sovereignty dictates, the anti-commandeering doctrine enforces those parameters, preventing sovereign entities' overreach into others' domains, ensuring proper allocation of decisionmaking authority.

3. Sovereign Immunity

Dual Sovereignty defined the universe of sovereign power's parameters. The anti-comandeering doctrine guards states against federal decisions that violate states' power to decide, their sovereign dignity. If a state could be called into court after exercising its power to decide, that would be no power at all. As part of the conservative project of devolving power downward, to prevent federal interference, the Court reinveneted a doctrine of Sovereign Immunity to prevent the federal government from empowering citizens to hold a state to account for acting in its sovereign capacity.[89]

Sovereign Immunity was not a new idea in the 1970s. In *Chisholm*, the Court established its own jurisdiction to hear a citizen of one state's claim against another state. The Court's conclusion in *Chisholm* implies that a citizen is empowered to bring such an action in a federal court. The

86 Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1471 (2018).

87 *Id.* at 1475.

88 *Id.* at 1484.

89 Sullivan, *supra* note 70, at 804 ("These sovereign immunity decisions, like the commandeering decisions, derive principally from the tacit structural postulates of the Constitution, not from the literal text of the Eleventh Amendment.").

Eleventh Amendment was ratified soon after. In 1890, the Court in *Hans v. Louisiana* instructed that, despite its literal wording doing nothing of the sort, the Eleventh Amendment restored to states the principal trapping of Sovereignty they had enjoyed at common law before the Constitution entered the picture: immunity.[90] The *Hans* Court failed to specify whether the Eleventh Amendment restored immunity to states from all suits, or just from some suits with certain procedural postures or party configurations. That ambiguity aside, *Hans* was a bewildering departure from the "plain path of equality and impartiality" the Court set out in *Chisholm*, which subordinated contrived to natural sovereigns.[91]

In law, for every right there must be a remedy. In 1908, Minnesota enacted a law regulating railroad rates; a federal court struck down Minnesota's law for violating Northern Pacific Railways shareholders' Fourteenth Amendment Due Process rights. The court's remedy was an injunction prohibiting Minnesota's Attorney General, Edward Young, from enforcing the law. The problem: Young represented the state, and so Young should have enjoyed immunity as a sovereign's agent. If Young were indeed immune, how could federal law be supreme, as the Constitution's Supremacy Clause requires? A federal right would be without a remedy. In *Ex Parte Young*,[92] the Court reasoned that Young acted beyond the state's authority in enforcing a state law in violation of the Constitution, thereby shedding immunity.

The *Hans* Court portrayed immunity as part of a state's sovereignty, but left tremendous ambiguity in its wake. The *Young* Court relied on interpretative fiat to characterize a private act as a public one, a legal fiction that carries a "distinct air of unreality."[93] Chief Justice Rehnquist saw his opening.

In 1988, Congress passed the Indian Gaming Regulatory Act (IGRA) to regulate gaming on Native American land—bingo, in particular.[94] IGRA granted tribes the right to regulate gaming on their lands so long as gaming was not prohibited by federal or state law. Tribes could conduct games on their lands, but only if a state consented; IGRA also required states to negotiate in good faith with tribes. Finally, IGRA granted tribes a statutory right to sue a state in federal court if a state failed to negotiate.[95]

90 Hans v. Louisiana, 134 U.S. 1, 13 (1890).

91 Chisolm v. Georgia, 2 U.S. 419, 477 (1793) (opinion of Jay, C.J.).

92 *Ex Parte Young*, 209 U.S. 123 (1908); Rush, *supra* note 35, at 1122.

93 James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of* Ex Parte Young, 72 STAN. L. REV. 1269, 1287 (2020).

94 Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

95 Laura M. Herpers, *State Sovereign Immunity: Myth or Reality After* Seminole Tribe of

The Seminole Tribe of Florida alleged that they had asked their state to negotiate to allow gaming activities, but Florida refused.[96] The Seminole Tribe sued Florida for violating IGRA. Florida raised a Sovereign Immunity defense. In *Seminole Tribe v. Florida*, the Court decided that although the Eleventh Amendment appears to restrict only a certain category of suits against states, the Eleventh Amendment does not mean what it says.[97] Instead, Sovereignty inheres in statehood, immunity inheres in Sovereignty, and therefore without their consent, states cannot be sued in federal court.[98]

The Seminole Tribe also sought an injunction against Florida's governor to force negotiations. The Court rejected this plea for relief, too, because the list of remedies set out in IGRA did not include injunctions. This outcome was not foreordained. The Rehnquist Court could have presumed the opposite, that injunctions' absence from IGRA's list of remedies meant Congress did *not* exclude injunctions.[99] Instead, the Court withheld relief. The Court in *Seminole Tribe* defied *stare decisis*, demonstrating the length the Court under Justice Rehnquist's leadership was willing to go to shift the balance of power between dual sovereigns.

A few years later, the questions *Seminole Tribe* had posed to the Court reappeared in its docket.[100] In 1992, a group of probation officers sued their employer, the state of Maine, in federal court for violations of the Fair Labor Standards Act's wage and hour rules.[101] After the Court decided *Seminole Tribe*, a federal trial court dismissed the probation officers' suit because, under *Seminole Tribe*, states are immune from suit in federal court, and Congress could not pierce that immunity. The probation officers then took their lawsuit to state court, where Maine claimed immunity. The problem: the Eleventh Amendment does not extend its immunity to sovereigns in state courts.[102]

In *Seminole Tribe*, the Court tinkered with the relationship between sovereigns, a quintessential Tenth Amendment undertaking, but had confined its reasoning to the Eleventh Amendment. In *Alden v. Maine*, Justice Kennedy invoked the Tenth Amendment explicitly:

> The phrase [Eleventh Amendment immunity] is…something

Florida v. Florida*?*, 46 Cath. U. L. Rev. 1005, 1016 (1997).

96 *Seminole Tribe*, 517 U.S. at 51–52.

97 *Id.* at 54.

98 *Id.*

99 Rush, *supra* note 35, at 1123.

100 Alden v. Maine, 527 U.S. 706 (1999).

101 *Id.*

102 *Id.* at 713.

> of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment . . .[103]

In *Alden*, the Court held that Congress cannot strip a state of Sovereign Immunity in its own courts.[104] Otherwise, Congress would not only violate the anti-commandeering doctrine,[105] but would also demean that state and deny that state its rightful Dignity: "[O]ur federalism requires that Congress treats the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation."[106] Empowering citizen suits against a state in state court might open the door to that court controlling that state's performance of its political duties, interfering with its autonomy.[107] Despite their constitutional privilege, states remain bound by the Constitution and valid federal law; against their abuse of unaccountability, Justice Kennedy relies on the "good faith of the States."[108]

Anti-commandeering guarantees states' inviolability from federal compulsion. Sovereign Immunity makes the same guarantee from a particular form of compulsion, judicial retribution. Although each Doctrine approaches things from a different angle, both respond to the same injury to the states at the hands of the federal government: violation of states' Dignity.[109]

4. Equal Sovereignty

From Sovereignty flows states' Dignity, and from there flows a presumption preventing federal law from singling states out for violating the Constitution in ways that offend basic notions of right and wrong. That presumption is the final doctrine conservative jurists conjured in their project

103 *Id.*; Rush, *supra* note 35, at 1124.
104 *Alden*, 527 U.S. at 743.
105 *Id.* at 749.
106 *Id.* at 714–15, 748–49.
107 *See* Great N. Life Ins. Co. v. Read, 322 U.S. 47, 51 (1944).
108 *Alden*, 527 U.S. at 755.
109 Erin Daly, *Human Dignity in the Roberts Court: A Story of Inchoate Institutions, Autonomous Individuals, and the Reluctant Recognition of a Right*, 37 OHIO N.U. L. REV. 381, 381 (2011).

of devolution, the doctrine of states' Equal Sovereignty.[110]

On March 7, 1965, police, some masked, some on horseback, discharged tear gas as they advanced toward a crowd. One hundred years after Confederate General Robert E. Lee and his Army of Northern Virginia surrendered to Union General Ulysses S. Grant at the Appomattox Courthouse, hundreds made their way from Selma to Montgomery, Alabama, in support of civil rights. At the Edmund Pettus Bridge, itself named for a Confederate general, a seering miasma engulfed the crowd, its scald punctuated by an unrelenting torrent of wooden bludgeons swaddled with metal barbs.[111] Days later, President Lyndon B. Johnson implored a joint session of Congress to act in obedience to its members' oath before God and Constitution. By August 1965, Congress passed and President Johnson signed the Voting Rights Act (VRA), whose foundation in the text of the Constitution was the Fifteenth Amendment, the last of three amendments adopted after the Civil War during Reconstruction.

The VRA contained a provision, called the preclearance provision,[112] that required certain jurisdictions to obtain approval from a panel of federal judges or the Attorney General before changing any voting laws.[113] As passed originally in 1965, the preclearance provision's "coverage formula" applied its approval process only to jurisdictions that had had a test or device to restrict voting, and less than ffity percent voter registration or turnout in the 1964 presidential election.[114] Congress reauthorized the VRA in 1970 and 1975, 1982 and 2006, but along the way expanded its original coverage formula to include jurisdictions with restrictive voting practices and low turnout in the 1968 or 1972 elections.[115]

In 2010, Shelby County, Alabama, challenged the VRA's coverage formula. In *Shelby County v. Holder*, the Supreme Court invalidated the VRA's coverage formula, ostensibly because it was out of step with current events.[116] Writing for the Court, Chief Justice Roberts concluded that by 2013, the

110 *See* Leah M. Litman, *Inventing Equal Sovereignty*, 114 Mich. L. Rev. 1207, 1256 (2016).

111 Christopher Klein, *How Selma's 'Bloody Sunday' Became a Turning Point in the Civil Rights Movement*, History (Mar. 6, 2015), https://www.history.com/news/selma-bloody-sunday-attack-civil-rights-movement.

112 The preclearance provision is actually two provisions: (1) one that prohibits eligible districts from enacting changes to their election laws and procedures without obtaining proper prior approval; and (2) another that defines the districts subject to the preclearance provision. For simplicity, the two are collapsed.

113 Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10302–03 (2008)).

114 *Id.* at § 4(b).

115 *Id.* at §§ 4(a), 4(b).

116 Shelby Cnty. v. Holder, 570 U.S. 529, 535, 540, 549 (2013).

facts no longer justified the VRA's constraints on states. This "stale facts" explanation of *Shelby County* is plausible but incomplete.[117]

Equal Sovereignty offers a better explanation. Recall the VRA's foundation in the Constitution's text is the Fifteenth Amendment, the final of three Reconstruction Amendments.[118] These amendments endowed Congress with immense, penetrating lawmaking power,[119] power Congress deemed necessary to quash lingering southern defiance too bald-faced to call subversion.[120] The promise of these pronouncements never came to pass; instead, they heralded retreat.[121] An 1863 essay called *Reconstruction of The Union* illumines the reason; its Iowan writer beseeched his fellow northerners "to consider and respect the South as an equal."[122] For states' Dignity sake, Reconstruction met a premature end so that Americans could avoid the daunting task of ascribing fault for the Civil War.[123]

Chief Justice Roberts' *Shelby County* decision reflected these same concerns about preserving states' Dignity, the same that animate both the anti-commandeering and Sovereign Immunity doctrines. Laws passed by Congress to enforce the Reconstruction Amendments are problematic from the standpoint of states' Dignity because they suggest violations not just of everyday law, but violations of elementary or "fundamental"[124] morality the Reconstruction Amendments were meant to guarantee.[125]

Before *Shelby County*, Equal Sovereignty had limited Congress' power to impose conditions on territories seeking admission as states into the federal Union, guaranteeing states would be admitted on similar terms.[126] That limit had traditionally applied at the moment of admission, neither

117 Litman, *supra* note 110, at 1261.

118 Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 437 (codified as amended at 52 U.S.C. § 10301 (2008) ("To enforce the fifteenth amendment to the Constitution of the United States, and for other purposes.")).

119 *Milestone Documents*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/list (last visited June 4, 2022).

120 ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019).

121 *Id.*

122 Litman, *supra* note 110, at 1255 (citing CITIZEN OF IOWA, RECONSTRUCTION OF THE UNION: SUGGESTIONS TO THE PEOPLE OF THE NORTH ON A RECONSTRUCTION OF THE UNION, 11 (1863)).

123 Litman, *supra* note 110, at 1254 (citing ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 194 (1988)) (quoting Journal of the Proceedings and Debates in the Constitutional Convention of the State of Mississippi, August 1865, at 165 (1865)).

124 Shelby Cnty. v. Holder, 570 U.S. 529, 556–57 (2013).

125 Litman, *supra* note 110, at 1264; *see, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997).

126 Litman, *supra* note 110, at 1264.

before, nor after.[127] Congress admitted Alabama into the Union in 1819; the Court decided *Shelby County* in 2013. Chief Justice Roberts expanded Equal Sovereignty in time to apply well after admission.[128] Although it is commonplace for federal law to distinguish among states,[129] the Chief Justice describes the VRA's doing so as "extraordinary."[130] Extraordinary, perhaps, in that the VRA sought to do more than regulate states' commonplace acts. Fundamental in that the VRA sought to curtail states' power to decide moral questions by branding them deplorable, affixing to them badges and incidents of wayward crookedness unbefitting a sovereign.

From states' Sovereignty flows their Dignity, from there flows states' presumptive benevolence, the doctrine of Equal Sovereignty. As Popular Sovereignty's manifold incarnations suggest, the principles underlying our Constitution are protean. Conservative jurisprudence in the late century changed things, solidifying Dual Sovereignty's dominance, recasting Popular Sovereignty as governmental, and expounding a series of doctrines to stem any countervailing tide. The significance of these changes should not be understated, nor should it be overstated. These changes fit into dialectic pattern of controversy and decision that extends back to the very genesis of judicial review.

II. Due Process

In 1803, Chief Justice John Marshall first asserted the Court's power to review and invalidate acts of other branches of government in the landmark case, *Marbury v. Madison*.[131] Chief Justice Marshall left the bounds of that power for posterity to define. The question posed to Chief Justice Marshall and that he posed to successive generations is: When can a judge declare an act of a political branch void?[132] Would allowing laws that oppress or that have no basis in fact or reason amount to political heresy, or to judicial orthodoxy? Would allowing such laws to survive scrutiny amount to judicial heresy, or to political orthodoxy?[133] A Court that struck down no law would be useless. A Court that struck down laws on a whim would be illegitimate. How far toward orthodoxy or heresy a Court will swing is contingent. To render a decision and lay a controversy to rest, swing the Court must. That

127 *See* United States v. Lousiana, 363 U.S. 1, 16 (1960).
128 *Shelby Cnty.*, 570 U.S. at 586 (Ginsburg, J., dissenting); Litman, *supra* note 110, at 1217.
129 Litman, *supra* note 110, at 1214.
130 *Shelby Cnty.*, 570 U.S. at 529, 544–47, 551, 554; Litman, *supra* note 110, at 1214 n.40.
131 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803).
132 Erin Daly, *The New Liberty*, 11 Widener L. Rev. 221 (2005).
133 *See* Peter L. Berger, Heretical Imperative: Contemporary Possibilities of Religious Affirmation (1980).

imperative is the enduring, central question of constitutional law that Due Process helps to resolve.[134]

Enslavement and the toll in blood of breaking its grip on the country demonstrated the uselessness of Sovereignty under the Tenth Amendment as a guarantor of individual rights. The Privileges or Immunities Clause of the Fourteenth Amendment, the lesser known companion of the Due Process and Equal Protection Clauses, also proved unequal to the task.[135] The Fourteenth Amendment's purpose was to change things, to transform America, to set forth principles about the rights of freed peoples and to guarantee the extension of those principles to all citizens.[136] Despite the Amendment's clear mandate, the Court bowed to the rearward tide. Popular Sovereignty was consigned to mediate the relationship between governmental entities. This section will recount how, to mediate the relationship between government and individuals in areas as intimate as reproductive choice and whom we marry, to secure individual rights, rather than to the Tenth Amendment, or to the Privileges or Immunities Clause, Courts turned instead to Liberty[137] and Equality[138] under the Due Process Clause of the Fourteenth Amendment.

Due Process is not as limited as its name might suggest. Process is only the half of it.[139] The Court's exposition of Due Process's substantive

134 Daly, *supra* note 132, at 223.

135 Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 21 (2015). Political Reconstruction concluded with the presidential election of 1876, when Republican and Southern Democrat party bosses struck a corrupt bargain to hand victory to the Republican Hayes in exchange for the removal of federal troops from the South. So ended military and political Reconstruction. Legal Reconstruction followed when the Court decided the *Slaughter-House Cases*, a series of cases whose combined consequence was to circumscribe the Privileges or Immunities Clause into hapless oblivion. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1870); Tribe, *supra*, at 21.

136 FONER, *supra* note 120, at 56.

137 *See, e.g.*, Lochner v. New York, 198 U.S. 45, 53, 56, 64 (1905) (holding New York state law violated "liberty of contract" protected by the Due Process Clause of the Fourteenth Amendment).

138 *See, e.g.*, Buchanan v. Warley, 245 U.S. 60, 81–82 (1917) (striking down statute barring property owner from conveying property to individual of another race).

