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# The Origins of American Health Libertarianism

Lewis A. Grossman



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Grossman: The Origins of American Health Libertarianism  
**The Origins of American Health Libertarianism**

**Lewis A. Grossman\***

**ABSTRACT:**

This Article examines Americans' enduring demand for freedom of therapeutic choice as a popular constitutional movement originating in the United States' early years. In exploring extrajudicial advocacy for therapeutic choice between the American Revolution and the Civil War, this piece illustrates how multiple concepts of freedom in addition to bodily freedom bolstered the concept of a constitutional right to medical liberty.

There is a deep current of belief in the United States that people have a right to choose their preferred treatments without government interference. Modern American history has given rise to movements for access to abortion, life-ending drugs, unapproved cancer treatments, and medical marijuana. Recently, cries of "Death Panels" have routinely been directed against health care reform proposals that citizens believe would limit the products and procedures covered by government health insurance. Some of the most prominent contemporary struggles for health freedom have been waged in court. But other important recent battles for freedom of therapeutic choice have taken place in other forums, from legislative hearings to Food and Drug Administration advisory committee meetings to public demonstrations.

This attitude of therapeutic libertarianism is not new. Drawing mainly on primary historical sources, this Article examines arguments in favor of freedom of therapeutic choice voiced in antebellum America in the context of battles against state licensing regimes. After considering some anti-licensing arguments made before independence, it discusses the views and statements of Benjamin Rush, an influential founding father who was also the most prominent American physician of the early national period. The Article then analyzes the Jacksonian-era battle against medical licensing laws waged by the practitioners and supporters of a school of botanical medicine known as Thomsonianism. This triumphant struggle was waged in explicitly constitutional terms, even though it occurred entirely outside of the courts. The Thomsonian campaign thus offers one of the most striking examples of a successful popular constitutional movement in American history. This article shows that, at its origin, the American commitment to freedom of therapeutic choice was based on notions of

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not only bodily freedom, but also economic freedom, freedom of conscience, and freedom of inquiry. Finally, this Article considers ways in which this early history helps illuminate the nature of current struggles for freedom of therapeutic choice.

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INTRODUCTION

An American editorialist, outraged by the government's intrusive meddling in health care, angrily contended that restrictions on freedom of medical choice were the product of an insidious conspiracy among elites both inside and outside the government. He argued that state interference in the therapeutic choices of citizens represented an unconstitutional violation of the people's most basic rights. The writer ominously declared, "The . . . duty demanded on a cargo of tea in '76, was of small importance, but . . . the principle it involved . . . turned the whole harbor of Boston into one . . . teapot." The writer warned the "demagogues" in the legislature "to remember that the blood of that tea party still lives and runs" in their constituents' veins. He sought the support of "every man . . . who does not wish to be trampled in the dust and deprived of his constitutional liberty."<sup>1</sup>

The column described above was not published in the twenty-first century, but rather appeared in an 1838 issue of the *Botanico-Medical Recorder*, a journal of alternative medicine. The author was almost certainly Alva Curtis, the leader of a group of botanical practitioners known as the "Independent Thomsonians."<sup>2</sup> Thomsonianism was a system of cure developed some thirty years earlier by a New Hampshire farmer and itinerant healer named Samuel Thomson. Shortly before writing this editorial, Curtis had engineered a factional split between his "Independents" and less compromising devotees of Thomson's original system.<sup>3</sup> Despite this development, Curtis remained committed to the core aspects of Thomsonian medicine.<sup>4</sup> In this column, he directed his fury at the Ohio Legislature's refusal to grant a charter to a medical school that he had recently established in Columbus with a curriculum based on Thomsonian principles.<sup>5</sup>

Curtis' rhetoric exemplifies an extraordinarily successful Thomsonian-led movement for medical freedom in antebellum America. The primary aim of this

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1 *Editorial*, 6 *BOTANICO-MEDICAL RECORDER* 24, Aug. 25, 1838, at 376. Alva Curtis served as both the editor and publisher of the *Botanico-Medical Recorder*, which until October 1937 was known as the *Thomsonian Recorder*. See also the newspaper excerpt—in a journal otherwise completely dedicated to botanical medicine—describing a visit to New York City by the last living participant in the Boston Tea Party. *The Only Survivor of the Boston Tea Party*, 3 *THOMSONIAN RECORDER* 368, 368 (1835).

2 See Alex Berman, *Neo-Thomsonianism in the United States*, 11 *J. HIST. MED. & ALLIED SCI.* 133, 138 (1956).

3 *Id.* at 134; JOHN S. HALLER JR., *THE PEOPLE'S DOCTORS: SAMUEL THOMSON AND THE AMERICAN BOTANICAL MOVEMENT 1790-1860*, at 98–99 (2000).

4 Berman, *supra* note 2, at 134.

5 A bill awarding the charter had died in December 1837 after the chairman of the relevant committee in the Ohio Senate—an orthodox doctor—had reported against it. Curtis' lobbying and public advocacy ultimately succeeded, however, and on March 6, 1839, the state legislature overwhelmingly passed a bill chartering the Botanico-Medical College of Ohio. HALLER, *THE PEOPLE'S DOCTORS*, *supra* note 3, at 98–99.

movement was the repeal of state medical licensing laws. According to the Thomsonians, these statutes represented an effort by the orthodox (or “regular”) medical profession to obtain a monopoly on the practice of medicine by effectively outlawing botanical and other alternative practice. In 1833, five years before the appearance of the editorial, medical freedom advocates had managed to erase a licensing requirement from Ohio’s statute books.<sup>6</sup> Curtis viewed the denial of the medical school charter as a revival of the plot to violate the freedom of unorthodox practitioners and their patients. These Ohio battles were just one front in a nationwide war for medical freedom waged by the Thomsonians and their supporters. Their overwhelming victory is reflected in the fact that between 1830 and the Civil War, the United States was transformed from a country that almost universally embraced some form of medical licensing to one in which this type of regulation was virtually nonexistent.

While this Article focuses on health libertarianism in the period between the American Revolution and the Civil War, my broader project seeks to demonstrate that struggles for freedom of therapeutic choice have recurred throughout American history. During the late nineteenth century, a second wave of medical licensing statutes provoked another outpouring of medical freedom-of-choice literature, written largely by drugless practitioners (such as mind-curers, Christian Scientists, and osteopaths) and their allies.<sup>7</sup> Unlike the antebellum medical licensing laws, these later statutes survived, buoyed by the Progressive Era’s embrace of the value of professional expertise. Nevertheless, the popular demand for freedom of therapeutic choice ensured that these laws were drafted, revised, interpreted, and enforced in a way that allowed alternative healers to continue to practice largely unimpeded.<sup>8</sup> Beginning around the turn of the twentieth century, popular movements also developed to resist more aggressive impositions of “state medicine,” such as mandatory vaccination laws and the proposed establishment of a National Department of Health, which was thought likely to be dominated by the orthodox medical establishment.<sup>9</sup>

Movements for freedom of therapeutic choice were largely—though not completely—dormant between the 1930s and the 1960s, a period characterized

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6 WILLIAM G. ROTHSTEIN, *AMERICAN PHYSICIANS IN THE NINETEENTH CENTURY: FROM SECTS TO SCIENCE* 75–76, 145–46 (1992).

7 See, e.g., Benjamin Orange Flower, *Restrictive Medical Legislation and the Public Weal*, 19 *ARENA* 781, 808 (1898); Clifford P. Smith, *Christian Science and Legislation*, 23 *CHRISTIAN SCI. J.* 407 (1905); Alexander Wilder, *Medical Liberty*, 2 *MIND* 193, 194–95 (1898). See generally Lewis A. Grossman, *You Can Choose Your Medicine: Freedom of Therapeutic Choice in American Law and History* (unpublished manuscript) (on file with author) (providing a complete examination of the struggle over medical licensing through the mid-1910s).

8 *Id.*

9 See MICHAEL WILLRICH, *POX: AN AMERICAN HISTORY* (2011); Stephen Petrino, *Medical Liberty: Drugless Healers Confront Allopathic Doctors, 1910-1931*, 29 *J. OF MED. HUMAN.* 205 (2008); Manfred Waserman, *The Quest for a National Health Department in the Progressive Era*, 49 *BULL. OF THE HIST. OF MED.* 353 (1975).

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by an anomalously high level of popular confidence in American governmental, scientific, and medical institutions.<sup>10</sup> Since the 1970s, however, such movements have reemerged in force, focusing on access to particular products and procedures. In contrast to the earlier *extrajudicial* medical freedom movements, many of the most prominent modern fights over freedom of medical choice have been waged in court. Most famously, in *Roe v. Wade*, the United States Supreme Court held that the constitutional right to privacy includes a time-limited right to obtain an abortion.<sup>11</sup> Since then, the Supreme Court has also wrestled with issues concerning access to alternative medicines,<sup>12</sup> life-ending drugs,<sup>13</sup> and medical marijuana.<sup>14</sup> Moreover, in a widely followed 2007 case, the United States Court of Appeals for the D.C. Circuit, sitting *en banc*, held that terminally ill patients do not have a substantive due process right to purchase drugs not approved by the FDA.<sup>15</sup>

Legal scholars have devoted an enormous amount of attention to these cases adjudicating the limits of medical freedom. But focusing exclusively on modern judicial decisions provides a misleading portrait of the struggle for medical freedom in the United States. This court-centered approach implies that constitutional arguments for freedom of therapeutic choice are only as old as modern privacy jurisprudence and that courts are the exclusive forum for

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10 See John C. Burnham, *American Medicine's Golden Age: What Happened to It?*, 215 SCI. 1474 (1982); Allan Mazur, *Commentary: Opinion Poll Measurement of American Confidence in Science*, 6 SCI., TECH. & HUMAN VALUES 16 (1981).

11 410 U.S. 113 (1973).

12 *United States v. Rutherford*, 442 U.S. 544 (1979) (holding that the Federal Food, Drug, and Cosmetic Act neither expressly nor impliedly provides an exemption to the new drug approval requirements for terminally ill patients). Earlier in this litigation, the United States District Court held that the FDA had infringed cancer patients' constitutionally protected privacy interests by denying them access to Laetrile, the drug at issue. *Rutherford v. United States*, 438 F. Supp. 1287, 1298-1301 (W.D. Okla. 1977). This constitutional question was not on review at the Supreme Court, and on remand, the Court of Appeals reversed the District Court's conclusion that the FDA had violated the patients' constitutional right to privacy. *Rutherford v. United States*, 616 F.2d 455 (10th Cir. 1980).

13 *Washington v. Glucksberg*, 521 U.S. 702 (1997) (rejecting substantive due process right to assisted suicide); *cf.* *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990) (confirming substantive due process right of competent individuals to refuse unwanted medical treatment, but permitting procedural safeguards to ensure that decision by incompetent patient's surrogates reflects patient's wishes).

14 *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001) (denying the existence of a medical necessity exception to the federal Controlled Substances Act that would permit marijuana used for medical purposes); *cf.* *Gonzales v. Raich*, 545 U.S. 1 (2005) (ruling that under the Commerce Clause, the federal government could constitutionally enforce the Controlled Substances Act with respect to homegrown marijuana cultivated for personal medical purposes).

15 *Abigail Alliance v. Von Eschenbach*, 445 F.3d 470 (D.C. Cir. 2006), 495 F.3d 695 (D.C. Cir. 2007) (*en banc*), *cert denied*, 552 U.S. 1159 (2008). This *en banc* decision vacated an earlier ruling in which a D.C. Circuit panel voted, 2-1, that terminally ill patients do, under certain circumstances, have a substantive due process right to purchase potentially life-saving drugs. 445 F.3d 470.

constitutional struggles of this type. Focusing only on judicial opinions may also suggest that American demands for medical freedom are typically based solely on notions of bodily liberty and integrity. This Article's exploration of the extrajudicial history of American health libertarianism in the country's first century is intended to challenge these assumptions.

By reviewing the robust early arguments for medical freedom in the United States, I will establish that such advocacy has deep roots, predating any substantial treatment in the Supreme Court jurisprudence. I will also show how during the antebellum period, struggles for freedom of therapeutic choice were waged on explicitly constitutional grounds, even though they occurred almost entirely outside of court. Furthermore, I will demonstrate that in the country's early years, advocates of medical freedom grounded their claims not only in the now dominant arguments for bodily freedom, but also in assertions of economic freedom, freedom of inquiry, and freedom of conscience and religion.

I begin, in Part I of this Article, by providing the background information necessary to understand early American health libertarianism. Section I.A presents a preliminary introduction to the concept of popular constitutionalism and lays the foundation for exploring how antebellum medical freedom advocates exemplified this phenomenon. Section I.B then offers a brief introduction to both orthodox and unorthodox medical practice in the nation's early years. In Part II, I proceed to examine American health libertarianism in the period prior to 1820. Section II.A describes the rise of medical licensing during the nation's first decades—a development that forms the backdrop for the medical freedom arguments explored in the remainder of the Article. Section II.B then examines some of the earliest examples of American anti-licensing rhetoric. Section II.C discusses Benjamin Rush who, though probably the most prominent orthodox physician of the early national period, advanced fairly detailed arguments for medical freedom. Section II.D goes on to consider Rush's legacy to later advocates for freedom of therapeutic choice.

In Part III of the Article, I explore the period between 1820 and the Civil War, during which the battle against medical licensing became a popular constitutionalist movement led by the Thomsonians. Section III.A begins by describing the success of this struggle, as illustrated by the virtual disappearance of medical practice acts from the American legal landscape. Section III.B then offers important information about the Thomsonian movement itself. Section III.C situates the Thomsonians in the broader context of Jacksonian Democracy, the dominant political culture of the 1830s and 1840s. Section III.D goes on to demonstrate that the victorious antebellum fight against medical licensing was waged on explicitly constitutional terms, even though it occurred completely outside the courts. Section III.E analyzes the different strands of freedom rhetoric contained in the Thomsonian literature, including not only bodily freedom, but also economic freedom, freedom of inquiry, and freedom of conscience and



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religion. Finally, Section III.F offers a detailed description of the anti-licensing campaign in New York to provide a concrete example of how the Thomsonians succeeded in erasing most medical practice acts from the country's statute books. I conclude the Article by briefly considering how this historical perspective can help us understand modern extrajudicial activism for medical freedom as part of a multidimensional popular constitutional movement.

I. BACKGROUND

*A. Popular Constitutionalism*

The story of the successful antebellum fight against medical licensing depicted in this Article supports the thesis that during this country's first seventy years or so, medical freedom advocates shaped certain aspects of constitutional meaning entirely outside the courts. This Article thus contributes to the literature on "popular constitutionalism."

Although the term "popular constitutionalism" appeared in the law review literature as early as 1984,<sup>16</sup> it emerged as a common label for a branch of constitutional studies in the late 1990s. In 1999, Douglas S. Reed, limning what he called a "theory of popular constitutionalism," drew on the work of a group of scholars who were "trying, in many different ways, to provide a theory of extrajudicial legal interpretation and mobilization."<sup>17</sup> One of the authors he discussed was Mark Tushnet, who earlier that year had published *Taking the Constitution Away from the Courts*, which would prove to be one of the seminal works of popular constitutionalist scholarship.<sup>18</sup> Tushnet's book distinguished between the "thick Constitution" and the "thin Constitution."<sup>19</sup> According to Tushnet, the former consists of the many detailed provisions of the U.S. Constitution setting forth and regulating the organization of the federal government. These provisions are rarely the source of widespread or impassioned public debate. The "thin Constitution," by contrast, consists of the fundamental principles of equality and liberty stated in the Declaration of Independence and the Constitution's preamble. Although the "thin Constitution" is reflected in the U.S. Constitution's specific rights-guaranteeing provisions, it is not identical to these provisions or what the Supreme Court has said about them. Rather, its meaning is contested and shaped by the people themselves in public, often political, venues outside the courts. Tushnet dubbed this model, which he

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16 Ronald K. L. Collins, *Foreword: Reliance on State Constitutions—Beyond the "New Federalism"*, 8 U. PUGET SOUND L. REV. vi, xi, xii, xxiii (1984).

17 Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L. J. 871, 877 (1999).

18 MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

19 *Id.* at 9–14.

presented as more aspirational than descriptive, “populist constitutionalism.”<sup>20</sup>

Tushnet’s “populist constitutionalism” and Reed’s “popular constitutionalism” were closely related concepts.<sup>21</sup> For whatever reason, the latter term captured the field. Since the turn of the century, “popular constitutionalism” has been a standard classification for the work of a diverse assortment of scholars, including Tushnet himself, who embrace the notion that the people, rather than judges, are the ultimate constitutional authority.<sup>22</sup> While some of these scholars, like Tushnet, take a primarily normative approach, others claim that popular constitutionalism is not only an ideal to strive for, but also is an accurate account of constitutional practice for much of U.S. history. Larry Kramer, for example, has asserted that popular constitutionalism thoroughly dominated American constitutional understanding in the country’s early years and remained an important strain of American constitutionalism until the 1980s, when judicial supremacy became a shared ideal across the political spectrum.<sup>23</sup>

The literature on popular constitutionalism emphasizes arenas outside the courts in which citizens have fought to shape constitutional meaning. Kramer, for example, describes various “extrajudicial” forums for popular constitutional lawmaking in U.S. history, including mobs, boycotts, rallies, petition drives, elections, and jury service.<sup>24</sup> This is not to say that all scholars of popular constitutionalism exclude courts from the scope of institutions subject to influence by social movements.<sup>25</sup> In fact, popular constitutionalists express a wide range of views regarding the optimal and actual function of the courts in constitutional interpretation.<sup>26</sup> But they all share a conviction that the

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20 See generally *id.*

21 The differences between Tushnet’s “populist constitutionalism” and Reed’s “popular constitutionalism” are rather vague. See Reed, *supra* note 17, at 879 n.14. Reed points out that they coined their terms simultaneously and independently. *Id.*

22 Some prominent examples of this growing body of literature include LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2005); Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594 (2005); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the de Facto ERA*, 94 CALIF. L. REV. 1323 (2006). See also *A Symposium on The People Themselves: Popular Constitutionalism and Judicial Review*, 81 CHI.-KENT L. REV. 809–1182 (2006).

23 KRAMER, *supra* note 22.

24 *Id.*

25 Reva Siegel, for example, has shown how the popular mobilization both supporting and opposing the unsuccessful Equal Rights Amendment in the 1970s shaped judges’ understanding of the constitutional doctrine of equal protection in a way that ultimately forged a “de facto” amendment reflected in court doctrine. Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006).

26 James E. Fleming offers a typology dividing popular constitutionalism into five versions based primarily on their adherents’ attitudes toward judicial review and judicial supremacy. James E. Fleming, *Judicial Review Without Judicial Supremacy: Taking the Constitution Seriously*

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construction of constitutional meaning cannot be fully understood through an exclusive focus on judges.<sup>27</sup>

The early nineteenth-century battle over medical licensing is an excellent example of American popular constitutionalism in action.<sup>28</sup> Furthermore, it offers an ideal opportunity to examine popular constitutionalism in an extrajudicial context, for courts simply did not play a part in the drama. Indeed, antebellum foes of medical licensing appear not to have even sought judicial review. As will be shown below, in Part III, they pursued their struggle, and achieved their victories, entirely through popular mobilization outside the courts.

### *B. Orthodox Medicine and Its Alternatives*

The medical freedom rhetoric examined by this Article cannot be fully comprehended without some background information on orthodox medicine in the late-eighteenth and early-nineteenth centuries.

