

CONSTITUTIONAL STUDIES

Volume 1.1



Editors

EDITOR: Howard Schweber

MANAGING EDITOR: Jennifer Brookhart

Editorial Board

Jack Balkin / *Yale University*
Sotorios Barber / *University of Notre Dame*
Elizabeth Beaumont / *University of Minnesota*
Saul Cornell / *Fordham University*
John Ferejohn / *New York University*
Tom Ginsburg / *University of Chicago*
Mark Graber / *University of Maryland*
Ran Hirschl / *University of Toronto*
Gary Jacobsohn / *University of Texas at Austin*
András Jakab / *Hungarian Academy of Sciences*
Kenneth Kersch / *Boston College*
Heinz Klug / *University of Wisconsin–Madison*

Sanford Levinson / *University of Texas at Austin*
Michael Les Benedict / *The Ohio State University*
Maeva Marcus / *George Washington University*
Kenneth Mayer / *University of Wisconsin–Madison*
Mitch Pickerill / *Northern Illinois University*
Kim Scheppele / *Princeton University*
Miguel Schor / *Drake University*
Stephen Sheppard / *St. Mary's University*
Rogers Smith / *University of Pennsylvania*
Robert Tsai / *American University*
Mark Tushnet / *Harvard University*
Keith Whittington / *Princeton University*

Editorial Office

Please address all editorial correspondence to:
Constitutional Studies
110 North Hall
1050 Bascom Mall
Madison, WI 53706
T: 608.263.2293
F: 608.265.2663
constitutional.studies@uwpress.wisc.edu

Business Office

Journals Division
The University of Wisconsin Press
1930 Monroe Street
Madison, WI 53711
T: 608-263-0668
F: 608-263-1173
journals@uwpress.wisc.edu

Constitutional Studies is published twice annually by the University of Wisconsin Press, 1930 Monroe Street, 3rd Floor, Madison, WI 53711-2059. Postage paid at Madison, WI and at additional mailing offices. POSTMASTER: Send address changes to *Constitutional Studies*, Journals Division, UW Press, 1930 Monroe Street, 3rd Floor, Madison, WI 53711-2059.

DISCLAIMER: The views expressed herein are to be attributed to their authors and not to this publication, the University of Wisconsin Press, or the Board of Regents of the University of Wisconsin System.

Open Access Policy

All articles published in *Constitutional Studies* are freely available online at <https://uwpress.wisc.edu/journals/journals/cs.html>. (Preservation services provided by Portico: <http://www.portico.org/digital-preservation/>) Print editions of the journal are available by paid subscription.

“GREEN” OPEN ACCESS: The University of Wisconsin Press supports Green Open Access for all articles: authors are free and are encouraged to make draft versions of articles available in on-line repositories as soon as possible, under the Press’s Guidelines for Journal Authors’ Rights.

This work is licensed under a Creative Commons
Attribution-NonCommercial-NoDerivatives 4.0 International License.
<http://creativecommons.org/licenses/by-nc-nd/4.0/>



Mission Statement

Constitutional Studies publishes work from a variety of disciplines that addresses the theory and practice of constitutional government. The journal seeks work of the highest quality that expands our understanding of constitutional institutions and the bases for their legitimacy, practices of constitutional self-government, formal and informal constitutional systems, approaches to constitutional jurisprudence, and related subjects. We welcome submissions from comparative, empirical, historical, normative, or analytic perspectives from scholars across the range of the social sciences and humanities. All submissions will be subjected to double-blind peer review.

The journal is affiliated with the Center for the Study of Liberal Democracy and supported by generous funding from the Bradley Foundation.

Instructions for Authors

MANUSCRIPT SUBMISSION AND REVIEW: To submit a manuscript for consideration, please send an electronic file (formatted in Microsoft Word) via the *Constitutional Studies* online submission portal (constitutionalstudies.msubmit.net). The menu will prompt the author to create an account, then log in and provide all necessary information, including the manuscript category, contact information for the corresponding author (phone number, fax number, e-mail address), and suggested reviewers. The web site will automatically acknowledge receipt of the manuscript and provide a reference number. The Editor will assign the manuscript to anonymous reviewers, and every effort will be made to provide the author with a review in a timely fashion.

