GROVE CITY COLLEGE

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The editors strongly prefer articles under 15,000 words in length, the equivalent of 50 *Journal* pages, including text and footnotes. The *Journal* will not publish articles exceeding 20,000 words, the equivalent of 60 *Journal* pages, except in extraordinary circumstances.

To facilitate our anonymous review process, please confine your name, affiliation, biographical information, and acknowledgements to a separate cover page. Please include the manuscript's title on the first text page.

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GROVE CITY COLLEGE

JOURNAL OF LAW & PUBLIC POLICY

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GROVE CITY COLLEGE

Grove City College was founded in 1876 in Grove City, Pennsylvania. The College is dedicated to providing high quality liberal arts and professional education in a Christian environment at an affordable cost. Nationally accredited and globally acclaimed, Grove City College educates students through the advancement of free enterprise, civil and religious liberty, representative government, arts and letters, and science and technology. True to its founding, the College strives to develop young leaders in areas of intellect, morality, spirituality, and society through intellectual inquiry, extensive study of the humanities, and the ethical absolutes of the Ten Commandments, and Christ's moral teachings. The College advocates independence in higher education and actively demonstrates that conviction by exemplifying the American ideals of individual liberty and responsibility.

Since its inception, Grove City College has consistently been ranked among the best colleges and universities in the nation. Recent accolades include: The Princeton Review's "America's Best Value Colleges," Young America's Foundation "Top Conservative College," and U.S. News & World Report's "America's Best Colleges."

GROVE CITY COLLEGE JOURNAL OF LAW & PUBLIC POLICY

The *Grove City College Journal of Law & Public Policy* was organized in the fall of 2009 and is devoted to the academic discussion of law and public policy and the pursuit of scholarly research. Organized by co-founders James Van Eerden ’12, Kevin Hoffman ’11, and Steven Irwin ’12, the *Journal* was originally sponsored by the Grove City College Law Society. The unique, close-knit nature of the College’s community allows the *Journal* to feature the work of undergraduates, faculty, and alumni, together in one publication.

Nearly entirely student-managed, the *Journal* serves as an educational tool for undergraduate students to gain invaluable experience that will be helpful in graduate school and their future careers. The participation of alumni and faculty editors and the inclusion of alumni and faculty submissions add credence to the publication and allow for natural mentoring to take place. The *Journal* continues to impact educational communities around the country and can now be found in the law libraries of Akron University, Regent University, Duquesne University, the University of Pittsburgh, and Pennsylvania State University. The *Journal* has been featured by the Heritage Foundation and continues to be supported by a myriad of law schools, law firms, and think tanks around the nation.

EDITOR'S PREFACE

Dear Reader,

It has been my distinct pleasure to work with this team of editors to produce this edition of the Journal. This year's staff is both dedicated and hardworking, and without them the production of this Journal would not have been possible. We have implemented new processes regarding article selection, committee leadership, and production to ensure that future volumes of the Journal are able to be produced more efficiently. I am so excited about the future of the Journal, as well as everything we were able to accomplish this year.

Throughout my time on the Journal, I have learned something about this publication's importance. The Journal is not important because interesting articles are published (though they are), or because it enhances the academic pedigree of the College (though it does). The Journal is an important part of campus because it serves as an academic outlet for students to showcase their intellectual abilities and pursue their interests, an outlet where people can learn more about other's ideas and opinions, and an outlet where authors are shown the importance of publishing their ideas for others to read and consider.

Intellect and the pursuit of academic endeavors are gifts given by God—pursuing such endeavors on campus through outlets like the Journal allows us to utilize the gifts he has given us to his further glory. I know that this edition of the Journal is one that showcases the intellectual curiosity of students on campus, and highlights what it means to pursue the highest form of scholarship. It is my hope that future volumes and future editors pursue excellence while giving all the glory back to God.

Eliz L. Slabaugh '23

Editor-in-Chief

FOREWORD

Dear Reader,

First and foremost, thank you for reading the Grove City Journal of Law and Public Policy. In an age where policy debates and legal proceedings have often become hyper-charged with polarizing rhetoric and partisan mischaracterizations, it is truly an honor to produce this Journal for readers like you, committed not only to rejecting those excesses but conversely supporting thoughtful examination of the issues that shape our country and world. It has been a privilege to work with my editorial colleagues to bring you a second edition of the Journal this year. This second edition contains six papers on a variety of topics relating to law and public policy.

The first, written by Jacob Sheldon Feiser ‘24, offers an argument regarding the roots of originalism and its reliance upon natural law. Feiser analyzes legal subject material from Court jurisprudence to the Declaration of Independence to build his case that neither natural law reasoning nor the Declaration should affect the originalist’s legal philosophy.

The second, written by Samuel Peterson ‘25 and Zachary Wood ‘25, is an analysis of America’s “war on drugs.” Peterson and Wood examine both opioid distribution laws and drug law enforcement data to explain how opioid potency has risen in past decades and offer relevant policy solutions.

The third, from Sebastian Anastasi ‘22, critiques monetary theory against the backdrop of the Great Depression. Anastasi considers issues from monetarist capital theory to the effects of 1920s-era credit expansion to argue that the monetary theory put forward by economists Milton Friedman and Anna J. Schwartz led to their misunderstandings of the Depression.

The fourth, authored by Molly E. Galbreath ‘25 and Elsa Miller ‘25, traces the history of governmental involvement in American civil service. Examining civil service at federal, state, and local levels, as well as relevant policies such as the 1883 Pendleton Act, McCommons and Miller show how a decline in control by political parties led to greater citizen involvement and the dawn of the Progressive Era.

The fifth, written by Alexander Sodini ‘24, presents an argument against antitrust laws. Sodini applies economic theory and an analysis of empirical evidence to antitrust-based government intervention in markets, concluding that such laws do more harm than help to American enterprise.

The sixth, written by Sam Branthoover ‘22, analyzes the legal structure of the Bedouins, nomadic tribes inhabiting the Arabian peninsula. Sam Branthoover examines the unconventional manner in which Bedouins handle crimes and ensure justice, as well as showing how their practices of oath-taking and arbitration hold their rarely-studied communities together.

As with past publications, this edition can be found online both on our website and on HeinOnline.

A debt of thanks is due to both Dr. Caleb Verbois and President Paul J. McNulty ‘80 for their advising roles in both of this year’s editions. I would also like to offer the degree of gratitude to my editorial colleagues for their tireless work in selecting and editing articles for this second edition, as well as the Journal’s generous donors who have provided the funding necessary to bring both of this year’s editions to print—without you, this publication would truly be fruitless. Lastly, I must offer the highest degree of thanks to you, the reader—without your invaluable support and readership, this endeavor would indeed be pointless.

Isaac Willour
Senior Editor - Grove City Journal of Law and Public Policy

ORIGINALISM & INTERPRETIVE SIN: NATURAL LAW, SUBSTANTIVE DUE PROCESS, & THE DECLARATION

Jacob S. Feiser

Abstract

The jurisprudence of originalism has been well-represented on the Supreme Court and in the legal academy for decades, such that it has become a now mainstream judicial philosophy. The legal and metaphysical dogmatics of originalism, however, continue to be debated on and off the Court. Ever since the borking of Judge Bork and the confirmation of Justice Thomas, the role of natural law in constitutional interpretation and construction has been a contested matter for originalists. Part I of this Article argues that material applications of natural law by the originalist are hermeneutically analogue to applications of substantive due process. Part II presents a surveyed use of case law to facilitate this discussion, examining originalism and Court jurisprudence from the first decade of the Supreme Court to the modern era. Both dissents and majority opinions are utilized in this survey. Part III considers the role of the Declaration of Independence in constitutional

interpretation. The tension between two subsets of originalist jurisprudence is introduced, and the justifications for both dispositions are established and defended in terms of legal and historical canons. Attention is given to the East Coast, West Coast Straussian differences, exemplified by the Jaffa-Mansfield debates. The Preamble to the Constitution is considered as a further justification for incorporating the Declaration and natural law into constitutional construction. Ultimately, this Article contends that natural law reasoning for the originalist is internally inconsistent, and that the Declaration of Independence – used to justify this reasoning – should play no role in an originalist jurisprudence of the Constitution.

*Jacob S. Feiser is a junior studying Political Science with minors in Biblical & Religious Studies, Economics, and History. He serves in multiple campus organizations, including the Grove City Journal of Law and Public Policy as Executive Content Editor. Jacob enjoys listening to Mongolian throat singing and discussing theological dogmatics over a good cup of tea

Part I

The law, and therefore its interpretation, is charged with moral energies which tell a population or jurisdiction not only what "is" but also what "ought" to be in the laws of society; law is not just for the worst of us, against what Justice Oliver Wendell Holmes's Bad-Man theory maintains. Merely describing the law provides no justification to obey it, and without that normative scaffolding, positivist legal interpretation remains comprehensively inert as to why any legal official should subscribe to a certain jurisprudence.[1] The foundations of the American system, although supplementary positive in fixity, are not positivistic; rather, the legal-philosophical foundations of not just the Constitution, but the Founding as an institutional whole is rooted in the natural law tradition. The customary positivism of so-called "living constitutionalism," not even interpretive vogue until the 20th Century, overthrew originalism as the *de facto* jurisprudence.[2] But until originalism lost sole interpretive clout – though not always faithfully applied – judges were "expected to consult [natural law] in

1 As a legal philosophy, originalism has been accused by critics of adopting this positivist approach, and although the "positive turn" in originalist thought provides an interesting theoretical exploration, the contentious connection to natural law is worth examination.

2 Jeffery Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 115 Geo. L. J. 97, 135-158 (2016).

the cases," even constitutional cases, "before them."[3] The "New Natural Law" movement hails the return of natural law considerations to originalist thought, best exemplified through jurists in the mold of Justice Thomas, as a means to properly interpret the broad principles of the Constitution and Founding to defend natural rights. Although natural law remains historically essential to understanding the Founding, the use of natural law as a constitutional hermeneutic remains inapposite for originalist interpretation and is effectually equivalent to substantive due process.

Natural law, properly understood within the legal-interpretive context, is not the laws of nature ("the natural law" or "natural laws") which function fully regardless of the freedom of human agents; neither is natural law a veiled Judeo-Christian morality, which definitionally requires substantive faith and belief in the divine.[4] Although there is often significant overlap between conclusions of Judeo-Christian morality and natural law, natural law depends on reason, not revelation; the use of natural law by judges is therefore not the state's oppressive use of religion, but instead remains the rationalistic inquiry towards unchanging and ubiquitous human action and nature. Therefore, the claims of natural law are a stark repudiation of the historicism inherent in the "living Constitution" approach. The substantive effects of natural law in the American

3 Brian T. Fitzpatrick, *Originalism and Natural Law*, 79 Fordham L. Rev. 1541, 1541-1544 (2011).

4 Santiago Legarre, *The New Natural Law Reading of the Constitution*, 78 La. L. Rev. 879, 879-883 (2018).

judicature are foundationally relevant for this discussion, as the uneven use of natural law in jurisprudence has a two-fold historical role of varying strength of application for judicial interpretation. Natural law was regularly employed – regardless of the strength of function – as an interpretive mechanism, serving as both a formal and material corollary to originalist jurisprudence: formal in that the Constitution assumed a structured order informed by natural law, viz., natural law-laden ideas such as "equal," "freedom," "right," or the text of the Ninth Amendment; material in that American case law held that:

> "[T]he general principles of law and reason [constrain governments]…. To maintain that our federal or state legislature possesses such powers [to violate contracts or private property] if it had not been expressly restrained would… be a political heresy altogether inadmissible in our free republican governments."[5]

The early Supreme Court held certain natural rights, e.g., private property, as rights that existed outside the rules of sovereign governments.[6] These *dicta* demanded that governments are not only beholden to their own constitutions, but also any power or limit essentially determined through natural law. Indeed, the Constitution was not written out of a Thermidorian Reaction, but instead developed and subsists in the Common Law system, which recognized

5 *Calder v. Bull*, 3 U.S. 386, 388 (1798) (per Chase, J.).
6 Fitzpatrick, *supra* note 3, at 1541.

natural law as a genetic contributor. "[T]he written constitution…was the instrument of positive law required for the realization of first principles [of natural law] on which healthy republican society depended."[7] Thus, to offer a necessary distinction, natural law is the method of analysis and interpretive hermeneutic which begets an understanding of natural rights. The Constitution as a positive product of natural law thinkers, however, does not merely typify "abstract principles of natural law or natural right" or "a scheme of abstract moral principles,"[8] but rather enumerates the specific provisions, roles, and powers of the federal government, even as these each may be informed by natural law – the Constitution plainly is the enumerated text, and enumeration is limitation.

As the metaphysical foundation for the Declaration and other expressions of Foundational thought, natural law reasoning does not prescribe strict behaviors of conduct, but rationally promotes general principles of action – there is no one natural law precept, per St. Thomas Aquinas.[9] For many social and judicial conservatives, natural law thus safeguards an ordered and legally legitimate approach to preserving good and avoiding evil; natural law then provides not only a rational basis for moral legislation – al-

7 Herman Belz, *Americanization Of Natural Law: A Historical Perspective*, 12 The Good Society 7, 8-13 (2003).

8 James E. Fleming, *Fidelity to Natural Law and Natural Rights in Constitutional Interpretation*, 69 Fordham L. Rev. 2285, 2292-2293 (2001).

9 Mattei Ion Radu, *Incompatible Theories: Natural Law and Substantive Due Process*, 54 Villanova L. Rev. 247, 269 (2009).

though legislation is inherently moral in some respect – but specifically allows for the institutional defense of social structures, like the family or property. Yet, natural law as a method of analysis does not leave a trail of breadcrumbs in which adherents can follow to reach the same or similar conclusions. As evidenced by sodomy laws, although classical natural law theorists generally agree that "[natural law] has condemned such homosexual activity as immoral,"[10] the legal prescription following the natural law reasoning is hardly uniform. Justice Thomas, in his dissent in *Lawrence v. Texas* (2003), conceded the anti-sodomy law of Texas was a misuse of state powers;[11] furthermore, other natural law theorists have argued that not only are anti-sodomy laws an illegitimate exercise of natural law, structures and institutions like "marriage [are] such a good thing that [they] ought to be made available to all, heterosexuals and homosexuals alike."[12] To those that claim fidelity to natural law reasoning, there is then little unanimity as to what actually is a proper exercise of natural law or expression of natural rights. Therefore, when one claims to follow natural law, there is no guarantee that their conclusions on an issue will be shared by other natural law adherents.[13] Nonetheless, these disagreements are largely products within the

10 *Id*. at 276.

11 *Id*. at 277.

12 Fleming, *supra* note 8, at 2289.

13 The orthodox methodological process and application of natural law, though of corollary import, is not considered. Rather, any employment of natural law and natural rights is assumed to be genuine.

"New Natural Law" movement and the modern discussion of natural law and rights; until the deposition of originalism from the jurisprudential throne in the early 20th century, there was vague agreement on what was natural law and what was not, although the specifics and applications were still not entirely uniform.

Originalism no longer holds an interpretive monopoly upon natural law – the formal and material application of natural law does not demand one be a constitutional originalist – though most iterations of competing judicial philosophies officially reject natural law as a component of interpretation.[14] Instead of employing natural law in jurisprudence, non-originalist philosophies often utilize substantive due process. The nomenclature of the tool aside, substantive due process is the idea that some rights are so substantive that due process cannot be affected to limit those rights or take them away – what those rights are, however, is an open-ended discussion that depends almost entirely on the jurist. In effect, substantive due process is an oxymoron, as due process is actually the process required to limit or take away rights.[15] In parallel, a firm belief in natural rights – those rights afforded by nature and nature's God – demand that these rights take priority over any asser-

14 To be a constitutional originalist does not demand that one reject natural law in the context of legal philosophy, nor does one need to be an originalist to apply a natural law hermeneutic to constitutional interpretation (cf. Fleming, supra note 8).

15 Radu, *supra* note 9, at 249.

tion of positive law, regardless of due process.[16] Although substantive due process is a favored tool of "living constitutionalism," the device is far older than Justices Brennan or Douglas; the earliest example of substantive due process in American jurisprudence is the long-reviled and truly evil *Dred Scott v. Sandford* (1856). In the majority opinion, the Court determined that as a slave, Scott was ineligible to sue; the Court additionally held that the right to private property, viz., slavery, was so substantive and essential that the federal government could not ban the practice, let alone regulate it:

> Nothing can be more conclusive to show the equality of [slave-holding] with every other right in all the citizens of the United States, and the iniquity and absurdity of the pretension to exclude or to disfranchise a portion of them because they are the owners of slaves, than the fact that the same instrument which imparts to Congress its very existence and its every function guaranties to the slaveholder the title to his property, and gives him the right to its reclamation throughout the entire extent of the nation, and farther that the only private property which the Constitution has *specifically recognised* [sic], and has imposed it as a direct obligation both on the States and the Federal Government to protect and enforce, is the property of the master in his slave; no other right of property is placed by the Constitution upon the same high ground, nor shielded by a

16 Thomas B. McAffee, *Substance Above All: The Utopian Vision of Modern Natural Law Constitutionalists*, 4 S. Cal. Interdisc. L.J. 501, 506 (1995).

similar guaranty.[17]

Substantive due process is thus the scion of slavery – although the ruling of *Dred Scott* was overturned by the reconstruction amendments, the framework of law clearly persisted, as is evident from modern legal reasoning. Only the right of substance has changed, e.g., *Obergefell v. Hodges* (2015). There exist effectively two critiques to the majority's employed reasoning in *Dred Scott*, however. *Prima facie*, one can argue that this case was an example of substantive due process "done wrong." Certainly, no juridic interpretation is going to be employed correctly all the time by fallible and errant jurists, and bad rulings tend to present themselves for later critique. Assuming a "living constitutionalism," aspirational senses of evolving standards of decency demand that slavery is itself wrong, and so argue that substantive due process – "properly employed" – would have recognized the substantive right of a slave to not be owned. In effect, the modern adherents of substantive due process view slavery as a violation of substantive right, not the regulation of slavery as argued by Chief Justice Taney. Yet this critique presents a substantive issue: the Taney Court effectively developed substantive due process in the *Dred Scott* decision; it is a great irony if, in the first instance of a principle's implementation, the architect of that principle gets it wrong, and such a reading is rather inap-

17 *Dred Scott v. Sandford*, 60 U.S. 393, 490 (1856) (per Taney, CJ.).

posite and implausible. Rather, substantive due process is idea-clay, shaped in effect to suit the potter, i.e., the jurist.

The second critique is – in the originalist's estimation – the correct one: substantive due process is just bad doctrine, a tool that is foundationally wrong and opposed to the Constitution. After all, specific to *Dred Scott*, the originalist would recognize that Congress always had the power to regulate slavery in the territories, e.g., the Northwest Ordinance. Substantive due process is effectually wrong because it seeks to materialize rights out of thin air, be it an absolute right to property *qua* slavery or rights of person; for the originalist, *Dred Scott* was not only wrong in decision, but also in decisional theory. Commenting on both *Dred Scott* and *Korematsu v. U. S.* (1944), Justice Gorsuch writes, "In both cases, judges sought to pursue policy ends they thought vital. Theirs was a living and evolving Constitution."[18] Substantive due process can, as a principle, be used to protect good or necessary rights, e.g., life and liberty and property. The principle, however, remains procedurally antifoundational, as no right – especially any right surrounding property – has ever been so fundamental as to warrant the near–absolute protection that substantive due process provides. Furthermore, the principle allows for the creation *ex nihilo* of rights by pure judicial fiat. The rights that are historically rooted in the nation are those that are constitutionally well-expressed or so enumerated by the legislature, not invented by nine black robes through

18 Neil Gorsuch, A Republic, If You Can Keep It 116 (2019).

perceived "penumbras," "emanations," or "concept[s] of ordered liberty." Substantive due process is an exercise of power that goes beyond what has been constitutionally committed to the Court, and the real effects of substantive due process are a striking mirror to natural rights and natural law reasoning.

