Officers' Rights: Toward a Unified Field Theory of American Constitutional Development

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The changing rights of legally designated officers provides a comprehensive framework for following American constitutional development over time, in both public and private settings. Rights are defined as judicially enforceable claims on the person or actions of another; development, as enduring change in constitutional provision, structure, and doctrine. It is proposed that constitutional development as a historical process has consisted of a shift in the balance between the rights of officers and the rights of citizens. The framework is demonstrated empirically in connection with the Bill of Rights, federalism, and the separation of powers. Officers' rights is recommended as a method for studying constitutions comparatively and for linking constitutional development to other political events and phenomena like social movements and parties.

In the following article I suggest a new way of thinking about American constitutional development. I seek an understanding of the U.S. Constitution over time that is interpretively comprehensive, doctrinally agile, and historically coherent. By interpretively comprehensive, I have in mind provisions expressed in the constitutional text and those unspecified but historically implemented as matters of law. By doctrinally agile, I mean applicable to the twists and seeming anomalies of constitutional decision-making as well as to major turning points. By historically coherent, I refer to the full course of constitutional development, within which the framing at Philadelphia represents only a critical episode. The article was completed for publication some months before the unexpected controversy addressed by the United States Supreme Court in *Bush v. Gore* (2000), and except for this introduction it will remain unchanged. One could not,

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however, find a clearer illustration of officers' rights in opposition to the rights of citizens than the tangle created by Florida Secretary of State Katherine Harris, local canvassing boards, state legislators, appointed electors, and the judges and Justices at all levels. The presentation as written, including the remarks on the future of judicial power, applies in every significant detail to the circumstances, contending principles, and resolution of that case.

The framework proposed builds on a simple design, centered on two familiar concepts. The first concept is *office,* the formal positions from which governance is conducted in diverse settings; office also implies the existence of non-office, of, so to speak, "mere citizenship." The second concept is *rights*, defined as the legitimate claims one person may make on the person or actions of another. These concepts are juxtaposed to analytically recreate the project of constitutionalism over time. By way of implementation, I will advance a single hypothesis concerning their interplay: American constitutional development has consisted of a shift in the balance between rights enjoyed by virtue of office and rights enjoyed by virtue of citizenship. This hypothesis involves a crucial change in the way we think about office and rights and their relation to each other. Whereas office is usually understood to entail "powers" rather than rights, the approach here dissolves that distinction into a single array of enforceable claims. Note that a single array does not imply claims of equal force. On the contrary, the intense historical charge of Anglo-American rights derives from their tenaciously hierarchical ordering.

There are several reasons for such an effort. One is a persistent gap between historical-institutionalist studies of constitutional politics, largely empirical in their thrust, and studies in legal history and constitutional law, where the deepest impulses are normative. A second is the attraction of synthesis across institutional arenas, exhibited, for instance, in constitutionally related formal modeling—I am thinking here of work on statutory review and on party history—which, however, through a different theoretical agenda, downplays historical transitions (Ferejohn & Weingast 1992; Aldrich 1995). A third reason is the ongoing need for a comprehensive approach to comparing national constitutions, one that supports the American case but is neither so "modular" (parliamentary versus presidential systems) as to preclude nuance nor so focused (for example, on judicial review) as to obscure the logic of constitutions in their entirety. The gains anticipated would not be fortuitous. Office and rights place constitutional change against the wider universe of political action that constitutional development presumes. They promote an analysis of diverse institutions, across the state-society divide. Corresponding to motives of constitutional actors over history, they

bring historical and normative study closer togther. Last but not least, office and rights identify the building blocks of constitutionalism worldwide (Huntington 1991; Larkins 1996).

It is useful at the outset to distinguish "officers' rights" from two other frameworks that cover similar ground, that is, between the Constitution and American political development. Both grapple with the special conundrum that the Constitution simultaneously affects preservation and change. The first, offered by Bruce Ackerman, pivots on "constitutional moments," broad public mandates issued periodically by new electoral alignments, which judges enforce in disparate controversies over ensuing decades (Ackerman 1991). The other, elaborated by Rogers Smith, argues for "multiple traditions," historical amalgams of contradictory public values, sorted and resorted over time to comprise the effective claims of American citizenship (Smith 1997). Each begs the virtues of the other. Ackerman, arguing for the majoritarian character of judicial review, deftly ties constitutional to political change; but his analysis is constrained in its rendering of the historical record by an overly demanding periodization. Smith, underscoring the recurrent shortfall from democratic ideals, captures the fragmented texture of constitutional change; but he confounds the issue of historical direction.

"Officers' rights" surmounts this standoff, setting the concerns of both positions within a unified field of legal relations. Tracking the enforceability of claims through successive thickets of conflict and resolution, the strategy provides a method for charting direction (or its absence) in terms of how formal arrangements of personal authority have changed (and not) over time. Identifying the Constitution's own structures as embankments in a stream older than the American tributary focuses on democratic ideals without the censoriousness characteristic of much constitutional commentary. Consider, for instance, the position that sees political overload, if not outright republican subversion, in contemporary "rights talk" (Glendon 1991; Sandel 1996). Through a more sensitive means of observation, it becomes apparent that the preoccupation with rights did not emerge with the Warren Court but has been the substance of constitutional politics for centuries; if the earlier clamor for rights was more restricted, it was not due to the self-restraint of participants. Every significant redistribution of rights has been accompanied by warnings of constitutional and moral decline; in that regard, recent critics are right in step.

A third important study is Akhil Amar's (1998), applying a "principal-agent" analysis to the Bill of Rights. Although Amar confines his application of rights to citizens and, in general, adopts an interpretive strategy very different from my own, there are certain affinities in our treatments, particularly the insistence on the conceptual unity between the Bill of Rights and the origi-

nal Constitution. However, where for Amar this unity is "all structure," following on the logical organization of the government's parts, the unity I describe is "all rights," following on the distribution of state and social authority. Though these interpretations overlap, the officers' rights account moves closer to the purposeful behavior on all sides, and therefore more directly to the political meaning of constitutional change in its many dimensions.

In the discussion I outline the officers' rights framework in its essentials. I start with the definition of basic terms and their application in different periods and domains and proceed to assorted problems of constitutional politics and interpretation. To show continuity between preconstitutional and current law, I draw a large number of examples from the 19th century; the argument, however, covers American constitutional development as a whole. As far as possible in a short article, I will support the hypothesis of a shift over time from officers' to citizens' rights; but I am equally interested in suggesting the kind of arguments that can be advanced on the basic idea. As the title suggests, I expect these arguments to run the gamut of political institutions, actors, ideologies, and events. A theory of constitutional development will not be a theory of state development or of the presidency or social movements. Still, to the extent that all address a single ongoing polity, they should be mutually illuminating and, in a fundamental sense, reconcilable—however loudly the gears might grind at any historical crossroad (Orren & Skowronek 1994).

Some caveats: I am not suggesting that the shift from officers' rights to citizens' rights occurs without the reversals and setbacks of all political change, or that something altogether new might not motivate constitutional politics in the future. On the contrary, the framework helps us assess where events have left us, where they might point, and it does so in terms relevant to constitutional scholars of both positivist and normative bent. Second, I am not insisting that constitutional participants, or officers in particular, consciously employ a reasoning consistent with our analysis, although they often do—in resisting colonial intrusions as "trespass" on royal prerogative; in defining wives' crimes against husbands as "petty treason"; in embracing "sovereign immunity." As the public discourse of rights has overwhelmed the public discourse of office, the latter has reinvented itself as the discourse of American tradition; compare, for instance, the Rehnquist Court's defense of its Eleventh Amendment sovereign immunity decisions, which, however, continue to trade heavily on the officers' rights theme of "dignity."[1]

[1] In *Alden v. Maine* (1999), discussed later, Justice Kennedy's majority opinion uses the word "tradition" or "traditional" eight times and "dignity" or "indignity" seven times. Chief Justice William Rehnquist's concurring opinion in *Bush v. Gore* (2000), on the other

What follows is not a full-fledged theory; thus "toward" in the title. Even "framework" will be too abstract if it suggests matter not plainly evinced in constitutional history. Moreover, in this article I say little about causation. This omission should not count as disinterest in "agency." On the contrary: Both office and rights are concepts redolent with structural and motivational dimensions likely to figure in any causal explanation proffered. The usual fragmentation of the subject matter—into separate branches and clauses, the Bill of Rights, individual amendments, changing Supreme Court membership, federalism, "normal" versus "constitutional" politics—has impeded systematic approaches to causes as well as to other questions about constitutional development. Put differently, before the debate on the causes of constitutional development may be productively joined, it will be useful to have a better understanding of what has been caused.

1. Office

The attributes of office have remained remarkably constant over the history of Anglo-American government: jurisdiction, tenure, compensation, liability. The details of these have altered since the 14th century, but it is not necessary to step outside this list to depict any ancient or modern office or its change over time. Perhaps the attribute most central to our considerations is jurisdiction, referring to position, authority, duty, and, as I discuss in the next section, right. Medieval jurisdiction is the starting point for the long transition between state and society at issue. In the United States, the privileges and duties of medieval office were transplanted, redefined, and redistributed. Some offices were (largely) homegrown, like the president and members of the U.S. Senate; most—sheriff, coroner, clerk, judge, election commissioner, attorney general, marshal, and others—were modeled directly on their English predecessors.