Early American orthodox medicine was based almost completely on speculative deduction from the principle that good health was a balance of systemic forces in the body. From this perspective, illness was an imbalance characterized by excessive excitement or enfeeblement. “The fundamental

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*Outside the Courts*, 73 FORDHAM L. REV. 1377, 1379–80 (2005).

27 Fleming, with questionable justification, counts among the ranks of popular constitutionalists “departmentalists who are not populists”—scholars who focus on the role of legislatures and executives, alongside courts, in determining constitutional construction but who do not emphasize the role of citizens generally. *Id.* at 1379. Robert Post and Reva Siegel warn against such a fusion of departmentalism and popular constitutionalism, observing, “Most theorists of departmentalism situate their analysis in the context of separation of powers, rather than popular constitutionalism.” Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1032 (2004).

28 Theodore W. Ruger makes points somewhat similar to mine in *Plural Constitutionalism and the Pathologies of American Health Care*, 120 YALE L.J. ONLINE 347 (2011), which includes a short discussion of the antebellum anti-licensing campaign. *Id.* at 354–56. In framing his argument regarding the existence of a “noncanonical” constitution that “prioritizes individual therapeutic choice,” *id.* at 348, 356, Ruger draws heavily on the framework of “large C” Constitutionalism versus “small c” constitutionalism set forth in WILLIAM N. ESKRIDGE & JOHN FEREJOHN, A REPUBLIC OF STATUTES (2010). In this formulation, “large C” Constitutionalism is based on the formal text of the Constitution and Supreme Court decisions interpreting this text, whereas “small c” constitutionalism is rooted in foundational commitments expressed through political activity and popular social movements. *Id.* at 1–24. As Eskridge and Ferejohn themselves remark, a parallel exists between their categories and Tushnet’s “thick Constitution” and “thin Constitution,” respectively. *Id.* at 60. My chief disagreement with Ruger is that he characterizes the antebellum arguments against medical licensing as being primarily “large C” ones, whereas in this Article I will show that “thin constitutional” arguments (parallel to “small c” arguments) were prevalent, and probably dominant, in the anti-licensing literature of the time. Ruger, *Plural Constitutionalism*, *supra*, at 354. I also find Tushnet’s framework more apt than Eskridge and Ferejohn’s for this particular topic, for although they criticize Tushnet for his apparent exclusion of courts from the interpretation of the “thin [“small c”] Constitution,” the courts did, in fact, remain on the sidelines of the antebellum medical licensing controversy.

objective was to restore the natural balance, which was accomplished by depleting or lowering the overexcited patient and by stimulating or elevating the patient enfeebled by disease.”<sup>29</sup> In the first decades of the nineteenth century, most regular doctors believed that most diseases were overstimulating, rather than enfeebling. The typical treatments used to restore the natural balance were thus depletive ones.<sup>30</sup> Mainstream doctors routinely enervated their patients through the use of therapies such as bleeding; the administration of massive doses of mineral-based purgatives, emetics, and diaphoretics;<sup>31</sup> and the application of blistering plasters to the skin. The two main symbols of this approach to medicine—among both its proponents and critics—were the lancet (an instrument used for bleeding) and calomel (a mercury-based purgative).

Later observers labeled this approach to healing “heroic” medicine because of the regular practitioners’ commitment to aggressive, interventionist treatment. As stated by a leading medical historian, “[D]uring the first two-thirds of the nineteenth century . . . the physician’s ‘redemptive role,’ his active therapeutic intervention in an effort to redeem patients from disease, was at the core of what it meant to be a physician in America.”<sup>32</sup> The most famous—or, in the eyes of critics, infamous—episode of heroic medicine’s reign occurred at the 1799 deathbed of George Washington, who was suffering from a severe throat infection. Physicians treating the stoic national hero dosed him with a purgative and emetic, applied blisters to his throat and legs, and drained about half of the blood from his body.<sup>33</sup>

Despite the frequent use of a single term, “heroic medicine,” to describe early American orthodox practice, disagreements sometimes arose among orthodox doctors with regard to both principles and remedies.<sup>34</sup> The United States’ most renowned and influential practitioner of depletive heroic medicine was Dr. Benjamin Rush, discussed in detail below.<sup>35</sup> In the 1790s, Rush was challenged by some other regular doctors who asserted that stimulative as well as

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29 JOHN HARLEY WARNER, *THE THERAPEUTIC PERSPECTIVE: MEDICAL PRACTICE, KNOWLEDGE, AND IDENTITY IN AMERICA, 1820-1885*, 85 (1986). Conventional medicine was later termed “allopathic” medicine by its homeopathic opponents, because it used drugs and remedies intended to produce effects opposite the symptoms being treated. JAMES C. WHORTON, *NATURE CURES: THE HISTORY OF ALTERNATIVE MEDICINE IN AMERICA* 18 (2004). In Greek, *allo* means opposite, and *pathos* means suffering.

30 WARNER, *supra* note 29, at 91.

31 These words are used to designate substances that induce bowel evacuation, vomiting, and sweating, respectively.

32 See WARNER, *supra* note 29, at 11.

33 RON CHERNOW, *WASHINGTON: A LIFE* 807–09 (2010); JARED SPARKS, *THE LIFE OF GEORGE WASHINGTON* 531–35 (1839). The purgative and emetic used were calomel and antimony potassium tartrate (“tartar emetic”), respectively.

34 BENJAMIN RUSH, *THE AUTOBIOGRAPHY OF BENJAMIN RUSH: HIS “TRAVELS THROUGH LIFE” TOGETHER WITH HIS COMMONPLACE BOOK FOR 1789-1813*, at 361–66 app. 1 (“Rush’s Medical Theories”) (G. W. Corner ed., 1970).

35 See *infra* Section II.C.

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depletive remedies had a useful role in treatment.<sup>36</sup> His opponents' view reemerged in force in the middle of the nineteenth century, as orthodox practitioners increasingly prescribed stimulative therapies such as quinine (from cinchona bark), iron compounds, and alcohol.<sup>37</sup> Furthermore, around that time, growing numbers of regular doctors began to articulate an attitude of therapeutic skepticism, suggesting that physicians should merely provide palliative care while letting nature take its course.<sup>38</sup> Such trends, however, should not be overstated. Although bleeding largely disappeared, other depletive therapies were used—though often in smaller doses—throughout the century.<sup>39</sup> And even those orthodox practitioners who embraced the rhetoric of skepticism remained committed to pharmaceutical intervention in practice.<sup>40</sup>

Who were these “regular” doctors? The borders defining the orthodox medical profession were quite indistinct in early American history. Regular physicians were likely to be members of local and state medical societies, and they increasingly also tended to be graduates of foreign or domestic medical schools. Yet neither of these credentials was a precondition for practice before the Civil War.<sup>41</sup> As discussed in detail below,<sup>42</sup> orthodox medical practitioners sought to secure the boundaries of their profession by encouraging the passage of state medical licensing requirements. The details of these laws varied greatly, but even the strictest of them posed relatively low barriers to entry. As Paul Starr observes, “The preferred statuses—medical school graduate, society member, licensed practitioner—were continually invaded by the lower ranks of the profession as schools multiplied, societies became less exclusive, and licenses became easier to acquire.”<sup>43</sup>

The blurriness of the line dividing regular and irregular medicine does not, however, negate the fact that many practitioners were clearly outside the fraternity of regular physicians. The antebellum medical landscape was populated

36 RUSH, *supra* note 34, at 361–66 app. 1 (“Rush’s Medical Theories”).

37 See WARNER, *supra* note 29, at 98.

38 *Id.* at 135, 240–41, 267–68.

39 Edmund D. Pellegrino, *The Sociocultural Impact of Twentieth-Century Therapeutics*, in THERAPEUTIC REVOLUTION: ESSAYS IN THE SOCIAL HISTORY OF AMERICAN MEDICINE 245, 247 (Morris J. Vogel & Charles E. Rosenberg eds., 1979).

40 Charles E. Rosenberg, *The Therapeutic Revolution: Medicine, Meaning, and Social Change in Nineteenth-Century America*, in THERAPEUTIC REVOLUTION: ESSAYS IN THE SOCIAL HISTORY OF AMERICAN MEDICINE 3, 19–21 (Morris J. Vogel & Charles E. Rosenberg eds., 1979); WARNER, *supra* note 29, at 29–31, 36.

41 ROTHSTEIN, *supra* note 6, at 63–72, 87–100.

42 See *infra* Section II.A.

43 PAUL STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE: THE RISE OF A SOVEREIGN PROFESSION AND THE MAKING OF A VAST INDUSTRY 46 (1984). The boundaries defining the orthodox armamentarium were somewhat permeable, as well. A few important remedies used by regular physicians, such as inoculation for smallpox and powdered cinchona bark (the source of quinine) for malaria, originated in folk medicine, and popular healers borrowed some remedies from orthodox medicine. *Id.* at 47.

by large numbers of indisputably lay practitioners, including botanical healers, midwives, bonesetters, unschooled inoculators, and abortionists.<sup>44</sup> In some instances, one's status as an "irregular" doctor was dictated by race or gender. Native Americans, African Americans, and women were virtually excluded from the orthodox medical profession, but they were extremely well represented among the ranks of lay and folk healers.<sup>45</sup> Indeed, women members of households were the nation's most important primary health care providers. Informed by oral tradition, by personal experience, and, increasingly, by published manuals on domestic medicine, many housewives were experts at the use of botanical and other household remedies.<sup>46</sup>

As the nineteenth century progressed, increasing numbers of alternative practitioners—including white men who might have been eligible to practice regular medicine—began to join organized groups that rejected orthodox medical practices and theories in favor of other healing systems. By the end of the nineteenth century, these irregular "schools" of medicine included eclectic medicine, homeopathy, Christian Science, and osteopathy, among many others. Because of this Article's focus on the antebellum years, the only alternative school that it will examine closely is Thomsonianism. This botanical medical sect was founded in the 1810s and thrived into the 1840s. It was the first significant organized alternative medicine group in the United States and was, by far, the most important of its time.<sup>47</sup> The Thomsonians were not merely adherents of a particular system of medicine; as the leaders of a nationwide fight against state medical licensing laws, they were also the core members of a popular constitutionalist movement for medical freedom. As the next section will show, however, the Thomsonians did not invent American health libertarianism. Examples of this attitude can be found in the nation's earliest years. It arose in response to the first attempts to establish medical licensing regimes, in the eighteenth century.

## II. AMERICAN HEALTH LIBERTARIANISM PRE-1820

### *A. The Rise of Medical Licensing*

Even prior to the Revolutionary War, orthodox physicians in America sporadically attempted to persuade colonial governments to pass laws mandating the examination and licensure of doctors. Their primary stated aim was to protect

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44 *Id.* at 48.

45 *Id.* at 47–51.

46 *Id.* at 32–37; ROTHSTEIN, *supra* note 6, at 32–34.

47 See CHARLES E. ROSENBERG, *THE CHOLERA YEARS 70* (1962) (explaining that the followers of Thomsonianism were the "most numerous and vocal" of the irregular medical groups); WHORTON, *supra* note 29, at 25 (asserting that Samuel Thomson was the "first into the field" of alternative medical movements).

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the vulnerable and ignorant public from “quacks” and “mountebanks.”<sup>48</sup> They also bemoaned the disrepute that untrained and unorthodox practitioners brought down on the entire profession. “It is very injurious to regular-bred physicians,” one licensing advocate remarked, “that such impostors are suffered to deceive mankind and bring into contempt the honorable profession of physic.”<sup>49</sup>

These efforts to create licensing regimes were generally unsuccessful,<sup>50</sup> and those few licensing laws that passed were primarily honorific measures that did not penalize practice by unlicensed physicians.<sup>51</sup> Prior to the middle of the eighteenth century, efforts to institute medical licensing almost invariably encountered opposition or indifference among the majority of citizens, suggesting the deep-rootedness of the American preference for freedom of therapeutic choice. In the words of medical historian Richard Harrison Shryock, “Most men seem to have believed that a people who entrusted their souls to all sorts of preachers, could likewise entrust their bodies to all sorts of ‘doctors.’”<sup>52</sup>

The strongest colonial licensing laws, at least on paper, were those enacted by New York in 1760 and by New Jersey in 1772. These statutes required that doctors be examined and licensed by lay officials and imposed fines on violators. The fate of these two laws, however, illustrates how (consistent with the approach of popular constitutionalism) it is often necessary to look beyond formal legal sources to determine citizens’ attitudes towards medical liberty. The New York and New Jersey laws were extremely unpopular and thus barely enforced, if at all.<sup>53</sup> In discussing these statutes (as well as the colonial-era measures that failed to pass) one scholar has observed, “many people resisted licensure essentially because of the threat it posed to their traditional freedom to choose from among a broad range of healers.”<sup>54</sup>

On the eve of the Revolution, no effective constraint on practice by unorthodox and untrained doctors existed in the American colonies. One commentator facetiously remarked in 1774, “There is no law for *hanging* mountebanks, that I know of, in this land of liberty; and therefore they that are

48 See, e.g., Anon., *The Correspondent*, No. XIV, CONN. J., Mar. 19, 1773, at 1.

49 Anon., *Untitled*, NEW-LONDON GAZETTE, Oct. 8, 1773, at 1.

50 For example, in 1767, the regular physicians of Litchfield County, Connecticut, organized themselves into a society that would examine and certify candidates, but the society’s effort to persuade the colonial legislature to formalize its status went nowhere. RICHARD HARRISON SHRYOCK, *MEDICAL LICENSING IN AMERICA, 1650-1965*, at 18 (1967); *Resolves of the Medical Corporation of Litchfield County*, CONN. COURANT, Feb. 23, 1767, at 1.

51 STARR, *supra* note 43, at 44. It was not, however, unheard of for courts to levy penalties. For example, in 1672, the Suffolk County Court fined a man for practicing medicine without its approval, as required at the time by Massachusetts law. SHRYOCK, *supra* note 50, at 14.

52 SHRYOCK, *supra* note 50, at 15.

53 *Id.* at 17; STARR, *supra* note 43, at 44.

54 JAMES H. CASSEY, *MEDICINE IN AMERICA: A SHORT HISTORY* 19 (1991). For discussions of the occasional gestures toward medical licensing in the American colonies, see *id.* at 18–19; ROTHSTEIN, *supra* note 6, at 37–38; SHRYOCK, *supra* note 50, at 13–19.

fond of them may . . . run after them as long as they please.”<sup>55</sup> The same year, a committee of Connecticut doctors complained:

[T]he power of the magistrate is very seldom or ever exerted, or any Notice taken in this country for the preservation of health, or distinguishing the eminent, the learned, from the illiterate and the ignorant. . . . The importance of a proper medical police is either not understood or very little attended to or regarded.<sup>56</sup>

After the signing of the Declaration of Independence, states gradually began to enact medical licensing laws in response to pressure from the growing body of regularly educated physicians.<sup>57</sup> By 1800, six states had medical practice acts of some kind on the books. The 1810s saw the multiplication and strengthening of state licensing regimes—a trend that peaked with a flurry of legislative activity in the late 1810s and early 1820s. The statutes of this period generally required examination and licensing by state medical societies—societies that were, in many instances, incorporated by the same laws.<sup>58</sup> By the end of 1825, eighteen of the twenty-four extant states, plus the District of Columbia, had adopted medical licensing.<sup>59</sup>

The nature and severity of the sanctions set forth in these licensing statutes varied significantly from state to state and also changed within states as the laws were amended. Some states’ medical practice laws established no penalty whatsoever for violators, and other states imposed fines too small to influence behavior.<sup>60</sup> In other jurisdictions, the sole sanction was a prohibition against unlicensed practitioners bringing suits for unpaid fees.<sup>61</sup> On the other side of the scale, about half of the states that enacted medical licensing laws during this era authorized the imposition of fines, and a few went so far as to allow the imprisonment of violators.<sup>62</sup> Despite the variation, overall, there was a trend toward stricter penalties until the mid-1820s.

55 Anon., *Untitled Letter*, ESSEX GAZETTE, Mar. 15, 1774, at 129.

56 Anon., *Untitled*, NEW-LONDON GAZETTE, Apr. 15, 1774, at 4.

57 ROTHSTEIN, *supra* note 6, at 74.

58 *Id.*; SHRYOCK, *supra* note 50, at 23. In some states, candidates could qualify for a license by passing examinations in medical school rather than the examination administered by the state medical society. *Id.* at 25–27.

59 See ROTHSTEIN, *supra* note 6, at 332–39 app. II. The states still without medical licensing systems in 1825 were Kentucky, Missouri, North Carolina, Pennsylvania, Tennessee, and Virginia. Tennessee enacted medical licensing in 1830 and North Carolina did so in 1859. The other four states enacted no licensing legislation before the Civil War.

60 *Id.* at 76.

61 Unlicensed practitioners could circumvent such provisions by simply demanding payment before providing treatment. See STARR, *supra* note 43, at 44–45. In any event, even licensed practitioners had trouble collecting unpaid fees in the courts. ROTHSTEIN, *supra* note 6, at 76.

62 See ROTHSTEIN, *supra* note 6, at 332–39 app. II.



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Nevertheless, this spread and toughening of medical licensing statutes does not necessarily evince widespread support among the population for such measures. One must assess a citizenry's embrace of a legal regime not only by the law in the books, but also by the extent to which that law is actually put into practice. Concededly, in New York—which, for a time, provided for imprisonment of unlicensed practitioners—the medical practice statute was “remarkably effective.”<sup>63</sup> But it appears that the licensing statutes in some other states were utterly ineffective in limiting the number of practitioners. For example, in 1811, the Maryland licensing examination committee grumbled that it was simply unable to bring violators of that state's medical practice act to justice.<sup>64</sup> In some jurisdictions, especially frontier states with sparse populations and small numbers of orthodox physicians, the antebellum licensing regimes failed due to half-hearted implementation and a lack of enforcement by government officials.<sup>65</sup> Moreover, juries routinely refused to convict unlicensed practitioners.<sup>66</sup> This jury conduct, in particular, suggests a widespread embrace of the notion of freedom of therapeutic choice—a notion that many jurors likely had never expressed, even to themselves, until they first encountered an actual instance of state intrusion into the medical sphere.

The steady proliferation and strengthening of state licensing statutes between the 1790s and early 1820s may have been due more to organizational than to ideological factors. During the early national period, regular physicians established many stable local and state medical societies,<sup>67</sup> while irregular doctors could point only to the network of small, local “Friendly Botanic Societies” that Thomson began to build around 1811.<sup>68</sup> This comparative lack of organizational structure—along with the relatively low literacy of many medical licensing opponents—may also help explain the dearth of a noteworthy body of American medical freedom literature prior to the emergence of significant Thomsonian societies and publications in the 1820s and 1830s. This scarcity of early anti-licensing literature makes it difficult to assess the precise basis—beyond economic self-interest—for the opposition to licensing by alternative practitioners and their supporters during the country's first few decades. There are, however, scattered clues.

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63 *Id.* at 75. According to one publication of the time, “many” botanical practitioners were imprisoned “for fifty or sixty days” in New York State. Anon., *Untitled*, 1 BOTANIC WATCHMAN 4, Jan. 1, 1834, at 5.

64 Rothstein, *supra* note 6, at 77.

65 *Id.* at 75–76.

66 *Id.* at 76.

67 *Id.* at 327–31 app. I.

