UNACCEPTABLE IN ANY ERA: THE UNUSUAL AND UNCONSTITUTIONAL EFFORT TO CRIMINALIZE SLEEPING WHILE HOMELESS

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ABSTRACT

Grants Pass, Oregon, effectively made it a crime for some of its homeless residents to sleep—a universal and unavoidable biological necessity. In a 2024 decision, the Supreme Court held that the Eighth Amendment's Cruel and Unusual Punishments Clause posed no obstacle to this law, but it emphasized that other constitutional provisions could place important limits on how cities treat their homeless residents.

This Article argues that modern laws criminalizing sleeping—especially when no shelter is available—represent an unprecedented and unconstitutional departure from centuries of American legal

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tradition. Tracing the evolution of vagrancy, poor relief, and settlement laws from the Statute of Labourers through Reconstruction and the twentieth-century, this Article demonstrates that earlier responses to poverty—however punitive and abhorrent—neither criminalized the universal, involuntary acts necessary for human survival, nor banished settled residents from their own communities. The law upheld in City of Grants Pass v. Johnson *breaks sharply from this history by penalizing unavoidable biological conduct and, in effect, exiling residents experiencing homelessness.*

The Article contends that such laws are inconsistent with foundational principles of criminal law requiring some measure of volition and prohibiting punishment of a person for simply existing. Making it a crime for a person to sleep within a city represents a radical departure from American history and poses a serious threat to the liberties that Americans have long enjoyed.

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INTRODUCTION

The Supreme Court's decision in *City of Grants Pass v. Johnson* is "an act of erasure."[1] Not only did the Court erase some of our nation's most vulnerable people from the protection of a vital constitutional right, but it also "eras[ed] the history of vagrancy law."[2] Unacknowledged by the majority decision, the antisleeping law upheld in *Grants Pass* is a radical departure from history. For the first time in history, the Supreme Court has said that cities can punish sleeping without running afoul of the Constitution's prohibition on cruel and unusual punishments.

In *Grants Pass*, a majority of the Supreme Court held that criminalizing the act of sleeping outside, when a person has nowhere else to go, did not violate the Eighth Amendment's Cruel and Unusual Punishments Clause.[3] In doing so, the majority refused to apply its prior holding from *Robinson v. California*, which involved a California law that outlawed "be[ing] addicted to the use of narcotics," that status-based punishment is cruel and unusual.[4] In the majority's view, the Grants Pass ordinances punished conduct, not mere status like the law at issue in *Robinson*,[5] even though the "conduct" targeted by the Grants Pass ordinances was not only a universal "biological necessity"[6] but also status-defining[7]: "The status of being homeless (lacking available shelter) is defined by the very behavior singled out for punishment (sleeping outside)."[8]

1. Risa Goluboff & Richard Schragger, Grants Pass *and the Vagrancy Revolution Revisited*, 2024 SUP. CT. REV. 191, 205.

2. *Id.* at 194.

3. *See* City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2215-20, 2226 (2024).

4. 370 U.S. 660, 662, 667 (1962).

5. *Grants Pass*, 144 S. Ct. at 2218 (citing *Robinson*, 370 U.S. at 664, 666, 689).

6. *Id.* at 2228, 2236 (Sotomayor, J., dissenting).

7. *Id.* at 2228, 2234-38.

8. *Id.* at 2234. To be sure, "the majority seem[ed] to agree that an ordinance that fined and jailed 'homeless' people would be unconstitutional." *Id.* at 2237-38 (citing *id.* at 2218 (majority opinion) (disclaiming that the city's ordinances "criminalize mere status" within the meaning of *Robinson*)). But, of course, governments are unlikely to do so explicitly—particularly now that the Supreme Court has blessed, at least under the Eighth Amendment's Cruel and Unusual Punishments Clause, laws that "effectively criminalize being homeless" by "singl[ing] out for punishment the activities that define the status of being homeless." *Id.* at 2235, 2241 (Sotomayor, J., dissenting).

What could be more cruel or unusual than punishing sleeping—a biological imperative shared by every human being as a necessary part of their very humanity?

The *Grants Pass* decision was wrong on a historic scale. The Court ignored the lessons of history and authorized an unprecedented and extreme law that makes it illegal for an entire category of people to live within their city. For centuries, poor people and other politically unpopular groups have been regulated and provided for under a system of vagrancy and poor relief laws that were often draconian and cruel, but none went so far as to ban a resident from falling asleep.[9] And these laws relied on outdated notions that have been rejected by developments in constitutional law—notably, the Thirteenth and Fourteenth Amendments.[10] The Court's decision mentions none of this.

Grants Pass will have profound implications for how courts scrutinize the substance of criminal laws under the Eighth Amendment and for how governments around the country respond to the homelessness crisis and treat some of the most vulnerable in our society.[11] Nevertheless, *Grants Pass* does not foreclose other avenues of potential relief from laws that criminalize people experiencing homelessness. Both the majority and dissenting opinions stress that other "substantive legal protections and provisions of the Constitution may have important roles to play when States and cities seek to enforce their laws against the homeless."[12] Among those

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9. *See* Risa L. Goluboff & Adam Sorensen, *United States Vagrancy Laws*, OXFORD RSCH. ENCYCS.: AM. HIST. 2 (2018), https://oxfordre.com/americanhistory/display/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-259 [https://perma.cc/2UFC-BA45].

10. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968).

11. *See* Joseph Mead, Keynote, *Going Forward After* Grants Pass, 67 WM. & MARY L. REV. 911 (2026); *see also One Year Since* Grants Pass: *Tracking the Criminalization of Homelessness*, ACLU (Feb. 4, 2026), https://www.aclu.org/one-year-since-grants-pass-tracking-the-criminalization-of-homelessness [https://perma.cc/CSS5-Z4N5] ("[Since *Grants Pass* was decided,] cities across the country have introduced over 320 bills criminalizing unhoused people, nearly 220 of which have passed. Under these ordinances, unhoused people could be saddled with thousands of dollars in fines and even jail time for sleeping outside, even if there are no shelter beds or housing options."); *1 Year Since* Grants Pass*: Increase in Laws That Make It a Crime To Be Homeless Sparks Increased Support for Housing, Not Handcuffs*, NAT'L HOMELESSNESS L. CTR. 1 (May 2025), https://housingnothandcuffs.org/wp-content/uploads/2025/06/Cicero-Homeless-Criminalization-Summary-May-2025.pdf [https://perma.cc/DB4V-K5SE] ("Over the past year, at least 57 state-level bills that make it a crime to be homeless were introduced across 17 states.... 8 have passed and 4 remain pending.").

12. *Grants Pass*, 144 S. Ct. at 2224; *id.* at 2241.

protections are those afforded by the Due Process Clauses of the Fifth and Fourteenth Amendments, which, among other things, "ensure that officials may not displace certain rules associated with criminal liability that are 'so old and venerable,' "'so rooted in the traditions and conscience of our people[,] as to be ranked as fundamental.'""[13] And in *Grants Pass*, all of the Justices agreed that *Robinson* "made some sense" as a due process case, because the Court's "due process jurisprudence has long taken guidance from the 'settled usage[s] ... in England and in this country,'" and "historically, crimes in England and this country have usually required proof of some act (or actus reus) undertaken with some measure of volition (mens rea)," neither of which were required by the law challenged in *Robinson*.[14]

To be sure, substantive due process claims are notoriously difficult to successfully argue, especially when analyzed through the lens of history and tradition.[15] Thus, the Court's mere recognition of viable alternative theories at the expense of the Eighth Amendment should not be lauded as any sort of real victory. But as litigators and advocates for people experiencing homelessness, we must navigate what remains after *Grants Pass* and chart a new path forward. In that spirit, this Article will explain how laws that criminalize a person's mere existence are inconsistent with our nation's history and tradition.[16]

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13. *Id.* at 2215 (alteration in original) (quoting Kahler v. Kansas, 589 U.S. 271, 279 (2020)).

14. *Id.* at 2217 (alteration in original) (quoting Hurtado v. California, 110 U.S. 516, 528 (1884)).

15. *See* Leah M. Litman, *The New Substantive Due Process*, 103 TEX. L. REV. 565, 567 (2025) (noting that the Court's recent decisions have raised the question of the viability of substantive due process claims).

16. Two caveats are important to note at the outset. First, there are very good reasons to push back against the history-and-tradition standard whenever possible. *See generally* MADIBA K. DENNIE, THE ORIGINALISM TRAP: HOW EXTREMISTS STOLE THE CONSTITUTION AND HOW WE THE PEOPLE CAN TAKE IT BACK (2024) (detailing the consequences of originalist standards). But because this standard was explicitly cited by the Court in *Grants Pass* in acknowledging possible future claims, 144 S. Ct. at 2221, this Article endeavors to explain why ordinances like those passed in Grants Pass fail even this more stringent standard. Second, and relatedly, the authors recognize that "[t]he targeted exclusion of specific marginalized groups ... is much older than modern efforts" to criminalize homelessness, JAVIER ORTIZ & MATTHEW DICK, HOMELESS RTS. ADVOC. PROJECT, THE WRONG SIDE OF HISTORY: A COMPARISON OF MODERN AND HISTORICAL CRIMINALIZATION LAWS 1 (Sara K. Rankin ed., 2015), https://digitalcommons.law.seattleu.edu/hrap/7/ [https://perma.cc/5WFS-

This Article proceeds in five parts. In Part I, we start with a brief note on methodology, explaining why we are conducting a historical analysis of vagrancy laws and defining the scope of what we are trying to accomplish. Part II will then survey the development of vagrancy and related antipoor laws through the centuries. The poor laws of centuries ago provided aid to residents who needed it while imposing requirements that people who were able to work did so.[17] After the Civil War, these laws were later deployed against formerly enslaved people and were an explicit target of the drafters of the Fourteenth Amendment.[18]

For most of the last century, courts invalidated vagrancy laws as inconsistent with the U.S. constitutional order.[19] As we explain in Part III, those laws were abhorrent in many ways, but even they did not go so far as to make it a crime for a resident of a community to simply exist. Punishing homeless people for resting or sleeping outside when they cannot afford or access shelter is thus a departure from the weight of history. In light of this history, Part IV will argue that imposing liability for existing is inconsistent with other basic constitutional principles, namely due process, which requires some measure of volition in order to impose punishment. Making an unavoidable, inherent biological act a crime is an extraordinary measure without historical foundation. And to make it a crime for a person to be human essentially banishes that person from the jurisdiction, another affront to our nation's legal tradition.[20] Finally, we conclude in Part V by observing that *Grants Pass* serves as one more datum in the growing mountain of evidence that the Court's use of history is selective and malleable. The Court failed to heed

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B3J5], and we are cognizant of the dangers of whitewashing history. It is our belief, however, that the arguments advanced in this Article do not require advocates to defend our country's historic cruelty towards the homeless community and other marginalized groups. We believe advocates can acknowledge that shameful history while also arguing that laws like those at issue in *Grants Pass* are even worse in a key respect and thus a departure from history.

17. *See infra* Parts II.B.1-2.

18. *See infra* Parts II.C-D.

19. *See infra* Part II.E.

20. *See Grants Pass*, 144 S. Ct. at 2243 (Sotomayor, J., dissenting) (citing banishment—"a measure that is now generally recognized as contrary to our Nation's legal tradition"—among the "other legal issues" that might be implicated by the laws in Grants Pass (quoting Brief for United States as Amicus Curiae in Support of Neither Party at 21, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175) (2024)).

the lessons of history in *Grants Pass*, and we are all the poorer for it.

I. A BRIEF NOTE ON METHODOLOGY

We recognize that "history is more than looking at select old things."[21] In writing about the past, historians "us[e] methods and tools they've developed over time to make statements that are reliable," and "[t]o do their job well, [they] must acknowledge the complexity of the past and the importance of context for making sense of things, among many other considerations."[22] Moreover, we recognize that "even under ideal conditions, historical evidence will often fail to provide clear answers to difficult questions."[23] Not only are historical materials often "too incomplete to support authoritative conclusions,"[24] but "even historical experts may reach conflicting conclusions based on the same sources."[25] For these reasons (among many others),[26] we doubt that "law-office history"[27] should drive the inquiry into the constitutional rights we possess today.

But in light of recent decisions from the Supreme Court, we are often forced to operate within a historical framework. To that end, we have done our best to represent the historical trends discussed

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21. Alexander Keyssar & Thomas Wolf, *This Supreme Court's 'Originalism' Doesn't Have Much to Do with History*, NEWSWEEK (Oct. 3, 2023, at 11:08 ET), https://www.newsweek.com/this-supreme-courts-originalism-doesnt-have-much-do-history-opinion-1831789 [https://perma.cc/ND2N-TBJT]. A full discussion of the criticisms (and defenses) of historical methodologies is beyond the scope of this Article. For more on this topic, see generally Jack M. Balkin, *Lawyers and Historians Argue About the Constitution*, 35 CONST. COMMENT. 345 (2020).

22. Keyssar & Wolf, *supra* note 21.

23. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2180 (2022) (Breyer, J., dissenting).

24. ERWIN CHEMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM 53 (2022).

25. *Bruen*, 142 S. Ct. at 2180 (Breyer, J., dissenting).

26. *See* DENNIE, *supra* note 16, at 5 ("[I]ronically enough, historical evidence suggests the Framers themselves did not want generations of Americans to be bound to their view of the document."); *infra* Part V; United States v. Bullock, 679 F. Supp. 3d 501, 507 (S.D. Miss. 2023) ("Judges are not historians. We were not trained as historians. We practiced law, not history."), *rev'd*, 123 F.4th 183 (5th Cir. 2024).

27. History professor Alfred Kelly coined "law-office history" sixty years ago. *See* Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 n.13.

in this Article by looking to the laws that existed during particular periods and cataloguing what others have said about them.

With these caveats in mind, our methodological approach to this Article is driven by the modes of historical inquiry that are common in American courts today. First and foremost, our assertions of "history" are focused on how the *written law* has evolved, so we base our argument on legal authorities—statutes on the books, judicial precedent of appellate courts, and contemporaneous legal commentary. We acknowledge that the law on the books often looks very different in application.[28] That is true today, and, we suspect, even truer in the past. Second, we recognize that context matters, but deep context for centuries of history across multiple countries is beyond the scope of a library of books, much less a single article. Thus, when possible, we attempt to supplement our discussion of legal history with insights from historians that we believe are relevant, but caution the reader that this story is incomplete. Despite these caveats, we believe that the history of written law that we put forward here is consistent with the methodology that governs constitutional decision-making in United States courts, for better or for worse.

II. VAGRANCY LAWS, THEN AND NOW

A. English Origins of Vagrancy Laws

Grants Pass's City Council described the law upheld by the Supreme Court as a response to its "current vagrancy problem[ ],"[29] and it is important to situate the law in the history of legal responses to poverty throughout American (and English) history.

The history of vagrancy laws typically starts with the Statute of Labourers of 1349.[30] One-third of England's working population had

28. Indeed, the available evidence suggests that the laws discussed in this Article were routinely under- or unenforced. *See, e.g.*, James W. Ely, Jr., *Poor Laws of the Post-Revolutionary South, 1776-1800*, 21 TULSA L.J. 1, 17-18 (1985).

29. City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2234 (2024) (Sotomayor, J., dissenting) (quoting Joint Appendix at *112, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175), 2024 WL 969510).

30. The plague prevented Parliament from meeting in 1349, so the edict was first adopted by the King alone. C.J. RIBTON-TURNER, A HISTORY OF VAGRANTS AND VAGRANCY AND

been killed by the Bubonic Plague the previous year,[31] leaving landowners desperate for labor.[32] At the same time, the decline of feudalism and transformation of the English economy severed the dependence of serf laborers on their feudal lords.[33] With greater demand for their services, and employers competing over their services, the workers had a newfound ability to bargain for their wages.[34]

This was unacceptable to landowners.[35] Vagrancy laws were created as the solution "to provide the powerful landowners with a ready supply of cheap labor."[36] The Statute of Labourers' preamble made this explicit.[37] Under the statute, "every able-bodied person without other means of support was required to work for wages fixed at the level preceding the Black Death; it was unlawful to accept more, or to refuse an offer of work," or to move to another community in hope of higher wages or better working conditions.[38]

To accomplish its antilabor goals, the statute (and the various refinements over the following centuries) contained four major elements: (1) compelled labor and maximum-wage rules; (2) restrictions on willful idleness—that is, refusing to work when able to do so; (3) providing poor relief to those deemed in need and worthy of it; and (4) a settlement system that restricted movement away from one's home parish and tied both economic and poor relief

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BEGGARS AND BEGGING 43 (London, Chapman & Hall Ltd. 1887).

31. *See* John Hatcher, *England in the Aftermath of the Black Death*, 144 PAST & PRESENT 3, 10 (1994).

32. *See* William P. Quigley, *Five Hundred Years of English Poor Laws, 1349-1834: Regulating the Working and Nonworking Poor*, 30 AKRON L. REV. 73, 83 (1996).

33. *See id.* at 75-77.

34. *See id.* at 83.

35. *See* Hatcher, *supra* note 31, at 10 ("Employers had a vested interest in keeping wages down, and landlords fought to stop the erosion of the incomes which they derived from their tenantry and of the control which they exercised over their lives.").

36. William J. Chambliss, *A Sociological Analysis of the Law of Vagrancy*, 12 SOC. PROBS. 67, 77 (1964).

37. Statute of Labourers 1349, 23 Edw. 3 c. 1, pmbl. (Eng.) ("Because a great Part of the People, and especially of Workmen and Servants, late died of the Pestilence, many seeing the Necessity of Masters, and great Scarcity of Servants, will not serve unless they may receive excessive Wages, and some rather willing to beg in Idleness, than by Labour to get their Living.").

38. Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 615 (1956).

opportunities to that parish.[39] These elements worked in tandem, forcing those able to work to work for artificially low wages,[40] while also providing assistance to those in the community who were unable to work.[41]

The Statute of Labourers was responding to an acute crisis beyond modern comprehension. But long after the Bubonic Plague and feudalism became a distant memory, the Statute of Labourers and its progeny have maintained a stubborn grip on policymaking, with echoes of the same logic being repeated today.[42]

1. Compulsory Labor and Wage Regulation

The Statute of Labourers imposed several draconian provisions on England's newly decimated workforce, including "compulsory work; reduced compensation and control of wages; [and] imprisonment as penalty for quitting work before the term ended."[43]

First, the Statute of Labourers decreed that "every Man and Woman of our Realm of England, of what[ever] condition he be, free or bond, able in body, and within the age of [sixty] years" was required to labor.[44] A person who was found without an appropriate occupation would be placed into compulsory service.[45]

Second, responding to what landowners decried as "excessive wages," the Statute of Labourers prohibited laborers from asking for or accepting wages beyond what they had received in prior years.[46] The following year, Parliament strengthened the law by prescribing

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39. *See* Ledwith v. Roberts [1937] 1 KB 232 at 271-72 (Eng.).

40. Some data suggests the effort to depress wages largely worked (except in London). *See* Hatcher, *supra* note 31, at 7.

41. *See Ledwith*, 1 KB at 271.

42. *See* William P. Quigley, *Backwards into the Future: How Welfare Changes in the Millenium Resemble English Poor Law of the Middle Ages*, 9 STAN. L. & POL'Y REV. 101, 101 (1998); Quigley, *supra* note 32, at 126-27; Larry Catá Backer, *Medieval Poor Law in Twentieth Century America: Looking Back Towards a General Theory of Modern American Poor Relief*, 44 CASE W. RSRV. L. REV. 871, 939 (1995).

43. Quigley, *supra* note 32, at 85.

44. Statute of Labourers 1349, 23 Edw. 3 c. 1, § 1 (Eng.).

45. *Id.*

46. *Id.* at pmbl., § 1 ("[H]e shall ... take only the Wages, Livery, Meed, or Salary, which were accustomed to be given in the places where he oweth to serve [in] the [twentieth] year of our Reign of England, or five or six other common years next before.").

a maximum wage that workers could receive.[47] The Statute further prohibited anyone from departing from their employment before the end of the "Term agreed" without permission or reasonable cause, on pain of imprisonment for both the departing employee and their new employer.[48]

The assumption underlying the Statute of Labourers and its progeny was that work was readily available, and those who refused to work were doing so willfully and harming the community.[49] The framework of the Statute of Labourers would remain remarkably durable over the following centuries, although it evolved through time. Starting with the Statute of Labourers, all "able-bodied males and unmarried females were required to labor for at least twelve hours per day in order to provide for their needs."[50] And to ensure that workers had no choice but to work on whatever terms they were offered, the law forbade various forms of idleness or alternative means of survival by those perceived as being able to work.[51]

2. Ban on Idleness

To further ensure that there was no option for workers but to labor for a local landowner on whatever terms he may offer, the Statute of Labourers prohibited providing aid to able-bodied "[valiant] Beggars," who "as long as they may live of begging, do refuse to labour, giving themselves to Idleness and Vice," thereby ensuring that such beggars "may be compelled to labour for their necessary Living."[52] The statute addressed only able-bodied beggars, known as sturdy beggars;[53] it did not target begging by those unable to work.[54]

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47. *See* Quigley, *supra* note 32, at 88.
48. Statute of Labourers 1349, 23 Edw. 3 c. 1, § 2 (Eng.).
49. *See* Quigley, *supra* note 32, at 87.
50. Backer, *supra* note 42, at 955.
51. *See* Quigley, *supra* note 32, at 92.
52. Statute of Labourers 1349, 23 Edw. 3 c. 1, § 7 (Eng.) (alteration in original).
53. A sturdy beggar was not simply anyone who solicited alms, but was "an able-bodied man begging without cause, and often with violence." *Sturdy Beggar*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/beggar_n?tab=meaning_and_use [https://perma.cc/DQ76-2LGA].
54. Quigley, *supra* note 32, at 87-88.

Prior to the Statute of Labourers, seeking and giving alms was apparently widely tolerated and driven by biblical teachings.[55] Although the statute curtailed begging among those deemed able to work, those unable to work were permitted to seek alms by the roadside.[56] Sometimes these beggars were subject to particular regulations, like lepers who were required to solicit alms using a basket to avoid direct contact with the donors.[57]

Restrictions on able-bodied beggars primarily targeted those from other areas who would travel away from their home in order to beg.[58] London, for example, passed a law cracking down on beggars from the country, complaining that they were:

> [N]ot wishing to labour or work for their sustenance, to the great damage of such the common people; and also, do waste divers alms, which would otherwise be given to many poor folks, such as lepers, blind, halt, and persons oppressed with old age and divers other maladies, to the destruction of the support of the same.[59]

By the end of the fourteenth century, people unable to work could be given licenses that would allow them to beg in their home parish without fearing punishment, although they were not allowed to leave their parish except under narrow circumstances.[60] In addition, the law authorized universities to provide letters to their scholars and students, allowing them to beg for their tuition and room and board.[61] Indeed, licenses to beg were regularly given out throughout the years following the Statute of Labourers.[62] But unlicensed begging, and begging by other visibly idle people able to work, were subject to increasingly severe punishments. For example, complaints of a rise in sturdy beggars (coinciding with the collapse of

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55. *See* RIBTON-TURNER, *supra* note 30, at 44.
56. *See id.* at 45-46; Rollin M. Perkins, *The Vagrancy Concept*, 9 HASTINGS L.J. 237, 244-45 (1958).
57. *See* RIBTON-TURNER, *supra* note 30, at 46.
58. *See* Perkins, *supra* note 56, at 244-45.
59. *See* RIBTON-TURNER, *supra* note 30, at 51.
60. *See id.* at 59-60.
61. *See id.* at 60-62.
62. *See* MARJORIE KENISTON MCINTOSH, POOR RELIEF IN ENGLAND, 1350-1600 42 (2012).

the Church in England),[63] coupled with a belief that idleness was leading to murders and other mayhem, prompted the passage of a set of brutal antivagrancy restrictions in 1530 under the reign of Henry VIII.[64] The provision was made for licenses to be given to the "impotent poor" to beg in their home settlement, while unlicensed, sturdy beggars and those practicing "physiognomy, palmistry, or other crafty sciences" were to be put to work or whipped.[65]

These laws remained on the books, but, by at least some accounts, fell into disuse over the years.[66] And through time, the restrictions lessened: "[B]egging was not prohibited, but on the contrary was permitted, encouraged, and injoined in certain cases."[67] By the 1760s, Blackstone's *Commentaries on the Laws of England* took a dim view of restrictions on idleness, and found their one redeeming quality to be that they were no longer enforced. Blackstone described related restrictions as "a disgrace to our statute book," although he emphasized that the laws were no longer "carr[ied] ... into practice," to "the honour of our national humanity."[68] General restrictions on begging were particularly underenforced: For example, an 1803 study in London identified some 2,000 adult beggars.[69]

3. Provision of Aid to (Some) Poor People

The established church was the primary institution that provided relief to those in need until the middle part of the sixteenth century.[70] At that point, a combination of forces shifted responsibility from the church to the local secular government.[71] First, the waning power of the church—not least of all from the forces of the

63. *See infra* text accompanying notes 70-72.

64. *See* Vagabonds Act 1530, 22 Hen. 8 c. 12, pmbl. (Eng.).

65. RIBTON-TURNER, *supra* note 30, at 73-74, 83; Vagabonds Act 1530, 22 Hen. 8 c. 12, pmbl., § 4 (Eng.).

66. *See* AUDREY ECCLES, VAGRANCY IN LAW AND PRACTICE UNDER THE OLD POOR LAW 52 (2012).

67. RICHARD BURN, THE HISTORY OF THE POOR LAWS: WITH OBSERVATIONS 116 (London, A. Miller 1764).

68. 4 WILLIAM BLACKSTONE, COMMENTARIES *165-66.

69. *See* Tim Hitchcock, *The Streets: Literary Beggars and the Realities of Eighteenth-Century London*, *in* A CONCISE COMPANION TO THE RESTORATION AND EIGHTEENTH CENTURY 80, 87-88 (Cynthia Wall ed., 2005).

70. *See* MCINTOSH, *supra* note 62, at 19-20.

71. *See id.* at 115.

Reformation and Henry VIII's severance of ties to Rome—limited the Church's capacity to distribute poor relief.[72] Moreover, worsening economic conditions and inefficient (arguably corrupt) oversight led to an increase in visible beggars, who were forced to seek aid from strangers instead of the local religious apparatus.[73] Recognizing that the poor could be "too numerous to be relieved by the parish," the local justices of the peace could license people to beg outside the parish to fill the gap in some situations.[74]

By the middle of the sixteenth century, the system of aid relief was still relatively informal. Each parish would assign a local community member to solicit alms from members of the community to be distributed to the poor.[75] People who declined to contribute would initially be shamed and cajoled, and, in subsequent years, jailed.[76] The parishes and poor-serving institutions commonly provided food, shelter, stipends, and beer.[77]

This informal system took on a more substantial form during the reign of Queen Elizabeth I with the adoption of the English Poor Law in 1601.[78] Each parish was required to appoint overseers of the local poor system, taxing parish residents to obtain

> a convenient Stocke of Flaxe Hempe Wooll Threed Iron and other necessarie Ware and Stuffe to sett the Poore on worke; And alsoe competent sūmes of Money for and towardes the necessarie Releife of the lame impotente olde blinde and suche other amonge them beinge poore and not able to work.[79]

By the early 1800s, an exhaustive official study of the development and practice of English poor laws concluded that aid to those in poverty was found "[i]n all extensive civilized communities," and that it would be "repugnant to the common sentiments of mankind"

72. *See id.*

73. *See* Quigley, *supra* note 32, at 95.

74. RIBTON-TURNER, *supra* note 30, at 100-01.

75. *See id.* at 95.

76. *See id.* at 95, 100.

77. *See* MCINTOSH, *supra* note 62, at 202-03 ("Each person was to receive daily one loaf of penny bread and three-eighths of a gallon of beer.").

78. Poor Relief Act 1601, 43 Eliz. 1 c. 2 (Eng.).

79. *Id.* § 1; *see also* MCINTOSH, *supra* note 62, at 279-81 (explaining additional elements of the formalized system).

to allow people to starve.[80] The authors of the study emphasized that the system of informal, parish-level administration led to fraud, favoritism, and other improprieties, and prescribed more rigorous oversight of the overseers of the poor.[81] Finally, the report acknowledged that the settlement system, discussed next, was entirely a function of locality-based organization of poor relief; switching to a national system would "put an end to settlements" and all of their downsides, although the authors stopped short of urging such a radical overhaul of the poor relief system at that time.[82]

4. Settlement (and Removal) System

The settlement and removal system was a system by which people were generally required to stay in their particular parish, with severe restrictions on movement—especially migration—to other locations.[83] As used throughout most of English (and American) history, the settlement system had both a positive, rights-giving component and a negative, consequence-inflicting component. In the positive sense, a person's settlement in a parish entitled them to some basic rights, including the protection against removal and potential eligibility for poor relief.[84] In the negative, a person outside of their settled parish had minimal rights, and they could be subject to forcible removal to their settled parish—along with severe penalties—if they were caught elsewhere while being poor or otherwise perceived as undesirable by the powers that be.[85]

"The settlement law arose out of at least three concerns: the desire to reduce local responsibility for poor relief; a growing sense that there needed to be a punitive dimension to poor relief; and a determination to keep the laboring poor close to home and away from the cities."[86] The rigidity of settlement rules grew as the provision of assistance to poor people shifted from the responsibility

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80. COMM'RS FOR INQUIRING INTO THE ADMIN. & PRAC. OPERATION OF THE POOR L., POOR LAW COMMISSIONERS' REPORT OF 1834, at 227 (1834) [hereinafter POOR LAW REPORT OF 1834].

81. *See id.* at 99.

82. *Id.* at 179.

83. *See* Quigley, *supra* note 32, at 103-04.

84. *See* GRENVILLE PIGOTT, THE LAWS OF SETTLEMENT & REMOVAL: THEIR EVILS AND THEIR REMEDY 18-19 (1862).

85. *See id.*

86. Quigley, *supra* note 32, at 104.

of the church (paid for by tithing) to the responsibility of local governments (paid for by taxation).[87] Local governments had every incentive to exclude those people who, in their eyes, would place strain on their budgets. Indeed, some have even argued that "settlement laws are an indispensable adjunct to a workable welfare system based on compulsory provision."[88]

There were various ways of obtaining a settlement, and through time, the ways of obtaining and losing a settlement became more complex.[89] A person born in a parish was automatically settled there, as was anyone who lived in a parish for a sufficient amount of time.[90] Parishes worked quickly and diligently to restrict settlement for (and then remove) newcomers unless they were considered desirable additions to the community.[91] If a person attempted to move elsewhere and fell into poverty or sickness, they could be removed back to their settlement.[92]

The settlement system was not explicitly part of the original Statute of Labourers, but restrictions on movement were longstanding.[93] Over the centuries, the settlement system became more entrenched and a defining feature of the regulation of movement and the working class in England.[94] England tried various laws and practices throughout the sixteenth and seventeenth centuries to restrict the movement of poor people between parishes, such as the comprehensive but unoriginal Settlement Act of 1662, which complained that "whereas by reason of some defects in the [existing] Law[,] poore people are not restrained from going from one Parish to another."[95]

Although historians agree that "above all," the settlement system was a system for establishing (and limiting) "the rights of the poor

87. *See id.* at 101.

88. James Stephen Taylor, *The Impact of Pauper Settlement 1691-1834*, 73 PAST & PRESENT 42, 46 (1976).

89. *See generally* F.C. Montague, *The Law of Settlement and Removal*, 4 LAW Q. REV. 40 (1888) (showing changes in settlement law). A full description of all the nuances of settlement is beyond the scope of this paper.

90. POOR LAW REPORT OF 1834, *supra* note 80, at 152.

91. *See* Montague, *supra* note 89, at 42.

92. *See id.*

93. Taylor, *supra* note 88, at 47-48.

94. *See id.* at 48-49.

95. Poor Relief Act 1662, 14 Car. 2 c. 12, pmbl. (Eng.).

to poor relief in certain parishes,"[96] they disagree about the extent to which the settlement system operated as a restriction on movement more generally.[97] Landau argues that, in addition to restrictions on movement of people "likely to become chargeable," settlement laws prevented movement of people ready and eager to work for higher wages or better conditions.[98] By the eighteenth century, English law ostensibly allowed for a person to obtain a new settlement through an apprenticeship or public service, but local governments were often not keen to accept the risk of providing support to a new arrival (and their heirs) if things did not work out.[99] And the ability to move for labor conflicted with a landowner-friendly regime of compelling cheap labor from a dependent workforce.[100] The system thus had echoes of feudalism.[101] Indeed, the apparent "object of this legislation was to provide a kind of substitute for the system of villainage and serfdom, which was then breaking down."[102]

"The enforcement of these provisions during the Elizabethan Period has been described as 'the most extreme and cruel form of localism that England had known previously or has known since.'"[103] Even in its time, the settlement system's problems were apparent. Adam Smith's highly influential *Wealth of Nations* offers an extended critique of the settlement system in which he minced no

96. K. D. M. Snell, *Pauper Settlement and the Right to Poor Relief in England and Wales*, 6 CONTINUITY & CHANGE 375, 377 (1991) (emphasis omitted).

97. *Compare* Norma Landau, *Who Was Subjected to the Laws of Settlement? Procedure Under the Settlement Laws in Eighteenth-Century England*, 43 AGRIC. HIST. REV. 139, 159 (1995) (arguing that settlement laws were primarily concerned with regulating migration), *with* Snell, *supra* note 96, at 377 (summarizing and critiquing Landau's interpretation of the laws' primary purpose).

98. *See* Landau, *supra* note 97, at 140.

99. *See* Taylor, *supra* note 88, at 51-52; 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 139 (Kathryn Sutherland ed., Oxford Univ. Press 1993) (1776) ("No independent workman, it is evident, whether labourer or artificer, is likely to gain any new settlement either by apprenticeship or by service.").

100. *See* Quigley, *supra* note 32, at 77.

101. *See* James R. Kristy, Comment, *A Showdown Between* Shapiro *and the Personal Responsibility and Work Opportunity Reconciliation Act: Infringement of the Right to Travel*, 20 WHITTIER L. REV. 449, 453 (1998).

102. 3 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 204 (London, MacMillan & Co. 1883).

103. Stephen Loffredo, *"If You Ain't Got the Do, Re, Mi": The Commerce Clause and State Residence Restrictions on Welfare*, 11 YALE L. & POL'Y REV. 147, 156 (1993) (quoting KARL DE SCHWEINITZ, ENGLAND'S ROAD TO SOCIAL SECURITY 39 (1943)).

words.[104] Smith described the settlement system's restrictions as the greatest disorder in England, "an evident violation of natural liberty and justice," and an "ill contrived law" that "cruelly oppres[sed]" many Englanders.[105] Smith documented at length how the settlement system's restriction on movement distorted wages, leading to both arbitrary inequality of wages between parishes and uneven distribution of labor.[106]

5. Conclusion

For five hundred years following the decimation of England's working population, English law sought to require able-bodied people to work, restrict the movement of poor people, and provide aid to those who needed it. By the 1700s, these laws had come under increased criticism,[107] and in 1834, England adopted sweeping reform.[108] Nevertheless, as seen in the following Section, the old way of thinking provided a template that was imported into the United States.