COMPONENTS: Submit the text of the manuscript as a Microsoft Word file, along with a separate cover letter (also in MS Word); if there are figures, upload them as individual image files. The cover letter should state that all authors have read and approved the submission of the manuscript, that the manuscript has not been published elsewhere, and that it is not currently under consideration for publication by another journal. Include the names and contact information for any individuals who are especially qualified to review the manuscript; you may also name any individuals who may not be able to provide an unbiased review.

AUTHOR ANONYMITY: Because manuscripts are evaluated anonymously, they should not bear the author's name or institutional affiliation. Please remove from the manuscript all references or acknowledgements that might indicate the identity of the author. However, the author's name and other identifying information may appear in the cover letter and will be required in the post-peer-reviewed, final submitted article.

LENGTH AND ABSTRACT: The normal length of published manuscripts is 8,000–10,000 words. All article submissions should include an abstract of 100–150 words. Please include 5–7 keywords to identify the article for search purposes.

MANUSCRIPT PREPARATION AND STYLE: Submissions should follow the author-date system of documentation as outlined in the *Chicago Manual of Style* (16th ed., chapt. 15 or 15th ed., chapt. 16). The journal office may request full revision of manuscripts not meeting the *Chicago Manual of Style* requirements for documentation.

Further instructions for authors can be found at constitutionalstudies.wisc.edu/contributors.html

TABLE OF CONTENTS

Editor's Note

1

Mark A. Graber | *Young Jeffersonians and Adult Marshallians*

5

Ethan Alexander-Davey | *Restoring Lost Liberty*

37

Clement Fatovic | *James Madison and the Emergency Powers
of the Legislature*

67

Thomas M. Keck | *Hate Speech and Double Standards*

95

Zoltán Szenté | *The Political Orientation of the Members of the
Hungarian Constitutional Court between 2010 and 2014*

123

COVER IMAGE: Bronze statue of John Marshall by American sculptor William Wetmore Story. (Image courtesy of Shutterstock.com.)

EDITOR'S NOTE

Welcome to the first issue of *Constitutional Studies*. This journal is brought to you with the generous support of the Bradley Foundation and the Center for the Study of Liberal Democracy at the University of Wisconsin–Madison. While this first issue has been considerably delayed by a variety of technical factors, we are confident that future issues will be forthcoming on a regular and timely basis.

The mission statement for this journal describes its goal as the presentation of research and analysis concerning constitutions from a broad range of viewpoints and approaches. The selection of articles in this first issue bears out that mission statement.

In “Young Jeffersonians and Adult Marshallians: Constitutional and Regime Transitions in Public Schools and Nation-States,” Mark Graber explores ways in which constitutional theories appear in places far removed from the halls of appellate courts. Graber considers the provocative idea that there are distinct and characterizable forms of constitutionalism that appear in student councils. Using Jefferson and Marshall as two broadly drawn templates for constitutional reasoning, Graber proposes that the thinking about rules and their interpretation that occurs in student councils is no less “constitutional” than the reasoning of the justices of the U.S. Supreme Court; it just displays a different version of constitutionalism at work. The implications of Graber’s argument are that “constitutionalism” is a phenomenon that we can see all around us if we only look and if we are open to the possibility of multiple different forms of the concept.

