
CONSTITUTIONAL RIGHTS BEFORE REALISM

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This Essay excavates a forgotten way of thinking about the relationship between state and federal constitutional rights that was prevalent from the Founding through the early twentieth century. Prior to the ascendancy of legal realism, American jurists understood most fundamental rights as a species of general law that applied across jurisdictional lines, regardless of whether these rights were constitutionally enumerated. And like other forms of general law, state and federal courts shared responsibility for interpreting and enforcing these rights. Nor did the Fourteenth Amendment initially disrupt this paradigm in ways that we might expect. Rather than viewing rights secured by the Fourteenth Amendment as distinctively “national,” most early interpreters thought that these rights remained a species of general law. For several decades, debates instead focused on the extent to which these rights were enforceable in federal court, akin to the way that federal courts could hear general-law claims in diversity-jurisdiction cases. It was only with the rise of legal realism that American jurists began to conceptualize fundamental rights distinctively in terms of state (constitutional) law and federal (constitutional) law and to divide interpretive authority into state and federal spheres.

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How do rights secured by state constitutions relate to those secured by the Fourteenth Amendment? For instance, do state-level guarantees of religious and expressive freedoms have the same legal content as the “incorporated” federal rights supplied by the First Amendment?¹ Some state courts say yes. But this

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1. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (recognizing the incorporation of the First Amendment against the states by the Fourteenth Amendment); *Bennefield v. Commonwealth*, 467 S.E.2d 306, 311 (Va.

approach is not required. Modern legal interpretation is largely grounded on the intent of the lawmakers,² so even identical language in different constitutions can carry different meanings.³ State constitutional rights need not track their federal counterparts.⁴

Building on this insight, Judge Sutton's *51 Imperfect Solutions* challenges us to rethink the relationship between state and federal constitutional rights.⁵ "There is no reason to think, as an interpretive matter," he writes, "that constitutional guarantees of independent sovereigns, even guarantees with the same or similar words, must be construed in the same way."⁶ Many state constitutional rights predated the federal constitution or emerged in entirely different circumstances.⁷ Moreover, he argues, giving state constitutional rights independent potency would accord with values of federalism and would perhaps also "ease the pressure on the U.S. Supreme Court to be the key rights innovator in modern America."⁸

This Essay aims to show that the federal dominance Judge Sutton laments and the state-based "imperfect solutions" he offers reflect modern shifts in the way that we think about constitutional rights.⁹ In particular, Americans used to view the state and federal bills of rights as declaratory of rights that were common across jurisdictions rather than as creating rights specific to that jurisdiction.¹⁰ Back then, contrary to Judge Sutton's suggestion, there *was* "reason to think, as an interpretive matter, that constitutional guarantees of independent sovereigns" carried the same meaning.¹¹ But this understanding also meant that

Ct. App. 1996) ("Our courts have consistently held that the protections afforded under the Virginia Constitution are co-extensive with those in the United States Constitution.").

2. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 591 (2008).

3. See *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 675 (2006) ("The definition of a term in one statute does not necessarily control the interpretation of that term in another statute, for where the purposes or contexts are different the terms may take on different meanings."); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 501 (1992) ("This Court . . . has not inflexibly required the same term to be interpreted in the same way for all purposes."); *Espeleta v. Sisters of Mercy Health Corp.*, 800 F.2d 119, 122 (7th Cir. 1986) ("Similar sounding phrases often have different meanings when applied in different legal contexts.").

4. See JEFFREY S. SUTTON, *51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW* 173 (2018).

5. *Id.* at 174.

6. *Id.*

7. See *id.* at 175.

8. *Id.* at 214.

9. I am indebted to the many scholars who have written about aspects of this transformation in far greater detail, and particularly to Charles McCurdy for introducing me to the concept of general constitutional law in his Salmon P. Chase Lecture in 2018. See Charles W. McCurdy, *The Problem of General Constitutional Law: Thomas McIntyre Cooley, Constitutional Limitations, and the Supreme Court of the United States, 1868-1878*, 18 GEO. J.L. & PUB. POL'Y 1 (2020). This Essay aims to show how the debates in different eras fit together and how the modern problems that Judge Sutton addresses are fundamentally the product of shifts in understanding of rights precipitated by the legal realist movement. The argument is descriptive, without taking any normative position about the proper use of history.

10. See, e.g., *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 571 (1949) (mentioning "rights derived from the Constitution of the United States").

11. SUTTON, *supra* note 4, at 174 ("There is no reason to think, as an interpretive matter, that constitutional guarantees of independent sovereigns, even guarantees with the same or similar words, must be construed in the same way.").

no single jurisdiction was supreme the in exposition of those rights. With the ascendancy of legal realism, however, all of this changed.

Part I begins by exploring debates in the late 1780s about whether state constitutional provisions could be used to identify rights against the federal government. What these debates reveal is a prevalent understanding of bills of rights as declaratory. On this view, rights were merely recognized in, and not created by, their placement in a constitution. Consequently, many Americans thought it possible to ascertain the rights that operated against the federal government by looking to state declarations of rights.

Of course, the Founders eventually opted for amendments—now known as the Bill of Rights—which then led to the question addressed in Part II: What, if any, relevance did federal constitutional provisions have when trying to ascertain limits on state power? Today, we typically answer this question quickly: The Bill of Rights did not apply to states before the passage of the Fourteenth Amendment.¹² Indeed, that seems to be the holding of *Barron v. Baltimore*.¹³ “As *Barron* confirms,” Judge Sutton states, “the key individual rights guarantees in the U.S. Constitution originally restricted the federal government.”¹⁴

This conventional wisdom is sort of true. But from a historical perspective, it conceals a different way of understanding the source and operation of rights. *Barron* held that federal courts lacked federal-question jurisdiction to hear rights claims against state governments.¹⁵ But *Barron* in no way resolved a lively debate about the declaratory nature of enumerated rights. The rights mentioned in state declarations and in the federal constitution were often conceptualized as a species of general law, not as a form of enacted law that one would expect to vary from jurisdiction to jurisdiction. State courts could—and often did—refer to the federal constitution and other state constitutions as evidence of the rights that operated against their governments.

Part III then considers the impact of the Fourteenth Amendment. The crucial issue that emerged after 1868 was not—as we usually assume—identifying which rights the Fourteenth Amendment created (or, to use the modern lingo, “incorporated”) against the states. Those rights already existed.¹⁶ Rather, the central controversy in the late nineteenth century was the extent to which the Fourteenth Amendment added a new way of enforcing these rights.

Part IV then considers the collapse of this earlier understanding of rights under the weight of legal realism. Once legal realism took the reins, with rights viewed in a positivist light, the notion of general fundamental rights became unsustainable on its own terms. Rights were not the creature of nature or some imagined social contract, realists implored. Rather, rights were a creature of positive law.

12. See SUTTON, *supra* note 4, at 12.

13. 32 U.S. (7 Pet.) 243, 251–52 (1833).

14. SUTTON, *supra* note 4, at 12.

15. *Barron*, 32 U.S. (7 Pet.) at 251–52.

16. The question of “political rights”—that is, rights to participation in the administration of government, like voting, legislative eligibility, and juror eligibility—were analyzed differently. See PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION* 61 (2011).

This Essay highlights two shifts that emerged from this new understanding of constitutional rights. First, realism suggested that there was not *one* set of fundamental rights but rather *fifty-one* sets of constitutionally created rights.¹⁷ In this way, it became more persuasive to argue—as did Justice Frankfurter,¹⁸ then Justice Brennan,¹⁹ and now Judge Sutton—that states ought to interpret their constitutions as independent sources of law, without being necessarily tied to federal rights. Indeed, as Judge Sutton notes, the idea that “differently situated sovereigns” would happen to have identical rights “often seems inexplicable” given modern premises about constitutional interpretation.²⁰

At the same time, however, the notion that the Fourteenth Amendment had actually created rights—not simply secured them—suggested that federal authorities, and particularly federal judges, were supreme in their exposition. A right created by the federal constitution was a right over which states had no claim of interpretive authority. The path was thus laid for greater federal supremacy in the definition of constitutional rights.