139 Among his achievements on the bench, Justice Taney not only was the first to link explicitly Popular Sovereignty with the Tenth Amendment, he was also among the first to describe a substantive Due Process. Recall Justice Taney's conclusion in *Dred Scott*: that the Missouri Compromise, which granted freedom to enslaved persons in federal territory, deprived their former enslavers of property and so of Due Process. Dred Scott Decision, 60 U.S. 393, 452 (1857). In Justice Taney's view, the heart of the matter was neither that the enslavers were deprived of notice or an opportunity to be heard, that is, of process, nor that these enslavers owned enslaved Black people in the first place. *Id.* at 450; Daly, *supra* note 132, at 224 n.18. In Justice Taney's view, the problem was substance, that the Missouri Compromise took property away from its

meaning began with those rights that the country's Founding generation had included in the Bill of Rights. Through the Fourteenth Amendment's Due Process Clause, the Court extended the first eight amendments' substantive rights, originally formulated to apply only against the federal government, to apply against state governments, too.[140] Their enumeration in the Bill of Rights' text rendered these rights an obvious starting point. These rights' enumeration suggested their rootedness in the "traditions and conscience of our people as to be ranked as fundamental."[141] Surely the first eight amendments are not an exhaustive list of rights the Constitution ought to protect. The Ninth Amendment makes clear there are other, unenumerated rights. With no other right has Court's, indeed the country's, struggle over choosing between orthodoxy and heresy proved more fraught with acrimony, than the question of reproductive autonomy.

A. *Reproductive Autonomy*

From the Court's first flirtation with the question in 1927, its treatment of reproductive autonomy was disheartening. In 1925 Carrie Buck was raped.[142] Buck was sixteen at the time. Years before, Virginia had deemed Buck's mother "unkempt" and committed her to a mental institution.[143] As the state had done to her mother, Virginia deemed Buck "feeble minded" and committed her to a mental institution. Given her supposed intellectual and moral "crookedness," state law allowed Virginia to sterilize Buck against her will. Buck challenged that law as a deprivation of Due Process under the Fourteenth Amendment. Justice Holmes, an otherwise esteemed figure in American legal history, upheld that law. After Buck had already suffered one desecration of her body, a majority of Justices refused her shelter from further torment and a savage, irremediable indignity.

Buck v. Bell was an inauspicious and ugly beginning. As the following

owners (i.e., enslavers). *Dred Scott Decision*, 60 U.S. at 452. As another Court explained in *Hurtado v. California*: written constitutions and Due Process Clauses are not bound by "ancient customary English law, [but instead] they must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty, and property." 110 U.S. 516, 532 (1884). Perhaps mindful of the stigma that history's judgment would rightly attach to Justice Taney for his vicious logic, neither *Hurtado*, nor subsequent substantive Due Process cases so much as mention *Dred Scott*. Daly, *supra* note 132, at 224 n.18.

140 Daly, *supra* note 132, at 226.

141 *Id.*; Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

142 *See* Adam Cohen, Imbiciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck (2016).

143 Buck v. Bell, 274 U.S. 200, 205 (1927).

sections show, subsequent Courts were more willing to extend protections for reproductive autonomy—just not always to women. The Court recognized a right attaching to intimate personal relationships before it recognized one attaching to individual women. Although the Court did in time enunciate a right capturing reproductive autonomy assigned to individual women, as set out below, the right proved ill-concieved. The right is less secure as of my writing this article than ever before.

1. Penumbras, Emanations, and Personal Relationships

In November 1961, Estelle Griswold, the executive director of the Planned Parenthood League of Connecticut, and Dr. C. Lee Buxton, a physician and Yale Medical School Professor, ran a Planned Parenthood clinic.[144] At the time, a Connecticut law prohibited use and distribution of contraceptives. Connecticut prosecuted Griswold and Buxton for providing contraceptives to a married woman.[145] In *Griswold v. Connecticut*, Justice Douglas, writing for the majority, found that the right to privacy was fundamental, and Connecticut's law violated that right. As had past substantive Due Process cases, *Griswold* focused on the "traditional relation of the family . . . as old and as fundamental as our entire civilization."[146] Justice Harlan, concurring with the Majority, concluded that this privacy right resided in the Fourteenth Amendment's Due Process Clause; Justice Douglas famously located the right to privacy nowhere in the Constitution's text.[147] Instead, based on the Ninth Amendment's suggestion of the existence of unenumerated rights, Justice Douglas conjured the specific right from the Constitutions' and Bill of Rights' amassed "penumbras" and "emanations."[148]

Griswold established a right, but only for individuals in a marriage. *Griswold*'s right to prevent procreation within marriage emanates from the bond, rather than from the individual bound, obscured by its penumbra.[149] *Griswold* did not protect or enunciate an individual right. For Justice Douglas, the Bill of Rights guarantees a fundamental right to prevent procreation within marriage because, if it were otherwise, the Court would sanction police

144 Griswold v. Connecticut, 381 U.S. 479, 480 (1965).

145 Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman's Private Choice*, 95 TEX. L. REV. 1189, 1201 (2017).

146 *Griswold*, 381 U.S. at 495–96 (Goldberg, J., concurring).

147 *See id.* at 500 (Harlan, J., concurring); *id.* at 485 (majority opinion).

148 *Id.* at 483–84 (majority opinion).

149 *Id.* at 479 ("We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.").

searching peoples' bedrooms for condom wrappers—a scenario "repulsive to the notions of privacy surrounding the marriage relationship."[150]

Shortly thereafter, the Court revisited the privacy right to prevent procreation, attaching it to individual women. In 1967, Bill Baird, a reproductive rights activist prearranged a violation of a Massachusetts law under which only registered doctors, nurses, and pharmacists could provide contraceptives, and only married individuals could obtain contraceptives.[151] After speaking at Boston University to students about birth control, Baird handed a young woman a vaginal foam contraceptive, and was arrested and prosecuted by Thomas Eisenstadt, the Sheriff of Suffolk County, Massachussetts. In *Eisenstadt v. Baird*, the Court struck down Massachusetts' law, and recognized an individual's privacy right to purchase and to use contraceptives.[152] For the Court's plurality, Justice Brennan wrote: "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."[153] *Eisenstadt* spoke of the privacy right to obtain and use contraceptives as an individual's right, but still the Court framed the decision as one protecting not individual persons, just intimate personal relationships.[154]

2. Abortion I: From Privacy To Liberty

In 1854, Texas adopted a law banning all abortions except those ordered by a doctor to save a woman's life.[155] In 1970, Norma McCorvey, under as assumed name, Jane Roe, sued Henry Wade, the District Attorney of Dallas County, Texas, challenging Texas' 1854 abortion ban. *Roe v. Wade* came before the Court twice,[156] first, in 1971, when just seven Justices sat on the bench, following the retirement of Justices Black and Harlan; and again in 1972, after President Nixon elevated Justices Powell and Rehnquist to the Court. In *Roe v. Wade*, the Court struck down Texas' law.[157] Justice Blackmun delivered the Court's opinion, concluding that the privacy right *Griswold* recognized and *Eisenstadt* enlarged, whether under the Ninth or Fourteenth Amendments, "is broad enough to encompass a woman's decision whether

150 *Id.* at 485–86.
151 Chemerinsky & Goodwin, *supra* note 145, at 1203.
152 Eisenstadt v. Baird 405 U.S. 438 (1972).
153 *Id.* at 453.
154 Lawrence v. Texas, *supra* note 11, at 1939.
155 Roe v. Wade, 401 U.S. 113, 119 (1973).
156 *Id.* at 113.
157 *Id.* at 164.

or not to terminate her pregnancy."[158]

Like Justice Douglas had in *Griswold*, Justice Blackmun conceived of the decision whether to abort as belonging to the right of privacy. Unlike Justice Douglas in *Griswold*, Justice Blackmun avoided discovering the right in shadows cast by distinct bits of text; Justice Blackmun instead founded the right on the Fourteenth Amendment's Due Process Clause's ward, Liberty.[159]

The Fourteenth Amendment's Due Process Clause protects only persons. A fetus, Justice Blackmun wrote, is not a "person" within the meaning of the Fourteenth Amendment.[160] That proposition was not radical in 1973—it aligned with precedent.[161] That plank of Justice Blackmun's logic did not mean the right to abort was absolute; against a woman's Liberty to choose balanced the state's interest in protecting, among other things, "prenatal life."[162] A fetus inside the womb might not be a person, but certainly a baby outside the womb is. Competing interests beg the question: Where, in time or fact, does the balance tip away from Liberty in regulation's direction? Justice Blackmun answered that the tipping point was "viability," that is, once a fetus has the "capability of meaningful life outside the mother's womb."[163] A hallmark of Justice Blackmun's *Roe* decision was his trimester framework for pegging the point of viability in time. During the first trimester, government could not prohibit abortions outright, and could regulate abortions no more than it could any other procedure.[164] During the second trimester, the government still could not prohibit abortions outright, but could regulate it in ways "reasonably related to maternal health."[165] In the final trimester, government could regulate or prohibit abortion, except as necessary for the mother's health or life.[166]

Roe was a momentous victory for procreative freedom in America: a single judicial opinion invalidated highly restrictive abortion laws in all but

158 *Id.* at 152–53.

159 *Id.* at 153. Although the Fourteenth Amendment's Equal Protection rationale was not invoked, Justice Blackmun expressed concern that a prohibition of abortions would exalt the blessings, but overlook the burdens birth bestows on women: "Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also distress, for all concerned, associated with the unwanted child . . . . " *Id.*

160 *Id.* at 158.

161 Chemerinsky & Goodwin, *supra* note 145, at 1204–05 nn.98–100.

162 *Roe*, 401 U.S. at 155, 162.

163 *Id.* at 163–64.

164 *Id.*

165 *Id.*

166 *Id.* at 164–65.

four states.[167] As this article's existence attests, *Roe*'s victory was far from total. Some critics of *Roe*, including Justice Ginsburg, contend *Roe* went too far too fast; others think that *Roe* did more to endanger, than it did to preserve, women's reproductive autonomy.[168] Other critics of *Roe* point to weaknesses in Justice Blackmun's reasoning.[169] For example, Justice Blackmun disclaims any attempt at resolving the question of when life begins—yet his opinion did just that.[170] Justice Blackmun's assumptions, too, were problematic from the perspective of equity.[171]

Roe's fundamental flaw, exploited recently by Mississippi, is that the right *Roe* enunciated is a right at all. Even a fundamental right is not

167 Williams, *supra* note 67, at 534.

168 Ruth Bader Ginsburg, *Madison Lecture, Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185, 1198–1209 (1992). This critique of *Roe* cites as evidence the reaction that it sparked: how it gave shape to, and galvanized the Religious Right, how President Reagan rode on those coattails to the White House, and how a nominee's position on *Roe* could make or break a nominee's prospects for Senate confirmation to the Supreme Court. Williams, *supra* note 67, at 513, 533; Jack Balkin, What *Roe v. Wade* Should Have Said 7 (2005). Yet there was no discernible trend towards state governments' protecting abortion rights before *Roe*. Chemerinsky & Goodwin, *supra* note 145, at 1210 (citing Linda Greenhouse & Reva B. Siegel, Before *Roe v. Wade*: Voices that Shaped the Abortion Debate Before the Supreme Court's Ruling 259–62 (2010)). It is equally plausible that the supposed reactions to *Roe* originated instead with Ronald Reagan's 1980 presidential campaign strategy: uniting and mobilizing evangelical Christians together with opponents of an Equal Rights Amendment. Balkin, *supra*, at 12; Chemerinsky & Goodwin, *supra* note 145, at 1210 n.153.

169 Justice Blackmun marked a fetus' viability as the moment life began, and so when states could prohibit abortions, except when necessary to protect a woman's life or health. Chemerinsky & Goodwin, *supra* note 145, at 1211. The choice was deeply problematic, as it cut against the right *Roe* purported to protect by pitting advances in medicine against a woman's right to choose.

170 *Roe*, 410 U.S. at 159.

171 *Roe* failed to identify the ways in which laws restricting abortions are discriminatory in a number of ways. For example, the Court took for granted that restrictive abortion laws affect men and women the same, and that such laws affect women of all cultural or ethnic affiliation, and social and economic strata the same. Chemerinsky & Goodwin, *supra* note 145, at 1211–12. There is a distinct air of unreality to these assumptions. In setting his decision in *Roe* apart from Justice Douglas' in *Griswold*, Justice Blackmun chose to found *Roe*'s right on the Fourteenth Amendment's Due Process Clause, omitting discussion of that same Amendment's Equal Protection Clause. Criticism of Justice Blackmun's omission of any meaningful argument under Equal Protection Clause should not be dismissed as unfairly holding history's characters to contemporary standards, or improperly projecting present values onto the past. Briefs submitted to the Court ahead of *Roe* argued that restrictive abortion laws imposed stereotypical understandings of a woman's role in society as procreator on women, that such laws coerce motherhood. Balkin, *supra* note 168, at 19 (citing Greenhouse & Siegel, *supra* note 168, at 63).

absolute.[172] Even if rights are taken as "trumps," reality requires that states limit rights—so long as states can justify such limits.[173] As the conservative project of privileging states' Sovereignty carried forward, justification for limiting federal, fundamental right cheapened to nothing more than a state legislature's whim.

Justice Blackmun's trimester framework was the fruit of compromise for the sake of majority. As Justice Blackmun had originally sketched his framework, a woman had a right to abort in the first trimester, limited only by the a pregnant woman's doctor, as early-term abortions are ordinarily as safe for women as is carrying a fetus to term; afterward a state could regulate so long as the regulation was stated with "sufficient clarity" so as to provided doctors fair warning.[174] This, Justices Brennan and Thurgood Marshall argued, failed to give women enough time to discover their pregnancies, or to protect the poor or women of color.[175] As it was delivered by the Court, the *Roe* decision denied personhood to the fetus and so protection under the Fourteenth Amendment.[176] Had Justice Blackmun decided that a fetus was a person, abortion would be forbidden outright; by finding that a fetus is not a person, abortion could be allowed, at least for a time.[177]

The trimester framework is arbitrary; its virtue, compared with the sublime question of when life begins, is its simplicity. The number three is readily comprehensible and familiar in context. Justice Blackmun's original formulation of the trimester framework demonstrates that he intended to entrust negotiating the ethical and moral propriety of the abortion procedure to the medical profession. His own background was likely a key influence.[178] To the extent that Justice Blackmun hoped that by defining a fetus as something other than a person, and thereby excluding a fetus from the scope of the Fourteenth Amendment's protections, he had erected an impenetrable doctrinal dam, Justice Blackmun was wrong. His hopes exceeded the grasp of his Due Process logic. *Roe*'s core flaw was Justice Blackmun's blind faith

172 Greene, *supra* note 11, at 30, 70–71, 86.

173 Jeremy Waldron, *Pildes on Dworkin's Theory of Rights*, 29 J. LEGAL STUD. 301, 301, 305 (Jan. 2000).

174 Justice Harry A. Blackmun, Draft Opinion of Roe v. Wade 48 (Nov. 21, 1972) (Blackmun Papers, Box 151, Folder 6), https://hdl.loc.gov/loc.mss/eadmss.ms003030; BALKIN, *supra* note 168, at 10.

175 BALKIN, *supra* note 168, at 10.

176 *Roe*, 410 U.S. at 157–58.

177 Greene, *supra* note 11 at 50.

178 Justice Blackmun studied math as an undergraduate. Justice Blackmun considered medical school but instead chose to go to law school, and he was the Mayo Clinic's in-house counsel from 1950–1959. To the extent that his experience before ascending to the Court may have justified Justice Blackmun's faith in the sturdy institutions of arithmetic or medicine to resolve the abortion question, that faith proved misplaced.

in high theory, and consequent blindess to the low politics that would later dictate the terms of debate. Justice Blackmun miscalculated the lengths subsequent Courts would go in their partisan misadventure of devolving power from individual women to despotic states.

Justice Blackmun's later opinions suggest he came to appreciate this essential weakness. In *Thornburgh v. American College of Obstetricians and Gynecologists*, the Court struck down a Pennsylvania law requiring physicians to provide information about abortion procedures to patients seeking abortions, to exercise care to preserve the fetus' life, and to have a second physician present during an abortion operation.[179] Writing for the majority, Justice Blackmun described the object of the right *Roe* set out to protect, a woman's decision whether to carry a fetus to term, in superlative terms: "Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy."[180] Justice Blackmun's Due Process analysis in *Roe* left the abortion right vulnerable to its detractors balancing it into oblivion, or overturning it outright because the balance might remain in perpetual flux. In *Thornburgh*, Justice Blackmun compensated for that vulnerability by describing the idea behind *Roe*'s right—privacy—and the abortion right itself as belonging to the individual woman, as if she alone held it in a secluded hollow, impregnable by public law. It was too little too late.

3. Abortion II: From Liberty to Dignity

As old Justices retired and new Justices ascended to the bench, the Court's progressively conservative composition cast grave doubt on *Roe*. By 1987, President Reagan had appointed three Justices to the Supreme Court: O'Connor, Scalia, and Kennedy. Together with the original *Roe* dissenters, Justices White and Rehnquist, the Court appeared ready to abort *Roe*.