To be clear, natural law reasoning and substantive due process are not synonymous, hermeneutical Gemini under different nomenclature. The political outcomes among cases utilizing the two are often disparate. Rather, recognizing the accidental properties of each – the history, the foundational reasoning, etc. – as different, the substantive effects of these two are essentially the same: both substantive due process and natural law as constitutional hermeneutics promote a procedurally and constitutionally inviable interpretation. Therefore, when a jurist engages in natural law interpretation, he effectively engages in substantive due process, and the originalist critique against the one applies to the other. A survey of case law reveals the striking parallel (or even interchangeability) between the two, and effectually demonstrates that when an originalist engages in natural law reasoning for constitutional interpretation, he exposes himself to the error of substantive due process.

Part II

Calder v. Bull (1798) presents the earliest internal debate in American constitutional history as to whether the originalist should employ natural law or preserve a structuralist and textualist position. Writing for the majority, Justice Chase maintained that natural law could void any constitutional action by a government, for,

> [a]n act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact and on republican principles must be determined by the nature of the power on which it is founded.[19]

The majority rightly understood according to natural law, that no positive law which violates natural law or natural rights can be considered a law; this reasoning perfectly comports with the Common Law, as Blackstone had previously articulated that all laws derive validity and force from their comportion with natural law. This reasoning, however, neglects that the authority of the federal government comes from the Constitution and the people. Natural law recognizes the import inherent in positive law, and although natural law is theoretically higher than positive law, any positive law properly established then constrains natural law through that positive law. Once positive

19 *Calder v. Bull*, *supra* note 5, at 388.

law which comports with natural law is established, the external validity of that law constrains any future operation of natural law in that system by nature of procedure. If one recognizes the natural law basis for government, as Justice Chase did in *Calder*, then the procedural justness of the Constitution bestows the necessary powers and primary authority to the federal government.

Therefore, if one functions within a constitutionally provided office or authority, natural law and procedural justice constrain one to only the valid positive law, i.e., the Constitution and procedurally appropriate laws; regardless if those derivative laws materially comport with natural law, their procedural validation and implementation formally comport with natural law, and therefore the material component is rendered moot by the immediate primacy of positive law. "Robert Bork state[d] his opinion on the matter succinctly: 'I am far from denying that there is a natural law, but I do deny both that we have given judges the authority to enforce it and that judges have any greater access to that law than do the rest of us.'"[20] Furthermore, the textual fixity of the Constitution constrains any material employment of natural law, lest "speculative jurists"[21] apply natural law to defy the procedurally just conclusions of positive law which itself already comports with and authoritatively limits natural law. As Justice Iredell wrote,

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20 Radu, *supra* note 9, at 280.

21 *Calder v. Bull*, *supra* note 5, at 398 (per Iredell, J., concurring in judgement).

> If, on the other hand, the legislature of the Union or the legislature of any member of the Union shall pass a law within the general scope of its constitutional power, the court cannot pronounce it to be void merely because it is in its judgment contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard; the ablest and the purest men have diverged upon the subject, and all that the court could properly say in such an event would be that the legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.[22]

This idea of natural law interpretation in the judicature effectively implies a form of judicial supremacy, demanding that the legislature and executive accede to whatever determination the courts make with respect to natural law and natural rights. If the legislature attempts a foray into the natural law discussion, it becomes the judiciary's business to either affirm or deny the legislative lunge – thus, they adopt another duty to not only interpret the Constitution, but also natural law. Natural law incorporated into constitutional interpretation does not require the tacit approval of anyone but the majority of justices, who, despite their learnedness, rarely can agree even on legal history, let alone moral philosophy. Nonetheless, it was Justice Chase's majority opinion that established early on the direction that most originalists would at least attempt to take with respect to constitutional interpretation.

22 *Id*. at 399.

Chief Justice Taney's majority opinion in *Dred Scott* would be no more wrong had the natural right of private property been his basis than relying instead upon substantive due process, although the former hypothetical would provide an excellent illustration for the misapprehension of natural law by the Court. Taney avoided the language of natural law entirely, and therefore *Dred Scott* cannot be pointed to as an example of natural law misapprehended, only shoddy jurisprudence and historicity by the majority of that opinion. A tangible case does exist, however, where the Court relied on natural law reasoning to accomplish their decision.

During the height of the Gilded Age, the Court handed down *Lochner v. New York* (1905), ruling that the fundamental right to contract found in the Due Process Clause of the Fourteenth Amendment was violated by a New York statute: "Under such circumstances, the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with without violating the Federal Constitution."[23] This acrimonious ruling has long been hailed as an exemplar of substantive due process, yet later Court references to *Lochner* make this claim only partially accurate. Rather, the decision is arguably a case of both substantive due process and natural law jurisprudence: "When [natural law reasoning] was revived during the

23 *Lochner v. New York*, 198 U.S. 45, 64 (1905) (per Peckham, J.).

Lochner era, disguised as substantive due process jurisprudence… it triggered similar criticisms of resurrecting natural law."[24] To demand that a decisional theory is either based in natural law or rooted in substantive due process is a picayune dichotomy, as the two functionally coexist well. The natural law component of *Lochner* was essential for the jurisprudential basis of that ruling, centering on the Fourteenth Amendment, since the first section of the Fourteenth Amendment had been formed and interpreted before through essentially natural law reasoning.[25] Thus, the *Lochner* court did not offer a material distinction between the natural right of contract and the substantive right of contract, even though the decisional theory formally leaned on the Due Process Clause.[26] Although *Lochner* came to be a derided case by future Courts, this is true only in the decision itself, rather than the decisional theory.

Since the natural law reasoning was so repugnant to the aspirationalist disposition of later Courts, those Courts attempted to achieve the same ends through at least nominally different means. In *Griswold v. Connecticut* (1965), the majority opinion expressed belief in a right to privacy through nearly any constitutional vehicle excepting the Due

24 Legarre, *supra* note 4, at 884.

25 Radu, *supra* note 9, at 281.

26 "Under that provision, no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment unless there are circumstances which exclude the right." *Lochner v. New York*, *supra* note 23, at 53.

Process Clause.[27] This utter avoidance was to expressly confirm that the Court was not relying on *Lochner*'s reasoning, instead seeing penumbral emanations from nearly every other right afforded in the Bill of Rights. Justice Goldberg, in a concurrence joined by Chief Justice Warren and Justice Brennan, argued, "that the right of privacy in the marital relation is fundamental and basic -- a personal right 'retained by the people' within the meaning of the Ninth Amendment.…which is protected by the Fourteenth Amendment from infringement by the States."[28] But by linking the Due Process Clause to his argument concerning the Ninth Amendment, Goldberg ensured that the more senior Justice Douglas would not join the concurrence. The formal linkage with *Lochner* was too great a legal quagmire for Douglas to embrace Due Process Clause justifications for a right to privacy, yet this ruling is still regarded as an act of substantive due process. Nonetheless, it would only seem causally relevant to ignore the formal reasoning in *Lochner* for Douglas unless it was understood that this formal reasoning through the Due Process Clause was in fact understood as natural law reasoning. Justice Black, in his *Griswold* dissent, said as much:

> Writing in dissent, Justice Hugo Black accused the majority of indulging in "the natural law due pro-

27 Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 Fordham L. Rev. 2269, 2271 (2001).

28 *Griswold v. Connecticut*, 381 U.S. 479, 499 (1965) (per Goldberg, J., concurring).

> cess philosophy" of judging. Although critics would later heap ridicule on the majority's metaphysics of "penumbras formed by emanations," Black was content on this score to merely record his view that we "get nowhere in this case by talk about a constitutional 'right of privacy' as an emanation from one or more constitutional provisions." His focus, rather, was on unmasking what he judged to be an implicit revival by the majority of the long discredited "natural law" doctrine.[29]

The material reasoning of *Griswold* offered the same hermeneutical issues as *Lochner* and *Dred Scott*, and Justice Black merely knew natural law jurisprudence when he saw it. The concurring opinions only reinforce this notion of natural law reasoning: Justice Goldberg cited the Ninth Amendment – definitionally requiring some degree of natural law reasoning from a historical perspective – as protected from the states, and Justice Harlan concurring in judgement argued that the ordered concept of liberty found implicit in the Due Process Clause of the Fourteenth Amendment was sufficient reasoning enough for the case.[30] Although Justice Harlan may not himself have understood the Fourteenth Amendment in terms of natural law reasoning, both Justice Black and Justice Douglas understood it so – and so did the *Lochner* Court. In effect, substantive due process and natural law reasoning are functional sub-

29 George, *supra* note 27, at 2270.

30 Radu, *supra* note 9, at 252-253; *cf. Griswold v. Connecticut*, *supra* note 27, at 486-502 (per Goldberg, J., concurring; Harlan, J., concurring in judgement).

stitutes, where the nomenclature selected depends only on the jurist's favored interpretive philosophy. Substantive due process becomes the favored mechanism for the so-called liberal Justice, and natural law reasoning the temptation of the conservative or originalist Justice.

Part III

A

Lest this claim of originalists "discovering" rights through natural law reasoning fails as a claim rooted in the misapplied originalism of *Lochner* and Courts long past, one need only look to the more recent debates between originalists on the bench. In *Troxel v. Granville* (2000), this debate was evidenced by Justice Thomas's concurrence in judgement and Justice Scalia's dissent. The issue central to the disagreement was the place of natural law reasoning and positive law. In his brief concurrence, Justice Thomas emphasizes three essential holdings that allow him to concur in judgment: he did not hold a fundamental right of parents to direct their upbringing as guaranteed through a substantive reading of the Due Process Clause; he instead held that the fundamental right of parents is found through the *Lochner*-era ruling *Pierce v. Society of Sisters* (1925), though he does not express a decisional theory beyond loose *stare decisis*; additionally, "[he] would apply strict scrutiny to infringements of fundamental rights."[31] His con-

31 *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (per Thomas, J.,

currence depended on the precedent of natural law reasoning of *Pierce* to secure the unenumerated rights of parents, although the plurality couched the unenumerated right in terms of substantive due process, once again demonstrating that the two hermeneutics are only interpretive mirrors; through natural law reasoning, Justice Thomas effectually engaged in substantive due process, his Due Process Clause rejection notwithstanding. This moral right of parents – a correct materialization of natural law – bears the same procedural problems as a right to privacy or freedom of contract, however.

Recognizing the natural law basis of the Declaration and the Ninth Amendment, Justice Scalia did not disagree with the natural law conclusions of Justice Thomas, though he dissented in the material employment of natural law by the majority.

> The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts; and the Constitution's refusal to "deny or disparage" other rights is far removed from affirming anyone of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people.[32]

This dissent raises the question, then, of the role the Declaration of Independence in legal and jurisprudential considerations. If the Declaration does play a substantive

concurring in judgement).

32 *Id*. at 91 (per Scalia, J., dissenting).

role in the "proper" originalist's hermeneutic, then natural law does indeed have a material function in constitutional interpretation and construction. Justice Scalia held that, because the Declaration is not a legal document and does not empower or confer any authority to the Court, a jurist need not consider the promises or the philosophy inherent to the foundational document. Certainly, the logic behind Scalia's reasoning is at least somewhat coherent; other documents, e.g., the *Federalist Papers*, used to guide interpretation of the Constitution were written in the constitutional context or during the ratification debates. The Declaration, however, was written at a different historical moment, when our constitution was the Articles of Confederation, and the Declaration does not itself offer any commentary on the proper form of government or the courts specifically. As Kirk argues, "the Declaration and the Constitution were drawn up under different circumstances for quite different purposes: the first in the enthusiasm of revolution, the second in the restoration of order, and the men of 1787 were not the men of 1776."[33] In brief, the apparent historical and jurisprudential difference of the two Founding documents should be sufficient grounds for the jurist to only consider the text of the Constitution or other tributary works. Justice Thomas disagrees. Thomas "sees an intimate connection between the principles of the Declaration, which are the principles

33 Russell Kirk, *Natural Law and the Constitution of the United States*, 69 Notre Dame L. Rev. 1035, 1040 (1993).

of individual liberty, and the text of the Constitution."[34] Thomas thus, *contra* Scalia and other originalist-textualists, sees the text of the Constitution as only having sense when understood around the Declaration; the American painting (the Declaration) is defined, experienced, and preserved by its frame (the Constitution).

Echoing the acrimonious Jaffa-Mansfield debate on the "soul" of the country, Thomas and Scalia's more civil debate serves as a microcosm for a larger jurisprudential question as to how the Founding should be understood and how the Constitution and Declaration should interplay. The position of Jaffa and therefore Thomas is largely the political-historical default. For Thomas, the Declaration's claims of equality are an indispensable necessity to give reason to follow the Constitution. Abraham Lincoln, as "one of the framers of the post-Civil War Constitution,"[35] centered the question on slavery during the Civil War. The Constitution and its institution of free elections – that which secession jeopardized – only matter because of the principles of liberty and equality inherent in the Declaration, otherwise the price of bloodshed for preserving the Constitution and the Union would have been too high.[36] Without the demand for equality in the Declaration, the Constitution has no politi-

34 Thomas G. West, *Jaffa versus Mansfield: Does America Have a Constitutional or a "Declaration of Independence" Soul?*, 31 Perspectives on Political Science 235, 243 (2002).

35 Lewis E. Lehrman, *On Jaffa, Lincoln, Marshall, and Original Intent*, 10 U. Puget Sound L. Rev. 343, 343-349 (1987).

36 West, *supra* note 34, at 241.

cal locomotion from one generation to the next. The mere persistence of established law does not offer an evaluation thereof. As a document, the Constitution does not much give a moral reason to admire itself – plenty of governing documents or principles order the state well and limit the powers of the government, or nominally afford the citizenry plenary protections from abuse by the state. In the context of the Civil War, "[b]oth sides appealed to the Constitution with perfect sincerity."[37] Without the moral inclinations of the Declaration, the Constitution can be read *tabula rasa* as a pro-slavery document, as the Antebellum South demonstrated; however, such is an inaccurate and inapposite reading of the Constitution. Lincoln and the North were in the right on both the Constitution and the War because they correctly understood the Constitution, but the correct reading for Lincoln was only achieved through a grounding in the Declaration and her principles, external to the Constitution itself. To the question of slavery, Mansfield and his disposition have no answer, philosophic or legal:

> The problem of slavery, Jaffa argues, exposes more clearly than anything else the weakness of Mansfield's position. The text of the original Constitution contained significant protections for slavery. That was the price the South demanded for its acquiescence in the Union. But if we read the Constitution as Mansfield recommends, namely, as a document whose authority is not derived from the idea of equal individual natural rights, we cannot know, on

37 *Id.*

> the basis of the Constitution, that slavery is wrong. We cannot know that anything is wrong. Quite the contrary: we might as easily conclude that slavery is right. For if Mansfield is right, a "constitutional people" does not aspire to look beyond the revered constitutional text. In this decisive instance, the Constitution contains not an ambiguity open to later distortion but a massive evil, a cancer that almost destroyed the Constitution in the Civil War.[38]

Indeed, slavery is not just a one-off historical example; rather, any legal-political issue that has divided the nation may be substituted in its place. Thus, for Thomas, the only way of properly reading the Constitution is not textualistically, but through the moral promises of the Declaration. The political-historical realities, however, stand in tension with the jurisprudential.

This political analysis of the two documents has obvious jurisprudential implications. If the Constitution is effectively understood only through the Declaration of Independence, then the constitutional hermeneutic which appeals to the Declaration must ontologically be correct, even if the reasoning and employment thereof has formal problems, like Thomas's reliance on natural law in *Troxel*. Yet this discontinuity between the constitutional ontology and the constitutional form of jurisprudence raises the issue of legitimacy to such an ontological position. After all, a jurisprudence which properly understands constitutional form can misunderstand the essence of the Constitution, but

38 *Id*. at 243.

still retain formal verity; the jurisprudence which properly understands constitutional ontology, however, can only yield proper form, as the formal proceeds out of ontological.[39] Therefore, if Justice Thomas's constitutional ontology were correct, so too would the formal exercise of his jurisprudence. Yet the material applications of natural law are formally incoherent with a proper constitutional ontology.

For Jaffa, and therefore Thomas, the Declaration is at the head of America's legal significance in part because of what the document legally accomplished, i.e., independence. Such is more than a mere philosophical document, *contra* Kirk.[40] Yet for Jaffa, and more pertinently for Thomas, the Declaration serves as a higher law than the Constitution, "according to which the positive law… must be interpreted in ambiguous cases, are codified in the natural law doctrine of the Declaration of Independence."[41] This jurisprudential approach offers a technical apparatus which conforms well to the Common Law tradition, building on the Anglo-American legal customs naturally. Furthermore, the theory of constitutional validity on which Jaffa and others in this minority opinion rely upon – "that 'there exists in the nature of things a natural standard for judging whether governments are legitimate or not.' That extrinsic

39 This theoretical reasoning understands a logical relationship between how jurists understand the Constitution *in se* and how the Constitution interacts with and is applied in the current legal setting, notwithstanding any such argument for human fallibility or judicial inconsistency.

40 *Cf.* Kirk, *supra* note 33, at 1040.

41 Lehrman, *supra* note 35, at 346.

authority - the standard of the Constitution - one finds in the Declaration of Independence,"[42] – is not entirely incompatible with the mainstream originalism popularized by Justice Scalia.[43] In some sense, as Lehrman and O'Neil both note, the Declaration as an organic law of the United States becomes necessarily incorporated into and reaffirmed by any law proceeding.[44] Unlike the Constitution, which claims its authority from the people and through ratification, the Declaration is not exogenously empowered. The Continental Congress was an *ad hoc* creation, designed to act on behalf of the colonial legislatures, and did not meet as a duly elected or representative body. The people certainly did not authorize the Continental Congress to emend the organic law of the newborn country.

> Locke would say that when government legally dissolves - as it did in the Glorious Revolution - then the legislative power devolves upon the people (for it can never be destroyed unless civil society itself ceases). In what way, however, may the rhetorical flourishes of Jefferson be seen as an act of the people corporately? Independence was undoubtedly an act of the people, but the high-blown rhetoric in

42 *Id.*

43 Scalia and those originalists currently on the Court with Thomas might, instead of grounding the authority of the Constitution in the Declaration, formulate constitutional legitimacy more broadly as based on the Founding and the people. Nonetheless, that both sides of this debate would agree for an objective extrinsic legitimacy is a significant bulwark against both legal positivism and legal pragmatism.

44 Lehrman, *supra* note 35, at 345; Patrick M. O'Neil, *The Declaration as Ur-Constitution: The Bizarre Jurisprudential Philosophy of Professor Harry V. Jaffa*, 28 Akron L. Rev. 237, 241 (1995).