In “Restoring Lost Liberty: François Hotman and the Nationalist Origins of Constitutional Self-Government,” Ethan Alexander-Davey provides us with a study in the intellectual history of constitutionalist thought. Focusing on the underappreciated work of François Hotman, Alexander-Davey shows unexpected nationalist

Constitutional Studies 1.1

©2016 by the Board of Regents of the University of Wisconsin System

This open access article is distributed under the terms of the CC BY-NC-ND 4.0 license (<https://creativecommons.org/licenses/by-nc-nd/4.0/>) and is freely available online at: <https://constitutionalstudies.wisc.edu> or <https://uwpress.wisc.edu/journals/journals/cs.html>

roots to what is usually thought of as liberal constitutionalism. Insofar as we seek to understand constitutionalism as a system of ideas, not merely a set of rules, this kind of excavation of the source materials makes an important contribution to our understanding. Ideas, as Alexander-Davey reminds us, have histories that shape and inform their meanings, and examining these histories challenges received notions of how different forms of constitutionalism relate to one another.

Clement Fatovic's article, "James Madison and the Emergency Powers of the Legislature," focuses on American constitutional practice, specifically the thinking of James Madison. Fatovic's exploration of Madison's treatment of emergency powers fills in a missing element in the thought of one of America's most important constitutional theorists. By extension, Fatovic's exploration of Madison's thinking points to the necessity of reading different elements of constitutional understanding together, as parts of a whole rather than as discrete, technical subjects. Fatovic's careful reading of Madison demonstrates that understanding the treatment of emergency powers in a constitutional theory illuminates the entirety of an approach to constitutionalism.

Thomas Keck's contribution, "Hate Speech and Double Standards," is of a different sort. Keck considers the unintended consequences of legislation intended to limit hate speech. While issues of legal doctrine are at the forefront of the discussion, Keck looks more deeply into the implications of legislation—the message that is sent to both those who are directly affected and those who are left out of the law's reach, the implications for analyzing other speech-related regulations—to consider the implications of legislation banning hate speech for constitutional principles generally in addition to specific issues of free speech protections. Keck's essay is thus a fine illustration of the way a question of constitutional law can be explored as a question of constitutionalism more broadly understood, an approach that has application in a wide range of areas.

Finally, Zoltán Szente contributes a study of ideology among justices of the Hungarian Constitutional Court in "The Political Orientation of the Members of the Hungarian Constitutional Court between 2010 and 2014." Szente applies methods and approaches developed by political scientists studying American courts to a comparative analysis of a critically important era. Szente's empirical and data-driven approach is a fine complement to the other approaches exemplified in this volume. His conclusions are disturbing, as his analysis indicates a strong and pervasive effect of political ideology in the constitutional decision-making process.

* * *

The image on the cover is a statue of John Marshall. The statue now resides in the rotunda of the first floor of the United States Supreme Court building. Marshall, of course, is an important figure in American legal history, but his presence on our cover is for another reason. It is a fine parlor game for historians to argue about when and where the first true “constitution” was created, and the intellectual roots of constitutionalism can be traced to ancient times. But the judicial opinions of John Marshall mark a turning point in modern constitutionalism, combining a theory of jurisprudence, a set of political theoretic principles, and recognition of conventional institutional practice. It is for this reason that we have chosen Chief Justice Marshall to provide the visual introduction to our journal.

Howard Schweber
Editor, *Constitutional Studies*

Jennifer Brookhart
Managing Editor, *Constitutional Studies*

YOUNG JEFFERSONIANS AND ADULT MARSHALLIANS

Constitutional and Regime Transitions
in Public Schools and Nation-States

MARK A. GRABER¹

ABSTRACT

Constitutional thinkers have much to learn about constitutions in general and constitutional transitions more specifically by extending their studies to all entities that purport to be constitutional rather than confining their analyses to the constitutions of nation-states or, in order to include American states, the constitution of semi-sovereign entities. The constitutions of student councils and nation-states create and empower governing institutions. Both are higher law than any edict enacted by the governing institutions they create. The reasons why high schools rarely experience constitutional transitions as disruptive help explain why nation-states almost always experience constitutional transitions as disruptive. The constitutions of many American states in crucial respects bear a closer resemblance to the constitutions of student councils than the constitutions of nation-states. The more a state constitution resembles that of a student council, some evidence suggests, the less likely that constitutional transformations or regime changes in that state are disruptive.