B. Extension to the United States

The old standards of English laws "were uphappily spread upon the statute books of a nation whose legal, political and social principles were of a very different order."[109] The American colonies (and then states) reflexively followed the pattern of the English poor laws, adopting vagrancy laws that implemented similar rules: punishment of idleness, compelled labor, and stingy poor relief, which were administered through local governments with restrictions on migration.[110]

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104. For evidence of Adam Smith's influence on the United States' Founding Fathers, see generally Samuel Fleischacker, *Adam Smith's Reception Among the American Founders, 1776-1790*, 59 WM. & MARY Q. 3d 897 (2002).

105. SMITH, *supra* note 99, at 136-37, 142.

106. *See id.* at 142.

107. *See, e.g.*, BURN, *supra* note 67, at 135-36 (quoting criticism from Sir Matthew Hale); 4 BLACKSTONE, *supra* note 68, at *165; SMITH, *supra* note 99, at 136-37, 142.

108. Ely, *supra* note 28, at 22.

109. Arthur H. Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision*, 48 CALIF. L. REV. 557, 558 (1960).

110. *See* William P. Quigley, *Reluctant Charity: Poor Laws in the Original Thirteen States*, 31 U. RICH. L. REV. 111, 113-14 (1997) [hereinafter Quigley, *Reluctant Charity*]; William P.

1. Aid to Poor

As in England, early U.S. poor laws did not punish people who were involuntarily unable to work. Instead, "[a]ll colonial poor laws acknowledged a public responsibility to provide for the impoverished neighbor who was unable to work."[111] For example, although Pennsylvania imposed compulsory labor for all persons who "refuse[d] to work, for the usual and common wages given to other labourers," including those who were sturdy beggars,[112] it commanded that those "poor, old, blind, impotent and lame persons and other persons not able to work[ ] within" a city "be maintained and provided for" by that city.[113] Indeed, Pennsylvania had long provided that

> if any Person or Persons shall fall into decay and Poverty and not be able to Maintaine themselves and Children with their honest Endeavers or shall dye and Leave poore Orphants ... Justices of the Peace ... Shall make provision for them in Such Way as they Shall See Convenient till the Next County Court and that there [sic] care be taken for their future Comfortable Subsistance.[114]

The same was true in other early states as well. Massachusetts, for example, provided that "legal settlements in any town or district in this Commonwealth, shall be hereafter gained, so as to subject and oblige such town or district to relieve and support the persons gaining the same."[115] South Carolina commanded in its 1778 Constitution that "[t]he poor shall be supported."[116]

Fearful of local governments shirking their responsibility, state law would often spell out, in some detail, the mode of appointment and responsibilities of local overseers of the poor relief system. In

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Quigley, *The Quicksands of the Poor Law: Poor Relief Legislation in a Growing Nation, 1790-1820*, 18 N. ILL. U. L. REV. 1, 52-54 (1997) [hereinafter Quigley, *The Quicksands of the Poor Law*].

111. William P. Quigley, *Work or Starve: Regulation of the Poor in Colonial America*, 31 U.S.F. L. REV. 35, 54 (1996).

112. Act of Feb. 21, 1767, ch. 555, § 1, 1766-1767 Pa. Acts 268, 268-69.

113. Act of Mar. 9, 1771, ch. 635, § 4, 1770-1771 Pa. Acts 332, 334.

114. Great Law of Pennsylvania, ch. 37 (Dec. 7, 1682).

115. Act of Feb. 11, 1794, § 2, 2 Mass. Laws 606, 606.

116. S.C. CONST. of 1778, art. XXXVIII.

Maryland, the initial overseers were identified by name in the statute, with specific processes for appointment of their replacements, details on how often they were required to meet, the oath they were required to take, and the salary they could draw.[117] New Jersey provided a system of appeal and review to ensure that overseers were not wasteful or improper in their spending.[118] State law provided specific procedures by which the overseers would collect taxes, assess a claim for relief, and provide accountability for their oversight.[119]

State law was also quite specific about what poor relief must entail: stipend, housing, clothing, food, education, materials with which to work, legal counsel, and access to a physician with the costs paid for by the locality. Delaware required localities to provide the poor "proper houses and places" and a supply of "hemp, flax, thread and other materials" with which to work.[120] Maryland required localities to provide "sufficient beds, bedding, working tools, kitchen utensils, cows, horses, and other necessaries."[121] South Carolina also required that the poor be "relieved and educated" and "assign[ed] ... council for the prosecution of" any "cause of action against any other person."[122] And Vermont specified that the poor were entitled to "nurses, physicians and surgeons" as needed.[123]

2. Compulsory Labor and Bans on Idleness

As the United States came into being, several states had adopted laws modeled after the Statute of Labourers, decreeing that able-bodied people must work, and imposing strict penalties for idleness.[124] Because of their obligation to provide poor relief to their settled residents,[125] localities were especially concerned with people

117. *See* Act of June 22, 1768, ch. 29, §§ 4-5, 11, 1768 Md. Acts.

118. *See* Act of Mar. 11, 1774, ch. 590, §§ 11, 14, 20, 30, 1702-1776 N.J. Acts 403, 408, 410, 412, 417.

119. *See, e.g.*, *id.*

120. Act of Mar. 29, 1775, ch. 225, § 3, 1 Del. Laws 544, 545.

121. Act of June 22, 1978, ch. 29, § 9, 1768 Md. Acts.

122. Poor, A DIGEST OF THE LAWS OF SOUTH-CAROLINA, CONTAINING THE PUBLIC STATUTE LAW OF THE STATE, DOWN TO THE YEAR 1822, §§ 4, 13-14 at 337, 340 [hereinafter S.C. LAWS].

123. Act of Mar. 3, 1797, ch. 39, § 2, 1 Vt. Laws 383, 384.

124. *See supra* Part II.A.1.

125. *See supra* Part II.B.1.

who were idle during the day rather than working to support themselves, and took steps to ensure that their idleness did not put them on the path toward receiving public aid.

For example, Rhode Island put to work "idle, indigent persons, as shall from time to time be found in the said town, who by their ill courses are likely to become a town charge."[126] Maryland's poor law amendment of 1768 noted the "continual increase, of the poor within this province, is very great, and exceedingly burthensome [sic]," and prescribed "employment of them" as the answer.[127]

Congress authorized the District of Columbia to demand assurances that they would not become a financial burden on the District from:

> [A]ll vagrants, idle or disorderly persons, ... and all such as have no visible means of support, or are likely to become chargeable to the city as paupers, or are found begging or drunk in or about the streets, or loitering in or about tippling houses, or who can show no reasonable cause of business or employment in the city.[128]

The very next provision allowed the District "to prescribe the terms and conditions upon which free negroes, mulattoes and others, who can show no visible means of support, may reside in the city."[129]

In Georgia, the legislature complained that there were "able-bodied men, capable of laboring for their support" whose "idle and disorderly life render[ed] themselves incapable of paying" their taxes.[130] Thus, Georgia decreed that "able-bodied persons, not having some visible property, or who do not follow some honest employment, sufficient for the support of themselves and for their families (if any), and who shall be found loitering and neglecting to labor for reasonable wages ... shall be deemed and adjudged vagabonds."[131] A person "found ... wandering, strolling, loitering about or misbehaving himself" could be charged as a vagabond, but would be acquitted if they had gainful employment or signed up for military

126. Quigley, *Reluctant Charity*, *supra* note 110, at 156.
127. Act of June 22, 1768, ch. 29, pmbl. 1768 Md. Acts.
128. Act of May 4, 1812, ch. 75, § 6, 2 Stat. 721, 726.
129. *Id.*
130. Vagabonds, 1755-1800 DIGEST OF THE LAWS OF THE STATE OF GEORGIA, pmbl. at 568.
131. *Id.* at 569.

service.[132] If not, they were put to forced labor for one year, with the wages earned applied toward supporting the worker's family and "paid to the [worker] himself."[133]

North Carolina's legislature complained about "divers[e] idle and disorderly Persons, having no visible Estates or Employments, and who are able to work" but nevertheless wandered "from one County to another, neglecting to labour."[134] By refusing to work, the State argued, these idle nonworkers were "render[ed] ... incapable of paying" their taxes.[135] Thus, the State commanded that "idle, vagrant, or dissolute Persons, wandering abroad, without betaking themselves to some lawful Employments, or honest Labour, or going about begging" would be returned to their home settlement.[136] Once home, the nonworker could either provide sufficient security that they would undertake "some lawful Calling, or honest Labour," or would be bound out to service for a year.[137]

Following the English tradition, the affirmative obligation to labor was sometimes coupled with a negative prohibition against idleness in the United States. For example, South Carolina targeted "sturdy beggars" and others who "le[d] idle and disorderly lives."[138] When placed on trial, the jury was required to "inquire in what manner, and by what means, the person accused gains his, or her, livelihood, and maintains his, or her, family."[139] If the jury concluded that the person was unable to support themself, their labor would be auctioned off to members of the public for up to a year.[140] A charge of idleness could be refuted by establishing one's financial means and providing assurance that the person would not become a financial burden on the locality's poor relief system.[141]

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132. *Id.* § 2.

133. *Id.*

134. 1773 A COMPLETE REVISAL OF ALL THE ACTS OF THE ASSEMBLY OF THE PROVINCE OF NORTH-CAROLINA NOW IN FORCE AND USE, ch. 6, pmbl. at 172.

135. *Id.*

136. *Id.* §§ 3-4.

137. *Id.* § 4.

138. S.C. LAWS, *supra* note 122, at 415-16.

139. *Id.* at 417.

140. *See id.*; *see also, e.g.*, 1798 R.I. Pub. Laws 362, 365 (providing that "any idle vagrant person" such as "any person who shall attempt to procure a living by begging," could be sent to the workhouse for a month of labor).

141. *See* S.C. LAWS, *supra* note 122, at 417.

With the substantial obligation to provide poor relief to those imposed on them, localities would take a heavy hand in deciding who could settle in their district. And for those who did settle, localities could be quite intrusive into private financial affairs. Connecticut, for example, instructed towns to "diligently inspect into the Affairs and Management of all Persons in their town" to ensure that no one became a public charge due to "Idleness, Mismanagement, or bad Husbandry."[142]

3. Settlement and Restrictions on Migration

Following the English model, the early United States' organization of poor relief at the local level brought with it English notions of settlement, including restrictions on movement. "Early American poor law already excluded relief for the poor who were considered able to work. Settlement further restricted poor relief to those who were unable to work and who had achieved legal residency in the local community."[143] Individuals who were currently poor or were "likely to become chargeable" financial burdens to the local government were not welcome to settle in town, and they could be removed back to the last place that they had settled.[144] The system involved particularly harsh restrictions on idle poor people, who were forcibly transported back to their home settlement, often with punishment along the way.[145]

For the first several decades following ratification of the Constitution, states and localities continued restrictions on migration, following the same model derived from the settlement system.[146] "In

142. An Act for Relieving and Ordering of Idiots, Impotent, Distracted and Idle Persons, 1784 Conn. Pub. Acts 98, 99.

143. Quigley, *Reluctant Charity*, *supra* note 110, at 140. *See generally* Marcus Wilson Jernegan, *The Development of Poor Relief in Colonial New England*, 5 SOC. SERV. REV. 175 (1931) (detailing the impact of English law on vagrancy laws in colonial New England).

144. *See, e.g.*, Act of June 22, 1768, ch. 29, §§ 17-18, 1768 Md. Acts; Quigley, *Reluctant Charity*, *supra* note 110, at 141-51. The Articles of Confederation guaranteed all "free inhabitants of each of the[ ] States ... all privileges and immunities of free citizens in the several States," including the right of "free ingress and regress to and from any other State," but excepted "paupers, vagabonds and fugitives from justice" from this right. ARTICLES OF CONFEDERATION OF 1781, art. IV, para. 1.

145. *See* Quigley, *Reluctant Charity*, *supra* note 110, at 147-49.

146. *See* Anna O. Law, *Lunatics, Idiots, Paupers, and Negro Seamen—Immigration Federalism and the Early American State*, 28 STUD. AM. POL. DEV. 107, 107-08 (2014).

the North, the main motivation for restriction on liberty of movement was to mitigate the social and economic effects of large-scale immigration. In the South, the imperative was preserving slavery and its concomitant white supremacist social hierarchy."[147] State and local governments during this period adopted a number of restrictions prohibiting the migration of paupers, people who were sick or with disabilities, and people likely to become a burden on the poor relief system.[148] These laws were often coupled with explicit prohibitions on allowing free persons of color from moving to a location.[149]

In 1837, the Supreme Court upheld these laws that restrict migration as valid exercises of state power.[150] The Court emphasized that states had a valid interest in preventing "citizens from being oppressed by the support of multitudes of poor persons, who come from foreign countries without possessing the means of supporting themselves," in light of the risk of the state "being subjected to a heavy charge in the maintenance of those who are poor."[151] The Court thus upheld New York's inspection and exclusion requirements as not improperly intruding on national commerce and found that the federal government had not preempted the state's restrictions.[152] These restrictions focused on immigration and did not authorize the expulsion of someone born or otherwise settled in the community simply because that person later sought poor relief.[153]

4. Conclusion

England's vagrancy laws influenced early American approaches to poverty.[154] From forced labor and bans on idleness to settlement-

147. *Id.* at 112.

148. *See id.* at 113.

149. *See* Quigley, *The Quicksands of the Poor Law*, *supra* note 110, at 88-92.

150. *See* Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 132 (1837).

151. *Id.* at 141; *see also* Smith v. Turner, 48 U.S. (7 How.) 283, 406 (1849) (opinion of McLean, J.) ("Except to guard its citizens against diseases and paupers, the municipal power of a State cannot prohibit the introduction of foreigners brought to this country under the authority of Congress. It may deny to them a residence, unless they shall give security to indemnify the public should they become paupers.").

152. *See Miln*, 36 U.S. (11 Pet.) at 143.

153. *See* Quigley, *supra* note 111, at 64; Taylor, *supra* note 88, at 56; Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1846 (1993).

154. *See* Quigley, *The Quicksands of the Poor Law*, *supra* note 110, at 52.

based relief and migration restrictions, the mechanisms used to aid and control the poor dating back to feudal England were replicated in colonial and post-revolutionary America. These approaches persisted in the states even after England's comprehensive reforms.[155]

C. Reconstruction Era

Founding-era vagrancy laws reflect the then-widespread acceptance of compulsory labor in a time of slavery and indentured servitude. With the end of the Civil War and the adoption of the Thirteenth Amendment, the United States outlawed forced labor except as punishment for a crime.[156] Yet even after slavery was formally abolished, southern states again looked to vagrancy laws, as part of their Black Codes, as a mechanism to "subjugate newly freed slaves and maintain the prewar racial hierarchy."[157] These laws imposed "draconian fines for violating broad proscriptions on 'vagrancy,'" and newly freed slaves who were unable to pay were often forced to perform involuntary labor.[158]

For example, in Mississippi—the first state to enact Black Codes—all adult "freedm[e]n, free negro[es] and mulatto[es]" were required to enter into labor contracts by the second Monday of January 1866 and annually thereafter.[159] Those "with no lawful employment or business" were deemed vagrants and subject to a fifty dollar fine and ten days' imprisonment.[160] If convicted and unable to pay, they were forcibly "hire[d] out" to whoever would pay the fine.[161]

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155. Ely, *supra* note 28, at 22.

156. U.S. CONST. amend. XIII.

157. Timbs v. Indiana, 139 S. Ct. 682, 688 (2019); *see* Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 AKRON L. REV. 671, 681-85 (2003); ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 48 (2019).

158. *Timbs*, 139 S. Ct. at 688 (quoting Mississippi Vagrant Law, Laws of Miss. § 2 (1865), *in* 1 W. FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 283-85 (1950)); *see id.* at 697 (Thomas, J., concurring in the judgment) (discussing the Black Codes and vagrancy statutes); City of Chicago v. Morales, 527 U.S. 41, 53 n.20 (1999) ("[V]agrancy laws were used after the Civil War to keep former slaves in a state of quasi slavery.").

159. Act of Nov. 25, 1865, ch. 4, § 5, 1865 Miss. Laws 82, 83.

160. Act of Nov. 24, 1865, ch. 6, § 2, 1865 Miss. Laws 90, 91.

161. *See id.* § 5, at 92; *see also Timbs*, 139 S. Ct. at 697 (Thomas, J., concurring in the judgment) ("Those convicted had five days to pay or they would be arrested and leased to 'any

Following Mississippi's lead, other southern states soon adopted Black Codes, including reinvigorated vagrancy statutes.[162] Although most vagrancy laws were facially racially neutral,[163] "Congress plainly perceived all of them as consciously conceived methods of resurrecting the incidents of slavery."[164] They "essentially made it a criminal offense not to work and were applied selectively" to Black people.[165]

In Alabama, for example, the state "broadened its vagrancy statute to include 'any runaway, stubborn servant or child' and 'a laborer or servant who loiters away his time, or refuses to comply with any contract for a term of service without just cause.'"[166] Many "defined 'vagrant' to include any man not gainfully employed," which encompassed "virtually every [B]lack [person] in the postwar South."[167] Georgia, for example, declared that "[a]ll persons wandering or strolling about in idleness[,] who are able to work, and

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person who will, for the shortest period of service, pay said fine and forfeiture and all costs.' Members of Congress criticized such laws 'for selling [black] men into slavery in punishment of crimes of the slightest magnitude.'" (alteration in original) (citations omitted)). In the same Act, Mississippi also imposed a tax on all freedmen and Black people in the state; failure to pay the tax was considered "*prima facie* evidence of vagrancy." §§ 6-7, 1865 Miss. Laws at 92-93.