68 HALLER, THE PEOPLE'S DOCTORS, *supra* note 3, at 35–36.

*B. Early Arguments Against Medical Licensing*

The meager record indicates that those who opposed medical licensing in the late eighteenth century did so for various reasons that would persist throughout the antebellum period examined in this Article. One theme that emerges from early anti-licensing statements is the threat to economic freedom posed by government-granted monopolies. For example, in 1769, an opponent of medical licensing in Connecticut raised the specter of a doctors' monopoly exacting excessive fees from the people. He contended, "[A] combination of Doctors perhaps gives them a greater advantage to impose on mankind, by extravagant demands, than if no such combination had been formed."<sup>69</sup> Importantly, foes of medical licensing seemed to fear that an orthodox doctors' monopoly would threaten their freedom as well as their pocketbooks. When the Connecticut legislature in 1787 considered, and rejected, a bill that would have established a state medical society with licensing power, one representative protested that he "did not like this plan: . . . it was a combination of the doctors: . . . they cost more than they do good: this society . . . was directly against liberty: they might shut out every body else: it was a very dangerous thing."<sup>70</sup>

Opposition to monopolies was widespread in Revolutionary America. Indeed, the American colonists' antagonism toward English grants of trade monopolies, such as the East India Company's monopoly over tea importation to the colonies, was a significant impetus for their bid for independence.<sup>71</sup> As reflected in the Connecticut legislator's remarks quoted above, many Americans of this period, drawing on a long tradition of anti-monopolism in English jurisprudence and political thought, viewed exclusive charters as not only detrimental to society's economic interests, but also as a violation of individuals' economic rights.<sup>72</sup> Indeed, Thomas Jefferson, as well as six state ratifying conventions, sought to include an anti-monopoly provision in the Bill of Rights of the United States Constitution.<sup>73</sup>

A related reason for the early opposition to medical licensing was suspicion of the motives of the exclusive medical societies that would administer these

69 Anon., *Untitled*, CONN. COURANT, Jul. 31, 1769, at 5.

70 *State of Connecticut, In the House of Representatives, May 24*, CONN. J., June 6, 1787, at 3. On the defeat of this measure, see ROTHSTEIN, *supra* note 6, at 68.

71 Steven G. Calabresi & Larissa Price, *Monopolies and the Constitution: A History of Crony Capitalism* 27–28 (Northwestern Sch. of Law Pub. Law & Legal Theory Series, Working Paper No. 12-20, 2012), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2130043](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2130043).

72 *Id.* at 7–22. *Dr. Bonham's Case*, 77 Eng. Rep. 646 (1610), an English case with an opinion by Sir Edward Coke, was frequently cited by American colonists to support their assertion that common law rights could abrogate Parliamentary Acts. Notably, the decision itself nullified a royal charter (confirmed and amended by statute) that gave the College of Physicians the authority (among other powers) to fine doctors for practicing without a license. See Theodore F.T. Plunkett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30 (1926).

73 Calabresi & Price, *supra* note 71, at 29–31, 33–34.

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schemes. At the end of the eighteenth century, Americans exhibited widespread “concern with the deceit and dissembling of sophisticated elites.”<sup>74</sup> They saw “designs within designs, cabals within cabals.”<sup>75</sup> Any group or gathering perceived to have aristocratic pretensions was viewed not only as unrepugnant, but also a conspiratorial threat to liberty.<sup>76</sup> Thus another Connecticut legislator opposed to the creation of a state medical society with licensing power opined “[t]hat he was against all societies, whose constitutions & designs we did not know; such as [the Society of the Cincinnati], free-masons, and this medical society; that they were composed of cunning men, and we know not what mischief they may be upon.”<sup>77</sup>

Another premise in the sparse early record that would become an enduring theme in American medical freedom literature was the importance of freedom of inquiry. For example, in 1788 a Philadelphia newspaper observed that, although the state legislature could address the problem of incompetent and ignorant practitioners through legislation, “it has never yet interfered, not only from an unwillingness to multiply restraint in a free country, but perhaps from a doubt, whether some equivalent advantage might not arise from the liberty of attempting medical experiments.”<sup>78</sup> This statement suggests that foes of medical licensing thought that such laws not only constituted excessive state interference into citizens’ private affairs, but also threatened the progress of medical science by hindering free inquiry. The writer of this column further explained: “Unfortunate individuals suffer in the course of [the uneducated practitioner’s] inquiries, but the community at large is sometimes benefitted by an accession to experimental knowledge.”<sup>79</sup>

These two themes—first, the aversion to monopolies and elite fraternities that undermined economic freedom and republican values, and second, the need for free inquiry to advance medical knowledge—would dominate the medical freedom rhetoric of Dr. Benjamin Rush. Paradoxically, although Rush was perhaps the most prominent orthodox physician of the early national period, he was also that era’s most articulate opponent of licensing and proponent of therapeutic choice.

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74 GORDON S. WOOD, *THE IDEA OF AMERICA: REFLECTIONS ON THE BIRTH OF THE UNITED STATES* 104 (2011).

75 *Id.* at 88.

76 *See id.* at 81–126. On anti-aristocratic sentiments in the Revolutionary generation, see GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 240–43 (1992).

77 *State of Connecticut, In the House of Representatives, May 24, CONNECTICUT JOURNAL*, June 6, 1787, at 2–3. The Society of the Cincinnati was a hereditary fraternal order of army officers, of whom George Washington was the first president. The society was widely scorned as a secretive, elitist, aristocratic institution, and in 1787, George Washington tried, with mixed success, to force reforms on it, including abandonment of its hereditary character. *See* CHERNOW, *supra* note 33, at 497–500.

78 Anon., *Untitled*, *INDEPENDENT GAZETTEER*, Dec. 16, 1788, at 3.

79 *Id.*

*C. Benjamin Rush: Orthodox Advocate for Medical Liberty*

Philadelphia's Benjamin Rush (1746-1813), although less celebrated than some of his fellow Founding Fathers, was an influential figure during the birth of the nation and an extraordinary Renaissance man almost on the level of Franklin and Jefferson. He was not only an extremely prominent physician and a medical professor at the University of Pennsylvania, but also a member of the Continental Congress, a signer of the Declaration of Independence, a member of the Pennsylvania ratifying convention, an antislavery pamphleteer, a longtime Treasurer of the U.S. Mint, and the founder of Dickinson College.<sup>80</sup> Most crucially for the purposes of this inquiry, Rush was also the first well-known American opponent of medical licensing and advocate for medical freedom.

One might assume that Rush, as the nation's leading orthodox doctor, would have sided with the forces of exclusion and privilege. In fact, during the Revolutionary years, Rush was a staunch Federalist, apprehensive about extreme democracy and hostile to Pennsylvania's radicals. By 1789, however, he had undergone a dramatic conversion, and for the remainder of his life he was a confirmed Jeffersonian Republican who railed against aristocratic conspiracies.<sup>81</sup>

In light of Rush's background, his transformation was not as surprising as it might seem. As Rush himself was acutely aware, he was in many ways an outsider to the elite medical community of Philadelphia and its well-off clientele. He came from a family of modest means and no connections. He was also a Presbyterian in a city dominated by Quakers and Anglicans.<sup>82</sup> Moreover, his role as a leading patriot in the American Revolution alienated him from a large portion of the city's upper class with loyalist sympathies.<sup>83</sup>

The manner in which Rush conducted his medical career further alienated his orthodox colleagues. He enraged them by working with unlicensed and unorthodox practitioners. As he described the situation, "I frequently exposed myself to reproach from the regular bred [*sic*] of physicians by attending patients with quacks, and with practitioners of physic [medicine] of slender education."<sup>84</sup> At times, Rush rationalized such cooperation in terms seemingly designed to appeal to his orthodox colleagues' elitist sensibilities. He recalled, "I justified this conduct by saying that I rescued the sick from the hands of ignorant men, and gave them a better chance of being cured, and at the same time instructed

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80 See generally ALYN BRODSKY, *BENJAMIN RUSH: PATRIOT AND PHYSICIAN* (2004).

81 LANCE BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY* 120-21 (1978); STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788-1800*, at 459 (1995); RUSH, *AUTOBIOGRAPHY*, *supra* note 34, at 58, 103; STARR, *supra* note 43, at 42.

82 ELKINS & MCKITRICK, *supra* note 81, at 459; RUSH, *AUTOBIOGRAPHY*, *supra* note 34, at 78-79.

83 RUSH, *AUTOBIOGRAPHY*, *supra* note 34, at 88-89.

84 *Id.* at 106.

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[the irregular doctors] in a regular mode of practice.”<sup>85</sup> Elsewhere, however, Rush was more generous to unschooled and alternative practitioners, maintaining that regular doctors could learn valuable lessons from them.<sup>86</sup> He declared medicine to be “a science so simple”<sup>87</sup> that it required little study and was “obvious to the meanest capacities.”<sup>88</sup> He also condemned the standard practice of writing prescriptions and publishing medical dissertations in Latin, charging that the use of this language unnecessarily wrapped medicine in “mystery or imposture.”<sup>89</sup> Such views could not have failed to outrage Rush’s snobbish brethren in the orthodox medical community.

In addition, many elite regular physicians in Philadelphia disdained Rush’s particular medical ideas. First, he infuriated the city’s established doctors by embracing the theories of his Scottish mentor, William Cullen, while they stubbornly clung to the older views of the Dutch physician Herman Boerhaave.<sup>90</sup> Then, in the late 1780s, after most of his colleagues had finally embraced Cullen’s teachings, Rush invited their wrath again by developing his own theory of disease and treatment.<sup>91</sup> Although his new approach, based on extreme bleeding and purging, would ultimately serve as the foundation for standard American heroic medicine in the early nineteenth century, Philadelphia’s fraternity of regulars did not immediately embrace it.<sup>92</sup>

For this combination of reasons, Philadelphia’s medical elite refused to engage in consultations with Rush and urged medical students to avoid his lectures.<sup>93</sup> The acrimony between Rush and other regular physicians peaked in 1793, when a severe yellow fever epidemic ravaged the city. Rush vehemently disagreed with most others in the medical establishment concerning both the origin of and the correct response to this scourge.<sup>94</sup> The rancor of this dispute

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<sup>85</sup> *Id.*

<sup>86</sup> See BENJAMIN RUSH, OBSERVATIONS ON THE DUTIES OF A PHYSICIAN, AND THE METHODS OF IMPROVING MEDICINE ACCOMMODATED TO THE PRESENT STATE OF SOCIETY AND THE MANNERS IN THE UNITED STATES 10 (Philadelphia, Prichard & Hall 1789).

<sup>87</sup> RUSH, AUTOBIOGRAPHY, *supra* note 34, at 88–89.

<sup>88</sup> Benjamin Rush, “Lecture VI. Upon the Causes Which Have Retarded the Progress of Medicine and the Means of Promoting Its Certainty and Greater Usefulness” in BENJAMIN RUSH, SIX INTRODUCTORY LECTURES TO COURSES OF LECTURES UPON THE INSTITUTES AND PRACTICE OF MEDICINE 157 (Philadelphia, John Conrad & Co. 1801).

<sup>89</sup> *Id.* at 156.

<sup>90</sup> BRODSKY, *supra* note 80, at 91–92.

<sup>91</sup> RUSH, AUTOBIOGRAPHY, *supra* note 34, at 82, 361–66 app. 1 (“Rush’s Medical Theories”); RICHARD HARRISON SHRYOCK, MEDICINE AND SOCIETY IN AMERICA: 1660–1860, at 67–72 (1960).

<sup>92</sup> Rush recommended, in extreme cases, the removal of up to four-fifths of the blood from the body. *Id.* at 70.

<sup>93</sup> RUSH, AUTOBIOGRAPHY, *supra* note 34, at 88, 96. Rush’s colleagues’ purported efforts to ruin him did not succeed; despite all the odium he was exposed to, he, by his own reckoning, “did more business, with more profit, between the years 1769 and 1800 than any contemporary physician in Philadelphia.” *Id.* at 108.

<sup>94</sup> Rush attributed the epidemic to “domestic origins” (a “noxious miasma”), whereas “nearly the whole College of Physicians . . . derived it from a foreign country,” namely, the thousands of

was heightened by the curious fact that public attitudes towards the causes of yellow fever and its appropriate treatment corresponded to political divisions, with Republicans supporting Rush and Federalists backing his opponents.<sup>95</sup> Rush's colleagues were so vituperative toward him that following the epidemic, he resigned from the College of Physicians.<sup>96</sup>

Probably impelled, at least in part, by the intense antagonism of the medical establishment, Rush became an outspoken advocate for medical freedom. Despite having what his biographer calls a "somewhat immutable conviction in the correctness . . . of his ideas,"<sup>97</sup> Rush was a voice for tolerance of different medical views. He opposed most restrictions on medical choice, including at least some types of medical licensing. In a published 1801 lecture to the University of Pennsylvania Medical School, Rush enumerated many "causes which have retarded the progress" of medicine, including the following:

21c. The interference of governments in prohibiting the use of certain remedies, and enforcing the use of others by law. The effects of this mistaken policy has [*sic*] been as hurtful to medicine, as a similar practice with respect to opinions, has been to the Christian religion.

22d. Conferring exclusive privileges upon bodies of physicians, and forbidding men of equal talents and knowledge, under severe penalties, from practising medicine within certain districts of cities and countries. Such institutions, however sanctioned by ancient charters and names, are the bastiles [*sic*] of our science.

23d. The refusal in universities to tolerate any opinions, in the private or public exercises of candidates for degrees in medicine, which are not taught nor believed by their professors, thus restraining a spirit of inquiry in that period of life which is most distinguished for ardour and invention in our science.<sup>98</sup>

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Frenchmen who arrived in Philadelphia after fleeing the Haitian Revolution. RUSH, *AUTOBIOGRAPHY*, *supra* note 34, at 97; *see also* BRODSKY, *supra* note 80, at 326; ELKINS & MCKITRICK, *supra* note 81, at 823 n.182. Moreover, the medical establishment contemptuously rejected Rush's recommendation that doctors battle the scourge through the use of extreme purging and bloodletting. BRODSKY, *supra* note 80, at 329–32.

95 ELKINS & MCKITRICK, *supra* note 81, at 823 n.182.

96 RUSH, *AUTOBIOGRAPHY*, *supra* note 34, at 98.

97 BRODSKY, *supra* note 80, at 345.

98 Rush, *Lecture VI*, *supra* note 89, at 151–52. In the first quoted paragraph, Rush seems to have been alluding primarily to actions by governments in Europe, rather than the United States; at the time Rush composed the lecture, few if any American laws had ever actually prohibited or mandated the use of particular remedies. The second paragraph, by contrast, addressed what Rush may have perceived to be an extant and growing problem in his own country, for about six states had enacted such laws by the time Rush prepared this address. Rush's own state, Pennsylvania,

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Rush's speech was not explicitly political or constitutional. He delivered it to medical students in the interest of "our science," and most of the obstacles to medical progress he identified concerned the attitudes and practices of physicians themselves. Nevertheless, the speech was deeply infused with Rush's republican worldview and his Jeffersonian devotion to limited government. Moreover, the three quoted paragraphs contain the seeds of three persistent medical liberty notions—freedom of conscience, economic freedom, and freedom of inquiry, respectively—that would eventually combine with the notion of bodily freedom to form the Thomsonians' explicitly constitutional argument for freedom of therapeutic choice.

In the first of the quoted paragraphs, Rush anticipated much subsequent medical freedom rhetoric by alluding to a parallel between medical freedom and religious freedom.<sup>99</sup> Like many Jeffersonians, he was a committed religious pluralist and outspoken advocate of religious liberty.<sup>100</sup> He equated the state imposition of orthodox medical doctrine with the despotism of an established church and the truth-stifling effect of religious intolerance.<sup>101</sup> Jefferson himself

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would not enact its first medical practice act until after the Civil War. ROTHSTEIN, *supra* note 6, at 339; Samuel Lee Baker, *Physician Licensure Laws in the United States, 1865-1915*, 39 J. OF THE HIST. OF MED. & ALLIED SCI. 173, 196 (1984). However, as Rush was likely aware, John Morgan, the founder of what later became the University of Pennsylvania Medical School, had petitioned the provincial legislature in 1769 for authority to found an elect College of Physicians with the power to examine and license practitioners. SHRYOCK, *supra* note 50, at 16–17. The Pennsylvania state legislature passed a medical practice statute in 1824, but the governor vetoed it. See John Andrew Shulze, *To the Assembly Vetoing "An Act to Regulate the Practice of Physics and Surgery Within this Commonwealth"* (Dec. 8, 1824), reprinted in PAPERS OF THE GOVERNORS 1817-1832, at 542 (George Edward Reed ed., 1990).

99 In 1789, Rush had similarly declared, "Medicine has its Pharisees, as well as religion. But the spirit of this sect is as unfriendly to the advancement of medicine, as it is to christian [*sic*] charity." RUSH, *DUTIES*, *supra* note 86, at 10.

100 BRODSKY, *supra* note 80, at 149, 290, 306, 346; RUSH, *AUTOBIOGRAPHY*, *supra* note 34, at 339–40. Jefferson himself was the author of the 1786 Virginia Act for Establishing Religious Freedom. In a widely circulated 1799 letter to Elbridge Gerry that became the platform for Jefferson's 1800 presidential campaign, Jefferson declared, "I am for freedom of religion, and against all maneuvers to bring about a legal ascendancy of one sect over another." THOMAS JEFFERSON & NOBLE E. CUNNINGHAM, *THE INAUGURAL ADDRESSES OF PRESIDENT THOMAS JEFFERSON, 1801 AND 1805*, at 3 (2001) (quoting Letter from Thomas Jefferson to Elbridge Gerry (January 26, 1799), in 9 *THE WORKS OF THOMAS JEFFERSON* 15, 18 (Paul L. Ford, ed. 1905)). On the Jeffersonian Republican commitment to the separation of church and state, see GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815*, at 587–89 (2009). In his *Notes on the State of Virginia*, Jefferson stated, "[d]ifference of opinion is advantageous in religion." THOMAS JEFFERSON, *WRITINGS*, *supra*, at 286 (1984).

101 The relationship between church and medicine was a longstanding one. As Rush may have been aware, when Parliament instituted a system of examination and licensure of physicians in 1510, it placed administration of the system in the hands of the Church of England. Ecclesiastical control over medical licensure, however, was relatively short lived. SHRYOCK, *supra* note 50, at 6–7.

reached the same analogy from the other direction in a discussion about religious liberty in his *Notes on the State of Virginia*. Bemoaning various symptoms of “religious slavery,” Jefferson remarked:

Reason and free enquiry are the only effectual agents against error. . . . Had not free enquiry been indulged, at the æra [*sic*] of reformation, the corruptions of Christianity could not have been purged away. If it be restrained now, the present corruptions will be protected, and new ones encouraged. Was the government to prescribe to us our medicine and diet, our bodies would be in such keeping as our souls are now. Thus in France the emetic was once forbidden as medicine, and the potatoe [*sic*] as an article of food. Government is just as infallible too when it fixes systems in physics. Galileo was sent to the inquisition for affirming that the earth was a sphere.<sup>102</sup>

Religious liberty (or freedom of conscience) and freedom of inquiry were thus intertwined for both Jefferson and Rush.

The second quoted paragraph, by condemning the artificial privilege and monopoly perpetuated by medical licensing, presaged the important role that the theme of economic freedom would play in Thomsonian medical freedom rhetoric. Just how wide Rush himself would have flung open the door to the medical profession is not clear; he complained in the address only about the exclusion of “men of equal talents and knowledge.” Nonetheless, Rush indisputably had a much less restrictive vision of the profession than many regulars. This opposition to special castes and exclusive privileges was a typically Republican position. Jeffersonians believed the granting of monopolies, particularly to favored elites, was “destructive of the principle of equal liberty” and inconsistent with a republican form of government.<sup>103</sup>

Rush’s reference to the relationship between freedom of inquiry and scientific progress illustrates yet another theme that would prove to be enduring. He contended that the prohibition of certain remedies was “hurtful to medicine,” that exclusive licensing regimes were “the bastiles of our science,” and that suppression of dissenting opinions in medical schools curbed “a spirit of inquiry in that period of life which is most distinguished for ardour and invention in our science.”