The controversies that have engaged Judge Sutton are the product of these developments. Whether we self-identify as legal realists or not, the terrain of rights discourse was fundamentally reshaped by the triumph of legal realism nearly a century ago.

I. STATE ENUMERATED RIGHTS AS LIMITS ON FEDERAL POWER

Americans today usually talk about rights as a creature of constitutional law. Identifying these rights, therefore, requires either explicit constitutional text, as with the rights of free exercise, free speech, and so forth, or else at least a plausible textual hook, as with “substantive” due process rights or Ninth Amendment rights.²¹ Either way, though, the ultimate source of constitutional rights is the Constitution.²² The terminology alone—“constitutional rights”—suggests as much.

17. Of course, there weren't fifty-one states earlier in the twentieth century, but you get the point.

18. See, e.g., *Adamson v. California*, 332 U.S. 46, 59–69 (1947) (Frankfurter, J., concurring); FELIX FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* 74–75 (1930).

19. See, e.g., William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (“State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law.”).

20. SUTTON, *supra* at 4, at 174–75.

21. See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 949 (1973) (“A neutral and durable principle may be a thing of beauty and a joy forever. But if it lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it.”).

22. See, e.g., *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 571 (1949) (mentioning “rights derived from the Constitution of the United States”). Revealingly, Justice Jackson cited to *Hanover Fire Ins. Co. v. Carr*, which mentioned “rights secured . . . by the Constitution of the United States,” 272 U.S. 494, 507 (1926) (emphasis added).

But many Americans simply did not think that way in the eighteenth and nineteenth centuries. A principal reason why was their immersion in social-contract theory.²³

In essence, social-contract theory was a backward-looking thought experiment designed to justify, and to limit, governmental authority.²⁴ The basic idea was straightforward. To understand the proper role of government, one can imagine a situation in which no government existed and then reconstruct the basic terms under which individuals would have unanimously agreed in a “social contract” (or “social compact”²⁵) to join together to form a political society—a body politic known as “the people.” Only after everyone had reached this unanimous agreement would the people then, under majority rule, form a system of government in a constitution.²⁶

Social-contract theory was ubiquitous in American constitutional thought, although sometimes hidden in plain sight. Consider the very first sentence of the Constitution. In the Preamble, William Findley of Pennsylvania recognized during the ratification controversy, “it is said, ‘We the People,’ and not ‘We the States,’ which therefore is a compact between individuals entering into society, and not between separate states enjoying independent power and delegating a portion of that power for their common benefit.”²⁷ State constitutions, too, often began with a basic statement of the precepts of social-contract theory.²⁸

Americans widely thought that individuals entering into a social contract would have agreed that the body politic had to preserve natural liberty—the freedom that humans would enjoy in an imagined state of nature—and had to guarantee certain positive rights, which Theophilus Parsons described as “the equivalent every man receives, as a consideration for the rights he has surrendered.”²⁹

23. This Part draws from an earlier blog post. See Jud Campbell, *The Bill of Rights and Social Contract Theory*, BALKINIZATION (Apr. 13, 2017), <https://balkin.blogspot.com/2017/04/the-bill-of-rights-and-social-contract.html>.

24. *Id.*

25. The term “social compact” is more historically accurate, but I want to avoid the possibility of confusion with the separate historical debate over the nature of the union, including the “compact theory” of Thomas Jefferson and others.

26. See Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 89 (2017).

27. Pennsylvania Ratification Convention Debates (Dec. 1, 1787) (remarks of William Findley), in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 447–48 (Merrill Jensen ed., 1976) (emphasis omitted); see also Luther Martin, *Genuine Information IV*, (Jan. 8, 1788), in THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 296, 297 (John P. Kaminski & Gaspare J. Saladino eds., 1984) (“It is in its very introduction declared to be a compact between the people of the United States as individuals . . . [rather than] by the States as States in their sovereign capacity.”) (emphasis omitted). See generally Jonathan Gienapp, *The Myth of the Constitutional Given: Enumeration and National Power at the Founding*, 69 AM. U. L. REV. FORUM 183, 194–209 (2020) (discussing these debates about the preamble).

28. See, e.g., MASS. CONST. of 1780, pmbl. (“The body politic is formed by a voluntary association of individuals: it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.”); N.H. CONST. of 1784, art. 1 (“All men are born equally free and independent: Therefore, all government, of right, originates from the people, is founded in consent, and instituted for the general good.”).

29. Theophilus Parsons, *Essex Result*, in MEMOIR OF THEOPHILUS PARSONS 359, 367 (Boston, Ticknor & Fields 1861).

These positive rights were rules about what the government had to do, like provide for trial by jury, and what the government could not do, like impose cruel and unusual punishments.³⁰ Consequently, as Thomas Jefferson explained, rights included not only “unceded portions of right”—that is natural rights, like “freedom of religion”—but also “certain fences which experience has proved peculiarly efficacious against wrong, and rarely obstructive of right,” like “trial by jury, Habeas corpus laws, [and] free presses.”³¹

For those who thought that individual rights were guaranteed in the social contract, it was unnecessary to enumerate them in a constitution or declaration of rights. The rights already existed. That did not mean that declaring rights was worthless; enumeration, for instance, might facilitate the political and judicial defense of rights. Declarations, Larry Kramer points out, could give rights “a degree of explicitness and clarity.”³² But crucially, as historians have broadly recognized,³³ enumeration was mostly a declaratory exercise.³⁴ The Ninth Amendment, with its reference to other rights “retained by the people,” reflects the same idea.³⁵

The Framers of the federal Constitution famously omitted a bill of rights. But the omission, they frequently argued, was inconsequential.³⁶ In part, their argument rested on the inherent fundamentality of certain rights.³⁷ “A Bill of Rights,” George Nicholas explained at the ratification convention in Virginia, “is only an acknowledgement of the pre-existing claim to rights in the people. They

30. Jud Campbell, *Judicial Review and the Enumeration of Rights*, 15 GEO. J.L. & PUB. POL’Y 569, 576–79 (2017).

31. Letter from Thomas Jefferson to Noah Webster, Jr. (Dec. 4, 1790), in 18 THE PAPERS OF THOMAS JEFFERSON 131, 132 (Julian P. Boyd ed., 1971).

32. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 51 (2004).

33. See, e.g., John Phillip Reid, *The Authority of Rights at the American Founding*, in THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND 67, 97 (Barry Alan Shain ed., 2007); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 295 (1969); see also Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 197 (“Our written Constitution presupposes an established set of fundamental rights not created by the Constitution but protected or preserved by it.”).

34. See, e.g., Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171, 171–72 (1992); Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1157–58 (1987); William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 502 (2005). A caveat is that enumerating rights in a constitution was also a way of “recognizing the fundamentality of positive rights not supported by custom.” Campbell, *supra*, note 30, at 577.

35. Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 20 (1988). Michael McConnell, however, views enumeration as a critical step in recognizing the constitutional status of rights. See Michael W. McConnell, *Natural Rights and the Ninth Amendment: How Does Lockean Legal Theory Assist in Interpretation?*, 5 N.Y.U. J.L. & LIBERTY 1, 19–20 (2010). But see KURT T. LASH, THE LOST HISTORY OF THE NINTH AMENDMENT 82 (2009) (“In sum: The text of the Ninth Amendment prevents interpretations of enumerated rights that negatively affect the unenumerated retained rights of the people. . . . [T]he fact of enumeration . . . [cannot be] relied upon to suggest the necessity or superiority of enumeration.”) (emphasis omitted).