To demonstrate that our interest is as much in the continuing hold of an old system as it is in the transition to a new I begin with a contemporary case, decided in the District Court for the Eastern District of New York, *City of New York ex rel Lungren* (1993). *City of New York ex rel Lungren* denied the plea of several cities, states, minority groups, and individual citizens that the judge of the District Court, Joseph McLaughlin, order Secretary of Commerce Ron Brown to adjust the 1990 census for several million persons left uncounted, a disproportionate number of whom were nonwhite. McLaughlin determined that plaintiffs' injuries were constitutional in nature, giving him jurisdiction. Reviewing the evidence, however, he found that Secretary Brown's

hand, is a classic of the officers' rights genre (while the per curiam adopts a citizens' rights tack it tries hard to contain).

refusal to make the adjustment was within the discretion provided his office by Congress, and that neither Brown's inaction, nor that of his predecessor Secretary William Mosbacher, was arbitrary or capricious under the applicable standard of the Administrative Procedures Act. In these circumstances, a federal judge could not lawfully issue the order prayed for, despite injuries to the plaintiffs.[2] Invoking Locke, Montesquieu, and the Massachusetts constitution on the point that the separation of powers ensures "a government of laws and not of men," McLaughlin quoted former Supreme Court Justice Benjamin Cardozo: A judge is "not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles" (929).

McLaughlin's (and Cardozo's) knight-errant image was apt. The plaintiffs' action, a suit against an officeholder, has its prototype in medieval England. To students of legal history, the suit will be second nature, having been prominent on the record since *Marbury v. Madison* (1803) and before; such actions provide a fair sample of the characteristic litigation in any era.[3] The historical tie is strengthened when one remembers that medieval English government was an extensive network of intricately arranged offices, in which officeholders from cabinet ministers to jail keepers were personally liable at common law for unlawful injuries they caused citizens or other officers in the course of their work. Only a few of these officers were styled "judges"; however, all presided over or took directives (often both) from "courts," and all enjoyed territorial or functional jurisdictions consisting of both "judicial" and "ministerial" duties. Judicial duties (also referred to as judicial "acts" and "powers") were those entrusted to the officer's personal discretion; as such, they could not, absent legal provision to the contrary, be commanded or reversed by any other officer. Ministerial duties (or "acts" or "powers") were duties ordered by statute or other legal authority; these could be reversed by an appropriate officer upon appeal. In some offices, judicial powers were all but eclipsed by ministerial ones; for instance, marshals had discretionary duties but are

[2] The district court was upheld by the Supreme Court in *Wisconsin v. City of New York* (1996). Plaintiffs' rights to an accurate count are discussed in *City of New York v. U.S. Dept. of Commerce* (1990).

[3] On the present viability of suits against federal, state, and local officers, see *Crawford-El v. Britton*, 523 U.S. 574 (1998), at 585. The Court here references *Butz v. Economou*, 438 U.S. 478 (1978). *Butz* denied that high federal officials enjoyed immunity from damage suits for their discretionary acts, except where proven that immunity was essential for the conduct of public business. Other leading cases include *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), holding that a former president is entitled to absolute immunity from liability for damages predicated on conduct within the scope of his official duties, and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), holding that senior presidential advisors are protected only by a "qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial"(813). *Fitzgerald* was a "whistle-blower" action by an employee of the Department of Defense.

routinely referred to over the centuries as "ministerial officers;" in the case of judges it is the other way around.

Legal to the core, this system was activated throughout by a variety of "actions" or "writs," purchasable by suitors for a fee. *Certiorari,* for instance, was an order that the record of one office be brought to another for inspection; *mandamus,* an order to perform a ministerial duty; *habeas corpus,* an inquiry by one officer into the legality of a prisoner's custody by another; and so on. The suit against Secretary Brown, an action at equity for affirmative relief, is one of a pair of ancient forms, the other being the suit at common law for monetary damages.[4] Writs followed the scheme of judicial and ministerial duties: certiorari issued on allegation of irregularity of procedures, procedures being mandated, but not on allegation of misjudgment of facts at trial, which were consigned to the judge's discretion; mandamus could compel a ministerial duty but not a judicial one; habeas petitions were available to confirm rightful jurisdiction, but not to examine the facts of arrest. For every harm the government might illegally inflict, there was some officer—cabinet secretary, sergeant-at-arms, tax collector—answerable to a suit for damages or other remedial action. That answerability was the essence of "the rule of law."

The medieval legacy amounted to far more than procedures. The U. S. Constitution of the framers was—is—, at its most mundane, an arrangement of officeholders, laid out in their respective jurisdictions, selection, tenures, and duties; the division between "ministerial" and "discretionary" authority organizes the liability of federal officers until today. It followed that the old writs to enforce these provisions became the permanent mainspring of constitutional accountability.[5] However, since the idea of constitutional government as an arrangement of officeholders may seem so uncontroversial as to lack all historical bite, it will be worth pausing to notice how things look different when office is

[4] The major division among English law courts from the 14th century was between courts at "common law" and at "equity." Remedies "at law," that is, under writs purchasable from common law courts, typically required compensatory payment of money to the injured party as damages. Remedies "at equity," under writs purchasable from equity courts, typically required the performance of some affirmative act, that property be vacated or returned or that activity of some kind cease and desist. In the United States, the division held, but the same judges heard both types of cases, not usually true in England. See also, on jury trial, p. 892.

[5] The "ministerial"-"discretionary" distinction appears today in various doctrinal and statutory settings. For instance, prior to the passage of the Federal Tort Claims Act in 1946, the United States government—as distinct from its officers—under the doctrine of sovereign immunity could not be sued without its permission for injuries caused by an employee's negligent act; such claims were heard by Congress on a case-by-case basis. Under the Act, sovereign immunity was waived for such suits except when "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . " (28 U.S.C. 2680 [1994]), i.e. when the negligence was by an officer, who might also be held individually liable.

highlighted instead of more familiar principles such as the separation of powers or federalism.

First, only a focus on office—on who is legally responsible to whom for what—captures the extent of fragmentation built into American government from the start. Catch phrases like "a divided government of shared powers" and "the marble cake of American federalism" convey something of the crosshatching and intermixing of constitutional jurisdictions; but inspection of the finer lines of officers' liability imposed historically reveals an absence of orderly command where it might be most expected. In one early suit, for instance, the commander of an American warship was held personally liable for damages when he seized a Danish vessel upon Executive Branch orders but, according to the Supreme Court, outside his statutory powers under the 1799 Non-Intercourse Act (*Little v. Barreme* 1804). In another, a custom collector's detainment of a ship for carrying suspicious cargo, under a directive from the Secretary of Treasury, was countermanded by a federal judge: The Embargo Act of 1808 authorized the seizure of ships at the personal discretion of the collector but not otherwise (*Gilchrist v. Collector* 1808).

The framers' preoccupation with office goes far to explain the pervasive legalism of American government, despite the presence of competing philosophical strains. That not only judges but all officeholders took authority from common law, that common law provisions on officers' rights were written into statutes, that the common law on "trafficking" in office dated from Richard II and on deputies' liability from Edward VI: this made it all but inevitable that common law judges would have a key role in deciding claims against government. The role of common law meant also that the Justices of the U.S. Supreme Court, on the model of Kings' Bench, would likely rule in disputes over jurisdiction between states and the national government; that was why Thomas Jefferson, among others, vehemently opposed the reception of common law by federal courts (White 1988: 126–27).

Finally, the definition of judicial and ministerial duties clarifies long-term patterns, such as the regular "resurgence" of Congress despite state-building developments to the contrary. Among constitutional officers, members of Congress are the most "judicial," that is, least governed in their assigned activities by external rules. The freedom from oversight that members of Congress enjoy under the speech and debate clause of Article I early extended to acts of fining and imprisoning fellow members, compelling witnesses to testify in investigations, and punishing private citizens for contempt.[6] Congress's discretion was not only

[6] That is, when "implied from those constitutional functions and duties . . . [necessary] to the proper performance of which it is essential"; (*Kilbourn v. Thompson* 1880, at 199), quoting the Massachusetts high court sanctioning a citizen's imprisonment for con-

wider ranging than judges, it was more pliable; unlike judges proper, members of Congress could delegate authority to other agencies of their creation to assist them in their lawmaking duties.[7] The Constitution assigns members of Congress alone the duty of removing officers, including each other, from their positions. Within the scheme of officers' rights, removal authority is "judicial" authority par excellence; once authoritatively located, no other officer can question its exercise. This duty has figured prominently in major political realignments, as signaled in the interbranch crises of 1802–03; 1865–66; 1936–37; 1973–74; 1998.[8]

2. Rights

As it would have in prior centuries, *City of New York ex rel Lungren* triggered a perusal of authority in all impinging jurisdictions—of the previous Commerce Secretary, of the Congress, and of the District Court judge himself. Given the regularity of such suits over time, and considering that officeholders' duties remain a perennial subject of constitutional litigation, the question arises of how officers' rights can support a viable paradigm of constitutional change. At this juncture it is helpful to reintroduce the second concept: *rights*. Offices are established positions in an interconnected system and, as such, are relatively fixed. Rights are privileges attached to these positions and, as such, are separable and are more often contested. It is this counterpoint, the stability of formal positions against uncertainty on the privileges they entail, that makes the officers' rights framework so valuable for historical use.