> the document of its proclamation - the Declaration of Independence - cannot, seemingly, claim that status.[45]

Nevertheless, the approach which affirms the Declaration as licit insists that this document is inherent to the character of all subsequent American law. Why the Declaration is chief as organic law in the United States becomes a matter of its historicity: because the *ad hoc* Congress effectually dissolved their own body in the writing of the Constitution, there is no legal means of adding to or amending the Declaration. "The seeming unamendability of the Declaration comes from… that the Continental Congress… went out of existence with the adoption of the Articles… and was placed further at a distance historically by the adoption of the U.S. Constitution as our Organic Law."[46] Yet the premise, that because the specific body which composed the Declaration is defunct, the document is immortalized in law and history, does not follow by Common Law principles. That the Continental Congress dissolved does not make whatever valid law they left behind impermeable to alteration or supersedure. It is easy to understand the contrapositive. No law that the Continental Congress passed which was invalidated, viz., the Articles of Confederation, was invalidated by the presiding body. Rather, the invalidation of the Articles came about externally by the ratification of the Constitution. Hence, it is illogical to hold,

45 O'Neil, *supra* note 44, at 242.
46 *Id.* at 242.

that because the body which composed the Declaration is no more, the law itself cannot be altered.

The Union remains perpetual, and consequently, any legitimate legislature of that Union – be it the Continental or constitutional Congress – can change the law from what a previous legislature wrote. If the same idea of unamendability were applied to a different law from the Continental Congress still in force, e.g., the Treaty of Paris (1783), would the post-1787 American government be utterly powerless to look back and pass a law of supersession? Furthermore, the Repeatability Canon pacifies the claims that the Declaration is legally immutable and therefore integrated into everything as organic law. "The legislature cannot derogate from its own authority or the authority of its successors…As Cicero wrote to Atticus: 'When you repeal the law itself,…you at the same time repeal the prohibitory clause which guards against such repeal.'"[47] Even the Constitution and her amendments are not immune to this legal canon, as the Eighteenth and Twenty-first Amendments demonstrate; such is only limited procedurally by the process enumerated within the Constitution. Even this procedural limit is not a theoretical absolute. The Articles of Confederation had their own amendment process, which the Framers expressly rejected in writing the Constitution. Should the U.S. Constitution ever be dissolved, it seems unlikely that it will be done so abiding by the enumerated

47 Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 278 (2012).

amendment process.

Returning to the slavery question, then, it is difficult to see for Jaffa how the Constitution's Slave Clauses (the Slave Trade Clause, the Fugitive Slave Clause, and the Three-Fifths Clause) did not then supersede the Declaration's principles of equality, only to be later superseded themselves by the Civil War Amendments.[48] The texts of the Slave Clauses are clearly at odds with the Foundational ideas of equality and natural law which Jaffa and Justice Thomas see as essential for their constitutional hermeneutic. The historicity of the Declaration as an essential organic law does not, then, give the document merit for a means of constitutional interpretation:

> If the Declaration of Independence could be passed by a simple act of the Continental Congress, why could an act of the U.S. Congress - a more regular and representative a legislative body than its predecessors - not repeal the Declaration (if that were what the act purported to do)? By the same token, an enactment of Congress which violated some part of the Declaration would seem by that very contradiction to invalidate that portion of the Declaration which its content contradicted.[49]

For whatever political-historical weight Jaffa may bear in

48 An argument for the re-incorporation of the Declaration into the Constitution through the Civil War Amendments may offer an argument worth considering, the complexities of the Fourteenth Amendment notwithstanding, though neither Jaffa nor Thomas make this claim.

49 O'Neil, *supra* note 44, at 244.

this debate, his position remains jurisprudentially inapposite.

B

Without commenting on the political-historical veracity of his point, Mansfield thus offers the more correct jurisprudence of the Constitution. The morality inherent in the Constitution is a textual and formal morality, not a material force of application. When critics of this textualist inclination point to the language of the Preamble as a moral expectation in the Constitution, they fail to understand the essential nature of the Preamble. The Preamble's force does not guarantee the Constitution but is realized through the Constitution. The Preamble to the document thus serves as a sort of political desideratum, not a moral foundation. Or, to frame it another way, the eschatology of the Constitution – the to-be realized expectation of the people and society – is co-temporaneous to the protology of the Constitution. Therefore, even though the Preamble textually comes first with moral language that might otherwise indicate the material employment of natural law reasoning or some acknowledgement of the Declaration's principles, that which is contained in the Preamble is absent of any legal or binding force. The Articles of the Constitution and the amendments to the Constitution are lacking anything beyond formal natural law reasoning. The Preamble does not beget the latter, but the latter induces the former. The

morals inherent to the Preamble were not some theoretical, primordial ooze out of which the Constitution grew, but they serve as an unrealized teleology in which the goal of American governance is expressed.

Furthermore, even if one were to argue that the Preamble to the Constitution should have the legal force of law, jurisprudence evinces that this is not so. "Laws often have prefatory statements prefixed to them, but no *necessary* logical relationship exists between the facts and values asserted in any preamble and the contents of the law it introduces [emphasis original]],"[50] nor could an act of Congress become licit merely by anointing the act with the language of the Preamble. This latter point reveals the same thing about the Constitution: just because there is the Preamble does not make the Constitution the means of establishing justice or ensuring domestic tranquility. Rather, the form of the Constitution – the government it prescribes – becomes the means of achieving that end. Unlike the Declaration, there is such a process established in the Constitution. Where the moral and legal purposes of the Declaration are immediate and realized, the Constitution is expected and unrealized.

This framing may seem backwards – the Constitution was immediately instituted upon ratification and the Declaration's demand for equality is for some still an on-going battle. Yet this is not the political-historical issue that embroiled Jaffa and Mansfield. Rather, the legal and

50 *Id.* at 239.

jurisprudential framing of this debate reorients the discussion away from historical chronology and to legal relevance. The Declaration's philosophical and sociological demand for equality may or may not be continuous, but its legal function is realized *in toto*. If the Declaration rests in natural law, then it is inherently transcendent and materialized in effect with immediacy; so, too, was independence immediate, not depending on the Treaty of Paris (1783). Yet the Constitution, with aspects formally rooted in natural law, is secular and ephemeral. As such a construction, it must be reapplied every day, constantly interpreted, and staunchly defended until its purpose and end are realized. It is even possible to imagine that the Constitution's purpose and end are altered through the amendment process.

Mansfield is correct from a jurisprudential perspective when he agrees with Publius that the Constitution puts its own form before its end because its form is part of its end.[51] Yet West and others see a contradiction in Mansfield, who also maintains that "the Founders thought that the form of the Constitution was never more than a means to securing justice."[52] The Preamble is still compositionally part of the Constitution, however, and so the form and end of the Constitution become somewhat unified in the Preamble, the first stated goal of which is to secure justice. All other enumerated goals are derivative thereof. Of course, the Constitution is not the source of the mores and

51 West, *supra* note 34, at 243.
52 *Id.*

philosophies in America, so there need not be any force of application like is necessitated by the Declaration. Thus, for this hermeneutical concern, it does not matter if Jaffa or Mansfield is correct about the "soul" of America. Such is beyond the scope of this paper, and it remains unclear if a resolution to that debate will have any political significance in this historical moment. Yet what is clear is that the Declaration of Independence by itself, without any support from post-constitutional work or analysis, remains otiose as a constitutional interpretation. As Lehrman notes about John Marshall's own originalism, "legal reasoning and opinion show that the original intent of the Framers and of the Constitution can generally be discovered intrinsically, that is, by analysis of the *full* text of the document itself [emphasis original]."[53]

Distilling the issue, Scalia is right about this if nothing else: the Declaration does not empower the judiciary, and therefore the judiciary cannot interpretively employ it under the name "Constitution." In binding judicial power to the Constitution, so too is the jurist's scope limited to the Constitution and any law begotten out of that constitutional system, viz., legislation. The Declaration, however relevant it may be for American political thought or governance, is *a priori* to the Constitution's order. Thomas's position is fundamentally wrong not because he misapplies natural law through the lens of the Declaration, but because he applies it at all. This does not mean that the Constitution

53 Lehrman, *supra* note 35, at 347.

and the Declaration are somehow at odds with each other, or that the documents do not politically comport. Kirk is right to recognize the different contexts and purposes to the documents but overstates the change in character between the Framers of 1776 and 1787. After all, the Declaration and the Constitution both are Founding documents. For the elected official – the legislator or executive – the political-historical incorporation of the Declaration suggested by Jaffa is the normative expectation, given Lincoln's example. Nonetheless, this jurisprudential approach to constitutional hermeneutics is wrong. The Constitution can be well interpreted and constructed without the Declaration, as case law past and present demonstrate. The incorporation of the Declaration into constitutional interpretation by the jurist allows only for the procedural injustice of substantive due process *qua* natural law.

Part IV

In practical result, the affirmation of rights by a judge-willed entitlement would inevitably require a judicially controlled and defined structure, thereby undermining the natural law reasoning. Nevertheless, natural law is a reality within the Constitution and the Founding that cannot be ignored by the originalist. After all, to be an originalist, one must consider the original meaning and intent behind the Constitution; by the philosophical ecosystem that

reared the Constitution, natural law was both architecturally utilized in the construction of the Constitution – e.g., the Preamble – and provided the milieu under which the Constitution was written. Yet natural law is not archetypal within the Constitution, but ectypal and provisional. The originalist's engagement with natural law must therefore be a purely historical inquiry, limited to formal and dialectical reasoning. The jurist must look at a provision in the Constitution only through the historic enforcement of that provision; as particular natural law reasonings are inherent in certain readings, this demands the formal implementation of natural law in a historical, not material, sense. To employ natural law reasoning, with or without the Declaration, is to commit interpretive sin for the originalist.

Yet this is not an implementation particular to the jurist or case but is merely the historiographic realization of the Constitution in full. The proper originalist does not employ natural law reasoning, he recognizes it where it is the textual impetus. Although this does allow for the Supreme Court to become merely a historiography club whose disagreements can wreak legal and political havoc, legal interpretation is definitionally an individual undertaking on the Supreme Court. The incorporation of natural law as a constitutional hermeneutic by originalists provides a coy rejection of substantive due process, only to be followed by the judicially seductive wink of approval when rights of merit are under consideration. Natural law calls for positive

law, provides the foundational authority for positive law, and ultimately is the loadstar by which to evaluate positive law. Sedition against positive law for the sake of natural law cannot come from official exercises of duty and office, e.g., the jurist, but rather only from a personal capacity through one's citizenship. Jurists therefore cannot strike down whatever the legislature has passed on grounds of natural law comportion, any argument for fidelity to the Constitution or procedural apposition notwithstanding. But the constitutional instrument of implementation is not the courts, but the legislature, if natural law is to be implemented at all. As John Marshall famously wrote, "it is *a Constitution* we are expounding."[54] For the Constitution to be expounded, it would become an odious burden if the Declaration needed to be carted out each time to act as a sort of cereal box decoder ring. When the originalist employs natural law reasoning, he wanders through the looking glass to arrive in a topsy-turvy world yclept substantive due process where he does not belong.

54 *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819) (per Marshall, CJ.).

THE OPIOIDS OF THE MASSES

Samuel D. Peterson

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Abstract

The United States government has engaged in a "war on drugs" for decades, but it has largely failed to achieve its stated goal of eliminating drug abuse. Instead, it has caused a variety of unintended consequences, such as the increasing potency of illicit drugs. We examine how legal prohibitions on opioid production and distribution increase the potency of illicit opiates through the mechanisms of the Iron Law of Prohibition and the Alchian-Allen effect. As restrictions on opioid production and distribution are enforced more strictly, we predict that the potency of illicit opiates will rise. Relevant drug law enforcement and opioid usage data provide empirical support for our explanation of rising opioid potency. We then propose public policy solutions to the problem of the potency effect.

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I. Introduction

In 1914, Congress passed the Harrison Narcotics Tax Act, the first major piece of anti-drug legislation to be enacted on a federal level.[1] The passing of the Harrison Act is widely considered to be the beginning of the U.S. war on drugs.[2] Ever since the Harrison Act was passed, drug control has only gotten stricter. Starting in 1937, with the passing of the Marijuana Tax Act, marijuana has been effectively prohibited in the United States.[3] In 1970, through the enactment of the Controlled Substances Act (CSA), federal law required that "all drugs [be placed] into one of five schedules based on the Drug Enforcement Administration's (DEA) assessment of each drug's medical value relative to its potential for abuse."[4] Today, drug control measures still follow the 1970 Controlled Substances Act as well as subsequently passed laws. Restrictions on opioids have further increased since the passing of the CSA, ranging from shutting down overdose treatment clinics to restricting when medical pro-

1 Audrey Redford & Benjamin Powell, *Dynamics of Intervention in the War on Drugs: The Buildup to the Harrison Act of 1914*, 20 The Independent Rev. 509, 509 (2016).

2 Id.

3 Mark Thornton, The Economics of Prohibition 65 (2014).

4 Jeffrey Miron et al., *Overdosing on Regulation: How GovernmentCaused the Opioid Epidemic*, Cato Institute: Policy Analysis (February 14, 2019), https://www.cato.org/sites/cato.org/files/pubs/pdf/pa_864.pdf [https://perma.cc/HW8F-JHA7].

fessionals can prescribe opioids.[5]

Despite the severe restrictions placed on the selling, possessing, prescribing, and consuming of opioids, overdose and death rates have steadily increased.[6] Additionally, the number of overdoses and deaths related to higher-strength opioids such as fentanyl has been increasing.[7] What is causing this increase in the use of higher-potency opioids? We propose that the increase in the potency of illicit opioids is caused by prohibition and restrictions on opioid production.

Scholars of the economics of drug prohibition have provided the background for our research. Jeffery Miron and Jeffery Zwiebel, in "The Economic Case Against Drug Prohibition," explain the effects of prohibition using supply and demand analysis. Mark Thornton has thoroughly explained the unintended consequences of prohibition, including the impact of the Iron Law of Prohibition, in works such as *The Economics of Prohibition*. Our goal is to contribute to the literature on prohibition by using this previously developed theory to explain the rise in the potency of opioids.

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5 Miron et al., supra note 4, at 9.

6 Nat'l Ctr. for Drug Abuse Statistics, Opioid Epidemic: Addiction Statistics (2022), https://drugabusestatistics.org/opioid-epidemic/ [https://perma.cc/CC2W-4Y23].

7 Nat'l Ctr. for Drug Abuse Statistics, Fentanyl Abuse Statistics (2022), https://drugabusestatistics.org/fentanyl-abuse-statistics/ [https://perma.cc/5PC2-BBQN].

We aim to explain in this paper how prohibition increases the potency of illicit opioids. We begin by applying the theory of the Iron Law of Prohibition and the Alchian-Allen effect to explain the predicted outcomes of drug prohibition on potency. In the next section, we develop an empirical analysis of the relationship between drug enforcement and the use of higher-potency opioids, applying our theory to explain the correlation. We conclude by proposing various public policy measures to decrease the potency of illicit opioids.

II. Theory

The Controlled Substances Act of 1970 is the primary statute governing U.S. drug policy. The Act places certain drugs into five "schedules" with differing levels of restrictions. Unless otherwise authorized, the Act prohibits the manufacture, distribution, and possession of controlled substances.[8] Heroin and illicit opiates are placed in Schedule I, making them among the most highly restricted drugs, while prescription opiates are placed in Schedule II.[9] Criminal penalties include fines and prison sentences.[10]

Drug prohibition affects both the supply

8 Joanna R. Lampe, The Controlled Substances Act (CSA): A Legal Overview for the 117th Congress, Congressional Research Service 17-18 (February 5, 2021), https://crsreports.congress.gov/product/pdf/R/R459 48 [https://perma.cc/4XDA-LEQG].

9 Lampe, *supra* note 8, at 6.

10 Lampe, *supra* note 8, at 19.

and demand sides of the market. On the supply side, drug prohibition causes supply to decrease by increasing the costs of producing and distributing drugs. These costs include potential fines and prison sentences that would result from being caught, as well as the costs incurred due to avoiding detection.[11] According to Jeffrey A. Miron and Jeffrey Zwiebel, an additional cost comes from the inability to rely on the legal system to enforce contracts and resolve disputes.[12]

Demand similarly shifts to the left under drug prohibition. The risk of being caught and charged with possession, stronger uncertainty about product safety and quality, and the dangers involved in illegal markets all factor into the decrease in demand.[13] An additional factor may be a certain amount of "respect for the law" by would-be consumers, but this may be at least partially offset by the potential glamorization effects of prohibition.[14]

While both supply and demand for illicit drugs are likely to decrease under prohibition, supply is likely to decrease further relative to the decrease in demand; compared to consumers, pro-

11 Jeffrey A. Miron & Jeffrey Zwiebel, The Economic Case Against Drug Prohibition, 9 JOURNAL OF ECONOMIC PERSPECTIVES 175, 176 (1995).

12 Id.

13 Id.

14 Miron and Zwiebel, *supra* note 11, at 176-177.

ducers and distributors face harsher legal penalties and higher transaction costs, such as a higher risk of violence.[15] As Miron and Zwiebel say, "Unless demand is far more elastic than supply, therefore, prices will increase under prohibition."[16] The decrease in supply relative to demand that occurs as a result of drug prohibition raises the market price of illegal drugs, keeping profits high and potentially inviting new entry. Drug prohibition fails to eliminate the incentive for drug production and likely decreases the equilibrium quantity only to a relatively small extent.[17]

Another problem facing drug prohibition is the "Iron Law of Prohibition," a term coined by Richard Cowan, sometimes called the potency effect. According to Cowan, "The iron law of drug prohibition is that the more intense the law enforcement, the more potent the drugs will become."[18] Prohibition tends to increase the potency of illicit drugs by distorting supply. Due to the cost of avoiding detection, it becomes relatively more profitable to transport less bulky but more potent drugs; Cowan claims that "Heroin replaced opium for similar

15 Miron and Zwiebel, *supra* note 11, at 176.
16 Miron and Zwiebel, *supra* note 11, at 177.
17 Id.
18 Richard C. Cowan, How the Narcs Created Crack, 38 National Review 26, 26-31 (1986).

> reasons."[19] Because drug trafficking penalties are based on the weight of shipments, Mark Thornton argues that an effective "tax" is placed on weight. Suppliers will thus raise the value of the shipment to bear the cost of the tax.[20] One way that suppliers can raise the value of shipments is to increase the potency of the drugs, so potency is likely to increase under this form of prohibition.[21]

The Iron Law of Prohibition also works through the mechanism of the Alchian-Allen effect, sometimes called the Third Law of Demand, which states that "adding a common charge to the price of two substitute goods increases the relative consumption of the higher quality good, real income held constant."[22] Thornton explains how the Alchian-Allen effect functioned on the supply side in the case of alcohol prohibition:

> "…the underground economy swiftly moved from the production of beer to the production of the more potent form of alcohol, spirits. Prohibition made it more difficult to supply weaker, bulkier products, such as beer, than stronger, compact products, such as whiskey, because the largest cost of selling an illegal product is avoiding detection."[23]

19 Cowan, *supra* note 18, at 27.

20 Thornton, *supra* note 3, at 96.

21 Id.

22 Tyler Cowen & Alexander Tabarrok, Good Grapes and Bad Lobsters: Applying the Alchian and Allen Theorem, 33 Economic Inquiry 253, 253 (1995).

