Do the Homeless Possess an Implied Right to Public Support? Exploring Professor Walker's Social Compact Theory

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Justice Robert H. Jackson wrote in *Edwards v. California* that "'[i]ndigence' in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color."[1] The Ninth Circuit United States Court of Appeals held many years later in *Martin v. Boise* that the Cruel and Unusual Punishments Clause of the "Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter."[2] Yet, the court characterized its ruling as a "narrow one."[3] It stated that the court did not dictate that sufficient shelter must be provided for the homeless or that anyone could sit, lie, or sleep anywhere, anytime.[4] The court explained that "[n]othing in the opinion reaches beyond criminalizing the biologically essential need to sleep when there is no available shelter."[5] In summary, the Cruel and Unusual Punishments Clause prohibits punishing unavoidable subsistence activities by homeless persons "on the false premise they had a choice in the matter."[6] However, the Constitution does not appear to require adoption of "any particular social policy, plan, or law to care for the homeless."[7]

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[1] Edwards v. California, 314 U.S. 160, 184-85 (1941) (Jackson, J., concurring).

[2] Martin v. Boise, 920 F.3d 584, 616 (9th Cir. 2019).

[3] *Id.* at 617.

[4] *Id.* at 617; *see also* Jones v. City of Los Angeles, 444 F.3d 1118, 1137-38 (9th Cir. 2006), *vacated,* 505 F.3d 1006 (9th Cir. 2007).

[5] *Martin*, 920 F.3d at 589 (Berzon, J., concurring in denial of rehearing en banc).

[6] *Id.* at 617; *see generally* Tim Donaldson, *Criminally Homeless? The Eighth Amendment Prohibition Against Penalizing Status*, 4 CONCORDIA L. REV. 1 (2019).

[7] *Jones*, 444 F.3d at 1138, *vacated,* 505 F.3d at 1006 (9th Cir. 2007); *see also Martin*, 920 F.3d, 616-17; *cf*. Kincaid v. City of Fresno, No. 1:06-cv-1445 OWW SMS, 2006 WL 3542732, at *35 (E.D. Cal. Dec. 8, 2006) (concluding that rights to due process and protection against unreasonable seizures were violated by sweeps to remove homeless encampments, but asserting that "[t]he Court will not presume to tell elected officials of the City of Fresno how to address and resolve problems presented by the homeless."). The practical effect rulings that foreclose municipal remedies unless homeless relief is provided may however arguably lead to the same result. *See* Johnson v. City of Dallas, 860 F.Supp. 344, 350-51 (N.D. Tex. 1994), *rev'd in part, vacated in part by* Johnson v. City of Dallas, 61 F.3d 442 (5th Cir. 1995).

Professor Timothy Walker expressed a different viewpoint in his early commentary, an *Introduction to American Law*.[8] Walker noted that a few constitutional provisions favor the poor but acknowledged that "[t]here is no one which directly asserts, that those who cannot support themselves, shall be maintained at the public expense."[9] He theorized however that one might be implied from social compact principles that underlie American conceptions of government:

> [T]heir right of maintenance would seem to result, not only from the dictates of humanity, but from all the great principles of social organization. In a state of nature, the poor might appropriate to themselves the first property within their reach. By entering into the social compact, they have been obliged to renounce this right; and among the chances of life, it has fallen to their lot to be destitute. May they not then claim a bare support as a right? Life is the first and highest of all rights; but what is life, without the means of living?[10]

Walker found it unnecessary to pursue his reasoning, because he believed that adequate provision for the poor had been made by county poor-houses and supply of other government support when no poor-house was available.[11]

This article picks up where Professor Walker left off in 1837. It explores social compact theory and how that political idea was understood at the time of the nation's founding. The article further examines whether a social compact principle is embedded in the Constitution that provides a basis for individual rights. Lastly, it considers whether the poor possess a social compact right to bare support.

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[8] TIMOTHY WALKER, INTRODUCTION TO AMERICAN LAW § 195, at 197-98 (1837). Timothy Walker founded the University of Cincinnati College of Law in 1833 and his *Introduction to American Law* gained a reputation as "the American Blackstone." Irwin Rutter and Samuel Wilson, *The College of Law: an Overview 1833-1983*, 52 U. CIN. L. REV. 311, 311-13 (1983). Walker's *Introduction to American Law* is now largely forgotten, but it has been cited by the Supreme Court as an authoritative resource for determining founding era intent. *See* District of Columbia v. Heller, 554 U.S. 570, 585 (2008).

[9] WALKER, *supra* note 8, at 197.

[10] *Id.* Some writers alternatively refer to a social compact and a social contract. *E.g.*, JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS 54-55 (Victor Gourevitch ed. and trans., Cambridge Univ. Press 2d ed. 2019) (1748). This article uses the social compact terminology adopted by Professor Walker except in quoted material and when necessary to discuss passages that expressly reference social contracts.

[11] WALKER, *supra* note 8, at 197-98.

I. SOCIAL COMPACT THEORY

Thomas Hobbes theorized in *Leviathan* that men are equal in nature and at conflict with each other for survival.[12] In Hobbes' view, this inherent disposition of man was evident from the way ordinary men safeguarded themselves when traveling and regularly secured their belongings to prevent them from being taken by others, and the manner in which kings took precautions to protect their kingdoms.[13] He considered this a condition of war where there cannot be assurance even during the abeyance of actual battle that another might not still take one's freedom, family, or property by violence at any time.[14] Hobbes opined that this condition is neither right nor wrong in the absence of society.[15] It is simply the way things are in nature, where life is "solitary, poore [sic], nasty, brutish, and short."[16]

Hobbes wrote that each man in nature has the liberty to do whatever he thinks is necessary to preserve his own life and to make use of whatever and whoever he sees fit.[17] This however provides no security to anyone, and men are therefore willing to surrender some of their liberty for peace; provided, others are willing to do the same.[18] To achieve the security that comes from peace, a person amenably forgoes the right in nature to do anything he wishes and is "*contented with so much liberty against other men, as he would allow other men against himselfe* [sic]."[19]

Hobbes asserted that the object of a man's surrender of natural liberty is his own benefit; therefore, some rights are inalienable.[20] For example, a man does not relinquish the right to defend himself against assault by others, because this cannot be understood to do himself any good.[21] Hobbes also acknowledged however that others are not dependent upon an individual's capitulation of rights for authority to act against that individual, because they already have a co-equal right in nature to act as they see fit.[22] Peaceful

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[12] THOMAS HOBBES, LEVIATHAN 86-89 (Richard Tuck ed., Cambridge Univ. Press rev. student ed. 1996) (1651).

[13] *Id.* at 89-90.

[14] *Id.* at 88-89.

[15] *Id.* at 90.

[16] *Id.* at 89.

[17] *Id.* at 91.

[18] *Id.* at 91-92.

[19] *Id.* at 92. *But see* CHARLES MONTESQUIEU, THE SPIRIT OF THE LAWS 6-9 (Anne Cohler et al. eds., Cambridge Univ. Press 1989) (1748) (disputing Hobbes' views on the nature of man but still concluding that societies consist of a union of individual wills and strengths).

[20] HOBBES, *supra* note 12, at 93.

[21] *Id.* at 93, 98, 151.