162. *See* William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42 J.S. HIST. 31, 47 (1976) (explaining that "all the former Confederate states except Tennessee and Arkansas passed new vagrancy laws in 1865 or 1866" because such laws provided a "way of forcing blacks to sign labor agreements"); *see also* DANIEL A. NOVAK, THE WHEEL OF SERVITUDE: BLACK FORCED LABOR AFTER SLAVERY 2-8 (1978) (discussing laws in nine Southern states).

163. *But see* Act of Jan. 12, 1866, ch. 1, 470, § 2, 1865 Fla. Laws 32, 32 (applying to "[P]erson[s] of Color"), *amended by*, Act of Dec. 13, 1866, ch. 1, 551, § 1, 1866 Fla. Laws 21, 21-22 (applying to all persons)); Act of Dec. 21, 1865, No. 4733, §§ 94, 96, 97, 1864-1865 S.C. Acts 291, 303-04 (same).

164. Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 386-87 (1982).

165. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 28 (rev. ed. 2012); *see also* Goluboff & Sorensen, *supra* note 9, at 3 ("[R]ace neutrality went only so far. From citizen patrol to sheriff to judge to jury, the whites who enforced vagrancy laws knew they were aimed at African Americans, especially those ... who asserted their autonomy.").

166. City of Chicago v. Morales, 527 U.S. 41, 53 n.20 (1999) (quoting THEODORE WILSON, BLACK CODES OF THE SOUTH 76 (1965)); Act of Dec. 15, 1865, No. 107, § 1, 1865-1866 Ala. Acts 116, 116; Act of Dec. 15, 1865, No. 112, § 2, 1865-1866 Ala. Acts 119, 119-20.

167. Glenn B. Manishin, Note, *Section 1981: Discriminatory Purpose or Disproportionate Impact?*, 80 COLUM. L. REV. 137, 158 (1980); *accord Gen. Bldg. Contractors Ass'n*, 458 U.S. at 410 n.2 (Marshall, J., dissenting) ("[Black] Codes included vagrancy laws, which were vague and broad enough to encompass virtually all Negro adults.").

who have no property to support them" were to be considered vagrants.[168] And its own supreme court later recognized that this law "should be rigidly enforced, against the colored population especially, because many of them do lead idle and vagrant lives."[169] Moreover, as in Mississippi, the vast majority provided for the "hiring out" of offenders, which kept formerly enslaved persons in a state of quasislavery.[170]

In sum, as states had during the Founding Era, the post-Civil War southern states looked to vagrancy laws to force people into labor. But they did not do so for the same reasons, namely, to reduce the burden on the local public fisc and keep people out of poverty.[171] This time, the targets of compulsory labor laws were Black people recently freed from slavery. The Reconstruction Era vagrancy laws plucked the compelled servitude element of the Founding vagrancy laws from the context in which it arose and applied it to achieve the even more nefarious and explicitly racist aim of keeping formerly enslaved people in a state of bondage after the Civil War.[172]

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168. Act of Mar. 12, 1866, No. 240, § 1, 1865-1866 Ga. Laws 234.

169. Hicks v. State, 76 Ga. 326, 328 (1886).

170. *See, e.g.*, Act of Dec. 21, 1865, No. 4733, §§ 96-98, 1864-1865 S.C. Acts 291, 303-04; Cohen, *supra* note 162, at 47; NOVAK, *supra* note 162, at 2-7; Finkelman, *supra* note 157, at 681-85; ALEXANDER, *supra* note 165, at 28.

171. *See* Quigley, *The Quicksands of the Poor Law*, *supra* note 110, at 78-79, 97-98.

172. *See* Timbs v. Indiana, 139 S. Ct. 682, 688-89 (2019); City of Chicago v. Morales, 527 U.S. 41, 53 n.20 (1999); Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 386-87 (1982); *see also* City of Memphis v. Greene, 451 U.S. 100, 134 n.6 (1981) (White, J., concurring in the judgment) (noting that vagrancy statutes were "used to oppress [B]lack [people] .... to impose upon freedmen a system tantamount to slave labor"); Goodman v. Lukens Steel Co., 482 U.S. 656, 672 n.2 (1987) (Brennan, J., concurring in part and dissenting in part) (noting that "southern vagrancy laws" forced Black people "back into agricultural labor under strict discipline" (quoting K. STAMPP, THE ERA OF RECONSTRUCTION 1865-1877, at 123 (1965))); Students for Fair Admissions, Inc. v. President of Harvard Coll., 143 S. Ct. 2141, 2227 (2023) (Sotomayor, J., dissenting) ("[T]he criminal punishment exception in the Thirteenth Amendment facilitated the creation of a new system of forced labor in the South.... States required, for example, that Black people 'sign a labor contract to work for a white employer or face prosecution for vagrancy[,]' [and] then forced Black convicted persons to labor in 'plantations, mines, and industries in the South.' This system of free forced labor ... was designed to intimidate, subjugate, and control newly emancipated Black people." (citations omitted) (quoting FONER, *supra* note 157, at 48, 50)); *id.* at 2266 (Jackson, J., dissenting) (describing "[v]agrancy laws criminaliz[ing] free Black men who failed to work for White landlords" as a "race-linked obstacle[ ] that the law ... laid down to hinder the progress and prosperity of Black people" in the post-Reconstruction South).

D. The Thirteenth and Fourteenth Amendments Reject Vagrancy Laws' Premises

Changes in circumstance and constitutional law soon rendered the pillars that supported vagrancy laws obsolete. As explained above, the compelled-servitude justification underpinning both the Founding- and Reconstruction-era vagrancy laws was largely rejected by the Thirteenth Amendment.[173] And through the Fourteenth Amendment, our nation emphatically rejected the notion that there are classes of Americans without constitutional rights—thereby foreclosing the use of vagrancy laws to "maintain ... racial hierarchy," as attempted by the southern states during Reconstruction.[174] "Congress plainly perceived" laws "penalizing vagrancy ... as consciously conceived methods of resurrecting the incidents of slavery."[175] Indeed, the drafters of the Fourteenth Amendment repeatedly cited abuses of vagrancy laws as justifying the need for the amendment.[176] For example, Representative Cook asked: "If a man can be sold as a vagrant because he does not labor, without any inquiry as to whether he can or cannot procure labor, is he a freeman?"[177] In other words, the Thirteenth and Fourteenth Amendments during Reconstruction "kicked the legs out from the legal restrictions that defined vagrancy statutes."[178]

173. *See supra* text accompanying note 156; *see also, e.g.*, Taylor v. Georgia, 315 U.S. 25, 29 (1942) (striking down law that imposed criminal punishment for failure to fulfill labor contract, as a form of unconstitutional "peonage"); Thompson v. Bunton, 22 S.W. 863, 864-65 (Mo. 1893) (striking down law allowing vagrants' labor to be auctioned off to the highest bidder); Fenster v. Leary, 229 N.E.2d 426, 429-30 (N.Y. 1967) (noting potential "Thirteenth Amendment problems" with state law that required "able-bodied poor ... to accept available employment"); *Ex parte* Hudgins, 103 S.E. 327, 329 (W. Va. 1920) (striking down state law that required able-bodied people to labor).

174. *Timbs*, 139 S. Ct. at 688-89.

175. *Gen. Bldg. Contractors Ass'n*, 458 U.S. at 386-87.

176. *See Timbs*, 139 S. Ct. at 688-89; *id.* at 697-98 (Thomas, J., concurring in the judgment).

177. CONG. GLOBE, 39th Cong., 1st Sess. 1124 (1866).

178. Brief of Professors William P. Quigley et al. as Amici Curiae in Support of Respondents at 20, City of Grants Pass v. Johnson, 144 S. Ct. 2202 (2024) (No. 23-175) [hereinafter Vagrancy Law Scholars Br.].

E. Beyond Reconstruction

Despite Reconstruction's change to the constitutional order, vagrancy laws persisted. In tandem with Jim Crow segregation laws, all but one of the former Confederate states adopted new vagrancy laws between 1893 and 1909.[179] "These laws defined the crime of vagrancy in painstaking detail, and yet, paradoxically, they were even broader and vaguer than before."[180] For example, in contrast to Alabama's 1866 statute, which defined a vagrant as, among other things, a person "who, having no visible means of support, or being dependent on his labor, lives without employment, or habitually neglects his employment,"[181] its 1903 replacement read: "[A]ny person wandering or strolling about in idleness, who is able to work, and has no property to support him; or any person leading an idle, immoral, profligate life, having no property to support him."[182] "This wording was identical" to the 1866 Georgia law discussed above "and was also adopted by Mississippi (1904) and North Carolina (1905)."[183] "With little change these acts remained in effect into the 1960s."[184]

Vagrancy laws "varied from state to state but contained one common element: [They] punished idle persons without visible means of support who, although able to work, failed to do so."[185] During the mid-twentieth century, however, courts began striking down vagrancy and related laws on constitutional grounds.

"The Great Depression brought the first successful challenges to official efforts to exclude the itinerant poor."[186] Although "states continued to enforce removal laws, ousting the newly arrived poor and sending them to their last places of residence[,] [s]ome states ... went further, attempting to enforce laws that criminalized the

179. Cohen, *supra* note 162, at 48.

180. *Id.*

181. Penal Code of Alabama § 88 (1866). As noted above, Alabama passed a harsher law in 1865. "The 1866 *Penal Code* contained a separate and milder vagrancy act." Cohen, *supra* note 162, at 48 n.36. "To eliminate ambiguity the first law was then repealed." *Id.*; *see* Act of Feb. 15, 1865, No. 447, 1866-1867 Ala. Acts 504, 504.

182. Act of Sep. 22, 1903, No. 229, § 1, 1903 Ala. Laws 244, 244.

183. Cohen, *supra* note 162, at 48.

184. *Id.* at 49 & n.37.

185. Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631, 640 (1992).

186. *Id.*

knowing importation of paupers into their jurisdictions."[187] The Supreme Court confronted such a law in *Edwards v. California* and struck it down under the Commerce Clause.[188] In response to the government's argument that prohibiting the transportation of indigent people into its state was firmly rooted "in English and American history," the Court announced that "the theory of the Elizabethan poor laws no longer fits the facts."[189] In particular, the Court explained that "the notion that each community should care for its own indigent" and "that relief is solely the responsibility of local government" no longer fit the facts because "the task of providing assistance to the needy ha[d] ceased to be local in character."[190] Instead, "[t]he duty to share the burden, if not wholly to assume it," had shifted to the state and federal government.[191]

Moreover, in *Edwards*, the Court explicitly rejected the reasoning underlying its nineteenth-century precedent in *Mayor of New York v. Miln* and held that it could no longer "seriously [be] contended that because a person is without employment and without funds he constitutes a 'moral pestilence.'"[192] "Poverty and immorality," the Court said, were "not synonymous."[193] Although *Edwards* did not involve a vagrancy law, it "rupture[d] ... centuries-old jurisprudential assumptions about regulating the poor" that "readily applied to vagrancy laws."[194] "If poverty resulted from large-scale structural economic issues rather than the moral failings of individuals, punishment seemed anachronistic and unjust."[195]

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187. *Id.*
188. 314 U.S. 160, 173-74 (1941).
189. *Id.* at 174.
190. *Id.* at 174-75.
191. *Id.* at 175.
192. *Id.* at 177. In *Miln*,

> the United States Supreme Court approved the efforts of the State of New York to exclude paupers arriving by ship, noting that it is "as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence, which may arise from unsound and infectious articles."

Simon, *supra* note 185, at 639 (quoting Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 146 (1837)); *see supra* text accompanying notes 149-51.

193. *Edwards*, 314 U.S. at 177.
194. Goluboff & Sorensen, *supra* note 9, at 6.
195. *Id.*

Another successful challenge to the exclusion of the displaced poor came in *Shapiro v. Thompson*, in which the Supreme Court struck down various state statutes that imposed a one-year waiting period before new residents could receive welfare benefits.[196] The Court held that these statutes implicated the fundamental right to travel interstate and could not be justified by a merely sufficient government interest.[197] In so holding, the Court reasoned that to the extent the statutes intended "to inhibit the migration by needy persons into the state," that purpose "was constitutionally impermissible."[198]

"Following World War II, vagrancy and loitering laws also became the object of criticism," and "numerous state and federal decisions struck [them] down ... on various constitutional grounds ... [d]uring the 1960s and early 1970s."[199] The "broad and vague nature of vagrancy laws" made them "one of the most effective weapons in the arsenal of law enforcement," allowing them to respond to new threats to social order as they emerged over time, and to "'vag' anyone suspicious, troublesome, deviant, out of place, or just plain poor."[200] Vagrancy law had become a tool for policing not only Black Americans,[201] but also other groups whom the majority wanted to control, such as "political dissidents, gay men and lesbians,

196. 394 U.S. 618, 621-22 (1969).

197. *See Shapiro*, 394 U.S. 627-31, 638; Simon, *supra* note 185, at 641.

198. Simon, *supra* note 185, at 641.

199. *Id.* at 642-43 (explaining that during this period, courts overturned vagrancy laws as invidious discrimination against the poor, cruel and unusual punishment of status or condition, and impermissible restrictions on the right to travel, and that "many courts held that these laws impermissibly punished essentially innocent conduct").

200. Goluboff & Schragger, *supra* note 1, at 197.

201. *See supra* Part II.C-D (discussing vagrancy laws during Reconstruction era). Into the twentieth century, vagrancy laws continued to be used against African Americans as a "tool [of] racial subordination" and a means of "coerc[ing] the formerly enslaved to work in the South as sharecroppers and peons." Goluboff & Schragger, *supra* note 1, at 198; RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S 116-17 (2016) (noting that in the early twentieth century, the "*Atlanta Constitution* admonished the police, 'Cotton is ripening. See that the "vags" get busy'"). They were also used to enforce the system that became known as Jim Crow, and indeed "served as a prime weapon against the civil rights movement." Goluboff & Schragger, *supra* note 1, at 198; *accord* GOLUBOFF, *supra*, at 117-23 ("During one week in 1913, a cleanup of Birmingham's saloons resulted in some two hundred vagrancy arrests—almost entirely of African Americans—and city officials endorsed the slogan, 'Go to work or go to jail.' Even during World War II, officials continued to use vagrancy arrests to try to tether increasingly mobile African Americans to the agricultural workforce."); Goluboff & Sorensen, *supra* note 9, at 7.

Beatniks, civil rights activists, interracial couples, antiwar protestors, and hippies, along with gangsters and petty criminals."[202] These abuses "drove major court decisions that ultimately forced American legislatures to disaggregate the crime of vagrancy."[203]

In 1972, the U.S. Supreme Court finally addressed "a comprehensive challenge to the constitutionality of the nation's vagrancy laws."[204] In *Papachristou v. City of Jacksonville*, the Court unanimously struck down a vagrancy ordinance on due process grounds.[205] The Court explained that although "the theory of the Elizabethan poor laws no longer fit[ ] the facts," the "archaic classifications" of historical vagrancy laws remained.[206] The ordinance was void for vagueness because it "fail[ed] to give a person of ordinary intelligence fair notice" of what conduct was prohibited and encouraged arbitrary enforcement.[207] The Court emphasized that the ordinance "criminal[ized] activities which by modern standards are normally innocent"[208] and reiterated its recognition in *Edwards* that "[p]overty and immorality are not synonymous."[209] The Court concluded its opinion by warning that these vagrancy laws, which "generally implicated ... poor people, nonconformists, dissenters, idlers," and other so-called undesirables, "teach that the scales of

202. Ben A. McJunkin, *The Negative Right to Shelter*, 111 CALIF. L. REV. 127, 137 (2023) (quoting Laura Weinrib, *The Vagrancy Law Challenge and the Vagaries of Legal Change*, 43 L. & SOC. INQUIRY 1669, 1670 (2018)); *accord* Goluboff & Schragger, *supra* note 1, at 197-203; Goluboff & Sorensen, *supra* note 9, at 5, 7-8.

203. McJunkin, *supra* note 202, at 137.

204. Goluboff & Sorensen, *supra* note 9, at 9.

205. 405 U.S. 156, 161-62 (1972).

206. *Id.* at 162 (quoting Edwards v. California, 314 U.S. 160, 174 (1941)). The ordinance at issue in *Papachristou* applied to

> [r]ogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, [and] persons able to work but habitually living upon the earnings of their wives or minor children.

Id. at 156 n.1 (quoting Jacksonville Ordinance Code § 26-57).

207. *Id.* at 162 (quoting United States v. Harriss, 347 U.S. 612, 617 (1954)).

208. *Id.* at 163.

209. *Id.* at 163 n.5 (quoting *Edwards*, 314 U.S. at 177).

justice are so tipped that even-handed administration of the law is not possible. The rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together."[210]

Several years after *Papachristou*, "police officers continued to arrest 'suspicious' individuals under the guise of loitering laws."[211] But the Supreme Court repudiated these efforts in *Kolender v. Lawson*, holding that a California law requiring people who "loiter[ed] or wander[ed] on the streets to provide 'credible and reliable' identification and to account for their presence" was also void for vagueness.[212] And in *City of Chicago v. Morales*, the Court struck down another loitering law on vagueness grounds, which prohibited "criminal street gang members" from "remain[ing] in any one place with no apparent purpose" with one another or with other persons.[213]

Papachristou and its progeny forced cities and states to "target [more] specific acts and behaviors" in policing the poor and homeless,[214] such as "sit-and-lie ordinances, sidewalk obstruction

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210. *Id.* at 170-71.

211. Simon, *supra* note 185, at 644; *see also* GOLUBOFF, *supra* note 201, at 339 ("As state and local officials attempted [in the wake of *Papachristou*] to reconstitute some of the authority that had previously resided in vagrancy laws, ... legislators passed more specific loitering laws.").