KEYWORDS: *Constitution, Student Council, Transition, Rule by Law, States*

1. Jacob A. France Professor of Constitutionalism, University of Maryland, Francis King Carey School of Law. Much thanks to Miguel Schor, Richard Albert, Sandy Levinson, Howard Schweber, and Jennifer Brookhart.

Constitutional Studies 1.1

©2016 by the Board of Regents of the University of Wisconsin System

This open access article is distributed under the terms of the CC BY-NC-ND 4.0 license (<https://creativecommons.org/licenses/by-nc-nd/4.0/>) and is freely available online at: <https://constitutionalstudies.wisc.edu> or <https://uwpress.wisc.edu/journals/journals/cs.html>

THE REPUBLIC OF IRELAND encourages students in all public secondary schools to draft and ratify constitutions that establish student councils. Section 27 (3) of the Education Act of 1998 declares, “. . . a board of a post-primary school shall encourage the establishment by students of a student council and shall facilitate and give all reasonable assistance to (a) students who wish to establish a student council, and (b) student councils when they have been established.”² The institutions responsible for implementing this measure, the Department of Education and Skills and the Office of the Minister for Children and Youth Affairs, promulgate guidelines stating, “Where a Student Council does not already have a constitution in place, it should be encouraged to draw one up.” These ministries assist student politicians in Ireland by setting up a website with sample constitutions of student councils (“Student Council Support” 2016). These laws, guidelines and websites are designed to begin the process of constitutional transformation throughout public post-primary schools in Ireland.

The impact of Section 27 (3) is difficult to discern from abroad, but fair reasons exist for thinking that constitutional transformations in Irish public schools are quite different from the constitutional transformations that capture the attention of constitutional theorists. Constitutional commentators frequently speak of constitutional transitions as both difficult and profound. Beau Breslin asserts, “New constitutions emerge out of the destruction of old and dysfunctional political orders” (2009, 31–32). Jon Elster maintains, the “link between crisis and constitution-making is quite robust” (1995, 370). The Irish Parliament almost certainly did not expect that their edict would disrupt public education throughout the realm, think that public schools in Ireland had become dysfunctional, or regard the nation as experiencing an educational crisis. The constitutions of student councils around the world are drafted, ratified, interpreted, amended, and abandoned without any of the consequences that constitutional commentators commonly attribute to constitutional transitions. The constitutional experiences of numerous constitutional associations that exist in civil society, constitutions of parent-teacher organizations, chess clubs, fraternal societies and the like, are similar to that of student governments. Constitutional change and transition are part of the normal life of the constituted entity, rather than a sharp, agonizing break with the constitutional past.

The constitutional experiences of Irish public schools, of public schools more generally, and of civic associations cries out for extending Ran Hirschl’s complaint about the parochial nature of constitutional commentary to the routine exclusion

2. Education Act, 1998, No. 51 of 1998.

in constitutional studies of the constitutions that exist in civil society. Hirschl criticizes the low ratio of national constitutions examined to actual national constitutions in comparative constitutional studies and the routine selection biases that present a distinctive category of national constitutions as encompassing the entire national constitutional experience. He speaks of

the pretense that insights based on the constitutional experience of a small set of “usual suspect” settings—all prosperous, stable constitutional democracies of the “global north”—are truly representative of the wide variety of constitutional experiences worldwide, and constitute a “gold standard” for understanding and assessing it. The question here is this: how truly “comparative” or generalizable is a body of knowledge that seldom draws on or refers to the constitutional experience, law, and institutions of the global south? (2014, 192–93)

No more reason exists for thinking that the relatively small number of national constitutions (and constitutions of semi-sovereign entities) fully captures the global constitutional experience, given the extraordinary number of civic associations with constitutions, than reason exists for thinking that the tiny set of global north constitutions is representative of the constitutional experience of nation-states. The constitutions of nation-states are worth studying as a distinctive category of constitutions, just as some comparativists have reasons for explicitly focusing attention only on a small set of stable constitutional democracies in the global north as a distinctive category of constitutions. Still, when the object of study purports to be the constitutional experience or constitutional transitions, no *a priori* reason exist for excluding constitutions of entities other than nation-states or semi-sovereign entities or for presuming that the constitutional experiences of student governments and civic associations shed no light on the constitutional experience more generally.