23 Mark Thornton, Alcohol Prohibition Was a Failure, Cato

Drug prohibition adds the fixed costs of avoiding detection to the costs of drug production, so producers may switch to producing more high-potency drugs, the "higher quality good."

Another factor that may contribute to increased potency is restrictions on the prescription of opioids. Opioids are only legally available in the U.S. through prescriptions, and doctors face legal restrictions on how much they can prescribe. When individuals' demand for opioids exceeds the amount which doctors can legally supply, they may switch to the black market instead, shifting the demand for illegal opioids, which are more likely to be of high potency, to the right.[24]

An economic analysis of drug prohibition shows that rather than eliminating the market for illegal drugs, prohibition instead tends to increase the potency of illegal drugs. The Iron Law of Prohibition and the Alchian-Allen effect make higher-potency drugs relatively more profitable to produce, and restrictions on legal opioid consumption drive consumers into black markets where high-potency drugs are more common.

Institute: Policy Analysis (July 17, 1991), https://www.cato.org/policy-analysis/alcohol-prohibition-was-failure [https://perma.cc/L8Y2-7PWT].

24 Miron et al., *supra* note 4, at 3.

III. Empirical Analysis

According to the theory laid out in the previous section, we should expect to see increasing amounts of higher-potency opioids being traded relative to lower-potency opioids because of prohibition and restrictions, and thus increased usage of higher-potency opioids relative to lower-potency opioids. *Ceteris paribus*, increased usage of deadlier higher-potency opioids should result in increased overdose deaths from opioids, particularly more potent synthetic opioids. As restrictions tighten and prohibition enforcement becomes more robust, we would expect the potency effect to worsen. Variations in opioid overdose deaths, especially from synthetic opioids, may be expected to reflect variations in restriction.

A case study of these expected effects can be conducted by examining the results of the changes in U.S. opioid policy and enforcement that took place around 2010. According to Jeffrey Miron, Greg Sollenberger, and Laura Nicolae, "Federal and state policies have also increasingly regulated prescription opioids, contributing to a decline in opioid prescribing starting in 2011."[25] According to the National Center for Drug Abuse Statistics, while opioid prescriptions fell by 39.29% from 2011-2019, opioid overdose deaths rose by 43.49% during the same period.[26] This suggests that consumption shifted from safer, legal opioids to

25 Miron et al., supra note 4, at 9.

26 Nat'l Ctr. for Drug Abuse Statistics, supra note 6.

more dangerous black-market opioids as consumers shifted to their available substitutes due to the reduced supply of prescription drugs induced by government restrictions.

Because of the Iron Law of Prohibition, we would expect increases in the enforcement of prohibition to be positively correlated with higher-potency opioid usage, which may be reflected in the rates of overdose deaths, especially from higher-potency synthetic opioids. A higher number of seizures indicates a higher degree of enforcement, so law enforcement seizures of synthetic opioid heroin and arrests for heroin trafficking can be used as a metric to measure the strength of enforcement. The annual amount of heroin seized by kilogram grew roughly 321% from 2008 to 2017, and according to a 2019 report by the Congressional Research Service, the increase could be driven by "enhanced U.S. law enforcement efforts to interdict and seize the contraband."[27] Annual heroin arrests by the Drug Enforcement Agency, meanwhile, grew roughly 145% from 2007 to 2017.[28] These data suggest that prohibition enforcement grew significantly over the period from 2007 to 2017. According to the National Center for Drug Abuse Statistics (NCDAS), heroin overdose death rates are increasing at an average annual rate of 55.7%, and the rate of overdose deaths involving synthetic opioids increased at an annual

27 Cong. Rsch. Serv., Heroin Trafficking in the United States (February 14, 2019), https://sgp.fas.org/crs/misc/R44 599.pdf [https://perma.cc/WAR6-47QN].

28 Cong. Rsch. Serv., *supra* note 27, at 5.

rate of 580% from 2012 through 2017, which would follow if producers substituted into producing higher-potency heroin and other synthetic opioids. [29]

Fentanyl is a synthetic opioid thirty times more potent than heroin.[30] As a result of stricter enforcement, we would also expect increased use of fentanyl relative to less potent opioids as a more potent substitute in production compared to heroin and other opioids. The NCDAS reports that "fentanyl OD rates are rising 2.5 times faster than heroin ODs," and "fentanyl ODs outpace prescription opioid ODs [by] 550.94%."[31] Additionally, the rates of fentanyl overdoses increased by 1,105% from 2012 to 2018.[32] These data reflect increased fentanyl use relative to other opioids, as our theory would predict, as a result of tougher restrictions and enforcement of prohibition.

Our theory predicts that as prohibition is expanded and more robustly enforced, the potency of illicit drugs produced and consumed will tend to increase. Empirical analysis of the available data reinforces the validity of our theory.

IV. Implications for Public Policy

29 Nat'l Ctr. for Drug Abuse Statistics, Drug Overdose Death Rates (2022) https://drugabusestatistics.org/drug-overdose-deaths/ [https://perma.cc/ZKY5-HST3].

30 Miron et al., *supra* note 4, at 4.

31 Nat'l Ctr. for Drug Abuse Statistics, *supra* note 7.

32 Nat'l Ctr. for Drug Abuse Statistics, *supra* note 7.

The anti-opioid crusades have had devastating effects on human life. Although policy has become increasingly strict on opium products, overdoses and deaths have continued to rise.[33] In short, to decrease the potency of opioids and the negative effects of the prevalence of high-potency opioids, current federal and state drug policy must be reversed. Policymakers have numerous options available to cause a decrease in the potency of illicit opioids, ranging from moving opioids to lower CSA schedules to allowing doctors to prescribe the quantity of opioids they see fit to full-on legalization.

A small step that would reduce the potency of opioids would be to change the CSA schedule that opioids fall under. Heroin is currently classified as a Schedule I narcotic while hydrocodone and opium are classified as Schedule II narcotics.[34] If any of these drugs or other opioids were placed into a lower CSA schedule, the supply of legal opioids would increase because more sellers would be allowed to enter the market and consumers would have easier access to safer, low-potency opioids. Currently, if one does not have a prescription for Schedule II narcotics, they will be unable to attain them legally. Schedule I narcotics, furthermore, are wholly illegal, so legal access to these

33 Miron et al, *supra* note 4, at 8.

34 United States Drug Enforcement Administration, *Controlled Substances – Alphabetical Order* (April 10, 2023), www.deadiversion.usdoj.gov/schedules/orangebook/c_cs_alpha.pdf [https://perma.cc/DNF4-B2EH].

drugs is impossible. If a consumer desires opioids enough, regardless of the drug's schedule placement, he will enter the underground market (the so-called "black market") to obtain them. In the underground market, not only will there be no access to legal remedies for dangerous products, but also, due to the Iron Law of Prohibition, many opioids will be laced with higher-potency opioids like fentanyl, thus leading to more overdoses and potential deaths.

A further policy step to reduce the potency of opioids would be to allow doctors to prescribe the quantity and strength of opioids they see fit for their patients. As aforementioned, federal and state governments have tightened regulation of opioid prescriptions, contributing to declines in prescriptions since 2011. According to Miron, Sollenberger, and Nicolae, "This may have exacerbated heroin mortality and the undertreatment of pain."[35] Opioids have legitimate medical purposes, mostly dealing with reducing chronic pain in patients. If patients are lacking in pain relief because doctors are not legally allowed to prescribe the quantity and strength of opioids that they believe is necessary to alleviate their patients' pain, patients may search for substitutes to satisfy their unfulfilled demand. In this case, consumers may find pain relief in higher-potency opioids, like heroin, rather than the legal lower-potency opioids, all because regulations have prevented legal prescription of low-potency opioids.

35 Miron et al., supra note 4, at 9.

Full legalization of the sale and consumption of opioids would lead to the dissolution of the underground market and a drastic decrease in consumers demanding higher-potency opioids. Consumer demand for opioids would be satisfied by going to their local pharmacy rather than going to an underground dealer. If the market for opioids were made fully legal, consumers would be able to go to the first best market where suppliers are not artificially induced to supply higher-potency opioids. With prohibition no longer being in effect, suppliers and transporters of opioids can supply opioids without fear of arrest and prosecution. This would lead to a decrease in the potency of opioids because the marginal cost of transporting opioids would be decreased, thereby allowing suppliers to move low-potency opioids without the risk of being arrested.

V. Conclusion

Ever since the beginning of the war on opioids in the mid-twentieth century, policy has become increasingly more restrictive. Despite the severe punishments for the possession, sale, and distribution of opioids, deaths and overdoses caused by high-potency opioids continue to rise. The potency of opioids increases due to the Alchian-Allen effect and the Iron Law of Prohibition, which raise the relative profitability of producing higher-potency opioids. The available data supports this theory as to why opioid potency increases. Simple policies that could reduce the potency of

opioids include lowering the CSA schedule that opioids fall under, allowing doctors to prescribe opioids to patients in need, and fully legalizing opioids.

The war on drugs is a fascinating subject with many facets to be explored. This paper specifically focused on the application of the Iron Law of Prohibition to the opioid market. The available data on this topic, such as the data used in this paper, is limited, so additional data gathering and collection would be helpful for future research. Furthermore, while this paper briefly discussed the history of prohibition, specifically as it relates to opioids, research on why the war on opioids continues from a public choice perspective would be a welcome addition to the literature on prohibition. Lastly, comparative research on similar states with loose regulations of opioid recovery treatment programs compared to states with strict regulations of opioid recovery treatment programs would help to understand how treatment programs affect death and overdose rates.

A THEORETICAL & HISTORICAL CRITIQUE OF THE MONETARIST HYPOTHESIS OF THE GREAT DEPRESSION

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1. Introduction

Milton Friedman is widely regarded by the conservative movement as a figurehead of free-market economics and his monetarist school of economic thought is considered by many a favorable alternative to Keynesianism. Unlike Keynes, who thought capitalist countries suffered from inherent instability, Friedman attributed business fluctuations to monetary shocks and blamed the Federal Reserve for failing to expand the money supply to stop the Great Depression. Milton Friedman and Anna J. Schwartz presented their monetarist hypothesis of the Great Depression in their seminal work, A Monetary History of the United States, 1867-1960. While Friedman was a brilliant economic thinker, his theory of business cycles leaves much to be desired. Upon examining Friedman and Schwartz's hypothesis and the accompanying literature many problems begin to emerge. Specifically, monetarism's lack of capital theory, misplaced fear of deflation, and failure to recognize the credit expansion of the 1920s led Friedman and Schwartz to draw erroneous conclusions about the causes of the Great Depression and recessions in general.

2. The Monetarist Hypothesis of the Great Depression

Friedman and the monetarists sought to establish a hypothesis of the Great Depression that would make the

government culpable for this economic catastrophe rather than the private sector. Skeptical of activist fiscal policy, monetarists believed that the economy was inherently stable apart from the influence of monetary shocks.[1] They thus advanced the notion that the Great Depression was primarily due to a massive monetary contraction. Friedman and his acolytes evidently thought this obviated the private sector of guilt for the Great Depression since the damage could have been stopped by the Federal Reserve reinflating the money supply.[2] As a general rule, monetarists thought that the primary factor explaining changes in money income was the money stock.[3]

Friedman and Schwartz apply this reasoning to the Great Depression, suggesting it began because of a monetary contraction. The contraction started out mild, with a handful of bank failures, however, a "contagion of fear" swept throughout the economy leading depositors to rush to convert their deposits into currency.[4] In November of 1930, 256 banks failed with more than $180 million of deposits. This was followed in December by another 352 bank failures with over $370 million of deposits. The first

1 Brian Snowdon & Howard R. Vane, Modern Macroeconomics: Its Origins, Development and Current State 193 (Edward Elgar Publishing Inc. 2005).

2 *Id.* at 79.

3 *Id.* at 173.

4 Id. at 170; Milton Friedman, and Anna Jacobson Schwartz, A Monetary History of the United States, 1867-1960, 308 (Princeton University Press 1963).

of these bank runs, and subsequent bank failures, started in agricultural areas, but took a drastic turn for the worse when the contagion spread to New York and the Bank of the United States on December 11. The bank had over $200 million in deposits making it the largest commercial bank to have failed in U.S. history. Additionally, the bank was esteemed in part due to its official-sounding name, which added further weight to its demise.[5] In short, a multitude of factors exacerbated depositors' fears and deepened the liquidity crisis.

Monetarists allege that this bank failure, and many others that would follow, could have been prevented if the Fed had merely expanded the money supply and provided the banks with the liquidity they desperately needed.[6] Despite extensive deliberation and planning, however, the Federal Reserve failed to act to save the Bank of the United States. This was in large part due to the Clearing House banks withdrawing their support from the measures advocated for by the Federal Reserve Bank of New York to save the Bank of the United States.[7] The Federal Reserve's intended solution called for merging the Bank of the United States with several other banks and the provision of a guarantee fund to be supported by other banks. This would have assured the depositors of the Bank of the United States of the safety of their assets. Furthermore, Friedman and other

5 Friedman, *supra* note 4, at 309-311.
6 *Id.* at 301.
7 *Id.* at 311.

monetarists argue that the Federal Reserve continued to have a lackadaisical approach to further monetary expansion after this. If they had merely engaged in more extensive open market operations then the Depression would not have been nearly as severe as we experienced. To quote Friedman: "Prevention or moderation of the decline in the stock of money, let alone the substitution of monetary expansion, would have reduced the contraction's severity and almost as certainly its duration."[8]

A further element of the monetarist hypothesis was the Federal Reserve's so-called "sterilization of gold" that flowed into the U.S. economy. In short, the United States, according to Friedman, didn't allow the inflows of gold they were receiving from the United Kingdom and other countries to expand the money stock. Instead, banks held onto gold to improve their liquidity position. In short, when gold would flow into the United States from trade with the United Kingdom, U.S. banks would hold onto the gold rather than lend out more money on those gold reserves. From 1929 to 1931 the U.S. gold stock dramatically increased in size. As Friedman and Schwartz note, the money stock had been 10.6 times the gold stock in August of 1929, but the money stock fell to 8.3 times the gold stock by August of 1931.[9] Friedman contends that the state of the economy could have been improved if these gold inflows

8 *Id.* at 301.
9 *Id.* at 360-361.

had been allowed to increase the amount of money available to businesses and individuals.

After this failure to allow the gold inflow to increase the money supply, the Federal Reserve had to confront another gold-related problem: the gold drain of 1931. The gold drain started in September of 1931 as a consequence of multiple European countries leaving the gold standard.[10] This is because foreigners were concerned that the United States would follow Europe's lead and stop backing guaranteeing a specific amount of gold in return for their banknotes. Consequently, foreigners began redeeming their banknotes for gold. Friedman believes the Federal Reserve's response to this monetary crisis was also insufficient. Specifically, Friedman believes that the gold drain and the elevated discount rates the Reserve had imposed should have been offset by sufficient open market operations. This would have offset the external drain of gold and lessened the pressure being put on banks' reserves.[11]

The above-mentioned bank failures, supposedly occasioned by the Fed's failure, led to a dramatic decline in the money stock, which Friedman pegs as the cause of all our woes. The statistics on the money stock decline are admittedly dramatic. Between 1929 and 1933 the United States' total money stock fell by over a third and commercial bank deposits dropped by more than 42 percent. In

10 *Id.* at 315-316.
11 *Id.* at 318.

absolute terms, this was a fall of $18 billion.[12] In arguing that this deflation is so deleterious, Friedman claims that such changes in the money stock are closely associated with declines in economic activity and money incomes. As has already been alluded to, money stock changes are considered by monetarists to be the most important factor influencing monetary incomes (Friedman and Schwartz 1963, 676; Snowdon and Vane 2005, 193). Throughout A Monetary History, one must search very hard to find theoretical explanations of why such deflation of the money stock is bad and why the market cannot sufficiently adjust its prices. In short, it is almost as if Friedman and Schwartz take the fact that deflation is bad as a given. Regardless of this ambiguity, it is this issue of deflation that is at the heart of the monetarist hypothesis of the Great Depression.

3. Monetarist's Lack of Methodology

While an exposition of the monetarist hypothesis is fairly straightforward, one issue that has drawn significant critique is Friedman and Schwartz's failure to articulate a clear methodology for their research and theorizing. In 1970 Friedman took up the task of explicating such a methodology in his paper "Theoretical Framework for Monetary Analysis." Far from presenting an elaborate new method of economic analysis, Friedman ended up presenting a framework akin in nature to the IS-LM model.[13] This was

12 *Id.* at 352.

13 "The IS-LM model is a Keynesian macroeconomic model de-

far from being negative in the eyes of Friedman. Indeed, his goal in writing this framework was to prove that he was thoroughly conventional in his framework and the differences between him and those who disagreed were namely empirical.[14] In the conclusion to this short exposition, Friedman explicitly states that the framework he presented is not unique to him and that most economists could agree with him. While different economists will stress different points or elaborate in different areas, the fundamentals remain unchanged. In short, Friedman argues that "the basic differences among economists are empirical, not theoretical."[15] As has been noted by Daniel J. Hammond, Friedman's desire was for the attention of his colleagues not to be directed at any theoretical model, but rather at the summaries of evidence he presented, and the implications drawn from theoretical models.[16]

4. Deficient Understanding of Capital and Production

Moving beyond methodology, one of the conspicuous inadequacies of monetarist thought on business cycles

scribing the interaction of the market for goods and the loanable funds market. The IS stands for "investment-saving" and the LM stands for "liquidity preference-money supply" (Investopedia 2023); Investopedia, IS-LM Model: What it is, IS and LM Curves, Characteristics, Limitations Investopedia (2023), https://www.investopedia.com/terms/i/islmmodel.asp.

14 Snowdon, *supra* note 1, at 174.

15 Friedman, *supra* note 4, at 234.

16 Daniel J. Hammond, Theory and Measurement: Causality Issues in Milton Friedman's Monetary Economics 154 (Cambridge University Press 1996).

is their lack of capital theory, or to be more precise, their distorted and limited conception of capital. In leveling this critique, it is important to note that the lack of capital theory is a defect of neoclassical economics more broadly which subsequently impacted the various schools of thought operating under this framework, including monetarism.[17] This lack on the part of monetarists helps explain the many analytical travesties they commit. To begin, one must examine definitions of capital from neoclassical economists like John Bates Clark and Frank Knight. Clark believed that capital was a self-sustaining fund that produced a return automatically, ruling out the possibility that capital could be consumed via depreciation and needed to be maintained.[18] Frank Knight similarly thought that capital was "a permanent fund which automatically and synchronously produces income."[19] Relatedly, Clark and Knight did not believe that production processes occurred in stages, rather it is simultaneous with consumption. This flows directly from a static Walrasian conception of general equilibrium and is present in contemporary circular flow diagrams which entirely rule out the role of time. The interest rate is simply lower if the "social fund" of capital is smaller, leaving no role for time preference.[20]

17 Jesús Huerta De Soto, Money, Bank Credit, and Economic Cycles 512 (The Ludwig von Mises Institute 2006).
18 *Id.* at 514.
19 *Id.* at 517.
20 *Id.* at 514-515.