36. See Campbell, *supra* note 30, at 572, 576–77.

37. See *id.*

belong to us as much as if they had been inserted in the Constitution.”³⁸ This was a common refrain.³⁹

But Federalists also made frequent reference to the sufficiency of *state*-level rights guarantees. “The state Declarations of Rights are not repealed by this Constitution, and being in force are sufficient,” Connecticut delegate Roger Sherman insisted toward the end of the Philadelphia Convention.⁴⁰ For those used to thinking about constitutional rights in positivist terms, this looks like a bizarre argument. Michael Klarman describes Sherman’s position as “surprisingly weak” and “hard to fathom.”⁴¹ How, we might ask, could *state* constitutions possibly limit *federal* power? The idea seems to turn federal supremacy on its head.

If we view Sherman’s argument through the lens of social-contract theory, however, it actually makes good sense. The original source of sovereignty, after all, was the consent of the people to the social contract.⁴² Unlike state bodies politic, however, the federal body politic was about to be formed through a partial delegation of sovereignty from state bodies politic—not through the presumed agreement of every individual in the entire country.⁴³ “[W]e are not working on the natural rights of men not yet gathered into society, but upon those rights, modified by society,” Edmund Randolph explained during the Philadelphia Convention.⁴⁴ And this reveals why Sherman disclaimed any need for a federal bill of rights.⁴⁵ The rights belonged to individuals, and therefore state bodies politic could not grant power to violate them any more than states could violate those rights themselves.

Other Federalists drew on social-contract theory to make the same argument.⁴⁶ Individual rights were “already provided for by the State Constitutions,” Tench Coxe insisted, “and relating only to personal rights, they could not be mentioned in a contract among sovereign states.”⁴⁷ Importantly, Coxe was not denying federal sovereignty by adopting the proto-Confederate position that the Constitution was simply a glorified treaty—a “compact under the style & title of

38. Virginia Ratification Convention Debates (June 16, 1788) (remarks of George Nicholas), in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1334 (John P. Kaminski et al. eds., 1993). Interestingly, the term “bill of rights” was much less prevalent in the United States until the twentieth century. See GERARD N. MAGLIOCCA, THE HEART OF THE CONSTITUTION: HOW THE BILL OF RIGHTS BECAME THE BILL OF RIGHTS 5 (2018).

39. See Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 299–300 (2017).

40. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 588 (Max Farrand ed., 1911).

41. MICHAEL J. KLARMAN, THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 552 (2016).

42. This is what James Wilson was talking about when he wrote, “The sovereign, when traced to his source, must be found in the man.” *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 458 (1793) (Wilson, J., concurring); see Campbell, *supra* note 26, at 88–89.

43. See Campbell, *supra* note 26, at 109–10.

44. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 40, at 137.

45. *Id.* at 138.

46. See, e.g., [Samuel Tenney], *Alfredus* (Jan. 18, 1788), reprinted in 28 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 86, 88–89 (John P. Kaminski et al. eds., 2017).

47. Tench Coxe, *An American Citizen IV: On the Federal Government* (Oct. 21, 1787), reprinted in 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 431, 434 (John P. Kaminski & Gaspare J. Saladino eds., 1981).

a Constitution,” as Thomas Jefferson infamously declared in 1798.⁴⁸ Rather, Coxe was restating the standard Federalist position that the Constitution would form a national body politic through a delegation of sovereignty rather than through an original social contract among individuals.⁴⁹

II. FEDERAL ENUMERATED RIGHTS AS LIMITS ON STATE POWER

The conventional wisdom is that the Bill of Rights did not apply to the states.⁵⁰ The full picture is more complicated. For those in the nineteenth century who understood the federal amendments as merely declaratory of existing rights, the federal amendments supplied evidence of the people’s rights just like the various provisions of state constitutions. Rights, on this view, were declared and secured by constitutions, not created by them.

The Georgia Supreme Court was particularly vocal in embracing this view.⁵¹ For example, in *Nunn v. State*,⁵² the defendant challenged the validity of a Georgia concealed-carry restriction based on a right to keep and bear arms that was not explicitly mentioned in the Georgia constitution. Writing for the Court, Chief Justice Joseph Lumpkin began by citing cases from other states explicating the scope of the right.⁵³ “It is true,” he acknowledged, “that these adjudications are all made on clauses in the State Constitutions.”⁵⁴ That, however, was a distinction without a difference, because “these instruments confer no *new rights* on the people which did not belong to them before.”⁵⁵ Rather, the right to bear arms was a right “guarantied to British subjects” and “one of the fundamental principles, upon which rests the great fabric of civil liberty.”⁵⁶ Moreover, Chief Justice Lumpkin pointed out, the Second Amendment to the federal constitution had, “in declaring that the right of the people to keep and bear arms . . . should not be infringed, only reiterated a truth announced a century before [in the English Bill of Rights].”⁵⁷

Some courts, he admitted, had denied that the rights mentioned in the federal amendments were limits on state power.⁵⁸ But Chief Justice Lumpkin was

48. KENTUCKY RESOLUTIONS OF 1798 AND 1799, reprinted in 4 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 540 (2d ed. 1863).

49. To be sure, Anti-Federalists had reasonable arguments on the other side. See, e.g., 2 THE COMPLETE ANTI-FEDERALIST 254, 376 (Herbert J. Storing ed., 1981). My only goal here is to recover a lost strand of Federalist thought, not to pick sides.

50. See, e.g., SUTTON, *supra* note 4, at 12 (citing *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833)).

51. For many more cases from a variety of states, see Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1, 32–55 (2007). The classic treatment of these “*Barron* contrarians” is AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 153–57 (1998); see also WILLIAM DAVENPORT MERCER, *DIMINISHING THE BILL OF RIGHTS: BARRON V. BALTIMORE AND THE FOUNDATIONS OF AMERICAN LIBERTY* 189–99 (2017).

52. 1 Ga. 243 (1846).

53. *Id.* at 247–49.

54. *Id.* at 249.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 250.

invoking them in a different way. “[T]he people of the several States, in ratifying [the federal amendments] in their respective State conventions, have virtually adopted them as beacon-lights to guide and control the action of their own legislatures, as well as that of Congress.”⁵⁹ Consequently, the declaration of an “unalienable right” in the federal constitution affirmed the existence of that right “at the bottom of every free government.”⁶⁰ These protections, he explained, were “as perfect under the State as the national legislature, and cannot be violated by either.”⁶¹

But viewing rights as derived from nature or the social compact—rather than from their constitutional enumeration—did not deprive the government of authority to regulate them by law. This idea sounds discordant to modern ears, but it was harmonious to nineteenth-century jurists.⁶² As understood from the founding through the early twentieth century, natural rights were regulable in promotion of the public good.⁶³ “True liberty,” James Iredell noted, “consists in such restraints, and no greater, on the actions of each particular individual as the common good of the whole requires.”⁶⁴ “[T]he right to speak and act,” American patriot James Otis explained at the onset of the colonial conflict, “is limited by the law—Political liberty consists in a freedom of speech and action, so far as the laws of a community will permit, and no farther.”⁶⁵ And because of this definition of natural rights, judges had very little room to overturn legislative judgments about how these rights could be curtailed.⁶⁶

Consequently, and quite confusingly to modern readers, the regulability of rights meant that recognizing a *common set* of rights, applicable against the state and federal governments alike,⁶⁷ did not necessarily mean that those rights had the same *legal* boundaries.⁶⁸ These rights, Chief Justice Ringo of the Arkansas Supreme Court summarized in *State v. Buzzard*, did not forbid “such regulations

59. *Id.* at 250–51.

60. *Id.* at 250.