Importantly, Rush would have extended freedom of inquiry not only to medical school students and erudite physicians, but also to irregular practitioners. Earlier in the same address, he condemned the medical profession’s “neglect to inquire after, and record cures which have been performed . . . by medicines,

<sup>102</sup> JEFFERSON, *supra* note 100, at 285.

<sup>103</sup> WOOD, *EMPIRE OF LIBERTY*, *supra* note 100, at 461 (citation omitted).



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administered by quacks, or by the friends of sick people.”<sup>104</sup> Twelve years before, in a published speech to the University of Pennsylvania’s graduating medical students, Rush had declared:

Let me remind you, that improvement in medicine is not to be derived only from colleges and universities. . . . [T]hose facts which constitute real knowledge, are to be met with in every walk of life. Remember how many of our most useful remedies have been discovered by quacks. Do not be afraid, therefore, of conversing with them, and of profiting by their ignorance and temerity in the practice of physic. . . . But further.—In the pursuit of medical knowledge, let me advise you to converse with nurses and old women. . . . Even negroes and Indians have sometimes stumbled upon discoveries in medicine. Be not ashamed to inquire into them.<sup>105</sup>

Rush’s views regarding the value of experimentation by the common man were also typical of early nineteenth-century republicanism. Despite Jefferson’s own belief in a “natural aristocracy,” his followers increasingly asserted that popular knowledge was as accurate and beneficial as the knowledge of experts.<sup>106</sup>

As I will discuss in Part III,<sup>107</sup> similar themes to those contained in Rush’s medical freedom discourse would pervade the Thomsonians’ anti-licensing rhetoric of the 1830s. Like Rush, the Thomsonians emphasized the parallel between medical freedom and religious freedom. Their literature was similarly filled with attacks on monopoly and “aristocratic privilege.” They, too, asserted that scientific progress depended on freedom of inquiry and trumpeted the medical discoveries made by unschooled practitioners. However, as I will also explain in Part III, the Thomsonians added to their argument an important strain of medical freedom strikingly absent from Rush’s speech—namely, bodily freedom.

#### *D. Rush’s Legacy*

##### *1. Rush and the Thomsonians*

Before turning to the Thomsonian campaign against medical licensing, it is worth considering whether and how Rush influenced them. Interestingly, despite his heroic approach to medicine, Rush is generally portrayed with admiration in Thomsonian literature. This favorable attitude likely derived largely from Samuel

<sup>104</sup> Rush, *Lecture VI*, *supra* note 88, at 151.

<sup>105</sup> RUSH, *DUTIES*, *supra* note 86, at 10.

<sup>106</sup> WOOD, *EMPIRE OF LIBERTY*, *supra* note 100, at 725–28.

<sup>107</sup> *Infra* Section III.E.

Thomson's depiction of his one encounter with Rush. In his widely circulated autobiographical narrative,<sup>108</sup> Thomson related how in 1813, he visited Rush and Benjamin Smith Barton, another University of Pennsylvania professor, to request their assistance in "introducing my system of practice to the world."<sup>109</sup> Although Rush "was so much engaged, that I was unable to have but little conversation," he "treated me with much politeness; and said that whatever Dr. Barton agreed to he would give his consent."<sup>110</sup> According to Thomson, Barton graciously agreed to accept some of Thomson's medicine and "make a trial of it."<sup>111</sup> Unfortunately, both professors died relatively soon afterward, thus depriving Thomson "of the influence of these two men, which I was confident would otherwise have been exerted in my favour."<sup>112</sup>

Thomson's followers, probably influenced by this account, regularly referred to Rush with adulatory phrases such as the "great Dr. Rush."<sup>113</sup> They highlighted the fact that the "much-distinguished" Rush, like their own mentor, believed in the "unity of disease and of cure."<sup>114</sup> They depicted Rush (somewhat accurately) as open-minded and (inaccurately) as ambivalent about his own variety of heroic treatments.<sup>115</sup> One Thomsonian lecturer, with some justification, characterized Rush as believing that "some lonely weed, trampled in the earth, might furnish a cure which had baffled all the wisdom of the schools."<sup>116</sup> But another speaker confused Rush's willingness to consider the benefits of herbal medicine with a wholesale rejection of orthodox principles. This lecturer asserted that Rush "opened the cry" in the United States against the orthodox "practice of poisoning the human system."<sup>117</sup> With no apparent basis, the Thomsonians repeatedly

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108 Because this narrative was published in the same volume as Thomson's *Guide to Health*, the handbook of Thomsonian medicine, enormous numbers of Thomsonians around the country possessed it. SAMUEL THOMSON, *NEW GUIDE TO HEALTH; OR, BOTANIC FAMILY PHYSICIAN. CONTAINING A COMPLETE SYSTEM OF PRACTICE ON A PLAN ENTIRELY NEW: WITH A DESCRIPTION OF THE VEGETABLES MADE USE OF, AND DIRECTIONS FOR PREPARING AND ADMINISTERING THEM, TO CURE DISEASE. TO WHICH IS PREFIXED A NARRATIVE OF THE LIFE AND MEDICAL DISCOVERIES OF THE AUTHOR* (2d ed. 1825) [hereinafter *NARRATIVE*].

109 *Id.* at 123. Whereas Thomson proudly highlighted this encounter in his autobiography, Rush did not mention it in his own.

110 *Id.*

111 *Id.*

112 *Id.* at 124.

113 See, e.g., Dr. T. Hersey, *A Lecture on the Comparative Merits of the Patent Steam Practice of Dr. Samuel K. Jennings and Dr. Samuel Thomson*, 2 THOMSONIAN RECORDER 193, 197 (1834) ("the great Dr. Rush").

114 R. H. Brumby, *Medical Botanist*, 2 THOMSONIAN RECORDER 367, 368 (1834).

115 See JAMES HARVEY YOUNG, *TOADSTOOL MILLIONAIRES: A SOCIAL HISTORY OF PATENT MEDICINES IN AMERICA BEFORE FEDERAL REGULATION* 37 (1972) (referring to the "self-confident way in which [Rush] advocated his theories").

116 Lecture by M. W. McCraw, in *Proceedings of the Mecklenburg Branch Society*, 2 THOMSONIAN RECORDER 401, 406 (1834).

117 SAMUEL ROBINSON, *A COURSE OF FIFTEEN LECTURES, ON MEDICAL BOTANY, DENOMINATED THOMSON'S NEW THEORY OF MEDICAL PRACTICE; IN WHICH THE VARIOUS THEORIES*

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quoted Rush as saying that the art of healing was like “an *unroofed temple*:- Uncovered at the top, and cracked at the foundation.”<sup>118</sup>

Despite the Thomsonians’ high regard for Rush, and the seeming echoes of his 1801 address that sounded throughout their own writings, it is far from clear that they were actually familiar with the speech. They never quoted from the lecture. Nevertheless, as I will show below,<sup>119</sup> the Thomsonians appear to have absorbed Rush’s arguments through cultural osmosis, even if they did not borrow them directly. At the very least, the esteemed Philadelphia physician and the radical botanical healers drew from the same intellectual and political traditions.

## 2. The Posthumous Transformation of Rush into Constitutional Advocate

Rush’s speech eventually found its way into non-Thomsonian anti-licensing literature. In 1838 or 1839, an American journal dedicated to the growing school of homeopathy reproduced much of the 1801 address—including the above-quoted passages.<sup>120</sup> Thereafter, medical licensing opponents quoted Rush’s paragraph opposing “exclusive privileges” with increasing frequency for the remainder of the century. Then, in the first decade of the twentieth century, opponents of restrictive licensing creatively expanded Rush’s words into a *constitutional* argument for medical freedom. In 1907, the *Journal of the American Osteopathic Association* conjured up the following imaginary declaration by Rush:

The constitution of this republic should make specific provision for medical freedom as well as for religious freedom. To restrict the practice of the art of healing to one class of physicians and deny to others equal privileges constitutes the bastiles of our science. All such laws are un-American and despotic. They are vestiges of monarchy and have no place in a republic.<sup>121</sup>

Over the course of the twentieth century, this fictitious rendering of Rush’s

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THAT HAVE PRECEDED IT, ARE REVIEWED AND COMPARED 10 (Columbus, Horton Howard 1829).

118 The earliest attribution of this quotation to Rush (or anyone) that I can find is in an 1829 Thomsonian publication. *Id.* at 16.

119 *Infra* Section III.E.

120 MISCELLANIES ON HOMOEOPATHY 159 (Ass’n of Homeopathic Physicians ed., 1839) (including a reissue of the 1838-1839 *American Journal of Homeopathy*). Although the three paragraphs on medical freedom are identical to those in Rush’s 1801 University of Pennsylvania address, they are enumerated differently, and the speech overall is abridged. It is unclear whether the homeopathic publication shortened Rush’s speech on its own, acquired an abridged transcript of the speech, or acquired a transcript of a similar speech delivered by Rush at another event.

121 *Directory of Members (Attachment)*, 6 JOURNAL OF THE AMERICAN OSTEOPATHIC ASSOCIATION 29 (1907). Although this is the earliest instance I could find of a claim that Rush had called for a constitutional provision protecting medical freedom, the editor of this journal might, of course, have borrowed these words from some other unidentified source.

words took on a life of its own. A Google search today reveals thousands of web pages that ascribe this precise language, or some variant of it, to Rush. His imagined advocacy of a medical freedom amendment to the Constitution has become fact in cyberspace. The truth that he never actually called for such an amendment should not, however, obscure his actual emphatic opposition to state interference in medical affairs.

### III. AMERICAN HEALTH LIBERTARIANISM BETWEEN 1820 AND THE CIVIL WAR

Starting around 1820, two major shifts occurred in the story of medical licensing in America. First, Thomsonian practitioners, patients, and supporters transformed a previously widespread, but uncoordinated, anti-licensing sentiment into a passionate, multi-pronged popular constitutional movement. Second, and not coincidentally, state medical practice acts began to disappear from the statute books.

#### *A. The Decline and Fall of Antebellum Medical Licensing*

The 1820s were the fulcrum of an abrupt shift in state legislative activity with respect to medical licensing. In the first twenty-four states to enter the union and the District of Columbia, every pertinent legislative enactment passed prior to 1820 was designed to either create or strengthen a licensing regime. In stark contrast, between 1830 and 1860, every relevant legislative action in these states (with a couple of minor exceptions) either weakened or entirely revoked medical licensing.<sup>122</sup> Some states took initial steps of lowering the penalty for practicing without a license, exempting certain classes of irregular practitioners from the licensing requirement, or both.<sup>123</sup> Eventually, however, most states repealed their medical licensing regimes altogether.<sup>124</sup> Moreover, in about half of the states that still had licensing laws, these statutes did not subject violators to any penalty.<sup>125</sup> According to one author, “[F]or half a century after 1820 licensing requirements apparently deteriorated. By the 1850s, when German authorities were

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122 See ROTHSTEIN, *supra* note 6, at 332–39 app. II. One exception was an 1847 statute in Georgia, which reversed an 1839 evisceration of the licensing system, but created an independent Botanico-Medical licensing board to license botanical physicians. *Id.* at 334. The other exception was an 1859 statute in North Carolina, which established a licensing board for the first time in that state. *Id.* at 339.

123 See ROTHSTEIN, *supra* note 6, at 332–39 app. II. State statutes variously exempted Thomsonians, botanical practitioners, and homeopaths. *Id.*

124 It is difficult to gather precise statistics regarding the revocation of antebellum state medical licensing statutes, but the sources leave no doubt that repeal was extremely widespread. See CASSEDY, *supra* note 53, at 26 (between 1830 and 1845, eleven states repealed their laws); HALLER, THE PEOPLE’S DOCTORS, *supra* note 3, at 200 (“By mid century, fifteen state legislatures had repudiated medical licensure”); WHORTON, NATURE CURES, *supra* note 29, at 36 (“By 1850 all but two states’ licensing statutes had been swept from the books.”).

125 See ROTHSTEIN, *supra* note 6, at 332–39 app. II.

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establishing uniform standards and when the British government was taking the first steps toward national control, the situation in the United States seemed to be approaching its nadir.”<sup>126</sup>

An examination of the statutes alone actually understates the disintegration of medical licensing in the antebellum period. As noted previously, even at the apex of medical licensing in the late 1810s and early 1820s, the laws’ effectiveness was uneven, at best.<sup>127</sup> But as the century advanced, the shrinking number of medical practice acts still on the books increasingly became wholly irrelevant. Executive authorities, apparently aware of the public’s growing distaste for restricting the practice of medicine, often simply failed to enforce the statutes.<sup>128</sup> Some of the remaining licensing boards settled into a state of permanent hibernation.<sup>129</sup>

By the 1840s, contemporary commentators agreed that medical licensing was, for all practical purposes, finished. In an 1844 article, a New York observer of the national scene remarked:

The conclusion which may be drawn is, that when restrictive laws are really efficient and enforced, they protect the community against inexperience and its consequences, but that popular sentiment is opposed to them; consequently the law is either so drawn as to be inefficient, or is, in nine out of ten cases, openly violated with impunity, whilst its existence is such as to get up a feeling of hostility to the regular profession.<sup>130</sup>

The president of the Ohio State Medical Society observed in 1849 that “all enactments upon the subject of medicine or prescriptions under fines, penalties, or the like, are extremely difficult of execution and have impracticability and soon become a dead letter.”<sup>131</sup> In his renowned 1850 report on public health in Massachusetts, Lemuel Shattuck wryly observed: “Any one, male or female, learned or ignorant, an honest man or a knave, can assume the name of a physician, and ‘practice’ upon any one, to cure or to kill, as either may happen, without accountability. ‘It’s a free country!’”<sup>132</sup> According to one scholar, “By

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<sup>126</sup> SHRYOCK, *MEDICAL LICENSING*, *supra* note 50, at 27.

<sup>127</sup> *See id.* (“the promise of early American laws proved illusory”); ROTHSTEIN, *supra* note 6, at 79 (“None of the licensing laws in this period was [*sic*] ever effective.”).

<sup>128</sup> ROTHSTEIN, *supra* note 6, at 77–78.

<sup>129</sup> *Id.* at 332–39 app. II.

<sup>130</sup> Charles Coventry, *History of Medical Legislation in the State of New York*, 4 N.Y. J. OF MED. & COLLATERAL SCI. 151, 160 (Mar. 1845).

<sup>131</sup> *See* ROTHSTEIN, *supra* note 6, at 78.

<sup>132</sup> LEMUEL SHATTUCK, REPORT OF A GENERAL PLAN FOR THE PROMOTION OF PUBLIC AND PERSONAL HEALTH DEVISED, PREPARED AND RECOMMENDED BY THE COMMISSIONERS APPOINTED UNDER A RESOLVE OF THE LEGISLATURE OF MASSACHUSETTS, RELATING TO A SANITARY SURVEY OF THE STATE 58 (1850).

the time of the Civil War, no effective medical licensing existed in any of the states.”<sup>133</sup>

What happened? The antebellum medical licensing regimes succumbed to the country’s first broad popular movement promoting medical freedom, led by the Thomsonians. These medical freedom advocates drew copiously from all four of the contributing strands of medical liberty identified above—bodily freedom, economic freedom, freedom of inquiry, and freedom of religion and conscience. In petitions, journals, and speeches, the Thomsonians framed a successful, multidimensional libertarian argument against medical licensing. And although they advanced their case entirely outside of court, their contentions were unmistakably constitutional.

### *B. The Thomsonians*

Samuel Thomson (1769-1843) was raised on a remote New Hampshire farm in humble circumstances and lacked any formal education. As a boy, he became fascinated by herbal remedies under the tutelage of a local widow. He suffered a severe ankle wound at age nineteen and attributed his recovery to botanical cures. In his early twenties, Thomson renounced regular medicine altogether after watching in horror as the heroic treatments of orthodox doctors apparently hastened his mother’s death from consumption and then nearly finished off his young wife when she suffered complications following childbirth.<sup>134</sup>

Thomson began to develop his own healing system while treating his family and neighbors. Beginning in 1805, he roamed around northern New England, offering his services to townsfolk and establishing a few medical offices.<sup>135</sup> The commercially savvy Thomson soon conceived an innovative business plan; he sold franchises—the right to use his system and proprietary remedies—to families in advance of any illness.<sup>136</sup> Thomson obtained a patent for his medicines and their method of use in 1813, filed copyrights for his *New Guide to Health* and his autobiographical narrative in 1822, and fiercely guarded his intellectual property until the end of his life.<sup>137</sup> Eventually, Thomson built a nationwide business empire, undergirded by an army of agents, thirteen editions of his bestselling *New Guide to Health*, a network of Friendly Botanic Societies, and annual United States Thomsonian Botanic Conventions.<sup>138</sup> Thomsonianism became wildly popular in the 1830s, especially in the South and Midwest. In 1839, Thomson himself boasted that three million Americans—approximately

133 JOHN S. HALLER, *AMERICAN MEDICINE IN TRANSITION, 1840-1910*, at 201 (1981).

134 HALLER, *THE PEOPLE’S DOCTORS*, *supra* note 3, at 10–13.

135 *Id.* at 14–19, 32.

136 *Id.* at 32–35.

137 *Id.* at 37–40, 49.

138 *Id.* at 35–36, 40–43, 143–47.

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twenty percent of the population—were adherents of his method.<sup>139</sup> One modern scholar surmises that Thomson's estimate, while likely exaggerated, did not vastly exceed the true number.<sup>140</sup>

Although the Thomsonians stridently disparaged regular doctors' use of dangerous mineral remedies, their system shared certain central characteristics with orthodox medicine, including a reductionist understanding of disease as a fundamental bodily imbalance and a uniform therapeutic method based on the evacuation of bodily fluids.<sup>141</sup> Thomson posited that all illness derived from the body's loss of natural heat, and his treatment regime was designed to restore the patient's "vital warmth" by clearing bodily obstructions through perspiration, purging, and vomiting.<sup>142</sup> The emblematic components of the Thomsonian healing system were lobelia (an emetic herb), cayenne pepper, and steam baths.<sup>143</sup> Despite its resemblance to regular medicine, Thomson's course of treatment was probably less enervating than the use of calomel and bleeding.<sup>144</sup> Many were attracted to the Thomsonians' use of "natural" vegetable-based remedies instead of mineral compounds such as calomel.

Although Thomson derived his system largely *a priori* from unproven premises about the nature of the human body and disease, Thomsonians took pride in being more "empirical" than the regulars. They viewed themselves as ascribing more value to actual experience and less to abstruse theory than regular physicians.<sup>145</sup> Whereas orthodox doctors often used the term "empiric" as an insulting moniker for undereducated, "unscientific" alternative practitioners, the Thomsonians embraced the label.<sup>146</sup> They condemned orthodox medicine for its abstract speculation, as well as for its ineffective and dangerous treatments.

The 1830s (the period from which most of the quotations in this section derive) were a tumultuous decade for Thomsonians. Samuel Thomson himself became progressively more self-important, fanatical, and vengeful. He tolerated no variation from his therapeutic methods and denied that conventional scientific education had any value to medicine whatsoever.<sup>147</sup> But the patriarch's unquestioning disciples were increasingly outnumbered by flexible advocates of a more general botanic cause.<sup>148</sup> The most prominent of these open-minded Thomsonians was likely Alva Curtis, the editor of the *Thomsonian Recorder*, the

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139 WHORTON, *NATURE CURES*, *supra* note 124, at 39.