This neoclassical understanding of capital would seem silly to any businessman faced with the very real phenomenon of the depreciation of capital and with the decisions of production which occur within the time constraints of his production process. As Austrian economist Fritz Machlup notes, "There was and is always the choice between maintaining, increasing, or consuming capital."[21] While the notion of perpetual capital might make sense to an academic, this concept would appear to the businessman as pure lunacy. Moreover, it seems almost painfully obvious to note that the production process is just that, a process. Steps must be taken in sequential order for a finished product to be produced. All these critiques point to neoclassical economists' clear divergence with a causal realist understanding of the economy on the issue of capital.

The lack of capital theory becomes problematical when monetarists' acceptance of the mechanistic version of the quantity theory of money is considered. Monetarists believe that monetary inflation changes prices directly and proportionately. In other words, inflation affects all economic sectors equally, meaning there is no discoordination of the structure of production. Malinvestment is not a problem. This naïve view stems from the fact that monetarists' conception of capital includes no time element and considers production to be simultaneous with consumption.

21 Fritz Machlup, *Professor Knight and the 'Period of Production,'* 43 *Journal of Political Economy* 577, 577 (1935).

It thus conceals the disrupting nature of credit inflation and leads monetarists to draw the wrong conclusions about the causes of economic recession.[22] Indeed, Friedrich A. Hayek said that the Achilles heel of monetarist theory is that it focuses solely on general price levels and not on "the effects on the structure of relative prices." This defect led economists to disregard the misallocation of resources across the production structure, which is the most damaging effect of inflation.[23] Due to monetarists' deficient understanding of capital, they confuse the cause with the effect in economic cycles. They mistakenly state that depressions are caused by monetary contraction, whereas, in reality, economic crises are caused by malinvestment enabled by credit expansion. Later this results in monetary contraction and recession in the bust part of the boom-bust cycle, not the other way around. In other words, as malinvestments are liquidated and many of the banks' previous loans are defaulted on, these banks will attempt to improve their liquidity position, and monetary contraction can occur. In other words, as defaults occur banks will feel pressure to improve their liquidity position and decrease their outstanding liabilities. As Jesús Huerta De Soto notes, "Attributing crises to a monetary contraction is like attributing measles to the fever and rash which accompany it."[24] What is even

22 De Soto, *supra* note 17, at 523.

23 F. A. Hayek, New Studies in Philosophy, Politics, Economics, and the History of Ideas 215 (University of Chicago Press 1978).

24 De Soto, *supra* note 17, at 527.

more unfortunate is that this confusion led monetarists to advocate for policies that merely target symptoms, namely monetary contraction. Inhibiting the speed with which the market liquidates malinvestment, however, merely allows entrepreneurial error to continue and prolongs the recession.[25]

5. Unwarranted Fear of Deflation

5.1 The Nature of Deflation and Its Supposed Danger

While the above analysis seems to suggest that the deflation experienced as part of the Great Depression was more likely a consequence than it was a cause of the downturn, monetarists' assumption that deflation is bad in general also warrants critique. While in the past the term deflation generally referred to a decrease in the stock of money, today it simply refers to a general fall in consumer prices.[26] Why is it that economists fear such deflation and even blame large-scale recessions on it? In answering this question, it must be noted that Friedman and Schwartz do not dedicate much of A Monetary History to a detailed exposition of how deflation impacts real economic processes. Instead, the focus of their analysis is empirical and traces the correlation between deflation and recession. With that disclaimer, we can outline the general reasoning

25 *Id.* at 534.

26 Joseph T. Salerno, *An Austrian Taxonomy of Deflation - With Applications to the US*, 6 The Quarterly Journal of Austrian Economics 81, 82-83 (Winter 2003).

of economists as to why deflation may cause recessions. Such economists suggest that deflation causes output prices to fall, but if wages or other input prices remain rigid or sticky then the proper adjustment doesn't take place and companies' revenues fall. They will then reduce production and lay off workers. A similar line of reasoning is that consumers may delay spending because they expect prices to fall further, triggering analogous reductions in output and employment. Additionally, falling prices make the real value of debt more onerous for borrowers.[27] Such fears have led many economists to warn that if expansionary or "re-inflation" policy is not taken, then the economy will fall into a so-called deflationary spiral.[28] As an examination of the theoretical and historical evidence will show, these fears are overblown.

5.2 Theoretical Critique

On the theoretical level, there does not seem to be anything inherent to the nature of deflation that would cause recessions. As has been observed by many Austrian economists, any quantity of money will suffice to meet all the needs of the market.[29] In other words, the economy will merely adjust prices such that money continues to service all exchanges. The problem of stickiness is overestimated

27 Claudio Borio et al., *The Costs of Deflations: A Historical Perspective,* BIS Quarterly Review 31, 31 (March 2015).

28 Jörg Guido Hülsmann, Deflation and Liberty 7 (The Ludwig von Mises Institute 2008).

29 *Id.* at 24.

and largely due to the government in the first place. Deflation is a monetary phenomenon; thus, it does not affect the wealth of society as a whole. Massive price drops would not change our ability to meet our daily needs because, as Hülsmann elegantly articulates, "the disappearance of money is not paralleled by a disappearance of the physical structure of production."[30] The key as far as wealth is concerned is the relative difference in prices, not their nominal level. The fact that deflation does not necessarily entail an aggregate decrease in wealth, however, should not be confused with money neutrality. Indeed, the main change brought about by deflation is not recession but rather a shift in the structure of ownership and redistribution of resources. This restructuring takes place based on how heavily different firms or households relied on debt. Firms that relied heavily on debt will go bankrupt because they will not be able to repay these debts as their revenue has been reduced by decreases in prices. The same will be true of private households with excessive debt. This isn't inherently good or bad, this simply means that different people own companies or houses.[31] So, while property ownership is shifted, there is not an aggregate reduction in wealth.

5.3 Evidentiary Critique

There are four types of deflation: growth, confiscatory, cash-building, and bank credit. The first three of these

30 *Id.* at 25.
31 *Id.* at 26-27.

are less relevant to the monetarist hypothesis but examining them still helps to illustrate that deflation is not inherently bad. Growth deflation is simply the deflation brought on by the increased competition from an increased supply of goods. The historical coexistence of economic growth and deflation has substantial evidentiary backing. This type of deflation was the norm throughout the nineteenth century in industrialized nations under the classical gold standard.[32] Or consider the example of 1876-1879 from the post-Civil War United States. The money stock had fallen by roughly 8.6 percent and the prices fell by just shy of 4 percent. Despite this deflation, real output was growing at a clip of 5.20 percent per year, a rate that greatly outstripped the average for the period of 1876-1913.[33] In short, deflation hardly seems to be a death knell for economic growth. Confiscatory deflation deals with the direct confiscation of cash balances by the government and is rarely—if ever—witnessed.[34] Cash-building deflation refers to people increasing their cash balance held in physical currency. Stated another way, bank depositors could convert their deposits into physical cash and hold onto it for use in the future. It is a voluntary market process that consequently satisfies peoples' preferences. Specifically, it can help people improve their liquidity position as their expectations of the future become more pessimistic or uncertain. This form of deflation doesn't

32 SALERNO, *supra* note 26, at 84.
33 *Id.* at 95.
34 *Id.* at 96.

affect the real wage rate, but rather only nominal prices, leading to the conclusion that it is not a threat to economic welfare.[35]

Finally, there is bank credit deflation, in other words, a contraction of the fractional-reserve bank credit. Such a contraction may be brought on either by bank runs or contractionary monetary policy. To take the first case, bank runs reflect depositors' lost faith in banks' ability to redeem notes and demand deposits. Since this is a voluntary process, it satisfies peoples' preferences. Banks that claim to be trustworthy guardians of depositors' wealth should be purged from the market if they fail to live up to these promises.[36] To be even more specific, if such institutions extend credit beyond real savings in ways that do not satisfy people's time preferences, then it is not in the interest of the market to allow such institutions to continue to operate. Not only is the elimination of such banks necessary to liquidate malinvestment and correct for the boom, but historically such periods of bank deflation had relatively mild effects on real output. Indeed, before the 1930s, Salerno notes that "bank credit deflations in the U.S. were swift and devoid of severe economic dislocations."[37] For example, in 1839 the money supply fell by a third as nearly a quarter of the nation's banks collapsed. Despite massive deflation, real consumption increased and only

35 *Id.* at 85-86.
36 *Id.* at 86-87.
37 *Id.* at 87.

investment decreased to correct the malinvestments of the boom. Today, government impositions like price controls and minimum wage requirements make prices stickier and hence make such adjustments more difficult.[38] We must note, however, that it is government intervention and not the deflation that is at fault in forestalling adjustment.

The second case of bank credit deflation caused by contractionary monetary policy has similar effects. Salerno notes that such deflation merely results in the destruction of "pseudo titles" and is thus no less damaging to economic well-being than eliminating counterfeit titles. Such monetary policy merely hastens the realization of the scam enabled by credit expansion.[39] Consider the case of the depression of 1920-21. In 1915-19 the Fed stimulated massive credit expansion and inflation to finance WWI. Recognizing this as a problem, the Fed raised discount rates in December 1919, January 1920, and June 1920. As a result, the money stock growth rate decreased to only 2.9 percent in 1920 and then fell further to -7.5 percent in 1921. The Depression was shockingly brief, however, lasting only 18 months. The market experienced intense deflation but recovered quickly.[40] This is consistent with the idea that the Fed merely accelerated the realization of the malinvestment of the boom.

38 *Id.*
39 *Id.* at 88.
40 *Id.* at 89.

Finally, recent empirical work seems to back up the argument that deflation does not cause recessions. Economists at the Federal Reserve Bank of Minneapolis have concluded that there is no link between deflation and depression. The only period for which they could find any such evidence was the Great Depression and even then, the evidence was far from overwhelming. Indeed, they found that 90 percent of episodes with deflation did not have depression associated with them.[41] The basic conclusion of all this analysis seems is that the primary evil pointed to in the monetarist hypothesis of the Great Depression (i.e. deflation) is far from being universally bad.

6. Credit Expansion and Unsustainable Growth

The final defect of the monetarist hypothesis is the assumption that the growth of the roaring twenties was sustainable. Monetarists claim banks were engaging in perfectly normal behavior and there was nothing uniquely wrong. The historical account, however, does not align with this narrative. To begin with, the money stock dramatically increased during the period of the 1920s. According to Benjamin Anderson, there were two major episodes of monetary expansion in 1924 and 1927. The Fed purchased several hundred million dollars in government securities each of these years. Unsurprisingly the excess reserves this

41 Andrew Atkeson & Patrick J. Kehoe, *Deflation and Depression: Is There an Empirical Link?,* 94 American Economic Review 99, 100-101 (2004).

gave banks enabled billions of dollars of credit expansion by banks.[42] Bank deposits increased by $13.5 billion, and investments and loans rose by $14.5 billion, numbers that dwarfed the credit expansion required to finance the United States' participation in WWI.[43] In defending Murray Rothbard's account of the inflation of the 1920s, Salerno offers similar statistics. Using Rothbardian definitions, the money stock increased by 61 percent from mid-1921 to 1928, resulting in an annual monetary inflation rate of 8.1 percent each year. Even using a restrictive definition, the money stock increased by 55 percent, an annual rate of 7.3 percent.[44] This credit expansion did not represent a decrease in people's actual time preferences and consequently was not representative of an increase in real savings. What is particularly interesting is that studies by mainstream economists have backed up the claim that bank failures were not merely due to irrational depositor fears resulting in a liquidity crisis. Rather, the wave of bank failures can be pointed to as resulting from changes in the fundamentals of bank health, including weaknesses in banks' portfolios and liability structures.[45] In short, rather than being a purely monetary liquidity crisis, the Great Depression and the

42 Benjamin Anderson, Economics and the Public Welfare: Financial and Economic History of the United States, 1914-1946, 128 (D. Van Nostrand Company 1949).

43 *Id.* at 134.

44 Salerno, *supra* note 26, at 428.

45 Charles W. Calomiris & Joseph R. Mason, *Fundamentals, Panics, and Bank Distress During the Depression*, 93 American Economic Review 1615, 1615 (December 2003).

monetary contraction that accompanied it seem to be traceable to worsening bank health which is a natural byproduct of extensive credit expansion.

7. Conclusion

In summation, monetarists believe that recessions like the Great Depression are the result of monetary contractions which result in significant deflation. The claims of Friedman and Schwartz are largely empirical, as evidenced by their lack of thorough methodology. Unfortunately, their hypothesis lacks the necessary understanding of capital and the production process to recognize many of the key features of the boom-bust cycles. Furthermore, monetarists' fear of deflation is not supported by solid theoretical reasoning or the corpus of historical evidence. Finally, monetarists ignore the evidence of significant credit expansion and the deterioration of bank health which point to malinvestment financed by the boom of the 1920s as the cause of the Great Depression. In short, while monetarists can be respected for their substantial contributions to economic thought, their theory of recession must be abandoned.

CIVIL SERVICE REFORM TO PROGRESSIVE ERA ACTIVISM

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Abstract

The latter half of the nineteenth century was characterized by large systems of government corruption. While politicians advocated for the good of their people, the decisions they made simply perpetuated their struggles. Patronage within American cities' political machines polluted the integrity of local, state, and federal government, perpetuating crime and poverty in urban neighborhoods. It was not until Congress hesitantly passed the Pendleton Act of 1883 that minor bits of government corruption began to chip away. Inspired by the efforts of civil service reformers, this act decreased the power of American political parties. To take their place, American citizens developed their own reform leagues, ringing in the start of the Progressive Era.

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In the nineteenth century, politics formed the core of American society. As advances in technology and the growth of industrialization ushered in an era of rapid urbanization, the need for a larger and more structured local and federal government grew, as well. The development of postal systems, public school districts, and police and fire departments demanded more resources and stronger bureaucratic forces. American governments were growing, and with them, came room for a dramatic rise in corruption and fraud.[2] Men were now able to make an easy fortune through a lifetime in the government, and thus, the career politician was born. Some welcomed this change in American culture. Suddenly, the government began to play a far more direct role in people's lives, providing necessary services and fighting for the community. However, this expansion also brought the growth of corruption and fear of increasing governmental power. Soon, citizen-led reform groups quickly began to sprout up across the nation, working to put an end to the ever-growing abuse of power. While politicians dragged their feet, it was up to the Amer-

1 Nicholas Kuipers & Alexander Sahn, *The Representational Consequences of Municipal Civil Service Reform*, 117 American Political Science Review 200, 200-201 (2022).

ican people to encourage reform. Due to an outspoken response from the public, demands for civil service reform acted as the major steppingstone to the political activism and social programming of the 20th Century Progressive Era.

While government corruption had existed well before the beginning of the United States, political corruption quickly began to flourish in new, industrial cities. Run by complex political machines, positions within the government provided tremendous opportunity and were heavily sought after. The all-powerful ward boss headed the local Democrat or Republican parties in their specific districts across cities. Structured like a pyramid, the ward boss appointed a handful of loyal district captains who could, in turn, search out more dedicated workers to serve the party in power.[3] This developed into the patronage system, in which political officials could delegate government jobs and projects to whomever they chose. Ranging from high-level advisors to the average postal clerk, ward bosses were responsible for thousands of political appointments in their cities.[4] Politicians favored those who supported them, and the appointments most frequently went to those who were able to guarantee votes in favor of the ward boss and his allies. Because of this system, appointees had to prove devotion to their position, but also to the party that

2 William L. Riordan, Plunkitt of Tammany Hall 6 (1st ed. 1993).

3 Kuipers & Sahn, *supra* note 1, at 200.

provided that position. Appointees were expected to campaign for their party, as well as contribute a set percentage of their annual wages in the form of mandatory political assessments. In 1883, these assessments made up almost 75% of all campaign donations in the Northeast, providing the financial backing for the urban political machines.[5] If appointees failed to contribute to their party, they would lose favor, stymying their political ambitions and leading to the loss of their job.

As a result of this system, there were mass turnover rates in governmental positions. From 1885 to 1889 and 1893 to 1897, the administration of President Grover Cleveland replaced over 40,000 government positions in the postal system alone.[6] Very rarely were workers able to maintain their position after an election upturned their political higher-ups, as new officials most certainly had their own supporters to reward and appoint. This rapid turnover brought on by political patronage meant many government employees were often untrained, unqualified, and uninterested in the work itself. Many took the appointments solely for the paycheck, knowing their position was temporary. Government incompetence was considerable, and in the postal system, reports of late, lost, or stolen packages were

4 Sean M. Theriault, *Patronage, the Pendleton Act, and the Power of the People*, 65 The Journal of Politics 50, 51-52 (2003).

5 Ronald N. Johnson & Gary D. Libecap, *Patronage to Merit and Control of the Federal Government Labor Force*, 31 Explorations in Economic History 91, 101 (1994).

common.[7] As bureaucracy grew in American cities, people became increasingly faced with the consequences of such a corrupt and self-serving government.

Though they may not have been skilled at their bureaucratic positions, participants in big-city political machines were still incredibly capable of imposing their power. These groups were determined to garner as many votes as possible and did so quite successfully by building strong relationships with their community. George Washington Plunkitt, a ward boss with New York City's infamous Tammany Hall, described his average day, in which he would attend the weddings of his constituents, secure jobs for the unemployed, and post bail for those neighbors who found themselves in jail.[8] The ward boss was more than just a government figure, but a pivotal staple of his community. He was both a close friend of his neighbors and a local celebrity. He was trusted and revered, loved and honored. Rather than securing votes on merit or policy, a successful ward boss was able to foster an unwavering voter base on personality alone.[9] In developing these relationships with one person, the ward boss could guarantee their vote, while also making them an outspoken supporter of his campaign. Word of a ward boss's kind deeds spread quickly through cities, providing the perfect source of campaign publicity.

However, it was easy to take advantage of patron-

6 *Id.* at 16.

7 Riordan, *supra* note 2, at 97-102.

8 *Id.* at 4.

age within political machines. Over time, any true ambition to help the community was usually replaced with greed and avarice. Ward bosses realized that the long list of his constituent's struggles came with an even longer list of tragedies he could remedy, meaning it was possible to guarantee a situation in which his support was absolutely essential for the well-being of his community. For instance, in 19th Century cities, the rapidly expanding and poorly built tenement housing was prone to fires that could take down the entire building, destroying homes and often ending lives. Rather than pushing through housing reform to prevent these disasters, ward bosses would simply be there to provide the necessary and immediate aid, such as food, clothes, and temporary housing for the victims.[10] They welcomed misfortune, as it gave them a position from which they could comfort their neighbors and confirm their vote. Their service undoubtedly helped countless people, but their complacency continued to perpetuate and permit the crises enveloping American cities.

Corruption and malfeasance did not end there. In certain urban slums, district leaders would buy off the police, encouraging them to stop enforcing laws regarding prostitution, gambling, and other illegal activities. Politicians could secure votes from criminals by promising not to enforce crime. These bribes were enormous and costly. As Lincoln Steffens, a popular American journalist from

9 *Id.* at 98.

the Progressive Era, wrote, "... in one year the police graft[11] was 'something over $3,000,000.'"[12] This payoff guaranteed that poor neighborhoods would be disadvantaged further by the cycle of crime and immoral activity. Citizens expected the growth of government to benefit them and to keep them safe, but the police and the government, the very institutions meant to protect them, failed to act. As the government spread, so too did graft, corruption, and crime.