212. 461 U.S. 352, 353 (1983) (quoting CAL. PENAL CODE § 647(e) (West 1970)).

213. 527 U.S. 41, 45-47, 56-60 (1999) (quoting CHI., ILL. MUN. CODE § 8-4-015 (1992)). Justice Stevens, joined by Justices Souter and Ginsburg, found the ordinance to be unconstitutionally vague because it failed to provide fair notice as to what conduct was prohibited. *See id.* at 56-60. Additionally, the Court found that the ordinance was so vague that it encouraged discriminatory enforcement. *See id.* at 56, 60-64. In discussing the lack of notice, Justice Stevens observed that in proscribing "remain[ing] in any one place with no apparent purpose," the law "fail[ed] to distinguish between innocent conduct and conduct threatening harm." *Id.* at 56-57 (quoting CHI., ILL. MUN. CODE § 8-4-015). And in his opinion concurring in part and concurring in the judgment, Justice Kennedy shared this concern. *See id.* at 69 (Kennedy, J., concurring in part and concurring in the judgment). Justices O'Connor and Breyer, for their part, agreed that the ordinance was vague for discriminatory-enforcement reasons because it "fail[ed] to provide police with any standard by which they can judge whether an individual has an '*apparent* purpose.'" *See id.* at 65-66 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 70 (Breyer, J., concurring in part and concurring in the judgment).

214. Goluboff & Schragger, *supra* note 1, at 205. Many cities and states simply refused to amend their laws to conform to constitutional requirements, perhaps due to inertia, or perhaps betting that even blatantly unconstitutional laws will evade judicial challenge. *See, e.g.*, MICH. COMP. LAWS § 750.167 (2025), *invalidated by*, Speet v. Schuette, 726 F.3d 870 (6th Cir. 2013); *see also, e.g.*, NAT'L HOMELESSNESS L. CTR., HOUSING NOT HANDCUFFS 2021: STATE

ordinances, anticamping ordinances, prohibitions on storing private property in public places, public urination and defecation ordinances, park exclusion orders, panhandling ordinances, prohibitions on sleeping in vehicles, public nuisance laws, and loitering with 'intent' ordinances."[215] "Where vagrancy laws criminalized 'wandering' or 'idleness,' new ordinances criminalize[d] 'sitting,' 'camping,' and 'panhandling'" in an effort to avoid vagueness challenges.[216]

These laws were driven in part by the broken windows theory of policing,[217] which posits that "small forms of disorder and low-level criminality (like a broken window), if left unaddressed, would lead to more significant disorder and higher-level criminality."[218] In their 1982 *Atlantic* article floating this theory, Professors James Q. Wilson and George Kelling "compared vagrants to broken windows in a building" and argued that "while the arrest of 'a single drunk or a single vagrant who has harmed no identifiable person seems unjust ... [f]ailing to do anything about a score of drunks or a hundred vagrants may destroy an entire community.'"[219] Under this theory, the police were urged to aggressively enforce prohibitions on low-level offenses to ensure that an area did not fall into disrepair in the first place,[220] and as applied to the issue of homelessness, the theory was used to justify the criminalization of the presence of homeless people in public.[221] The theory never had an empirical foundation and was floated with all of the rigor of a blog post. Few

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LAW SUPPLEMENT 7 (2021), https://homelesslaw.org/wp-content/uploads/2021/11/2021-HNH-State-Crim-Supplement.pdf [https://perma.cc/WN72-C3QB] (providing data on state laws criminalizing homelessness); Goluboff & Sorensen, *supra* note 9, at 10 ("[*Papachristou* did not] eradicate the effects of all vagrancy laws. Some government officials continued to enforce invalid laws.").

215. ORTIZ & DICK, *supra* note 16, at 17; *see also* GOLUBOFF, *supra* note 201, at 342 (noting that officials, who "faced ... an increase in what they called 'the derelict population' complained loudly about being hamstrung by the absence of vagrancy laws" and the Supreme Court, "respond[ed] to the subsequent—and enduring—rise in homelessness" by among other things, passing laws that "prohibit[ed] panhandling and sleeping on park benches and in cars").

216. ORTIZ & DICK, *supra* note 16, at 17 (quoting SEATTLE, WASH., MUN. CODE §§ 15.48.250, 18.12.250, 12A.12.015 (2015)).

217. *See id.* at 19; Simon, *supra* note 185, at 645-46.

218. Goluboff & Schragger, *supra* note 1, at 218.

219. Simon, *supra* note 185, at 645 (alteration in original) (quoting James Q. Wilson & George L. Kelling, *Broken Windows*, ATL. MONTHLY, Mar. 1982, at 29, 35)).

220. Goluboff & Schragger, *supra* note 1, at 218.

221. *See* Simon, *supra* note 185, at 645-46, 646 n.96; ORTIZ & DICK, *supra* note 16, at 19-20.

theories in the social sciences have been as roundly and thoroughly debunked[222]—one scholar called it "fraudulent."[223] Even "its originator Mr. Kelling has decried its use for rampant discriminatory enforcement."[224] Yet, it remains an influential authority to this day.

Although the new wave of vagrancy laws sought to avoid the vagueness problems that doomed prior versions, it has left open ample opportunity for discriminatory enforcement. For example, antiloitering laws, although constitutionally dubious after *Morales*, remain commonplace and implicitly depend on police officers to distinguish between the picnicker and the pauper.[225] And the new wave of antivagrancy laws target aspects of a homeless person's life that are innocent and constitutionally protected. For example, a law prohibiting begging or panhandling prohibits a person who is poor from communicating their needs with others, a flagrant violation of the freedom of speech.[226] A law prohibiting standing or sitting in particular areas criminalizes conduct that is commonplace and innocent.[227] As will be seen in the next Section, however, even these laws—while problematic—stop short of making it illegal for a person to live in a city altogether.

In sum, *Papachristou* marked the downfall of traditional vagrancy laws and thus precluded officials from relying on "infinitely elastic law[s] to address new social problems."[228] However, their legacy has remained insofar as modern, more specific laws are rooted in similarly offensive moral judgments about the poor and the "perception of a continuing need to control some of its 'suspicious' or 'undesirable' members."[229] Nevertheless, as discussed

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222. *See, e.g.*, Daniel T. O'Brien, Chelsea Farrell & Brandon C. Welsh, *Looking Through Broken Windows: The Impact of Neighborhood Disorder on Aggression and Fear of Crime Is an Artifact of Research Design*, 2 ANN. REV. CRIMINOLOGY 53, 54, 65 (2019).

223. CURRENT AFFAIRS: *Why the Fraudulent "Broken Windows" Theory of Policing Refuses to Die* (Spotify, Nov. 6, 2024).

224. *Cited for Being in Plain Sight: How California Polices Being Black, Brown, and Unhoused in Public*, LAWS. COMM. FOR C.R. OF THE S.F. BAY AREA 27 (2020), https://lccrsf.org/wp-content/uploads/LCCR_CA_Infraction_report_4WEB-1.pdf [https://perma.cc/AZ8P-RP4C].

225. *See* NAT'L HOMELESSNESS L. CTR., *supra* note 214, at 7.

226. *See, e.g.*, Singleton v. City of Montgomery, No. 23-11163, 2025 WL 1042101, at *5 (11th Cir. Apr. 8, 2025) (per curiam); Speet v. Schuette, 726 F.3d 867, 870 (6th Cir. 2013).

227. *See* NAT'L HOMELESSNESS L. CTR., *supra* note 214, at 7.

228. Goluboff & Sorensen, *supra* note 9, at 11.

229. Chambliss, *supra* note 36, at 75; *see infra* Part III.A.

below, although the premises of the earlier vagrancy laws have been eroded and appropriately swept into the dustbin of history, and thus cannot be used to legitimatize laws today,[230] even these earlier laws did not go as far as the law considered by the Supreme Court in *Grants Pass*.[231]

III. LAWS LIKE THOSE IN GRANTS PASS ARE AN INDEFENSIBLE DEPARTURE FROM A HISTORICAL PERSPECTIVE

The City of Grants Pass argued to the Supreme Court that it could criminalize sleeping in public even if there was no private place for the person to sleep.[232] The operative ordinances purported to criminalize camping, but they defined camping as merely "occupy[ing]" a location "where bedding, sleeping bag, or other material used for bedding purposes ... is placed, established, or maintained for the purpose of maintaining a temporary place to live, whether or not such place incorporates the use of any tent ... or any other structure."[233] The only place a homeless person without access to available indoor shelter may engage in the biological imperatives of resting or sleeping is in a public space outdoors.[234]

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230. *See infra* Part III.B.

231. *See infra* Part III.C.

232. *See* Transcript of Oral Argument at 19-20, City of Grants Pass v. Johnson, 144 S. Ct. 2202 (2024) (No. 23-175).

233. Petition for Writ of Certiorari app. at 221a-22a, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175). The City also had a sleeping ordinance that specifically prohibited sleeping "on public sidewalks, streets, or alleyways." *Id.* at 221a.

Almost immediately after the Supreme Court's decision, Grants Pass amended its laws to provide designated campsites to try to comply with a state law that codified the rule of the lower courts and prohibited city-wide bans on sleeping or other life-sustaining activities by people experiencing homelessness. *See* Jane Vaughan, *After US Supreme Court Decision, Grants Pass Struggles to Make Long-Term Plan for Homelessness*, OPB (Sep. 19, 2024, at 14:01 ET), https://www.opb.org/article/2024/09/19/after-us-supreme-court-decision-grants-pass-struggles-to-make-long-term-plan-for-homelessness/ [https://perma.cc/6NYD-S7B6]; *see* OR. REV. STAT. § 195.530(2) (2025). However, a state court has now preliminarily enjoined Grants Pass's antisleeping regime under that state law. Order Granting Plaintiff's Motion for Preliminary Injunction at 1, Disability Rts. Or. v. Grants Pass, No. 25CV05989 (Or. Cir. Ct. Mar. 28, 2025).

234. *See* City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2228 (2024) (Sotomayor, J., dissenting) ("Sleep is a biological necessity."); Brief for Public Health Professionals and Organizations as Amici Curiae in Support of Respondents at 3-4, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175) [hereinafter Public Health Amicus Br.] ("Sleep is ... a biological necessity .... Homeless persons, like any other person, must sleep to live."); *id.* at 8 ("Sleep is a required

And when people sleep outside, they almost always use some sort of "bedding" such as a blanket or other item to protect them from the weather.[235] Indeed, in places such as Grants Pass where it is cold and rainy, forgoing a blanket while resting or sleeping outside is often incompatible with survival.[236] The ordinances thus equated "camping" with living as a homeless person outside in Grants Pass. While a person who has a home does not "maintain a temporary place to live" when sitting on a blanket for a picnic in the park, a homeless person temporarily "lives" wherever she rests or sleeps.[237]

The Grants Pass ordinances considered by the Supreme Court are an outlier compared to what other cities have done. A ban on falling asleep in the city if you are homeless, even if there is no other option, is something that few other jurisdictions have done until recently.[238] Yet since the *Grants Pass* decision, cities have decided

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health factor for survival—a basic need akin to ... 'breathing.'" (quoting *What Are Sleep Deprivation and Deficiency?*, NAT'L HEART LUNG, & BLOOD INST. (Mar. 24, 2022), https://www.nhlbi.nih.gov/health/sleep-deprivation [https://perma.cc/6722-SE3E]); Brief of Amici Curiae the Southern Poverty Law Center et al. in Support of Respondents at 6, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175) ("Humans only exist either in a state of sleep or wakefulness.").

235. *See* Blake v. City of Grants Pass, No. 18-cv-01823-CL, 2020 WL 4209227, at *6, *8 (D. Or. July 22, 2020) (explaining that "bedding" or other material "used as 'bedding'" could be as little as a "blanket," a "bundled up item of clothing [used] as a pillow," or "a flattened cardboard box to separate [a person] from the wet cold ground").

236. *See, e.g.*, Jane E. Brody, *Surviving the Cold, or Even the Not So Cold*, N.Y. TIMES (Jan. 9, 2007), https://www.nytimes.com/2007/01/09/health/09brody.html [https://perma.cc/C6F8-MMHM] (describing the hypothermia death of a man stranded in the Oregon wilderness and noting that "temperatures need not be at freezing, or even very low, for hypothermia to occur"); *see also* Public Health Amicus Br., *supra* note 234, at 12-14 (explaining the importance of bedding to the quality of sleep generally).

237. *See Grants Pass*, 144 S. Ct. at 2235 (Sotomayor, J., dissenting) ("Infants napping in strollers, Sunday afternoon picnickers, and nighttime stargazers may all engage in the same conduct of bringing blankets to public spaces [and sleeping], but they are exempt from punishment because they have a separate 'place to live' to which they presumably intend to return" (alteration in original) (quoting Brief of Criminal Law and Punishment Scholars as Amici Curiae in Support of Respondents at 12, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175) [hereinafter Criminal Scholars Br.])); *see also* Criminal Scholars Br., *supra*, at 12 (highlighting officer testimony that "laying on a blanket enjoying the park" or "bringing a sleeping bag to look at the stars" "would not violate the ordinances," but that "someone would ... violate the ordinance if he did not 'have another home to go to'").

238. *See* NAT'L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS 2019, at 41-42 (2019), https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf [https://perma.cc/MN5M-HD73] (surveying 187 cities and finding that in 2019, 21 percent prohibited sleeping in public citywide—marking a 50 percent increase since 2006). *See generally* Joint Appendix at 107, *Grants Pass*, 144 S. Ct. 2202 (No.

it is open season on homeless people, adopting a wave of new laws that criminalize the very existence of people without shelter in their communities.[239]

Although modern antihomelessness laws borrow from some of the worst impulses from history, as discussed next in Part III.A, they are still distinguishable from historical vagrancy laws in that they fail to acknowledge changes in law and circumstance and impose a level of cruelty on poor people that cannot be justified by history in any event, as discussed in Parts III.B and C, respectively.

A. Laws like Those in Grants Pass Inherit Many of the Worst Motives of Earlier Vagrancy Laws

Antivagrancy laws and their ilk were driven by exclusionary, often racist, impulses that viewed poor people akin to a pestilence. All people come into this world with a set of inalienable rights, including the right to live, exist, and be treated equally and fairly by their communities.[240] But society's thinking about people experiencing homelessness remains stuck in the mindset of a former enslaver or feudal lord, grieving over the perceived slight of losing control over other human beings. Excluding people deemed undesirable by those in power from public spaces is in vogue, enthusiastically embraced with bipartisan support.[241] America fought wars to affirm and reaffirm the principle of universal human rights,[242]

23-175) (explaining the difficulties associated with finding affordable housing in Grants Pass).

239. *See* ACLU, *supra* note 11.

240. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

241. *See, e.g.*, CALIFORNIA GOVERNOR GAVIN NEWSOM, *Governor Newsom Makes Statewide Funding Announcement on Mental Health, Homelessness Crisis*, at 35:48 (YouTube, May 12, 2025), https://www.youtube.com/watch?v=cgbhBJljqQ8 [https://perma.cc/VF4E-P3LN] ("It is time to take back the streets. It is time to take back the sidewalks."); Press Release, Exec. Off. of the Fla. Governor, Governor DeSantis Signs Legislation to Address Homelessness and Protect the Public and Quality of Life for Floridians (Mar. 20, 2024), https://www.flgov.com/eog/news/press/2024/governor-desantis-signs-legislation-address-homelessness-and-protect-public-and [https://perma.cc/8W5B-B587] ("Florida will not allow homeless encampments to intrude on its citizens or undermine their quality of life.").

242. *See, e.g.*, President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863) (on file with Libr. of Cong., Printed Ephemera Collection, Portfolio 244, Folder 45) ("Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal. Now we are engaged in a great civil war, testing whether that nation, or any nation so conceived and so dedicated, can long endure.").

and yet common thinking about poverty remains stubbornly stuck centuries in the past.[243]

Moreover, historical poor laws viewed poverty as a moral failing susceptible to correction through punishment and distinguished between the "worthy" and "unworthy" poor.[244] Again, echoes of history reverberate through modern debates over the scope of poor relief. This is a point amply made by previous scholars,[245] but it is worth emphasizing again. Indeed, it is startling how similar modern discourse is to some of the concepts articulated in the Statute of Labourers,[246] a hasty, draconian measure passed in the wake of the unimaginable tragedy of losing a third of the nation's population.[247] These ideas never worked well;[248] but even *if* they had made sense for a decimated England in 1351, it is a farce to continue down the same path in the United States today.

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243. *See supra* Part II; *see also* William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1, 14 (1960) ("The measure of the health of our legal system is the justice dispensed at all levels. Better that we be rid of the ancient poor laws that oppress our people ... than that we reach the moon.").

244. *See, e.g.*, Quigley, *supra* note 32, at 125.

245. *See, e.g.*, *id.*; Edith Abbott, *The Pauper Laws Still Go On*, 9 SOC. SERV. REV. 731, 731 (1935).

246. *Compare, e.g.*, Statute of Labourers of 1349, 23 Edw. 3 c. 1, pmbl. (Eng.) (complaining that servants are not willing to serve unless they receive "excessive Wages," and others, rather than through "Labour to get their Living," prefer to "beg in Idleness"), *with* CITY OF SIOUX FALLS, *One Sioux Falls Media Briefing 8-8-24*, at 4:22 (YouTube, Aug. 8, 2024), https://www.youtube.com/watch?v=JpZ27cngEzk [https://perma.cc/A5HH-M64K] (statement of Mayor Paul TenHaken) ("There are people who are not homeless by choice, and then there are people who are choosing that lifestyle."); *compare* Statute of Labourers, 23 Edw. 3 c. 1, § 7 (condemning those who "under the colour of Pity or Alms, give any thing to such, which may labour, or presume to favour them [towards their Desires,] so that thereby they may be compelled to labour for their necessary Living" (alteration in original) (footnote omitted)), *with* Press Release, Off. of Commc'ns & Engagement, Prince William Cnty., Va., Prince William County Launches "Give Where It Counts" Campaign to Address Panhandling (Dec. 4, 2024), https://www.pwcva.gov/news/prince-william-county-launches-give-where-it-counts-campaign-address-panhandling/ [https://perma.cc/A46E-9JR7] (discussing campaign to discourage providing money directly to panhandlers).