140 *Id.* at 39.

141 HALLER, *THE PEOPLE'S DOCTORS*, *supra* note 3, at 17–18, 29–30, 39–40.

142 *Id.* at 17–24.

143 *Id.* at 21–22, 24–29.

144 *Id.* at 30.

145 WHORTON, *NATURE CURES*, *supra* note 29, at 10–12.

146 HALLER, *THE PEOPLE'S DOCTORS*, *supra* note 3, at 51.

147 *Id.* at 147–59.

148 *Id.* at 67–73, 139, 154.

oldest and most popular botanic magazine in the nation.<sup>149</sup> In 1836, Curtis (whose words open this Article) defied Thomson on the educational issue by founding the initially unchartered Botanico-Medical College of Ohio, whose curriculum incorporated lectures and texts on basic science.<sup>150</sup> In 1838, Curtis led a secession of “Independent Thomsonians” away from the purists—a schism impelled by the Independents’ desire for freedom to explore improvements to Dr. Thomson’s system, including expansion of its *materia medica*.<sup>151</sup>

It is important to recognize the issues of social status that swirled around the Thomsonian movement. While by the 1830s Thomsonianism was attracting some middle class and wealthy followers,<sup>152</sup> it remained at its core “a rural and lower-class phenomenon.”<sup>153</sup> Thomsonians were, during this era, driven by populist passion—a rejection of elite practitioners, institutions, and knowledge. In this respect, they were representative of a broad, egalitarian political culture with affinity to President Andrew Jackson’s Democratic Party—a political culture that frequently exhibited a fierce libertarian opposition to government intrusion into private affairs.

### C. The Thomsonians and Jacksonian Liberty

To fully grasp the Thomsonians’ broad vision of medical freedom, and the appeal of their message, one must understand that they were overwhelmingly Jacksonian Democrats.<sup>154</sup> The Jacksonians generally were not laissez-faire absolutists.<sup>155</sup> Nonetheless, they, along with their Jeffersonian Republican

149 *Id.* at 215. Curtis renamed the publication the *Botanico-Medical Recorder* in 1838.

150 *Id.* at 94–98. The school was located in Columbus.

151 *Id.* at 170–73.

152 *Id.* at 143.

153 CHARLES E. ROSENBERG, *THE CHOLERA YEARS* 72 (1962). William G. Rothstein states that “[a]lthough most of the eastern supporters of Thomsonism [*sic*] were lower class . . . the system was popular with all social classes in the midwest and south.” ROTHSTEIN, *supra* note 6, at 141.

154 Scholars routinely identify Thomsonianism with Jacksonian Democracy. *See, e.g.*, STARR, *supra* note 43, at 56–57; HALLER, *THE PEOPLE’S DOCTORS*, *supra* note 3, at 63; WHORTON, *NATURE CURES*, *supra* note 29, at 33–35; SHRYOCK, *supra* note 50, at 31. One author recently contended that, at least in Connecticut, the Thomsonians who opposed licensing in the late 1830s and early 1840s were more “professionalized” and “conservative” than is usually assumed. He concluded that while the Connecticut Thomsonians drew more support from the state’s weak Democratic Party than from the Whigs, they were not interested in a broader populist Jacksonian agenda. *See* Toby A. Appel, *The Thomsonian Movement, the Regular Profession, and the State in Antebellum Connecticut: A Case Study of the Repeal of Early Medical Licensing Laws*, 65 J. OF THE HIST. OF MED. & ALLIED SCI. 153 (2010). Nevertheless, this scholar acknowledges, “Compared to other states, Connecticut’s Thomsonian story falls toward the conservative end of a spectrum.” *Id.* at 185.

155 Jacksonians mistrusted big business rather than economic regulation *per se* and thus embraced some regulation not deemed to advance the interests of self-aggrandizing moneyed aristocrats. DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848*, at 505 (2009); WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 43 (1996). Furthermore, the issue of slavery led southern Democrats in particular to support intrusive state interference with freedom of speech,



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forebears, probably had the most comprehensive libertarian philosophy of any major political culture in American history.<sup>156</sup> As described by Marvin Meyers, Jacksonians believed that a “laissez-faire society . . . would re-establish continuity with that golden age in which liberty and progress were joined inseparably with simple yeoman virtues.”<sup>157</sup> Whereas the Jacksonians’ Whig opponents supported an active role for the government in funding and facilitating economic development, the Jacksonians tended to reject such measures as special legislation favoring privileged patricians. They had an almost paranoid view of the grasping “money power’s” ability to control the organs of government.<sup>158</sup> Jacksonian laissez-faireism was thus populist in spirit, reflecting a view that economic regulations were the instruments of corrupt, scheming elites striving to aggrandize their wealth and power at the expense of the common man. The Jacksonian journalist William Leggett believed (in Marvin Meyers’ words): “Freedom is . . . freedom *from* chartered exploitation, from ‘aristocratic innovation.’”<sup>159</sup>

The Whigs and Jacksonians also disagreed about government’s appropriate posture with respect to religion and the regulation of private behavior. The Whigs believed the state should enforce moral standards and promote cultural homogeneity; accordingly, they supported temperance laws, obligatory Sabbath observance, and a broad partnership between church and state to advance a “national religion.”<sup>160</sup> Jacksonians, on the other hand—with the support of the vast majority of the nation’s Catholics—opposed temperance laws, embraced the strict separation of church and state, and generally “made room for widely divergent private behavior.”<sup>161</sup>

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assembly, and petition. KENNETH IRA KERSCH, *FREEDOM OF SPEECH: RIGHTS AND LIBERTIES UNDER THE LAW* 76–80 (2003).

156 For a discussion of the “republican theory and practice” that bridged the Jeffersonian and Jacksonian political cultures, see HARRY L. WATSON, *LIBERTY AND POWER: THE POLITICS OF JACKSONIAN AMERICA* 42–72 (2006).

157 MARVIN MEYERS, *THE JACKSONIAN PERSUASION: POLITICS AND BELIEF* 12 (1960).

158 WATSON, *supra* note 156, at 167.

159 MEYERS, *supra* note 157, at 194–95. Samuel Thomson’s own view of the inordinate power of the regular physicians in combination with their governmental sponsors is illustrated by his complaint that “the doctors have so much influence in society . . . that the common people are kept back from a knowledge of what is of the utmost importance for them to know. If any man undertakes to pursue a practice different from what is sanctioned by the regular faculty . . . he is hunted down like a wild beast; and a hue and cry raised against him from one end of the country to the other.” THOMSON, *NARRATIVE*, *supra* note 108, at 8.

160 ARTHUR MEIER SCHLESINGER, *THE AGE OF JACKSON* 137–40, 352–54 (1945); HOWE, *supra* note 155, at 583; WATSON, *supra* note 156, at 245.

161 WATSON, *supra* note 156, at 242; SCHLESINGER, *supra* note 160, at 354–56. On Catholic support, see HOWE, *supra* note 155, at 581, 688. Interestingly, alcohol consumption presented a challenge to the Thomsonian philosophy, as demonstrated by the treatment of the topic in Curtis’ *Thomsonian Recorder*. Although alcohol was a common part of the regular physician’s dispensary, Curtis did not reject its use out of hand; for example, he acknowledged its efficacy as a cholera preventive. *Brandy, Cholera, and Cholera Syrup*, 2 THOMSONIAN RECORDER 117 (1834).

In short, in the words of historian Daniel Walker Howe, “Whigs had a positive conception of liberty; they treasured it as a means to the formation of individual character and a good society. Democrats, by contrast, held a negative conception of liberty; they saw it as freeing the common (white) man from the oppressive burdens of an aristocracy.”<sup>162</sup> The popular Jacksonian magazine *Democratic Review* maintained that the “principle of [America’s] organization” was a collection of four freedoms: “freedom of conscience, freedom of person, freedom of trade and business pursuits, [and] universality of freedom and equality.”<sup>163</sup> The Thomsonians would embrace all of these in their fight against medical licensing statutes.

#### *D. The Thomsonians’ Constitutional Struggle*

The Thomsonians’ battle for medical freedom was an explicitly constitutional one, even though they apparently did not attempt to challenge any state medical practice acts in court.<sup>164</sup> The Thomsonians and their supporters instead waged their successful struggle against the orthodox medical establishment by using the press, petitions, and party politics to influence legislators and governors. As mentioned above, citizens also used their power as jurors to undermine medical licensing statutes, and executive officials often responded to popular opposition to such laws by declining to enforce them.

Why did the Thomsonians and their supporters not use lawsuits as an additional or alternative tactic? Perhaps they believed that such actions would be futile. Jacksonians generally viewed the courts as bastions of antidemocratic aristocracy, especially in states that had not yet embraced judicial elections. The Thomsonians may thus have viewed judges as prejudiced in favor of the privileged class of regular physicians.<sup>165</sup> The concern about judicial bias in favor of licensing may have been exacerbated by Thomsonian knowledge of a parallel struggle occurring in the legal profession during this era. The elite portion of the bar, which many judges identified with, was fighting its own (losing) battle against a Jacksonian movement to eliminate the already-low requirements for

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Moreover, Curtis expressly advocated tolerance for the use of wine for sacramental purposes. *Temerance [sic] Society*, 2 THOMSONIAN RECORDER 279 (1834). At the same time, however, he saw the consumption of alcoholic beverages outside medical and religious uses as a “depraved appetite.” *Brandy, Cholera, and Cholera Syrup, supra*, at 118.

<sup>162</sup> HOWE, *supra* note 155, at 583.

<sup>163</sup> John L. O’Sullivan, *The Great Nation of Futurity*, 6 U.S. MAG & DEM. REV. 23, 430 (1839).

<sup>164</sup> I have been unable to identify a single antebellum case challenging the constitutionality of a state medical practice law.

<sup>165</sup> For discussions of attitudes toward courts and judges in Jacksonian America, see generally Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. OF LEGAL HIST. 191 (1993); Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061 (2010).

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practicing law.<sup>166</sup> Arguably, the judiciary actually led this effort to maintain restrictions on access to the legal profession.<sup>167</sup>

Furthermore, opponents of medical licensing were likely aware that antebellum courts did not typically strike down legislation based on the application of broad constitutional principles.<sup>168</sup> As one scholar has noted, flexibly phrased constitutional provisions “could hardly form the bases for judicial review of legislation until jurists became used to adjudging the reasonableness of legislation in the late nineteenth century.”<sup>169</sup>

Finally—and importantly—Americans at this stage in history simply did not view courts as the exclusive, or even primary, arena for contesting constitutional principles. In the Jacksonian era, all of the nonjudicial methods used to shape constitutional meaning during the Revolutionary period—except perhaps mobbing<sup>170</sup>—were still considered valid vehicles for popular constitutionalism. The important difference was that party politics had become the chief means by which the people expressed their constitutional understandings.<sup>171</sup> In light of this development, one scholar describes the Jacksonian era as an age of “party-based popular constitutionalism.”<sup>172</sup> The legislative and executive departments were deemed to have at least as much of a role in constitutional interpretation as the courts, and the people sought, through a wide variety of party-based activities, to ensure that these elected branches acted in accordance with their constitutional vision. In Larry Kramer’s words, “Democratic-dominated governments at both the state and national levels successfully marginalized the judiciary . . . and

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166 RICHARD L. ABEL, *AMERICAN LAWYERS* 40–41 (1989); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW*, REVISED EDITION 315–18 (1985). In the antebellum years, admission to the bar required, at most, a period of apprenticeship and passage of an oral bar examination administered by a local judge. The proportion of states mandating a period of apprenticeship dropped from fourteen out of nineteen in 1800, to eleven out of thirty in 1840, to nine out of thirty-one in 1860. ABEL, *supra*, at 40. Lawrence Friedman points out, “In the 1840s, a few states eliminated *all* requirements for admission to the bar, except good moral character.” FRIEDMAN, *supra*, at 316–17.

167 See MAXWELL BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876*, at 139 (1999) (“[I]t was the judiciary . . . that did most to establish the guidelines for legal practice.”).

168 Mark A. Graber, *Resolving Political Questions Into Judicial Questions: Tocqueville’s Thesis Revisited*, 21 CONST. COMMENT. 485, 529–30 (2004) (“Remarkably, hardly any constitutional question arose in the antebellum United States that was resolved into a judicial question.”).

169 Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 322 (1985).

170 KRAMER, *supra* note 22, at 168.

171 *Id.* at 167–68.

172 Keith E. Whittington, *Give “the People” What They Want*, 81 CHI.-KENT L. REV. 911, 918 (2006). According to Whittington, mass political parties were especially effective instruments for vindicating constitutional principles during the Jacksonian era because they were organized around constitutional principles, exerted great centralized discipline over their members, and uncompromisingly controlled the government once in power. *Id.* at 914–15.

reasserted popular control over constitutional development.”<sup>173</sup> In short, the fact that the Thomsonians advanced their arguments in forums other than court should not obscure the fact they were *constitutional* arguments and that, for them, medical liberty was a *constitutional* imperative.

The earliest suggestion I have found of a widespread challenge to the constitutionality of medical licensing is contained in an 1824 message by Pennsylvania Governor Andrew Shulze accompanying his veto of a medical practice statute. In this document, Schulze questioned “the expediency of enacting a law, which a large and respectable [*sic*] portion of the community believe to be contrary to the best established principles of the [C]onstitution.”<sup>174</sup> It is unclear who exactly these members of the community were and how they communicated their views to the governor. Nonetheless, this veto message offers an intriguing hint that as early as 1824, citizens were, perhaps in an organized manner, voicing constitutional arguments for freedom of therapeutic choice to the political branches of the government.

Another of the earliest explicit assertions of the unconstitutionality of medical licensing came from the pen of a prominent member of the academic medical elite—Professor Benjamin Waterhouse of Harvard.<sup>175</sup> Waterhouse was a personal friend of Samuel Thomson and one of the few members of the regular medical profession who respected his work, although, in Waterhouse’s own words, he wished that Thomson’s “science had been commensurate to his experience and natural sagacity.”<sup>176</sup> Like Rush, Waterhouse was an ardent Jeffersonian and anti-Federalist, and he believed that Thomson was being vilified because of his Republican principles.<sup>177</sup>

In an 1825 letter to a New York correspondent, delivered by Thomson himself, Waterhouse asked, “How came your Legislature to pass so unconstitutional an act as that called the *anti-quack* law?”<sup>178</sup> This dispatch may have emboldened the Thomsonians to launch an explicitly constitutional fight

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173 KRAMER, *supra* note 22, at 205.

174 Shulze, *supra* note 98, at 542, 543, in 5 PA. ARCHIVES Fourth Ser. (George Edward Reed ed., 1900).

175 Waterhouse (1754-1846) served at Harvard from 1783 until 1812 as one of the school’s original professors of medicine but left because of personal conflicts with the rest of the faculty. He is best known as the pioneer of the use of cowpox vaccination for smallpox prevention in the United States.

176 JOHN W. COMFORT, THE PRACTICE OF MEDICINE ON THOMSONIAN PRINCIPLES, ADAPTED AS WELL TO THE USE OF FAMILIES, AS TO THAT OF THE PRACTITIONER. CONTAINING A BIOGRAPHICAL SKETCH OF DR. THOMSON xxxv–xxxvi (1850). Waterhouse came to approve of Thomson’s use of a combination of lobelia and vapor baths, although there is no evidence that he ever, like Thomson, embraced this as a primary or universal remedy. See *id.* at xxxvi.

177 HALLER, THE PEOPLE’S DOCTORS, *supra* note 3, at 54–56.

178 Samuel Waterhouse, *Copy of a Letter from Dr. Benjamin Waterhouse, Formerly Lecturer on the Theory and Practice of Physic, in Cambridge University, to the Late Samuel L. Mitchell, of New-York*, 1 THOMSONIAN RECORDER 104 (1832).

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against medical licensing. The fact that the letter was, seven years later, reproduced early in the very first volume of the *Thomsonian Recorder* hints at the importance they ascribed to it.

Regardless of how the Thomsonians conceived the idea of launching an explicitly constitutional attack, in the early 1830s, they took the lead in elaborating on and publicizing the constitutional arguments. Consider, for example, a lengthy 1832 piece in the *Thomsonian Recorder* titled “An Essay in Relation to the Unconstitutionality, Injustice, and Injurious Effects, Resulting from Our Present Aristocratical Medical Law in the State of Ohio.”<sup>179</sup> Pseudonymously authored, in Revolutionary-era fashion, by “Honestus,” the article reads like a legal document—similar to a brief or bill of particulars. Honestus condemns the licensing statute as “contrary to the letter and spirit of the constitution and a direct and undeniable violation of the oath of legislators, whereby they are sworn to maintain that sacred charter of our liberties.”<sup>180</sup> He then goes on to explain why the law violates various provisions of the Ohio state constitution, including the guarantee of the “natural and unalienable rights” of “enjoying and defending life and liberty, acquiring, possessing and protecting property, pursuing and obtaining happiness and safety” and the prohibition against laws impairing the validity of contracts.<sup>181</sup>

Other examples of Thomsonian constitutional rhetoric abound. In 1834, the Friendly Botanic Society of New York City adopted resolutions against New York State’s medical practice law, including a preamble declaring, “[W]e . . . feel ourselves aggrieved by the passage of such an act, because we are restricted from and denied the privilege of exercising those dear rights guaranteed to us by our forefathers in the invaluable Constitution of our beloved nation.”<sup>182</sup> In an 1832 petition presented to the Ohio legislature, citizens declared their “unalienable and constitutional rights violated” by an 1824 Ohio medical act.<sup>183</sup>

When asserting the unconstitutionality of medical practice acts, the Thomsonians frequently appealed not only to the words of the state and federal constitutions, but also to fundamental rights embodied in the Declaration of Independence and vindicated on the battlefields of the Revolutionary War. Such statements were concrete examples of the “thin constitutionalism” celebrated by Mark Tushnet. Take, for instance, a lengthy 1837 editorial in the *Thomsonian Recorder* titled “The Declaration of Independence.” The author of this unsigned

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179 Honestus, *An Essay in Relation to the Unconstitutionality, Injustice, and Injurious Effects, Resulting from Our Present Aristocratical Medical Law in the State of Ohio*, 1 THOMSONIAN RECORDER 121 (1832).

180 *Id.* at 124.

181 *Id.* at 130–31.

182 *Preamble and Resolutions of the Friendly Botanic Society of the City and County of New York* (Apr. 7, 1834), reprinted in 2 THOMSONIAN RECORDER 242–43 (1834). These documents are discussed in more detail *infra* Subsection III.E.1.