In 1986, the state of Missouri enacted a law prohibiting public employees and facilities from performing or assisting abortions. The law's preamble defied Justice Blackmun's holding explicitly, proclaiming life begins at conception.[181] In *Webster v. Reproductive Health Services*, the Court upheld Missouri's law—without a majority opinion. Justice Scalia argued the Court ought to overturn *Roe*, and that its failure to, at that juncture, "needlessly . . . prolong[ed] this Court's self-awarded sovereignty" over "cruel" and therefore

179 Thornberg v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 747–49 (1986).

180 *Id.* at 772.

181 Webster v. Reprod. Health Servs., 492 U.S. 490, 504 (1989).

"political" rather than "juridical" questions.[182] Foreshadowing his "only proper objects of government" argument in *Printz*, Justice Scalia frames that question as simple to dispel of: whether to allocate decisionmaking authority between the federal Court and state legislatures.[183]

Writing for the plurality, Chief Justice Rehnquist rejected any balancing whatsoever: "[T]he State's interest, if compelling after viability, is equally compelling before viability."[184] Given states' always compelling interest in protecting prenatal life, the Court should review abortion regulation with the least exacting, most deferential degree of scrutiny in the Court's toolbox, rational basis review. *Roe* survived *Webster* because of Justice O'Connor's vote for the Chief Justice's result, but not his reasoning. Since Missouri's law did not prohibit abortions altogether, it was not yet time to reexamine *Roe*.[185]

In 1988, Pennsylvania passed a law in bald defiance of *Roe* and its progeny.[186] The law required a woman seeking an abortion to wait twenty four hours before first requesting to obtain the procedure, during which time she was forced to listen to a prepared speech about the procedure, the health risks of abortion, the alternatives to abortion, the likely gestational age of the fetus, and a father's liability for child support. Under Pennsylavania's law, a married woman seeking an abortion had to sign a statement affirming that she had notified her husband.

By the time Pennsylvania's law came before the Court, Justices Brennan and Marshall had resigned from the bench; Justices Souter and Thomas had taken their places. In other words, as the Court prepared for yet another reckoning with *Roe*, the Court's composition suggested that *Roe*'s days were numbered. And yet, in 1992, by a vote of five to four, the Court again reaffirmed *Roe*. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the authors of a joint opinion wrote that it was high-time for each side of the abortion debate to reconcile, and to accept a "common mandate rooted in the Constitution."[187]

In *Casey*, the Court did not uphold all of *Roe*. *Casey* upheld just *Roe*'s essential holding, and substituted Justice Blackmun's trimester framework for an "undue burden" test for abortion regulation: whether an abortion regulation is valid hinges on whether that regulation places an undue burden

182 *Webster*, 492 U.S. at 532 (Scalia, J., concurring in part and concurring in the judgment).
183 *Id.* at 532; s*ee also* Printz v. United States, 521 U.S. 898, 920 (1997) (citing THE FEDERALIST NO. 15, at 109 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).
184 *Webster,* 492 U.S. at 519 (White, J., dissenting) (citing *Thornburgh*, 476 U.S. at 795).
185 *Id.* at 532–31 (O'Connor, J., concurring in part and concurring in the judgment).
186 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992).
187 *Id.* at 867 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

on a woman's access to abortion.[188]

The conventional story of procreative freedom in America continues next to the cynical snares hidden within *Casey*'s logic. *Casey* instructs that a law is unduly burdensome if its purpose or effect is to place a substantial obstacle in a woman's path when seeking an abortion before a fetus reaches the point of viability. *Casey* also instructs that "[t]o promote states' profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion."[189] Here, too, the whole truth is more complicated and more interesting.

"Liberty finds no refuge in a jurisprudence of doubt," the *Casey* Court began.[190] From conception, *Casey* was different than its progenitor, *Griswold*. Like Justice Blackmun had in *Roe*, the authors of *Casey*'s joint opinion founded their right in the Fourteenth Amendment:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[191]

Liberty may have been the *Casey* Court's bridgehead to the Constitution's text, but Liberty was not its terminus. *Casey*'s chief contribution was its undue burden test.[192] The *Casey* Court followed Justice Blackmun's re-orientiation

188 *Id.* at 874, 878. The Court abandoned Justice Blackmun's trimester framework, and instead split the pregnancy in two at the point of viability. Before viability, the government may not prohibit abortion; after viability, government may prohibit abortion, except when necessary to protect the woman's life or health. In lieu of a trimester framework, the *Casey* Court sketched a new "undue burden" test for abortion regulations: a regulation of abortion is invalid only if it places an "undue burden" upon a woman's access to abortion. The *Casey* Court upheld the Pennsylvania law's waiting period provision and prepared speech requirement, but struck down the spousal consent requirement, which the Court concluded imposed an undue burden. *Id.* at 878.

189 *Id*. at 878; *see* Chemerinsky & Goodwin, *supra* note 145, at 1220.

190 *Casey*, 505 U.S. at 844.

191 *Id.* at 851.

192 The origin of *Casey*'s undue burden test is Justice Kennedy's earlier decision in *Ohio v. Akron Center. See* Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502 (1990). There,

of *Roe*'s right in *Thornburgh* toward privacy, connecting the "private sphere of the family" with the "bodily integrity of the pregnant woman."[193]

Casey's joint authors' use of the phrase "private" did not mean a negative freedom like freedom from unreasonable governmental searches or seizures—a buried ambiguity *Casey*'s dissenters raised.[194] *Casey*'s authors meant a more gravid power, a power to decide.[195] Justice Blackmun's private notes reveal that Justice Kennedy was the fifth vote that sustained *Roe*.[196] Justice Kennedy is responsible for the portion of *Casey* excerpted above, mentioning Liberty but also declaring the reason the Constitution protects decisions about family life in the first place: Dignity. By enumerating Dignity, *Casey* protects women's power to render and to make real self-defining, self-governing choices of conscience.[197] As Justice Stevens explained, "[t]he authority to make such traumatic and yet empowering decisions is an element of basic human dignity."[198] *Casey*'s authors expounded less a "right to be let alone," and more the underlying reason a person should be let alone: In a society organized and free, society must give the individual not only space, but also respect.[199]

The essence of *Roe* that *Casey* upheld was that the blessings and burdens of birth are too "intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture."[200] *Casey* upheld *Roe* and so emanates from *Griswold*. The Court had come a long way since *Buck*. *Casey*'s right was not a right of privacy, not the family's right to a refuge from public scrutiny. Instead, *Casey*'s right was like the object of Chief Justice Roberts' Equal Sovereignty doctrine in *Shelby County*, a state's power to decide moral questions. *Casey*'s right was one of Dignity, an individual's power to decide.

Kennedy wrote that the "dignity of the family" justified a parental consent requirement because it was reasonable to ensure young women receive guidance and understanding from a parent, and that it did not impose an undue burden. *Id.*

193 *Casey*, 505 U.S. at 896; *see* Thornburgh v. Am. Coll. of Obstreticians and Gynecologists, 476 U.S. 747 (1986); Lawrence v. Texas, *supra* note 11, at 1927.

194 *Casey*, 505 U.S. at 951–52 (Rehnquist, J., concurring).

195 Daly, *supra* note 109, at 410.

196 Chemerinsky & Goodwin, *supra* note 145, at 1215.

197 GREENHOUSE & SIEGEL, *supra* note 168, at 1740.

198 *Casey*, 505 U.S. at 916.

199 Daly, *supra* note 132, at 234.

200 *Casey*, 505 U.S. at 852; Lawrence v. Texas, *supra* note 11, at 1927.

B. *Recognizing Rights—Two Competing Views*

From *Dred Scott* up to *Buck* and through *Casey*, the Court has wrestled to discover the substance and limitations of Due Process. Alongside its clearing a path for a gradual flowering of procreative freedom, the Court articulated two distinct approaches to recognizing unenumerated rights, rights which do not appear in the text of the Constitution, but whose existence the Ninth Amendment guarantees.

The first approach originates from a dissenting opinion written in 1961 by the second Justice Harlan in *Poe v. Ullman*, a case about a criminal ban on the use of contraception.[201] For Justice Harlan, history and tradition should inform but not constrain analysis of Due Process, whose full meaning he left to future experience to define. In *Poe*, Justice Harlan took the opportunity to sketch a method of examining Due Process claims by weighing individual Liberty against government interest, treating it as if the idea were alive and dynamic. "[T]hrough the course of this Court's decisions it has represented the balance which our Nation, built upon the postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society." Further, "[with] regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing."[202]

Justice Harlan's sketch of Due Process did not remain in dissent for long. In search of precedent to support their construction of a right rooted in, but distinct from privacy, the joint authors of *Casey* cited to Justice Harlan's *Poe* dissent.[203] *Casey*'s joint authors' citation imbued Justice Harlan's *Poe* dissent with its plurality's precedential weight, as if it had been a majority opinion.

Where Justice Harlan was prepared to look beyond the past in favor of progress, the Court's second approach exalted history and tradition. Where the first may be malleable, the second approach is severe. The second approach draws from the majority opinion in *Washington v. Glucksberg*, a case about whether the right to privacy includes a right to physician-assisted suicide.[204] Writing for a unanimous Court, Chief Justice Rehnquist framed the issue as whether the Constitution empowered the state to preserve life by preventing suicide.[205] Chief Justice Rehnquist wrote that before Due Process could protect a substantive right, that right had to be rooted in history and

201 Poe v. Ullman, 367 U.S. 497 (1961).
202 *Id.* at 542 (Harlan, J., dissenting).
203 *Casey*, 505 U.S. at 848–49.
204 Washington v. Glucksberg, 521 U.S. 702 (1997).
205 *Id.* at 730–31.

tradition, so much so that it is "'implicit in the concept of ordered liberty.'"[206]

Even if a Court were to find the requisite history and tradition to justify recognizing a right as fundamental, *Glucksberg* commands that a Court craft a "careful description" of the supposed right.[207] For Chief Justice Rehnquist, history and tradition should guide a judge's examination of Due Process, whose full meaning has already been discovered, but whose limitations require conservative construction.

Chief Justice Rehnquist's dismissal of the first approach to recognizing rights was blunt; he referred to Justice Harlan's *Poe* dissent contemptuously as a "modern justification."[208] Though Chief Justice Rehnquist concedes Justice Harlan's *Poe* dissent is oft-cited, the Court, the Chief Justice insists, never abandoned the "fundamental-rights-based analytical method."[209] Chief Justice Rehnquist was nothing if not consistent.[210] The Chief Justice argued that the state of "Washington has an '*unqualified* interest in the preservation of human life.'"[211] The Chief Justice also took the opportunity to re-litigate the *Casey* joint authors' willingness to make a positive right out of privacy. In *Glucksberg*, Chief Justice Rehnquist suggested the Court's fundamental-rights-based approach tended toward negative rights, freedoms *from* government interference, rather than freedoms *to* any sort of entitlement or benefit.[212] No matter that *Casey* had made binding precedent out of Justice Harlan's *Poe* dissent.[213] Lightly casting aside precedent and reviving forsaken logic, Chief Justice Rehnquist asserted, "[i]ndeed, to read such a radical move into the Court's opinion in *Casey* would seem to fly in the face of that opinion's emphasis on *stare decisis*."[214]

A radical move, indeed.

Written in 1961, Justice Harlan's *Poe* dissent was a creature of a "constitutional moment" in American history, witness to a social movement

206 *Id.* at 720–21 (internal citations omitted).

207 Kenji Yoshino, *A New Birth of Freedon?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 154 (2015).

208 *Glucksberg*, 521 U.S. at 721 n.17.

209 *Id.*

210 Consider his decisions re-defining Popular Sovereignty and re-balancing federalism in states' favor, and like his declaration in *Webster* that states' interest in protecting potential life is as compelling before viability as it is afterward. Webster v. Reprod. Health Servs., 492 U.S. 490, 519 (1989).

211 *Glucksberg*, 521 U.S. at 728 (emphasis added) (quoting Cruzan v. Mo. Dept. of Health, 497 U.S. 261, 282 (1990)).

212 *Id.* at 719–20.

213 "True, the Court relied on Justice Harlan's dissent in *Casey*, but, as *Flores* demonstrates, we did not in so doing jettison our established approach." *Id.* at 721 n.17.

214 *Id.*

compelling otherwise inert institutions to move forward.[215] For Justice Harlan, Due Process evolved alongside human experience in its richness and complexity. Justice Harlan's analysis does not countenance any toadying to doctrinal punctilio when it means turning the other cheek to grave iniquity.

Such disregard for stricture was exactly the vice Justice Rehnquist meant to arrest with his *Glucksberg* approach to Due Process. Some twenty years before *Glucksberg*, in his dissenting opinion in *Roe*, then-Justice Rehnquist rebelled against such logic, writing that Justice Blackmun was wrongly importing "legal considerations associated with the Equal Protection Clause of the Fourteenth Amendment to [*Roe*] arising under the Due Process Clause of the Fourteenth Amendment."[216] Yet Justice Blackmun raised no meaningful argument about the Fourteenth Amendment's Equal Protection Clause. For Chief Justice Rehnquist, Justice Harlan's approach to Due Process spelled the Court's legitimacy's, and so the institution's, steady undoing.

The struggle over which of the two approaches to apply is not academic. While the debate about the relative weight of history and tradition is abstract, its stakes are profound. To a litigant, the choice of approach may well dictate whether or not the Court determines that the Constitution recognizes an unenumerated right she claims, and grants her solace for its violation. To the Justices, the choice of approach may well dictate the legitimacy of the Court. Protect too few rights the Constitution's text omits but equity counsels ought to be protected, and Justices risk their decisions' reach exceeding the institution's grasp. Protect too many rights too far afield from the Constitution's text, and Justices risk their decisions' finality and so their infallibility. A Court that allowed every law to stand would be

215 Justice Harlan occupied the bench alongside the likes of Chief Justice Earl Warren, whose Court was responsible for more than its fair share of landmark decisions. One such decision, albeit lesser known, was *Bolling v. Sharpe*, a companion to the better known *Brown v. Board of Education*, which held states' segregation of schools violated the Equal Protection Clause of the Fourteenth Amendment. Bolling v. Sharpe, 347 U.S. 497, 499 (1954); *see* Brown v. Bd. of Educ., 347 U.S. 483 (1955). For students in Washington D.C., a federal district rather than a state, and so subject to the Fifth Amendment rather than the Fourteenth, *Brown* offered little—the Fifth Amendment contains no Equal Protection Clause. Enter *Bolling*. Writing for the majority, Chief Justice Warren wrote: "The Fifth Amendment . . . does not contain an equal protection clause. . . . But the concepts of Equal Protection and Due Process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' [is narrower than] 'due process of law'. . . . But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process." *Bolling*, 347 U.S. at 499.

216 Kenji Yoshino, *The New Equal Protection*, 124 Harv. L. Rev. 747, 783 (2011) (citing Roe v. Wade, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting)).

unworkable. A Court that struck down every law would be intolerable.

The essence of Due Process is the assignment of decisionmaking power. This power underlies the Court's decision whether to recognize a right as fundamental.[217] At the same time that he oversaw the devolution of power from the national to state governments, by deciding *Glucksberg*, Chief Justice Rehnquist stultified Due Process to prevent future Courts from lightly casting aside important traditional values and inventing new ones in any misguided effort to expand the scope of individual rights.[218] After *Glucksberg*, to the extent the Constitution secured individuals' or minorities' civil or political rights against discrimination, no matter how longstanding or engrained, it did so with Equal Protection rather than Due Process.[219]

In time, Due Process became a "backward-looking" concept that evolved to "safeguard[] against novel developments brought about by temporary majorities who are insufficiently sensitive to the claims of history."[220] As Popular Sovereignty had been domesticated and adapted to recalibrate the balance of Federalism in states' favor, Chief Justice Rehnquist bent Due Process to partisan, ideological ends, arresting the idea's momentum with *Glucksberg*'s restraints.

For a time.

III. HUMAN DIGNITY

In our contemporary constellation of legal and political ideas, Dignity is Liberty's companion, an object of the Constitution's safeguards.[221] Earlier in time, Dignity attached exclusively to inanimate entities.[222] The Court's earliest usages of the word "indignity" concerned an 1821 dispute about whether the United States House of Representatives could hold one

217 Lawrence v. Texas, *supra* note 11, at 1927.

218 Michael H. v. Gerald D., 491 U.S. 110, 124 (1989). The Chief Justice wrote: "Our Nation's history, legal, traditions, and practices thus provide the crucial 'guideposts for responsible decision-making'…that direct and restrain our exposition of the Due Process Clause." *Glucksberg*, 521 U.S. at 721 (quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992)).

219 Yoshino, *supra* note 207, at 152; Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 3 (1994); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1988).

220 Yoshino, *supra* note 207, at 152; *Homosexuality and the Constitution*, *supra* note 219, at 3; *Sexual Orientation and the Constitution*, *supra* note 219, at 1163.

221 Glasser v. United States, 315 U.S. 60, 89 (1942) (Frankfurter, J., dissenting); Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1934 (2003).