61. *Id.* at 251. Other judges reached similar conclusions. *See, e.g.*, *State v. Buzzard*, 4 Ark. 18, 43 (1842) (opinion of Lacy, J.) (“Many of these rights [enumerated in the Bill of Rights] lie behind the Constitution, and existed antecedent to its formation and its adoption. They are embodied in its will, and organized by its power, to give them greater sanctity and effect. They are written that they may be understood and remembered; and then declared inviolate and supreme, because they cannot be weakened or invaded without doing the government and citizen manifest injustice and wrong.”).

62. Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751, 752 (2009).

63. *See* Campbell, *supra* note 26, at 92–98; Nourse, *supra* note 62.

64. James Iredell’s Charge to the Grand Jury of the Circuit Court for the District of Massachusetts (Oct. 12, 1792), in 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 308, 310 (Maeva Marcus ed., 1988).

65. *Freeborn American*, BOS. GAZETTE & COUNTRY J., Mar. 9, 1767, reprinted in FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 95, 95 (Leonard W. Levy ed., 1966).

66. *See* Campbell, *supra* note 30, at 572–74.

67. Though states had their own social contracts, the terms of these social contracts were determined by *abstract* reasoning about what individuals would agree to upon entering into a political society—not an *interpretive* inquiry into what individuals had actually agreed to at a particular moment. Thus, discussion of a particular state’s social contract was interchangeable with reasoning about “fundamental principles of free governments” and the like.

68. *See* Campbell, *supra* note 26, at 92–93.

as might be found necessary to prevent [the] exercise [of these rights] from operating prejudicially upon the private rights of others, or to the general interests of the community.”⁶⁹ The guarantees of the right to keep and bear arms under the Arkansas constitution and the federal Second Amendment were “declaratory of the same right,” Justice Dickinson explained in the same case, yet states had the authority to restrict that right under a “police regulation,”⁷⁰ and “[t]he police of a State is to be regulated by its own laws.”⁷¹ This understanding of rights opened the door to diversity among states in the legal content of rights, even though the rights were conceptually identical from state to state.⁷² Countless other judges in the nineteenth century took a similar approach.⁷³

In light of this history, the Supreme Court’s famous holding in *Barron v. Baltimore* seems more modest. Because the Court’s appellate jurisdiction to review state court decisions was strictly limited to *federal* questions, it was enough for Chief Justice Marshall to say that the Takings Clause did not, *as a matter of federal law*, bind state governments.⁷⁴ But in suits brought in state court, as well as suits brought in federal court in the first instance,⁷⁵ the Takings Clause could still be invoked as declaratory of one of the “first principles of government”—a principle that bound the federal and state governments alike.⁷⁶ *Barron* said nothing to the contrary. As the New Jersey Supreme Court said in 1839:

This principle [of compensation for takings] has been made by express enactment, a part of the Constitution of the United States; . . . but it has been decided that as a *constitutional* provision, it does not apply to the several States. Still . . . it is operative as a principle of universal law; and the legislature of this State, can no more take private property for public use, without just compensation, than if this restraining principle were incorporated into, and made part of its State Constitution.⁷⁷

In a world where rights were protected in the social contract *before* the framing of a government in a constitution, this view made perfect sense. The “*Barron*

69. 4 Ark. 18, 21 (1842). On this ground, the court upheld a state law against concealed carry of firearms. *See id.* at 28.

70. *Id.* at 32.

71. *Id.* at 31.

72. *See* Eric R. Claeys, *Blackstone’s Commentaries and the Privileges or Immunities of United States Citizens: A Modest Tribute to Professor Siegan*, 45 S.D. L. REV. 777, 808–11 (2008). Not everyone took this view of legislative control to delineate the legal scope of enumerated natural rights. For Justice Lacy, who dissented from the Arkansas Supreme Court’s decision in *Buzzard*, the constitutional recognition of the right to keep and bear arms meant that “this right was excepted out of the general powers of the government and declared inviolate.” 4 Ark. at 36 (Lacy, J., dissenting).

73. *See* sources cited *supra* note 51.

74. 32 U.S. (7 Pet.) 243, 250–51 (1833).

75. Professor Mazzone distinguishes between “diversity” and “nondiversity” cases brought in federal court. *See* Mazzone, *supra* note 51, at 66–67. In my view, the key distinction was between cases—in diversity or otherwise—where the federal court had full jurisdiction as opposed to the more limited jurisdiction that the Supreme Court had in direct review of state court decisions under Section 25 of the Judiciary Act of 1789.

76. *Gardner v. Trs. of Newburgh*, 2 Johns. Ch. 162, 168 (N.Y. Ch. 1816); *see also* Mazzone, *supra* note 51, at 37–43 (discussing this and other takings cases).

77. *Sinnickson v. Johnson*, 17 N.J.L. 129, 144–46 (1839).

contrarians,” as Akhil Amar calls them,⁷⁸ were effectively taking the same position that Federalists had taken in the late 1780s—just now in reverse.

III. THE FOURTEENTH AMENDMENT

Modern interpretive controversies over the Fourteenth Amendment presuppose that the rights recognized are *federal* rights.⁷⁹ This Part recovers a different understanding.⁸⁰ In the decades after the ratification of the Fourteenth Amendment, the Supreme Court frequently described it as securing rights rather than creating them. The rights, in other words, were derived from already existing fundamental law. But while these rights were not originally enforceable in federal court under *Barron v. Baltimore*, perhaps the Fourteenth Amendment now made them subject to federal protection.

The starting point for this exploration is the famous *Slaughter-House Cases*.⁸¹ The plaintiffs, invoking the newly enacted Fourteenth Amendment, challenged a Louisiana statute that restricted the location of slaughter-house operations around New Orleans and that gave the Slaughter-House Company an exclusive license to operate “the live-stock landing and slaughter-house business” within that area.⁸²

Four of the Supreme Court justices voted for the plaintiffs.⁸³ As Justice Field put it in his dissent, their argument had “support in the fundamental law of the country.”⁸⁴ The state had broad authority to pass “regulations affecting the health, good, order, morals, peace, and safety of society,” Field explained, thus giving it lawful authority to restrict rights in all sorts of ways “not in conflict with any constitutional prohibitions, or fundamental principles.”⁸⁵ But the state could not, “under the pretence of prescribing a police regulation,” pass a law that encroached upon “rights of the citizen, which the Constitution intended to secure against abridgment.”⁸⁶ Notice the wording: *secure*—not create. The question that had to be asked, Field continued, was whether the Fourteenth Amendment “protect[s] the citizens of the United States against the deprivation of their common rights by State legislation.”⁸⁷ The answer, he insisted, was yes. The amendment was meant “to place the common rights of American citizens under the protection of the National government.”⁸⁸

These “common rights” did not necessarily enjoy identical legal protection in each state, Field wrote, echoing the point that Arkansas Chief Justice Ringo

78. See AMAR, *supra* note 51, at 153.

79. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597–98 (2015).

80. This Part does not purport to address the “original meaning” of the Fourteenth Amendment. Rather, it focuses solely on judicial decisions in the decades that followed the Fourteenth Amendment.

81. 83 U.S. (16 Wall.) 36 (1873).

82. *Id.* at 59.

83. *Id.* at 83–130.

84. *Id.* at 86–87 (Field, J., dissenting).

85. *Id.*

86. *Id.*

87. *Id.* at 89.

88. *Id.* at 93.

had made decades earlier.⁸⁹ “The exercise of these rights and privileges [of citizenship], and the degree of enjoyment received from such exercise,” he noted, “are always more or less affected by the condition and the local institutions of the State, or city, or town where he resides.”⁹⁰ Fundamental rights, it bears emphasis, were generally not the type of legal immunities that we tend to assume today; they were simply rights that the government could restrain only by law and only in promotion of the public good. “They are thus affected in State by the wisdom of its laws,” Field observed, describing the principle as “a result which follows from the constitution of society.”⁹¹ These rights did “not derive their existence from its legislation, and cannot be destroyed by its powers.”⁹² All of this should sound familiar. Field was expounding a theory of rights derived from social-contract theory.