183 *Petition to be presented to the next Legislature*, 1 THOMSONIAN RECORDER 24 (1832).

piece (possibly Alva Curtis) starts by roughly quoting the actual Declaration. “On July 4<sup>th</sup>, 1776, it was declared by the Representatives of these United States, in Congress assembled, to be ‘self-evident, that all men were created equal and endowed by their Creator, with certain inalienable rights, among which are life, liberty, and the pursuit of happiness.’”<sup>184</sup> He then asserts that the federal and state constitutions were formed “[i]n accordance with these principles” and that all of them “substantially declare[] that all enactments of men . . . which are opposed to these principles, are null, void and of no effect.”<sup>185</sup> The author continues his introduction as follows:

These propositions [from the Declaration of Independence], having been admitted for sixty-one years to be self evident, we shall spend a portion of this day in proving it susceptible of the clearest demonstration, that *all the laws* in the United States which make it a misdemeanor for any but a member of “the Regular Medical Faculty” to administer remedies to cure the sick, or for any person to employ and pay whom he pleases as his physician; or that prevent any man from recovering, by process of common law, a just reward for medical services that had been voluntarily solicited and faithfully performed, are unconstitutional, oppressive, and wicked.<sup>186</sup>

The editorial’s final call to action is addressed to the “[s]ons of the patriotic sires who nobly resisted laws made without their consent; who, half clothed and half starved, poured out for seven years their treasures and their blood, to secure to you, their posterity, equal enjoyment of your inalienable rights.”<sup>187</sup>

### *E. The Multiple Strands of Medical Freedom*

The Thomsonians’ specific arguments against medical licensing statutes demonstrate that they had a multidimensional vision of the constitutional right to freedom of therapeutic choice. In their view, medical freedom implicated various categories of inalienable liberties protected by the country’s founding documents and by higher law. As I will show below, the Thomsonians referred repeatedly to all four of the strands of freedom identified earlier—bodily freedom, economic freedom, freedom of religion and conscience, and freedom of inquiry.

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<sup>184</sup> *The Declaration of Independence*, 5 THOMSONIAN RECORDER 326, 326 (1837).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* The editorial concludes, “Thus we see that these laws . . . abolish inalienable, natural rights that are above all laws or constitutions: and not only this; they suspend the action of the very decree of Heaven, ‘Ye shall not defraud nor oppress your brother—and whoso sheddeth man’s blood, by man shall his blood be shed.’” *Id.* at 329.

<sup>187</sup> *Id.* at 329.

### 1. Bodily Freedom

To modern ears, the Thomsonian arguments that sound most familiar are those concerning the right of control over one's body. One version of this argument was the assertion that people have a right to decide what and what not to put into their bodies. In particular, the Thomsonians insisted that citizens should be free to avoid the dangerous remedies employed by regular physicians. Honestus asked, "If I be conscientiously opposed to bleeding, blistering, mercurialising [*sic*], or poisoning with emetic tartar, opium, arsenic, or prussic acid, shall I be compelled to employ a law-made doctor, who deals almost exclusively in these potent remedies?"<sup>188</sup> A legislative committee considering repeal of the New York medical practice law painted a particularly vivid picture, stating that the legislature should not "thrust calomel and mercury down a man's throat while he wills to take only cayenne or lobelia."<sup>189</sup>

A related Thomsonian argument with parallels in modern rhetoric was the contention that each individual has a right to choose what steps to take to protect his or her physical well-being. For instance, in resolutions adopted in 1834 by the Friendly Botanic Society of New York City against New York State's medical practice law, the Society maintained a "freedom to choose the means which we believe are best calculated to secure to us health and life."<sup>190</sup> This document further stated, "A large majority of us are private citizens [i.e., not practitioners], and are deprived of the privilege . . . of calling on such physicians as we prefer, that we may have health restored to us when suffering from the inroads of disease."<sup>191</sup> The author of the "Declaration of Independence," after condemning the "poisons" administered by regular physicians, maintained, "To give poisons, is to deprive men of sound health, if not the whole of vitality or life; and, therefore unconstitutional and wicked."<sup>192</sup> An 1831 or 1832 petition against the New Jersey medical practice act declared: "In matters which concern our LIVES, we conceive it to be *our* interest, and that it should be *our privilege*, to choose

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<sup>188</sup> Honestus, *supra* note 179, at 130.

<sup>189</sup> ROTHSTEIN, *supra* note 6, at 145 (quoting *Report of Minority of Select Committee*, in TRANSACTIONS OF THE MEDICAL SOCIETY OF THE STATE OF NEW YORK 241, 243–44 (1841)). The Thomsonians sometimes contended for a broader freedom of consumption, encompassing foods as well as medicines. For example, protesting a Columbus, Ohio ordinance prohibiting commerce in fruits and vegetables to control the spread of cholera, the *Thomsonian Recorder* asked: "Is it not an invasion of the rights and privileges of the people to refuse them the liberty of buying and using the usual articles of diet?" *For the Recorder (Editorial)*, 2 THOMSONIAN RECORDER 11, 11 (1833).

<sup>190</sup> *Preamble & Resolutions of the Friendly Botanic Society of the City and County of New York* (April 7, 1834), in 2 THOMSONIAN RECORDER 241, 243 (1834).

<sup>191</sup> *Id.* at 243. In his 1824 message accompanying his veto of a medical practice bill, the Pennsylvania governor similarly referred to "the right which every man claims of employing the person, who, in his opinion, may be best qualified to afford relief to his sufferings." Shulze, *supra* note 98, at 543.

<sup>192</sup> *Declaration of Independence*, *supra* note 184, at 329.

such Physicians for our relief, as we have most confidence in.”<sup>193</sup>

## 2. *Economic Freedom*

References to economic freedom were even more common in the Thomsonian literature than those to bodily freedom. Before I review these arguments, it is important to stress that the Jacksonians’ support of economic liberty was tied to their broader vision of political and human liberty. It was not based merely on a wish to maximize economic efficiency and growth. Moreover, it bears repeating that unlike many later proponents of the laissez-faire principle, the Jacksonians emphatically were not impelled by a desire to protect wealthy individuals and large businesses from the government. To the contrary, their opposition to economic regulation was directed primarily against “special legislation,” such as the bestowal of monopolies, which promoted the interests of the affluent and influential rather than the advancing the common good.<sup>194</sup>

Consequently, when the New York Thomsonians contemplated forming a third party to push for repeal of the New York medical licensing statute, they called it the “Anti-Monopoly Party.”<sup>195</sup> Their *bête noir* was not simply economic regulation in the medical field, but regulation used to prop up an aristocratic monopoly. Similarly, Honestus proclaimed, “The coalision [*sic*] of the medical faculty in this state [Ohio], and the protection of that coalision by legislative patronage, we confidently affirm to be contrary to the letter and spirit of the constitution.”<sup>196</sup>

Because they believed that medical licensing was a monopolistic plot by the medical establishment, the Thomsonians were certain that the medical practice acts’ stated goal of protecting health was mere camouflage for mercenary motives. This conviction was bolstered by the fact that many states, rather than prohibiting the unlicensed practice of medicine altogether, merely forbade the collection of fees by unlicensed doctors or banned suits by them for unpaid compensation. A New York statute’s exemption for freely provided botanical medical services led *The Thomsonian Recorder* to quip: “Quacks may kill whom they please . . . if they do not take any money for the commission of the act.”<sup>197</sup>

The battle over medical licensing was thus a quintessential Jacksonian era conflict, pitting, in Meyers’ words, “equality against privilege, liberty against domination; . . . natural dignity against factitious superiority; . . . progress against

193 Petition to the Hon. The Legislature of the State of New Jersey, *reprinted in Medical*, THE INDEPENDENCE, Feb. 15, 1832, at 1.

194 See Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 314–26 (1985).

195 HALLER, THE PEOPLE’S DOCTORS, *supra* note 3, at 138.

196 Honestus, *supra* note 179, at 124.

197 *The Die is Cast*, 2 THOMSONIAN RECORDER 241, 241 (1834).



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dead precedent.”<sup>198</sup> The Thomsonians saw themselves as commonsensical, empirical, and democratic, in contrast to the pretentious, doctrinaire, and cliquish regular physicians they struggled against. Whereas the regulars were attempting to fortify their economic and social position through the establishment of an artificial monopoly, the Thomsonians were fighting for an open medical services market in which the price and availability of different therapeutic approaches would reflect their actual value to patients. According to a Maine senator advocating the repeal of that state’s practice of medicine law, the public demanded:

[T]hat it will be the judge of its own wants—it will select its own servants. . . . —that there shall be no bar to competition between two classes of physicians; but that each individual shall stand or fall on his own merits—that he who pretends to superior attainments or endowments, shall support his claims, not by appealing to his lineage or associations, but by what he accomplishes.<sup>199</sup>

The Thomsonians viewed their fight for medical freedom as part of a larger war being fought by the country’s honest, productive citizens against aristocratic privilege and power. Calling for revocation of the New York practice law, the *Poughkeepsie Thomsonian* contended:

Nothing short of such a measure can wrest the reins of government from the polluted hands of aristocracy, and place its inhabitants on an equal footing. This step must eventually be taken, in order to break down that disgusting monopoly which has long been sapping the very foundations of American freedom. . . . Thomsonians are by no means the only class that suffer from corrupt legislation. Farmers, mechanics, and laborers in general experience . . . the demoralizing influence of unfair and unjust speculation, set on foot by the anti-republican nabobs that infest our country. These drones of community feast and fatten at the expense of the honest and industrious parts of society.<sup>200</sup>

This emphasis on aristocratic conspiracies and class conflict does not mean that the Thomsonians did not also view the medical licensing statutes as direct infringements of their *individual* economic rights. To the contrary, undergirding

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198 MEYERS, *supra* note 157, at 10.

199 *Speech of Mr. Smart*, 8 BOTANICO-MEDICAL RECORDER 270, 271 (1840).

200 *The Cause in New York*, 9 BOTANICO-MEDICAL RECORDER 248, 248-49 (1841) (excerpt from *Poughkeepsie Thomsonian*).

the Jacksonian attack against special legislation were fundamental constitutional norms of economic liberty—namely, a prohibition against the government taking the property of one citizen and giving it to another and a ban on laws impairing the obligation of contracts.<sup>201</sup> The Jacksonians drew from a constitutional tradition, most famously embodied in Supreme Court Justice Samuel Chase’s 1798 *Calder v. Bull* opinion, that these state actions were violative of “certain vital principles in our *free republican governments*” and “contrary to the *great first principles* of the *social compact*,” even when not directly forbidden by particular constitutional language.<sup>202</sup>

When antebellum judges grounded economic rights in specific constitutional provisions, they relied on state constitutional prohibitions against the deprivation of property without due process of law, state constitutional bans against the taking of property without just compensation, and state and federal constitutional language forbidding laws impairing the obligation of contracts.<sup>203</sup> The Thomsonians occasionally also referred to such provisions. For example, Honestus contended that the Ohio medical practice act’s prohibition against suits for fees by unlicensed practitioners violated the state constitutional bar against laws impairing the validity of contracts.<sup>204</sup> The statute did so, he maintained, by rendering “null and void” any contract “that has been, may or can be made between the unprivileged physician and his patient.”<sup>205</sup>

Overall, however, the Thomsonians tended to base the economic liberty strand of their medical freedom arguments not on the letter of the state and federal constitutions, but on basic principles of American justice—that is, on the “thin Constitution” described by Tushnet.<sup>206</sup> For example, the editorial titled “Declaration of Independence” invoked general free labor and free contract notions in remarking:

Our tradesmen and mechanics are permitted and encouraged to hire themselves for what they can earn, and to bring forward the

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201 See Benedict, *supra* note 194, at 321–23.

202 *Calder v. Bull*, 3 U.S. 386, 388 (1798) (Chase, J.). Among the legislative actions that Chase contended were prohibited were “a law that destroys, or impairs, the *lawful private* contracts of citizens” and “a law that takes *property* from A. and gives it to B.” *Id.*

203 See Benedict, *supra* note 194, at 324–26; Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution Nineteenth-Century in State Just Compensation Law*, 52 VAND. L. REV. 57 (1999). The federal “Contracts Clause” is at U.S. CONST. art. I, § 10. The due process clause of the Fifth Amendment was originally not deemed to restrain the actions of state governments—a problem that was remedied by the ratification of the Fourteenth Amendment, which had its own due process clause, in 1868. U.S. CONST. amend. XIV, § 1. The takings clause of the Fifth Amendment was similarly deemed not to apply to actions of states until 1897, when the Supreme Court applied it to the states through incorporation into the due process clause of the Fourteenth Amendment. *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

204 OHIO CONST. of 1802, art. VIII, § 16.

205 Honestus, *supra* note 179, at 131.

206 See *supra* Section I.A.

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fruits of their labor and sell them for what they are worth, without being questioned where, with whom, or how long they served as apprentices. . . . So should it be with the doctor.<sup>207</sup>

A proposed petition to the New York legislature, presented in the voice of patients, contended: “It is one of the privileges of an independent people to pay their money to whom they please, and for what they please, without the direct or indirect interference of any one.”<sup>208</sup>

In this “thin constitutional” mode, the Thomsonians sometimes combined their arguments regarding economic freedom with appeals to bodily freedom. For instance, an editorial in a New York botanical newspaper, attacking the state’s prohibition against compensation for unlicensed practitioners, explicitly linked the law’s tyrannical economic coercion against unlicensed practitioners with an equally oppressive bodily coercion against patients.

Here we are gravely told by law that we shall not command our own property. If A. employs B. because he is a skilful [*sic*] practitioner, C. steps in and says if A. pays B. any thing [*sic*] for his services he will have B. fined and imprisoned for taking it. C. therefore commands the will and purse of A. and prevents B. from doing the service that A. must have done in order to save his life. But B. in consequence of being jeopardized both in his “*life, liberty and property*,” and having a family to support, must go into other business, thereby throwing the sick man, or A. and his property into the power of a set of men in whom he has no confidence, or he must go without a doctor until he will come to the terms that are dictated to him, and be poisoned “*Secundum Artem*” [according to the accepted practice of the profession], and according to law.<sup>209</sup>

This paragraph illustrates how the different aspects of medical freedom in the Thomsonian literature were sometimes almost inextricably intertwined. The next strand of medical freedom that I will discuss—freedom of inquiry—similarly cannot be viewed in isolation from the other strands.

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207 *Declaration of Independence*, *supra* note 184, at 327.

208 *Memorial to the Honorable the Legislature of the State of New York*, 1 BOTANIC WATCHMAN 82 (1834). This was a draft petition offered by the editor of the *Botanic Watchman* for consideration by the Botanic Society of the State of New York. The petition ultimately promulgated by the Society is discussed in detail *infra* Section III.F.

209 *The Medical Pension Bill*, 1 BOTANIC WATCHMAN 57 (1834) (emphasis in original).

### 3. *Freedom of Inquiry*

The Thomsonians directed their anti-monopoly arguments not only at regular physicians' attempts to control the market for medical fees, but also at their efforts to control the marketplace of medical ideas. Like Benjamin Rush, the Thomsonians railed against the orthodox medical establishment's squelching of competing systems of medical knowledge and understanding.

Opponents of medical licensing invoked the general right of free inquiry as a necessary feature of a free and democratic society. For example, New York Senator Scott, in a report advocating repeal of that state's medical licensing statute, declared, "A people accustomed to govern themselves, and boasting of their intelligence, are impatient of restraint. They want no protection but freedom of inquiry and freedom of action."<sup>210</sup> The Thomsonian essayist Honestus maintained:

Learning and property are the elements of political power. These elements combined and put in operation, are the most efficient means for the elevation of the few and the subjugation of the many. . . . This monopolizing spirit constitutes . . . a literary aristocracy, a privileged order, whose ends and aims have been, are now, and ever will be hostile to the equal and unalienable rights and privileges of society at large.<sup>211</sup>

These statements demonstrate that the Thomsonians considered free inquiry to be essential for equality and political liberty. Importantly, they also deemed it necessary for intellectual progress. Honestus lamented the fact that, although "[w]e live in an enlightened era" marked by "the progress of science and the march of mind," the elite "renounce the demonstrations of reason, received from honest inquiry, devoutly idolize antiquated traditions, and in philosophy, medicine, and their kindred sciences adhere . . . pertinaciously . . . to the impress of superstition."<sup>212</sup> To buttress his contention that open inquiry advanced the attainment of truth, Honestus stressed a theme that would reverberate throughout the history of American medical liberty advocacy—the incompleteness and imperfection of present scientific knowledge. Honestus maintained that because of "the defective limitedness and imperfection of human intellect," many

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210 Quoted in Coventry, *supra* note 130, at 160. In this same spirit, the *Recorder* published a paean to "Liberty of the Press," which argued that truth would emerge from the clash of ideas. "Let then opinion meet opinion on all grounds of debate and controversy.—Let system combat system, and theory wrestle with theory. Let the Press work on with all its activity; throw not over it a single fetter. Who says that truth is powerless and cannot prevail? She must prevail." *The Liberty of the Press*, 1 THOMSONIAN RECORDER 477, 479 (1832).

211 Honestus, *supra* note 179, at 123.

212 *Id.* at 122.

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supposedly established “facts and demonstrations . . . lie open for free enquiry [sic] and the most ample discussion.”<sup>213</sup> Freedom of inquiry was necessary, he explained, “not because there are no fixed immutable principles, relations and dependencies . . . existing inherently in the nature and fitness of things,” but because “these relations, connections and dependencies have never been perfectly understood, and therefore never fully developed by the boldest researches of science and time.”<sup>214</sup>

Consistent with their egalitarian Jacksonian world view, the Thomsonians frequently proclaimed that if people of all classes were liberated to exercise their natural genius, common folk would be at least as likely as book-trained physicians to advance medical knowledge.<sup>215</sup> Freedom of inquiry, if extended to ordinary citizens, would propel progress by emancipating medicine from the university-trained elite doctors’ stagnant, superstition-tainted orthodoxy. In a Georgia Senate debate on a bill that would revise the state medical practice act so as to permit botanical physicians to charge for their services, Senator Norborn B. Powell declared: “I feel unwilling to fetter the human mind, to bind men by law to any particular system of physic. Such a course must curtail the range of human intellect. Have not some of the most important discoveries in science been made by those in the humblest walks of life?”<sup>216</sup> In response to this rhetorical question, Powell pointed to the contributions that the “illiterate dairy-women of England,” the “unlettered Indians of Peru,” and the “cannibals of Brazil” had made to medicine by discovering the therapeutic qualities of cowpox matter, cinchona bark, and ipecac, respectively.<sup>217</sup>

In the Thomsonian literature, such celebrations of common people’s achievements usually presumed not that the unschooled masses possessed great intellectual sophistication, but rather that medicine was an uncomplicated discipline that did not demand much brainpower. A Maryland legislative committee observed, “Of all sciences, the knowledge of disease and the means of cure, must be supposed . . . as most simple and easy of attainment. It is, essentially, a science of experience.”<sup>218</sup> When medicine was viewed in this way, the “free inquiry” required for its progress was not complex scientific analysis, but simple practical experimentation, uncorrupted by abstract theory. Samuel Thomson himself, in an autobiography written in the third person, remarked:

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213 *Id.*

214 *Id.*

215 See WHORTON, *NATURE CURES*, *supra* note 29, at 40 (“The whole wide expanse of Thomsonian publications . . . fairly dripped with folksy egalitarianism.”).

216 *Legislature of Georgia. Equal Rights*, 5 THOMSONIAN RECORDER 136, 137 (1837).

217 *Id.* All three of these therapies were, by the late 1830s, part of the orthodox *materia medica*. “Cowpox matter” was used for smallpox vaccination, cinchona bark (from which quinine was derived) for malaria and fever, and ipecac as an emetic.

218 *Maryland Legislature*, 2 THOMSONIAN RECORDER 188, 188 (1834).