[22] *Id.* at 92.

society therefore depends upon a reciprocal or mutual transfer or renunciation of certain rights.[23] This process, Hobbes explained, "is that which men call CONTRACT."[24]

A commonwealth is instituted, according to Hobbes, when a multitude agree, "*every one, with every one*," to give some person or assembly the right to represent them and authorize the actions and judgments of that person or assembly as if they were the multitude's own, "to the end, to live peaceably amongst themselves, and be protected against other men."[25] It is a product of necessity.[26] Hobbes believed that certain natural laws, such as justice, arise when men reciprocally pursue peace.[27] They are however incapable of enforcement without some power to cause their observance, because they are contrary to natural passions.[28] The only way, in Hobbes' view, to secure a lasting social contract is to appoint someone or some assembly with authority to act in matters concerning common peace and safety, and submit the individual wills of the multitude to the will of those appointed.[29] Sovereign power is therefore "conferred by the consent of the People assembled."[30]

John Locke similarly wrote in his *Two Treatises of Government* that "[m]en being . . . by Nature, all free, equal and independent, no one can be put out of this Estate, and subjected to the Political Power of another, without his own *Consent*."[31] Locke theorized that all men were naturally in a state of perfect freedom to do as they see fit within the bounds of the law of nature.[32] They also existed in a state of equality where power was reciprocal, and no one was subordinate to another absent divine declaration.[33] Locke did not however believe that someone in nature possessed license to harm others unless necessary for the person's own preservation.[34] Since all were equal, he perceived that every individual had a corresponding obligation to defend the rest of mankind and the life, liberty, health, limb, and goods of others.[35] He further explained that each person held power to execute the law of nature and therefore protect the innocent and punish offenders.[36] The law of

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[23] *Id.* at 92-94, 117-21.
[24] *Id.* at 94.
[25] *Id.* at 121.
[26] *See id.* at 96, 117-21.
[27] *Id.* at 100-05.
[28] *Id.* at 117-18.
[29] *Id.* at 120-21.
[30] *Id.* at 121.
[31] JOHN LOCKE, TWO TREATISES OF GOVERNMENT 330 (Peter Laslett ed., Cambridge Univ. Press student ed. 1988) (1690).
[32] *Id.* at 269, 323-24.
[33] *Id.* at 269.
[34] *Id.* at 270-71.
[35] *Id.* at 271.
[36] *Id.* at 271-72, 323-24.

nature requiring the peace and preservation of all mankind, in Locke's words, would:

> be in vain, if there were no body that in the State of Nature, had a *Power to Execute* that Law, and thereby preserve the innocent and restrain offenders, and if any one in the State of Nature may punish another, for any evil he has done, every one may do so. For in that *State of perfect Equality*, where naturally there is no superiority or jurisdiction of one, over another, what any may do in Prosecution of that Law, every one must needs have a Right to do.[37]

Locke wrote that God imbued people with "strong Obligations of Necessity, Convenience, and Inclination to drive [them] into *Society*. . . ."[38] As an example, he cited the conjugal society of a man and woman that is needed not only for procreation but also care of their young for the species to survive.[39] Additionally, Locke cited the dangers and uncertainties in the state of nature as impetus for men to willingly give up their personal executory power and take sanctuary under society and established rules.[40] Particular communities were not however dictated by man's predisposition for society, and were instead, in Locke's view, dependent upon men joining into a community "for their comfortable, safe, and peaceable living one amongst another, in a secure Enjoyment of their Properties, and a greater Security against any that are not of it."[41] When doing so, each was understood to "give up all the power necessary to the ends for which they unite into Society. . . ."[42] Locke called this "*all the Compact*" needed to form a commonwealth and wrote, "this is that, and that only, which did, or could give *beginning* to any *lawful Government* in the World."[43]

Locke disagreed with Hobbes regarding the duration of consent given by those who enter into a social compact.[44] Hobbes wrote that the consent given to sovereign power by the multitude is essentially irrevocable.[45] In contrast, Locke asserted that men gave up their equality, liberty, and executive power in nature to form society "only with an intention in every

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[37] *Id.* at 271-72.
[38] *Id.* at 318.
[39] *Id.* at 319-22.
[40] *Id.* at 350-52.
[41] *Id.* at 331.
[42] *Id.* at 333.
[43] *Id.*
[44] *Compare Id.* at 406-428 (describing the circumstances in which government may be dissolved), *with* HOBBES, *supra* note 12, at 122-23 (opining that subjects cannot be freed from their covenant to a sovereign).
[45] *See* HOBBES at 121-23.

one the better to preserve himself his Liberty and Property. . . ."[46] Therefore, whoever possessed supreme power in a commonwealth could only exercise that authority for the peace, safety, and public good of the people and for no other end.[47] When those in power breach their public trust by ambition, fear, folly or corruption, "it devolves to the People, who have a Right to resume their original Liberty, and . . . provide for their own Safety and Security, which is the end for which they are in Society."[48]

In contrast to Locke's view that members of a social compact give up some of the rights they have in nature to the extent necessary for the ends of society,[49] Jean-Jacques Rousseau declared in *The Social Contract* that they alienate all of their rights to the whole community when entering into a social contract.[50] However, Rousseau agreed with the central premise that man in nature has "an unlimited right to everything that tempts him and he can reach[,]" and that right is given up when joining with others into a society.[51] Therefore, sovereignty is solely the product of the association of individuals and cannot have any interests contrary to those who have associated.[52] In Rousseau's words, the "Sovereign owes its being solely to the sanctity of the contract."[53] The contract was not however between the governed and the government, but was instead the association among the governed who are in fact the sovereign.[54]

Rousseau theorized that the surrender of all natural rights to the community by individuals creates a condition of equality.[55] This equality brings into being a moral and collective body made up of its members.[56] The transition "produces a most remarkable change in man by substituting justice for instinct in his conduct . . . ."[57] In summary, Rousseau believed that the trade-off for an individual surrendering natural freedom is civil freedom.[58] So-called rights in nature, which amounted only to an unfettered and unprotected ability to usurp, transformed into genuine rights protected by society.[59]

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[46] LOCKE, *supra* note 31, at 353.
[47] *Id.* at 353, 357-63.
[48] *Id.* at 412-13.
[49] *Id.* at 333.
[50] ROUSSEAU, *supra* note 10, at 52.
[51] *Id.* at 55-56.
[52] *Id.* at 51-55.
[53] *Id.* at 54.
[54] *Id.* at 119-21.
[55] *Id.* at 52, 64-65.
[56] *Id.* at 52-53.
[57] *Id.* at 55.
[58] *Id.* at 55-56.
[59] *Id.* at 55-58. Rousseau's views differ from the idea of reserved natural rights advocated by the Constitution's Founders. *See e.g.* 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 429 (Philadelphia, J.B. Lippincott

By the time of the American revolution, social compact theory (and Locke's views in particular) had gained recognition beyond political thought and penetrated into legal discourse.[60] William Blackstone wrote in his *Commentaries on the Laws of England* that a system of laws is designed to maintain civil liberty except to the extent that the "public good requires some direction or restraint."[61] Blackstone endorsed the view that man in nature possessed absolute rights that could be exercised as he saw fit as a "free agent."[62] He recognized that every man, "when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish."[63] Therefore, "the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals."[64] Political or civil liberty, in Blackstone's view, was "no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the publick [sic]."[65]

II. CONSTITUTIONAL INFLUENCE OF SOCIAL COMPACT THEORY

Modern scholars disagree upon the extent to which social compact theory actually guided the drafting of the Constitution.[66] It did however at least influence colonial thought. Locke is expressly mentioned in a list of rights asserted by Bostonians in 1772 which declares:

> The natural liberty of Men by entring [sic] into society is abridg'd or restrained so far only as is necessary for the Great end of Society the best good of the whole—
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> In the state of nature, every man is under God, Judge and sole Judge, of his own rights and the injuries done him: By entering into society, he agrees to an Arbiter or indifferent Judge between him and his neighbours [sic]; but he no more renounces his original right, than by taking a

Co. 2d ed. 1941) (comments by James Wilson). There is however some support for Rousseau's belief that natural rights were replaced by civil rights through the social compact. *See e.g.* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 319-21 (1827) (Trimble, J., concurring).

[60] *E.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 121-22 (Oxford, Clarendon Press 1765) (promoting social compact theory and citing Locke).

[61] *Id.* at 122.

[62] *Id.* at 121.

[63] *Id.*

[64] *Id.* at 120.

[65] *Id.* at 121.

[66] Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1, 2-5 (1999) (citing authorities and explaining different points of view).