Constitutional thinkers have much to learn about constitutions in general and constitutional transitions more specifically by extending their studies to all entities that purport to be constitutional rather than confining their analyses to the constitutions of nation-states or, in order to include American states, the constitution of semi-sovereign entities. The constitutions of student councils are a different species of the constitution genus and do not, as commonly assumed, bear the same relationship to the constitutions of nation-states as James Madison does to Madison, Wisconsin.³ The constitutions of student councils and nation-states create and empower governing institutions. Both are higher law than any edict enacted by

3. Jack Balkin is responsible for this *bon mot* (1995, 1955).

the governing institutions they create. The differences between the two forms of constitutions are instructive. The reasons why high schools rarely experience constitutional transitions as disruptive help explain why nation-states almost always experience constitutional transitions as disruptive. The comparison between the constitutions of nation-states and the constitutions of student governments also explains why some nation-states experience disruptive regime change without changing constitutions, while public schools experience constitutional transitions without disruptive regime changes. The constitutions of many American states in crucial respects bear a closer resemblance to the constitutions of student councils than the constitutions of nation-states. The more a state constitution resembles that of a student council, some evidence suggests, the less likely that constitutional transformations or regime changes in that state are disruptive.

The constitutions of nation-states and the constitutions of student governments differ sharply in their transgenerational origins and aspirations, and the presence or absence of these transgenerational origins and aspirations helps explain why some constitutional transitions are more disruptive than others. The constitutions of most nation-states are drafted by transgenerational coalitions that enter and exit the political world in fits and starts. The persons responsible for national constitutions tend to be Marshallian in their belief that a constitution should “endure for ages to come.”⁴ Most nation-states experience political crises when their constitutions are created, modified or abandoned because those constitutions are designed to shape the polity for the indefinite future. Future generations are expected to maintain the constitution as the most important symbol and manifestation of the regime’s fundamental commitments. The constitutions of most student councils are drafted by a distinctive generational cohort that enters and exits the school at the same time. Public school students and principals tend to be Jeffersonian in their belief that each new generation is free to adopt the governing arrangements they think best. Student governments and other similarly situated constitutional entities in civil society experience no distinctive political crises when their constitutions are created, modified, or abandoned because no general expectation exists that these constitutions will outlast the framing generation or exist longer than the particular problems that brought them into being. These constitutions are instruments of governance that may be changed whenever governing coalitions or circumstances change. The constitutions of such semi-sovereign entities as American states often resemble the constitutions of student councils in their relative lack of transgenerational coalitions

4. *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819).

and aspirations. Perhaps for this reason, American states tend to experience constitutional transitions as far less disruptive than nation-states.

Marshallian nation-states experience a different relationship between constitutional transitions, regime changes, and political disruption than the Jeffersonian constitutional entities that exist in civil society. Marshallian regimes that regard constitutions as the most important manifestation and symbol of a transgenerational project have the following characteristics.

1. Regime change may occur without constitutional change.
2. Constitutional change is almost always accompanied by regime change.
3. Constitutional and regime changes are inherently disruptive, even when regime changes are not accompanied by constitutional changes.

Jeffersonian regimes that regard constitutions as instruments of governance tend to have the following characteristics:

1. Constitutional change may occur without regime change.
2. Regime change is almost always accompanied by constitutional change.
3. Neither constitutional change nor regime change is inherently disruptive, though disruptions may occur depending on the underlying politics.