That office per se entails rights can be seen when rights are contrasted with a disability of some kind—for instance, the bar against office-holding by felons. Likewise clear are those rights

tempt of the state House of Representatives. *Kilbourn*, one of the *least* expansive readings of Congress's judicial authority in the 19th century, held that the only person punishable when members of the U.S. House imprisoned a private citizen for 45 days was their ministerial officer, the Sergeant-At-Arms.

[7] In 1894, the Supreme Court held that Congress might enlist federal judges to enforce subpoenas of the Interstate Commerce Commission. Denying either house had "general" powers to conduct inquiries into the affairs of citizens, Justice John Harlan nevertheless endorsed Chief Justice John Marshall's opinion that where "the law is not prohibited, and is really calculated to affect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground" (*I.C.C. v. Brimson* 1894, 472). For a recent and critical assessment, see Engdahl (1999).

[8] The interbranch crises referred to are, respectively, the Jeffersonian assault on the Federalist judiciary; the impeachment of President Andrew Johnson; New Deal legislation to "pack" the Supreme Court; the imminent impeachment of President Nixon; and the impeachment of President Clinton. The last two may be said to represent a sputtering realignment from the New Deal, in contrast to earlier, more definitive transitions. Congress also met resistance by abolishing offices, e.g., of lower court judges in 1802 and 1863.

attached as "incidents" of office, such as the right to compensation; thus the landmark decision of *Humphrey's Executor v. United States* (1935), where the Supreme Court awarded back salary to the estate of a deceased F.T.C. commissioner dismissed during his rightful tenure by President Franklin Roosevelt. But the idea that officers have rights against competing lawful claims by citizens or other officers of the same government, rights with all of the force of citizens' rights to own property and to free speech and against unlawful search, is perhaps less self-evident, especially in a country that for most of its history denied an office could be property (*In re Hennen* 1839; *Taylor & Marshall v. Beckham* 1900). Yet precisely that reality determined the outcome in *City of New York ex rel Lungren.* The Commerce Secretary's congressionally assigned duty to supervise the census was, in the face of a challenge to his discretion, his inviolable right.

For purposes of this discussion, a right is defined by three characteristics. The first is the *moral attachment* of a right to its holder, such that any violation constitutes a felt assault on the latter's dignity and, to varying degree, a wrong to the social order as a whole. This moral coloring draws on the deepest origin of rights in obligations undertaken by specific persons, thereby distinguishing rights from "interests." So strong is this interpersonal theme in English tradition—of justice located in what one person owed another—that trespass on private land by strangers was remedied by writs drawn in relation to the King, as "breach of [his] peace." When Englishmen's rights came to be administered by central courts, it required royal officers who had the duty—the right—to process lawsuits, thereby entwining the entire system of justice in a web of personal obligations, extending in and outside the machinery of state.

The second characteristic of rights is *fact independence;* that is, rights may be exercised in the universe of circumstances not otherwise precluded by law (such as "clear and present danger"). In this regard, rights serve as a priori standards against which particular facts in litigation may be evaluated. In the United States, these standards are said today to arise from the Constitution, from statutes, and from common law. From a contemporary viewpoint, fact independence may seem in conflict with the interpersonality of rights. As a historical matter, rights become increasingly objectified, moving from what is owed one person by another in a specific relation to what is owed him or her by "all the world," and from being legally conclusive between persons in a specific relation to being one among other facts in dispute.

The third characteristic of rights is their *presumed enforceability* against persons or agencies that violate them; this is invoked by the maxim "no right without a remedy." Common law supposed a complete and perfect ordering of persons and obligations; legal centralization in England went hand-in-hand with the inven-

tion of writs, each signaling a new right the King would protect; "rights" and "actions" developed together and were closely coordinated. As rights over time become more independent, more "absolute," they also more often collide. In *City of New York ex rel Lungren*, plaintiffs' constitutional rights were violated by the inaccurate census count. In an earlier era, injuries that an officer like Secretary Brown had authority to inflict would not have been deemed a violation of "rights." Note also that presumed enforceability is not synonymous with Article III standing to sue, which concerns only the rights of plaintiffs; officers' rights are typically interposed in answer to a citizen's suit.

The affinity of rights with office is expressed in the concept of jurisdiction, literally, the right to say what the law is; recall the echo in *Marbury* (177). Medieval jurisdiction resided in all persons assigned discretionary duties, including persons we would not today normally call officers—e.g., landlords. Like an officer in the case of his deputy, a landlord had jurisdiction to decide disputes involving his tenants, including tenants' disputes with himself. Conversely, an officer's rights, once vested, were his "own," in the manner of landlords. Offices, often inherited or purchased, included rights to collect fees for service and to sue intruders for trespass. Such parallels might suggest that officers' rights derived from landholding. Upon closer examination, the influence moves in the other direction. Unlike continental Europe, where property, on the model of Roman law, was grounded in a legal relation between person-and-thing, English landholding was, like other rights, interpersonal; in England only the King, by virtue of his office, owned land, all other lords "holding" of him in return for the obligation of military supply.[9]

The foundation of rights in office, including rights that would eventually attach to the persons of citizens, is shown in the history of particular constitutional provisions. The "Great Writ" of habeas corpus, for instance, was originally an administrative instrument for securing an accused person's appearance in court. By the 15th century, habeas became a weapon by which royal judges enlarged their authority (and income) at the expense of local and franchise judges and, later, judges of prerogative courts, such as Star Chamber. Only in the 17th century, when prisoners were identified with such prominent political causes as resistance to the monarch's forced loans, did the writ attach less to officers' jurisdiction and more to citizens' personal liberty (Duker 1980). Similarly, freedom of speech was interposed first on behalf of sitting members of Parliament (Pole

[9] Perhaps this explains why English and American rights have been slower to take on the "thingness" typical of civil-law countries, where, at least in theory, both property and office could confer more absolute ownership. In civil law, the critical distinction with regard to rights is whether they exist *in rem* or *in personam*; in Anglo-American law it is whether rights are addressable by actions in equity or at common law (Samuel 1988).

1998); citizens' rights against self-incrimination became effective alongside the late 18th-century office of defense counsel (Langbein 1994).

The interweaving of office and rights in Antebellum America, and also the growing tension between them, may be seen in *United States v. Morris*, decided in 1825. Morris, the federal marshal for the Southern District of New York, was sued for misfeasance when he failed to execute an order of the U.S. District Court in Maine to sell certain properties condemned in forfeit of a penalty against their owners for importing prohibited merchandise. The suit was entered in the name of the United States by an attorney appointed by the Maine District Court; standing immediately behind, however, as real parties at interest, were the collector and surveyor of the port at Portland, who, by ancient usage and under the Collection Act of 1799, were entitled to a share in one-half the proceeds—their "moiety"—from the marshal's sale. The marshal answered along traditional officers' rights lines: his nonexecution of the District Court's order was justified by a warrant in his possession, issued by the Secretary of Treasury, indicating the latter officer had weighed evidence appropriately submitted and had decided to remit the penalty.

The issue was joined on whether the Secretary of Treasury was a lawful judge of individual rights of the sort normally determined in a court of law. The marshal argued that the Secretary's decision to remit a penalty when persuaded there was no willful negligence or fraud was lawful under Congress's Remission Act of 1797; the remission therefore was equivalent to the judgment or decree of a competent tribunal, superseding the District Court's duty to enforce the Collection Act. The award to the port officers was conditional: Until the Secretary had decided, no rights of ownership vested. Daniel Webster, attorney for the port officers, argued the more modern case, based on the Constitution. Under the separation of powers, the Secretary was a "ministerial officer" of the Executive, without judicial power and therefore not the final decisionmaker on a question of individual rights. The port officers' rights to their moiety vested the moment the District Court imposed the penalty; from then on, their rights existed independently of all other facts.

In a unanimous decision, the Supreme Court agreed with the marshal. Congress had submitted the question of remission to the Treasury Secretary's "sound discretion"; as with the Commerce Secretary's administration of the census almost two centuries later, "the correctness of his conclusion . . . no one can question" (285). The port officers' rights were neither absolute nor vested. As for the marshal himself, to ask more of a ministerial officer than that he possess a valid warrant, indicating the Secretary had made his decision by appropriate procedures, "would be imposing upon him great hardship" (284). The Court's opinion,

notably, refers to the Secretary's "discretion," "jurisdiction," "authority," and "power," but not his "right." To do otherwise may well have been awkward in a nation by now saturated with natural rights, inalienable rights, and, generally, rights secured against—not for—state officers. This vocabulary had no more bearing on the outcome than it would today.

3. Hierarchy

Office connotes hierarchy, position in an order of higher and lower. In that sense, not only English government but also English society in the 18th century was ordered as a great system of offices, from the King in his court to the father in the humblest family. Blackstone's *Commentaries* gives parallel treatment to legislators, royal councilors, supreme and subordinate magistrates, clergy, and military officers, alongside masters, husbands, parents, guardians, each in terms of the incidents of their positions and their rights and duties toward persons subject to their rule. The first group are the "public relations," magistrates and people, governors and governed. By Blackstone's time jurisdiction over their affairs has been transferred out of the common law courts to Parliament. The second group are the "private relations," "persons over persons in 'oeconomical' spheres," the King's subjects, still governed by common law as administered by royal judges (Blackstone 1979 [1765]). The division in jurisdictions is important, because after America's independence it continues to allocate authority between legislators and judges.