Dr. Thomson . . . had nothing to guide him but his own experience. He not having had an education, has received no advantages from reading books, which left his mind unshackled by the visionary theories and opinions of others; his whole studies have been in the great book of nature, and his conclusions have all been drawn from that unerring guide; by this he was enabled to form correct opinions of the fitness of things.<sup>219</sup>

As discussed previously,<sup>220</sup> Samuel Thomson was not himself actually a paragon of free inquiry, at least later in his life. Committed to protecting the purity of his system, he increasingly condemned explorations into improved or supplemental therapies as “mongrelism.”<sup>221</sup> But the increasingly dominant Curtis and his Independents were deeply devoted to free inquiry; indeed, their schism from the purists was based in large part on their commitment to this ideal.<sup>222</sup> The Independent Thomsonians opened the pages of their journals and the curricula of their classrooms to both conventional science and other alternative medical systems of the era, including Grahamism, Mesmerism, phrenology, and hydropathy.<sup>223</sup> In 1837, Curtis defended his Botanico-Medical College of Ohio from the purists’ attacks by boasting, “We have given the utmost freedom and latitude to inquiry, cheerfully confessed our ignorance where we felt it, and advised submission to nothing but demonstration by the best evidences that the nature of the cases would admit.”<sup>224</sup>

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219 THOMSON, *supra* note 108, at 8–10. Although the preface is written “By a Friend,” Haller ascribes it to Thomson himself. HALLER, THE PEOPLE’S DOCTORS, *supra* note 3, at 50.

220 *Supra* text accompanying notes 147–151.

221 HALLER, THE PEOPLE’S DOCTORS, *supra* note 3, at 180.

222 *Id.* at 163–67.

223 *Id.* at 201–02, 232–33. Later in his own life, Curtis also became somewhat doctrinaire and intolerant of dissension. He resisted merger with the Eclectics and circulated his own purity pledge. *Id.* at 248. He eventually even supported the licensing of educated botanical physicians. WHORTON, NATURE CURES, *supra* note 29, at 46.

224 *Medical Organizations*, 5 THOMSONIAN RECORDER 236, 236 (1837). As another sign of his commitment to free inquiry, Curtis proposed using surplus federal revenues to create something like today’s National Institutes of Health, although this entity would have rewarded completed discoveries instead of funding proposed research. Alva Curtis, *Quackery Again*, 5 THOMSONIAN RECORDER 91 (1836). Seeking a “constitutional use” for the federal surplus—“that is, an appropriation by which it should be made to benefit equally, all the citizens of the Republic,”—Curtis drafted a petition to Congress suggesting the creation of a permanent fund that would be used to grant “rewards or premiums to discoverers of useful truths in science, and the inventors of useful means and processes in the arts that are calculated to render the advantages of those scientific truths or principles, profitable to the community.” The distribution of prizes would have been determined by a five-member “committee on medical science.” *Id.* at 92.

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4. *Freedom of Conscience/Religion*

Finally, the Thomsonians' medical liberty arguments also invoked the principle of freedom of conscience. For example, in his essay, Honestus proclaimed himself "conscientiously opposed" to orthodox medicine and then rhetorically queried:

Might I not with equal propriety, and with equal justice, be compelled to attend at, or to erect and support certain places of worship, or maintain a patented clergy, either Papal or Protestant without my consent and against my conscience, as to be compelled to employ a physician of a certain class, contrary to my best judgment, and utterly against my will?<sup>225</sup>

It is difficult to determine exactly what the Thomsonians meant when they asserted that the American value of "freedom of conscience" demanded freedom of therapeutic choice. On the one hand, they may have believed that this term was synonymous with freedom of religion—and thus that a person's choice of health practitioner was in some way an exercise of religion. On the other hand, they may have believed that medical freedom and freedom of religion were distinct, though analogous, concepts under a broader umbrella of "freedom of conscience."<sup>226</sup> Both are possible. Dictionaries of the time did not limit the word *conscience* to religious belief. For example, Webster's *American Dictionary* of 1828 defined the word as, "Internal or self-knowledge, or judgment of right and wrong; or the faculty, power or principle within us, which decides on the lawfulness or unlawfulness of our own actions and affections, and instantly approves or condemns them."<sup>227</sup> But as Michael McConnell has observed, in the early years of the United States, "outside of dictionaries, the vast preponderance of references to 'liberty of conscience' . . . were either expressly or impliedly limited to religious conscience."<sup>228</sup>

At times, the Thomsonians emphasized freedom of opinion and belief in the more expansive sense. A letter to the *Thomsonian Recorder* proclaimed: "Legislatures may enact laws against Thomsonianism, but, thank heaven, they cannot bind the mind of man. . . . For freedom of thought and speech are the

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225 Honestus, *supra* note 179, at 130–31.

226 The best discussion of the relationship between the terms "free exercise of religion" and "freedom of conscience" is Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1488–1500 (1990).

227 WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828), available at <http://1828.mshaffer.com/>. For discussion of other early dictionary definitions of *conscience*, see McConnell, *supra* note 226, at 1493.

228 McConnell, *supra* note 226, at 1493.

unalienable rights of man.”<sup>229</sup> Honestus implored, “In this land of freedom . . . shall we not as a free, magnanimous and independent people, dare to think and act for ourselves, to assume our proper rank and dignity in the scale of being . . . ?”<sup>230</sup>

But the Thomsonians—echoing Rush and Jefferson before them—usually linked their invocations of freedom of “conscience” or “thought” directly or indirectly to religious liberty.<sup>231</sup> For example, Honestus, immediately following the statement quoted above, urged the people to “shake off the reckless aspirations of a clerical, legal, and medical denomination, that invades our rights and holds them in contempt.”<sup>232</sup> Thomsonians frequently compared orthodox medicine to an established church and equated the right to choose a physician with the right to choose a minister. For instance, an unsigned editorial in the *Thomsonian Recorder* declared: “[W]e could never see what right any man, or any body of men, can have in the nature and fitness of things to control us in our choice of a lawyer, preacher or physician.”<sup>233</sup> Samuel Thomson himself opened the introduction to his magnum opus by equating the orthodox physicians of his own day to the priests of ages past, who “held the things of religion in their own hands, and brought the people to their terms.”<sup>234</sup>

As one scholar has observed, although “little in [Thomsonianism] could be called overtly or distinctively religious,” it nonetheless “had deep roots in the Second Great Awakening, which accentuated the role of humans in effecting the Kingdom of God on earth.”<sup>235</sup> The Thomsonians sometimes strengthened the association between medicine and religion by suggesting that the “natural” botanical remedies of their system were divinely sanctioned. The very first page of the first issue of the *Thomsonian Recorder* claimed a divine foundation for the Thomsonian system, bemoaning the persecution of any practitioner “who dares to remove disease with healing medicine, which the God of Nature has so profusely scattered for the benefit of all.”<sup>236</sup> The previously mentioned New Jersey petition similarly declared:

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229 B. W. S., *A Second Voice from New York*, 2 THOMSONIAN RECORDER 252 (1834).

230 Honestus, *supra* note 179, at 123.

231 One potential problem for the Thomsonians in relying on “freedom of conscience” is that, compared to “free exercise of religion” (the phrase chosen by the drafters of the First Amendment to the U.S. Constitution over James Madison’s proposed “rights of conscience”), “freedom of conscience” less clearly encompasses liberty of action as well as of belief. McConnell, *supra* note 226, at 1488–90. See also U.S. CONST. amend. I. Unsurprisingly, though, Thomsonians insisted on their right to act on their medical opinions, not merely to hold them.

232 Honestus, *supra* note 179, at 123.

233 *Untitled Editorial 1*, 2 THOMSONIAN RECORDER 246 (1834).

234 THOMSON, *NEW GUIDE TO HEALTH*, *supra* note 108, at 5.

235 ROBERT C. FULLER, *ALTERNATIVE MEDICINE AND AMERICAN RELIGIOUS LIFE* 34, 36 (1989).

236 *To our Patrons*, 1 THOMSONIAN RECORDER 1, 1 (1832).



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As we believe, the God of Nature has bountifully caused to grow in our own country, and placed within our reach, medicines for the alleviation and cure of the various maladies with which we are from time to time afflicted; and we conceive it an infraction of our rights to debar us from the use of such remedies, or from employing such physicians as administer them.<sup>237</sup>

After the Civil War, when groups with more explicitly spiritual agendas assumed the role of leading advocates for medical freedom, the association between medical and religious liberty became stronger and stronger until, in the early twentieth century, Christian Scientists began regularly to cite constitutional religion clauses both inside and outside court.<sup>238</sup> By contrast, I have found no instance in which a Thomsonian-era commentator directly contended that a medical licensing statute violated a particular religion clause in a state constitution.<sup>239</sup> Nonetheless, the link between medical and religious choice was so close that when the Arkansas territorial governor vetoed a medical practice law in 1831, he asserted in his veto message that government should not control a citizen's "will and faith" on the subject of the choice of medical practitioners.<sup>240</sup>

#### F. *The Battle in New York*

The Thomsonians' popular constitutionalist articulation of medical freedom, with its four contributing strands, achieved its greatest triumph in 1844, with the revocation of the medical practice law of New York, the nation's most populous state.

New York had had a medical licensing statute on the books since colonial times, and the legislature had ratcheted up the penalties until, by 1827, unlicensed practitioners were subject to fines and imprisonment, at least in theory.<sup>241</sup> The Thomsonians' campaign for medical liberty in New York commenced in the late 1820s, when they conducted a statewide petition

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237 Petition, *supra* note 193, at 1. Thomson himself stated that his medical system and its cures derived from "the God of nature." THOMSON, *NEW GUIDE TO HEALTH*, *supra* note 108, at 16, 86.

238 See, e.g., RENNIE B. SCHOEPLIN, *CHRISTIAN SCIENCE ON TRIAL* 156 (2003); Margery Fox, *Conflict to Coexistence: Christian Science and Medicine*, 8 MED. ANTHROPOLOGY 292, 296 (1984). In an unpublished draft manuscript (available on request), I examine in detail the relationship between medical freedom and religious freedom and the late-nineteenth and early-twentieth century. Grossman, *You Can Choose Your Medicine*, *supra* note 7.

239 The free exercise clause of the First Amendment of the United States Constitution was not deemed to apply to the states by incorporation through the Due Process Clause of the Fourteenth Amendment until 1940. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

240 *The Governor's Veto*, ARKANSAS GAZETTE, Nov. 9, 1831, at 1.

241 LAWS OF THE STATE OF NEW YORK, PASSED AT THE SECOND MEETING OF THE 50TH SESSION OF THE LEGISLATURE Title VII, § 22 (1827); HALLER, *THE PEOPLE'S DOCTORS*, *supra* note 3, at 134–35; ROTHSTEIN, *supra* note 6, at 338 app. II.

campaign that persuaded the legislature, in 1830, to exempt from the licensing requirement any person “using or applying, for the benefit of any sick person, any roots, barks, or herbs, the growth or produce of the United States.”<sup>242</sup> Four years later, however, the regulars persuaded the legislature to repeal this exemption for botanical practitioners, although the 1834 amended statute allowed botanical doctors to perform their services “without fee or reward.”<sup>243</sup> Thus commenced a decade-long crusade, led by the Thomsonians, to revoke the state’s medical practice statute altogether.

In September 1834, the New York Botanic State Convention, comprising delegates from local botanic societies throughout the state, launched a campaign against the revised medical practice law. As described by the editor of the *Botanic Watchman*:

A spirit of unanimity pervaded the convention in all its deliberations, and as they felt the weight of their oppression, they were unanimously resolved to apply at the source of evil [the legislature] for a redress of their grievances, and a mitigation of the abuses, that have been unwarrantably heaped upon them, until the right of a free selection of their favorite physician, is left unfettered by legal restraint. If every state in the Union would pursue a similar course, we might ere long, throw off the shackles of despotism, which the lordly faculty are endeavoring [*sic*] to make fast, until the people are entirely lost to a sense of their freedom, and the right to exercise their constitutional privileges.<sup>244</sup>

The convention appointed two committees, one to draft a petition for repeal of the medical practice law and another to write resolutions expressing the views of the convention.<sup>245</sup> The resulting documents, discussed in detail below, are notable both for their explicit invocation of the Constitution and for their reference to all of the strands of medical freedom discussed above.<sup>246</sup>

The convention ordered the printing of one thousand copies of the resolutions and five hundred copies of the petition.<sup>247</sup> In February 1835, the *Thomsonian Recorder* reported that “[p]etitions are pouring in to the Capitol from every

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242 LAWS OF THE STATE OF NEW YORK, PASSED AT THE 53RD SESSION OF THE LEGISLATURE 126, § 2 (1830).

243 LAWS OF THE STATE OF NEW YORK, PASSED AT THE 57TH SESSION OF THE LEGISLATURE 68, § 2 (1834).

244 *The Botanic State Convention*, 1 BOTANIC WATCHMAN 145 (1834).

245 *Proceedings of the Botanic State Convention*, 3 THOMSONIAN RECORDER 17, 18 (1834). Both five-man committees included Samuel Thomson’s son, John. *Id.* at 18.

246 See *infra* Section III.E.

247 *Proceedings of the Botanic State Convention*, *supra* note 245, at 18, 20.

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portion of the Empire State,”<sup>248</sup> and three months later the same publication claimed that the number of petitioners had “swelled to 40,000.”<sup>249</sup> A revocation bill passed the House, but lost in the Senate.<sup>250</sup> The Thomsonians nevertheless energetically continued their petition campaign; on one occasion Samuel Thomson’s son, John, paraded into Albany pushing a wheelbarrow containing a petition with so many signatures that it stretched to thirty-one yards.<sup>251</sup> The petitioners obtained the same disappointing result (passage in the House, defeat in the Senate) three additional times before they achieved total victory.<sup>252</sup> In 1844, the legislature finally repealed the New York medical practice statute and enacted a law explicitly stating: “No person shall be liable to any criminal prosecution or to indictment, for practising physic and surgery without license, excepting in cases of mal-practice, or gross ignorance, or immoral conduct in such practice.”<sup>253</sup>

An examination of the 1834 petition and resolutions demonstrates that the New York Thomsonians viewed themselves as vindicating fundamental constitutional principles. The petition declared, “[W]e believe said law is a direct infringement of our constitutional privileges.”<sup>254</sup> The resolutions presented the Botanic Convention’s mission as the prevention of the usurpation of New York citizens’ constitutional rights and privileges by an unholy alliance of orthodox physicians and legislators. The resolutions’ introduction characterized those legislators who supported medical licensing as “traitors to their constituents, and assassins to the principles of a liberal and just government.”<sup>255</sup> It continued, “Upon such men should not the mark of disapprobation be branded, so plainly as to warn all others from encroaching in like manner upon our constitutional rights?”<sup>256</sup>

In detailing which of their rights the despised statute invaded, the convention members used every libertarian argument in the Jacksonian arsenal. Because the 1834 New York law did not prohibit botanical practitioners from administering their remedies to patients, but only from receiving compensation, the petition and resolutions paid special attention to the idea of economic freedom. Indeed, the petition—a much shorter document than the resolutions, and focused especially on the ban on compensation—rested almost exclusively on principles of free contract and free labor. First, the petition declared from the perspective of

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248 *Untitled Editorial*, 3 THOMSONIAN RECORDER 159, 160 (1835).

249 *Untitled Editorial*, 3 THOMSONIAN RECORDER 253, 253 (1835).

250 HALLER, THE PEOPLE’S DOCTORS, *supra* note 3, at 137.

251 WHORTON, NATURE CURES, *supra* note 29, at 36; YOUNG, *supra* note 115, at 55.

252 HALLER, THE PEOPLE’S DOCTORS, *supra* note 3, at 137-38.

253 LAWS OF THE STATE OF NEW YORK, PASSED AT THE SIXTY-SEVENTH SESSION OF THE LEGISLATURE 406 § 3 (1844) (Ch. 275: An Act in relation to the practice of Physic and Surgery, passed May 6, 1844); *see also* HALLER, THE PEOPLE’S DOCTORS, *supra* note 3, at 138.

254 *Proceedings of the Botanic State Convention*, *supra* note 245, at 18.

255 *Id.* at 19.

256 *Id.*

patients:

We have a right, beyond doubt, to employ any person whom we may think proper, as our physician, without jeopardizing his life, liberty or property. If we employ a person to administer to us as our physician, common law and justice should give him a reasonable compensation for his services.<sup>257</sup>

Assuming the voice of practitioners, the petition then asserted: “In all matters of business, we have a right to manage our own affairs, and that right we wish to exercise unmolested by those who may make it their interest to thwart and perplex us in our just and legal avocations.”<sup>258</sup>

The resolutions echoed these themes, asserting, for example, that law should “leav[e] all professions to stand or fall by their own merits, regulated by a fair competition, and an accountability to their employers.”<sup>259</sup> But the committee on resolutions also set its advocacy for the economic strand of medical freedom within a broader, typically Jacksonian attack on corrupt special legislation favoring the economic aristocracy. Although the resolutions vigorously attacked the legislators who supported the medical practice law, the committee’s primary villains were the “medical men,” who had captured the legislative process to “invade in an unjust manner [our] rights and privileges.”<sup>260</sup> One resolution declared that the law “was obtained through the influence of a designing faculty, and expressly calculated to force a monopoly of practice into their own hands by the exclusion of all others.”<sup>261</sup> Another pledged, “[W]e will use all laudable endeavors to counteract the influence of all medical monopolies in the halls of Legislation, and to produce an equalized system of practice, resting on its respective merits.”<sup>262</sup>

The New York Thomsonians’ arguments were not solely economic, however. They also asserted a right to control one’s body and the treatment of it:

We are all sensitive beings, both in mind and body, and it is to protect these functions from insult and injury, that we object to the [law]. If we are distressed in body, what greater privilege can we enjoy than the free and independent right in the selection of our Physicians to relieve our maladies?<sup>263</sup>

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257 *Id.* at 18.

258 *Id.*

259 *Id.* at 19.

260 *Id.*

261 *Id.*

262 *Id.* at 20.

263 *Id.* at 19.

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The resolutions proclaimed that the right to employ one's choice of physician was part of the "blood-bought freedom of our venerable sires, which was purchased by them on the field of battle for their posterity."<sup>264</sup> The committee on resolutions bolstered its argument for bodily freedom by reference to the dangers of heroic orthodox medicine. "[I]t were better to have no laws regulating the practice of medicine, than to place all power in the hands of a privileged few, and those using the most dangerous poisons for medicine."<sup>265</sup>

In the resolutions, the Thomsonians also invoked the parallel between medical freedom and religious freedom. "If our minds are diseased, who would have the audacity to dictate to us our spiritual Physician: would we not all of us consider ourselves fully competent to select the Physician for our souls as well as bodies?"<sup>266</sup> This argument proved to be persuasive to the legislative committee considering repeal measures, which, in supporting the petitioners, remarked, "Men cannot be legislated out of one religion and into another."<sup>267</sup>

Finally, although the resolutions did not greatly emphasize freedom of inquiry, they did allude to the merits of "unshackled" science.<sup>268</sup> The committee that drafted the resolutions, like Thomsonian commentators generally, embraced a populist empirical vision of medical science, in which therapeutic systems are "tested by experience" and any law restricting free access to different types of practitioners unfairly "charges the people with ignorance, and infringes on their rights."<sup>269</sup>

In short, the documents emerging from the 1834 New York Botanic Convention epitomize the Thomsonians' multidimensional view of medical rights as constitutional rights. Moreover, the tactics used by the Thomsonians in New York exemplify how medical freedom advocates, like others in Jacksonian America, did not treat courts as the only forum, or even the preferred forum, for asserting constitutional rights. Finally, the result of these struggles demonstrates that such extrajudicial constitutional campaigns could be astonishingly successful.

## IV. CONCLUSION

The Independent Thomsonians continued to exist, under a series of different names, until the early years of the twentieth century.<sup>270</sup> After the revocation of

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<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 20.

<sup>266</sup> *Id.* at 19.