Part I of the essay maintains that the constitutions of student councils are constitutions in the same sense that high school basketball is basketball, even though professional basketball is played by different rules, and that the high school musical is a musical, even though the score may be less demanding and the lyrics somewhat different than the same show performed on Broadway. These youth activities are distinctive versions or categories of a more general activity, not pale imitations of the pure adult form. Part II discusses the Marshallian nature and ambitions of nation-state constitutions. Transgenerational coalitions frame, ratify, and maintain these constitutions, these constitutions initiate transgenerational projects, and they are the most important symbol or manifestation of those projects. The presence of these transgenerational coalitions and projects practically guarantees that constitutional transitions will be disruptive and explains why in strong Marshallian constitutional orders disruptive regime changes may take place without any apparent constitutional transition. Part III discusses the Jeffersonian nature and ambitions of student council constitutions. Distinctive generational cohorts frame these constitutions, these constitutions tend to be limited to generational projects, and they are more often regarded as instruments of governance than as sacred symbols of

fundamental regime commitments. The absence of transgenerational coalitions and projects helps explain why constitutional transitions in public schools are rarely disruptive and public schools frequently experience constitutional transitions without accompanying regime changes. Part IV notes the Jeffersonian tendencies of many state constitutions. Most state constitutions most of the time are instruments of governance rather than symbols and manifestations of transgenerational projects. As such, constitutional transitions in American states have historically been less disruptive than constitutional transitions in most nation-states, except during and immediately after the Civil War when state constitutions were invested with Marshallian regime commitments. Part V concludes with thoughts on what the practice of Jeffersonian constitutionalism in civil society suggests about the possibilities of a more self-conscious Jeffersonian constitutionalism in nation-states. As even Jefferson suspected, self-conscious Jeffersonian orders require generations that enter and exit the world together, limit their ambitions to their foreseeable future, and regard constitutions as instruments of governance rather than sacred symbols of fundamental values. These conditions better capture the constitutional experience of public school students than their adult selves.

The following discussion, on the constitutional experience in public schools is necessarily impressionistic. Westlaw word searches failed to turn up a single article written over the last thirty years that even mentioned the constitutions of student councils or other constitutions in civil society. JSTOR was similarly unhelpful. The rare commentaries on the constitutions of student councils occur in short pieces directed at teachers and principals (see Armstrong 1970; Kaminsky 1962). No general empirical study appears to have ever been conducted on the writing, modifying, and abandoning of student council constitutions or, for that matter, the constitutions of civic associations. The consequence of this dearth of information is that this paper relies heavily on a random set of student council constitutions taken from the web, a few internet searches on constitutional transitions in primary and secondary schools, and, mostly, my experience in 1973 as the James Madison of Mephram High School and conversations with others who performed that noble function in their public school.

A brief survey of university and chess club constitutions suggests that this article's conclusions hold for the constitutions of student governments at major universities and the constitutions of various organizations in civil society that are not directly subordinate to state officials as is the case for student governments in public schools. The Preamble to Constitution of the Harvard Graduate Student Government, for example, is generic and makes no mention of any unique mission of that institution (Harvard 2014). The Constitution of the Searcy Knightlife Chess

Club consists largely of rules and regulations, eschewing broad abstract statements of principle whose meaning might be contestable. Far more research obviously needs to be done on the matter; but at least as a matter of practice, the constitutions of national-states are symbolic representations of a people with distinctive histories and aspirations, while the constitutions of civic associations appear to be instruments of government. In theory, the preamble to the Constitution of the Harvard Graduate Student Government might elaborate the distinctive place of that institution in global education, just as in theory the constitution of nation-states might simply set out rules for governing a polity. The practice of nation-building, however, seems to require constituting a people (see Anderson 1983; Smith 2003), whereas the process of organizing a chess club or student government seems to merely require laying out rules.