So what was the relationship of the Fourteenth Amendment to these rights? Field’s answer was clear:

The amendment does not attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing. It assumes that there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by State legislation.⁹³

The Fourteenth Amendment did not create rights.⁹⁴ And for that reason, as Field clarified in an opinion the following year, the Fourteenth Amendment did not “interfere[] in any respect with the police power of the State.”⁹⁵

Nonetheless, Field explained in his *Slaughter-House Cases* dissent, the Amendment had “profound significance and consequence” for the protection of these already extant “natural and inalienable rights.”⁹⁶ The Fourteenth Amendment, he stated later in the opinion, “was intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes.”⁹⁷ How? By enabling means of *federal* enforcement.⁹⁸

In a separate opinion, Justice Bradley was even more emphatic about the declaratory nature of civil rights. “[E]ven if the Constitution were silent,” he wrote, “the fundamental privileges and immunities of citizens, as such, would be

89. See *State v. Buzzard*, 4 Ark. 18, 28 (1842).

90. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 95.

91. *Id.*

92. *Id.* at 95–96.

93. *Id.* at 96.

94. See *id.*

95. *Bartemeyer v. Iowa*, 85 U.S. 129, 138 (1874) (Field, J., concurring). Field made the same point in his opinion for the Court in *Barbier v. Connolly*, 113 U.S. 27 (1885) (“But neither the [Fourteenth] amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.”).

96. 83 U.S. (16 Wall.) at 96 (Field, J., dissenting).

97. *Id.* at 105.

98. See *id.* at 101 (“The fourteenth amendment places them under the guardianship of the National authority.”); see also *id.* at 121–24 (Bradley, J., dissenting) (making the same point).

no less real and no less inviolable than they now are. . . . Their very citizenship conferred these privileges.”⁹⁹ The Fourteenth Amendment was designed merely “to provide National security against violation by the States” of these “fundamental rights” of citizenship;¹⁰⁰ or, as Justice Swayne’s dissenting opinion described them, “the fundamental principles of the social compact.”¹⁰¹

Of course, the majority in the *Slaughter-House Cases* disagreed with Justice Field’s understanding of the “privileges or immunities of citizens of the United States.”¹⁰² These rights, Justice Miller announced for the majority, were rights of *national* citizenship, not *state* citizenship.¹⁰³ The Fourteenth Amendment did not “transfer the security and protection of all the civil rights . . . from the States to the Federal government.”¹⁰⁴ To have done so, he argued, would have “radically change[d] the whole theory of the relations of the State and Federal governments.”¹⁰⁵ Importantly, Miller was not denying the existence of the underlying rights that the dissenters invoked.¹⁰⁶ He simply denied that the federal government, including federal courts, had responsibility for securing those rights, at least absent racial discrimination.¹⁰⁷

When federal courts had original jurisdiction in diversity cases, however, federal judges continued their earlier practice of recognizing general limits on state power.¹⁰⁸ In *Township of Pine Grove v. Talcott*, for example, the Supreme Court upheld a municipal bond measure under principles of general constitutional law even though state judicial precedents pointed toward the invalidity of the measure.¹⁰⁹ “The question before us belongs to the domain of general jurisprudence,” Justice Swayne explained.¹¹⁰ “In this class of cases this court is not bound by the judgment of the courts of the States where the cases arise. It must hear and determine for itself.”¹¹¹ Writing for the Court in *Loan Association v. Topeka* the following year,¹¹² Justice Miller explained that “[t]here are limitations on [governmental] power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to

99. *Id.* at 119 (Bradley, J., dissenting).

100. *Id.* at 122.

101. *Id.* at 129 (Swayne, J., dissenting).

102. *Id.* at 75. (majority opinion).

103. *Id.*

104. *See id.* at 77.

105. *Id.* at 78.

106. Put simply, Miller did not deny that there was a right to pursue employment. He did, however, disagree about whether the restriction of that right by Louisiana was justifiable, at least under the deferential standards of judicial review.

107. *Id.* at 81.

108. *See, e.g., Township of Pine Grove v. Talcott*, 86 U.S. (19 Wall.) 666, 676 (1874).

109. *Id.* at 677.

110. *Id.*

111. *Id.*; *see also* *Olcott v. Fond du Lac County*, 83 U.S. (16 Wall.) 678, 690 (1873). As Michael Collins points out, the key distinction in these cases, as well as cases involving statutes, was whether the state rule was itself founded on general principles of common law (or fundamental law), in which case the federal court sitting in diversity should apply general law. *See* Michael G. Collins, *Before Lochner—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263, 1280–81, 1283 (2000).

112. *Citizens’ Savings & Loan Ass’n v. Topeka*, 87 U.S. (20 Wall.) 655, 663 (1875).

the name.”¹¹³ Miller, in other words, agreed with Field about the existence of general fundamental rights even though he disagreed with Field’s conclusion that the Fourteenth Amendment made these rights federally enforceable.¹¹⁴

But the jurisprudential fight was not over. Some justices still believed that the Fourteenth Amendment provided at least some security for a broader range of fundamental rights.¹¹⁵ The premises articulated in these decisions sounded exactly like the Court’s statements with respect to general constitutional law.¹¹⁶ The scope of state authority over individual rights, Chief Justice Waite explained for the Court in *Munn v. Illinois*,¹¹⁷ was settled in the social contract. “When one becomes a member of society, he necessarily parts with some rights or privileges,” Waite wrote.¹¹⁸ “This does not confer power upon the whole people to control rights which are purely and exclusively private,” he continued, but the government did have the authority to restrict rights “when such regulation becomes necessary for the public good.”¹¹⁹ Consequently, “statutes regulating the use, or even the price of the use, of private property [had not] necessarily deprived an owner of his property without due process of law.”¹²⁰ But then Waite ended with a cryptic suggestion: “Under some circumstances they may.”¹²¹ Perhaps, he intimated, some state regulations would violate the rights secured under the Fourteenth Amendment.

For a while, the Court showed little willingness to run with this suggestion. In *Davidson v. New Orleans*,¹²² for example, Justice Miller adamantly denied that the Due Process Clause could warrant bringing most fundamental-rights claims into federal court.¹²³ Takings of property without compensation “maybe violate some provision of the State Constitution,” Miller explained for the majority, “but the Federal Constitution imposes no restraints on the States in that regard.”¹²⁴ What the Due Process Clause required, he insisted, was “a fair trial in a court of justice, according to the modes of proceeding applicable to such a case.”¹²⁵ In a separate opinion, Justice Bradley reiterated his view that “arbitrary,

113. *Id.*

114. *See Davidson v. New Orleans*, 96 U.S. 97, 105 (1878) (“It may violate some provision of the State Constitution against unequal taxation; but the Federal Constitution imposes no restraints on the States in that regard. If private property be taken for public uses without just compensation, it must be remembered that, when the fourteenth amendment was adopted, the provision on that subject, in immediate juxtaposition in the fifth amendment with the one we are construing, was left out, and this was taken. It may possibly violate some of those principles of general constitutional law, of which we could take jurisdiction if we were sitting in review of a Circuit Court of the United States, as we were in *Loan Association v. Topeka* (20 Wall. 655).”).

115. *See, e.g., Munn v. Illinois*, 94 U.S. 113, 124 (1877).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 124–25.

120. *Id.* at 125.

121. *Id.*

122. *Davidson v. New Orleans*, 96 U.S. 97 (1878).

123. *Id.* at 104.

124. *Id.* at 105.