Any complete study of American constitutional government will have "private relations" as a major focus. The restructuring of rights in "public relations" marks the fierce struggles of English constitutional history before the American Revolution. The successive reorderings of slave owner and slave, master and servant, husband and wife, and the foreshadows and reverberations of these events are key episodes and stress lines of American constitutional change (Orren 1992). In this article, however, I detailed consideration of these hierarchies to convey the broader relation of officers and citizens, Blackstone's "magistrates and people." Within that picture, private relations are still a critical feature, demonstrating the unity of the officers' rights system and its penetration into society as the essence of legality. Also, as I argue later, they have been an important condition of the rights of particular "magistrates."

As a first item of business in 1789, the new Congress wrote the English common law of offices into federal statutes. Custom collectors, Indian agents, land assessors, revenue officers, and others were paid by fees, secured by bond, assigned ministerial and discretionary duties, the same as their English predecessors (White 1965). Sheriffs, coroners, constables—Blackstone's

subordinate magistrates—continued under the common law in force when those officers were colonials. English "private relations," the relations of plain subjects, transferred into the United States wholesale, as American states and territories except Louisiana adopted English common law and statutes up to some designated date, e.g., the settlement of the colony or the adoption of the federal Constitution, into their own laws. Rights existing between officers and citizens followed the pattern: The Bill of Rights, the Supreme Court declared, instituted "no novel principles" but "embodied certain guarantees and immunities which we had inherited from our English ancestors and which had from time immemorial been subject to certain well-recognized exceptions particular to the case" (*Robertson v. Baldwin* 1897, 281.)

The precedence of officers' rights over citizens' rights shows itself legally in judges' decisions that hold officers not liable for causing citizens' injuries and therefore not required to pay damages or provide affirmative remedy. A claim that a right has been injured opens every lawsuit; sometimes, it is the right's nonexistence that the trial ultimately decides. In *United States v. Morris,* for instance, the decision denied that the marshal could have injured the port officers' property rights before the Treasury Secretary decided the question of remission. Of primary interest, then, are those decisions in which the court acknowledges an injury to a citizen's right but rules that this injury cannot be legally remedied. *City of New York ex rel Lungren* is such a decision. An Antebellum example is *Anderson v. Dunn* (1821), where the Sergeant-At-Arms of the House of Representatives arrested a private citizen for bribing a House member on the floor, subsequently keeping the accused in custody for two months, during which time he was examined at "the bar of the House," pronounced guilty of contempt, reprimanded by the Speaker, and released. When the citizen sued the Sergeant-At-Arms for assault and false imprisonment, the Supreme Court held the latter not liable: The officer acted under a warrant, issued by the Speaker and witnessed by the Clerk. The Court did not quarrel with the plaintiff's argument that under the Constitution's Sixth Amendment indictment must precede punishment. However, "the safety of the people is the supreme law," overriding "casual conflict with the rights of particular individuals" (226–27).

By no means did the hierarchy of officers over citizens depend for its enforcement on judges' facility with common law maxims. It was supported by the rules of the period for pleading cases that had as their first principle the protection of officers' rights to act within their lawful jurisdictions. Under these rules, no citizens' rights arose directly from the constitutional document, that is, without a citizen's demonstration that he or she suffered some common-law injury like trespass or assault through

an officer's act (Collins 1989). When the officer answered in his defense that the act was justified by a judicial or ministerial duty, e.g., that it was commanded by a superior officer, the plaintiff could aver that the command violated a provision of the Constitution. If the officer offered no such justification, or if his act was found to be *ultra vires*, beyond his authority, the plaintiff might receive damages or injunctive relief but not the affirmation of a constitutional right. If the officer offered justification for his act, its validity as weighed by judge or jury would determine the result, not the existence of the citizen's right in the abstract.

Officers' rights over citizens' rights is familiar in American history as common law "police powers." Less appreciated in constitutional analysis is the extent to which officers' rights were regularly enjoyed by persons not occupying formal positions in government. To say "officers' rights" in this context is not a matter of altering the meaning of words to fit an argument. Consider habeas corpus, the venerable means at common law for ascertaining the legality of a prisoner's custody. Nineteenth-century parents, husbands, and masters could sue in habeas to obtain custody of children, wives, apprentices and, before 1860, slaves; once jurisdiction was established, they had immunity to suits by others for the charge's release (Hurd 1878). As standard in these relations, the superior party was exempt from suits claiming that they had inhibited the subordinate's freedom of movement or speech as surely as if he were a marshal or judge.

Parents, husbands, and masters were usually citizens as well, of course, but their rights as private officers were not available to citizens who did not hold their positions. By the same token, subordinate persons other than slaves were also usually citizens, but their disabilities were not shared by citizens at-large. Again, the common-law earmark of interpersonality: Husbands enjoyed immunity against suits by their wives for injuries they inflicted, but not against suits by women in the relation of fellow citizens. Over the centuries, statutes allocated rights wholesale to entire categories of persons; normally, however, this allocation signaled a crisis—a shortage or glut of employees, escaping slaves, family instability—in which the common law required reinforcement.[10] English judges were as practiced at enforcing particularized rights among citizens as they were at enforcing particularized rights among officers. When, in the 18th century, the rights of citizens took on increased currency in political discourse, legal theory and practice continued to uphold these well-worn compartments of jurisdiction.

Legal precedents crossed freely between public and private domains. Shortly after the Civil War, for instance, the Court held

[10] These measures include the Statutes of Labour (1349) and of Artificers (1563); the Fugitive Slave Acts of 1793 and 1850, the Women's Property Acts of the 1830s, and the Workers' Compensation Acts of the 1880s.

that a congressional statute regulating hours for federal employees did not give a right to a steam plant operator at West Point to sue for hours worked over the maximum, such regulations being merely "advisory" between principals—members of Congress—, and agent—the manager of West Point (*United States v. Martin* 1876, 404). This case afterward became a precedent for disputes arising from state statutes providing maximum hours in private employment, with identical legal effect: denial that the employee had any actionable claim.[11] Or, for another example of crossover, Thomas Cooley, in *A Treatise on the Constitutional Limitations* (1883), discusses "freedom of speech" as it pertains to criticism of public officers and candidates, and concludes that such speech is protected against libel actions only when it is addressed to an officer or body the citizen believes is an "an authority possessing power in the premises." Cooley supports his conclusion with precedents concerning private employers, postmasters, and a Secretary of War (1883: 620).

The assimilation of public and private hierarchies is evidenced in the writings of Jeremy Bentham, arguably the most important rights theorist in the Anglo-American world prior to Holmes and hardly someone on whom the growing conceptual divide between public and private would be lost. Here is Bentham's analysis of "power" and "right" (see Hart 1970 [1945]: 200–01; see also Singer 1982), one consistent with our own:

> When the law exempts a man from punishment in case of his dealing with your person in a manner that either stands a chance or is certain of being disagreeable to you, it thereby confers on him a power: it gives him a power over you; a power over your person. Now this is what it may find necessary to do for various purposes: for the sake of providing for the discharge of the several functions of the husband, the parent, the guardian, the master, the judge, the military officer, and the sovereign: . . . These powers then form so many exceptions to the general rule that no man has the right to meddle with the person of another.

American jurists, as we have seen, endorsed these exceptions, conceptually as well as in their holdings. When enforcing laws against fugitive slaves, for instance, judges were wont to compare the slaves' recapture to the rightful confinement exercised over children, apprentices, bailees, and men in military service (cf. *Johnson v. Tomkins* 1833, 843). Likewise, Cooley (1883) moves easily from public to private officers in enumerating rights: the police power "resided primarily and ultimately in the legislature"; however, "in the absence of legislative control, . . . corporations themselves exercise [the police power] over their operatives, and

[11] See *Grisell v. Noel Brothers* (1894). To complete the interoffice circle, the private cases reappear in arguments as precedents against government officers; see *Rush et al. v. U.S.* (1898).

to some extent over all who do business with them, or come on their grounds, through their general statutes, and by their officers" (575).

It was taken for granted that public officers would respect the rights of their private counterparts. This respect did not preclude intense struggles among them, e.g., between employers and legislators over the state's police powers. Among officers, judges were especially inclined to respect private relations.[12] It was not by accident. As hierarchies governed by common law, private relations remained at the bedrock of judges' ancient authority, already greatly eroded by the time of the framing in favor of legislators. Supreme Court Justices' protective attitude toward their jurisdiction is pronounced in periods of institutional turmoil, for instance, after Reconstruction and in the early New Deal. From this vantage point, the rights jurisprudence of the Warren Court can be read as Justices' regrouping after legislators' gains in the New Deal, much as substantive due process represents their regrouping after Reconstruction. Indeed, considering the reliance of the Warren Court on the Congress-empowering Fourteenth Amendment, the jurisprudence of the Burger and Rehnquist Courts can be regarded as Justices' regrouping after the tactics of the Warren Court.

In any era, of course, where justice turns on rights codified as procedures, public officers will frequently have the proverbial last word. Reference was made earlier to the rules for pleading cases. Similarly, the defeat of a citizen's claim in a lawsuit or in registering a deed could—can—be caused by a failure to make the right filings in the right order with the right officers. Likewise, judges' common law authority to fine and imprison persons for contempt, upon summary trial without a jury and with scant possibility of appeal, was—is—a consummate officers' right. The contempt power has historical parallels in private rights, in a husband's right to confine his wife at home, e.g., and in an employer's right to fine and discharge employees for virtually any reason. By the middle of the Antebellum period, Congress trimmed judges' contempt power, maintaining summary and unlimited discretion only over insults occurring in the vicinity of their courtrooms; analogous statutory provisions would not be imposed on husbands and employers for another full century.[13]

[12] Judges respected common law rights even when it wasn't necessary for their holdings. In *Meyer v. Nebraska* (1923), e.g., the U.S. Supreme Court agreed with a schoolteacher's claim that a state law restricting children's instruction in the German language interfered with his constitutional right to pursue his vocation. However, it devoted the heart of its opinion to expounding on the common-law right of parents, who were not plaintiffs, to control their children's education.