247. Quigley, *supra* note 32, at 83-84.

248. *See, e.g.*, BURN, *supra* note 67, at 106 ("Another thing very remarkable is, *that almost every proposal which hath been made for the reformation of the poor laws, hath been tried in former ages, and found ineffectual*."); *id.* at 120 ("It is affecting to humanity, to observe the various methods that have been invented, for the *punishment* of vagrants; none of all which wrought the desired effect."); *id.* at 122 ("[T]he obvious conclusion seems to be, that punishment alone is not sufficient. Therefore the remedy must be sought elsewhere.").

We have (allegedly) advanced not only in our recognition that laws and rights apply equally to everyone—white, male, and propertied, or not—but we have also made tremendous progress in understanding how the world works, including how humans work. Adam Smith demonstrated long ago that the old antipoor laws were inconsistent with lessons from economics.[249] Despite centuries of trying policies that criminalize various manifestations of poverty, there is no evidence that it works, and an abundance of evidence that it does not.[250] This research simply confirms what logic already compelled: Making it a crime for someone to be involuntarily without shelter does not increase the chances of that person finding shelter.[251]

B. Laws like Those in Grants Pass Rely on Pillars of Earlier Vagrancy Laws That Have Been Destroyed over Centuries by Changes in Circumstances and Law

It is incoherent to pluck aspects of earlier antipoor laws and force them into the modern legal environment without recognizing that the premises behind them no longer exist. As discussed above,

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249. *See supra* notes 105-06 and accompanying text.

250. *See, e.g.*, Hannah Lebovits & Andrew Sullivan, *Do Criminalization Policies Impact Local Homelessness?*, 54 POL'Y STUD. J. (forthcoming 2026) (manuscript at 2), https://onlinelibrary.wiley.com/doi/10.1111/psj.70056 [https://perma.cc/NNV2-ZQE3] ("[P]assage of a criminalization ordinance does not statistically relate to a decrease in homelessness in the years following the ordinance."); Chris Herring, Dilara Yarbrough & Lisa Marie Alatorre, *Pervasive Penality: How the Criminalization of Poverty Perpetuates Homelessness*, 67 SOC. PROBS. 131, 133 (2019); Jeff Olivet, *Collaborate, Don't Criminalize: How Communities Can Effectively and Humanely Address Homelessness*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS (Oct. 26, 2022), https://www.usich.gov/news-events/news/collaborate-don't-criminalize-how-communities-can-effectively-and-humanely-address [https://perma.cc/PRQ5-7NFE] ("These policies are ineffective, expensive, and actually worsen the tragedy of homelessness."); MARGOT KUSHEL & TIANA MOORE, BENIOFF HOMELESSNESS & HOUS. INITIATIVE, TOWARD A NEW UNDERSTANDING: THE CALIFORNIA STATEWIDE STUDY OF PEOPLE EXPERIENCING HOMELESSNESS 87 (2023), https://homelessness.ucsf.edu/sites/default/files/2023-06/CASPEH_ Report_62023.pdf [https://perma.cc/TMD5-CYAR] ("Criminal justice responses to survival behaviors, such as sleeping or living in public spaces are associated with ... prolongation of homelessness.").

251. *See, e.g.*, Laurie Hauber, *Criminalization of the Unhoused: A Case Study of Alternatives to a Punitive System*, 31 GEO. J. ON POVERTY L. & POL'Y 199, 204 (2024) ("[T]o the extent laws are intended to deter 'illegal behavior,' anti-homelessness laws enforced against people for trying to survive do not serve as motivation to avoid or modify behavior. People have no other choice but to commit these violations given the lack of accessible options.").

historically, the settlement system, poor relief laws, and vagrancy laws worked together as part of a unified whole.[252] Vagrancy law's restrictions on idleness and the settlement system's exclusionary rules were justified primarily by the local government's obligation to provide care for those in need.[253] As the Supreme Court put it, the logic of the old "poor laws no longer fits the facts."[254] Local governments like Grants Pass's typically do not fund poor relief for their residents; that responsibility has long been shifted to the state and (primarily) national governments.[255] Grants Pass's principal response to homelessness is to simply criminalize it instead of addressing it with a more productive package of tools such as providing resources and assistance.[256]

The law has also changed. Earlier antipoor laws had many indefensible features. Constitutional changes have undercut the foundation that might have propped up these laws in the past, and it is an affront to our current constitutional order to ignore those changes.[257] Antipoor laws often relied on two notions unequivocally rejected after the Civil War: the notion of compulsory labor and the idea of incomplete citizenship.[258] Throughout the antipoor laws of the earlier eras, governments claimed a right to force people to labor.[259] Indeed, a primary goal of antivagrancy laws was initially to prop up feudalism, and later slavery.[260] The Reconstruction Amendments unequivocally forbade both slavery and involuntary servitude,[261] and the drafters of the amendments repeatedly identified vagrancy laws as an evil that should not persist with the Thirteenth and Fourteenth Amendments.[262] The full promise of these amendments remains, as yet, unfulfilled, but they remain the law of the land regardless.

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252. *See supra* Parts II.A-B.
253. *See* Quigley, *Reluctant Charity*, *supra* note 110, at 114.
254. Edwards v. California, 314 U.S. 160, 174 (1941).
255. *See id.* at 174-75.
256. *See* City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2234 (2024) (Sotomayor, J., dissenting) (describing the city's approach).
257. *See* Goluboff & Schragger, *supra* note 1, at 200-01.
258. *See supra* Part II.C.
259. *See supra* Part II.A.1.
260. *See* Chambliss, *supra* note 36, at 77; Quigley, *supra* note 32, at 85.
261. U.S. CONST. amend. XIII.
262. *See supra* Part II.D.

Moreover, modern notions of citizenship and universality of rights reject the old forms of thinking that allowed a state or local government to deny rights to its residents. Perhaps at a time, rights were reserved only for those with property, a certain skin color, or who fit in some other constrained notion of the "People," but that time has long since passed. Yet one can sometimes hear a government argue that poor people do not have any rights, as when the State of Alabama recently argued that it could criminalize people in poverty based on its view that "paupers ... forfeited all civil, political, and social rights" at the founding of the United States.[263] The Fourteenth Amendment put an end to this mischief, rejecting stingier notions of rationed citizenship that underpinned *Dred Scott v. Sanford*, and guaranteeing that all persons within a state (regardless of property or other qualification) were entitled to equal protection of the laws, due process of law, and all of the privileges of U.S. citizenship.[264] Being poor does not place one outside of the protections of the Constitution, at least as amended.

C. Laws like Those in Grants Pass Constitute a Departure from History

Although modern antipoor laws borrow impulses from earlier generations, they impose fundamentally different costs and are ultimately justified by fundamentally different rationales than the laws of yesteryear. Grants Pass's ordinance demonstrates this point vividly.

As an initial matter, as noted above, the historical premise of these laws is no longer applicable. Cities are no longer required to provide aid to the poor and do not exist within a cohesive poor-relief scheme relying on local funds.[265] Thus, deference to local prejudices on the best means to provide relief is completely unwarranted; local governments largely are not the ones providing aid to their residents.[266] Unlike earlier times, when cities might have supplied

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263. *See* Appellant's Opening Brief at 12, Singleton v. Taylor, No. 20-CV-99, 2023 WL 2942998 (M.D. Ala. Mar. 10, 2023) (No. 23-11163).

264. U.S. CONST. amend. XIV, § 1; *see* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 406-07 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

265. *See supra* Part III.B.

266. *See* Edwards v. California, 314 U.S. 160, 175 (1941).

shelter, food, beer, health care, legal aid, and a stipend to at least some poor residents,[267] Grants Pass is uninterested in providing even basic aid to its homeless residents,[268] and has affirmatively tried to stop others from providing aid.[269] Local governments' stinginess denies relief even to those who, like Gloria Johnson, would have qualified for aid under earlier vagrancy laws on account of age, disability, and long-standing settlement in the community.[270] Earlier antipoor regimes would have understood an obligation to ensure she had shelter;[271] today, the antipoor regime is simply punitive without addressing the absence of shelter.[272]

Moreover, earlier poor laws were targeted at problematic manifestations of idleness—drinking, games of chance, or sturdy begging—by those who were deemed able to work but who refused to do so.[273] Criminalizing universal human functions such as sleeping or eating lacks historical support. In fact, courts rejected the idea that merely sleeping outside of a house at night could be considered vagrancy.[274] Instead, under English nightwalker laws, *not* sleeping during the night could be grounds for suspicion.[275] By

267. *See* McIntosh, *supra* note 62, at 202-03.

268. *See* City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2234-35 (2024) (Sotomayor, J., dissenting) (noting that the Grants Pass city council contemplated disseminating a "'do not serve' list" to service agencies and denying basic services to the homeless to accomplish their goal in making the city so uncomfortable for the homeless population that they would leave the city (quoting Joint Appendix at 121, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175))).

269. *See* Jane Vaughan, *Grants Pass City Council Votes to Regulate Groups Helping Homeless People on Public Property*, OPB (Mar. 12, 2024, at 02:20 ET), https://www.opb.org/article/2024/03/11/grants-pass-oregon-non-profit-organizations-charitable-work [https://perma.cc/S8Y3-KH4B].

270. *See* Joint Appendix at 1, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175) (noting Johnson was sixty-eight years old and was a long-time city resident); *supra* notes 112-16 and accompanying text.

271. *See, e.g.*, supra note 77 and accompanying text.

272. *See* Maria Foscarinis, *Downward Spiral: Homelessness and Its Criminalization*, 14 YALE L. & POL'Y REV. 1, 25, (1996) ("Cities instituting criminalizing measures typically do not offer assistance—emergency or long-term—in any way sufficient to allow their homeless residents to move off the streets or out of the shelters.").

273. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 156 n.1 (1972).

274. *See In re* Jordan, 50 N.W. 1087, 1087 (Mich. 1892) (per curiam) ("Sleeping in a barn one night and going about the township is not 'vagrancy,' under any definition that we can find in the law.").

275. *See* Atwater v. City of Lago Vista, 532 U.S. 318, 333-34 (2001) (describing English nightwalker laws); 4 BLACKSTONE, *supra* note 68, at *169.

contrast, modern antipoor laws punish sleeping in a city where unhoused individuals have no choice but to sleep in public.

Finally, the premise of the earlier laws was that work was available to everyone who wanted it, and at rates sufficient to support oneself and one's family.[276] Whether or not that was true in centuries past, it bears little resemblance to modern poverty. Many people who are homeless work, but the gap between modern wages and modern shelter costs leaves significant fractions of the population unable to afford shelter.[277] Unlike the Founding-era vagrancy laws, today's ordinances do not aim to regulate labor or punish idleness, and they are not limited to voluntarily "idle" persons who choose not to work.[278] Those with jobs but without shelter are caught up in their net, and punishing people who are able and willing to work (or who are unable to work due to age, disability, or sickness) but who cannot afford shelter runs counter to the history of vagrancy laws.

The closest historical analogues for the modern laws are the so-called "ugly laws"[279] and "sundown town laws"[280] of the late

276. *See, e.g.*, Quigley, *supra* note 32, at 83-87.

277. *Data & Trends*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, https://usich.gov/guidance-reports-data/data-trends [https://perma.cc/UMN4-DBS8].

278. *See, e.g.*, GRANTS PASS, OR., MUN. CODE § 5.61.010 (2025).

279. Between the late 1860s and the 1970s, some cities had "ugly laws," which punished people with physical disabilities for existing in public places. Dan Thompson, *Ugly Laws: The History of Disability Regulation in North America*, PROGRESS, Spring 2011, at 15, 15. For example, Chicago passed an ordinance making it a crime for "[a]ny person who is diseased, maimed, mutilated, or in any way deformed, so as to be an unsightly or disgusting object, or an improper person to be allowed in or on the streets, highways, thoroughfares or public places in this city," to "expose himself or herself to public view." CHI., ILL., MUN. CODE art. 38, § 1612 (1881).

280. Sundown towns surfaced in the late nineteenth century and proliferated in the early- to mid-twentieth century. *See* Tom I. Romero, II, *No Brown Towns: Anti-Immigrant Ordinances and Equality of Educational Opportunity for Latina/os*, 12 J. GENDER, RACE & JUST. 13, 28-29 (2008). These towns—unsurprisingly, including Grants Pass itself—aimed to prevent African-Americans and other racial minorities "from occupying public space within a town's geographical borders." ORTIZ & DICK, *supra* note 16, at 11; Brief of Amicus Curiae The National Homelessness Law Center in Support of Respondents at 8, City of Grants Pass v. Johnson, 144 S. Ct. 2202 (2024) (No. 23-175); *From Sundown to Sunrise*, VISIT GRANTS PASS: HISTORY OF GRANTS PASS, https://visitgrantspass.com/history/ [https://perma.cc/34AK-FRHZ] (choose "06: Sundown to Sunrise" from sidebar). They did so through ordinances that barred minorities from being within the city limits during certain hours of the day, property covenants limiting land ownership to white Americans, or even public signage directing minorities to leave the city limits after dark. Peter Carlson, *When Signs Said 'Get Out,'* WASH. POST (Feb. 20, 2006), https://www.washingtonpost.com/archive/lifestyle/2006/02/21/when-

nineteenth and twentieth centuries, which targeted disfavored groups based on their identity and attempted to exclude them from public space.[281] But these laws, like historical vagrancy laws, have since disappeared.[282] These laws are appropriately looked on with disgust today and doubtlessly would be invalidated. We hope cities defending their antihomeless laws appreciate the company that they are keeping.

IV. MOVING FORWARD

As the previous Parts have demonstrated, when properly situated in history, modern antipoor laws like the Grants Pass ordinances considered by the Supreme Court are extreme both by modern and historic measures. By punishing poor people for merely living, even when it is impossible for that person to comply with the law, modern antipoor laws run afoul of ancient legal principles that have governed our legal regime since the *Magna Carta*.

A. Criminalizing an Involuntary Act of Life Violates Deeply Rooted History

One of the most extreme features of antipoor ordinances like those in Grants Pass is that they impose criminal consequences on a person even if there is no physical or possible way that a person can avoid those consequences in the jurisdiction.[283] If Grants Pass can prohibit sleeping anywhere in the city, and get away with calling it a conduct-based ban that is immune from Eighth Amendment scrutiny, cities could just as readily ban breathing, blinking, or sneezing—perhaps even occupying space, or having the wrong

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signs-said-get-out-span-classbankheadin-sundown-towns-racism-in-the-rearview-mirrorspan/0e80ab6c-51a7-4412-a320-168315ced22b/ [https://perma.cc/496J-NZB4].

281. *See* ORTIZ & DICK, *supra* note 16, at 9-12.

282. Ugly laws are no longer on the books; *see id.* at 10 ("In 1990, Congress acted to officially end all such discrimination with the American [sic] with Disabilities Act."), having been recognized as "cruel." *See* Edward Schreiber, *"Affront to Everyone:" A Law That's an Offense*, CHI. TRIB., Oct. 18, 1973, at A1 (quoting Alderman Paul Wigoda). "The disappearance of Sundown Towns flowed incidentally from Supreme Court cases ruling that restrictive covenants were unconstitutional." ORTIZ & DICK, *supra* note 16, at 11.

283. *See* Hauber, *supra* note 251, at 204.

blood type—and yet face no scrutiny under the Cruel and Unusual Punishments Clause.[284]

That, of course, is an extraordinary and radical result. As explained above, it enjoys no refuge in history, even in a history replete with animosity toward poor people.[285] But it is also breathtaking because it contradicts one of the most fundamentally ingrained notions of criminal law, which requires that a person must have *some* measure of blameworthiness or volition before imposing criminal responsibility.[286] As a unanimous Supreme Court said less than a decade after the ratification of the Fourteenth Amendment,

> the law at the same time is not so unreasonable as to attach culpability, and consequently to impose punishment, where there is no intention to evade its provisions, and the usual means to comply with them are adopted. All punitive legislation contemplates some relation between guilt and punishment. To inflict the latter where the former does not exist would shock the sense of justice of every one.[287]

Making it a crime to sleep, breathe, or otherwise engage in necessary biological acts when there is no way to avoid doing so flies directly in the face of this rule.

Indeed, the rule that a person has to voluntarily act (or refrain from acting),[288] and with some measure of blameworthiness, in order

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284. *See* City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2236 (2024) (Sotomayor, J., dissenting) ("The majority countenances the criminalization of status as long as the City tacks on an essential bodily function—blinking, sleeping, eating, or breathing. That is just another way to ban the person.").

285. *See supra* Parts II.A-B.

286. *See* Criminal Scholars Br., *supra* note 237, at 4 ("Perhaps the most fundamental limit on criminal punishment is that it cannot be imposed on innocent conduct."). In a recent essay, Professor McJunkin calls this ancient understanding into question, suggesting that more recent applications of criminal law do "punish[ ] *mala prohibita* crimes that, in some sense, could not be avoided." *See* Ben A. McJunkin, Grants Pass *and the Pathology of the Criminal Law*, 102 WASH. U. L. REV. 1583, 1606-07 (2025).