222 Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821); Resnik & Suk, *supra* note 221, at 1934.

of its own members in contempt for failing to attend House meetings.[223] There, the Court linked Dignity with the House of Representative's ability to achieve its purpose, to govern. Earlier still, in *Chisholm*, the Court had linked Dignity with debt, the obligation to pay, and the Court's power to enforce that obligation.[224]As applied to institutions and inanimate entities, Dignity is less about an institution's general autonomy, and more about its particular purpose. [225] Inanimate Dignity empowered an entity to achieve specific goals.[226]

Human Dignity, like procreative autonomy, emerged from an ugly case involving an Oklahoma law empowering the state to forcibly sterilize individuals convicted of felonies and whose pattern of offenses amounted to moral turpitude. In *Skinner v. Oklahoma*, the Court struck down that law.[227] Concurring in *Skinner*, Justice Jackson wrote that the "dignity and personality and natural powers of a minority" limit the power of a "legislatively represented majority."[228] Decided some twenty years after the Court had failed Carrie Buck, in *Skinner*, the Court invoked Human Dignity to protect human individuals from society's overbearing organization, from coerced conformity. In the decades following *Skinner*, the Court would raise a principle from the ashes of total war and set it against a burgeoning post-war police state, a principle so powerful it bent a sovereign's will and ascended into our constellation of ideals central to the American experience, essential to our contemporary national identity.

223 *Anderson*, 19 U.S. at 228. In *Anderson v. Dunn*, the Court concluded the House of Representatives was so empowered; the Court reasoned that a contrary conclusion would expose the institution to "every indignity." *Id.*

224 Resnik & Suk, *supra* note 221, at 1941 n.113; *see also* United States v. Fischer, 6 U.S. (2 Cranch) 358, 397 (1805). For example, in *Fischer,* the Court raised the concern that "[t]his claim of priority on the part of the United States will, it has been said, interfere with the right of the state sovereignties respecting the dignity of debts." *Fischer*, 6 U.S. at 396–97. As *The Federalist No. 30* put it: "How is it possible that a government half supplied and always necessitous, can fulfill the purposes of its institutions—can provide for the security of—advance the prosperity—or support the reputation of the commonwealth?" The Federalist No. 30 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (addressing in general the need for sources of revenue for the federal government).

225 Resnik & Suk, *supra* note 221, at 1943.

226 *Id.*

227 Skinner v. Oklahoma, 316 U.S. 535 (1942).

228 *Id.* at 546 (Jackson, J., concurring).

A. *From Ashes of War*

Human Dignity is a hardy and serotinous[229] variety whose earnest sprout followed the United States' wading into total war's inferno in 1941.[230] During the Second World War, Justices invoked Human Dignity in an attempt to keep American government from defeating Totalitarianism and losing its soul along the way. Addressing the national government's effort at prosecuting world war on the domestic front, Justice Frankfurter explained why government owes individuals whom it arrests a hearing before a committing authority: Democratic society requires respect for the Dignity of all men, it follows society must guard against misuse of law enforcement process.[231] In *Korematsu v. U.S.*, the Court notoriously upheld President Franklin D. Roosevelt's internment of people of Japanese ancestry from designated military areas within the United States.[232] In dissent, Justice Murphy compared internment to actions undertaken by the United States' enemies.[233] The Court's failure to intervene against the federal government's mass internment, and its failure to demand that criminal guilt be the exclusive basis for depriving an individual of Liberty, amounted to the Court's blessing Totalitarianism's cruel rationales for crushing individual Dignity.[234]

Justice Murphy drew a line from the hoary heretical imperative that Chief Justice Marshall had posed a century earlier about Due Process to the trauma of total war—a line that led to a principle of Human Dignity. As active hostilities subsided, tribunals began to prosecute belligerents for their wartime atrocities. One American prosecution involved an Imperial Japanese Army commander's actions in the Phillipines that resulted in no fewer than one-hundred thousand deaths.[235] Dissenting in *Yamashita*, Justice Murphy wrote that the Due Process Clause of the Fifth Amendment secured "immutable rights" against popular frenzy, legislatures, executives, and courts

229 Botanical term meaning "following" or "later." Serotinous species are characterized typically by seeds encased in thick resin that release for germination only upon exposure to extreme heat generated by fire. Many such varieties are patient; they require burning to reproduce and are among the natural worlds' most wily adapters and hardiest organisms. *Fire Ecology*, VA. TECH DENDROLOGY, http://dendro.cnre.vt.edu/forsite/valentine/fire_ecology.htm (last visited Apr. 12, 2022).

230 Daly, *supra* note 109, at 391.

231 McNabb v. United States, 318 U.S. 332, 342–43 (1943); *cf.* RICHARD A. PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 182 (1999) (focusing on the influence of Hannah Arendt on the turn in American political and legal theory to "human dignity"); Resnik & Suk, *supra* note 221, at 1934 n.73.

232 Korematsu v. United States, 323 U.S. 214 (1944).

233 *Id.* at 240 (Murphy, J., dissenting).

234 *Id.*; Daly, *supra* note 109, at 392–93.

235 Daly, *supra* note 109, at 395.

alike, rights reposed in individuals, be they victor, vanquished, belligerent, or outlaw, rights owed on the basis of nothing more than humanness.[236] For Justice Murphy, the Court's vindicating the Constitution's recognition of individuals' Dignity was part and parcel with confronting, without unwittingly emulating, Totalitarianism.[237] In another military prosecution, *Homma v. Patterson, Secretary of War*, the Court summarily dismissed the Defendant's appeal in a single sentence.[238] Again in dissent, Justice Murphy warned that a docile Court left no one safe, that judicial passivity invited "[a] procession of judicial lynchings without due process of law."[239]

To negate the nothingness that followed wartime horrors of annihilation and extermination, Justices Frankfurter and Murphy articulated a notion of individual worth that flows from mere being. That notion's application to military prosecution of belligerents, individuals who had abandoned human feeling for infernal cruelty, tested the notion's limit. The proposition that such monstruous individuals deserve the Constitution's respect is revolting, but also right. Were the Constitution to tolerate summary deprivations of individual Liberty without at least a single voice from within the halls of government registering meaningful dissent on that government's behalf, then the outcome of World War II would have proved Pyrrhic. Martial conquest would have cost the nation its soul.[240] In time, American jurisprudence came to accept that proposition.[241] From the ashes of war rose Human Dignity.

B. *Human Dignity Restrains the Police State*

After the second World War, the Court invoked Human Dignity mostly to restrain the police state, as Justice Murphy had foretold in *Homma*.[242] Rather than bombs, gas, or starvation destroying human personality and Dignity, on the homefront, it was police's unheralded search and seizure

236 *In re* Yamashita, 327 U.S. 1, 26–27 (1946) (Murphy, J., dissenting); Daly, *supra* note 109, at 394.

237 *See In re Yamashita*, 327 U.S. at 29 (Murphy, J., dissenting); Daly, *supra* note 109, at 394.

238 *In re Homma*, 327 U.S. 759, 759–60 (1946); Daly, *supra* note 109, at 394.

239 *In re Homma*, 327 U.S. at 760 (1946); Daly, *supra* note 109, at 395.

240 "A nation must not perish because, in the natural frenzy of the aftermath of war, it abandoned its central theme of the dignity of the human personality and due process of law." *See In re Homma*, 327 U.S. at 761.

241 Daly, *supra* note 109, at 397.

242 *In re Homma*, 327 U.S. at 760–61 (1946) ("A nation must not perish because, in the natural frenzy of the aftermath of war, it abandoned its central theme of the dignity of the human personality and due process of law."); Daly, *supra* note 109, at 395.

of homes, persons, and possessions.[243] In the wartime context, Justice Murphy's proposition that Dignity, and government's obligation to respect it, inhered in human existence was revolting. In this new, domestic context, the proposition proved palatable. It was here, in criminal law, that the Court described Dignity as flowing from natural personhood.

In *Trop v. Dulles*, the Court ruled that the government's revoking a citizen's citizenship as punishment for wartime desertion violated the Eighth Amendment's prohibition against cruel and unusual punishment.[244] The *Trop* Court's conclusion did not hinge on whether the litigant was charged or convicted of a crime, on whether the litigant's crime was commited during peace or war, or even on whether the litigant was innocent or guilty. Human Dignity requires only humanness.[245]

Human Dignity went from thwarting abusive law enforcement to thwarting enforcement of abusive law. Justice Murphy's thunderous articulations of Human Dignity reverberated in several landmark civil rights cases later in time. When the Court took up questions about civil rights, Justice Harlan wrote his *Poe* dissent. Justice Harlan's basic proposition in *Poe* was that Human "[D]ignity and personality" limit any legislatively represented majority's power; for that proposition, Justice Harlan cited *Skinner*.[246] After its conscription to preserve precious tenets of democracy against collapse in the face of existential foreign threat, Human Dignity returned home to take up a new mantle, restraining the police state.

A skeptical reader might mistake Justice Murphy's Dignity-talk as empty excess, inane flourish, pathetic appeal rather than reasoned argument. Human Dignity is no old chestnut. Time validated Human Dignity's staying power and substance. In 2005, the last year that Chief Justice Rehnquist sat on the bench, in *Roper v. Simmons*, the Court ruled that the government's attempt to execute a person under the age of eighteen violated the Eighth Amendment—doing so would deprive the child of Dignity.[247] Writing for the *Roper* majority, Justice Kennedy listed Dignity among our first principles, alongside hallowed mainstays: Federalism, Separation of Powers, and Individual Freedom.[248] Justice Kennedy's use of Dignity was not as a florid platitude, but rather as an operative idea that limited government power.

243 Daly, *supra* note 109, at 397–98; *see, e.g.*, Brinegar v. United States, 338 U.S. 160, 180–81 (1949) (Jackson, J., dissenting).

244 356 U.S. 86, 100 (1958) ("The basic concept underlying the Eighth Amendment," the Court wrote, is the "dignity of man.").

245 Lois Shepherd, *Dignity and Autonomy After* Washington v. Glucksberg*: An Essay About Abortion, Death, and Crime*, 7 CORNELL J.L. & PUB. POL'Y 431, 457 (1998).

246 Poe v. Ullman, 367 U.S. 497, 555 (1961) (Harlan, J., dissenting).

247 543 U.S. 551, 551, 560, 572 (2005).

248 *Id.* at 551, 578 (quoting *Trop*, 356 U.S. at 100–01).

As the language of Human Dignity took root in the Court's rights register, the Court gradually blessed the underlying idea of Human Dignity. *Roper* was Human Dignity's song of ascent into our constellation of legal and political ideas as an independent value central to the American experience and essential to our contemporary national identity

C. *Equal Dignity Under the Law*

Human Dignity's dimensions are manifold as human experience. In this way, Human Dignity is similar to its companion, Due Process. Each is dynamic. Different from Due Process, Human Dignity and its impulses toward free conscience and just absolution inhere in the individual, and so cannot be constrained by history or tradition. Any such constraint would be self-defeating; history and tradition can hardly be credited with justifying or compelling the Court's protection of the full range of fundamental rights.[249] The controversies that shape tradition sprang into existence only because courageous individuals dared to defy the status quo in order to emancipate the law from blindness to its own iniquity.[250] As Justice Holmes quipped of judges' inclination towards "blind imitation of the past," the notion of enforcing a rule for no reason other than that "it was laid down in the time of Henry IV" is "revolting."[251]

The relevant wisdom of Justice Holmes' quip, that fidelity to tradition counsels against *Glucksberg*' retrograde logic, suggests the focus of the following sections: how those impulses that had once animated Popular Sovereignty before the Civil War, and Due Process before *Glucksberg*, came to inhabit the space the Court created for Human Dignity, to vindicate an unenumerated right, and to humble a sovereign.

1. The Legal Double Helix

On September 17, 1998, in Houston, Texas, police entered a private residence, responding to a report of a disturbance involving weapons.[252] The evolution of Human Dignity hinged on what the Police found inside:

249 Shepherd, *supra* note 245, at 431.

250 *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (finding the right to marry interracially).

251 Erwin Chemerinsky, Washington v. Glucksberg *Was Tragically Wrong*, 106 Mich. L. Rev. 1501, 1505 (2008); Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897).

252 Lawrence v. Texas, 539 U.S. 558, 562 (2003); Krystyna Blokhina Gilkis, *Lawrence v. Texas*, Cornell L. Sch., https://www.law.cornell.edu/wex/lawrence_v._texas (Sept. 2018).

John Lawrence having sex with Tyron Garner. Lawrence and Garner were arrested and convicted of violating Texas' law forbidding their same-sex intercourse. At the time, the leading precedent, a 1986 case called *Bowers v. Hardwick*, offered Lawrence and Garner no protection.[253] In *Bowers*, the divided Court held that because it was neither "deeply rooted in the nation's history or tradition," nor "implicit in the concept of ordered liberty," the Due Process Clause of the Fourteenth Amendment secured no such individual right "to engage in homosexual sodomy," a denial whose perjorative framing suggests much about the Court, and indeed, its jurists' witting or unwitting prejudices.[254] After the Court decided *Bowers*, some scholars suggested the Fourteenth Amendment's Equal Protection Clause might offer same sex couples solace. This optimism proved misguided.[255]

Instead, Dignity provided a path forward.

In *Lawrence v. Texas*, an opinion that began with "Liberty" and ended with "freedom," the Court struck down Texas's anti-sodomy law, and overturned *Bowers*.[256] The Court agreed to consider whether Texas' law violated either the Fourteenth Amendment's Equal Protection or Due Process Clause.[257] Writing for the majority, Justice Kennedy wrote that adults' choice "to enter [into such a] relationship in the confines [] of home[] [cannot deprive them of] dignity as free persons."[258] *Lawrence* is ordinarily thought of as a case about privacy in the fashion of *Griswold*, a right to be let alone; Justice Kennedy was careful in *Lawrence* to point out that the police found Lawrence and Garner in a private home.[259] Yet Justice Kennedy's use of privacy in *Lawrence* was less akin to Justice Douglas' in *Griswold*, and more similar to the concept enunciated by the joint authors in *Casey*. Privacy cannot tell *Lawrence*'s whole story.

Although *Lawrence* was decided several years before *Roper*, and so the Court had not yet recognized Dignity as an full-fledged value on par with Liberty or Equality, *Lawrence* was decided after *Glucksberg*. Recall that the crux of *Glucksberg*'s vision of Due Process is restraint by tradition. In *Glucksberg*, Chief Justice Rehnquist commanded the Court to cast an anchor. Yet by their favorable citation to Justice Harlan's *Poe* dissent,[260] the joint authors of *Casey* had already weighed anchor in anticipation of a rising tide.

253 *See* Bowers v. Hardwick, 478 U.S. 186 (1986).
254 *Id.* at 191–92 (internal citations omitted)
255 Yoshino, *supra* note 207, at 153; *see* Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987).
256 *Lawrence*, 539 U.S. at 562, 579.
257 Yoshino, *supra* note 207, at 153; *Lawrence*, 539 U.S. at 778–79.
258 *Lawrence,* 539 U.S. at 567.
259 Daly, *supra* note 132, at 409–10; *Lawrence*, 539 U.S. at 564.
260 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844–49 (1992).

Ultimately, *Glucksberg*'s definition of, and myopic focus on, tradition is circular and defeats itself. Yesterday's novelty might well form tomorrow's tradition; a tradition of rights exists only because generations of Americans reckoned with the imperfections of past practice and shortcomings of received wisdom. Monarchy, for one; enslavement for another. The Framers of our Constitution wrote the Due Process clauses with the humility of heresy, rather than pretensions of orthodoxy, mindful of the continual, inconstant dialectic that would shape human experience, and so jurisprudence. The Framers, Justice Kennedy wrote, did not presume to know the "manifold possibilities" of Liberty; rather, the Framers knew that "times can blind us" and that posterity might witness the rightful end of laws "once thought necessary and proper [that] serve only to oppress."[261] Defying *Glucksberg*, Justice Kennedy posited that "every generation can invoke its principles in their own search for greater freedom."[262] In *Lawrence*, the Court acknowledged that "for centuries there have been powerful voices to condemn homosexual conduct as immoral . . ."[263] If *Glucksberg* had controlled, things would have ended there—those powerful voices spoke for tradition, and tradition spoke for the Court. Yet a history of discrimination weighed in favor of recognizing a right too long denied.[264] *Lawrence* undid *Bowers*; curiously, *Lawrence* never so much as mentions *Glucksberg*.

Recall the Court's grant of certiori—either the Fourteenth Amendment's Equal Protection or Due Process Clause.[265] Implicit in that disjunctive syllogism of "either-or," is another possibility: "both." Strictly speaking, the Court struck down *Bowers* based on Liberty grounds: that Texas' law violated the fundamental rights of all persons to control their intimate sexual relations—*all* persons.[266] Yet *Lawrence* necessarily helped some more than others.[267] Although the Court found the *Lawrence* litigants' Equal Protection argument "tenable," the Court did not decide *Lawrence* on that ground.[268] Odd, then, that Justice Kennedy comments in *Lawrence*

261 *Lawrence*, 539 U.S. at 578–79.

262 *Id.* at 579.

263 *Id.* at 571.