[13] After 1834, incidents of contempt occurring outside federal courtrooms were punishable after indictment by three months maximum imprisonment and $500 maximum fine. Inside the courtroom or its vicinity, judges' discretion over contempt remained virtually unlimited.

An anticipated not-so-fast: Doesn't the Constitution ensure that the proverbial last word, at least with higher officers, will belong to citizens, exercising their rights as the sovereign electorate? The short answer is no. To pick a nonrandom example: An outspoken critic of Commerce Secretary Mosbacher's refusal to adjust the 1990 census was Ron Brown, then-Chairman of the National Democratic Committee. Brown said Mosbacher's inaction was sufficient reason to oust the entire Bush administration. Another critic was Bill Clinton, candidate for president (Rapp 1994). The discretion these officers enjoyed to change their minds is among the Constitution's most basic principles.

4. Constitution

So far in the discussion, the Constitution has played little independent role. Following the Civil War, however, major departures regularly express themselves as constitutional change. Give private relations their due: The removal of slave masters' rights over slaves occurred through constitutional amendment; the removal of employers' rights over employees pitted constitutional law against common law; the current reorganization of family rights is accompanied by constitutional retrenchment; each change involved a transfer to the legislature of subject matters formerly regulated by the judiciary. An associated pattern is seen in the procedures that relate officers' rights and citizens' rights to each other. The 1867 Judiciary (Habeas Corpus) Act gave habeas corpus rights for the first time to both state and federal prisoners when held "in violation of the Constitution." Each of these changes supports the hypothesis of a shift in the balance between officers' and citizens' rights: Insofar as no new privileges were instituted to redress the relations that ensued, each enlarged citizens' rights.

Needless to say, new rights do not proceed automatically from recognition to enforcement. Among the most daunting challenges they must surmount is the labyrinth of officers' rights in state and federal jurisdictions, left by the framers as a permanent obstacle course against imprudent innovation; a century of civil rights reversals under the Court's state-action doctrine is only the most paradoxical example (Orren 1998). In an officers' rights perspective, then, the Constitution emerges as a platform, improvised and reconstructed over time, for the purpose of enacting enduring political change, that is to say, constitutional development. This is not so much a "living" Constitution as one situated on ground yet to be cleared of ancient hedgerows, and of roots that repeatedly undermine finished work. Abandoning metaphor for history: Next in importance to the event of the framing, the officers' rights analysis recalls a constitutional design that for all its creative energies was careful to respect of-

ficers' jurisdictions already in place. American constitutional development—indeed, constitutionalism as a form of government—has entailed coming to terms with this predisposition.

Pointing up this aspect of the framing clarifies several important issues: for example, how it was that private hierarchies remained so long under state jurisdiction; why the Bill of Rights did not from its inception apply to the states; and why property and commerce, alone except for religion among nongovernmental affairs, were given express protection. Thus, regarding the latter: The right to buy and sell, free from officers' dictates, was a largely realized ideal of the English Revolution and of the commercial expansion that followed. By contrast, workplaces, schools, and families continued under the prescriptive regimes that Hamilton in *Federalist 17* promises will remain the states' own "empire of justice."[14] Again, the aim here is not to uncover what is unknown, but to aggregate systematically what is known in a single analytic framework.

The reorganization of rights that is constitutional development presents two characteristic moves; their evidence across subject matters demonstrates the historical shift from officers' to citizens' rights at the level of legal process. First, rights resting on preconstitutional foundations of English common law are replaced by rights resting on constitutional foundations, either textual or statutory or both. Second, the burden of justification in enforcement proceedings moves from citizen to officer; put differently, the advantage of the default position in a given legal proceeding moves from officer to citizen. Afterward, relations between parties are still determined by the rights of each, but these rights are no longer a function of these relations but have independent status. In *City of New York ex rel Lungren,* plaintiffs' rights against the Commerce Secretary were ultimately defeated by the Secretary's right against the district judge, but they were all the while based in the Constitution; had a common law injury been required, as in the 19th century, there would have been no grounds for suit.

I will next apply the officers' rights framework to three areas of constitutional law: the Bill of Rights, federalism, and the separation of powers. Each discussion shows a different analytic gain: in relating separate lines of doctrine, in tracking doctrine over time, and in interpreting contemporary jurisprudence politically. The argument is not that there are no other valid or productive readings, but that this one offers coherence through history and across constitutional structures; that it illuminates doctrinal progressions, including shadings and backtrackings; and that it aligns constitutional change with constitutional actors, in a form

[14] *The Federalist,* No. 17: 81 (New York: E. P. Dutton, n. d.). An original discussion of religion and education in the thought of the framers is found in Amar (1992).

consonant with questions, including normative questions, asked by scholars of political development. Moreover it does these things without obscuring the "real issues" but by connecting them and augmenting their significance.

The Bill of Rights lends itself best to independent discussion. To the well-known story of expanding citizens' rights under those several provisions, the officers' rights analysis adds sharper definition: The Bill of Rights develops over time from largely a redaction of officers' common law jurisdictions—a Bill of Better Rights—to become a charter of citizens' predictable guarantees. As illustration, consider the Seventh Amendment, the right to jury trial in civil cases at common law. For most of its history, the amendment provided juries in cases that, had they arisen in England in 1791, the year of the amendment's adoption, would have been tried in an English court of common law; in cases that, had they arisen in England in 1791, would have been tried in an English court of equity or admiralty, the American judge had the right to hear the evidence alone, without a jury.[15] The default position lay with the judge: If, on one hand, in a common law case, neither party called for a jury, the judge could, at his discretion, hear the case alone. In an equity case, the judge had discretion to call a jury, regardless of the parties' will. If an equity court had jurisdiction and issues at common law arose, the judge might hear those also, under the so-called clean-up doctrine. Juries, on the other hand, heard only issues at common law; if equitable issues arose, the judge tried them separately without a jury.

The severing with tradition came in 1959, when the Supreme Court decided that the clean-up doctrine was eliminated through the combined effect of the Declaratory Judgment Act (1934), explicitly preserving "the rights of jury trial for both parties," and the present Rules of Civil Procedure (*Beacon Theaters v. Westover* 1959, 504). Before 1959, the Court regularly affirmed the clean-up doctrine; an equity judge had the "undoubted right" in a case under his jurisdiction to enjoin any common law proceedings that might begin elsewhere (*Barton v. Barbour* 1881). Under the new jurisprudence, a citizen's right to jury trial in civil cases was deemed "a constitutional one . . . while no similar requirement protects trials by the court" (*Beacon,* 510). Issues at common law must be submitted to a jury "regardless of whether the trial judge chooses to characterize the legal issues presented as 'incidental' to equitable issues or not" (*Dairy Queen v. Wood* 1961, 473).

The same moves are seen in First Amendment freedom of speech, e.g., in the prophetic Supreme Court opinions of Justice Oliver Wendell Holmes. Historically, freedom of speech was defined by the English rule against prior restraint (government

[15] This classification was determined retroactively, according to the remedy sought, whether it was one provided at common law or at equity. See n.4.

censorship); other claims were subordinated to officers' rights to punish speech judged harmful after the fact. On that basis, in 1907, in *Patterson v. Colorado*, when a newspaper editor asked the Court to rescind a fine for contempt imposed for publishing articles critical of the high court of Colorado, Holmes denied jurisdiction: Even "were we to assume" the speech in question was protected from abridgment by the states, contempt was a matter of "local law . . . , however wrong and however contrary to previous decisions" (461). By 1921, however, in *Milwaukee Publishing Co. v. Burleson* (1921), when the majority upheld a postmaster's statutory right to deny mailing privileges to a socialist newspaper for making treasonous statements during World War I, Holmes dissented: "it would take pretty strong language," he said, to convince him that "Congress could ever confer such despotic power on an administrative officer" (437).

The "preferred position" that subsequently vindicated Holmes' *Burleson* opinion takes on dimension in light of officers' rights. The greater protection of noneconomic over economic rights is accompanied in individual cases by greater protection for citizens over officers (*Palko v. Connecticut* 1937; *United States v. Carolene Products* 1938). That this is development, not movement back and forth, is suggested by the strain apparent in later efforts to alter course. For example, despite the expressed purpose of members of Congress to deny funds for art they consider profane, the Court recently upheld an act requiring the National Foundation on the Arts and Humanities when awarding grants to consider "general standards of decency and respect for the diverse beliefs and values of the American people" (*National Endowment v. Finley* 1998). Constitutionality is found in the virtue that "decency" and "values of the American people" are too vague to preclude particular viewpoints; moreover, "it is not always feasible for Congress to legislate with clarity" (4).[16] A similar realism tempered Seventh Amendment decisions when, soon into the present judicial dispensation, the Burger Court held that administrative fines, historically a remedy at common law, need not implicate jury trial: "Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation" (*Atlas Roofing v. O.S.H.R.C.* 1977, 455).