Graft did not end with the police, however, and many big city politicians would openly admit to their questionable actions. George Plunkitt of Tammany Hall in New York spoke publicly about the difference between honest graft, defined as a sort of common-sense attempt to get ahead such as bribery or insider trading, and dishonest graft, which would have essentially only included extreme examples of embezzlement.[13] A significant source of this so-called "honest graft" came from the railroads, corporations large enough and expansive enough to have a firm hold on politicians across the country. At the time, politicians were truly in the pocket of the big business leaders, accepting bribes in the form of company shares in exchange for certain votes.[14] This caused politicians to move against

10 Graft here refers to corruption and bribery from the community to government-appointed positions, allowing for the development of personal wealth in an immoral and corrupt fashion.

11 Riordan, *supra* note 2, at 129.

12 *Id.* at 49-51.

13 H.G. Callaway, Lincoln Steffens's the Shame of the Cities, and the Philosophy of Corruption and Reform 13 (2019).

unionization, preventing revision and reform. One of the major scandals of the Gilded Age was the *Credit* Mobilier Scandal of the Grant Administration. While constructing the transatlantic railway, the Union Pacific Railroad created a trust company called Credit Mobilier, which they then used to funnel government funds into their own pockets. In 1872, it was publicly revealed that several of Grant's cabinet members and other high-ranking officials were receiving funds from the Credit Mobilier trust, guaranteeing their allyship with the rail companies.[15]

Despite the clear and pervasive corruption, the political machines of the Gilded Age still did serve an incredibly necessary function in cities. At a time of mass poverty in overcrowded cities, ward bosses and their employees created a sort of welfare system for the people in their communities. A ward boss would provide funds and aid when the people most needed it; he would post bail, provide character testimonies in court, help cover high rents, and aid his citizens with finding a job with which to support their families. He was there to celebrate when each baby was born and there to mourn at each funeral.[16] The service of Gilded Age ward bosses was such a core part of the community that in the instances corruption was found and proven, it was easily ignored, forgotten, or forgiven.[17] Corruption was so central to society that most people simply

14 *Id.* at 34-37.

15 Riordan, *supra* note 2, at 118-119.

16 *Id.* at 124.

turned a blind eye for decades. In fact, the ward boss would have been seen as a sort of Robin Hood figure; he stole money from the wealthy and the city's elite to give it to the poor. Of course, the Robin Hood of the Gilded Age political machine lined his own pockets heavily along the way, but this was seen as just another necessary part of the American political process.[18]

The general acceptance of corruption came to a screeching halt in 1881, however, with the death of President James Garfield. On July 2, 1881, a man named Charles Guiteau shot the president, resulting in Garfield's death a few months later on September 19. Guiteau had been a supporter of Garfield and felt he was owed a federal position in return.[19] Guiteau likely suffered from a mental or physical condition that drove him insane, but proponents of civil service reform jumped and argued that murder and anarchy were the necessary and direct consequences of a patronage system.[20] To them, government corruption was the true man behind the trigger.

A few months after President Garfield's assassination, hundreds of local groups of reformers organized to create the National Civil Service Reform League.[21] This marked a notable change for the plenty of local reform groups centered in cities. At the time, there were over 80

17 *Id.* at 121.

18 Theriault, *supra* note 4, at 56.

19 *Id.* at 53.

20 *Id.* at 56.

reform leagues in New York City alone, but the assassination inspired the unification of these organizations.[22] A huge organization that expanded across the entire country, the NCSRL was incredibly active. Finally, they were able to make significant demands for American politicians throughout America. Reformers put out informational pamphlets and newsletters *en masse*, educating the public on the dangers of a corrupt government in both federal and local positions. They were outspoken and determined. As the many local reform leagues came together, they were able to inspire a broader movement that recognized and resented corrupt politicians. After the shooting, 65% of American Congressmen received at least one large-scale petition in favor of civil service reform.[23] The people were clear; corrupt politics needed to go.

In the immediate aftermath of the assassination, however, politicians were not as ready to move against corruption. In the summer of 1881, Congress passed a bill that granted merely $15,000 to the Civil Service Reform Commission to draft a proposal on reform. This was not the first time that civil service reform was proposed, nor would it be the last. In 1864, years before the shooting, Senator Charles Sumner proposed a bill that would require federal employees to pass an examination before accepting a governmental position. At this time radical, reforming Republicans had almost complete control of Congress because the Civil

21 Kuipers & Sahn, *supra* note 1, at 213.

22 *Id.* at 62.

War removed Southern Democratic conservatives from the American federal government, yet this bill was still almost immediately shot down.[24] This period saw a rapid growth in government power and intervention, as Congress passed countless bills such as the Morrill Land Grant Act, which provided land for universities out west, and the Homestead Act, which provided cheap land to those who were willing to settle on it. Both acts were supported by reformers across the country, yet Sumner's reform bill was ignored and tabled without a vote.

Eventually, in 1883, the Pendleton Act made its way to Congress. This bill aimed to prevent corruption in government by mandating that appointees must pass a standardized merit examination before accepting a position in the federal government. It split government jobs into two categories: classified and unclassified. Unclassified positions were filled by appointment only, while classified positions required the exam.[25] The Pendleton Act also made mandatory political assessments illegal. By attacking corruption, this bill intended to put a stop to personal back-scratching in Congress. Though it passed, more than 40% of Senators chose to vote absentee, refusing to cast their ballot either way, knowing that voting to turn the bill down would infuriate the reformers in their constituency while voting yes would limit their ability to wield government

23 Theriault, *supra* note 4, at 54.

24 Kuipers & Sahn, *supra* note 1, at 206.

power.[26] Unlike other reform movements that came from Radical Republicans, this bill directly attacked the power of politicians. It was only due to the demands of the people and the NCSRL that the Pendleton Act was able to scrape through Congress.

While the Pendleton Act was a step in the right direction, it certainly did not do enough to curb corruption in government. Only 10% of federal positions were considered classified, meaning most government positions were still open to political patronage.[27] Even then, politicians worked to prevent the effectiveness of the exams; they would drag their feet when giving, grading, and accepting the exams. Thanks to the purposeful obstinance of politicians, the process of accepting a government job was dramatically slowed to the point where it could take months on end for an appointee to officially begin their position.[28] Other politicians realized that the classification of more fields would prevent later leaders from appointing their supporters to those positions. Over time, more federal jobs were included under the classification label of the Pendleton Act, preventing the effectiveness of future political appointments. If merit exams were required, it would be far more difficult to pass down a federal job in the patronage

25 Ronald, *supra* note 5, at 18.

26 Edward H. Miller, *They Vote Only for the Spoils: Massachusetts Reformers, Suffrage Restriction, and the 1884 Civil Service Law*, 8 The Journal of the Gilded Age and Progressive Era 341, 341 (2009).

27 Kuipers & Sahn, *supra* note 1, at 206.

system, meaning the original political appointments were more likely to keep their position.[29]

When political parties were no longer able to control votes through patronage, they lost a significant amount of their power. After the Pendleton Act, citizens could credit their passage of the merit exams on their success, meaning they no longer had a sense of undying loyalty and gratitude to their local political machine. The party was no longer the provider of much-needed, life-changing jobs. Politicians lost their celebrity. Over time, as the adoration for the ward bosses died down, people began to recognize and call out the impacts of the policies that their politicians supported. No longer could complacency, greed, and corruption be swept under the rug.[30] Parties lost much of their local power, and the policies of American leaders began to take center stage.

Citizens began to demand new and more formal policy reform. The day-to-day activities of ward bosses and career politicians had created new expectations for American citizens; people became used to a government that played a vital role in their lives. They relied on the resources their local parties could provide. As parties lost their all-encompassing power with civil service reform, people still expected that aid; they expected a government that would protect them in every way, shape, and form. They

28 *Id.* at 206-207.

29 Theriault, *supra* note 4, at 51.

knew society needed transformation and counted on the government to help make that change.

This mentality is what swept in the Progressive Era at the turn of the 20th century. After decades of being ruled by corrupt political parties, demand for social and economic reforms began to rule. Local reform leagues for a plethora of causes grew and swept the country like wildfire, picking up anyone who would support their platform. Politics and reform at this time began to focus on actual, concrete changes for the people; it centered on helping the poor, sick, and unfortunate in any way they might need. The Progressive Era brought incredibly impactful organizations, such as the National Association for the Advancement of Colored People (NAACP), the Women's Christian Temperance Union, and the American Federation of Labor, among many, many more.[31] The public demanded concrete and clear changes, and they expected them to come from the government.

The Sherman Antitrust Act of 1890 is one of the most transformative and well-known pieces of legislation in American history. This act was designed to limit the power of American big business. As large, international companies developed, they swarmed and took over their competition. American robber barons controlled the market and because of this, were able to keep politicians in their pockets to better serve the interests of the company. In

30 Cocks, Catherine, et al. Historical Dictionary of the Progressive Era 11 (2009).

the eyes of the citizens, this was a betrayal that cut deep, so Congress passed the Sherman Act. While this eventually became an incredibly impactful bill, it was written with the intention of making only minimal change, while allowing Congressmen to still profit off interactions with big business.[32] The act was written vaguely, leaving room for significant interpretation and debate. The Sherman Act made many references to common law concerning big businesses, which were still quite new to the 19th century. For instance, the Sherman Act referred to "consumer welfare," which would have been referring to profit maximization or general satisfaction. This definition was, conveniently, left out of the written legal proceedings, meaning the Sherman Act could have been interpreted as strictly or as loosely as the courts desired.[33] Quite simply, there was not a large enough history of legal cases in relation to large-scale corporate monopolies to sufficiently take quick action against the giants of the American economy, especially regarding the development of all-powerful trusts.[34] Since this area of law was not fully fleshed out yet, Congressmen expected this ambiguity to prevent or stall any actual effort to break up trusts. They intended the passage of the Sherman Act to simply placate the cries for reform, while still allowing

31 Peter R. Dickson & Philippa K. Wells, *The Dubious Origins of the Sherman Antitrust Act: The Mouse That Roared*, 20 Journal of Public Policy & Marketing 3, 3-6 (2001).

32 Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 The Journal of Law and Economics 7, 13 (1966).

33 *Id.* at 26-29.

themselves to profit through corruption.[35] Congress was not attempting to make any true and concrete change as much as they were hoping to calm the demands of their constituents. Politicians valued the enormous amount of power granted to them during the Gilded Age and were not ready to give it up. It was due only to the insistence of the reformers that large-scale reform legislation was able to pass.

The nineteenth century was soiled with rampant government corruption. Duplicitous politicians were quick to jump at the chance to become personally wealthy off of their political dealings, sacrificing the well-being of their citizens if necessary. Any spirit of service was quashed by the systematization of fraud and deceit. Eventually, when the people began to demand reform, politicians still shrank from the call, passing the insufficient Pendleton Act and the rudimentary Sherman Antitrust Act. While they welcomed reform elsewhere, civil service reform was the true thorn in their side and the true hurdle of successful Progressive Era reform. Going into the 20th Century, it was only when the people were willing and able to form their own expansive reform groups that the fraud in the government would begin to give way. In their attack on corruption, people were forced to distance themselves from the ever-powerful political parties and provide their own aid. Reform movements grew as a response to corrupt politicians, forcing Americans to address a wider array of conflicts and bringing the country into the socially active Progressive Era.

34 *Id.*

ANTITRUST: WIN OR WEAPON?

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On December 4, 2021, several Democratic members of Congress sent a letter urging Attorney General Merrick Garland and the Department of Justice to review the impending merger between WarnerMedia and Discovery. These congressional appointees felt the "transaction raises significant antitrust concerns. In particular, the merger threatens to enhance the market power of the combined firm and substantially lessen competition in the media and entertainment industry, harming both consumers and American workers."[1] In the wake of increasing mergers and acquisitions, economists, politicians, and laymen alike have become increasingly concerned about the potential for monopolistic practices that would harm consumers. Disney, Amazon, Microsoft, and various other corporations have similarly faced scrutiny by the DOJ. In each case, calls for antitrust have arisen to save markets by breaking up firms for fear of anti-competitive behavior. While the goal of antitrust is noble — to maintain competition and therefore protect consumers from monopolistic markets — economists take divisive positions on the usefulness of antitrust. Standard justification comes courtesy of neoclassical price theory, using abstract models to justify state intervention in markets. Austrian economists, however, argue the neoclassical framework — from which antitrust law is justified — suffers from several theoretical issues. Additionally, em-

1 Letter from Rep. David N. Cicilline et al., to Attorney General Garland & Assistant Attorney General Kanter (December 4, 2021), https://castro.house.gov/imo/media/doc/Letter%20to%20DOJ%20(Press).pdf [https://perma.cc/3QCE-XQD6].

pirical evidence suggests that antitrust laws have damaged markets more than protected them, as antitrust has historically been used as an anticompetitive weapon by firms as opposed to the government.

The name antitrust "originated in the United States in the late nineteenth century in response to the rise of trusts, a term that became a euphemism for big business.[2] Proponents argue it is "the central role of antitrust in protecting consumers against anticompetitive conduct that raises prices, reduces output, and hinders innovation and economic growth."[3] The U.S. federal government itself asserts that it "enforces three major federal antitrust laws, and most states also have their own. In short, these laws prohibit business practices that unreasonably deprive consumers of the benefits of competition, resulting in higher prices for products and services" (*Antitrust Laws and You*, 2015).[4] The three primary antitrust laws are the Sherman Antitrust Act (1890), Clayton Act (1914), and Federal Trade Commission Act (1914). Each act covers various aspects of supposedly anticompetitive practices such as tying, cartel-

2 Laura Phillips Sawyer, *U.S. Antitrust Law and Policy in Historical Perspective* 1-35, 1-2 (Harvard Business School, Working Paper No. 19-110, September 2019), https://www.hbs.edu/ris/Publication%20Files/19-110_e21447ad-d98a-451f-8ef0-ba42209018e6.pdf [https://perma.cc/UKS2-MSRW].

3 Jonathan B. Baker, *The Case for Antitrust Enforcement*, 17 Journal of Economic Perspectives 27, 27-50 (2003).

4 The United States Department of Justice, Antitrust Laws and You, www.justice.gov/atr/antitrust-laws-and-you-0 [https://perma.cc/8XLV-YWX2].

ization, and "attempted monopolization" that would result in monopolistic markets. Despite the passing and enforcement of such laws, economists have long debated, and even opposed such measures. Economists originally opposed any amount of antitrust legislation starting from the late 1800s to the mid 1900s, viewing competition as "rivalrous activity."[5] In the 1940s, however, economists began to conventionally accept and justify the use of antitrust, with the emergence of the Industrial Organization field. Throughout the rest of the 20th century, antitrust support would waver and wane as economists like Murray Rothbard and Dominick Armentano expressed disinterest in neoclassical monopoly theory, while support continued through the 2000s to fight big tech companies and maximize consumer welfare.[6]

The Neoclassical perfect competition model provides the conventional justification for antitrust law. The perfect competition model posits a static equilibrium market state in which four main assumptions hold: (1) Perfect Information; (2) Homogenous Products; (3) Infinite Sellers; (4) Free Entry and Exit. Deviations from this model are deemed as determinants of monopoly power: single sellers of a good violate the infinite sellers' assumption, sellers

5 In the 1920s, progressive institutionalists were far more open to the use (and necessity) of antitrust laws, but mainstream support among economists did not formalize until later.

6 Caleb S. Fuller, Public Policy: Firms & Antitrust, Grove City College (Feb. 23, 2021).

with distinguished products violate the homogenous products assumption, and so forth. Monopoly power is a result of barriers to entry, including government regulation, economies of scale, and natural monopoly.[7]

Sources of monopoly power all exhibit deviations from the perfect competition model, and it is the rise of firms with monopoly power into a monopolistic market which results in inefficiency:

The difference between the outcomes in perfect competition and monopoly defines the

> [Neoclassical Price Theory] concept of efficiency. In perfect competition, the price of the product represents not only the utility that consumers derive from the good, or value, as measured by their willingness to pay, that consumers place on the good. The price also represents the cost to suppliers, the societal cost, to produce the good. The net effect is that suppliers produce goods at the lowest cost to society, and all consumers who value the good at that cost and price can purchase it. Monopoly yields inefficiency because the monopolist operates at a price above marginal cost. At that output level, allocative inefficiency results because a subset of consumers would have been willing to purchase the product at marginal cost but now must buy other products valued less highly, whether from the mo-

7 Edgar K. Browning & Mark A. Zupan, Microeconomics: Theory and Applications 331 (J. Wiley & Sons Inc. 11th ed. 2011).

nopolist or from suppliers in other markets.[8]

Neoclassical price theory asserts that the optimal level of production within perfect competition is the quantity and price where the marginal cost curve intersects with marginal revenue (price). In a monopoly market, however, firms can charge a price above their own marginal costs, which results in an inefficient outcome for society: firms charging a higher "monopoly price" while restricting output[9]. The distinction between a perfectly competitive price and a monopolistic price is what necessitates the use of antitrust: "under competitive equilibrium conditions, production occurs at the most "efficient" point in the market. In a natural monopoly, the monopolist's demand function is necessarily tilted downward, and the monopolist has total control of demand. The monopolist can charge prices higher than the marginal cost, producing a smaller amount than would be offered to the market in 'perfectly' competitive conditions."[10] Firms charging a monopoly price at a lower output thus results in deadweight loss, or in neoclassical terms, a loss in consumer welfare. Antitrust is thus neces-

8 Jay M. Strader, The Impact of Neoclassical Price Theory on Monopolization Law: A Transatlantic Perspective 13 (2015) (unpublished Ph.D. diss., University College London).

9 The monopolist cannot simply charge *any* price, as they are still constrained by the downward-sloping demand curve they are facing.

10 João F. R. Lanza, *The Myth of Natural Monopoly: The Case of Railroads*, 24 The Quarterly Journal of Austrian Economics 566, 567-568 (2021).

sary to regulate monopolistic markets to perform closer to the efficiency level possible under perfectly competitive conditions. So, "state intervention ensures efficient allocation in the market by fixing the price so that the monopolist behaves like a competitive firm, producing the 'optimal' quantity at which the marginal cost is equal to the selling price, emulating a market in 'competitive equilibrium.'"[11]

To begin the critique of neoclassical monopoly theory, it is important to recognize that the models of perfect competition and monopoly fail to resonate with economic reality. These models are no more than an abstract ideal: a timeless, theoretical model. Since the models fail to account for reality, their distinction becomes meaningless and illusory. Murray Rothbard notes that "there is no such thing as a monopoly price or competitive price on the market. There is only, the 'free-market price.'"[12] The state, therefore, has no way of knowing or distinguishing between the monopoly and perfectly competitive price to effectively engage in antitrust. In the real economy, firms do not sell homogenous goods, market participants do not have perfect information, firms do not have free entry and exit and lastly, there is no infinite number of sellers. As such, "The neoclassical habit of confusing competitive process with a final, static equilibrium condition makes for gross errors

11 *Id.*

12 1 Murray N. Rothbard, Man, Economy, and State: A Treatise on Economic Principles 614-615 (Nash Publishing 2d ed. 1970).

in economic analysis. For instance, product differentiation, advertising, price competition (including price discrimination), and innovation are rather routinely condemned as 'monopolistic' and, thus, as resource misallocating and socially undesirable."[13] Practices like advertising and product differentiation are necessary in a competitive market yet are shunned by neoclassicals. This oversight is due to their faulty view of the economy through the lens of perfect competition: "by comparing the real-world competitive process to a yardstick of perfect knowledge, one quite naturally concludes that such expenditures are wasteful. But what appears from the viewpoint of omniscience to be waste is precisely the instrument employed by the competitive process to eliminate imperfections in knowledge, imperfections that hinder market exchange."[14] The perfect competition model is therefore "a highly unrealistic model that can play little or no role in an understanding or explication of economic reality," so utilizing antitrust laws to strive for an ideal incongruent with reality is irresponsible at best and destructive at worst.[15]

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13 Dominick T. Armentano, *A Critique of Neoclassical and Austrian Monopoly Theory*, in New Directions in Austrian Economics 94, 96 (Louis M. Spadaro ed., Sheed Andrews and McMeel 1978).