264 *See, e.g., id.*

265 Yoshino, *supra* note 216, at 776.

266 *Id.*, *supra* note 216, at 777.

267 Straight peoples' lives were made little better by *Lawrence*. *Id.*, *supra* note 216, at 779.

268 More likely than not, the reason is that the Court would have become mired in a doctrinal thicket. Constitutional cases often turn on the level of scrutiny a factual predicate demands. The Court's precedent to do with Equal Protection and same-sex relations was Romer v. Evans, 517 U.S. 620 (1996). *Romer*, however, was less than specific about what level of scrutiny it applied—it applied Rational Basis but "with bite"—and therefore left open the question of what level of scrutiny successive Courts ought to apply to the category of sexual orientation. *Id.* at 640. If the Court applied

that *Romer v. Evans*,[269] a case only about Equal Protection, was of "principal relevance."[270] Although *Romer* involved a state's discrimination on the basis of sexual orientation—and the fact that Justice Kennedy wrote it—*Romer* and *Lawrence* have little in common. By severing *Glucksberg*'s restraints on Due Process, Justice Kennedy freed it to drift towards Equal Protection.

The Fourteenth Amendment's Due Process Clause protects *what we choose to do*. Its Equal Protection Clause protects "*who we are*,"[271] and keeps government from imposing burdens on us because of our unchangeable attributes.[272] To the extent *Lawrence* is about Equal Protection, it is not Equal Protection against mere classification. *Lawrence* goes further: It prevents laws from aggravating or perpetuating specially disadvantaged groups' inferior status.[273] *Lawrence* was about John Lawrence's and Tyron Garner's choice to engage in intercourse; it was also about John Lawrence's and Tyron Garner's immutable identities. *Lawrence* implicated both concepts, and illumined their symbiosis.[274] No wonder that Justice Kennedy focuses the discussion of *Bowers* on discrimination rather than deprivation, that it demeaned a whole class on the basis of an unchangeable attribute.[275] *Lawrence* was not only about a personal choice protected by the Due Process Clause, nor was *Lawrence* only about invidious discrimination on the basis of sexual orientation prohibited by the Equal Protection Clause; *Lawrence* was about a personal imperative rooted in one's own essence.[276]

Romer, i.e., decided *Lawrence* on Equal Protection grounds, the Court would have been forced to detail the meaning of Rational Basis "with bite." Yoshino, *supra* note 207, at 172. From the perspective of an institution for whom discretion means credibility to spar in a pinch, providing excessive detail concedes power—a length to which a majority of Justices were unwilling to go.

269 *Romer,* 517 U.S. at 620.

270 Lawrence v. Texas, 539 U.S. 558, 574 (2003).

271 Daly, *supra* note 132, at 236; Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972)) ("[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . .").

272 *See, e.g.,* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 11 (2003) (highlighting the Equal Protection Clause's anticlassification principles in invalidating Jim Crow-era segregation practices).

273 *Id.* at 10.

274 *Lawrence,* 539 U.S. at 575 ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects," Justice Kennedy wrote in *Lawrence*, "and a decision on the latter point advances both interests.").

275 Daly, *supra* note 132, at 237; *Lawrence,* 539 U.S. at 566–67.

276 Daly, *supra* note 132, at 236.

"Liberty," Justice Kennedy writes in *Lawrence*, "presumes [] autonomy of self . . ."[277] Liberty's presumption augured Equal Sovereignty's presumption Chief Justice Roberts articulated a decade later in *Shelby County*. *Seminole Tribe*, decided three years after *Lawrence*—and also written by Justice Kennedy—distilled states' essential Dignity from an admixture of the Tenth and Eleventh Amendments. *Casey* refashioned *Griswold*'s and *Roe's* procreative, negative right of Privacy into a positive right to Dignity. *Casey* removed any doubt that Dignity could succumb to tradition's manacles. Dignity is dynamic as might be successive generations' confrontation of our forerunner's unwitting blindness or witting heedlessness. *Lawrence* vindicated more than who we are, more than what we do; *Lawrence* vindicated our self-discovery and self-construction. Together, *Casey* and *Lawrence*[278] entwine Due Process with Equal Protection[279] into a "tightly wound . . . legal double helix."[280]

2. Interlocking Gears

Lawrence was part of a movement that culminated in the Court's holding that the Fourteenth Amendment required states to perform and to recognize marriages between individuals of the same sex.[281] *Lawrence* met a moment of social change with creativity about doctrine, the same imagination and dexterity the Court summoned to resolve other monumental controversies.[282] These are the hardest controversies because they both register existing social change and stir it, too.[283] These are the controversies that lay bare the divergence between justice and jurisprudence, that expose our unconscious folly and demand of us conscious resolution. Looking back in time, sorting moments of genuine, organic social transformation from fleeting moments of sudden but inchoate fervor is more or less straightforward. There is no sure method to identify these moments as

277 *Id.*; *Lawrence*, 538 U.S. at 562.

278 Yoshino, *supra* note 216, at 779 n.222; *Lawrence,* 539 U.S. at 567 ("[A]dults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."); *it.* at 574 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.)) (discussing "personal dignity and autonomy").

279 Daly, *supra* note 132, at 241.

280 Tribe, *supra* note 135, at 17.

281 *See* Obergefell v. Hodges, 576 U.S. 644 (2015).

282 *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (overturning Plessy v. Ferguson, 163 U.S. 537 (1896)) (overturning separate but equal).

283 Heather K. Gerken, *Windsor's Mad Genius: The Interlocking Gears of Rights and Structure*, 95 B.U. L. Rev. 587, 603 (2015).

they occur. Even if there were such a method, it would beg, but could not answer, familiar normative questions: How *should* a judge decide between orthodoxy and heresy? When *should* change in society translate to change in the Constitution?[284] Perhaps a judge should move slowly for the political process to yield an enlightened consensus.[285] Perhaps a judge should move fast and simply do what she knows to be right to avoid sanctioning harm in the interim. When the Court next took up the question of marriage equality, it chose alacrity over hesitation.

In 1996, Congress enacted the Defense of Marriage Act (DOMA), that defined marriage for federal purposes to mean legal unions between a man and a woman. Later in 2013, the Court struck down the part of DOMA that withheld federal recognition from state-recognized same-sex marriages in *Winsdor v. United States.*[286] In *Windsor*, the Court focuses on Liberty, but not privacy.[287] It recognizes the right to marriage as fundamental, but left open the question of whether same-sex marriage is a fundamental right.[288] *Windsor* focuses on Equality,[289] but does not say whether sexual minorities are a suspect classification, a necessary threshold question for Equal Protection analysis. Unlike *Lawrence*, where the Court entwined Due Process with Equal Protection, *Windsor* protected the Equal Dignity of same-sex marriage without grounding its decision in either.[290]

This was novel. *Windsor* introduced the phrase "Equal Dignity" into the jurisprudence as a separate category of right. To expound the phrase's meaning, Justice Kennedy begins with structure by focusing on the conflict between state and federal power.[291] Next, in a cryptic gesture, Justice Kennedy describes DOMA as problematic, "quite apart from the principles

284 *Id.* at 604.

285 *Id.* at 606.

286 *See* 570 U.S. 744 (2013). In 2007, Edith Windsor and Thea Clara Spyer were married in Toronto, Canada; the state of New York recognized their marriage. In 2009, Spyer died and left her estate to Winsdor. Unlike New York law, federal tax law (DOMA) did not recognize their union, and so Winsdor's inheritance of Spyer's estate did not qualify for a federal tax exemption. Windsor challenged DOMA. *Id.*

287 *Id.*

288 Erin Daly, *Constitutional Comparisons: Emerging Dignity Rights at Home and Abroad*, 20 WIDENER L. REV. 199, 200–01 (2014).

289 *Id.* at 200. This piece describes DOMA's "purpose and effect of disapproval of [same-sex couples seeking marriage]." *Windsor*, 570 U.S. at 770 ("[DOMA's] avowed purpose and practical effect . . . are to impose a disadvantage, a separate status, and so a stigma upon all who enter in same-sex marriages . . . ."); Gerken, *supra* note 283, at 589.

290 Daly, *supra* note 288, at 201.

291 *Windsor,* 570 U.S. at 770. He frames the conflict as between state and federal authority, writing that New York's recognition of same-sex marriage, is doubtless a "proper exercise of its sovereign authority within our federal system . . . ." *Id.*

of federalism."[292]

Apart from structure are rights. Contrary to DOMA, New York conferred "a dignity and status of immense import" on same-sex couples, and so "enhanced the recognition, dignity, and protection of the class in their own community."[293] *Windsor* begins to resemble *Romer*, a case Justice Kennedy also wrote, about Equal Protection. In *Romer*, the injury had been a state, Colorado, preventing by referendum vote a town, Boulder, from protecting LGBTQIA+ individuals. DOMA, Justice Kennedy wrote, is "designed to injure the same class the State seeks to protect."[294] DOMA's injury is to Windsor, the litigant, but DOMA's malignancy is its decision to move the power to decide what constitutes marriage from the states to the federal government.[295] As Justice Kennedy writes, that malignancy's "essence" is Congress' purpose in enacting DOMA: "to influence or [to] interfere with state sovereign choices about who may be married."[296]

The strand of Justice Kennedy's logic that "causes academics' heads to explode"[297] is that DOMA's injury to Windsor, a deprivation of rights guaranteed by the *federal* Constitution, is a deprivation of *state* rights.[298] The problem: the Fifth and Fourteenth Amendments' protections depend only on whether federal law confers a right.[299] This is where *Windsor*'s mystery thickens. If the Court struck down DOMA with that logic, that is, if the Fifth and Fourteenth Amendments' protection accounted for state law, then any state marriage law that discriminates against same-sex couples would fall. On the other hand, if the Court struck down DOMA on grounds of structure, that is, that states' sovereignty over defining marriage is absolute, the Supremacy Clause as applied to marriage would be dead-letter, and any state marriage law that discriminates would stand. The intermixture of Liberty, Equality, and Federalism illumine the "hidden logic that helps make sense of [*Windsor*'s] many mysteries."[300] *Windsor* defies our impulse to segregate ideas into a comprehensible taxonomy; it entangles Liberty and Equality with Federalism because rights and structure can no more rightly be segregated than can races—in truth, they are one and the same. Structure, Federalism's diffusion of lawmaking and enforcement power up and down, and across governmental entities, enables individuals asserting

292 *Id.* at 769; Gerken, *supra* note 283, at 590.
293 *Windsor*, 570 U.S. at 769; Gerken, *supra* note 283, at 589.
294 *Windsor,* 570 U.S. at 768.
295 *Id.* at 769–71; Gerken, *supra* note 283, at 590.
296 *Windsor,* 570 U.S. at 769–70; Gerken, *supra* note 283, at 609.
297 Gerken, *supra* note 283, at 590.
298 *Windsor,* 570 U.S. at 768; Gerken, *supra* note 283, at 590.
299 Gerken, *supra* note 283, at 590.
300 *Id.* at 594.

yet-unrecognized rights to register dissent, to "dissent by deciding."[301] In a federal system, power is diffuse among states and the national government but interconnected; neither any state, nor the federal government, can move without "tugging the other along."[302]

Windsor did not resolve the question of marriage equality. *Windsor* chose alacrity over hesitation, but not heresy over orthodoxy. Instead, *Windsor* changed the conditions under which public discourse would occur.[303] Justice Kennedy decided in *Windsor* that the national government—Congress and the Court—should move out of the states' way as they "rethought the old consensus."[304] DOMA's unwillingness to recognize same-sex marriage branded Windsor, the litigant, as inferior, undignified, and therefore undeserving of inclusion or participation in the national political community.[305] Read in light of *Windsor*, *Romer* reads as much about allocation of decision-making authority as it does about preventing local political pressure from percolating upward to the state legislature, and from there to Congress.[306]

Dissenting in both *Lawrence* and *Windsor*, Justice Scalia prophesied that the Court would end up mandating a right to same-sex marriage to vindicate same-sex couples' Liberty.[307] *Windsor* teaches that equal dignity demands inclusion and it demands participation in the broader political community. Justice Scalia's instinct was right because of the "interlocking gears" of rights and structure that together propel us forward.[308]

3. Equal Dignity

After *Windsor*, courts across the country invalidated state bans on same-sex marriage.[309] Until the Sixth Circuit upheld them in Ohio, Michigan, Kentucky, and Tennessee. In light of the split among Circuits, the Supreme Court took up the question of whether the national government could override state marriage law that discriminated against same-sex couples.[310]

301 *Id.* at 590, 600 (emphasis omitted).
302 *Id.* at 598.
303 *Id.* at 602.
304 *Id.* at 610.
305 Daly, *supra* note 288, at 208*; Windsor*, 570 U.S. at 772.
306 Gerken, *supra* note 283, at 607–08.
307 Lawrence v. Texas, 539 U.S. 558, 604–05 (Scalia, J., dissenting); *Windsor*, 570 U.S. at 799–800 (Scalia, J., dissenting).
308 Gerken, *supra* note 283, at 594.
309 *See* Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014); Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014).
310 Rather presciently, see Gerken, *supra* note 283, at 591.

In *Obergefell v. Hodges*, the Court held that the Fourteenth Amendment required states to recognize and bless marriages between individuals of the same sex.[311] Chief Justice Roberts understood the import of *Obergefell* for the jurisprudence, that it required the Court to overrule *Glucksberg*.[312] Recapitulating Dignity to vindicate the litigants' hope not to be condemned to loneliness and excluded from the institution of marriage, *Obergefell* carried forward the movement the Court had exposed in *Casey* and developed in *Lawrence* and *Windsor*.[313] *Casey* and *Lawrence* entwined Due Process to push against *Glucksberg*'s restraints. *Windsdor* invoked structure to further secure same-sex couples place within the American political community. All the while, *Glucksberg* endured.[314] With the concept, language, and implication of Equal Dignity in its quiver, the Court in *Obergefell* at last took aim at *Glucksberg*. In *Obergefell*, the Court pushed against *Glucksberg*, articulating a three-part doctrine of Equal Dignity.[315]

First, *Obergefell* relegated tradition to a subordinate role in analysis of substantive Due Process. Impressing the fallacy of *Glucksberg*'s defining tradition only looking backwards in time, *Obergefell* reprised *Lawrence*'s tonic key, the Framers' clairvoyant, heretical humility.[316] Next, the Court cites Justice Harlan's *Poe* dissent to signal which of the two approaches to recognizing rights it would deploy.[317] Rather than to *Glucksberg*, the Court points to four "principles and traditions" that explain the "reasons marriage is fundamental under the Constitution [and] appl[ies] with equal force to same-sex couples."[318]

311 576 U.S. 644, 681 (2015). "Michigan, Kentucky, Ohio, and Tennessee define marriage as a union between one man and one woman. The petitioners, 14 same-sex couples and two men whose same-sex partners are deceased, filed suits in Federal District Courts in their home States, claiming that respondent state officials violate the Fourteenth Amendment by denying them the right to marry or to have marriages lawfully performed in another State given full recognition. Each District Court ruled in petitioners' favor, but the Sixth Circuit consolidated the cases and reversed." *Id*. at 644.

312 Yoshino, *supra* note 207, at 162; *Obergefell*, 576 U.S. at 702 (Roberts, C.J., dissenting).

313 *Obergefell*, 576 U.S. at 681.

314 Yoshino, *supra* note 207, at 162 n.135 (citing Steven G. Calabresi, *Substantive Due Process After* Gonzales v. Carhart, 106 Mich. L. Rev. 1517, 1518 (2008)); *see, e.g.*, Pavan v. Smith, 137 S. Ct. 2075 (2017) (reaffirming *Obergefell*).

315 Tribe, *supra* note 135, at 17.

316 Yoshino, *supra* note 207, at 163; *Obergefell*, 576 U.S. at 664 ("The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom . . . and so they entrusted to future generations a charter protecting the right of all person to enjoy liberty as we learn its meaning.").

317 Yoshino, *supra* note 207, at 163–64; *Obergefell*, 576 U.S. at 664 (quoting Poe v. Ullman, 367 U.S. at 497, 542 (1961) (Harlan, J., dissenting)).

318 The four "principles and traditions" are: (1) right to personal choice regarding marriage

Second, *Obergefell* collapses the categories of negative and positive Liberty. A few months before the Court decided *Obergefell*, the Supreme Court of Alabama rejected a same-sex couple's plea for Equality. Alabama's high court reasoned that *Lawrence* struck down anti-sodomy laws because "government had no legitimate interest in interfering with consenting adults' sexual conduct in the privacy of their bedrooms."[319] Dissenting in *Obergefell*, Justice Thomas argued the same, that "'liberty" had long meant "freedom *from* governmental action," rather than any public entitlement.'"[320] *Lawrence* did as the Alabama Court said it did—and more: "[I]t does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty."[321] *Obergefell* is the canonic marriage Equality case; and yet the Court's concern is about the full promise of Liberty. *Casey*'s joint authors performed a similar maneuver with privacy.[322] So, too, did the author of *Lawrence* with Equality, as did *Windsor* with Liberty. Marriage is well-suited to this logic: Marriage is a negative right in that it involves a "sacred precinct of the marital bedroom," but also a positive right in that it requires the state to recognize and certify the union.[323] In *Casey*, *Lawrence*, and *Windsor*, the Court elides negative and positive meanings. In *Obergefell*, the Court altogether collapses categories into a unified notion of an individual's right to marry another individual of his or her same sex.