> cause out of the ordinary course of law, and leaving the decision to Referees or indifferent Arbitrations.[67]

According to the Bostonian list: "Every natural Right not expressly given up or from the nature of a Social Compact necessarily ceded remains."[68] In addition, the Declaration of Independence echoes Lockean ideas. For example, it contends that governments derive "their just powers from the consent of the governed."[69] This contention is identical to Locke's hypothesis that no one can be subjected to the political power of another "without his own *Consent*."[70] The Declaration of Independence also asserts a right to dissolve political bands and assume "the separate and equal station to which the laws of nature and of nature's God entitle them. . . ."[71] This assertion appears quite similar to Locke's views that men are independent, equal, and subordinate to no one in nature, and that they have the right to resume their original liberty and establish new government when existing government abuses its authority.[72]

Social compact theory was repeatedly raised during the debates surrounding the writing of the Constitution.[73] At the federal convention, delegate James Wilson analogized the willingness of States to cede power to a federal government to the willingness of men in nature to surrender personal freedom to form society:

> Federal liberty is to States, what civil liberty, is to private individuals. And States are not more unwilling to purchase it, by the necessary concession of their political sovereignty, tha[n] the savage is to purchase civil liberty by the surrender of his personal sovereignty, which he enjoys in a State of nature.[74]

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[67] THE RIGHTS OF THE COLONISTS AND A LIST OF INFRINGEMENTS AND VIOLATIONS OF RIGHTS, 1772, *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 200, 201 (1971) (referring to Locke as "Mr. Lock").

[68] *Id.* at 200.

[69] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[70] LOCKE, *supra* note 31, at 330.

[71] THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

[72] LOCKE, *supra* note 31, at 269, 330-31, 412-14, 427-28.

[73] Andrew C. McLaughlin, *Social Compact and Constitutional Construction*, 5 AM. HIST. REV. 467, 472-77 (1900).

[74] JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 77 (Gaillard Hunt & James Brown Scott, eds., 1920) (James Wilson was an original Supreme Court Associate Justice. Re: Appointment of Justices, 2 U.S. (2 Dall.) 399 (1790). Wilson is also one of only a handful of the Founders who both signed the Declaration of Independence and served as a delegate to the Constitutional Convention of 1787). *See* 1 ST. HIST. SOC. OF WIS., THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 76, 317 (Merrill Jenson, ed., 1976) (identifying signatories to the Declaration of Independence and Constitution).

Wilson elaborated in the Pennsylvania State convention:

> Civil liberty is natural liberty itself, divested of only that part which, placed in the government, produces more good and happiness to the community than if it had remained in the individual. Hence it follows that civil liberty, while it resigns a part of natural liberty, retains the free and generous exercise of all the human faculties, so far as it is compatible with the public welfare . . . . When a single government is instituted, the individuals of which it is composed surrender to it a part of their natural independence, which they before enjoyed as men.[75]

Wilson later wrote that a state may be described as "a complete body of free persons, united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others."[76] Wilson believed that the only method of constituting civil society was "by the convention or consent of the members, who compose it."[77] He concluded that it was "indispensably necessary, that the wills and the power of all the members be united in such a manner, that they shall never act nor desire but one and the same thing, in whatever relates to the end, for which the society [was] established."[78] In Wilson's view, each individual in the social compact thus "engages with the whole collectively, and the whole collectively engage with each individual. These engagements are obligatory, because they are mutual."[79] Wilson called such civil society a state even without some form of government attached, and concluded that government therefore must serve the happiness of society.[80] Since this social compact concept of "state" underlies all government, Wilson wrote: "[l]et government - let even the constitution be, as they ought to be, the handmaids; let them not be for they ought not to be, the mistresses of the state."[81]

Constitutional debaters seemed to accept that social compact theory underlies American democracy and instead, argued whether arrangements

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[75] *See* 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 429 (Philadelphia, J.B. Lippincott Co. 2d ed. 1941) (comments by James Wilson).

[76] 1 JAMES WILSON, THE WORKS OF JAMES WILSON 239 (Robert Green McCloskey ed. Belknap Press, 1967).

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.* at 238-39.

[81] *Id.* at 239.

which formed a national government should be considered a compact between States or something different.[82] The Founders' belief in social compact principles is evidenced by the September 17, 1787 letter from the Constitutional Convention to Congress transmitting the Constitution:

> Individuals entering into society, must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstance, as on the object to be obtained. It is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be reserved; and on the present occasion this difficulty was encreased [sic] by a difference among the several States as to their situation, extent, habits, and particular interests.[83]

The Ninth Amendment to the U.S. Constitution memorializes the premise of reserved rights that is central to Lockean social compact theory, by stating:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.[84]

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[82] *See* McLaughlin, *supra* note 73, at, 473-81; *see also* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 306-72, at 279-343 (1833); 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. 140-56 (1803). (It should however be noted that McLaughlin reports some remarks made by Wilson in the Pennsylvania convention that might at first glance appear to deny that the Constitution has a compact origin, however, any confusion likely arises from context. McLaughlin, *supra* note 73, at 478-79. Wilson later clarified that the Constitution, in his view, is an agreement between the people of the various States rather than a compact among completely sovereign States, and he submitted that the source of confusion and perplexity was the emphasis given to State-politics by several publications of that time.) *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 462-64 (1793) (opinion of Wilson, J.).

[83] Letter from George Washington, President of the Constitutional Convention, to the President of Congress (Sept. 17, 1787), *reprinted in* THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION , *supra* note 74, at 305; *see also* THE FEDERALIST NO. 84 (Alexander Hamilton) (arguing that bills of rights are stipulations between kings and subjects and unnecessary in the Constitution which recognized reserved popular rights by asserting that the people ordained and established it: "Here, in strictness, the people surrender nothing, and as they retain every thing, they have no need of particular reservations."), *reprinted in* ALEXANDER HAMILTON ET. AL., THE FEDERALIST 578 (Jacob E. Cook ed., 1961).

[84] U.S. CONST. amend. IX; *see* 3 STORY, *supra* note 82, §§ 1861, 1898, at 720-21, 751-52. (The Tenth Amendment similarly indicates a reserved rights philosophy, and provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." U.S. CONST. amend. X.). Application of the Ninth Amendment is beyond the scope of this article, but its history and purposes are ably covered elsewhere. *E.g.* CALVIN R. MASSEY, SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION'S UNENUMERATED RIGHTS (Temple University Press 1995); BENNETT B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955); Kurt T. Lash, *Three Myths of the Ninth Amendment*, 56 DRAKE L. REV. 875 (2008);

Justice James Wilson relied upon social compact principles when rejecting an argument in *Chisholm v. Georgia* that a State could assert sovereign immunity against the jurisdiction of the Supreme Court, explaining that Georgia was not sovereign in a feudal sense.[85] Wilson described a State as "a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others."[86] Wilson wrote that "laws derived from the pure source of equality and justice must be founded on the CONSENT of those, whose obedience they require. The *sovereign*, when traced to his source, must be found in the *man*."[87] Wilson concluded that the citizens of Georgia "did *not* surrender the Supreme or sovereign Power to that State; but, *as to the purposes of the Union*, retained it to themselves. *As to the purposes of the Union*, therefore, *Georgia is* NOT *a sovereign State*."[88] Therefore, in Wilson's opinion, Georgia was subject to the jurisdiction of United States courts, because the people of the United States (which included the people of Georgia) exercised their reserved sovereignty to vest the Union with judicial power through the Constitution.[89]

Chief Justice John Jay explained in *Chisholm* that sovereignty in the United States rests with the people, and government is only the agent of the people.[90] He wrote that the Constitution recognizes this sovereignty with the expression that it was established by "[w]e the *people* of the *United States*."[91] In Jay's view:

Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006); Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597 (2005); Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331 (2004); Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223 (1983); Raoul Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1 (1980); Knowlton H. Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L. J. 309 (1936). The Chicago-Kent Law Review published an instructive issue devoted primarily to a Ninth Amendment symposium which contains contributions from many preeminent scholars. *E.g.*, Randy E. Barnett, *Foreword: The Ninth Amendment and Constitutional Legitimacy*, 64 CHI-KENT L. REV. 37 (1988). It later published rebuttal papers by other top scholars on the Ninth Amendment. Suzanna Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, 64 CHI-KENT L. REV. 1001 (1988); Calvin R. Massey, *Antifederalism and the Ninth Amendment*, 64 CHI-KENT L. REV. 987 (1988); Earl M. Maltz, *Unenumerated Rights and Originalist Methodology: a Comment on the Ninth Amendment Symposium*, 64 CHI-KENT L. REV. 981 (1988).