14 Thomas J. DiLorenzo, *Chapter 55: Industrial Organization and the Austrian School*, in The Elgar Companion to Austrian Economics 384-387 (Peter J. Boettke ed., Edward Elgar Publishing 1994).

15 William Barnett II et al., Austrian Economics, Neoclassical Economics, Marketing, and Finance, 5 The Quarterly Journal of Austrian Economics 51, 52 (2002).

Perfect competition, however, does not account for all justification for antitrust. During the 1950s, economists shifted into the growing industrial organization field: "The theoretical foundations of antitrust policy developed generally from neoclassical microeconomics and were refined by scholars specializing in industrial organization."[16] In an attempt to "formulate empirically testable hypotheses, the industrial organization field bypassed the neoclassical notions of perfect competition or workable competition, in favor of the structure-conduct-performance paradigm."[17] The structure-conduct-performance paradigm, much like perfect competition, is an analytical tool in which neoclassical economists derive the necessity for antitrust laws. This paradigm asserts that the structure of the market will affect the conduct of the firm, which in turn determines the performance. More specifically, "The main predictions of the structure-conduct-performance paradigm are: (1) that concentration will facilitate collusion, whether tacit or explicit, and (2) that as barriers to entry rise, the optimal price-cost margin of the leading firm or firms likewise will increase."[18] Similar conclusions to the perfect competition model are found within the SCP-Paradigm model, as

16 Dominick T. Armentano, Antitrust: The Case for Repeal 13 (Ludwig von Mises Institute 2d ed. 2007).

17 Mark Glick & Eduardo M. Ochoa, *Classical and Neoclassical Elements in Industrial Organization*, 16 Eastern Economic Journal 197, 201 (1990).

18 Leonard W. Weiss, *Structure-Conduct-Performance Paradigm and Antitrust*, 127 U. Pa. L. Rev. 1104, 1105 (1979).

concentration in the market (monopoly power) leads to inefficient firm conduct and thus market performance. Yet, the SCP paradigm model is built on the same defective reasoning as perfect competition, and largely fails due to the narrow focus on the firm and market structure, similarly neglecting how real, competitive markets operate: "Unfortunately, the structure-conduct-performance paradigm cannot solve the problems industrial organization faces because it still requires implicit notions of the firm and its objectives, of markets, and of competition."[19] A proper view of competition easily disputes the analytical framework of both the SCP-paradigm and perfect competition, both of which serve as misguided tools in the justification of antitrust.

Rather than striving for an ideal through the abstract model of perfect competition or focusing narrowly on market structure and arbitrarily defined market share through the SCP-paradigm, a comprehensive analysis of antitrust laws must examine the true market competitive process. Austrian economists typically view competition:

> Not as a state of affairs, which is called "competitive equilibrium" but as a dynamic process of interacting decisions of market participants in succeeding periods of time. It is a process, because not all decisions of the market participants may have led to the expected results, as the correspondent market participants might have been either too pessimistic or too optimistic. As a result, in the succeeding peri-

19 Glick & Ochoa, *supra* note 17, at 201.

> od of time, decisions will be revised. Competition is regarded as inherently rivalrous, because each market participant must not only pay careful heed to the prospective decisions of the actors on the other side of the market, but also to the prospective decisions of actual and potential competitors.[20]

Competition is a dynamic process in a market as entrepreneurs are constantly attempting to best satisfy consumer desires to reap profits. The real economy does not exist within a static equilibrium state, but rather is a process that takes place in time, through trial and error, where losses are possible, and where firms or businesses can have "monopoly power." By viewing the market through a lens of a dynamic competitive process which accurately reflects the real world, the necessity for antitrust is dissolved as the free market provides inherent checks and balances against monopoly due to the nature of dynamic competition: "a monopolist can be at any moment outrivaled by another competitor or even by his own consumers through their substitution power."[21] For, in real, competitive markets, "Hayek argues 'the most effective size of the individual firm is as much one of the unknowns to be discovered by

20 Jürgen Wandel, *Competition and Antitrust Policy: An Austrian Economics Perspective*, 30 Progress in Economics Research 47, 49-54 (2015).

21 Look no further than Victor Keegan's (somewhat) famous article from 2007: *Will MySpace Ever Lose its Monopoly*?; Andreas Stamate, *An Economics Interpretation of Neoclassical Monopoly Theory In Light of the Austrian Schoo*l, 13 Annales Universitatis Apulensis: Series Oeconomica 549, 553 (2011).

the market process as the prices, quantities or qualities of goods to be produced and sold.'"[22]

The narrow focus of analytical tools to judge an equilibrium state through market share or monopoly power simply does not reflect real-world economic phenomena. Neoclassical models have limiting explanatory power and as such, generate potentially dangerous policy conclusions like the necessity of antitrust: "Understanding the limits of the modern neoclassical models is essential to understanding the current debate over the efficacy of antitrust law. If the potential explanatory power of these models is weak, then harnessing them to laws which usurp private property is not only counterproductive, but also exposes government power grabs for what they really are."[23] "Once one views competition as a dynamic, rivalrous process and acknowledges the importance of entrepreneurship, many of the business activities that the PC/SCP model views suspiciously as monopolistic are interpreted as essential parts of the competitive process. This is not to suggest that monopoly is not a problem, but that its origins are not likely to be the free market."[24]

Austrian economists oppose antitrust laws as "[n]ot only are they purposely vague, but they represent a clear government assault upon private property." (Anderson

22 Wandel, *supra* note 21, at 54.
23 DiLorenzo, *supra* note 14, at 387.
24 *Id.*

2000).[25] Neoclassical economists assert antitrust is necessary to correct monopolistic markets, but consequences of antitrust can often be diminished or unnoticed. The state, backed by neoclassical theory, can prosecute firms for engaging in so-called monopolistic practices: in reality, said firm is engaging in practices inherent to a dynamically competitive process. Governments are thus provided justification for breaking apart, harming, or nationalizing any firm deemed to be possessing too much "monopoly power." This ultimately leads to a decrease in innovation and efficiency, as firms engaging in traditionally competitive behavior could find themselves in an antitrust lawsuit.

R. Preston McAfee and Nicholas Vakkur highlight the failures of antitrust from the perspective of private lawsuits in their work *The Strategic Abuse of The Antitrust Laws*. McAfee and Vakkur recognize several in which private competitors can abuse antitrust laws to reduce competition and force other firms to either pay hefty fines and renumeration or engage in lengthy and costly legal battles. Inefficient companies now have an opportunity to acquire wealth through antitrust lawsuits (or slow competitors down), instead of allowing competition (through best satisfying consumers) to select winners on the market. As such, McAfee and Vakkur conclude that "As with many laws, there are serious unintended consequences of these

25 Anderson L. William, *Economics and Antitrust*, Mises Institute (May 11, 2000, 12:00 am), https://mises.org/library/economists-and-antitrust [https://perma.cc/88PR-WJNN].

laws. There are several uses of the antitrust laws that have nothing to do with promoting competition, and at least two uses whose purpose is reducing competition."[26] Antitrust thus pursues goals of consumer welfare, but ironically supports inefficient firms.[27] When markets do not align with neoclassical perception, antitrust laws cause far greater harm than protection for consumers as competitors can utilize antitrust as a weapon against other competitors, or to break up efficient and welfare-enhancing industries. In Microsoft's famous case in the 1990s, Netscape alleged that Microsoft's bundling of its Internet Explorer browser with the Windows operating system along with exclusive contracts were anticompetitive practices that would grant Microsoft a monopoly in the browser sphere (conveniently ignoring Netscape's overwhelming market share just years earlier). In *U.S. v Microsoft*, Microsoft ultimately lost and was forced to pay millions in fines and alter its business practices. Unintended consequences of antitrust predictably went unnoticed:

> Consumers are the focus of this case. Are they harmed or benefited by what Microsoft did? I think the evidence is overwhelming that the browser competition between Microsoft's Internet Explorer and Netscape Navigator has led to an incredible

26 Randolph P. McAfee & Nicholas Vakkur, *The Strategic Abuse of the Antitrust Laws,* 1 Journal of Strategic Management Education 15 (2004).

27 Robert H. Bork, *The Goals of Antitrust Policy*, 57 The American Economic Review 242 (1967).

> expansion of what we now call the "Net." We now sit in awe of the massive shift of resources in capital markets and the rush of consumers to embrace powerful new e-commerce technology. However, that shift did not create these benefits by half measures of regulated competition. This tremendous outburst of browserware was a robust, violent process of creative destruction.[28]

Netscape, an inefficient firm, was able to use antitrust as a weapon that consumed time, money, and innovation. Microsoft's true crime was evidently being too efficient at providing consumers with a product they desired: "Rather than possessing a competitive advantage over Netscape in bidding for the Internet access provider accounts, Microsoft succeeded merely because it offered them, and therefore their subscribers, a better deal."[29] Antitrust is not a win for consumers, but rather a weapon for firms to diminish competition. Rivals can effectively engage in antitrust warfare by alleging monopolistic practices and thus entering a lengthy and costly legal battle. Firms that are stuck in antitrust suits must now devote time and resources away from innovation and towards legal fees. Therefore, even a

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28 Thomas Hazlett et al., *Legal and Economic Aspects of the Microsoft Case: Antitrust and the Information Age: Prominent Scholars Explore the Issues*, 35 Business Economics 45, 47 (2000).

29 Benjamin Klein, *The Microsoft Case: What Can a Dominant Firm Do to Defend Its Market Position?*, 15 Journal of Economic Perspectives 45, 55 (2001).

win in court still costs significant damages in reputation, time, and money.

The costs of an antitrust case are also inherently difficult to measure. The legal costs of the firms to engage in battle, opportunity cost of being in court, the cost of enforcement from the U.S. government, the cost of harming efficient firms, and the cost of potential future firms who fail to innovate for fear of antitrust lawsuits all contribute to implicit and explicit cots of antitrust. Jonathan Baker, former Director of the Bureau of Economics at the Federal Trade Commission believes that the benefits to consumer welfare is far greater than the cost of antitrust enforcement: "Overall, the benefits of antitrust enforcement to consumers and social welfare—particularly in deterring the harms from anticompetitive conduct across the economy—seem likely to be far larger than what the government spends on antitrust enforcement and firms spend directly or indirectly on antitrust compliance" (Baker 2003).[30] Baker, however, along with conventional neoclassical economists, completely neglects hidden costs beyond simply pure monetary expenditure and the potential deterrent for anticompetitive conduct: "other costs of this model go unacknowledged … There is no better example to illustrate this claim than the billions of dollars that have been wasted both prosecuting and defending against antitrust lawsuits, and the vast harm supposedly antimonopolistic laws have done to the struc-

30 Baker, *supra* note 3.

ture of the economy."[31]

Lastly, while neoclassical literature recognizes that government regulation can be a source of monopoly power, the doctrine fails to fully articulate that monopoly is more accurately defined as a grant of privilege by the state.[32] In fact, "the monopoly granted by the State is not as harmless as the private one, which can develop on a free market."[33] The state can guarantee a persistent monopoly, enforceable by law, that cannot be found on the free market. The state can either provide direct benefits in the form of subsidies and bailouts, or more subtle, indirect benefits through regulation. Binding regulation reduces consumer welfare by imposing costs that benefit larger, incumbent firms. Larger firms can more easily absorb the costs of regulation, driving smaller firms out of the market, shielding larger firms from competition. In essence, state privilege (regardless of intention) grants either monopolies or quasi-monopolies. A grant of special privilege by the state imposes the exact high barriers to entry that neoclassicals warn of, yet supposedly the solution to monopolistic markets is more government intervention. Monopoly cannot originate due to dynamic competition on the unhampered market; rather, it is the direct privilege by a state that confers monopoly benefits. Economist Thomas DiLorenzo puts the final nail in the coffin for neoclassical monopoly theory as he humorously

31 Barnett II, *supra* note 15, at 59.
32 Rothbard, *supra* note 12, at 113.
33 Stamate, *supra* note 22, at 553.

explains the absurdity of neoclassical theorists in failing to recognize the true cause of monopoly:

> It is socially wasteful for an economist to spend his career seeking to uncover the extent to which price diverges from marginal cost at a point in time or spinning endless oligopoly tales. Cloistered in his windowless office, he ignores the fact that he is paying a monopolistic price for his cable TV, is forced to cater only to the US PostalService's monopoly in first-class mail, he must send his children to a monopolistic public school system, have his garbage collected by a government monopoly, pay gas, electric and water bills to other government-sponsored monopolies, pay supracompetitive prices for the services of taxi drivers, physicians, attorneys, hairdressers, undertakers and myriad other service providers because of supply-reducing occupational licensing laws, he is victimized by misguided antitrust regulation which encourages inefficient businesses to sue their more efficient rivals for cutting their prices or expanding their product lines, and he pays higher food prices caused by acreage allotments and other forms of farm protectionism.[34]

Overall, neoclassical doctrine utilizes abstract models to provide an ideal state by which real-world markets are compared to. This faulty foundation leads to the conclusion that so-called monopoly power grants firms the right to charge above their marginal costs, at a point deviating from the perfectly competitive price. Any deviation from

34 DiLorenzo, *supra* note 14, at 387-388.

the perfectly competitive price results in a loss in consumer welfare and is inefficient for society; thus, antitrust must be necessary to correct these market imbalances. This model, however, suffers terribly from the fact that the neoclassical model does not represent an accurate assessment of the economy or markets. On the contrary, a dynamic view of competition is congruent with the real economy and eliminates the necessity for antitrust by explaining that the practices considered anticompetitive or monopolistic by neoclassicals, are in fact part of the normal competitive process. Antitrust enforcement is perceived as beneficial in protecting consumers, yet consumers are largely harmed due to the exorbitant costs associated with it which ultimately reduce competition, reduce innovation, and benefit inefficient firms. Additionally, while neoclassical literature recognizes that government intervention can serve as a barrier to entry, there is widespread failure among the neoclassical school of thought to fully recognize the extent to which the state harms competition. Rather than focusing on the illusory distinction between perfectly competitive and monopoly price, neoclassical economists' effort would be better spent recognizing the state's role in monopoly through grants of privilege or antitrust itself.

DESERT JUSTICE: BEDOUIN PRIVATE LAW

Sam Branthoover

Abstract

Bedouins rarely consult government courts. For a millennium, they peacefully resolved disputes and ensured safe cooperation through private methods of dispute resolution. How can a voluntary legal system persist wherein accused parties are not forced to attend trials? Why are dozens of oaths required to introduce witnesses in arbitration? Why are superstitious ordeals routinely consulted? Whereas contemporary academics have failed to explain these practices' persistence, this paper creates a rational choice framework to answer the aforementioned questions. Bedouins' private law efficiently mediates and deters criminal activity given three constraints: the high monitoring costs of crime, low incidence of evidence, and high cost of verdict enforcement.

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1. Introduction

Bedouins are nomadic peoples living in the deserts of the Middle East. For centuries, their norms and lifestyles rendered them outcasts to surrounding societies; to this day, their nomadic practices are only surrendered upon state mandates to do so. Though often tacit, contemporary scholars and laymen alike relegate Bedouins' customs and practices to that of a backwards, primitive, or uncivilized past. The renowned explorer, Sir Wilfred Thesiger, wrote that:

> Their way of life naturally made them fatalists; so much was beyond their control. It was impossible for them to provide for a morrow when everything depended on a chance fall of rain or when raiders, sickness, or any one of a hundred chance happenings might at any time leave them destitute, or end their lives.[1]

The life Thesiger attributes to Bedouins seems nasty, brutish, and short. A frequent term one finds associated with Bedouin life is "volatile," used to summarize the harsh deserts and frequent violence.[2] Academics often denounce desert living for its violence, but this assumption is falsely founded on Bedouins' lack of government-provided protection, and ignores the host of remedies Bedouins employ to

1 Wilfred Thesiger, Arabian Sands (1st ed. 1959).

2 9 Dawn Chatty & William Young, *Culture Summary: Bedouin*, in The Encyclopedia of World Cultures: Africa and the Middle East. (Laurel L. Rose et al. eds., 1995).

enforce private property. The argument that Bedouins live in perpetual violence is devoid of reality and ignores their decision-making capabilities. It is methodically fallacious to posit that a population has lived in near-death conditions for centuries when their opportunity cost is so readily apparent.[3]

A more appropriate approach to interpreting Bedouin life starts with asking why these individuals remain in their perceivably terrible conditions. Perhaps their conditions are not truly so terrible. Though Bedouins have historically remained without government-provided law and protection, they are not without law or protection. For almost any crime, Bedouins may appeal to assessors, arbitrators, and holy men to resolve their complaints peacefully and voluntarily. Academics that recognize these methods of dispute mediation rarely consider them to be effective, but they should.

No previous literature has seriously explained how Bedouins enforce property claims without extraneous legal enforcement. This paper uses a rational-choice approach to examine how Bedouins resolve disputes and emphasizes why these practices are efficient given obstacles they face. Bedouin literature often fails to document the effects of clan relationships and reputational living, but these details

3 Peter Leeson, *Logic is a Harsh Mistress: Welfare Economics For Economists*, 16 JOURNAL OF INSTITUTIONAL ECONOMICS, 1, 1-6 (2019).

are key to the efficiency of their dispute resolutions. Bedouins' system of private law efficiently mediates and deters criminal activity, given three constraints: the high monitoring costs of crime, low incidence of evidence, and high cost of verdict enforcement.

2. An Introduction to the Bedouin Legal World

All of Bedouin legal customs depend on evidence, or lack thereof. In Western cultures, individuals are accustomed to verdicts only being decided if evidence proves one guilty beyond reasonable doubt. None can debate that an effective legal system is one that requires evidence to condemn bad actors, but if Bedouins' standard for condemning bad actors was the procurement of uncontested proof by United States' standards, hardly any criminal would ever be proven guilty. In the desert, many crimes may go easily undetected.

This issue pervades Bedouin life, and scholars have yet to understand it. Most serious crimes in the United States, for example, leave some form of hard evidence. Fibers, fingerprints, and cameras quickly come to mind, all which Bedouins lack the capacity to utilize. When witnesses are introduced in U.S. courts, they must provide first-hand or second-hand accounts, something Bedouins also lack. Moreover, citizens of the United States also generally have access to a police force, one that will respond upon request. At the least, police act as on-call witnesses—many

physical and accidental crimes are documented quickly, like assaults or fender benders. The availability of police increases the possibility of evidence being found.