Third, *Obergefell* rebelled against *Glucksberg*'s specificity restraint, its requirement that the Court articulate a "careful description" of a right it recognizes as fundamental.[324] The Court concedes that *Glucksberg* did so require, but reasons that *Glucksberg*'s specificity restraint was itself specific to physician-assisted suicide; that it was "inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. In each of the major cases where the Court took up a question to do with marriage, the question was not whether there is a right specific to the individual litigant or fact pattern, but rather whether there was

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is inherent in individual autonomy; (2) marital union is unique in its importance to committed individuals; (3) the right to marry safeguards children and families, and so draws meaning from related fundamental rights; and (4) marriage is a keystone of our social order. Yoshino, *supra* note 207, at 164; *Obergefell*, 576 U.S. at 663–69.

319 Yoshino, *supra* note 207, at 167; *Ex parte* State *ex rel.* Ala. Pol'y Inst., 200 So.3d 495, 539 (Ala. 2015) (per curiam).

320 Yoshino, *supra* note 207, at 167; *Obergefell*, 576 U.S. at 725–26 (Thomas, J., dissenting).

321 Yoshino, *supra* note 207, at 168; *Obergefell*, 576 U.S. at 677.

322 Daly, *supra* note 109, at 410 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

323 Yoshino, *supra* note 207, at 168 (quoting Griswold v. Connecticut, 381 U.S. 479 (1965)).

324 Yoshino, *supra* note 207, at 164–65; Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

"sufficient justification for excluding the relevant class from the right."[325] *Obergefell* loosened *Glucksberg*'s specificity restraint.

Obergefell's doctrine of Equal Dignity returns the Court from Chief Justice Rehnquist's *Glucksberg* approach, to the recognition of rights urged by Justice Harlan in his *Poe* dissent. The thrust of the *Obergefell* dissenters' argument is that behind *Obergefell*'s madness, there is no method, only the whims of the majority. Abandon fixed rules of interpretation and the Court risks ceding control to individual Justices' "theoretical opinions."[326] The Chief Justice compares *Obergefell* to *Lochner v. New York*, a case which applied substantive Due Process to construct an unenumerated right, freedom of contract, and struck down a federal law that limited the number of hours bakers could work.[327] *Lochner* is the great bugaboo of constitutional jurisprudence; it is a metonymy for a vagarious, misadventurous, heretical Justice.

Obergefell was less heresy than it was reformation of orthodoxy. *Obergefell* may have unmoored the Court's recognition of rights from tradition, but *Obergefell* did not leave the Court adrift. Instead, *Obergefell* provided a sextant and polestar: a principle of anti-subordination.[328] *Obergefell* dovetailed *Lawrence*'s condemnation of laws that aggravate or perpetuate specially disadvantaged groups' inferior status.[329] Justice O'Connor's concurrence in *Lawrence* left open the possibility that a state might solve the legal problem presented in *Lawrence* by doing more, by banning all sodomy, or by doing less, by abandoning all bans on sodomy; the resulting moral problem would be solved at the ballot, by voting out from office any opprobrious actor.[330] *Obergefell* rejected hesitation for alacrity. A state's or a judge's hesitation is no justification for inflicting "dignitary wounds [which] cannot always be healed with the stroke of a pen."[331] It is the "dynamic of our constitutional system" that individuals whose Dignity falls under threat need not wait for their plight

325 Yoshino, *supra* note 207, at 165; *Obergefell*, 576 U.S. at 671 ("*Loving* did not ask about a 'right to interracial marriage'; *Turner* did not ask about a 'right of inmates to marry'; and *Zablocki* did not ask about a 'right of fathers with unpaid child support duties to marry.'").

326 Yoshino, *supra* note 207, at 170; *Obergefell*, 576 U.S. at 696 (Roberts, C.J., dissenting) (quoting *Dred Scott Decision*, 60 U.S. (19 How.) 393, 621 (1857) (Curtis, J., dissenting)).

327 Lochner v. New York, 198 U.S. 45, 65 (1905).

328 Yoshino, *supra* note 207, at 174. Yoshino refers to this principle as "antisubordination liberty." The notion of antisubordination is not Yoshino's invention; it has been contrasted with another companion notion of anticlassification elsewhere, e.g., Balkin & Siegel, *supra* note 272, at 9.

329 Balkin & Siegel, *supra* note 272, at 10.

330 Yoshino, *supra* note 207, at 173.

331 *Obergefell*, 576 U.S. at 678.

to dawn on society.[332] That dynamic "withdraw[s] certain subjects from the vicissitudes of political controversy," entrusting them to steadier institutions, guided less by frenzied passion, more by legal principle.[333] The Due Process and Equal Protection clauses each propose independent principles, each illumines the definition and scope of the other, each pushes the other forward.[334] *Lawrence* avowed humility about its knowledge of what freedom is. *Obergefell* honored protections derived from the "dignity and autonomy of the individual standing against the forces of coerced conformity,"[335] it declared what freedom had to become.

Out of the ashes of war a hopeful notion of Human Dignity arose. If not for the Court's aquiescence towards Reconstruction's ignominious end, if not for *Glucksberg*'s undue constraints on Due Process, Dignity would have remained dormant. Dignity came to serve the Fourteenth Amendment's deeper purpose; it does what its Framers must have intended for the Privileges or Immunities Clause to do. *Obergefell*'s doctrine of Equal Dignity made good on the Constitution's promise to LGBTQIA+ people seeking to participate in the institution of marriage, humbling a sovereign.[336]

Obergefell thus vindicated an otherwise unrecognized right. That meant forcing a state to change its definition of marriage. In dissent, Chief Justice Roberts wrote that "[t]he fundamental right to marry does not include" such power, the power of a sovereign.[337] In other words, even a right the Court had already recognized as fundamental, marriage to someone of the opposite sex, cannot empower an individual to commandeer a state toward heresy. The criticism mirrors *Glucksberg*'s argument, and its circularity is no less fatal in dissent.[338] Invoking the sting of supposed backlash against *Roe*, Chief Justice Roberts wrote that the *Obergefell* majority was "[s]tealing this issue from the people…, making a dramatic social change that much more

332 *Id.* at 677.

333 Tribe, *supra* note 135, at 25; *Obergefell*, 576 U.S. at 677 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)). The theory that expounds "the idea of the Constitution" is drawn from *West Virginia State Board of Education v. Barnette*. Tribe, *supra* note 135, at 25–26. In *Barnette*, the Court held that a school may not force students to recite the Pledge of Allegiance. There is no clause in the Constitution to that effect. Instead, *Barnette*, like *Obergefell*, protects rights derived from "the dignity and autonomy of the individual standing against the forces of coerced conformity." *Id.* at 26.

334 Yoshino, *supra* note 207, at 172; *Obergefell*, 576 U.S. at 672.

335 Tribe, *supra* note 135, at 26.

336 *Id.* at 21–22.

337 *Obergefell*, 576 U.S. at 686 (Roberts, C.J., dissenting).

338 *Id.* at 671 (majority opinion). As Justice Kennedy wrote, "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied." *Id.*

difficult to accept."[339] For the wrong reason, the Chief Justice was right. Difficult or easy, the Constitution commands that we accept that change. It was not from the people *as an enfranchised collective* that *Obergefell* took the issue. *Obergefell* returned the issue to where it had forever belonged—to the individual.

IV. Slouching Towards Bethlehem

Obergefell exposed Dual Sovereignty's sophistry. The steady and inevitable process of categories' collapse quickens. Two years before *Windsor*, the Court issued a rare unanimous decision, *Bond v. United States*, holding that because the Tenth Amendment secures individual freedom, private individuals may challenge federal laws for violating the Tenth Amendment.[340] In seeking to vindicate her *own* constitutional interests, the *Bond* litigant sought to "assert injury from governmental action taken in excess of the authority that federal law defines" in regard to rights that "do not belong to a State."[341] *Bond* recognizes individuals' place in the Tenth Amendment's constellation of sovereigns.

Although his *Obergefell* dissent might suggest otherwise, Chief Justice Roberts has elsewhere argued the same from another angle. In *Shelby County*, Chief Justice Roberts wrote about states as if they were persons, that the Voting Rights Act "subject[s] a disfavored subset of States," "requir[ing] [them] to beseech the Federal Government for permission to implement laws."[342] He unambiguously hearkens to language the Court has used to scrutinize laws under the Equal Protection Clause that might relegate "disfavored class[es]" of individuals to "disfavored legal status."[343] The Chief Justice cites to the Tenth Amendment in *Shelby County* only once, as a prelude to situate his argument, and there lays the groundwork to establish states' Equal Sovereignty.[344] It could have been mere argument by analogy and nothing more.

Consider Sovereign Immunity. *Seminole Tribe* and *Alden* together instruct that because states are sovereign and so are immune from suit, Congress cannot strip states of that immunity—their Dignity prevents it.[345]

339 *Id.* at 687, 710 (Roberts, C.J., dissenting).

340 Bond v. United States, 564 U.S. 211 (2011).

341 *Id.* at 220 (who otherwise qualify under Article III's Standing requirements).

342 Litman, *supra* note 110, at 1257–58; *See* Shelby Cnty. v. Holder, 570 U.S. 2612 (2013).

343 Romer v. Evans, 517 U.S. 620 (1996) (quoting U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 181 (1980) (Stevens, J., concurring)); *see also* Lawrence v. Texas, 539 U.S. 558, 575 (2003); Litman, *supra* note 110, at 1257.

344 *Shelby Cnty.*, 570 U.S. at 543–44.

345 Sullivan, *supra* note 70, at 804 ("These sovereign immunity decisions, like the

Alden retold history as if ratification of our Constitution depended upon that consensus, unspoken and unwritten at the Founding.[346] *Alden*'s main argument was that states "are not relegated to the role of mere provinces or political corporations, but retain the Dignity, though not the full authority, of Sovereignty."[347] For the Framers, Justice Kennedy insisted, "immunity from private suits [was] central to sovereign dignity."[348]

In support of his historical proposition, Justice Kennedy invoked a parade of Framers, Hamilton, Madison, and Marshall, whose identification with the Federalist Party made for a compelling series of endorsements.[349] From these curated quotes, Justice Kennedy divines the Framers' supposed original intent, and distills it into a "fundamental postulate[] implicit in the constitutional design,"[350] that states are sovereign and so are above the fray of legal rights and remedies. Justice Kennedy's historical methods are at best problematic and, at worst, deceptive. Justice Kennedy quotes debates over ratification, which were equal parts legal explication and political theater, intended to mollify anti-Federalist opposition.[351] It seems farfetched that the likes of Hamilton, the quintessential advocate of a powerful national government, would have endorsed *Alden*'s theory of states' Sovereignty, Dignity, or Immunity.[352]

Consider the anti-commandeering doctrine. In *Printz*, Justice Scalia begins with the premise that the Constitution established a system of "[D]ual [S]overeignty."[353] Justice Scalia's conclusion is that the Constitution protects state Sovereignty against federal compulsion. To arrive at this conclusion, Justice Scalia invokes *The Federalist No. 15*, written by the original Federalist himself, Hamilton. Referencing Hamilton and others who wrote that the People are "the only proper object" of government, Justice Scalia deduced that states could not be a proper object of federal authority.[354] Chief Justice Marshall relied on the Tenth Amendment's distinction between the People and the states to curtail a state's power relative to that of the federal

commandeering decisions, derive principally from the tacit structural postulates of the Constitution, not from the literal text of the Eleventh Amendment.").

346 Sher, *supra* note 18, at 609.

347 Alden v. Maine, 527 U.S. 706, 715 (1999).

348 *Id.*

349 Sher, *supra* note 18, at 611.

350 *Alden*, 527 U.S. at 727–29; Sher, *supra* note 18, at 611.

351 Sher, *supra* note 18, at 612.

352 *Id.* at 613; *see* RON CHERNOW, ALEXANDER HAMILTON 321 (2004) (summarizing Hamilton's "agenda" as "to strengthen the central government, bolster the executive branch at the expense of the legislature, and subordinate the states").

353 Printz v. United States, 521 U.S. 898, 918–19 (1997).

354 *Printz*, 521 U.S. at 920–21 (citing THE FEDERALIST NO. 15, at 109 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

government;[355] Justice Scalia relied on the Tenth Amendment to curtail federal power relative to that of the states.

In Justice Scalia's vision of the Constitution's architecture, the People benefit from a "double security," that "different governments will control each other, at the same time that each will be controlled by itself."[356] Is incontestable that Justice Scalia was a maestro of rhetoric. Of all the quotes in American jurisprudence that would have supported his reasoning, Justice Scalia chose one that cast the People in a passive, singular role: as the only object, and an object, only. Justice Scalia's usage of "object" marked a striking departure from Hamilton's contemporaries' use of that same phrase. For example, Chief Justice Jay used the phrase in *Chisholm*, referring to "ensur[ing] justice" as an "object[]," and to the People as "fellow citizens and joint sovereigns."[357] Given Justice Scalia's command of language, this grammatical sleight of pen suggests not only that the people are the only proper object of government, but that they are an object only—never subjects, never syntactic protagonists in control of the government of their own destinies. More casuistry than solecism, the double meaning would not have been lost on Justice Scalia.

From Justice Scalia to Kennedy, all profess fealty to a common orthodoxy: Dual Sovereignty. All assume that from states' Sovereignty flows their Dignity. That cannot be right.

A. *Returning to First Principles*

The same Justices whose arguments pledge allegiance to Dual Sovereignty elsewhere concede its error. Recall *San Antonio Metro Transit Authority*, where, in 1985, Justice Brennan elided the People with the United States, while Justice Powell elided the People with the states. By 1985, Justices on either end of the ideological spectrum had embraced Dual Sovereignty's central dogma: Under the Constitution, there are two effectual governments and an enfeebled People.[358]

355 M'Culloch v. Maryland, 17 U.S. 316, 429 (1819) ("The sovereignty of a State extends to [everything] which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States . . . the people of a single State cannot confer a sovereignty which will extend over them.").

356 *Printz*, 521 U.S. at 921–22 (citing The Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961)).

357 Chisholm v. Georgia, 2 U.S. 419, 477, 479 (1793) (opinion of Jay, C.J.).

358 Thomas B. McAffee et al., Powers Reserved for the People and the States: A

In 1992, orthodoxy's edifice cracked.

In 1992, voters in Arkansas amended their state constitution to impose term limits on their representative to the federal government, unwittingly setting the stage for a confrontation over "first principle[s]."[359] In *U.S. Term Limits, Inc. v. Thornton*, the Court struck down the amendment, concluding that neither Congress nor the states can add to the Constitution's requirements for congressional office. The dissenters[360] agreed that the Constitution set "a ceiling" for Congress's additions, but argued those same limits set "a floor" for the states.[361] Like *McCulloch* had held a state cannot literally tax the federal government, *Term Limits* held that no state can figuratively tax the collective intelligence of Congress by limiting its members' tenure.[362] Yet neither the majority,[363] nor the dissenters, had much to say about actual term limits. The Justices hardly debated the wisdom of the Arkansas voters' amendment. Instead, the Justices' debate centered on first principles, to whom the Constitution grants the power to decide whether there ought to be term limits.[364]

The majority argued that after entering into the Union, states retained two kinds of powers only: first, power that belonged to the states before entry into the Union, reserved to states by the Tenth Amendment; and second, powers the Constitution delegated to them.[365] Since Congress did not exist before the Union, and the Constitution does not delegate to states the power to set qualifications for congressional office, the Arkansas voters' amendment was invalid. Writing in dissent, Justice Thomas argued the "ultimate source of the Constitution's authority" resides in the "peoples of each individual state . . . not an undifferentiated people of the Nation as a whole."[366] The act of Constitution was less an act of *popular* Sovereignty, and more one of *state* Sovereignty. Ratification meant the peoples of each

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359 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 783–84 (1995) (Kennedy, J., concurring). Arkansas' Term Limit Amendment provided that any person who served three or more terms as a member of the United States House of Representatives or two or more terms as a member Senate from Arkansas would be ineligible for re-election to that same office. *Id.* at 784.

360 The dissenters were Chief Justice Rehnquist, Justices O'Connor, Thomas, and Scalia. *U.S. Term Limits*, 514 U.S. at 845 (Thomas, J., dissenting).

361 Kathleen M. Sullivan, *Dueling Sovereignties:* U.S. Term Limits, Inc. v. Thornton, 109 HARV. L. REV. 78, 78–79 (1995).

362 U.S. Term Limits, 514 U.S. at 808.

363 The majority consisted of Justices Stevens, Ginsburg, Souter, Breyer, and Kennedy. *Id.* at 781.

364 Sullivan, *supra* note 361, at 79–80.

365 *Id.* at 89.