The agility of an officers' rights synthesis to address problematic cases can be seen with the Fourth Amendment. The "exclusionary rule" announced in *Weeks v. United States* (1914) broke with the English tradition that evidence seized in an unconstitutional search by a federal officer was admissible in later criminal prosecutions and in damage suits against officers; i.e., before *Weeks*, citizens' rights against unlawful search were qualified by

[16] Under the Warren Court, the precaution recommended against officers' propensity to infringe on First Amendment rights was, ironically enough, the strict avoidance of vague statutory language. See *N.A.A.C.P. v. Button* (1961).

the rights of prosecutors and officers who performed the search. Recently, the Court has carved out exceptions to the exclusionary rule, including warrantless searches by employers, state hospital supervisors, and school administrators, based on "special needs." These "special needs" decisions have been criticized as shallowly reasoned and illogical (Buffaloe 1997); against the background of officers' rights in private relations for centuries, however, they run true to form. Justice Sandra O'Connor, citing Blackstone, justifies warrantless drug searches in school by the fact that teachers and administrators stood "at common law and still today in loco parentis over unemancipated minors . . . even as to their physical freedom" (*Vernonia School District v. Acton* 1995, 654). Where supervisors searched the desk of a state hospital psychiatrist, she recalls the master's dominion over the servant: "The employee's expectation of privacy must be assessed in the context of the employment relation" (*O'Connor v. Ortega* 1987, 717).

Distinguishing between public and private officers would seem fundamental in Fourth Amendment doctrine, but the "special needs" opinions elide the two: "[In another decision we] suggested the union employee did not have a reasonable expectation of privacy against his union supervisors" (*O'Connor v. Ortega* 717). There is the standing suspicion of outside interference: "school discipline," avers Justice Harry Blackmun, "could not be maintained if a teacher were required to secure a warrant supported by probable cause every time she wanted to search a student" (*New Jersey v. T.L.O.* 1985, 353). With regard to the state hospital psychiatrist, Justice O'Connor predicts that "the delay in correcting the employee misconduct caused by the need for probable cause rather than reasonable suspicion will be translated into tangible and often irreparable damage to the agency's work" (*O'Connor v. Ortega*, 724). On the officeholders' rights reading, then, the "special needs" cases are arguably less instructive on Fourth Amendment backsliding than on the Constitution's ingrained habits of hierarchy.

Federalism, the division of authority between national and state officers, may seem to elude development altogether, at irregular intervals rotating under the commerce clause between national and state precedence: *Gibbons v. Ogden* (1824),[17] *New York v. Miln* (1837),[18] *Wabash v. Illinois* (1886),[19] *Hammer v. Dagenhart* (1918),[20] *N.L.R.B. v. Jones & Laughlin Steel*

[17] *Gibbons v. Ogden* invalidated a state steamboat monopoly as unconstitutional, based on the commerce clause.

[18] *New York v. Miln* affirmed a state statute requiring masters of immigrant ships to post bonds against their passengers becoming public charges.

[19] *Wabash v. Illinois* held that individual states lacked power to outlaw discriminatory rates charged by interstate railroads.

[20] *Hammer v. Dagenhart* held that Congress's 1916 statute regulating hours of child laborers in manufacturing was an unconstitutional exercise of the commerce clause.

(1937),[21] *United States v. Lopez* (1995).[22] But in the officers' rights perspective, this sequence of cases reflects the upward grade of "mere citizens'" rights in private relations. By the late 18th century, commercial relations enjoyed constitutional status, free from common law restraints and subject to legislation (*Gibbons, Miln, Wabash*); later on, legislator-proof subordination of employees (see the change from *Hammer* to *Jones & Laughlin Steel*) and students while at school (*Lopez*) have been dissolved. This wide-angle view may be similarly trained on the Fourteenth Amendment. The potential of the Fourteenth Amendment lay in raising to constitutional status certain claims of former slaves and others, by that method overcoming nonconstitutional rights relied on by state officers in defense. It was this step, an across-the-board promotion for citizens' rights, that the U.S. Supreme Court declined to take for almost a century.

Congress's 1871 act to enforce the Fourteenth Amendment provided actions at law and equity against persons who, "under color of" law or custom, deprived suitors of rights "secured by the Constitution"; because it affected citizens other than former slaves, it was swiftly restricted by the Court to a slender list of rights that the Constitution alone could be said to protect (*Slaughter-House Cases* 1872). The restriction did not apply to Congress's act of 1875, which provided federal jurisdiction for disputes "arising under" the Constitution; however, that statute was limited to disputes with a value greater that $500 (raised in 1911 to $3,000), protecting only rights measurable in dollars, mainly property rights. For this reason, citizens' rights advanced under the standard of substantive due process. In *Ex Parte Young* (1908), based on the theory that a state officer was "stripped of his official character" when enforcing an unconstitutional act, the Court sanctioned, directly on Fourteenth Amendment grounds, without a plea of common-law injury, a suit by railroad stockholders in federal court to enjoin the Minnesota Attorney General from enforcing state utility rates. *Young* was a crucial holding at a time when the Court's revival of Eleventh Amendment sovereign immunity blocked alternative avenues to federal jurisdiction; it also opened the way for injunctions sought by citizens in the future, including the landmark *Brown v. Board of Education* (1954).[23]

[21] *N.L.R.B. v. Jones & Laughlin Steel* decided that the National Labor Relations Act was a valid exercise of the commerce power.

[22] *U.S. v. Lopez* held that the Gun-Free School Zones Act of 1990 exceeded congressional power under the commerce clause. An analogous rotation is found among officers' changing constitutional authority within the national government—back and forth between Congress, for instance, and the Executive.

[23] On Eleventh Amendment sovereign immunity and *Young* see Orth (1983). *Brown v. Board of Education* overturned racial segregation in schools, upheld under the "separate but equal" doctrine of *Plessy v. Fergusson* (1896).

But there was still no federal remedy after the fact; that is, damages for state officers' injuries to nonproperty interests. In the officers' rights narrative, that key turning point was not (as is often portrayed) *Monroe v. Pape* (1961), which subjected local police officers to damages for illegal search and seizure, but *Hague v. C.I.O* (1939), in which, based on the First Amendment, the mayor and other city officers were enjoined from enforcing a ban on union organizing in Jersey City, New Jersey. Chief Justice Harlan Stone's (plurality) opinion held that because the 1875 act gave protection to property rights against unconstitutional infringement by state officers, the 1871 act gave parallel protection to "personal" rights, including First Amendment free speech; Justice Owen Roberts sought the same destination via the "privilege and immunity" of organizers to disseminate information about the National Labor Relations Act. *Monroe* brought *Hague*'s precepts into the era of the modern civil rights movement. Officers' rights links the "rights revolution" under the Warren Court to the disavowal of masters' common law rights over employees in *Jones & Laughlin Steel* and to Holmes' dissent in *Burleson*.

The durability of the change is again evidenced in the Court's efforts, since the 1970s, to retrench, strengthening officers' defenses with an assortment of state-of-mind immunities, deference to state process, and limits on damages—but not by forthright challenges to the abstract legitimacy of citizens' rights claimed. Although the practical effect has been to reduce the proportion of citizens' suits that can be expected to prevail, such officers' defenses are nonconstitutional, presumably changeable by Congress. I say "presumably" because the present Court has embarked on a program of curbing Congress's rights relative to its own, and under doctrines also thought by many to be settled law.

The separation of powers among the branches of the national government is the topic of a vast literature, much of it devoted to justifications for judicial power. Without aiming to supplant that scholarship, much less to translate its arguments into the language of officers' rights, I instead suggest the sort of analysis prompted by the framework at hand.[24] Indeed, a number of the decisions in which the Court has declared congressional stat-

[24] On first impression, it may seem far-fetched to think about the separation of powers in these terms, until it is recalled that, legally, the branches must test their authority through suits by individual officers, against the same criteria of Article III standing, ripeness, and so on that are applied to all other plaintiffs. See, e.g., *Raines v. Byrd* (1997), denying standing to senators to challenge the Line Item Veto Act because, having claimed only to have suffered a loss of "power," they lacked the concrete injury required; and *United States v. Nixon* (1974), upholding the subpoena of the Watergate tapes by the House of Representatives against the claim of executive privilege. On ripeness, see Justice Lewis Powell's concurring opinion in *Goldwater v. Carter* (1979) in which members of Congress contested the constitutionality of the Executive's termination of a treaty with Taiwan.

utes unconstitutional also involve federalism: *U.S. v. Lopez* (1995), striking down the Gun-Free School Zones Act of 1990, *Printz v. U.S.* (1997), striking down provisions of the Brady Handgun Violence Prevention Act of 1993, and others (several of which I discuss later). Observers have remarked on the peculiarly formal quality of these opinions, which argue at length for the framers' intent and for the structural necessity of state authority with a vigor not observed since the Court's earliest years (e.g., Dinan 1999). Officers' rights suggests a reason behind this formalistic turn.