Bedouins do not have police, and for good reason. It would be ridiculously expensive to have a response team available in the middle of the desert. Every group of Bedouins would need idle labor on-call to respond, not to mention a method of reaching them. Any effective police would prove too expensive because of the sheer dispersion of Bedouin peoples.

Bedouins deal with the rarity of evidence when seeking dispute resolution by consulting one of three methods of dispute mediation, according to amount of evidence: assessorships, arbitration, and ordeals. Assessors are consulted when evidence is condemning, arbitration when evidence is disputed or replaced with oaths, and ordeals when there is no evidence whatsoever. The model below explains which method is used.

Certain Evidence	No Evidence
Assessors Ordeals	Arbitration

The next three sections address each of the three methods of dispute resolution Bedouins undergo.

3. The Market for Assessors

When there is enough evidence for fault, Bedouins appeal to assessors. The reader may first ask who decides whether fault is established, or whether assessors are consulted. There is no central authority that makes these decisions, the conclusion is drawn by both accused and accuser, and by onlookers[4] alike.[5] Accusers will naturally argue that the evidence is condemning. Onlookers, usually clan members of the two parties, will also look at the evidence and form their own opinions. Though there is always an incentive for the accused to deny any charge, their reputation is on the line. If all the onlookers knew that the accused had committed the crime, then it would behoove the accused to accept the charge of guilt. If the accused were to seriously dispute an accusation known to be true, he or she would be considered an untrustworthy liar. In a society wherein reputation determines marriage, transactions, and livelihood, one does not want their reputation to be hindered. By forcing individuals' reputations to be at stake when making their case, they are incented to plead the truth, so long as the evidence is stacked against them. Therefore, it often behooves an accused party to submit under pressure, as he

4 I use this term loosely. This is not to say there are literally individuals watching a debate take place. By onlookers, I mean individuals generally living in the same area that will form opinions on accusations that affect future interactions. Onlookers' opinions matter, in that they represent the social (and often economic) cost of an outstanding accusation.

5 Austin Kennett, Bedouin Justice Laws & Customs Among the Egyptian Bedouin (1st ed. 1925); Clinton Bailey, Bedouin Law from Sinai and the Negev (2009).

or she is only adding to their punishment by holding out further.

Assessors are individuals that measure the extent to which parties are responsible for criminal charges. They assess the crime and declare what fine shall be paid. [6] Assessors are privately provided; there is no central authority that trains or approves assessors. Each clan generally has one assessor for each kind of crime that is most prevalent; for crimes not very prevalent, there are assessors in nearby clans with different specializations, or one assessor may broaden their specialty on a case-by-case basis. Intra-clan disputes are settled by clan assessors unless there is a conflict of interest, in which case a neighboring clan's assessor will step in. Inter-clan disputes are settled by a third-party clan's assessor.

Assessors are paid a fee for their services, which is attached to the fine levied on parties at fault. Assessors develop reputations for their work; some are considered better than others, and any man may attempt to become an assessor if others are willing to pay him for it. Typically, assessorship is passed down through generations, inherited from fathers; a father would train a son to take the title of assessor upon his death. This leads some to wrongly conflate assessorships with something similar to a feudal title;

6 Joseph Ginat, *Bisha'h: Trial by Fire*, 67 The Middle East Journal 141, 141-2 (2013); Kennett, *supra* note 7; Bailey, *supra* note 7.

assessorships are not some kind of divine right bestowed upon its holders.[7] This inheritance makes sense when reputation is considered—a "good" assessor that trains his son will likely train him well; thus, the son inherits the "brand" of good assessorship from his father.

Common assessorships typically include that of wounds, land disputes, cattle disputes, and petty theft.[8] Less common assessorships that would not typically appear in each clan were that of murder, rape, large-scale theft, and bride-prices. Ultimately, the idea of assessorships is not a hard one to grasp; they are consulted when there is enough evidence for both parties to accept one's fault. Bedouin legal norms become more interesting when evidence is not so straightforward.

4. Arbitration

There is often not undisputable evidence that a party has committed a crime. Assessorships are only useful insofar as they produce recommended fines. Assessors evaluate the extent to which parties are at fault, not whether they are at fault to begin with. Arbitration is a method Bedouins use to produce a *verdict*, not merely a fine.

There is always an incentive to resolve any dispute. If an accused party is innocent, they will want to clear their name dispute fault. If an accused party is actually guilty,

7 Ginat, *supra* note 9, at 141-142.

8 Kennett, *supra* note 7.

they would be asked to stand before an arbitrator only if there is not enough evidence to directly condemn the accused without assessorship. The question would naturally arise: why would a guilty party even show up? The answer to this is similar to that of assessors. Not only would accused parties ruin their reputation, but they are further solidifying their own guilt. If one appears at arbitration, there could at least be a chance that they are exonerated. Avoidance of arbitration means admitting guilt and accepting the fine.

Readers may be curious to how non-cooperative punishments are carried out, such as execution. Said readers may be surprised to learn that there are no levied punishments in Bedouin legal customs, save for fines. The only time any punishment may be levied beyond a fine is in the case of blood money, when an accused or guilty person may be killed. This is not a punishment levied by any individual person, it is only colloquially accepted when the accused or guilty individual either refuses to show up for arbitration, or refuses to pay a fine. Whether an accuser is justified in slaying the accused is an art, rather than a science; the action is generally only justified for serious crimes, such as murder. For example, if person (x) murdered person (y) and did not show up to the arbitrator's trial, it would be colloquially acceptable for person (y)'s family to strike down person (x) to take retribution. However, if person (x) merely stole a cheap slice of flourless

chocolate cake, it would not be colloquially accepted for person (y) to strike down person (x) if they declined to pay a fine or show up for arbitration. There are documented cases wherein clans seek compensation for an unjust killing for blood money; ironically, some of these cases result in retribution murders when the fines levied are not paid.[9] This, however, does not happen often.

Further, if two parties do not reconcile, they both lose. It cannot be exaggerated how important securing the commitment of one's neighbors is for mere survival in Bedouin society. If two clans shun each other, their division of labor decreases significantly; they are both worse off. The lack of trade impoverishes both sides and incents both to resolve the conflict. Additionally, each clan must also worry about the threat of violence that the other clan imposes. If each clan derives benefit from trading with the other, both are incented against common aggression. Without trading partners, productive capacity diminishes, uncertainty abounds, and poverty grows. Economists Colin Harris and Adam Kaiser, among many others, have literature describing how important dispute resolution was for these very reasons in history; often, peoples would rather burn or bury goods to merely avoid conflicting interests.[10] The incentive to resolve conflicts is natural and ever-present not only

9 KENNETT, *supra* note 7.

10 Colin Harris & Adam Kaiser, *Burying the Hatchet*, 130 THE POLITICAL ECONOMY OF CONFLICT AND INSTITUTIONS, 1025, 1025-1044 (2020).

in Bedouin society, but in any group that lacks assertive, extraneous legal enforcement.

As aforementioned, arbitration is used when evidence is lacking. Many cases revolve around witnesses that provide no credible proof by Western society's standards, such as rumors and accusations. Kennett noted that if "hearsay evidence were ruled out as inadmissible… many cases would never be completed."[11] These cases are decided by what the witnesses offer, yet they frequently give only *third-hand* accounts.[12] First-hand accounts are when a witness observes the accused committing a crime; second-hand accounts are seeing evidence connecting the accused to a crime. Third-hand evidence is when a witness saw neither a condemning act, nor anything directly connecting the accused to the crime; in other words, usually hearsay and rumors. For this reason, many governments consider Bedouin courts to be fraught with false verdicts, and many scholars mistakenly interpret this the same way.[13] However, the witnesses are providing valuable information. This is because of the process by which witnesses are introduced.

In Bedouin courts, oaths must be given to introduce witnesses. The number of oaths required is dependent on the severity of the crime. Evidence suggests that the

11 Kennett, *supra* note 7.

12 Frank Stewart, Customary Law Among the Bedouin of the Middle East and North Africa (2005); Kennett, *supra* note 7; Bailey, *supra* note 7.

13 Ginat, *supra* note 9, at 141-142.

number of oaths for various crimes is consistent, but those numbers are not recorded extensively. The explorer and (posthumously deemed) sociologist Austin Kennett witnessed a Bedouin murder trial in which sixty oaths were required to introduce a witness. At first glance, it is hard to imagine why this practice persists; indeed, many scholars and government officials also neglect this practice as it does not appear to have much meaning. Leeson, however, found a similar phenomenon in ecclesiastical courts of Medieval Europe. He wrote that:

> Oath swearing had limited usefulness. Certain defendants' oaths were unacceptable, such as those of unfree persons, who composed much of the medieval population. Foreigners, persons who perjured themselves, those who had failed in a legal contest, and those with tarnished reputations also had unacceptable oaths. In cases in which oath helping was used, defendants' inability to produce the requisite number of compurgators created a similar problem.[14]

Leeson does not provide an explanation for the oaths he found, only that they were often used to find evidence. Leeson's paper concerned ordeals and did not explain the mechanism by which oaths produced actual evidence. Many explanations of oath-taking phenomena interpret the trusting of oaths as some kind of superstition; because of religion, people were merely tricked into be-

14 Peter Leeson, *Ordeals*, 55 Journal of Law and Economics, 691, 691-714 (2012).

lieving oaths.[15] This does not seem to be the case. If oaths did not produce actionable evidence, then arbitrators would not solicit them. Further, the oaths must have been more costly than merely saying words. Contemporary interpreters have largely misunderstood oaths because they do not understand that oaths *were indeed* more costly than just saying words. Oaths were putting one's reputation on the line; this paper has already discussed the heavy cost of tarnishing one's reputation in a society wherein all transactions are predicated on one's reputation. By requiring oaths, arbitrators are taking advantage of localized knowledge. In the wake of little to no hard evidence, Bedouins put their reputations on the line to secure a kinsman's innocence.

This process produces *accurate* verdicts, because the process of oath-taking is an entrepreneurial venture wherein oath-takers only profit if their oaths are correct. The standard oath-taker will only swear if they expect the likelihood of their oath being correct to be exceedingly high. Since oath-takers are always kinsman of the party introducing a witness, arbitrators are using the intimate knowledge kinsman have of each other to determine whether a party is being truthful in their assertions. Therefore, the process of requiring oaths is, in itself, the "evidence" that is brought forward. The testimony witnesses give is not evidence because they are convincing in of themselves, they are convincing because potentially dozens of individuals

15 KENNETT, *supra* note 7.

staked their reputation on it being true. The demographic of oath-takers is also telling: they are always men. The fact that women are never oath-takers is representative of their role in the society; women do not have their own reputations but are extensions of their husbands or fathers. Women's and outsiders' absence from oath-taking tells us two things: reputation and localized knowledge are required for oaths. Women's absence from oath-taking is not indicative of Bedouins' irrationality in the practice, but further suggests that oath-taking is a method of procuring evidence from the localized knowledge of family members.

A question then arises: what is the point of witnesses at all? Why not merely require oaths regardless of witnesses? For one, it requires oath-takers to remain consistent and, above all, *precise* in what they are swearing. If one were to merely swear to the truthfulness of an accusation or defense, then when their testimony later proves untrue, they could easily claim some form of vague truth in what they personally meant in swearing an oath.

Perhaps more convincingly, it seems that witnesses were more akin to lawyers than witnesses. For one, witnesses were paid; further, they were usually the older and wiser men of each party's clan.[16] In introducing a witness to a Bedouin court, one is introducing a wise man to argue the case on your behalf. Witnesses' payment is indicative of this, as they are the only person in court (other than the

16 STEWART, *supra* note 17; KENNETT, *supra* note 7.

arbitrator) to be *paid* for their time; why not compensate all the oath-takers? The witnesses are paid because they provide an actual service.

Arbitrators in this process are essentially highly specialized assessors. Assessors usually do not make a living of assessing, whereas arbitrators do. Arbitrators compete with each other on the grounds of fairness and accurateness. They are paid by the accusing party, and if the defendant is found guilty, they are required to pay the fine. To ensure compliance with verdicts, both parties are required to pay the maximum fine possible before the trial begins; then, the winner of the trial is refunded.

To ensure financial recompense, entire clans are held accountable for fines. Many authors interpret this to mean that Bedouins are a collectivist society, because clans are so often held accountable for individuals' actions. This is a bad explanation, and one that lacks methodological individualism. There is no abstract ideal of collectivism that persuades or pressures Bedouins into thinking of their kin more than themselves; in fact, it is rational to do so. One's clan is one's brand name; it is the mechanism by which others may assess one's trustworthiness. A well-known clan with a good reputation may give its members more benefits in trading, as any trading partner knows that the other's clan will be held financially responsible if the trade was intentionally or accidentally rigged against him. If a clan is

known to not cover debts of its members, then individuals will be more averse to trading with them. It behooves clan members to maintain their brand name by ensuring that debts are paid, even if they individually were not liable for debts. Some authors have tried to describe similar phenomena; Posner posits that clans exist to provide insurance for members.[17] While covering debts is not something Posner explicitly mentions, it stands to reason that clans act as vessels for insurance when individual members cannot afford expenses, such as fines. Without this insurance, they may be killed by the party owed money, as aforementioned. In sum, clan responsibility ensures verdict enforcement without using centralized force of any kind.

5. Ordeals

When absolutely no evidence is available, Bedouins resort to a ritual wherein the accused must undergo an ordeal to prove his or her innocence. The most common ordeal for the past few centuries has been the *bisha'h*. To undergo the bisha'h, one must lick a spoon which has sat on red hot coals for an indiscernible amount of time. The ordeal is conducted by a *mubasha*, an individual that has a form of magic holiness about him which is inherited by a son upon passing. As mubashas are described in primary sources, they similarly compete with other mubashas just

17 Richard Posner, *A Theory of Primitive Society, With Special Reference to Law*, 23 Journal of Law and Economics 1, 1-51 (1980).

as assessors and arbitrators do.[18] The only difference is that a mubasha cannot be a random person. A mubasha must come from a line of mubashas because superstition asserts that only special people can invoke Allah to intercede on behalf of the defendant.

The trial by ordeal begins when the defendant agrees to the accuser's request. The key to ordeals, just as other Bedouin legal customs, is that it be voluntary. Ordeals are unlike assessments and arbitrations in that there is little at stake upon refusal; since there is never evidence in cases surrounding ordeals, there is never much social pressure nor much threat of being killed. If a case is brought to a mubasha, the only incentive a defendant may have is in marginally clearing one's name and, more importantly, restoring relations with the clan of the accuser.

Once both parties embark upon a visit to the mubasha, they spend an entire day at the mubasha's residence. The mubasha speaks with both parties individually, together, and individually once more. The goal of the mubasha is to broker a settlement before the ritual need be consulted. If no compromise can be reached, then the ordeal begins. While the spoon sits atop the coals, the mubasha prays. Then the spoon is removed, water is splashed on it to emphasize its heat (it will sizzle and steam), and the accused must lick the spoon three times. Then five minutes pass; this is the time in which Allah intervenes on behalf of the

18 KENNETT, *supra* note 7; Ginat, *supra* note 9, at 141-142.

accused if they are innocent. If his or her tongue is deemed unscathed after the time is up, they are innocent.

As with most ordeals, this one seems asinine. However, there is already extensive literature explaining how superstitions yield positive results. Leeson explains of European ordeals that they create a separating equilibrium, in which usually only innocent individuals will undergo the ordeal to begin with.[19] Holding that all participants truly believe that Allah intervenes, only an innocent individual will have faith that they will come out not only innocent, but also safe. A fire-scorched tongue sounds as bad as it is. This explains why most ordeals result exoneration; Leeson found that most medieval European ordeals resulted in exoneration. Similarly, Bedouin ordeals have an 80-90% exoneration rate.[20]

There are a few fundamental premises to Leeson's argument. The first being that ordeals are voluntary; Bedouin ordeals were certainly that. The second premise being

19 Leeson, *supra* note 21.

20 Ginat, *supra* note 9, at 141-142; the listed exoneration rate is around 83%; however, unlike Leeson's European ordeals, multiple people may be tried at once in Bedouin ordeals. If one person is found guilty, all of the accused are found guilty, regardless of their tongues. While Ginat includes these guilty verdicts for his 83% figure, I argue that the norm of holding all individuals responsible largely persists because usually clan members are tried together. Since clans are always held financially and reputationally responsible for fines, it makes sense that they would be considered "guilty", but that does not mean they are literally at fault for the crime. If the figure is adjusted for this, the real exoneration rate is around 92%.

that the administrator of the ordeal has opportunities to rig the ordeal for or against undertakers; this is also true of Bedouin ordeals, as mubashas control how much water cools down the spoons, how long the spoons are off the coals, and how long the spoons touch tongues. A third premise of Leeson's argument is that ordeals be used when there is no evidence. As he wrote:

> Since evidence was absent for crimes involving unobservable acts or states of mind, ordeals were often used to try accusations of magic, idolatry, and heresy. Other crimes unlikely to produce evidence that often used ordeals include incest and adultery.[21]

This final point about evidence is important for Leeson's entire argument because if there truly was any hard evidence, it would be wholly more effective to go off of that. This is because ordeals must be limited in use; if they are used too often, then they may be proven wrong more frequently, which disrupts the separating equilibrium because individuals will lose faith. Bedouin ordeals superficially appear as if they do not follow Leeson's rule of evidence not being present, because it appears that many Bedouin disputes do not have hard evidence, yet not all evidence-less disputes are brought to ordeals. If one considers oaths to be evidence, as the last section explains them to be, then it becomes clear that ordeals are truly only used when there is no evidence. Bedouin ordeals are only consulted *when no oaths are taken*. A rule that every mubasha is incredibly

21 Leeson, *supra* note 21.

strict with, is that if *any* oath is taken whatsoever, there cannot be any ordeal.[22] Oaths are mutually exclusive with Bedouin ordeals. This only makes sense if one considers oaths as evidence; with this point in mind, Leeson's premises succeed in explaining Bedouin ordeals' accuracy.

7. Conclusion

Bedouin legal practices, properly understood, have important implications. The first: that criminal behavior can be aptly constrained regardless of whether government is present to enforce court attendance and verdict enforcement. As outlined, Bedouin culture possesses mechanisms of cooperatively addressing these issues. The Bedouin case also illuminates how clan responsibility can be individually incentivized, and not the result of abstract collectivist ideals. We further learn that Bedouins' oaths can be evidence when the reputations of oath-takers are meaningful and at stake. Examination of sources also indicates that Bedouin ordeals fit Leeson's framework for ordeals, suggesting that Bedouins' employment of trial by ordeals is an accurate method of assessing guilt and innocence.

Ultimately, this paper contributes to literature surrounding private governance, superstition, and cultural norms, and provides a living example of a society that lives safely and peacefully without government courts. David Friedman notably wrote about a similar Icelandic society,

22 Ginat, *supra* note 9, at 141-142; Kennett, *supra* note 7.

but his example only existed for three-hundred years and ended eight-hundred years ago.[23] Bedouins continue these practices today and have persisted in them for hundreds of years. They are an amazing example of the organization markets can achieve without any centralized authority. Though they are often considered backwards and uncivilized, they live in order and trust. Contemporary scholars and laymen alike must consider that age-old traditions may be rooted in wisdom, and that safe governance can be achieved without government.

23 David Friedman, *Private Creation and Enforcement of Law: A Historical Case*, 8 Journal of Legal Studies 399, 399-415 (1979).