287. Felton v. United States, 96 U.S. 699, 703 (1877); *cf.* Calder v. Bull, 3 U.S. (3 Dall.) 386, 396 (1798) (opinion of Paterson, J.) (emphasizing the link between control over action and the ability to punish it, noting that it would be "cruel and unjust" to impose punishment on someone who did something completely innocent at the time of acting).

288. *See* Brief of Professors Peter W. Low & Joel S. Johnson as Amici Curiae in Support of Neither Party at 8, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175) [hereinafter Professors Low & Johnson Br.] ("The conduct requirement is now firmly and independently embedded as a

to be criminally liable has an ancient pedigree, dating back to at least the infancy of the criminal law in the twelfth century.[289] The eminent common-law authorities have maintained for centuries the basic principle of blameworthy action or inaction in the defendant's control as the foundation of criminal law.[290] Additionally, Roscoe Pound posited almost a century ago that "our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong."[291] Joel Prentiss Bishop's influential treatise on criminal law decreed that an unavoidable act is not indictable and that "[t]o this doctrine there can be and is no exception, it is universal."[292] Blackstone's *Commentaries*, which predated the Constitution, emphasized that "[a]n involuntary act, as it has no claim to merit, so neither can it induce any guilt."[293] Still earlier commentaries reiterated that "[n]o action can be criminal, if it is not possible for a man to do otherwise. An unavoidable crime is a contradiction: [W]hatever is unavoidable is no crime; and whatever is a crime is not unavoidable."[294] More than a hundred years before that, Edward Coke articulated the same principle.[295] As far back as Sir Francis Bacon's writings in the 1600s, it was a basic concept that the law held anyone responsible "where the act is compulsory and not voluntary, and where there is not a consent and election; and therefore if either there be an impossibility for a man to do otherwise ... such necessity carrieth a privilege in itself."[296]

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constitutional constraint on crime definition.").

289. *See* 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 477 (Cambridge Univ. Press 1968) (1898) (tracing requirement of mens rea to the twelfth century in England).

290. *See* Kahler v. Kansas, 140 S. Ct. 1021, 1040 (2020) (Breyer, J., dissenting).

291. Roscoe Pound, *Introduction* to FRANCIS BOWES SAYRE, A SELECTION OF CASES ON CRIMINAL LAW, at xxix, xxxvi-xxxvii (1927).

292. 1 JOEL PRENTISS BISHOP, BISHOP ON CRIMINAL LAW § 346, at 242 (John M. Zane & Carl Zollmann eds., 9th ed. 1923).

293. 4 BLACKSTONE, *supra* note 68, at *15.

294. 1 T. RUTHERFORTH, INSTITUTES OF NATURAL LAW 434 (Cambridge, Cambridge Univ. Press 1754); *see also* HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 922 (Richard Tuck ed., Liberty Fund 2005) (1738) ("Those acts that are unavoidable by human Nature, are not to be punished by human Laws.").

295. 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 6, 107 (4th ed. London, 1669).

296. FRANCIS BACON, *The Elements of the Common Laws of England*, *in* LAW TRACTS 23, 55 (London, 1737).

When a rule of law is so firmly ingrained in history as a foundation of criminal law, we should be skeptical of attempts to abandon it. Yet for all of its purported love of history, the Supreme Court seems increasingly willing to tolerate state and local officials discarding ancient principles to inflict expedient punishment.[297] Still, whatever latitude that governments may have to tweak scienter standards or insanity defense elements,[298] it is a fundamentally different thing to abandon the foundation of criminal law that a person being punished has at least some ability to control their situation.

In addition to the Eighth Amendment, courts have long viewed the Due Process Clause as offering protection against capricious state punishments.[299] But in its 2020 *Kahler v. Kansas* decision, the Supreme Court announced a "high bar" for such challenges to succeed: "[A] state rule about criminal liability—laying out either the elements of or the defenses to a crime—violates due process only if it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[300] The person accused of a crime in *Kahler* argued that the state's modification of the insanity defense had violated his due process rights by departing from history.[301] Surveying many of the same authorities noted above, the Court acknowledged that "for hundreds of years jurists and judges have recognized insanity (however defined) as relieving responsibility for a crime," and suggested that a state law that completely departed from that principle might be invalid.[302] Nevertheless, the Court turned away the accused's reliance on this history, finding that state law was close enough: At least some form of insanity defense remained, and that was enough to show that the State complied with the mandates of history.[303] And in seeming tension with its earlier insistence that history controls, the Court

297. *See* Kahler v. Kansas, 140 S. Ct. 1021, 1024 (2020); Morissette v. United States, 342 U.S. 246, 263 (1952).

298. *See* McJunkin, *supra* note 286, at 1615 ("Punishing those who have nowhere else to sleep is inhumane, but it is arguably consistent with a criminal system that routinely makes inhumanity a feature.").

299. *Kahler*, 140 S. Ct. at 1027.

300. *See id.* (quoting Leland v. Oregon, 343 U.S. 790, 798 (1952)).

301. *Id.* at 1029.

302. *See id.* at 1030-31.

303. *Id.* at 1031-37.

ended its opinion by urging that the law should not be constrained by history but "open to revision over time, as new medical knowledge emerges and as legal and moral norms evolve."[304]

Although the standard that *Kahler* announces is a high one, it is one that criminalizing involuntary conduct like sleeping, breathing, or sneezing would seem to satisfy. Imposing criminal liability on a person when it is physically impossible for the person to comply with the law is a sharp departure from ancient rules of criminal liability. The *Grants Pass* majority acknowledged that "a variety of other legal doctrines and constitutional provisions work to protect those in our criminal justice system from a conviction,"[305] and scholars have already identified due process as one potential protection against the most extreme excesses of modern antipoor laws.[306] We agree.

Critics of our position might argue that whatever excuse from criminal liability due process requires can and should be provided by the necessity defense. The *Grants Pass* majority emphasized this possibility, noting that, "[l]ike some other jurisdictions, Oregon recognizes a 'necessity' defense to certain criminal charges. It may be that defense extends to charges for illegal camping when it comes to those with nowhere else to go."[307] The Court's use of such equivocal language—that "some" places recognize a defense to "certain criminal charges" that "may be" available to homeless people—hardly suggests that the necessity defense is going to meaningfully cabin antipoor laws.[308] But even if the defense were theoretically available, it is far from guaranteed that a person punished under an antipoor law could take advantage of it. Much of the punishment inflicted by antipoor laws takes place when police use their cover to issue move-along orders or otherwise prevent people from existing in their community.[309] And even if a case ends up in

304. *Id.* at 1037.

305. City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2220 (2024).

306. McJunkin, *supra* note 286, at 1614 ("[T]here are constitutional doctrines that protect agency, most notably the substantive due process ensured by the Fifth and Fourteenth Amendments (and state analogues)."); Professors Low & Johnson Br., *supra* note 288, at 9.

307. *Grants Pass*, 144 S. Ct. at 2220.

308. The City argued that the necessity defense is "very narrow." Transcript of Oral Argument at 46, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175).

309. Hauber, *supra* note 251, at 202-03; Herring et al., *supra* note 250, at 145.

court, most people charged under antipoor laws will be convicted without ever having a lawyer represent them.[310]

B. Banishment and Exile of Poor People

Making it a crime to sleep in a jurisdiction is not only a radical departure from history, it also functions as a mode of banishing people from a community simply for being poor[311]—a phenomenon at odds with the structure of our Constitution and "that is now generally recognized as contrary to our Nation's legal tradition."[312] A person, involuntarily without access to shelter, can avoid liability under an antipoor law, such as Grants Pass's, only by leaving the jurisdiction altogether, just like Robinson could leave California and no longer be criminalized.[313] But forcing a person to leave a jurisdiction or face criminal consequences raises its own constitutional problems for functioning as de facto banishment and does not solve the significant due process issue of antipoor laws criminalizing a person's necessary behavior.[314]

As Professor Smith-Drelich recently catalogued, the freedom of movement throughout the United States is deeply rooted in history and tradition, dating back to the *Magna Carta* and ingrained in American law.[315] More than a dozen times, the Supreme Court has recognized that people have the right to live and move through all parts of the United States.[316] Indeed, "[t]he right of a citizen of one

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310. There is no obligation that indigent criminal defendants be given a court-appointed attorney in misdemeanor cases that will not result in immediate and actual imprisonment. Alabama v. Shelton, 535 U.S. 654, 657 (2002).

311. *See, e.g.*, Douglas, *supra* note 243, at 2 ("Scores of people are thus banished from our cities every day. Those exiled are not traitors or even thieves. They are wanderers, men of the 'open road;' persons whose only crime in many cases is in being jobless and homeless.").

312. Brief for the United States as Amicus Curiae in Support of Neither Party, at 21, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175).

313. *See* Robinson v. California, 370 U.S. 660, 663 (1962).

314. *Grants Pass*, 144 S. Ct. at 2243 (Sotomayor, J., dissenting). *See generally* Sara K. Rankin, *The Influence of Exile*, 76 MD. L. REV. 4 (2016) (providing background on how criminalization laws have been used in the United States to exile certain communities from public spaces).

315. *See generally* Noah Smith-Drelich, *The Forgotten Fundamental Right to Free Movement*, 119 NW. U. L. REV. 811 (2025) (describing the emergence and history of the right to free movement).

316. *Id.* at 881 (noting fourteen Supreme Court majority opinions recognizing the right); *accord*, Saenz v. Roe, 526 U.S. 489, 503-04 (1999); Shapiro v. Thompson, 394 U.S. 618, 634

state to pass through, or to reside in any other state ... [is] clearly embraced by the general description of privileges deemed to be fundamental."[317] Blackstone noted that "[a] natural and regular consequence of this personal liberty, is, that every Englishman may claim a right to abide in his own country so long as he pleases."[318] The Citizenship Clause of the Fourteenth Amendment recognizes the right of people to be treated as citizens of whatever state "wherein they reside."[319] And even apart from the right to move about, simply deterring poor people from moving to a community is "not a valid exercise of the police power."[320]

Even Justice Thomas's dissenting opinion in *Obergefell v. Hodges*, in which he took a narrow view of the scope of rights protected by the Fourteenth Amendment, recognized the liberty that one has to

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(1969) ("But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional."), *overruled in part on other grounds by*, Edelman v. Jordan, 415 U.S. 651, 671 (1974); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 80 (1872) ("[The Privileges and Immunities Clause ensures] that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bonâ fide* residence therein, with the same rights as other citizens of that State."); *id.* at 112-13 (Bradley, J., dissenting) ("A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right. He is not bound to cringe to any superior, or to pray for any act of grace, as a means of enjoying all the rights and privileges enjoyed by other citizens."); Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1870) (holding the Privileges and Immunities Clause "plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation"); Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 49 (1867) ("We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States.").

317. Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230); *accord* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 71 (3d ed. New York 1836) (describing the right "to pass through or reside in the state at pleasure" as "fundamental"). The Supreme Court has "repeatedly approved as authoritative" the *Corfield* decision. Canadian N. Ry. Co. v. Eggen, 252 U.S. 553, 560 (1920).

318. 1 BLACKSTONE, *supra* note 68, at *137.

319. U.S. CONST. amend. XIV, § 1.

320. Edwards v. California, 314 U.S. 160, 177 (1941); *accord, e.g.*, Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 263-64 (1974) ("[T]o the extent [that] the purpose of the [law] is to inhibit the immigration of indigents generally, that goal is constitutionally impermissible."). The structure of the settlement system allowed for restrictions on migration of paupers historically, but it would have been a breach for a local government to exile a settled resident. *See* Quigley, *supra* note 32, at 103.

move about, free from restrictions on locomotion.[321] Justice Thomas described "'the right of personal liberty' as 'the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law.'"[322] And he noted that:

> When the colonists described laws that would infringe their liberties, they discussed laws that would prohibit individuals "from walking in the streets and highways on certain saints days, or from being abroad after a certain time in the evening, or ... restrain [them] from working up and manufacturing materials of [their] own growth."[323]

That source that Justice Thomas cited for the colonists' understanding of liberty waxes poetic about how Americans "found freedom in the wilderness; they ... lodged under trees and among bushes; but in that state they were happy because they were free."[324] The freedom celebrated in Justice Thomas's dissent is now the very thing that cities rush to make a crime.

Restricting a person's ability to exist in a jurisdiction is akin to banishment or exile.[325] The *Magna Carta* expressly forbade banishment except pursuant to due process.[326] Blackstone noted that exile was "a punishment unknown to the common law," and thus no one was to be "driven from [their home country] unless by the sentence of the law.... [N]o[,] not even a criminal."[327] Yet laws that exclude poor people from a community have the same practical

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321. 576 U.S. 644, 728 (2015) (Thomas, J., dissenting).

322. *Id.* at 724 (quoting 1 BLACKSTONE, *supra* note 68, at *125, 130).

323. *Id.* at 728 (second and third alterations in original) (quoting Silas Downer, *A Discourse at the Dedication of the Tree of Liberty*, *in* 1 CHARLES S. HYNEMAN & DONALD S. LUTZ, AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805, at 101 (1983)).

324. Silas Downer, *A Discourse at the Dedication of the Tree of Liberty*, *in* 1 CHARLES S. HYNEMAN & DONALD S. LUTZ, AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805, at 107 (1983).

325. By forcing a person away from a jurisdiction, banishment interferes with a person's right to travel throughout the United States. *See, e.g.*, Johnson v. City of Cincinnati, 310 F.3d 484, 498 (6th Cir. 2002); Pottinger v. City of Miami, 810 F. Supp. 1551, 1578 (S.D. Fla. 1992) (finding antihomeless law violated the fundamental right to travel); Foscarinis, *supra* note 272, at 43-49.

326. The Magna Carta of Edward 1 1297, 25 Edw. 1 c. 9, cl. 39 (Eng.).

327. 1 BLACKSTONE, *supra* note 68, at *137.

effect, even though those people have committed no crime.[328] The Constitution forecloses jurisdictions from making it unlawful for a person to exist in their jurisdiction.[329]

V. THE SUPREME COURT CITES HISTORY, BUT DOES IT LEARN FROM IT?

History is not on Grants Pass's side. Yet with scarce analysis, the Supreme Court majority briefly invoked history to support its conclusion that Grants Pass's law was valid,[330] failing to even acknowledge, much less grapple with, the many ways in which history undercut the Court's reasoning.[331] In fact, neither the Court nor Grants Pass nor amici could identify any historical analogue to what Grants Pass sought to do.

Grants Pass serves as one more datum in the growing mountain of evidence against the Court's current selective approach to history. Even if one subscribes to the premise of originalism and history-informed adjudication, even if one believes that "a page of history is worth a volume of logic,"[332] and that history can be uncovered in a sufficiently methodologically sound way in litigation,[333] the Supreme

328. In a united country, banishing a person from one jurisdiction intrudes not only on that person's rights, but also on the interests of other jurisdictions. People v. Baum, 231 N.W. 95, 96 (Mich. 1930) (holding that banishment as punishment would "tend to incite dissension, provoke retaliation, and disturb that fundamental equality of political rights among the several states which is the basis of the Union itself").

329. *See* City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2243 (2024) (Sotomayor, J., dissenting).

330. *Id.* at 2216 (majority opinion) ("[L]arge numbers of cities and States across the country have long employed ... similar punishments for similar offenses." (citing Brief for Professor John F. Stinneford as Amicus Curiae in Support of Petitioner at 7-13, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175)).

331. The Court simply asserted that "neither the plaintiffs nor the dissent meaningfully contests" the argument that the City's law was similar to historical vagrancy laws, *id.*, and ignored that the respondents' brief devoted pages detailing how "radically different" the City's laws were "from the vagrancy laws of early America," Brief for Respondents at 34-40, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175). *See generally* Vagrancy Law Scholars Br., *supra* note 178 (arguing to the Court that the Grants Pass ordinance was not in line with history and tradition).

332. N.Y. Tr. Co. v. Eisner, 256 U.S. 345, 349 (1921).

333. Scholars have argued that the Court sometimes just gets history wrong. *See* Michael J. Zydney Mannheimer, Harmelin*'s Faulty Originalism*, 14 NEV. L.J. 522, 522 (2014); John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 913-14 (2011).

Court's recent decisions cast serious doubt over whether its increasing references to history are meaningfully informing the outcome of its cases. In other words, history-driven analysis has not proven to be a potent constraint on judicial discretion or mitigating ideologically driven results.

One reason why history has not proven a reliable guide is because the Court's use of history is too malleable. Across doctrines, the Court has moved away from Justice Scalia's theory of originalism (public meaning originalism)[334] to an inquiry into historical analogues to the practice.[335] As others have argued, the historical analogue approach is hard to defend on originalist grounds.[336] But even if one accepts that the historical-analogue test is an appropriate expression of originalist theory, the Court's application is indefensible. What is meaningful seems very much to be in the eye of the beholder.

In adopting a new originalist test for Second Amendment challenges in *New York State Rifle & Pistol Association v. Bruen* and requiring that any law that burdens conduct covered by the plain text of the Second Amendment be justified by a historical analoge, Justice Thomas, writing for a majority of the Supreme Court, emphasized that, "when it comes to interpreting the Constitution, not all history is created equal."[337] And, according to Madiba Dennie, "[b]asically, any history that supported the gun regulation didn't count" in the Court's search for a historical analogue to New York's gun regulation at issue in *Bruen*.[338] "Some history that supported the regulation was ignored because it was before the Founding, which made it too early. Other history was too late. Some historical laws were too different from the New York statute. Other[s] ... were

334. *See* Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 103 (2023).

335. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2129-30 (2022).

336. *See, e.g.*, Cass R. Sunstein, *Injury in Fact, Transformed*, 2021 SUP. CT. REV. 349, 369 ("The Court has invented a tradition. *TransUnion* makes some brisk gestures in the direction of originalism, but it makes no effort to ground its holding in the original understanding." (footnote omitted)).