366 *Id.* at 90.

state surrendered powers the Constitution expressly withdrew from them, or others withdrawn by necessary implication. All other power, like setting term limits, Justice Thomas concluded, is reserved to the states.[367] Justice Thomas' formulation is striking; the breadth of power he proposes that the Tenth Amendment assigns to the states evokes John C. Calhoun's proto-Confederate vision of nullification.[368]

Term Limits is both banal and exceptional. Banal because the composition of majority and dissent reflects partisan ideology, except for Justice Kennedy, who broke rank from conservatives and so the partisan stalemate. Exceptional because the Court does not ordinarily broach first principles. For himself, Justice Kennedy wrote of the act of Constitution that the Framers "split the atom of sovereignty."[369] Although splitting atoms connotes halves and so conforms to Dual Sovereignty's orthodoxy, the idea is ambiguous. Atoms might be manipulated to release energy either by fusion (unification) or fission (separation).[370] *Term Limits* provided early insight into Justice Kennedy's heretical thinking that matured into *Obergefell*. *Term Limits* also provided a foundation for conservative jurists to embattle Dual Sovereignty and its doctrines into the Court's orthodoxy.

The crack in the orthodoxy's edifice is slight but runs through its foundation, marrow-deep. Justices debated over contemporary consequences of the metaphysics of the act of Constitution. That debate fits with Dual Sovereignty's orthodoxy in every way but one. Both *Terms Limits*' majority and dissenters take for granted that the Tenth Amendment establishes three sovereigns.[371]

367 *Id.*

368 Linda Greenhouse, *Focus on Federal Power,* N.Y. Times, May 24, 1995, at A1; Sullivan, *supra* note 361, at 98.

369 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

370 Carol S. Weissert & Sanford F. Schram, *The State of American Federalism*, 26 Publius No. 3 (1996).

371 Reese, *supra* note 47, at 2074–76.

B. *Chisholm Fugue*

Term Limits and its implicit acknowledgment of a third sovereign contradicted the orthodoxy of Dual Sovereignty, but was consistent with Court's own past answer to the question, who is sovereign?

Chisholm held that Article III of the Constitution extended federal courts' power to hear suits brought by individuals against states for violations of state law. The issue in *Chisholm*, as Justice Wilson put it, was: If a dishonest merchant made a promise and broke it, the merchant would be sued; if a state made a promise and broke it, why should the state be immune from suit?[372] For Justice Wilson, there was an existential danger in establishing "haughty notions of *state independence*, *state sovereignty* and *state supremacy*."[373] "In *despotic* governments, the *government* has usurped, in a similar manner, both upon the *state* and the *people* . . . In *each*, *man* is degraded from the *prime* rank, which he ought to hold in human affairs: In the *latter*, the *state* as well as the *man* is degraded."[374] Given American notions of Popular Sovereignty, federal courts' power to hear individuals' claims brought under state law was the only and obvious conclusion.

Justice Wilson's conclusion proved intolerable to the states, and so they ratified the Eleventh Amendment.[375] The states' reactions to *Chisholm* were swift and severe. Georgia's House of Representatives passed legislation rendering any judgment upon itself on behalf of Alexander Chisholm a felony punishable by "death, without the benefit of clergy."[376] The chronology of states' reactions is fact, and signals that *Chisholm* violated the states' and Framers' "original understanding of states' immunity from suit in federal courts."[377] This is the story that the Court set out in *Hans*[378] in 1890, and that the Court retold in *Seminole Tribe of Florida*,[379] and *Alden*.[380] Chief Justice Rehnquist, in *Seminole Tribe*, called *Chisholm* a "now-discredited decision," and reaffirmed *Hans*' endorsement of *Chisholm*'s dissent: "I can readily assume that Justice Iredell's dissent . . . correctly states the law that

372 Chisholm v. Georgia, 2 U.S. 419, 456 (1793) (opinion of Wilson, J.) ("Upon general principles of right, shall [a state] when summoned to answer the fair demands of its creditor[s], be permitted, proteus-like, to assume a new appearance, and to insult him and justice, by declaring *I am a* SOVEREIGN *State*?").

373 *Id.* at 461.

374 *Id.*

375 Massey, *supra* note 26, at 111.

376 *Id.*

377 *Id.*

378 Hans v. Louisiana, 134 U.S. 1 (1890).

379 Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996).

380 Alden v. Maine, 527 U.S. 706 (1999).

should govern our decision today."[381]

This rendition of events tells only part of the story.

The Eleventh Amendment was not passed overnight—it was sent to the states for ratification after two sessions of Congress.[382] Massachusetts Congressman Theodore Sedgewick proposed an Eleventh Amendment far broader than the one states ratified.[383] Even Congressman Sedgwick's expansive proposal addressed only the scope of judicial power to hear cases. To the extent that they register in the historical record, public debates about *Chisholm* spoke of narrow "suability," not Sovereignty.[384] Perhaps *Chisholm*'s conclusion of states' legal exposure and so their financial vulnerability threatened states' solvency. Perhaps it was material motivations rather than political beliefs that impelled states'reactions.[385]

Chisholm was decided in 1793, *Hans* in 1890. Closer in time to *Chisholm* in 1810, writing for the Court in *Fletcher v. Peck*, Chief Justice Marshall, a contemporary of the Framers, rejected the narrative that *Chisholm* was wrongly decided: "The constitution, *as passed*, gave the courts of the United States jurisdiction in suits brought against individual States."[386] Chief Justice Marshall concedes that the Eleventh Amendment changed certain things: "This feature is no longer found in the constitution"[387]; the "feature," meaning states' suability. Chief Justice Marshall's account of *Chisholm* teaches two lessons: first, that in the Constitution's original form, natural individuals were sovereign superiors to their contrived inferiors, the states; and second, that while *Chisholm* expounded both Popular Sovereignty and suability, the Eleventh Amendment addressed suability, only.

Of the past, we can be certain of little more than that we cannot be certain of much. This much is certain: Federalists sought to avoid another convention following *Chisholm* and so conceded to the states the Eleventh Amendment to the Constitution.[388] That Amendment repudiated part, but not all of, *Chisholm*. *Chisholm*'s conception of Popular Sovereignty survives.

381 *Seminole Tribe*, 517 U.S. at 68–69; *Hans*, 134 U.S. 1.

382 Massey, *supra* note 26, at 111.

383 Barnett, *supra* note 36, 1754–55 ("That no state shall be liable to be made a party defendant, in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons, whether a citizen or citizens, or a foreigner or foreigners, or of any body politic or corporate, whether within or without the United States . . . .").

384 Barnett, *supra* note 36, at 1755.

385 Massey, *supra* note 26, at 110–11, 113.

386 Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 139 (1810); Barnett, *supra* note 36, at 1745.

387 *Fletcher,* 10 U.S. at 139; Barnett, *supra* note 36, at 1745.

388 Massey, *supra* note 26, at 111, 113.

C. *The Third Sovereign*

Chisholm's survival means ours must be a system of three, rather than two, sovereign entities. The thread of history running back through *Obergefell*, to *Term Limits* to *Chisholm* leads inexorably back to the text of the Constitution. The Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[389] The Tenth Amendment defines the relationship among sovereign entities: It delegates some power to the national government, delegates some power to states, and reserves certain powers to the People.[390] No lawyerly divination is necessary to make sense of the Tenth Amendment. The text speaks for itself. In our constellation of sovereign entities, there are two governmental sovereigns, who wield only powers delegated to, or reserved for, them. Above them is a single natural sovereign, who inhabits the remainder of our legal cosmos, who encompasses Sovereignty's full measure: the People.

1. "[O]r to the People"

Orthodoxy's defenders understand the Tenth Amendment as a general reservation of undelegated powers, rather than a provision capable of securing specific individual rights.[391] They conclude that, even less than a truism, the Tenth Amendment is a "kind of exclamation point, an italicization, of the Constitution's basic themes of federalism and popular sovereignty."[392] Dual Sovereignty requires that we ignore the Tenth Amendment's final clause, that we ignore our forerunners choice to include it. The history of that choice illuminates the depth of Dual Sovereignty's ignorance. Although a sense of crass transaction pervades the story of the Eleventh Amendment, the story of the Bill of Rights as a whole, and the Tenth Amendment in particular, stands as a marbled sanctuary devoted to hard-fought independence, the values undergirding our Constitution, and the necessity of compromise.

Consider the Virginia Ratification Convention. The Virginia Convention's reservations were typical among Anti-Federalists: leeriness about losing independence won in Revolution to a new overbearing, national government. Federalists contended the Constitution's enumeration of the national government's powers was limit enough: the new government could

389 U.S. CONST. amend. X.
390 Reese, *supra* note 47, at 2082–83.
391 MCAFFEE ET AL., *supra* note 358, at 44.
392 *Id.* at 44 n.121 (quoting Professor Amar).

exercise only as much power as the Constitution granted it.[393] A favorite target of Anti-Federalist ire was Article I, Section 8, which grants to Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers…"[394] To us, the notion of Congress' implied powers is prosaic. For Anti-Federalists, the "Sweeping Clause" was a dramatic reversal, monarchy reincarnate.[395] To Federalists, these arguments missed the point: the offending clause's sweep was limited by such language as "necessary" and "proper," and so offensive laws regulating speech, religion, allowing general warrants, abolishing jury trials, and the like were already unlawful.[396] Federalists nevertheless recognized the political exigency of compromise, and so the Bill of Rights came into being.

The Virginians' proposed Tenth Amendment omitted "the people."[397] Although the Virginia Convention ultimately ratified our Tenth Amendment, it rejected it initially because of the final clause, "or to the people." The addition, they believed, was calculated to undermine states' power.[398] The Virginians' fear was that by assigning the residuum of sovereignty to the People of the United States, rather than to the peoples of each state, the Constitution would leave the measure of power reserved to states' legislatures, if any, in doubt.[399]

The historical record is unclear about the precise origin of the Tenth Amendment's final clause. Orthodoxy insists that on August 22, 1789, Maryland Representative Daniel Carroll objected to the addition of the phrase, "or to the people," because it "tended to create a distinction between the people and their legislatures."[400] The historical record is not so certain. The *Annals of Congress* reports that Daniel Carroll moved to add the language; New York's *Gazette of the United States* reports that Elbridge Gerry, James Madisons' Vice President, made the motion, and that Carroll

393 Gary Lawson, *A Truism with Attitude: The Tenth Amendment in Constitutional Context*, 83 Notre Dame L. Rev. 469, 476 (2008).

394 U.S. Const. art. I, § 8.

395 Lawson, *supra* note 393, at 479–80.

396 *Id.* at 480–81.

397 "First, That each State in the Union shall respectively retain every power, jurisdiction and right which is not by this Constitution delegated to the Congress of the United States or to the departments of the Foederal [*sic*] Government . . . ." Randy E. Barnett, *Kurt Lash's Majoritarian Difficulty: A Response to a Textual-Historical Theory of the Ninth Amendment*, 60 Stan. L. Rev. 937, 950–52 (2008).

398 *Id.* at 952–53.

399 *Id.* at 951 (citing Saturday, December 12, 1789, *in* Journal of the Senate of the Commonwealth of Virginia 63 (Richmond, Thomas W. White 1828)).

400 McAffee et al., *supra* note 358, at 43 (quoting Daniel Carroll, *Debates in the House of Representatives* (August 22, 1789)).

objected.[401] Daniel Carroll was a Roman Catholic who was denied any representation or participation in government in colonial America on account of his faith.[402] Although after 1776 Carroll could participate, even in the process of drafting our Constitution, he remained a minority; all but three of the Framers belonged to some denomination of Protestantism.[403]

Given the conflicting historical accounts, there is no way to know which of Elbridge Gerry and Daniel Carroll proposed or opposed the phrase. Gerry, an Anti-Federalist standard-bearerer of Jefferson's Democratic Republican party, is familiar enough a character to infer what he meant by his use of the phrase: that the central government's actions should be dictated by, or conform to the actions of the states.[404] Of Carroll, we can be certain that he would have been familiar with Coode's Rebellion, a violent Protestant uprising in 1689 in Maryland against a colonial government chartered to, and operated by, Roman Catholics.[405] We might fairly infer, then, that by his use of this phrase, Carroll meant that government could secure individual freedoms, at least to religious practice and political participation, on two conditions: first, that a state legislature's composition is representative of those individuals it purports to represent; and second, that the People are a distinct entity, both from legislatures, and from the states.

If this interpretation is correct, the orthodoxy of Dual Sovereignty, its central dogma of elision of "the people" and "the states" and their legislatures,[406] must fall. The Constitution's text confirms, at least, Carroll's distinction of "the people" from both "the states" and their legislatures. Apart from the Bill of Rights and Constitution's Preamble, the only mention of "the people" in the Constitution, as it was originally drafted, is in Article I, Section 2, which lays out the House of Representatives' composition and electoral intervals: "The House of Representatives shall be composed of Members chosen every second Year by the People . . ."[407] The Constitution uses the term "legislature" to refer to the states' elected representatives;

401 Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and "Expressly" Delegated Power*, 83 NOTRE DAME L. REV. 1889, 1921 n.125 (2008).

402 *See Washington Journal: Friday*, C-SPAN, at 2:20:46 (Oct. 25, 1996), https://www.c-span.org/video/?76130-1/washington-journal-friday (Brian Lamb's interview with Maryland State Archivist Edward Papenfuse).

403 David L. Holmes, *The Founding Fathers, Deism, and Christianity*, BRITANNICA, https://www.britannica.com/topic/The-Founding-Fathers-Deism-and-Christianity-1272214 (last visited Apr. 26, 2022).

404 *Washington Journal: Friday*, *supra* note 402.

405 *John Coode*, MD. ARCHIVES, https://msa.maryland.gov/megafile/msa/speccol/sc3500/sc3520/000200/000269/html/269bio.html (last visited Apr. 26, 2022).

406 Troxel v. Granville, 530 U.S. 57, 91–92 (2000) (Scalia, J., dissenting) (eliding "the people" and "the states" and their legislatures).

407 Barnett, *supra* note 397, at 949 (quoting U.S. CONST. art. 1, § 2).

Article I, Section 3 provides that "The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . ."[408] The People are distinct not only from the states, but also from any legislature. There is no direct or definitive evidence, to be sure, but there is evidence enough to surmise that Gerry opposed, and Carroll proposed the phrase, and that Carroll's meaning signals a third sovereign: the People.

2. Individual or Collective?

This third sovereign could be "the [P]eople" acting as a collective entity, as a body politic, rather than as many entities, as individuals. The Bill of Rights' other uses of the phrase "the [P]eople" suggest that it is intended to encompass both the singular and the plural meanings. The preamble to the Constitution asserts that "We the People of the United States, in Order to form a more perfect Union" established and ordain a new Constitution to "secure the Blessings Liberty to ourselves and our Posterity . . ." "Ourselves," rather than "Ourself." [409] The First Amendment protects the right of "the [P]eople" to assembly, petition, redress for grievances, and freedoms of speech and press. Each right can be exercised and accomplished on one's own.[410] For example, the Third Amendment protects against governments' unconsented-to quartering of soldiers in "any house . . . of the Owner . . ." The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures . . ."[411] Even accounting for the collective function and democratic benefits of the right to trial by jury that the Seventh Amendment guarantees, the right must attach to an individual Defendant, or an individual Juror, or both.[412] Defining rights that enable collective rights as individual rights collapses the distinction between the collective and the individual.[413] The Framers' ambiguity was surely no mistake. The Framers' ambiguity comports with reality's complexity—it cannot always be made to conform

408 *Id.* at 950 (quoting U.S. Const. art. 1, § 3).

409 *Id.*

410 U.S. Const. The Second Amendment protects the right of "the people to keep and bear arms," if only as part of an organized militia. The Fifth ("[n]o person shall be held to answer . . . without due process of law") and Sixth Amendments ("the accused") are similarly worded.

411 U.S. Const. amend. IV.

412 *See generally* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 Cornell L. Rev. 203 (1995).

413 Reese, *supra* note 47, at 2090 n.202 (citing Kurt Lash, *On Federalism, Freedom, and the Founders' View of Retained Rights: A Reply to Randy Barnett*, 60 Stan. L. Rev. 969, 971 (2008)).

to a tidy taxonomy. Like the Tenth Amendment's reserved powers, these Amendments' rights are both singular and plural, at once shared in common and held by each of us, alone.[414]

Reality's messiness aside, a problem remains: if the Tenth Amendment's addition to the Constitution was to furnish a space for a third, individual sovereign, it would appear to conflict with the Ninth Amendment, the other Popular Sovereignty amendment.[415] The Ninth Amendment reads: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."[416] If the Tenth Amendment's third sovereign is the individual, it would render the Ninth Amendment illogical or superfluous.[417] Were it the same "pot of sovereign powers," that criticism would be fatal. The Ninth Amendment's use of the phrase "rights" versus the Tenth Amendment's "powers" belies the criticism. If there were no difference in the Amendments' meaning, there would be no difference in their text. There is, however, a difference in the Amendments' text, and so there must be difference in meaning.

Consider the right to vote. Is it a right, or a power? The act of voting is individual. Yet, the act is meaningful only when exercised alongside others as part of an election. In ordinary times, in elections for public office and the like, collective and individual conceptions of Popular Sovereignty overlap. In ordinary times, voting presents as a right. In extraordinary times, when a vote is cast as part of a Convention, we can see that voting is also a power. That power is both individual and collective; a vote cast only counts if cast as part of a Convention. Our vote cast in a Convention to alter or abolish a form of government emulates in our time the Framers' generation's constitutive decision to form a Union. In extraordinary moments, voting is neither a political nor civil right; voting is a sovereign power.