[85] Chisholm, 2 U.S. (2 Dall.) at 454-58 (opinion of Wilson, J.), *superseded by constitutional amendment*, U.S. CONST. amend. XI; *see also* Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798) (holding that U.S. CONST. amend. XI superseded Chisholm).

[86] Chisholm, 2 U.S. (2 Dall.) at 455.

[87] *Id.* at 458.

[88] *Id.* at 457.

[89] *Id.* at 457-58, 463.

[90] *Id.* at 472 (opinion of Jay, C.J.).

[91] *Id.* at 471.

> Every State Constitution is a compact made by and between the citizens of a State to govern themselves in a certain manner; and the Constitution of the *United States* is likewise a compact made by the people of the *United States* to govern themselves as to general objects, in a certain manner.[92]

He opined that the residuary sovereignty of each State belonged to the people of that State.[93] Jay concluded that Georgia could be sued in federal courts by the citizens of another State, because it would be strange if the people of this country, "the joint and equal sovereigns[,]" would grant the collective citizens of one State the right to sue a citizen of another while denying those citizens the right of suing them.[94]

Justice James Iredell dissented in *Chisholm*, writing that the Judiciary Act of 1789 required the Court to respect the common law doctrine of sovereign immunity which he believed the States possessed.[95] In addition, the majority's view regarding sovereign immunity was quickly repudiated by the adoption of the Eleventh Amendment.[96] The Court later stated in *Hans v. Louisiana* that the *Chisholm* majority decision:

> created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States. This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the Supreme Court.[97]

The text of the Eleventh Amendment does not directly address or abandon the social compact principles relied upon by Jay and Wilson in *Chisholm*.[98] It must, however, be conceded with respect to the question of sovereign immunity that "*Chisholm* was contrary to the well-understood meaning of the Constitution[,]"[99] given the speed with which it was publicly rejected.

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[92] *Id.*
[93] *Id.* at 471-72.
[94] *Id.* at 477.
[95] *Chisholm*, 2 U.S. (2 Dall.) at 434-36 (opinion of Iredell, J.).
[96] *See* U.S. CONST. amend. XI.
[97] Hans v. Louisiana, 134 U.S. 1, 11 (1890).
[98] *See* U.S. CONST. amend. XI; *cf.* Munn v. Illinois, 94 U.S. 113, 124-25 (1876) (later reconfirming adherence to social compact principles), *and* Loan Ass'n v. Topeka, 87 U.S. 655, 663 (1874).
[99] Seminole Tribe v. Florida, 517 U.S. 44, 69 (1996).

The Supreme Court quickly acknowledged and yielded to the reversal of *Chisholm* by constitutional amendment.[100]

Another Supreme Court Justice also expressed the belief that social compact principles might be used to invalidate contradictory legislation.[101] Justice Samuel Chase surmised in *Calder v. Bull* that it would be political heresy to maintain that legislative authority was unlimited except as expressly retrained by the Constitution or other fundamental law of a State.[102] Chase wrote that "[t]he *nature* and *ends* of *legislative* power will limit the *exercise* of it."[103] Chase further explained that the social compact is the foundation of legislative power, and the terms of the social compact therefore determine the proper objects of legislation.[104] In his view, "[t]he people of the *United States* erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their *persons* and *property* from violence."[105] Chase reasoned that vital principles of government prohibit flagrant abuses of legislative power such as "*authoriz*[ing] *manifest injustice by positive law*; or . . . tak[ing] away that security for *personal liberty*, or *private property*, for the protection whereof the government was established."[106] Chase concluded that "[a]n ACT of the Legislature (for I cannot call it a *law*) contrary to the *great first principles* of the *social compact*; cannot be considered a *rightful exercise* of *legislative* authority."[107] The Supreme Court later held in *Loan Association v. Topeka* that a State legislature may not authorize imposition of taxes purely in aid of private enterprise.[108] The Court did not point to a specific constitutional provision that would invalidate a tax collected for private purposes, and instead reasoned: "[i]t must be conceded that there are such rights in every free government beyond the control of the State."[109] In the Court's view,

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[100] *See* Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378, 382 (1798).

[101] Calder v. Bull, 3 U.S. (3 Dall.) 386, 387-89 (1798) (opinion of Chase, J.).

[102] *Id.* at 388-89.

[103] *Id.* at 388.

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.*; *see also* Kelo v. City of New London, 545 U.S. 469, 494 (2005) (O'Connor, J., dissenting) (quoting Chase); *Calder*, 3 U.S. (3 Dall.) at 397 (opinion of Paterson, J) ("It may, in general, be truly observed of retrospective laws of every description, that they neither accord with sound legislation, nor the fundamental principles of the social compact."); THE FEDERALIST NO. 44 (James Madison) ("Bills of attainder, ex post facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact. . . ."), *reprinted in* ALEXANDER HAMILTON ET. AL., THE FEDERALIST 301 (Jacob E. Cooke ed., 1961).

[108] *Loan Ass'n*, 87 U.S. at 659-64.

[109] *Id.* at 662.

government could quickly devolve into despotism without such limitations.[110] It went on to explain:

> There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A. and B. who were husband and wife to each other should be so no longer, but that A. should thereafter be the husband of C., and B. the wife of D. Or which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B.[111]

The Court expressed concern that the power to tax is most liable to abuse and therefore limited it by a principle derived from the social compact maxim that government exists only for the public good,[112] writing that "there can be no lawful tax which is not laid for a *public purpose*."[113]

A framework thus exists to at least entertain Walker's theory that unwritten rights might be based upon the social compact.[114] However, the foundation beneath it might no longer be that sound. Justice Iredell issued a strong concurrence in *Calder* that questioned the authority of courts to invalidate legislation based upon rights unexpressed by the Constitution.[115] Iredell explained that governments in America are framed by constitutions "to define with precision the objects of legislative power" and if legislation "violates those constitutional provisions, it is unquestionably void. . . ."[116] Iredell cautioned, however, "as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case."[117] Iredell elaborated that the Supreme Court cannot declare legislation void:

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[110] *Id.*

[111] *Id.* at 663.

[112] *See generally* LOCKE, *supra* note 31, at, 363, 374-80 (explaining that men give up liberty in nature only for peace, safety, and public good, and that legislative authority and discretionary executive authority, *i.e.* prerogative, must be exercised only for public good).

[113] *Loan Ass'n*, 87 U.S. at 664.

[114] WALKER, *supra* note 8, at 197.

[115] *Calder*, 3 U.S. (3 Dall.) at 398-99 (1798) (opinion of Iredell, J.).

[116] *Id.* at 399.

[117] *Id*.

> merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.[118]

It is arguable that "[l]ater jurisprudence vindicated Justice Iredell's view, and the idea that 'first principles' or concepts of 'natural justice' might take precedence over the Constitution or other positive law 'all but disappeared in American discourse.'"[119] In addition, the Supreme Court in *Loan Association v. Topeka* and Justice Chase in *Calder v. Bull* held only that social compact principles might provide grounds to invalidate legislation and neither indicated that they could be used to impose affirmative obligations upon government.[120] The platform for consideration of Walker's proposal is therefore unsteady and may not extend far.[121]

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[118] *Id*.