337. 142 S. Ct. at 2126, 2136. In announcing this new history-focused test for Second Amendment challenges, the Court rejected the framework that lower courts had applied to gun restrictions, which incorporated the type of means-end scrutiny that typically governs in litigation over constitutional rights. *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 996-99 (7th ed. 2023) (explaining means-end scrutiny).

338. DENNIE, *supra* note 16, at 11.

similar but were outliers, and unrepresentative of the historical period."[339] In other words, *Bruen*

> left [us] with something not much better than the Goldilocks solution: [H]istory can't be viewed too specifically, and it can't be viewed too generally. It must be, like the bed, the chair, or the porridge, "just right." And that "perfect" length, or height, or temperature will remain in the eye of the beholder, or perhaps the final court to consider the matter.[340]

In *Dobbs v. Jackson Women's Health Organization*, in which a majority of the Supreme overturned *Roe v. Wade* and held that pregnant people do not have a constitutional right to end their pregnancies, Justice Alito reasoned that the Constitution only protects those rights that are explicitly mentioned in the Constitution's text or "deeply rooted in this Nation's history and tradition."[341]

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339. *Id.*; *see Bruen*, 142 S. Ct. at 2138-57.

340. Atkinson v. Garland, 70 F.4th 1018, 1029 (7th Cir. 2023) (Wood, J., dissenting) (citations omitted) (citing Jake Charles, Bruen, *Analogies, and the Quest for Goldilocks History*, DUKE CTR. FOR FIREARMS L. BLOG (June 28, 2022), https://firearmslaw.duke.edu/2022/06/bruen-analogies-and-the-quest-for-goldilocks-history [https://perma.cc/NM7Y-FLFR]); *see also* United States v. Bullock, 679 F. Supp. 3d 501, 505 (S.D. Miss. 2023) (criticizing *Bruen* for its reliance on "'law office history'—that is, history selected to 'fit the needs of people looking for ammunition in their causes'—in Constitutional interpretation" (quoting Gordon S. Wood, *The Supreme Court and the Uses of History*, 39 OHIO N.U. L. REV. 435, 446 (2013))), *rev'd and remanded*, 123 F.4th 183 (5th Cir. 2024); Saul Cornell, *Cherry-Picked History and Ideology-Driven Outcomes:* Bruen*'s Originalist Distortions*, SCOTUSBLOG (June 27, 2022), https://www.scotusblog.com/2022/06/cherry-picked-history-and-ideology-driven-outcomes-bruens-originalist-distortions/ [https://perma.cc/79G6-V3EU] (discussing the use of law-office history in *Bruen*). Although the Supreme Court attempted to clarify *Bruen* and its novel historical test in *United States v. Rahimi*, 144 S. Ct. 1889, 1897-98 (2024), that case still leaves numerous questions unanswered and thus "plenty of room for judicial subjectivity," Lawrence Rosenthal, *Litigating Original Meaning from* Heller *to* Rahimi*: The Role of Lawyering in the Confused Path of Second Amendment Jurisprudence*, 73 AM. U. L. REV. 1857, 1892 (2024); *see also* Jimmy Donlon, Comment, United States v. Rahimi: *"We Do Not Resolve Any of Those Questions Because We Cannot,"* 111 VA. L. REV. ONLINE 27 (2025), https://virginialawreview.org/articles/united-states-v-rahimi-we-do-not-resolve-any-of-those-questions-because-we-cannot/ [https://perma.cc/778L-V7SA] (arguing that *Rahimi* does not provide lower courts with guidance on how to apply *Bruen*).

341. 142 S. Ct. 2228, 2242 (2022) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)). The right to an abortion, previously recognized by *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, was situated in the guarantee of liberty in the Fourteenth Amendment's Due Process Clause, and built upon prior cases that recognized a right to privacy as inherent to that liberty guarantee. *See* Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992). The evolution of substantive due

The right to abortion did not satisfy this history-and-tradition test, Justice Alito explained, because, "[u]ntil the latter part of the [twentieth] century, such a right was entirely unknown in American law."[342] In particular, Justice Alito emphasized that "[n]o state constitutional provision" or "federal or state court" had recognized such a right, "[n]or had any scholarly treatise," and that "until shortly before *Roe*, ... abortion had long been a *crime* in every single State."[343]

Of course, looking to a historical period during which a particular group of people had no right to participate in American democracy in order to determine the scope of the rights those people have today is problematic on its own terms.[344] But the Court's supposed "careful analysis of the history"[345] was selective and riddled with choices about which history to credit. "The justices in *Dobbs* made a *choice* about when, whether, and to what extent they should discount practices that existed around the time the Constitution was ratified."[346] They made "a choice about what level of generality to

process doctrine is beyond the scope of this paper, but suffice it to say that the Court's insistence on using history and tradition (and the level of specificity at which the right in question is defined) has not been consistent over time. For more on this point, see DENNIE, *supra* note 16, at 54-64.

342. *Dobbs*, 142 S. Ct. at 2242.

343. *Id.* at 2248-49 ("At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions. By the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow.").

344. Women did not gain the right to vote until 1920, when the Nineteenth Amendment was ratified, so fair to say lawmakers in the 1700s and 1800s did not represent their views. *Cf. id.* at 2324-25 (Breyer, J., dissenting) (noting that although "[t]he majority's core legal postulate ... is that we in the 21st century must read the Fourteenth Amendment just as its ratifiers did," only men ratified the Fourteenth Amendment, who, at that time, "did not understand women as full members of the community"). Indeed, as part of the Court's historical analysis of the scope of a woman's right to abortion in *Dobbs*, Justice Alito cited writings by a seventeenth-century English jurist, Sir Matthew Hale, *id.* at 2249-51 (majority opinion), who conceived "the legal notion that a married woman cannot be raped by her husband" and who sentenced women to death for being convicted for being a witch, Ken Armstrong, *Draft Overturning* Roe v. Wade *Quotes Infamous Witch Trial Judge with Long-Discredited Ideas on Rape*, PROPUBLICA (May 6, 2022, at 13:50 ET), https://www.propublica.org/article/abortion-roe-wade-alito-scotus-hale [https://perma.cc/3BWL-3WQ9].

345. *Dobbs*, 142 S. Ct. at 2246.

346. LEAH LITMAN, LAWLESS: HOW THE SUPREME COURT RUNS ON CONSERVATIVE GRIEVANCE, FRINGE THEORIES, AND BAD VIBES 39 (2025).

interpret the historical record”—that is, whether to look for laws that specifically allowed abortions versus laws that gave people other kinds of bodily autonomy; “[a] choice to privilege the law on the books over the law on the ground and ignore how women procured abortions despite laws prohibiting abortion[s]”; and “a choice to discount laws that distinguished between abortions at different points in pregnancy.”[347] And on the latter point, the Court discounted the history highlighted by actual historians, who submitted an amicus brief confirming *Roe*’s conclusion that “American history and traditions from the founding to the post-Civil War years included a woman’s ability to make decisions regarding abortion, as far as allowed by the common law.”[348]

This “à la carte approach” to history is even more stunning when one compares *Bruen* to *Dobbs*, which came down the next day:

> In *Bruen*, the Court’s originalists said if a gun regulation did not exist in the past, it was because the regulation was constitutionally impermissible, and today’s laws can go no further. In *Dobbs*, the Court’s originalists said that the fact that an abortion regulation did not exist in the past has no bearing on whether the regulation is constitutionally permissible, and today’s lawmakers can prohibit abortion in any way they want.[349]

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347. *Id.* at 39-40.

348. Brief for Amici Curiae American Historical Association and Organization of American Historians in Support of Respondents at 30, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392). The historians’ brief explained that the English common law did not even recognize an abortion as occurring before “quickening,” that is, until a pregnant person could feel a fetus move, which could occur as late as twenty-five weeks; that “[u]p to the Civil War, the majority of state abortion laws either codified the common law by prohibiting abortion only in later stages of pregnancy, or followed the common law’s reasoning by punishing abortion prior to quickening more lightly”; and that “as of 1868, nearly one-third of states ... continued to draw on the common law.” *Id.* at 2-4. After the *Dobbs* decision, these amici, joined by thirty other groups, published a joint statement lamenting that, for all its reference to “history,” the majority opinion “inadequately represents the history of the common law, the significance of quickening in state law and practice in the United States, and the 19th-century forces that turned early abortion into a crime.” *History, the Supreme Court, and* Dobbs v. Jackson: *Joint Statement from the AHA and the OAH*, AM. HIST. ASS’N (July 6, 2022), https://www.historians.org/news/history-the-supreme-court-and-dobbs-v-jackson-joint-statement-from-the-aha-and-the-oah/ [https://perma.cc/4TBW-4ZF4].

349. DENNIE, *supra* note 16, at 11 (footnote omitted). *Contrast* N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2131 (2022) (“[W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged

Moreover, the centuries-spanning history that the majority considered in *Dobbs* is tough to reconcile with the Court's opinion in *Bruen*.[350]

The Court's selective approach to history is evident in other cases as well. For example, in significantly limiting Congress's power to create rights by statute as a basis for standing in *TransUnion LLC v. Ramirez*, Justice Kavanaugh, writing for a majority of the Court, emphasized that in assessing whether a plaintiff has suffered a "concrete" harm for purposes of standing, "courts should assess whether the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts."[351] The plaintiffs sued a credit reporting agency because their credit file suggested—falsely—they were a terrorist, drug trafficker, or other serious criminal.[352] And there was no question that the common law recognized an interest in protecting one's reputation, and that being designated a terrorist, for example,

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regulation is inconsistent with the Second Amendment. Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional."), *with Dobbs*, 144 S. Ct. at 2255 ("The Solicitor General ... suggests that history supports an abortion right because [of] the common law's failure to criminalize abortion before quickening .... [b]ut the insistence on quickening was not universal, *and regardless*, the fact that many States in the late 18th and early 19th century did not criminalize pre-quickening abortions does not mean that anyone thought the States lacked the authority to do so." (emphasis added) (citations omitted)).

350. *See Dobbs*, 142 S. Ct. at 2323-24 (Breyer, J., dissenting) (noting that although the majority framed the question as whether the right recognized in *Roe* and *Casey* existed in 1868 when the Fourteenth Amendment was ratified, its opinion "refers as well to some later and earlier history": "On the one side of 1868, it goes back as far as the 13th (the 13th!) century," which should be too early to be relevant under the logic of *Bruen*, and "[o]n the other side of 1868, the majority occasionally notes that many States barred abortion up to the time of *Roe*," even though *Bruen* said postratification evidence that is inconsistent with the original meaning of the Constitution cannot be credited).

351. 141 S. Ct. 2190, 2204 (2021) (quoting Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016)). The four dissenting justices—including Justice Thomas—criticized the Court's holding as being at odds with history. In his dissent, Justice Thomas explained that the key question for standing purposes is whether an individual asserts a violation of his or her own rights, regardless of whether the right stems from common law or a newly created statute. *See id.* at 2217-21 (Thomas, J., dissenting); *see also id.* at 2225 (Kagan, J., dissenting) (echoing similar concerns). Indeed, the availability of informer and qui tam statutes at the founding calls into question much of modern standing doctrine. *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 175 (1992). *But see* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 701 (2004).

352. *TransUnion*, 141 S. Ct. at 2201.

intruded on this interest.[353] Yet, the Court nevertheless concluded that thousands of plaintiffs lacked standing, reasoning that they failed to meet all of the substantive elements for liability under the common law test used in most states because the defamatory information was not "published."[354] In other words, the Court gave no deference to the legislature, and held that Congress's ability to create causes of action is constrained by the core elements of a common law tort.[355] The Court's analysis "demonstrate[s] the problems inherent in unsystematic application of levels of generality in legal analogies."[356]

TransUnion's highly specific demand for a direct historical analogue is similar to another case about federal judicial power: *Trump v. CASA, Inc.*[357] The plaintiffs in *CASA* challenged a facially unlawful executive order that purported to end birthright citizenship, and obtained relief that prohibited the Executive Branch from enforcing the new policy against anyone.[358] In determining that federal courts' power extended only to the parties before it, the *CASA* majority refused to recognize a "bill of peace," a longstanding equitable tool to provide relief to nonparties, as a historical analogue justifying nonparty injunctions against the federal government.[359] In the Court's view, the bill of peace was typically

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353. *See id.* at 2204. Justice Thomas's dissent notes:

> But even setting aside everything already mentioned—the Constitution's text, history, precedent, financial harm, libel, the risk of publication, and actual disclosure to a third party—one need only tap into common sense to know that receiving a letter identifying you as a potential drug trafficker or terrorist is harmful.

Id. at 2223 (Thomas, J., dissenting).

354. *See id.* at 2208-10, 2210 n.6 (majority opinion) ("Many American courts did not traditionally recognize intra-company disclosures as actionable publications for purposes of the tort of defamation.").

355. This approach resurrects long-discarded notions of common law supremacy, in which judge-made common law superseded the legislative power to refine the rules. *See generally* Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908) (discussing the ways courts interact with legislative innovations).

356. Jason Altabet, Comment, TransUnion v. Ramirez*: Levels of Generality and Originalist Analogies*, 45 HARV. J.L. & PUB. POL'Y 1077, 1097 (2022).

357. 145 S. Ct. 2540 (2025).

358. *See CASA, Inc.*, 145 S. Ct. at 2549.

359. *See id.* at 2554-55. Bills of peace were issued "where the parties [were] very numerous, and the court perceive[d], that it [would] be almost impossible to bring them all before the court; or where the question [was] of general interest, and a few [could] sue for the benefit of the whole." Ortiz v. Fibreboard Corp., 527 U.S. 815, 832 (1999) (quoting West v. Randall, 29

used to provide relief to smaller groups (like those challenging a municipal policy),[360] and so could not be used to sustain a factually distinct situation (like those challenging a federal policy).[361] Instead, the Court reasoned that the plaintiffs were required to meet the class action requirements of Rule 23, even though the Court conceded that those requirements were "in some ways 'more restrictive of representative suits than the original bills of peace.'"[362]

Across doctrinal areas, the Court's turn to history has arguably become a tool of convenience, not constraint.[363] The historical-analogue inquiry fails to offer reliable constraints on which analogues count, how specific or general the analogue should be viewed, and what features of the historical analogue are relevant to informing modern decision-making.[364] *Bruen*, *TransUnion*, and *CASA* all demanded a very specific, near-identical historical analogue in order to sustain the challenged practice.[365] *Grants Pass*, in contrast, upheld a law that was significantly different from historical ordinances.[366] The failure of the *Grants Pass* majority to acknowledge the lack of a relevant historical analogue to the

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F. Cas. 718, 722 (C.C.D.R.I. 1820) (No. 17,424)).

360. The Court's decision relied on scholarship by Sam Bray, who noted examples of bills of peace brought to challenge the collection of municipal or county taxes. *See CASA, Inc.*, 145 S. Ct. at 2551-56 (citing Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017)).

361. *See id.* at 2555-56.

362. *Id.* at 2555 (quoting Rodgers v. Bryant, 942 F.3d 451, 464 (8th Cir. 2019) (Stras, J., concurring)). Another recent example of so-called "law-office history" can be found in *Brown v. Davenport*. 142 S. Ct. 1510, 1520-1523 (2022). Though history was not particularly relevant to the Court's ultimate holding in that case (which addressed the standard federal habeas courts should use when evaluating whether a state trial court error was harmless), Justice Kagan, joined by Justices Breyer and Sotomayor, offered a rebuttal to the majority's discussion of historical habeas practice. *See id.* at 1531 (Kagan, J., dissenting) (noting that "the majority, unprompted," offered a "from-Blackstone-onward theory of habeas practice" despite its irrelevance to the matter at hand, "perhaps hoping that the seeds it sowed would yield more succulent fruit in cases to come"); *id.* at 1531-35 (explaining why the majority's theory that "post-conviction habeas relief was all but unavailable until the mid-20th century" was "wrong" in "its fundamentals").

363. Another example of a high level of abstraction comes from *Kahler*, discussed above, which asked simply whether the State provided any insanity defense, regardless of whether the modern elements of the defense matched earlier versions. *See supra* text accompanying notes 299-303.

364. *See, e.g.*, Peter J. Smith, *Originalism and Level of Generality*, 51 GA. L. REV. 485, 532 (2017).

365. *See supra* text accompanying notes 337-40, 351-61.

366. *See supra* Part III.C.

antisleeping law adds further doubt that history is serving as a useful guide. Still, we think it important to situate the modern anti-homeless law in its historical context, and to highlight just how extraordinary it is to criminalize our neighbors when they fall asleep.

CONCLUSION

"Punishing and imprisoning the poor is the distinctively American response to poverty in the twenty-first century."[367] And since *Grants Pass* came down, the problem has only gotten worse. Today, the Land of the Free outlaws people for sleeping, making it impossible for a person experiencing homelessness to live without violating the law. Whether judged from historical, modern, international, constitutional, or logical standards, criminalizing people for being without shelter is truly extraordinary and abnormal.

History need not constrain society, but it can offer important lessons. When we indulge the animosities of old, we harm our neighbors and we degrade ourselves.[368] And when we criminalize people for sleeping or performing other necessary biological imperatives simply because they are poor, we depart from history, and we depart from the Constitution. We call on courts and policymakers to build on history, not regress.

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367. Philip Alston (Special Rapporteur on Extreme Poverty and Human Rights), *Rep. of the Special Rapporteur on Extreme Poverty and Human Rights on His Mission to the United States of America*, Hum. Rts. Council, ¶ 71, U.N. Doc. A/HRC/38/33/Add.1 (May 4, 2018).

368. *See* Goluboff & Schragger, *supra* note 1, at 194.