As in other areas, separation-of-powers jurisprudence over time shows a patterned interplay between public and private officers. Compare the recent decisions mentioned above with the occasions when previous Courts have struck down congressional statutes, in part at least, on federalism grounds: *Dred Scott v. Sanford* (1857); the *Civil Rights Cases* (1883); *Hammer v. Dagenhart* (1918); *Schechter Poultry Co. v. United States* (1935); *Oregon v. Mitchell* (1970); and *National League of Cities v. Usery* (1976).[25] Within their historical contexts, the decisions prior to *Oregon v. Mitchell* clearly support one group of private rights holders over another—slave owners, parents, employers over slaves, children, employees (in our terms private officers over "mere citizens"). To that extent, and based on the reasoning provided in the cases themselves, the Court's preference for state over national authority was incidental to its position on the underlying relations of social authority. None of the opinions argue the case for state jurisdiction independently of the issues of personal relations at stake. Even the opinion in *Hammer v. Dagenhart*, which comes closest to the present Court's approach, defended striking down a national child-labor law with the argument that just as it cannot prevent the existence of women's wage and hour laws in some states and not in others, it also cannot, in an effort to "equalize economic conditions," eliminate child labor in states where it is legal (1918, 273).

Contrast these with *United States v. Morrison* (2000), the only decision of the recent series that upholds the right of one private citizen against another. *Morrison* overturned a judgment against parties that were sued under the Violence Against Women Act of 1994 and were held by the court below to have exhibited antigender bias in performing an act of rape. The Court emphasizes that its objection stems strictly from Congress's overreaching under the commerce clause: If plaintiff's "allegations are

[25] The laws the Court declared unconstitutional were, in order, the Missouri Law of 1820, the sections of the Civil Rights Act of 1875 pertaining to individual, not government, action; a 1916 act prohibiting transportation in interstate commerce of goods produced by child labor; the National Industrial Recovery Act of 1933; voting age provisions of the Voting Act Amendments of 1970 that applied to state and local elections; and 1974 amendments to the Fair Labor Standards Act, extending wage and hour provisions to state and municipal governments.

true, no civilized system of justice could fail to provide her a remedy"(1759). These words need not be taken at face value: As the opinion records, much violent crime contemplated by the Act is committed by husbands, thereby perhaps engaging the Court's well-known regard for traditional families, in this case as a permanent preserve of state jurisdiction (1761). But the detachment of constitutional reasoning from a corresponding view on the social interests involved remains instructive.

It is instructive politically, as a reminder of the Court's longtime alignment with private officers: alignment with slave masters against antislavery interests, both state and national, during the Antebellum era (cf. *Prigg v. Pennsylvania* 1842; *Dred Scott* 1857), and with employers, husbands, and parents against intrusion into their domains, by state or national legislators, prior to the New Deal (*Lochner v. New York* 1905; *Bradwell v. State* 1872; *Meyer v. Nebraska* 1923).[26] By the same token, antislavery proponents found their voice in Congress; likewise, after the Civil War, did the trade union movement. Following the New Deal, and especially after World War II, the picture begins to blur. In the years before the mid-1970s, the Court changed sides, to defend, if less consistently, "mere citizens," employees, women, children, and the descendants of slaves, often in defense of congressional legislation. However, Congress shows no fixed positions; besides promptly legislating Taft-Hartley, it was slow in following up *Brown v. Board of Education* (1954) and never passed the statutory equivalent of *Roe v. Wade* (1973).[27] Put differently, the legislative setting by its nature does not provide permanent high ground to one side against another in a social controversy, as the judicial setting by its nature could and did for officers at common law.

From here, the Court's detachment from social issues becomes instructive institutionally, on the question of continuing judicial power. My overview suggests that, for the better part of U.S. history, equilibrium among constitutional officers in separate branches has been conditioned on a legalized asymmetry in private relations. This asymmetry provided allies for the Court against competing constitutional officers, and in particular against legislators who, under the office-holding scheme, enjoy preeminence. As private structures swayed, e.g., in the intense social confrontations of the 1850s and 1930s, the Justices found themselves on the public defensive, recovering only with political realignment across the board. This history, moreover, supports the idea that volleying between federal and state authority has

[26] *Prigg* overturned Pennsylvania's "liberty law" of 1826; *Lochner* overturned New York's minimum hours statute providing a 60-hour work week for bakery employees; *Bradwell* upheld an Illinois law preventing women from admission to the bar; and *Meyer* overturned a Nebraska statute prohibiting the teaching of languages other than English to school children who had not passed the eighth grade.

[27] *Roe v. Wade* (1973) affirmed a woman's constitutional right to abortion during the first trimester of pregnancy.

been an important judicial maneuver, but also that it has never stood on its own.

The foregoing, finally, situates the present Court's rhetoric. With overt preferences no longer legitimated by common law, the Court draws lines based on the Constitution's formal features. In the case of federalism, however, it is questionable whether it is likely to prove the effective foil it was in the past. In place of divisions corresponding to common law rights, what emerges today is a confrontation of Justices against citizens *en bloc*. *Morrison*, striking down the Violence Against Women Act, is a case in point: Of 27 state attorney generals submitting amicus briefs, 26 argued in opposition to the Court's eventual holding. Another is *City of Boerne v. Flores* (1997), striking down the Religious Freedom Restoration Act of 1993, legislation that was supported by both houses of Congress only three votes short of unanimously. A third is *Alden v. Maine* (1999), turning away a suit by public employees against their employer, the state of Maine, for overtime wages due under the Fair Labor Standards Act, based on an Eleventh Amendment bar against Congress's subjecting state officers to private damage suits without their consent in their own courts.[28]

Recent decisions do not mean an absolute shortage of citizen-allies for the majority on the Court: *Seminole Tribe v. Florida* (1996) and another pro-state Eleventh Amendment holding, *Idaho v. Coeur d'Alene* (1997), travel the time-honored trail between Native Americans and their neighbors;[29] even *Morrison* arguably divides the public over family values; in *City of Boerne v. Flores*, Justice John Paul Stevens argues that the Religious Freedom Restoration Act favored religious citizens over the nonreligious. But as the decisions themselves suggest, this is a grab bag. For their part, legislators show little sign of abjuring their tendency—and now virtually unlimited subject-matter jurisdiction—to proliferate citizens' rights; it is difficult to imagine Justices forming alliances remotely as stable as under black-letter law.

5. Constitutional Systems

The preceding observations suggest a Constitution that is, historically speaking, not only a platform for the realization of citizens' rights but also a stage in a systematic removal of ancient institutions, one that will eventually encompass the Constitution's own officers. Other testimony has been put on the record

[28] Congress's provision of suits in federal courts against state officers without their consent was barred in *Seminole Tribe v. Florida* (1996).

[29] See note 28. *Idaho v. Coeur d'Alene Tribe* barred, on grounds of Eleventh Amendment sovereign immunity, all claims against state officers and agencies to quiet claims on submerged tribal lands. But see also *Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 751 (1998).

to this effect: The transition to the rights of legislators relative to the rights of judges in private relations, noted in passing, can be seen as a move toward government authority more broadly responsive to citizens' rights and to a redistribution of officers' rights more receptive to their divestment. But because the transition occurred under the auspices of Supreme Court majorities exercising their right "to say what the law is" from their most ancient of offices, it invites the counterargument that officers' rights continue to hold sway as strongly as before.

One way out of this circle is by way of evidence farther removed from everyday constitutional practice. This evidence may be found in the seventeen amendments added to the Constitution after the Bill of Rights was adopted in 1791. These provisions are certainly not untouched by constitutional officers, especially members of Congress, who in every instance initiated the amendment process; but the participation of Supreme Court justices was ancillary to the main event, limited to prior adverse decisions and subsequent interpretation of results. The amendments themselves are a motley assortment—some monumental, some managerial—scattered across two centuries of political and institutional change. It is therefore all the more impressive that when grouped according to their primary purpose at passage they present an unambiguous pattern.

Nine amendments purposely enlarge citizens' rights—the Thirteenth (abolition of slavery), Fourteenth (equal protection of the laws), Fifteenth (no discrimination in voting on the basis of race), Seventeenth (popular election of senators), Nineteenth (no discrimination in voting on the basis of sex), Twenty-First (repeal of prohibition), Twenty-Third (presidential vote for residents of the District of Columbia), Twenty-Fourth (bar against poll tax), and Twenty-Sixth (voting age lowered to 18). Except as members of Congress are authorized to implement the foregoing, only one amendment augmented officers' rights, the Sixteenth (authorizing Congress to lay and collect an income tax). Two amendments purposely restricted officers' rights, the Twenty-Second (limiting presidential terms) and the Twenty-Seventh (restricting the effective date of congressional pay raises). Only one amendment purposely restricted citizens' rights, the Eighteenth (prohibition of manufacture, transport, and sale of intoxicating liquors); it was soon repealed by the Twenty-First.[30]

On the one hand, the pattern is no surprise, confirming the commonly held view that the American political tradition is pronouncedly liberal, without a pro-state ideology of either right or left strain that commands a following in the electorate. In this

[30] Four amendments were neutral in their relative impact on citizens and officers: the Eleventh (limiting federal suits against states), the Twelfth (designation of votes for president and vice-president), the Twentieth (ending "lame duck" sessions of Congress), and the Twenty-Fifth (presidential disability and succession).

regard, it is telling that the deviant Eighteenth Amendment, instituting prohibition, was motivated by religious and not political or economic opinion. Furthermore, constitutional amendments may be inherently populist vehicles. Still, the pattern deepens the case for a systematic shift from officers' to citizens' rights that lies outside officers' and particularly judges' control. Another thread: Among the original ten amendments (and excluding the Third as obsolete), the Second Amendment, the right of the people to keep and bear arms, was the least hemmed at passage by common law qualifications; indeed, it marked a rare expansion on the rights enjoyed by British subjects. It is notable, therefore, that the Second Amendment is also the one least modified by judicial interpretation.[31]

At the start, I indicated that the focus of this article would be on the substance of American constitutional development as a coherent process, with little attention paid to causation. Having presented an analysis showing a clear pattern in a single direction, however, the argument may seem inadequate without at least a few words about the nature of the momentum at work. The reigning explanations are persuasive as far as they go: the framers' blueprint of checks and balances against officers' self-aggrandizement, situated in a diverse electorate and a relatively egalitarian political culture. Because this combination arguably says more about democratic stability than about change, however, the officers' rights perspective ventures the following: The structure of the original Constitution, when imposed on common law rights of the time, was so lopsided in its preference for officers, both in public and private relations, that impetus to change of a magnitude sufficient to modify fundamental law was more likely to occur among non-officers and their sympathizers than elsewhere in the system.