[119] *Seminole Tribe*, 517 U.S. at 168 (Souter, J., dissenting) (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST 52 (1980)); *see also* Alden v. Maine, 527 U.S. 706, 736 (1999) ("the contours of sovereign immunity are determined by the Founders' understanding, not by the principles or limitations derived from natural law."); Griswold v. Connecticut, 381 U.S. 479, 514-27 (1965) (Black, J., dissenting) (deriding use of "mysterious and uncertain" natural law concepts to strike down legislation); Adamson v. California, 332 U.S. 46, 69-92 (Black, J., dissenting); John M. Harlan, *The Bill of Rights and the Constitution*, 50 ABA J. 918, 920 (1964) ("There is no such thing in our constitutional jurisprudence as a doctrine of civil rights at large, standing independent of other constitutional limitations or giving rise to rights born only out of the personal predilections of judges as to what is good.").

[120] *See Loan Ass'n*, 87 U.S. at 663-64; *Calder*, 3 U.S. (3 Dall.) at 388-89 (1798); *see generally* Elizabeth Pascal, *Welfare Rights in State Constitutions*, 39 RUTGERS L.J. 863, 865-69 (2008). The opinions of Connecticut Supreme Court Justices in *Moore v. Ganim* contain an informative debate about whether unenumerated affirmative governmental obligations should be recognized. Moore v. Ganim, 660 A.2d 742, 761-62 (majority opinion), 774-76 (Peters, C.J., concurring), 808 n.61 (Berdon, J., dissenting) (Conn. 1995).

[121] The Supreme Court has rejected assertion of a social welfare right in other contexts. *See e.g.*, Harris v. McRae, 448 U.S. 297, 318 (1980) (holding that the liberty interest protected by the due process "does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution."); Maher v. Roe, 432 U.S. 464, 469 (1977) ("The Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents"); Lindsey v. Normet, 405 U.S. 56, 74 (1972) (explaining that "the Constitution does not provide judicial remedies for every social and economic ill."); *cf.* Bowen v. Gilliard, 483 U.S. 587, 598 (1987) (confirming the plenary power of Congress to terminate public welfare benefits and the deferential standard of review utilized by the Court); Youngberg v. Romeo, 457 U.S. 307, 317 (1982) (writing, "[a]s a general matter, a State is under no constitutional duty to provide substantive services for those within its border."); Dandridge v. Williams, 397 U.S. 471, 485 (1970) (stating that there need only be a reasonable basis for benefit classifications in social welfare regulations to satisfy equal protection requirements).

III. RIGHTS OF THE POOR UNDER THE SOCIAL COMPACT

Walker's theory finds superficial validation in Hobbes. Hobbes believed that the right to defend oneself is inalienable.[122] He therefore espoused a complementary position that someone who is impoverished might be excused when taking action needed to survive:

> When a man is destitute of food, or other thing necessary for his life, and cannot preserve himself[] [sic] any other way, but by some fact against the Law; as if in a great famine he take the food by force, or stealth, which he cannot obtaine [sic] for money [sic] nor charity; or in defence [sic] of his life, snatch away another mans Sword, he is totally Excused. . . .[123]

One could therefore argue, as suggested by Walker, that a person might be entitled to support by forgoing appropriation by force or stealth.[124] It would however be inconsistent with Hobbes at root, because inalienable rights were not renounced or reciprocally transferred as part of a social compact.[125] This included: "the Right (he can never abandon) of defending his life, and means of living."[126] These inalienable rights therefore could not transform into a correlative right to support.[127] A pact or covenant was created only when one contractor delivered something on promise of future delivery of something else.[128] In Hobbes' construct, a binding right to support would never arise, because the right to do whatever is necessary to defend one's own life was never exchanged for something in return.[129]

Hobbes supported public charity.[130] He maintained that a sovereign is obliged by the law of nature to procure the "*safety of the people*."[131] Safety

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[122] HOBBES, supra note 12, at 93, 98, 151.
[123] *Id.* at 208.
[124] WALKER, *supra* note 8, at 197.
[125] *See* HOBBES, *supra* note 12, at 93-94.
[126] *Id.* at 96.
[127] *See Id.* at 92-94.
[128] *Id.* at 94.
[129] *Id.* at 93-94. It should also be noted the idea that poverty might excuse crime would be inimical with American justice. *See e.g.* United States v. Manzella, 791 F.2d 1263, 1269 (7th Cir. 1986) ("[P]overty is not a defense to larceny. Cause and responsibility are not synonyms."); Johnson v. City of Dallas, 860 F.Supp. 344, 349-50 (N.D. Texas 1994) (explaining that homelessness does not create a class of persons constitutionally immune from much of criminal law), *rev'd in part, vacated in part by* Johnson v. City of Dallas, 61 F.3d 442 (5th Cir. 1995); *see generally* Jeremy Waldron, *Why Indigence Is Not a Justification*, in FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE: POVERTY AND THE ADMINISTRATION OF CRIMINAL LAW 98-113 (William C. Heffernan & John Kleinig eds., 2000).
[130] HOBBES, *supra* note 12, at 239.
[131] *Id.* at 231.

meant more than just bare preservation, it also included protection of "all other Contentments of life, which every man by lawful[] [sic] Industry, without danger, or hurt to the Common-wealth, shall acquire to himself[] [sic]."[132] Hobbes wrote that those who by some unavoidable accident:

> become unable to maintain themselves by their labour ; they ought not to be left to the Charity of private persons; but to be provided for, (as far-forth as the necessities of Nature require,) by the Lawes [sic] of the Common-wealth. For as it is Uncharitablenesse [sic] in any man, to neglect the impotent; so it is in the Soveraign [sic] of a Common-wealth to expose them to the hazard of such uncertain Charity.[133]

It is doubtful however that Hobbes' advice for a sovereign to provide public charity was derived from a right that belonged to the poor by entry into a social compact, because transferring a right in hopes of gaining charity, in Hobbes view, "is not Contract, but GIFT, FREE-GIFT, GRACE. . . ."[134] Good laws benefitting the people were needed, but no law made by a sovereign could be considered unjust.[135] Grounds therefore would not exist under Hobbes for individuals to demand that a sovereign provide support as a matter of compact right, because the "Soveraigne [sic] maketh no Covenant with his subjects before-hand. . . ."[136]

Walker finds more desultory support in Lockean ideology. Locke wrote that "Government has no other end but the preservation of Property."[137] This should not be misunderstood as mere protection of property in a narrow sense, because Locke described a person's property as "his Life, Liberty, and Estate."[138] As suggested by Walker, the argument could therefore be made that life is more important than an estate, and partial surrender of liberty by individuals entering into the social compact entitles them to the

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[132] *Id.*

[133] HOBBES, *supra* note 12, at 239. It should be noted that Hobbes also wrote that the sovereign should force the able-bodied poor to work or move to under-inhabited lands. *Id.*

[134] *Id.* at 94. Montesquieu also wrote that a state "owes all the citizens an assured sustenance, nourishment, suitable clothing, and a kind of life which is not contrary to health[,]" but he did not explain this as an individual right and instead advised it as a means to keep people from suffering and avoid rebellion, and he recommended only temporary relief measures. *See* MONTESQUIEU, *supra* note 19, at 455-56.

[135] HOBBES, *supra* note 12, at 124, 239.

[136] *Id.* at 122.

[137] LOCKE, *supra* note 12, at 329, 330-31, 360.