125. *Id.*

oppressive, and unjust” state abridgments of property rights abridged rights secured by the Fourteenth Amendment.¹²⁶

In the decade that followed, however, the views of Justices Field and Bradley gradually gained traction. “The Fourteenth Amendment . . . undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights,” Justice Field declared for a unanimous court in *Barbier v. Connolly*, upholding a San Francisco laundry ordinance.¹²⁷ The Fourteenth Amendment, he emphasized, was not meant to interfere with the police powers of the state.¹²⁸ But by highlighting the limits of state power, Field signaled a willingness to consider the arbitrariness of state legislation under the auspices of Fourteenth Amendment law.¹²⁹

Later the same year, the Court considered a challenge to another San Francisco laundry ordinance in *Soon Hing v. Crowley*, again rejecting the claim out of hand.¹³⁰ This time, however, the case was originally filed in federal court.¹³¹ And Field—just as he had done in *Barbier*—treated it as one that raised a colorable federal claim.¹³² “[State and local] regulations in this matter are not subject to any interference by the federal tribunals,” he explained, “unless they are made the occasion for invading the substantial rights of persons, and no such invasion is caused by the regulation in question.”¹³³ After all, *Barbier* had upheld an analogous scheme, and “[n]o invidious discrimination is made against any one by the measures adopted.”¹³⁴ Field carefully went through each of the distinctions in the statute, explaining its validity.¹³⁵ And he further rejected the plaintiff’s claim that San Francisco had denied the “right to work”:

However broad the right of every one to follow such calling and employ his time as he may judge most conducive to his interests, it must be exercised subject to such general rules as are adopted by society for the common welfare. All sorts of restrictions are imposed upon the actions of men notwithstanding the liberty which is guaranteed to each. It is liberty regulated by just and impartial laws.¹³⁶

Finally, Field rejected the plaintiff’s “principal objection” that the law “was adopted owing to a feeling of antipathy and hatred prevailing in the city and

126. *Id.* at 107 (Bradley, J., concurring).

127. *Barbier v. Connolly*, 113 U.S. 27, 31 (1885).

128. *Id.*

129. The prior year, Justices Field and Bradley had reiterated their earlier views about the reach of the Fourteenth Amendment. Field emphasized that the amendment was not a font of general private law, nor did it curtail state police powers. *See Butchers’ Union v. Crescent City*, 111 U.S. 746, 759 (1884) (Field, J., concurring); *id.* at 764 (Bradley, J., concurring).

130. *Soon Hing v. Crowley*, 113 U.S. 703, 711 (1885).

131. *Id.* at 704.

132. *Id.* at 708.

133. *Id.*

134. *Id.*

135. *Id.* at 708–09.

136. *Id.* at 709.

county of San Francisco against the subjects of the Emperor of China resident therein.”¹³⁷ A facially neutral statute, he explained, would not be “changed from a legitimate police regulation, unless in its enforcement it is made to operate only against the class mentioned.”¹³⁸

With these two laundry cases, Field had carefully laid the groundwork for a broader understanding of the Fourteenth Amendment.¹³⁹ To be sure, the principles he articulated were no libertarian panacea. “[G]eneral rules as are adopted by society for the common welfare” did not abridge the Fourteenth Amendment, he insisted—a point that courts would reiterate countless times in the decades to come.¹⁴⁰ Nonetheless, Field had created an opening for federal suits that alleged “arbitrary” or “invidious” discrimination.¹⁴¹

What body of law would courts use to evaluate the scope of state police powers under this framework? Cases at first suggested the use of general fundamental law.¹⁴² Justice Matthews’s decision for the Court in *Yick Wo v. Hopkins*, for instance, stated that “the fundamental rights to life, liberty, and the pursuit of happiness”—as well as limits on governmental power over those rights—flowed from “the nature and the theory of our institutions of government” and “the principles upon which they are supposed to rest.”¹⁴³ These were, as Justice Bradley had put it in 1884, “primordial and fundamental rights” that the Fourteenth Amendment had “referred to,” not created.¹⁴⁴

Nonetheless, the actual legal rules that applied—both procedurally and substantively—in state and federal court often differed. From a procedural standpoint, the Supreme Court recognized that “due process” and “equal protection” did not entail a need for uniform procedures from state to state, or even within a state.¹⁴⁵ Instead, the people of each state could generally vary procedures according to “their organic law providing for their own affairs.”¹⁴⁶ The states had broad latitude when it came to the particulars of criminal and civil processes, such as how many jurors would sit on a jury, whether verdicts had to be unanimous, and so forth.¹⁴⁷ “[T]he state has full control over the procedure in its courts, both in

137. *Id.* at 710.

138. *Id.* at 711.

139. See Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. CIV. RTS. L.J. 219, 289–91 (2009); David Bernstein, Lochner, *Parity*, and the *Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211 (1999).

140. *Soon Hing*, 113 U.S. at 709.

141. See *Yick Wo v. Hopkins*, 118 U.S. 356, 367 (1886) (citing *Barbier v. Connolly*, 113 U.S. 27, 31 (1885)).

142. See, e.g., *id.* at 369–70.

143. *Id.* Consequently, he explained, the government could not impose “purely personal and arbitrary power” over property. *Id.* at 370.

144. *Butchers’ Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock & Slaughter-House Co.*, 111 U.S. 746, 765 (1884) (Bradley, J., concurring). Michael Collins notes a similar ambiguity in the Court’s later due process decisions, observing that “when lower federal courts resolved questions of reasonableness in the exercise of their diversity jurisdiction, it was less than clear whether federal due process as opposed to ‘general principles’ provided the relevant source of substantive law.” Michael G. Collins, *October Term, 1896—Embracing Due Process*, 45 AM. J. LEGAL HIST. 71, 81 (2001).

145. *Maxwell v. Dow*, 176 U.S. 581, 599 (1900).

146. *Id.* at 604.

147. See *id.* at 605.

civil and criminal cases,” the Court explained in *Maxwell v. Dow*, “subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution.”¹⁴⁸

On the substantive side, courts often disagreed about how far the police powers extended.¹⁴⁹ At first, it was state courts—not their federal counterparts—that took the lead in recognizing limits on legislative power.¹⁵⁰ “There are certain fundamental rights of every citizen which are recognized in the organic law of all our free American states,” the Massachusetts Supreme Judicial Court declared when striking down a wage regulation in 1891.¹⁵¹ These fundamental rights were judicially enforceable, the court explained, “even though the enactment of it is not expressly forbidden” by the state constitution.¹⁵² Throughout this era, state courts cited precedent from many jurisdictions—in-state, out-of-state, federal, and even English—when trying to ascertain the scope of the police powers.¹⁵³ But, of course, these decisions were not always consistent with one another.¹⁵⁴ The scope of state power was often in the eyes of the judge.

Federal courts began more actively reviewing due process challenges in the mid-1890s.¹⁵⁵ The hint that the Fourteenth Amendment’s Due Process Clause provided a mechanism for substantive review was around much earlier,¹⁵⁶ but the Court now seemed more confident about the existence of substantive protections offered by the Fourteenth Amendment.¹⁵⁷ These underlying limits, however, were still supplied by general principles—not ones that the Fourteenth Amendment created.

The logic of “substantive” due process, after all, was simply that the government could only take away life, liberty, and property pursuant to *law*, and that legislative *acts* that violated fundamental social-contractarian principles were not

148. *Id.*

149. *See, e.g.*, the various opinions cited in *Gulf, Colo. & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 160–65 (1897); *Atchison, Topeka, & Santa Fe R.R. v. Matthews*, 174 U.S. 96 (1899).

150. *See* WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886-1937*, at 126–33 (1998).

151. *Commonwealth v. Perry*, 28 N.E. 1126, 1126 (Mass. 1891).

152. *Id.* at 1126–27. In that case, the Court noted that the state law “violates fundamental principles of right which are expressly recognized in our constitution,” though notably the Court did not claim that these fundamental principles were *created* by the constitution. *Id.* Justice Oliver Wendell Holmes, Jr.—at that time a state judge—dissented, stating his view that “The prohibition, if any, must be found in the words of the constitution, either expressed or implied, upon a fair and historical construction.” *Id.* at 1127 (Holmes, J., dissenting).