<sup>267</sup> ROTHSTEIN, *supra* note 6, at 145 (quoting "Report of Minority of Select Committee" and "Report of the Select Committee . . . Jan. 30, 1841," *Transactions of the Medical Society of the State of New York* 241, 243-44, 265, 268 (1841)).

<sup>268</sup> *Proceedings of the Botanic State Convention*, *supra* note 245, at 19.

<sup>269</sup> *Id.* at 20.

<sup>270</sup> The Independent Thomsonians changed their name first to Botanic-Medicals and then, after 1850, to Physio-Medicals.

most of the medical licensing statutes by the mid-1800s, however, there was a discernible change of character in the group. They lost their grass-roots, popular fervor (and much of their following) and assumed all the trappings of orthodox medicine, including state medical societies and a small network of diploma-granting medical schools.<sup>271</sup> Meanwhile, the purist Thomsonian faction shriveled away and disappeared following the dissolution of the United States Thomsonian Society in 1840 and the founder's death in 1843.<sup>272</sup> During the second half of the nineteenth century, botanical medicine proponents who traced their roots back to Samuel Thomson transformed from a "remarkable socio-medical movement" to "a small, ineffectual, and pseudo-scientific cult."<sup>273</sup>

Nevertheless, other botanical systems continued to prosper through the 1800s.<sup>274</sup> Moreover, botanical medicine was just the first in a long list of popular non-orthodox medical approaches that would emerge over the course of the century. In 1893, Henry Wood listed the various types of "irregulars" he was familiar with: "the homeopathists, eclectics, hydropathists, magnetic, electric, and 'biochemic' practitioners, Thomsonians, hygienists, metaphysicians, Christian scientists, mental healers, hypnotists, clairvoyants, mediumistic healers, faith curists, gospel healers, and members of the Christian Alliance."<sup>275</sup> In subsequent decades, these alternative systems would be joined by others, including osteopathy, chiropractic, and naturopathy. Indeed, alternative medicine movements continued to arise throughout the twentieth century, and they remain an important aspect of the American medical scene today.<sup>276</sup> While these different systems have produced a kaleidoscope of theories and philosophies, they have all tended to embrace the same cluster of attitudes: skepticism toward orthodox medical science, an embrace of more "natural" and lower-risk alternatives to regular drugs, and, in many instances, a populist suspicion of nefarious conspiracies involving the medical elite.

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271 See Berman, *supra* note 2, at 133, 139–42.

272 See HALLER, THE PEOPLE'S DOCTORS, *supra* note 3, at 180, 184–86. The remnants of the Thomsonian purists sought accommodation with the Independents after Thomson's passing. See *id.* at 187.

273 See Berman, *supra* note 2, at 135.

274 See William G. Rothstein, *The Botanical Movements and Orthodox Medicine*, in OTHER HEALERS: UNORTHODOX MEDICINE IN AMERICA 29, 47–50 (Norman Gevitz ed., 1988); James C. Whorton, *From Cultism to CAM: Alternative Medicine in the Twentieth Century*, in THE POLITICS OF HEALING: HISTORIES OF ALTERNATIVE MEDICINE IN TWENTIETH-CENTURY NORTH AMERICA 287, 288 (Robert D. Johnston ed., 2004). Before the Civil War, a botanical practitioner named Wooster Beach founded another branch of botanical medicine that came to be known as the "eclectics." Eventually, many Independent Thomsonian schools and practitioners converted to eclecticism, and the eclectics became (along with the regulars and the homeopaths) one of the three major organized medical sects during the latter part of the nineteenth century. *Id.*

275 Henry Wood, *Medical Slavery Through Legislation*, 8 ARENA 680, 687 (1893).

276 See generally OTHER HEALERS, *supra* note 274; THE POLITICS OF HEALING, *supra* note 274; WHORTON, NATURE CURES, *supra* note 29, at 287–307.

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As I explore in a separate piece,<sup>277</sup> a second wave of medical licensing arose after the Civil War, as did a corresponding revival of medical freedom literature. By 1901, every state and the District of Columbia had a medical licensing system of some sort.<sup>278</sup> These new licensing regimes generally mandated more rigorous qualifications for medical practice and imposed more severe penalties on violators than did their antebellum counterparts.<sup>279</sup> The opponents of post-Civil War medical licensing were more likely than their early American forerunners to pursue constitutional challenges in court, but these challenges were almost invariably unsuccessful. Their litigation strategy suffered its severest blow in 1888, with the Supreme Court's upholding of a state licensing law in *Dent v. West Virginia*.<sup>280</sup>

Nevertheless, the almost universal adoption of medical licensing during the Gilded Age did not represent the demise of a widespread ethos in favor of freedom of therapeutic choice. During this later period, Americans increasingly recognized the benefits of professional expertise and thus embraced licensing systems designed to ensure that medical practitioners were sufficiently educated and trained.<sup>281</sup> But there was still broad consensus that government should not discriminate against or in favor of different systems of medicine. This continuing commitment to freedom of therapeutic choice is evidenced by the content of the state medical practice acts themselves,<sup>282</sup> by enforcement patterns and jury

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277 Grossman, *You Can Choose Your Medicine*, *supra* note 7.

278 STARR, *supra* note 43, at 104.

279 See *Medical Practice Laws*, 3 AM. MED. ASS'N BULL. 34, 103 (1907) (describing post-Civil War medical practice laws in each state).

280 129 U.S. 114 (1889). Dent was a West Virginia eclectic practitioner practicing without a license. The only version of "freedom" that he expressly fought for in this case was his own freedom to practice his trade and preserve his vested property interests in his profession under the due process clause of the Fourteenth Amendment. In the Supreme Court's opinion, Justice Stephen Field emphatically reaffirmed the existence of the "right of every citizen of the United States to follow any lawful calling, business, or profession he may choose." *Id.* at 121. He nonetheless upheld the constitutionality of medical licensing, observing: "Few professions require more careful preparation by one who seeks to enter it than that of medicine." *Id.* at 122. As I argue elsewhere, the fact that Field in this case upheld a licensing statute mandating a medical diploma from a reputable school does not mean that he would have upheld a discriminatory statute that accepted diplomas only from orthodox medical schools and not from their homeopathic and eclectic counterparts. See Grossman, *You Can Choose Your Medicine*, *supra* note 7.

281 See Samuel Lee Baker, *Medical Licensing in America: An Early Liberal Reform* S-6, 12 (1977) (unpublished Ph.D. dissertation, Harvard University) (on file with Yale Library); Grossman, *You Can Choose Your Medicine*, *supra* note 7.

282 Most of the second wave statutes explicitly preserved the rights of at least some alternative practitioners, if adequately educated, and they routinely included homeopaths and eclectic doctors in the administration of the licensing regimes. Moreover, some of these laws included explicit nondiscrimination clauses. See *Medical Practice Laws*, *supra* note 279 (offering a comprehensive review of the medical practice laws of every state as of 1907). Finally, these medical practice acts frequently exempted various types of drugless practitioners from their requirements altogether. See *id.* at 107.

behavior;<sup>283</sup> and by petition campaigns, mobbed legislative hearings, the formation of advocacy organizations, and the promulgation of medical freedom literature.<sup>284</sup>

As was the case before the Civil War, efforts to preserve medical freedom during the Gilded Age and Progressive Era were largely the product of organized movements by alternative practitioners and their supporters. These later opponents of discriminatory medical licensing—many of whom were intimately familiar with the Thomsonians' own struggle—inherited their predecessors' "thin constitutional" arguments as well as their articulation of the four strands of medical freedom identified in this Article. This is not to say that there were no differences in emphasis in the battle against the second wave of medical licensing. For example, arguments regarding the link between freedom of inquiry and medical progress assumed a more prominent—and sometimes dominant—role in the later rhetoric.<sup>285</sup> The rise of drugless therapies, such as Mind Cure and Christian Science, with spiritual and religious foundations, brought greater focus on the association between medical freedom and religious freedom. And because many of the dominant postbellum alternative medical movements were favored by the middle class and elites, much of the medical freedom literature lost the populist tone of the Thomsonian arguments. Nonetheless, the Thomsonians' lasting influence on the medical freedom rhetoric was unmistakable.<sup>286</sup>

The inexorable rise of effective scientific medicine and "wonder drugs" in the early twentieth century posed a serious challenge to alternative medicine. Nevertheless, interest in and use of alternative remedies have soared since the 1960s.<sup>287</sup> A notable feature of the story of American alternative medicine during

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283 Prosecutors and juries widely refused to prosecute or convict unorthodox practitioners during this era. ROTHSTEIN, *supra* note 6, at 310. James C. Whorton contends that these second wave medical licensing statutes were "applied more seriously" than the antebellum versions and that "hundreds, if not thousands, of irregular practitioners were fined and/or jailed for unlicensed practice." Whorton, *From Cultism to CAM*, *supra* note 274, at 293, 294. However, evidence suggests that these laws were rarely enforced by prosecutors and that defendants were rarely convicted by juries. See Samuel Lee Baker, Medical Licensing in America, *supra* note 281, at 183–84 (discussing the lack of enforcement of medical practice acts in the 1870s and 1880s); FREDERICK R. GREEN, STATE REGULATION OF THE PRACTICE OF MEDICINE 23 (1917) ("I venture to assert that there is not a single state in the Union today in which the medical practice act prevents any except the most flagrant quacks and charlatans from carrying on their business unmolested.").

284 Grossman, *You Can Choose Your Medicine*, *supra* note 7.

285 The most prominent and influential example of a Gilded Age argument for medical freedom based primarily on freedom of inquiry was William James' testimony in an 1898 legislative hearing against the application of the Massachusetts medical licensing law to mind curers. WILLIAM JAMES, THE WORKS OF WILLIAM JAMES: ESSAYS, COMMENTS, AND REVIEWS 56 (1987).

286 Notably, the Thomsonians' anti-monopoly theme would remain prevalent in the anti-medical licensing literature well into the twentieth century, when medical freedom advocates frequently leveled antitrust arguments against perceived machinations of the American Medical Association.

287 See Robert B. Saper, *Overview of Herbal Medicine and Dietary Supplements*, WOLTERS



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the past half century has been the remarkable ability of its supporters—primarily outside of court—to thwart attempts by the government (frequently backed by organized medicine and the pharmaceutical industry) to restrict access to alternative practitioners and products.<sup>288</sup> Modern campaigns for medical freedom outside of orthodox medicine, though often led by financially-interested alternative medicine practitioners and manufacturers, are regularly bolstered by massive outpourings of popular support.<sup>289</sup> Moreover, the rhetoric supporting these campaigns bears many similarities to the antebellum struggle against medical licensing, including “thin constitutional” claims of individual rights, populist rages against unholy alliances between government and the medical establishment, and multidimensional freedom arguments invoking not only bodily liberty, but also economic freedom and freedom of conscience and religion.<sup>290</sup>

A related, but largely distinct, trend has been the emergence in the past four decades of movements for freedom *within* orthodox medicine. These movements have often taken the shape of campaigns by the terminally ill and their proponents for access to drugs that the FDA has either not yet approved or has rejected.<sup>291</sup> Because the pharmaceutical products sought by these drives are developed by profitable corporations using modern scientific techniques (often with the support of government grants), movements for access to these drugs have largely lacked the populist passion, religious overtones, and “natural rights”

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KLUWER HEALTH UPtODATE (Sept. 25, 2005), <http://www.uptodate.com/contents/overview-of-herbal-medicine-and-dietary-supplements#H4> (“In the US, use of herbal medicine declined in the early 1900s only to experience a resurgence beginning in the 1960’s that was part of a larger movement towards using natural nonconventional approaches to healthcare.”); David M. Eisenberg et al., *Trends in Alternative Medicine Use in the United States, 1990-1997*, 280 JAMA 1569 (1998) (reporting surge in use).

288 See generally Whorton, *From Cultism to CAM*, *supra* note 274. Indeed, alternative medicine has achieved a striking degree of positive government recognition, with the establishment in 1992 of the Office of Alternative Medicine (now called the National Center for Complementary and Alternative Medicine) at the National Institutes for Health.

289 For example, in the early 1990s, when the public perceived the FDA as threatening the availability of dietary supplements, Congress reportedly received more mail on this issue than on any other that session—including health care reform. See John Schwartz, *Next Week, FDA Will Take Vitamins; Lawmakers Get Avalanche of Letters About Agency’s Regulation of Dietary Supplements*, WASH. POST, Dec. 7, 1993, at A23; Editorial, *Vitamin Cease-Fire*, WASH. POST, Oct. 20, 1994, at A20.

290 For a variety of discussions of these trends, see WHORTON, *NATURE CURES*, *supra* note 29, at 141–307; and the excellent collection of essays in *THE POLITICS OF HEALING*, *supra* note 274.

291 However, these campaigns have not been limited to those suffering from fatal diseases like cancer and AIDS. For example, in response to impassioned protests by sufferers of irritable bowel syndrome, the FDA in 2002 permitted the return to the market of Lotronex, a drug earlier withdrawn because of occasional severe side effects. Denise Grady, *U.S. Lets Drug Tied to Deaths Back on Market*, N.Y. TIMES (June 8, 2002), <http://www.nytimes.com/2002/06/08/us/us-lets-drug-tied-to-deaths-back-on-market.html>. On its return, the drug was subjected to a restricted distribution regime. *Id.*

rhetoric of the alternative movements. But this may be changing, as disease groups increasingly express anti-statist outrage and invoke constitutional principles in favor of their cause. For example, a petition recently circulated by Freedom of Access to Medicine, an organization dedicated to preserving breast cancer patients' access to the drug Avastin, concludes:

We are a civilized society that values life. We also cherish individual freedom and the right of a patient to choose her medical options with her physician. By acting on this, you will confirm our belief that Life, Liberty and the Pursuit of Happiness is an inalienable right for all, including the seriously ill.<sup>292</sup>

Although such patient advocacy groups ordinarily emphasize bodily liberty, they are often backed by groups and publications that also advocate economic freedom and minimalist government more generally.<sup>293</sup> Most recently, the libertarian battle against state interference with freedom of therapeutic choice has paradoxically manifested itself in the context of government-reimbursed health care, with cries of "Death Panels!" directed at every hint or apparition of a limitation on Medicare coverage.<sup>294</sup>

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292 *Petition to Protect the Avastin Women*, FREEDOM OF ACCESS TO MEDICINES, <http://fameds.org/petition.php> (last visited Nov. 14, 2012).

293 See, e.g., Michael F. Cannon, *Why Should Politicians and Bureaucrats Decide Whether Breast-Cancer Patients Can Take Avastin?*, CATO@LIBERTY (Nov. 14, 2012), <http://www.cato-at-liberty.org/why-should-politicians-and-bureaucrats-decide-whether-breast-cancer-patients-can-take-avastin/>; Editorial, *The Avastin Mugging*, WALL ST. J. (Aug. 18, 2010), <http://online.wsj.com/article/SB10001424052748704271804575405203894857436.html>.

294 This attack line against health care reform exploded into the public discourse in August 2009, when Alaska governor (and former vice-presidential candidate) Sarah Palin posted comments on her Facebook page warning readers—with no apparent justification—that under the president's health care plans, they would have to "stand in front of Obama's 'death panel' so his bureaucrats [could] decide, based on a subjective judgment of their 'level of productivity in society,' whether they [were] worthy of health care." Ceci Connolly, *Seniors Remain Wary of Health-Care Reform*, WASH. POST (Aug. 9, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/08/AR2009080802367.html>. The "death panel" charge was leveled at the FDA recently, in November 2011, when the agency withdrew its provisional approval of the drug Avastin for the treatment of breast cancer. Conservative websites and editorial pages erupted with outrage at the notion that the government would remove a treatment option from victims of the disease. See, e.g., Editorial, *The Avastin Denial*, WALL ST. J. (Nov. 19, 2011), <http://online.wsj.com/article/SB10001424052970203611404577046133283707236.html>; Milton R. Wolf, *The FDA's One-Man Death Panel*, WASH. TIMES, June 21, 2011, <http://www.washingtontimes.com/news/2011/jun/21/the-fdas-one-man-death-panel/>. The author has on file comments posted on various media websites on November 18, 2011, the day the FDA announced its final decision. The FDA's withdrawal of Avastin's "accelerated approval" for breast cancer did not remove the drug from the market, because it is still approved for other cancers, and doctors remain free to prescribe it to breast cancer sufferers. The real fear of opponents of the FDA decision, therefore, is that government insurance (and, in response, private insurance plans) will stop reimbursing for this use. The "death panel" meme reappeared during the 2012 presidential campaign, when Republican

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Importantly, however, as is the case with alternative remedies, few advocates for freedom of therapeutic choice within orthodox medicine have achieved victory in court. The most successful arguments have been advanced through vehicles such as testimony at legislative hearings and FDA advisory committee meetings, organized letter-writing drives, administrative filings, press campaigns, and public demonstrations. Although these campaigns have not been as explicitly constitutional as their nineteenth-century counterparts, recent trends indicate an increasing embrace of constitutional rhetoric.

It remains to be seen, however, whether current promoters of freedom of therapeutic choice within orthodox medicine will construct a persuasive multi-pronged argument similar to the Thomsonians' rhetoric. Not all people arguing for freer access to unapproved pharmaceutical products embrace economic libertarianism and broader hostility to government. To the contrary, some disease advocacy groups value the FDA's role as a gatekeeper ensuring drug safety and effectiveness, even as they exhort the agency to open the gate a bit wider, and virtually all groups lobby energetically for more government funding of medical research. In the 1980s, for example, the leaders of a demonstration at FDA headquarters by AIDS activists demanding earlier and greater access to experimental drugs warned participants to "be careful to keep their agenda . . . from being confused with the Bush/*Wall Street Journal*/Heritage Foundation agenda of sweeping drug industry deregulation."<sup>295</sup>

Furthermore, contemporary arguments for liberty within orthodox medicine rarely invoke the freedom of inquiry strand of medical freedom. Since the middle of the twentieth century, the gold standard for establishing medical effectiveness has been the meticulously structured, highly restricted, placebo-controlled clinical study. In this regime, the unregulated use of unproven remedies is perceived as undermining, rather than advancing, the pursuit of truth. Finally, while freedom of conscience continues to be an important theme for religious groups like Christian Scientists resisting the use of orthodox treatments, freedom of conscience arguments are largely absent from the rhetoric of activists urging freedom of patient choice within the field of regular medicine. This secular tone may dominate because modern scientific medicine, with its materialist and empirical underpinnings, has a tenuous connection to spiritual matters.

It is thus possible that the calls for freedom of therapeutic choice within orthodox medicine will never assume the features of a broad popular

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candidate Mitt Romney declared in a debate with President Barack Obama that he opposed "Obamacare" (the Affordable Care Act) in part because "it puts in place an unelected board that's going to tell people, ultimately, what kind of treatments they can have." Romney was referring to Independent Payment Advisory Board (IPAB), which in fact is forbidden by the statute from making any recommendation "to ration health care" or "otherwise restrict benefits or modify eligibility." See *Reality Check: Looking at Candidates' Claims*, CHIC. TRIB., Oct. 4, 2012, at C20.

295 Jim Eigo et. al., *FDA Action Handbook* (Sept. 12, 1988), <http://www.actupny.org/documents/FDAhandbook1.html>.

constitutionalist movement. But this result is not foreordained. Perhaps bodily freedom arguments alone can drive such a movement. Or maybe conditions will change so as to enhance the modern relevance of one or more of the other traditional strands of medical freedom. Or perhaps new strands will form. In any event, the stubborn American insistence on freedom of therapeutic choice is something policymakers inevitably will have to wrestle with as they struggle to devise solutions to the health care crisis of the twenty-first century.