[138] *Id.* at 323.

means of living.[139] However, this would be inconsistent with Locke's views upon property rights in the narrower sense.[140]

Locke agreed that people submit their possessions to the jurisdiction of the government when entering society.[141] He acknowledged that government has the power to regulate property but wrote that such power is not cannot be arbitrarily exercised.[142] Locke also recognized that everyone must pay their share for the maintenance of government.[143] He argued however that the preservation of property is an objective of government, and it would be absurd to suppose that men would lose their property by entering into society.[144] Locke wrote that "it is a mistake to think, that the Supream [sic] or *Legislative Power* of any Commonwealth, can do what it will, and dispose of the Estates of the Subject *arbitrarily*, or take any part of them at pleasure."[145]

Locke stated that every man has a property right in his own person.[146] He also postulated that a person's labor thus confers a right to other types of property (*i.e.* private possessions).[147] Locke thought that a person's natural right to property was limited to the extent of that person's needs, and the rest belonged to all in common.[148] However, the value attributed to property was a product of labor and industry which belonged to the person who applied them.[149] This gave rise to the invention of money by which men could accumulate possessions in different proportions.[150] Locke concluded that persons have given up their natural common property rights and settled the right to property amongst themselves through compact and agreement.[151] In Locke's view, "[m]en have agreed to disproportionate and unequal Possession of the Earth. . . ."[152] It would be hard to reconcile a social welfare right with Locke's theoretical defense of unequal property rights in society.

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[139] WALKER, *supra* note 8, at 197. Locke arguably might not prioritize the right to life over estate in the manner suggested by Professor Walker. In his discussion of property rights, Locke wrote that an army officer's authority to send a soldier to his death does not give the officer a right to make the soldier "give him one penny of his Money." *Id.* at 362.

[140] *See* LOCKE, *supra* note 12, at 285-302, 360-62.

[141] *Id.* at 348.

[142] *Id.* at 361.

[143] *Id.* at 362.

[144] *Id.* at 360.

[145] *Id.* at 361.

[146] *Id.* at 287.

[147] *Id.* at 287-92.

[148] *Id.* at 285-87, 290-96, 299-300, 302.

[149] *Id.* at 296-300.

[150] *Id.* at 293, 299-302.

[151] *Id.* at 299.

[152] *Id.* at 302.

Locke believed in charity,[153] but it is impossible to ignore his apparent disdain for the jobless poor.[154] He blamed them for their own condition.[155] Locke derisively described some as "begging drones, who live unnecessarily upon other people's labour [sic]."[156] He unkindly called others "idle vagabonds."[157] Locke proposed that able-bodied beggars in maritime counties between the ages of fourteen and fifty be indentured to serve three years on navy ships and those who were maimed or over the age of fifty be sent to houses of correction and kept at hard labor for three years.[158] He supported use of similarly draconian measures against female beggars.[159] Locke envisioned that his remedies would induce the poor to at least make pretense that they desired work, and he urged indentured servitude or jail for those who refused work that was offered to them.[160] Locke additionally proposed sending indigent children above the age of three to working schools.[161] While Locke revealed his Dickensian world-view on poverty in a separate paper,[162] it is consistent with his political perspective that property rights are created by labor.[163] He thought that the poor were a burden upon the industrious,[164] and it is therefore difficult to conceptualize a Lockean-based right to depend, as Locke put it, on the labor of others.[165]

Founder John Adams did not advance an egalitarian view of economic rights in his *Defense of the Constitutions of Government of the United States of America* but instead indicated that rich and poor alike are protected by the structure of American government, writing:

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[153] *Id.* at 170.

[154] JOHN LOCKE, BOARD OF TRADE PAPER ON THE POOR (1697), *reprinted in* H.R. FOX BOURNE, 2 THE LIFE OF JOHN LOCKE 377-91 (New York, Harper & Brothers 1876).

[155] LOCKE, *supra* note 31, at 171 ("[T]he Subjection of the Needy Beggar began not from the Possession of the Lord, but the Consent of the poor Man, who preferr'd being his Subject to starving."); *see also* LOCKE, *supra* note 154, at 378-79.

[156] LOCKE, supra note 154, at 378.

[157] *Id.* at 379.

[158] *Id.* at 379-80.

[159] *Id.* at 380-81.

[160] *Id.* at 381-82.

[161] *Id.* at 383-85.

[162] *Id.* at 377-91.

[163] *Compare id.*, *supra* note 154, at 382 (opining that the poor who are willing to work "either through want of fit work provided for them, or their unskillfulness in working in what might be a public advantage, do little that turns to any account, but live idly upon the parish allowance or begging, if not worse. Their labour, therefore, as far as they are able to work, should be saved to the public, and what their earnings come short of a full maintenance should be supplied out of the labor of others, that is, out of the parish allowance.") *with* LOCKE, *supra* note 31, at 296-302 (opining that productive labor entitles a laborer not only to property but also increases in property value).

[164] *See* LOCKE, *supra* note 154, at 378 ("Could all the able hands in England be brought to work, the greatest part of the burden that lies upon the industrious for maintaining the poor would immediately cease.").

[165] *Id.* at 378.

> It is agreed that "the end of all government is the good and ease of the people, in a secure enjoyment of their rights, without oppression;" but it must be remembered, that the rich are *people* as well as the poor; that they have rights as well as others; that they have as clear and as *sacred* a right to their large property, and as wicked, as others have to theirs which is smaller; that oppression to them is as possible, as to others; that stealing, robbing, cheating, are the same crimes and sins, whether committed against them or others. The rich, therefore, ought to have an effectual barrier in the constitution against being robbed, plundered, and murdered, as well as the poor; and this can never be without an independent senate. The poor should have a bulwark against the same dangers and oppressions; and this can never be without a house of representatives of the people. But neither the rich nor the poor can be defended by their respective guardians in the constitution, without any executive power, vested with a negative, equal to either, to hold the balance even between them, and decide when they cannot agree.[166]

Adams' *Defense* later reemphasized the importance of having a senate to defend economic inequality, explaining:

> Without this the rich will never enjoy any liberty, property, reputation or life, in security. The rich have as clear a right to their liberty and property as the poor: it is essential to liberty that the rights of the rich be secured; if they are not, they will soon be robbed and become poor, and in their turn rob their robbers; and thus neither the liberty or property of any will be regarded.[167]

Adams did not exhibit the same contempt for the poor as Locke, but he did display a significant amount of distrust and concern for preservation of private fortunes.[168]

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[166] 3 JOHN ADAMS, DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 293-94 (London, John Stockdale 1794). (John Adams was a signer of the Declaration of Independence. *See* THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 74, at 76 (identifying signatories).).

[167] ADAMS, *supra* note 166, at 328.

[168] *See Id.* at 216-21, 293-94, 328-29, 334-40.

Rousseau would appear to support the broader principle behind Professor Walker's theory.[169] Rousseau wrote that "[w]hat is most needful and perhaps most difficult in government is a strict integrity to render justice to all, and above all to protect the poor against the tyranny of the rich."[170] Rousseau further stated, "as regards wealth, no citizen [should] be rich enough to be able to buy another, and none so poor that he is compelled to sell himself."[171] He believed that it is the task of government to "prevent extreme inequality of fortunes" by leveling the economic playing field and preventing the accumulation of disproportionate wealth.[172] Rousseau acknowledged that "the right of property is the most sacred of all the citizens' rights and in some respects more important than freedom itself . . . ."[173] He believed however that the social compact obligated everyone to contribute their share to public needs,[174] and Rousseau asserted that taxes should be assessed in proportion with ability to pay.[175]

Rousseau felt that it was an essential duty of government to give thought to the subsistence of its citizens, but his view on providing support is more nuanced.[176] He wrote that government's duty to consider the subsistence of its citizens "consists not in filling the granaries of private parties and to exempt them from labor, but in keeping plenty so within their reach that, in order to acquire it labor is always necessary and never useless."[177] He similarly indicated that government should prevent extreme inequality of fortunes not "by building poorhouses but by shielding citizens from becoming poor."[178] According to Rousseau, the obligation to the poor therefore appears to be careful economic management and preservation of opportunity rather than direct financial aid.[179]

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[169] *Compare* ROUSSEAU, *supra* note 10, at 23 ("It is not enough to have citizens and to protect them; it is also necessary to give thought to their subsistence. . . .") *with* WALKER, *supra* note 8, at 197 (The right of the poor to "maintenance would seem to result, not only from the dictates of humanity, but from all the great principles of social organization.").