Within these parameters, it is possible to more fully characterize the shift observed. Others will be better qualified than I to assess the value of the officers' rights framework in different national settings.[32] However, a frequently-drawn comparison between the U.S. and continental European constitutions invites another clarifying step back from the scene, one that also spotlights the foundational place of officeholding across political societies. For this purpose, then, note that the amendments expanding citizens' rights do so in a particular style, that is, by restraining the rights of officers rather than granting new rights to citizens directly. The Nineteenth and Twenty-Fourth Amendments, for instance, do not enfranchise women or citizens over

[31] A leading student of the topic has declared Second Amendment doctrine "missing in action," a case of "arrested jurisprudence" (Van Alstyne 1994:1240).

[32] The relationship with traditional approaches is readily established. A classic work on constitutionalism, by A.V. Dicey (1959), finds the deepest contrast between the English and French constitutions in their respective institutions of officeholder liability.

18 years of age; instead, they require that on those occasions when officers undertake to provide suffrage to citizens they cannot by any act exclude persons because of membership in these groups. This "negative" approach characterizes constitutional development generally. Under the "clean-up" doctrine, as we have seen, American judges with jurisdiction to hear a case at equity enjoyed discretion to hear common law issues that arose during the trial, whereas after the doctrine's demise they must, upon the request of either party, provide a separate jury trial for issues at common law.

This characterization is not an absolute, but it is prevalent enough for scholars to regularly contrast it with continental European (and other) constitutions that provide "affirmative" or "positive" guarantees. The French Constitution of 1791 promised to "furnish work to the able-bodied poor who cannot obtain it for themselves." The Norwegian Constitution of 1814 made it "incumbent on the authorities of the State to create conditions which make it possible for every person who is able to work to earn his living by his work." The Basic Law of the Federal Republic of Germany of 1949 provides Germans "the right to freely choose their trade, occupation, or profession, their place of work and their place of training" (Currie 1986; Glendon 1992; see also Barber 1997). The closest American equivalent to these provisions is the proscription against state interference with citizens' pursuit of a lawful calling, a right incorporated into national law by the judiciary under the Fourteenth Amendment during Reconstruction (*Munn v. Illinois* 1877). A more recent approximation, found in the Wagner Act, guaranteeing employees "unions and union leaders of their own choosing" and, in some readings, constitutionalized under the First Amendment, is written as a set of prohibitions against employers (Forbath 1999).

The distinction between the two constitutional systems shows its bite where third parties are concerned. It may make little practical difference to an American citizen that state officers violating her freedom of speech are forbidden to do so under the Fourteenth Amendment but are not affirmatively obliged, as under the German Constitution, to protect her "right freely to express and disseminate" her opinion. That said, in the United States, one citizen has no recourse against another citizen who inhibits her free expression through, say, words experienced as intimidating, whereas the German formulation extends state protection to this situation as well. In the United States, even affirmative-sounding rights such as the "right to privacy" are restraints on lawmakers and enforcement officers but not, absent ordinances or other law to the contrary, on newsmen or neighbors. Likewise, shortly after the U.S. Court held in *Roe* that state officers were prohibited under the "right to privacy" from criminalizing all abortions, German judges held in a parallel suit that the Basic

Law's "right to life" required them to declare all abortions criminal (BVerfGE 1975).

The negative-affirmative contrast is accessible without recourse to officers' rights. But that is less true for the explanation of the difference, regularly attributed to "deeply rooted cultural attitudes" (Casper 1989, 318–19). Affirmative rights, e.g., are said to accompany a long European tradition of communal solidarity (Eberle 1997), and negative rights are said to result from the "philosophical individualism of the older common law" (quoted in Currie 1986, n.13). No doubt these associations have historical validity; but unless the proposition is abandoned that constitutional form and political culture reinforce each other, such explanations beg the question of why these configurations should diverge so neatly in the first place. Here, the structure of ancient office-holding assumes importance, presenting the advantage, in the English case, of having been imposed by conquest, and on the European continent, of being an adjustment to continual warfare. Although both are literally embodiments of law, both office-holding structures have moorings independent of the solidarity and individuality they alternately fostered.

As already suggested, English government was from an early date a highly coordinated affair (Holdsworth 1908). All authority flowed uninterrupted from the Crown to the diverse stations of society, operated by public officers and their private counterparts, answerable in royal or local courts for trespasses they committed beyond their designated jurisdictions. This arrangement, continually fine-tuned by judges and elaborated as common law, was inclusive, plenary, "zero-sum": When, in a famous episode, Elizabeth I attempted to install a favorite to a seat on the Court of Common Pleas, judges already sitting sued to enjoin her for illegally narrowing their authority. (They won.)[33] Rights, including property rights, were, in essence, those claims the King authorized persons in particular fact situations to assert in court against another person for overstepping. Given that the field of action was fully occupied, any new writs declared must be carved out from another's former liberty, or, what amounted to the same thing, their former immunity against such an action.

The organization historically of English courts underscores the inapposite place of affirmative guarantees on the Continental model. All judges until the 18th century were appointed and dismissed by the King; from the 12th century, this included judges in ecclesiastical courts. Organized geographically, with appeals and royal causes located at Westminster, divided primarily by the remedies they were authorized by the King to administer, the rivalry and competition for business among the divisions—com-

[33] *Cavendish's case* (1586). For an astonishing demonstration of the common law's inclusiveness, see Bush (1993).

mon law, equity, Admiralty, franchise courts, and so on—prevented establishment of an autonomous order of jurists of the sort that enjoyed prestige across Europe. Moreover, the fact that writs covered diverse factual settings and that plaintiffs with some effort must mold their pleas to fit proceedings available for purchase further deflated the notion that the rights about to be tested in court had objective existence outside the judges' authority.

By contrast, European kings surveyed realms fragmented into principalities, duchies, estates, bishoprics, and all manner of corporate associations, to whom they granted or sold off land and privileges in exchange for aid and supplies in the constant struggle against invasion (Dawson 1968; Bellomo 1995). Law mirrored this fragmentation. Well into the revolutionary era of the 18th century, for instance, landlords enjoyed feudal, including military, privileges over tenants; likewise guilds over their members. Not ordered by prescribed remedies within an interlocking formation, as in England, European localities maintained earlier law codes and customary methods of settling disputes, providing venues corresponding to the daily concerns of society. Separate courts heard suits about land, servants, animals, markets, and fairs. Even though rights as a practical matter adhered mainly to officeholders in the form of immunities even more generous than in England, the legal landscape as a whole continued to convey the diversity of a medieval community and the autonomous standing of its parts.

In spite of, or perhaps because of, this fragmentation, European jurists, "civilians" (more likely academics and court advisors rather than hands-on judges) maintained association across territories based on their common adherence to a theoretical model of Roman and canon law. This interchange, as well as the model's existence, promoted the idea that law was, so to speak, out there, above particular places and modes. Roman law itself, moreover, exhibited an "affirmative" spirit. First, it postulated "things," "persons," and "actions" as objective and distinct vehicles of rights. Second, although in major part judge-made law historically, Roman law was received in the 12th century in the form of a "code" or collection of legal materials compiled during the reign of Emperor Justinian at the close of the ancient world. The first stage in testing an English or American right consisted in a judge's determining whether his court had a remedy that would solve the plaintiff's problem. Continental judges started with formularies, preset models derived from the code of factual situations justifying remedy, against which rights claims would be matched at trial. As Alan Watson (1990) has noticed, in contrast to English justice where actionability takes precedence over right, the Roman heritage reverses these priorities.

The generation of the American framers was familiar with this Roman tradition and the natural rights tradition it spawned (Hoeflich 1997). If their stance of colonial rebellion were not sufficient to win them over to the latter, the era of benign neglect by the British before the 18th century loosened their forebearers from the common law's mood of negativism. The Declaration of Independence reflects the amalgam which, at the level of political ideas, lives on today. But once the Constitution and national consolidation overtook the republican project, the United States, organizationally, operationally—which in the Anglo-American system goes far to say, legally—was destined to conform to its closer relative.

These remarks have identified an important channel of subsequent events. They put a new spin on Louis Hartz's argument of a half-century ago, that the United States adopted the Constitution it did because it drank in its Locke without having first tasted feudalism (1955). If the previous reading holds, Hartz is vindicated, but only by the irony that the English system from which the American nation separated was more, not less, totalistic than the more feudal European alternative. This still leaves the shift from officers' rights to citizens' rights a long distance from causes. For causes, it will be necessary to attach political leaders, parties, social movements—to which end this venture was embarked upon in the first place.

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