Popular sovereignty is neither wholly, nor necessarily collective or individual. The error in logic is not collapsing individual with collective rights; instead, the error is collapsing ordinary, positive rights, with extraordinary, ultimate powers.[418] Justice Wilson wrote in *Chisholm* that Georgia retained legislative authority, yet was less than a full sovereign, and so Georgia was inferior to natural individuals.[419] Ordinary power of positive law belongs to

414 Barnett, *supra* note 397, at 946.

415 *See generally* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 119-33 (2000) (discussing both Ninth and Tenth Amendments).

416 U.S. CONST. amend. IX.

417 Reese, *supra* note 47, at 2089–91 ("It cannot be that the people as individuals retain powers (other than their rights and freedoms from the Ninth Amendment) that are in the same pot of sovereign powers at play in the rest of the Tenth Amendment.").

418 *See, e.g.*, Lash, *supra* note 413, at 971–72.

419 Sher, *supra* note 18, at 602.

governmental sovereigns; extraordinary power of ultimate law belongs to each individual. Chief Justice Jay wrote in *Chisholm* that our Constitution's "great and glorious principle" is that "the people are the sovereign of this country" and that the People are "fellow citizens and joint sovereigns."[420] We are fellow citizens when we exercise our privileges or immunities. We are persons when a government deprives us of life, liberty, or property without Due Process of law, or denies us Equal Protection of the law. We are sovereign when we exercise those powers the Tenth Amendment reserves to us. Dual Sovereignty's orthodoxy made a "truism" out of the Tenth Amendment. Lift the veil of orthodoxy and observe the Amendment's truth. The Tenth Amendment's final four words delineate powers possessed by neither the federal government, nor the states; it reserves power to the third sovereign, to you and to me.[421] Choosing government representatives or deciding to alter or abolish a government, might be history's archetypal examples of Popular Sovereignty. Choosing government representatives is one, but not the sole expression, of Popular Sovereignty's beating core: choice.

V. The Personal Question Doctrine

Popular Sovereignty, Due Process, and Dignity are different faces of a singular crystalline solid: "the freedom of the individual."[422] If Popular Sovereignty's evolution from creation myth to celestial polestar teaches any lesson about our Constitution, it is that beyond arguments' rhetorical superfluities and doctrinal intricacies is an idea simple and sublime: that freedom means the power to decide.[423] We might secure that freedom the Constitution promises us with a principle capable of policing the proper boundaries of the third sovereign's dominion: a Personal Question Doctrine.

Where are those boundaries? If there are three sovereigns, what decisions fit within the compass of the third sovereign's powers? The Constitution could not withdraw all choice from this third sovereign and allocate power solely to governmental sovereigns, this would be intolerable. Nor could the Constitution remand all choice to it, this would be unworkable. The Framers provided us an exemplar of compromise in the form of voting. The Tenth Amendment's final clause signals that voting is not alone: "The *powers* not delegated . . ." The Tenth Amendment's ambiguity is doubtless deliberate. The generations that wrote and ratified the Bill of Rights and the Reconstruction Amendments could not know, and did not presume to

420 Chisholm v. Georgia, 2 U.S. 419, 479 (1793) (opinion of Jay, C.J.).
421 Redlich, *supra* note 11, at 807.
422 Bond v. United States, 564 U.S. 211 (2011).
423 Lawrence v. Texas, *supra* note 11, at 1927.

know, the whole of freedom; they entrusted us to discover its scope and meaning.[424] Dominion belonging to the third sovereign, like her governmental companions', expands or contracts with time. Perpetual reassessment of that compass is how the Constitution sustains the heavy burdens of democracy, withstands the strains of the Framers' grand experiment.

Where the text of the Constitution is silent, the jurisprudence speaks.

A. *Constitutive Questions*

Not all questions are created equal. Certain questions are political, for example, and so not susceptible to judicial resolution; this was the Court's conclusion in *Luther,* that the Court has since affirmed.[425] Questions posed to courts might well be susceptible to political resolution, yet they are committed to, and so decided by, the courts. This dynamic, to shelter whole categories of choice from the frenzies and passions of popular majorities is by design.[426] This dynamic is Popular Sovereignty as a structural principle in motion.

Due Process embodies this same idea. The Court's recognition of a right as fundamental withdraws from some individual or group, and assigns to another, the power to decide.[427] On the surface, Chief Justice Rehnquist's *Glucksberg* opinion, and Justice Harlan's *Poe* dissent are two distinct approaches to recognizing unenumerated rights. In truth, each is a distinct approach to the allocation and assignment of decisionmaking power. *Glucksberg*'s emphasis on history and tradition favors orthodoxy over heresy, hesitation over alacrity. *Glucksberg* recognizes fundamental rights only if they are "'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty.'"[428] Justice Harlan's *Poe* dissent looked to history and tradition, but looked beyond them, too. In *Obergefell*, Justice Kennedy embraced Justice Harlan's approach, and dismantled much of *Glucksberg*—but not all of it: "[W]hile [*Glucksberg*] may have been appropriate for the asserted right there involved [physician-assisted suicide], it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage

424 Yoshino, *supra* note 207, at 163; *see* Obergefell v. Hodges, 576 U.S. 644, 664 (2015).

425 Baker v. Carr, 369 U.S. 186, 222 (1962) (defining parameters of non-justiciable questions).

426 Tribe, *supra* note 136, at 16; *Obergefell*, 576 U.S. at 676–77 (It is "the idea of the Constitution . . . 'to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.'" (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943))).

427 Lawrence v. Texas, *supra* note 11, at 1927.

428 Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

and intimacy."[429] Some piece of *Glucksberg* endures.

Justice Kennedy was vague as to which piece that might be. Perhaps it is that not all rights, not even all fundamental rights, are the same; that the Court ought to draw distinctions among rights,[430] and between rights and powers. Perhaps it is that the difference between the rights to marriage and intimacy and a right to physician-assisted suicide is that one is fundamental, and the other constitutive and thus ill-suited to Due Process's protection. Ill-suited not because the Constitution cannot protect it, but because the Constitution should protect it as integral to Human Dignity. If this is the strand of *Glucksberg*'s logic that Justice Kennedy sought to sever from the rest and to preserve, together with *Obergefell*'s notion of Equal Dignity, they teach that the substance of the decision the Court is assigning power over ought to dictate the Court's analysis, and not the other way around. Where the decision is constitutive, the Court should assign the power to decide, as the Tenth Amendment's final clause instructs it must, to the People.[431]

Consider the decision whether to bear or beget a child. A legislature cannot by fiat coerce a child-bearing individual into conforming to its decision, because the long and lasting labors of birth impose a "suffering [] too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture."[432] The Court has assigned the decision to the individual woman because the decision is "personal and intimate," "properly private," and "basic to individual dignity and autonomy."[433] Affirming that assignment, the Court described the decision as "defin[ing] one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[434] Were the choice assigned to a government rather than the individual, "[b]eliefs about these matters could not define the attributes of personhood."[435] The questions remanded to the third sovereign are the most solemn questions, "traumatic [] and [] empower[ing]…" and whose assignment to the individual is a mandate of "basic [H]uman [D]

429 *Obergefell,* 576 U.S. at 671.

430 *E.g.,* Vacco v. Quill, 521 U.S. 793, 804–05 (1997) (Chief Justice Rehnquist differentiating between withdrawing treatment and administering drugs to end a person's life).

431 "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. amend. X.

432 Lawrence v. Texas, *supra* note 11, at 1927 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992)).

433 Thornburgh v. Am. Coll. of Obstreticians and Gynecologists, 476 U.S. 747, 772 (1986).

434 Greenhouse & Siegel, *supra* note 168, at 1740 (quoting *Casey*, 505 U.S. at 851).

435 *Id.*

ignity."[436] It is for the individual to answer these questions not because of citizenship, not because of race or creed, but because of her humanity.[437]

Glucksberg rejected an argument about physician-assisted suicide like this one about abortion. The Court has since rejected much of *Glucksberg*. Consider, then, the Ninth Circuit's reasoning affirming the individual's right to a physician-assisted suicide:

> Some argue strongly that decisions regarding matters affecting life or death should not be made by the courts. Essentially, we agree with that proposition. In this case, by permitting the individual to exercise the right to choose we are following the constitutional mandate to take such decisions out of the hands of the government, both state and federal, and to put them where they rightly belong, in the hands of the people. We are allowing individuals to make the decisions that so profoundly affect their very existence – and precluding the state from intruding excessively into that critical realm. The Constitution and the courts stand as a bulwark between individual freedom and arbitrary and intrusive governmental power. Under our constitutional system, neither the state nor the majority of the people in a state can impose its will upon the individual in a matter so highly "central to personal dignity and autonomy." Those who believe strongly that death must come without physician assistance are free to follow that creed, be they doctors or patients. They are not free, however, to force their views, their religious convictions, or their philosophies on all the other members of a democratic society, and to compel those whose values differ with theirs to die painful, protracted, and agonizing deaths.[438]

These are not the decisions of everyday life. These are deterministic questions of discovery, construction and even destruction.[439] These are choices whose consequences reverberate through time, define the essence of, and determine the course of, one's existence. Any law threatening to place a substantive or procedural obstacle in the way of rendering such choices would be "extraordinary."[440] The Personal Question Doctrine would

436 *Casey*, 505 U.S. at 916.

437 Screws v. United States, 325 U.S. 91, 134–35 (Murphy, J., dissenting); Daly, *supra* note 109, at 393.

438 Compassion in Dying v. Washington, 79 F.3d 790, 839 (9th Cir. 1996) (en banc), *rev'd sub nom*. Washington v. Glucksberg, 521 U.S. 702 (1997) (citation omitted).

439 Lawrence v. Texas, *supra* note 11, at 1898.

440 Litman, *supra* note 110, at 1214 n.40 (citing Shelby Cnty. v. Holder, 570 U.S. 2612, 2618, 2624–26, 2628, 2630 (2013)).

strike down laws that survive scrutiny under ordinary Due Process analysis or *Casey*'s undue burden test, because both condone states' "disparate treatment"[441] of natural, sovereign indivduals in a "fundamental way."[442] The crux of such laws' injury is their failure to distinguish between rights and powers, between buying health insurance[443] and choosing to meet death on one's own terms.[444] In the name of protecting potential life—a boundless notion that threatens to enlarge states' police power to no principled end—such laws ascribe presumptive moral culpability to women on the basis of bygone notions of a woman's role in society as domestic procreator, or worse, an overriding distrust of women so thorough as to bond her, to degrade her, and to condemn her. These decisions are moments of tragedy that might tarnish, or triumph that might burnish, human experience; moments we face as mortals, alone in communion with eternity. The text of the Constitution contemplates one decision, whether to alter or abolish a form of government. The jurisprudence suggests another: the decision whether to bear a child.

On the surface, Due Process and the Personal Question Doctrine do something similar: each assigns a decision. Due Process assigns decisions as rights owed to citizens or persons whose protections flow from either Liberty or Equality. The Personal Question Doctrine assigns decisions as power owed to a natural sovereign whose protections flow from Dignity. Where the origin of a decision's assignment is Human Dignity, it draws from an ancient mainstem,[445] universal and unassuming, flowing a greater distance and with greater force than could its tributary streams, Liberty and Equality, even as they entwine.

Observe the cascades downstream.

B. *Sovereign Immunity*

The Personal Question Doctrine guarantees sovereigns' immunity. Were law to attach guilt to an individual's resolution of such questions, questions of conscience,[446] it would render the choice no choice at all.[447] The Constitution distributes to the individual these questions of one's own moral

441 *Shelby Cnty.*, 570 U.S. at 2630.
442 *Id.* at 2631.
443 *See* Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & Liberty 581, 585, 614 (2010).
444 *See* Chemerinsky, *supra* note 251, at 1501–16.
445 Sher, *supra* note 18, at 594–605.
446 *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 916 (1992).
447 Great N. Life Ins. Co. v. Read, 322 U.S. 47, 51 (1944).

policy,[448] of one's embrace or rebuke of elementary notions of right and wrong, whenever[449] and in whatever form[450] they arise. The third sovereign's dominion extends to constitutive questions, and for those answers, we cannot be held to account.

C. *Unalienable Powers*

The Personal Question Doctrine secures the individual's power against legislative or popular usurpation. An individual can choose to waive a right. An individual can promise not to enforce another entity's obligations to the individual.[451] Rights can also be delegated, so that we assign our rights to enforce another entity's obligations to us to someone else. The Constitution itself is an exemplar of delegation, but of a different, more permanent kind. Although we can choose to waive certain rights that the Constitution grants us, we cannot choose to waive powers that the Constitution reserves to us.

Powers are different. The terms of the Constitution's delegation can be, and have been, changed by proper amendment. Powers the Constitution has already committed to one sovereign entity or another, absent amendment, cannot be waived. Even if an individual's past conduct causes her inability to exercise her power later in time, that past conduct cannot amount to a waiver.[452] "The Constitution's division of power among the three Branches," three organs of a single larger, sovereign entity, "is violated where one Branch invades the territory of another, whether or not the encroached-upon Branch approves the encroachment."[453] The reason for waiver's impotence to fiddle with the Framers' design, the reason one governmental sovereign cannot consign its duty to decide away, is the nature of the decision.[454] At stake is individual Liberty.[455] Our Declaration of Independence reads: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among

448 *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1471 (2018).

449 Litman, *supra* note 110, at 1220–21.

450 *Id.* at 1217 (citing Shelby Cnty. v. Holder, 570 U.S. 2612, 2648 (2013) (Ginsburg, J., dissenting)).

451 For example, click-wrap agreements, digital prompts that ask whether you agree to, or accept terms and conditions, before you can do whatever it is you intend to do, ask whether we want to waive rights—and we do.

452 *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, *supra* note 11, at 333.

453 New York v. United States, 505 U.S. 144, 182 (1992).

454 *See, e.g.*, Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983); Myers v. United States, 272 U.S. 52 (1926).

455 Boumediene v. Bush, 533 U.S. 723, 742 (2008).

these are Life, Liberty, and the pursuit of Happiness."[456] The Declaration continues: "That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it…"[457] The Declaration mentions two, distinct kinds of rights: "rights" secured by a limited set of powers we distribute to Governments, and "Rights" we keep for ourselves; the latter are the powers reserved by the Tenth Amendment. Capital-R "Rights," our sovereign powers, are "unalienable."

Conclusion

The Tenth Amendment's triptych truth threatens to destroy orthodoxy. Observing the constellation of sovereigns and values in their totality, without orthodoxy's obsfuscating mist, threatens to banish Dual Sovereignty to desuetude. Its defenders will zealously guard the old view, accusing the challenge mounted herein of staking out a radical position beyond the bounds of respectable argument[458] and of attempting to destroy original revelation. At the moment of Revolution, Thomas Paine wrote in his pamphlet, *Common Sense*:

> Perhaps the sentiments contained in the following pages, are not yet sufficiently fashionable to procure them general favor; a long habit of not thinking a thing wrong, gives it a superficial appearance of being right, and raises at first a formidable outcry in defense of custom. But the tumult soon subsides. Time makes more converts than reason.[459]

The founding generation chose heresy over an orthodoxy which was the product of lassitude and sloppy thought. At the moment of Independence, that generation declared:

> When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and

456 The Declaration of Independence para. 2 (U.S. 1776).
457 *Id.*
458 Barnett, *supra* note 36, at 1758.
459 Thomas Paine, Common Sense (1776), https://www.gutenberg.org/files/147/147-h/147-h.htm.

> of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.[460]

The founding generation chose alacrity. At the moment of Constitution, the Framers wrote, "[w]e the People of the United States, in Order to form a more perfect Union…[to] secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."[461]

The Framers of our Constitution chose to harness boundless discord to create a harmonious equipoise. The Framers of our Constitution chose pluralism.[462] At moments of triumph and tragedy in our lives, at constitutive moments, each of us stands alone. This article has presented landscapes of history to justify remanding these moments' decisions to the individual to decide as the Tenth Amendment commands. These sketches, isolated from jurisprudence's flow through time, are parsimonious compared to the richness and complexity of the larger scheme of things,[463] a scheme that can and will only grow richer in complexity. Beneath the surface of that tumultuous flow are quiet depths. There, the weight of history arrests any oppressive impulse, crushes the cruel artifice of orthodoxy. Discovery takes curiosity, construction dexterity, and destruction empathy. The Personal Question Doctrine empowers us to peer into that tranquil abyss, to find the good in bad things,[464] and to navigate through the fierce storms of life, to carry toward fruition the idea of the Constitution.

460 THE DECLARATION OF INDEPENDENCE, *supra* note 456.

461 U.S. CONST. pmbl.

462 GADDIS, *supra* note 4, at 311 n.43; ISAIAH BERLIN, *Two Concepts of Liberty*, *in* THE PROPER STUDY OF MANKIND 191–242 (Henry Hardy & Roger Hausheer eds., 1997).

463 ISAIAH BERLIN, THE HEDGEHOG AND THE FOX 88–90 (1953).

464 GADDIS, *supra* note 4, at 109.