[170] ROUSSEAU, *supra* note 10, at 19. Rousseau explained that equality is only illusory under bad governments and "serves only to keep the poor in his misery and the rich in his usurpation[,]" and therefore concluded that "the social state is advantageous to men only insofar as all have something and none of them has too much." *Id.* at 58.

[171] *Id.* at 80-81.

[172] *Id.* at 19-20.

[173] *Id.* at 23.

[174] *Id.* at 30.

[175] *Id.* at 30-33.

[176] *Id.* at 23.

[177] *Id.*

[178] *Id.* at 19-20.

[179] *See id.* at 17-23; *see also id.* at 81 n.* ("Do you, then, want to give the State stability? bring the extremes as close together as possible; tolerate neither very rich people nor beggars.").

Similarly to Walker, James Wilson believed that American democracy was based upon social compact principles.[180] However, Wilson proposed a different compact-themed alternative for the impoverished rather than public support. Wilson wrote that:

> [T]here are certainly cases, in which a citizen has an unquestionable right to renounce his country, and go in quest of a settlement in some other part of the world. One of these cases is, when, in his own country, he cannot procure subsistence.[181]

Wilson's remedy is impractical in a modern world where readily accessible new frontiers have largely disappeared. In addition, Justice Joseph Story argued that recognition of a right to withdraw from a social compact is theoretically unsound.[182] In Story's opinion, a right to withdraw would be tantamount to giving an individual the power to "dissolve the whole government at his pleasure, or to absolve himself from all obligations and duties thereto, at his choice . . . ."[183] Wilson's viewpoint nonetheless reflects a noteworthy opinion of a Founder about the options of the poor under the American social compact.

In summary, Hobbes might not recognize a pact to provide support,[184] but he advocated in favor of public charity,[185] and would excuse theft by the destitute.[186] Locke believed that people are entitled to the fruits of their labor,[187] except possibly the unemployed,[188] and he thought that men by consent have agreed to disproportionate and unequal wealth.[189] Rousseau would consider it an essential duty of government to address economic inequality and the subsistence of citizens, but his approach would appear to be careful management of economic opportunities rather than direct financial support.[190] Wilson hypothesized that those in society who cannot procure subsistence may leave to seek greener pastures.[191]

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[180] *Compare* WALKER, *supra* note 8, at 21-23 (explaining the origins of social organization) *with* WILSON, *supra* note 76, at 238-39 (describing the foundations of a state).
[181] 1WILSON, *supra* note 76, at 244.
[182] 1 STORY, *supra* note 82, § 333, at 302-03.
[183] *Id.* at 302.
[184] *See* HOBBES, *supra* note 12, at 92-94, 96.
[185] *Id.* at 239.
[186] *Id.* at 208.
[187] LOCKE, *supra* note 31, at 287-89.
[188] LOCKE, *supra* note 154, at 382.
[189] LOCKE, *supra* note 31, at 299-302.
[190] *See* ROUSSEAU, *supra* note 10, at 17-23.
[191] 1 WILSON, *supra* note 76, at 244.

This article does not maintain that Hobbes, Locke, Rousseau, or Wilson are correct. It does not join Adams' lamentations on behalf of the rich. It certainly does not endorse Locke's horrific proposals for solving poverty. In addition, this article does not arrogantly assert that its interpretation of Hobbes, Locke, Rousseau, and Wilson is beyond debate.[192] It does however, submit that their widely diverse opinions demonstrate a lack of unanimity among theorists regarding the rights of the poor under the social compact at the time of the Founding. A right to public support therefore cannot be assuredly based solely upon principles of social organization.

IV. *MOORE V. GANIM*[193]

Unlike the U.S. Constitution, the 1818 State Constitution of Connecticut included an express social compact clause that provides, "All men when they form a social compact, are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community."[194] As a consequence, the Connecticut Supreme Court was eventually called upon in *Moore v. Ganim* to decide whether "the right to governmentally provided minimal subsistence is one such right acquired by the people upon entering into the social compact."[195]

Persons dependent upon public assistance for survival challenged a statute in *Moore v. Ganim* that limited such support to nine months in a twelve-month period.[196] The court addressed two primary arguments: (1) whether the statute violated a provision of the Connecticut State Constitution that guaranteed court access and a remedy by due course of law;[197] and (2) whether the statute abrogated an unenumerated constitutional obligation that Connecticut provide subsistence benefits to citizens in need.[198] The *Moore* majority addressed social compact contentions in the context of its

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[192] For alternative viewpoints *see e.g.*, John W. Seaman, *Hobbes on Public Charity & the Prevention of Idleness: A Liberal Case for Welfare*, 23 POLITY 105 (1990); Bruno Rea, *John Locke: Between Charity and Welfare Rights*, 18 J. OF SOC. PHIL. 13 (1987).

[193] Moore v. Ganim, 660 A.2d 742 (Conn. 1995).

[194] CONN. CONST. art. I, § 1; *see generally Moore* 660 A.2d at 763-64 (detailing the history of the clause). The Kentucky and Oregon constitutions contain similar clauses. KY. CONST. § 3 ("All men, when they form a social compact, are equal; and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services. . . ."); OR. CONST. art. I, § 1 ("We declare that all men, when they form a social compact are equal in right. . . ."). The preamble to the Massachusetts constitution provides that "[t]he body politic is formed by a voluntary association of individuals: it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." MASS. CONST. pmbl.

[195] *Moore* 660 A.2d at 763.

[196] *Id.* at 746.

[197] *Id.* at 750-54.

[198] *Id.* at 754-69.

discussion about unenumerated rights.[199] The dissent focused upon the social compact during its examination of natural law.[200]

The majority in *Moore* acknowledged that individuals "relinquish certain individual liberties in exchange 'for the mutual preservation of their lives, liberties, and estates.'"[201] It also agreed that early law of the colony and the State of Connecticut was based on natural law and "fundamental notions of what is morally right."[202] It nonetheless held that there should not be too much emphasis placed on the social compact clause in the Connecticut State Constitution, because there was little substantive debate when it was adopted and natural law may have been understood to be flexible.[203] The majority further wrote that "[t]he mere fact that the framers intended some unenumerated natural rights to survive the drafting of the written constitution . . . does not give us carte blanch to recognize new constitutional rights as inherent in natural law."[204]

The *Moore* majority recognized that early Connecticut jurists referenced obligations to support the poor, but it found that "the historical record, taken in its entirety, is too ambiguous and contradictory to provide a basis from which we, with any reasonable degree of confidence, can infer an implied unenumerated fundamental constitutional obligation to provide minimal subsistence."[205] It further determined that early Connecticut statutes regarding maintenance of the poor were too cryptic and contradictory to form the basis of a constitutional right to subsistence.[206] In its broader discussion of unenumerated rights, the majority reviewed decisions from other jurisdictions and concluded that none but New York recognized a right to subsistence support, and it attributed New York's position to a post-depression State constitutional amendment.[207]

Connecticut Chief Justice Ellen A. Peters ultimately concurred with the majority, because she concluded that the nine-month benefit limitation at issue in *Moore* was consistent with the State's obligation to provide support and imposed a reasonable inducement for the unemployed to seek work.[208] However, Chief Justice Peters strongly disagreed with the majority's interpretation of the historical record.[209] Peters acknowledged that history is always ambiguous and contradictory, but reasoned that ambiguity regarding

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[199] *See Id.* at 762-68.
[200] *Id.* at 801-02 (Berdon, J., dissenting).
[201] *Id.* at 762 (quoting LOCKE, *supra* note 31, at 350 (different edition of Locke cited in *Moore*)).
[202] *Id.* at 763.
[203] *Id.* at 763-64.
[204] *Id.* at 764.
[205] *Id.* at 765.
[206] *Id.* at 765-68.
[207] *Id.* at 755-59.
[208] *Id.* at 782-83 (Peters, C.J., concurring).
[209] *Id.* at 776-79.