153. One could cite hundreds of cases. *See, e.g.*, *Jenks v. Stump*, 93 P. 17, 18–19 (Colo. 1907). For an example of reliance on English cases about “unjust discrimination,” *see* *Chi. & Alton R.R. v. People ex rel. Koerner*, 67 Ill. 11, 27 (1873).

154. *See* sources cited *supra* notes 148, 152.

155. *See, e.g.*, *Bell’s Gap R.R. v. Pennsylvania*, 134 U.S. 232, 237 (1890).

156. *See, e.g.*, *Munn v. Illinois*, 94 U.S. 113, 141–42 (1877) (Field, J., dissenting) (“Except by due process of law, no State can deprive any person of [life, liberty, or property]. The provision has been supposed to secure to every individual the essential conditions for the pursuit of happiness; and for that reason has not been heretofore, and should never be, construed in any narrow or restricted sense.”).

157. *See, e.g.*, *Bell’s Gap R.R.*, 134 U.S. at 237 (“clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition”).

law.¹⁵⁸ Consequently, the argument went, a deprivation of life, liberty, or property in violation of the social contract also violated due process.¹⁵⁹ “An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority,” Justice Chase had famously argued in *Calder v. Bull*.¹⁶⁰ At root, then, the “substantive” limits on state authority were really questions of fundamental law, not of “due process.” And this appears to have been the Supreme Court’s initial view. The Fourteenth Amendment “conferred no new and additional rights, but only extended the protection of the Federal Constitution over rights of life, liberty, and property that previously existed under all state constitutions,” the Court explained in 1894.¹⁶¹ Perhaps, then, the *substantive* dimensions of due process were questions of general fundamental law.¹⁶²

But just two years later, as Michael Collins has observed, the justices decided a string of cases that started to treat these substantive restraints on legislative power as questions of federal law.¹⁶³ “We should not be justified in holding the act to be in violation of the state constitution in the face of clear and repeated decisions of the highest court of the state to the contrary, under the pretext that we were deciding principles of general constitutional law,” the Supreme Court resolved in 1896.¹⁶⁴ “We are therefore practically confined in this case to the inquiry whether the act in question, as it has been construed by the state courts, violates the federal constitution.”¹⁶⁵ Whether a state law violated the Due Process Clause, the Court explained, was one that the justices “must decide . . . in accordance with our views of constitutional law.”¹⁶⁶ While it articulated due process as a *federal* standard, however, the Court also suggested a need for deference to “state courts which are to pass upon the question of public use in light of the facts which surround in their own state.”¹⁶⁷ The “deliberate judgment and matured thought of the courts of that state” thus deserved “very great respect,”¹⁶⁸ even regarding the application of a federal rule.

Perhaps not surprisingly, then, state and federal courts engaged in a long-running dialogue over the proper boundaries of state power. Federal and state courts constantly referenced each other’s decisions.¹⁶⁹ And sometimes there

158. See Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 WM. & MARY L. REV. 1599 (2019).

159. *Id.*

160. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387–89 (1798).

161. *Mobile & Ohio R.R. v. Tennessee*, 153 U.S. 486, 506 (1894).

162. See Collins, *supra* note 144, at 81 (“[W]hen lower federal courts resolved questions of rate-reasonableness in the exercise of their diversity jurisdiction, it was less than clear whether federal due process as opposed to ‘general principles’ provided the relevant source of substantive law.”).

163. See *id.* at 71–72.

164. *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 155 (1896).

165. *Id.* at 156.

166. *Id.* at 159.

167. *Id.* at 160.

168. *Id.*; see also *Clark v. Nash*, 198 U.S. 361, 367–69 (1905).

169. See, e.g., *Murphy v. California*, 225 U.S. 623 (1912); *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U.S. 96 (1899); *Gulf, C. & S. F. Ry. Co. v. Ellis*, 165 U.S. 150 (1897); *McGuire v. Chi., B. & Q.R. Co.*, 131 Iowa 340 (1906), *aff’d*, 219 U.S. 549 (1911); *Farmers’ & Merchants’ Ins. Co. v. Dabney*, 62 Neb. 213 (1901), *aff’d*

were disagreements, though my cursory search only revealed one example of a state court flatly rejecting the reasoning of the Supreme Court.¹⁷⁰ And there were times when state courts noted the “decisive” or “conclusive” effect of a Supreme Court decision in cases involving the scope of state police powers.¹⁷¹ “The questions arising under the federal Constitution will be first considered, for their determination will largely dispose of those arising under the state Constitution,” the Supreme Court of Vermont stated in 1907.¹⁷² “It is needless to say that on the federal questions the decisions of the federal Supreme Court are controlling, so we shall not go much outside of them.”¹⁷³

IV. THE REVOLUTION OF LEGAL REALISM

American understandings of rights fundamentally changed with the advent and eventual triumph of legal realism.¹⁷⁴ Many realists agreed with certain underpinning premises of rights jurisprudence. “The principle of the *Lochner* case is simple enough: that arbitrary restriction of men’s activities, unrelated in reason to the ‘public welfare,’ offends the Fourteenth Amendment,” then-professor Felix Frankfurter observed in 1917.¹⁷⁵ “As to the principle,” Frankfurter noted,

189 U.S. 301 (1903) (same); *State v. Nichols*, 28 Wash. 628 (1902) (ascertaining the scope of the police powers, and the Fourteenth Amendment, in reference to other state decisions).

170. See *Whitney v. Township Board of Grand Rapids*, 71 Mich. 234, 238 (1888) (“I cannot agree with the chief justice that the legislature can arbitrarily prohibit the sale of liquor in this state, or any portion of the state.” (disagreeing with *Mugler v. Kansas*, 123 U.S. 623 (1887))). Occasionally state courts would state their agreement with Supreme Court decisions in ways sounding like they were exercising independent judgment. See, e.g., *Shaver v. Martin*, 166 Ga. 424, 404 (1928) (“we hold the [Supreme Court’s earlier] judgment [regarding the scope of police powers under the Fourteenth Amendment] to be sound”). And in *Ives v. South Buffalo Railway Co.*, 201 N.Y. 271, 317 (1911), the New York Court of Appeals explicitly disagreed with the reasoning of the Supreme Court in *Noble State Bank v. Haskell*, 219 U.S. 104 (1911), regarding the scope of the police power, but the justices were careful to delineate that the Supreme Court’s decision was not “controlling of our construction of our own Constitution.” *Id.* at 317; see also *id.* at 319 (Cullen, C.J., concurring) (“[T]he decision in the *Noble Bank* case is not controlling upon this court in the construction of the Constitution of our own state, and I am not disposed to accept it, at least, until it has received the approval of a majority of the court.”).

171. See *Phenix Ins. Co. v. Hart*, 112 Ga. 765, 68 (1901) (“conclusive”); *Efland v. Southern Ry. Co.*, 146 N.C. 135, 359 (1907) (“decisive”).

172. *Lawrence v. Rutland R. Co.*, 80 Vt. 370, 1092 (1907).

173. *Id.*

174. I use the term “realism” with some hesitation, recognizing that it carries many different connotations. See Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749, 749–50 n.2 (2013) (noting disagreements about how to define “realism”); Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465 (1988) (discussing many different strands of “realist” thought); see generally NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (1995) (offering a history of American jurisprudence). As used here, the term embraces strands of “sociological jurisprudence,” which scholars often distinguish from “realism.” These categorization efforts are important in some contexts, but not here. The key point for present purposes is that a broad and diverse group of jurists rejected the earlier view that judges “discover” the law, and in doing so they destroyed the conceptual underpinnings of general law. See G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 155 (1976) (“Sociological Jurisprudence and Realism found the separation between ‘law’ and the interpretations of its officials to be artificial.”).

175. Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353, 369 (1916); see also *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (accepting the basic framework of substantive due process but criticizing the majority for insufficiently deferring to legislative judgments); Walter H. Hamilton, *Affection with Public Interest*, 39 YALE L.J. 1089, 1111 (1930) (“The court may doubtless impose a veto upon legislation which is clearly arbitrary.”).

“there is no dispute.”¹⁷⁶ Rather, the problem emerged “in its application,” given the extent to which assessments of the public interest often turned on the judges’ personal views.¹⁷⁷

Realists were far more hostile, however, to the Court’s embrace of a declaratory theory of rights. Legal rights, they insisted, were the creature of law—not something merely recognized by it.¹⁷⁸ Law, for example, had played a material role in producing the very same inequality that progressive legislation sought to correct.¹⁷⁹ Redistributive progressive legislation, then, was not—as the Supreme Court had declared in *Coppage v. Kansas*—a form of redistribution for its own sake,¹⁸⁰ interfering with the “legitimate . . . inequalities of fortune” that inhered in “the nature of things.”¹⁸¹ Rather, for critics of *Lochner*, these arguments about natural rights, social compacts, and so forth, were the “nonsense upon stilts” that Jeremy Bentham had decried a century earlier.¹⁸² As Justice Holmes famously explained:

Books written about any branch of the common law treat it as a unit, cite cases from this Court, from the Circuit Courts of Appeals, from the State Courts, from England and the Colonies of England indiscriminately, and criticize them as right or wrong according to the writer’s notions of a single theory. It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.¹⁸³

The Supreme Court, of course, eventually embraced this critique in *Erie*.¹⁸⁴

176. Frankfurter, *supra* note 175, at 369.

177. *See id.*

178. Singer, *supra* note 174, at 500–01.

179. *See, e.g.*, Robert L. Hale, *Labor Legislation as an Enlargement of Individual Liberty*, 15 AM. LAB. LEGIS. REV. 155 (1925).

180. 236 U.S. 1, 19 (1915) (“The mere restriction of liberty or of property rights cannot of itself be denominated ‘public welfare,’ and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the Amendment.”).

181. *Id.* at 17.

182. *See, e.g.*, JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 98–99 (Roland Gray comp., The MacMillan Co. 1921) (“When the element of long time is introduced, the absurdity of the view of Law preexistent to its declaration is obvious.”). For a probing discussion of how this realist critique connected with broader changes in elite thought, *see* EDWARD A. PURCELL JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* (1973).

183. *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533–34 (1928) (Holmes, J., dissenting).

184. *See Erie R. Co. v. Topkins*, 304 U.S. 64, 79–80 (1938).

Realism thus precipitated a powerful shift in the prevailing understanding of constitutional rights. In *Palko v. Connecticut*,¹⁸⁵ for example, Justice Cardozo asked whether governmental appeals in a criminal case were “unlawful by force of the Fourteenth Amendment”¹⁸⁶ in light of the rights that Fifth Amendment “creates.”¹⁸⁷ The test of incorporation harkened back to an earlier conception of fundamental law, asking whether these rights reflected a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”¹⁸⁸ But the way that Justice Cardozo talked about the Fourteenth Amendment hardly reflected the earlier view that it left state authority exactly as it stood before. The question at hand, Cardozo explained, was ascertaining the “domain of liberty, *withdrawn* by the Fourteenth Amendment from encroachment by the states.”¹⁸⁹ The linguistic drift was striking.

With the notion that incorporated rights were federal rights came a natural assumption that these rights were uniquely subject to federal definition. “[T]he task of translating the majestic generalities of the Bill of Rights . . . into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence,” Justice Jackson explained in *West Virginia Board of Education v. Barnette*.¹⁹⁰ “But we act in these matters not by authority of our competence but by force of our commissions.”¹⁹¹ It was, in other words, the duty of the judge—and particularly the federal Supreme Court—to ascertain and apply constitutional boundaries on governmental power.¹⁹² “The very purpose of a Bill of Rights,” Jackson asserted, “was 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 courts.”¹⁹³ Judges were now to be primary authority in ascertaining the meaning of these

185. 302 U.S. 319 (1937).

186. *Id.* at 323.

187. *Id.* at 322. Compare *Maxwell v. Dow*, 176 U.S. 581, 587 (1900) (describing the Bill of Rights as “secur[ing] and recogniz[ing] the fundamental rights of the individual as against the exercise of Federal power”—not as a *creating* the underlying rights that the amendments secured and recognized), with *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 235–36 (1897) (describing the rule against uncompensated takings as “a principle of universal law” (internal quotation marks omitted)). See also William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of Mahon*, 86 GEO. L.J. 813, 831–32 (1998) (recognizing *Chicago, Burlington* as not an “incorporation” case in the modern sense).

188. *Palko*, 302 U.S. at 325 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

189. *Id.* at 327 (emphasis added). For a direct engagement with this issue, see the Brief for Respondent at 140, *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939) (“There may be such things as rights which exist apart from an effective means for their enforcement, but if there are such, they are irrelevant to the law; the law takes no notice of them. In realistic terms a right can only be defined in terms of what a party aggrieved by its violation can do about it.”). This issue potentially affected whether these rights were protected by federal civil-rights statutes (which came with jurisdictional grants that lacked amount-in-controversy requirements). Justice Stone ended up agreeing with them. *Hague*, 307 U.S. at 524–32 (Stone, J., concurring). The plurality opinion of Justice Roberts, joined by Justice Black, did not reach the issue. For a similar analysis to that of the C.I.O. lawyers, see Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

190. 319 U.S. 624, 639 (1943).

191. *Id.* at 640.

192. *Id.*

193. *Id.*

preferred freedoms.¹⁹⁴ Gone was the earlier notion that the Fourteenth Amendment simply left police powers where they originally stood, with states having the power to restrict rights in promotion of the public good.¹⁹⁵

For the next several decades, the Supreme Court justices divided over just how broadly to interpret federal constitutional rights—and particularly those that operated against the states. Some justices took a capacious view of the Bill of Rights and insisted that the Fourteenth Amendment fully “incorporated” those rights against the states.¹⁹⁶ Others had a more limited reading of enumerated rights and also thought that the reach of the Fourteenth Amendment’s Due Process Clause was even narrower.¹⁹⁷ But by this point, everyone agreed that whatever these rights entailed, all of them were defined by a *federal* standard, with supreme interpretive authority resting in the Supreme Court.¹⁹⁸ Gone were the days of general law.

V. CONCLUSION

The realist movement transformed American constitutional jurisprudence. The notion that the Fourteenth Amendment had actually *created* new federal rights—and not simply *secured* existing fundamental rights—suggested that federal authorities, and particularly federal judges, were supreme in their exposition. At the same time, though, it suggested that state constitutional rights might have a different meaning than their federal counterparts. Both the malady and the antidote that Judge Sutton describes are thus grounded on a modern conception of rights.

194. *Id.*

195. *Id.*

196. This generally describes, for instance, the position taken by Justice Black. *See, e.g., Adamson v. California*, 332 U.S. 46, 68 (1947) (Black, J., dissenting).

197. This generally describes, for instance, the position taken by Justice Frankfurter. *See, e.g., Rochin v. California*, 342 U.S. 165, 177 (1952).

198. For the opponents of mechanical incorporation, this national standard was “less rigid and more fluid,” *Beets v. Brady*, 316 U.S. 455, 462 (1942), but it was still defined in terms of *federal* constitutional law. Had this more deferential approach prevailed, however, the setting of national standards under the Fourteenth Amendment would have been less intrusive on state power, and therefore the dynamics that Judge Sutton describes in his book would likely have been far different.