the scope of a right says "nothing about the *existence* of such an obligation, because the scope of *every* constitutional principle is ambiguous *by design*."[210] Peters' review of the historical record and contemporary considerations of law and public policy led her to conclude that Connecticut had a constitutional obligation to provide minimal subsistence support to the poor.[211]

The dissenters in *Moore* recognized that the legal theory of natural law has fallen into disfavor in recent times but "occupied a prominent position in our colonial jurisprudence."[212] They therefore felt that the court should not entirely disregard social compact principles.[213] The dissenters wrote that early views of natural law recognized obligations between citizens and a duty to help the needy.[214] They also disagreed with the majority's reading of the historical record, and thought the early statutory law of Connecticut and common law imparted into the State constitution an obligation to provide minimal subsistence to the poor.[215] They were critical of the majority's analysis of holdings from other jurisdictions and concluded that none undercut the dissenters' conclusion that the Connecticut State Constitution vested the poor with a right to support.[216] The dissenters concluded that "the affirmative obligation of the state to provide subsistence to the poor was part of the fabric of the social compact in Connecticut."[217]

The result in *Moore* should not be treated as a death-knell for Walker's theory, because, in reality, it was only a four to three decision against recognition of a right to subsistence support.[218] It instead provides a helpful roadmap for social compact issues. As a theoretical matter, philosophical sources are too varied to assemble a unitary viewpoint,[219] and Walker's thesis fares better as a component of a more encompassing unenumerated rights argument.[220] In addition, its success depends upon a particularized examination of a jurisdiction's historical record.[221]

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[210] *Id.* at 776.
[211] *Id.* at 777-82.
[212] *Id.* at 801 (Berdon, J., dissenting).
[213] *Id.*
[214] *Id.* at 801-02.
[215] *Id.* at 793-801.
[216] *Id.* at 802-08 (Berdon, J., dissenting).
[217] *Id.* at 802.
[218] *See id.* at 771 (majority opinion of 4 justices), 782 (Peters, C.J., concurring), 809-10 (Berdon, J., dissenting opinion of 2 justices).
[219] *Compare* ROUSSEAU, *supra* note 10, at 19-20 (asserting that prevention of inequality of fortunes is one of the most important tasks of government) *with* LOCKE, *supra* note 31, at 301-02 (concluding that men have plainly agreed to disproportionate and unequal possession of the Earth).
[220] *Id.* at 791-810 (Berdon, J., dissenting).
[221] *Id.* at 762-68 (majority opinion), 777-79 (Peters, C.J., concurring), 792-801 (Berdon, J., dissenting).

Moore indicates that social compact considerations present more than just a theoretical question. The majority in *Moore* wrote that:

> in determining whether unenumerated rights were incorporated into the constitution, we must focus on the *framers*' understanding of whether a particular right was part of the natural law, i.e., on the framers' understanding of whether the particular right was so fundamental to an ordered society that it did not require explicit enumeration. We can discern the framers' understanding, of course, only by examining the historical sources.[222]

The dissent agreed and added that two primary sources are especially important when explicit constitutional provisions cannot be found: "law codified in statutory form and the common law" as it existed at the time a constitution was adopted or prior thereto.[223] The dissent in *Moore* further explained that the common law may consist of documented adjudications, evidence of customs and usages, and reported reliance on natural law.[224] Therefore, while recognition of a federal right seems unlikely,[225] plenty of room for debate remains at the State level.[226]

V. CONCLUSION

Professor Timothy Walker acknowledged in his *Introduction to American Law* that no constitutional provisions directly assert that the poor must be given public subsistence support, but he theorized that such a right might be derived from social compact principles.[227] During the period in which Professor Walker published his treatise, natural law was occasionally used to supplement express constitutional provisions.[228] It has since fallen into disfavor as a jurisprudential doctrine.[229] However, ideas of natural

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[222] *Id.* at 764.

[223] *Id.* at 792 (Berdon, J., dissenting). Chief Justice Peters also agreed that the test requires review of historical sources. *Id.* at 776 (Peters, C.J., concurring).

[224] *See id.* at 795-802 (Berdon, J., dissenting).

[225] *See e.g.*, DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 196 (1989) (commenting that the Due Process Clauses generally provide no affirmative right to public aid).

[226] *Compare* Moore, 660 A.2d at 755-68 *with* 791-808 (expressing profound disagreement about how to interpret Connecticut's historical record and approaches taken in other jurisdictions).

[227] WALKER, *supra* note 8, at 197.

[228] *Eg.* Loan Ass'n, 87 U.S. at 663; Calder, 3 U.S. (3 Dall.) at 388-89 (Chase, J.).

[229] Seminole Tribe, 517 U.S. at 167-68 (Souter, J., dissenting); *cf.* Moore, 660 A.2d at 801 (Berdon, J., dissenting) (commenting that the philosophical theory of natural law has fallen into disfavor).

justice and considerations arising from social compact principles have not been entirely abandoned.[230]

Pre-founding political theorists did not agree about the rights of the poor. Thomas Hobbes supported public charity, but he did not appear to consider it a social compact right.[231] John Locke, in contrast, believed that men have agreed to disproportionate and unequal wealth,[232] and wrote that many of the poor live unnecessarily on other people's labor.[233] Jean-Jacques Rousseau wrote that it is an essential duty of government to consider the subsistence of its citizens, but he indicated that the obligation is prevention rather than cure.[234] It therefore cannot be said with certainty that the social compact creates a right to public support as a matter of universally settled doctrine.

It seems unlikely that a federal constitutional right to subsistence support would be recognized. Social compact theory clearly influenced colonial thought.[235] However, modern scholars disagree upon the extent to which it actually guided the drafting of the Constitution.[236] With the theoretical uncertainty regarding the rights of the poor under natural law, recognition of an unwritten social compact right to support seems inconceivable given the Supreme Court's acknowledgment that its cases recognize "the Constitution 'generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.'"[237]

Professor Walker's theory could however, gain traction at the state level.[238] A sharply divided Connecticut Supreme Court opted against recognition of a social compact right to support in *Moore v. Ganim*, but the varied opinions of the justices demonstrate that reasonable minds can differ, and the issue is fairly debatable.[239] The success of Walker's theory would likely depend upon an historical examination of a jurisdiction's common law, statutory sources, customs and usages, and articulations of natural law leading up to adoption of that State's constitution.[240] Public subsistence support may not technically be a contracted right arising from the social compact, but as Rousseau rhetorically asked, "is not the body of the nation

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[230] *E.g.* Moore, 660 A.2d at 801-02 (Berdon, J., dissenting).

[231] *Compare* HOBBES, *supra* note 12, at 239 (advocating for public charity) *with* HOBBES, *supra* note 12, at 94 (opining that transfer of a right on hopes of charity is not contract but instead gift).

[232] LOCKE, *supra* note 31, at 301-02.

[233] LOCKE, *supra* note 154, at 378.

[234] *See* ROUSSEAU, *supra* note 10, at 23.

[235] *See e.g.*, SCHWARTZ, *supra* note 67, at 200-02.

[236] Allen, *supra* note 66, at 2-5.

[237] M.L.B. v. S.L.J., 519 U.S. 102, 125 (1996) (quoting DeShaney, 489 U.S. at 196).

[238] *See* Moore, 660 A.2d at 801-02 (Berdon, J., dissenting); *see generally* Pascal, *supra* note 120, at 868-77, 891-901.

[239] Moore, 660 A.2d at 762-68 (majority opinion), 801-02 (Berdon, J., dissenting).

[240] *Id.* at 764 (majority opinion), 776 (Peters, C.J., concurring), 791-802 (Berdon, J., dissenting).

committed to provide for the preservation of the least of its members with as much care as for that of all the others?"[241]

[241] ROUSSEAU, *supra* note 10, at 17.