I. STUDENT GOVERNMENT CONSTITUTIONS AS CONSTITUTIONS

Comparative constitutional studies routinely ignore the vast majority of texts that purport to be “constitutions” and entities that purport to be constitutional. Selection biases are often unconscious. Much comparative constitutional commentary assumes without argument that the constitutional experiences of western regimes, regimes that have western aspirations, or nation-states encompass the full dimension of the global constitutional experience.⁵ Some scholars forthrightly state exclusionary principles. Walter Murphy excluded regimes that do not respect basic human rights from the constitutional family, even if their founding document is called a “constitution.” “Constitutionalism,” he wrote, “demand[s] adherence . . . to principles that center on respect for human dignity and the obligations that flow from those principles” (2007, 15–16). Other distinguished commentators maintain that the constitution of New York and the constitutions of the other forty-nine states are not really constitutions. James Gardner writes:

The diversity of state constitutional provisions and bills of rights . . . contradicts any “universalist illusions” that state constitutions embody truly fundamental values. State constitutions are not epic social texts; they have “no ‘Founders’; no Federalist Papers; no equivalence of constitution and nationhood; no singularity.” Indeed, the residents of a state cannot really be termed a “people” in the constitutionalist sense because “our state boundaries do not follow ethnic, linguistic, or religious lines.” A state itself is thus not a distinct polity, but merely a “territorially

5. For variations on these complaints, see Hirschl (2014) and Zackin (2013).

defined legal system”—an artificial rather than an organic entity. (1993, 1029–30; quoting Hans Linde)

If neither Indonesia nor New York is a constitutional entity, then clearly the student government of Mepham High School and most civic associations fare no better for all the reasons discussed by Professors Murphy and Gardner. The constitutions of those entities are not epic social texts grounded in a core commitment to human dignity, the student body (or members of the local chess club) is not a people, and neither public schools nor civic associations are natural entities.

The constitutional provincialism that excludes the constitutions of Indonesia, New York, and Mepham High School from the constitutional family is nevertheless puzzling. “Constitution” is not a word like “joint,” which can refer to a knee, a marijuana cigarette, or a speakeasy. When proponents of “constitutional theocracy” (Hirschl 2010), members of a state constitutional convention, or student leaders draft a constitution for their nation-state, state government, or student council of their secondary school, respectively, they think they are drafting a document whose crucial characteristics resemble or are identical to those of the Constitution of the United States and the Constitution of South Africa. The constitutions of student governments and other civic associations are not sham or façade constitutions, constitutions that are designed to disguise a regime’s lack of commitment to fundamental constitutional values.⁶ Students writing constitutions for their public schools are making good-faith efforts to spell out the rules and procedures that will determine in practice the actual powers and structure of the student council, as well as guide future interactions between the student body and the school administration.

Experts routinely use “constitution” without scare quotes when discussing the constitutions of student councils. The Irish Department of Education and Skills, when calling for student councils to adopt constitutions, almost certainly had lawyers on staff who understood the significance of referring to the texts that establish student councils as “constitutions.” “Constitution of University Student Government—State University” is one of the legal forms found in the second edition of *American Jurisprudence*.⁷ Educators routinely use “constitution” when referring to the texts that create and empower student governments. An article in the *Clearing House* declared, “no one would advocate the organization of a student council without adoption of the student-council constitution by the students” (McGinnis 1944, 463). Law professors use “constitution” to refer to these texts in ordinary

6. For sham and façade constitutions, see Law and Versteeg (2013) and Sartori (1962, 861).

7. 4B Am. Jur. Legal Forms 2d § 60:56.50.

conversation. A recent discussion on the constitutional law listserv explored the merits of having students write a constitution for their class. No member of the listserv declared that such a document by definition could not be a constitution (see Caplan 2015).

The constitutions of student councils and the constitutions of nation-states are fundamental instruments for governance. Both create and empower institutions. The constitution of the student government of Colonial High School establishes a student council, composed of a “president, vice-president, corresponding secretary, recording secretary, and treasurer,” as well as representatives from “each grade level,” and authorizes that institution “to plan and regulate all money-making policies in the area of student government” (2011, Article 6 § B). That constitution is higher law than any ordinary measure passed by the student council. The by-laws of the student council of Colonial High School may “not conflict with the elements and spirit of this constitution” (Article 6 § A).

That state governments and student councils may have different purposes than nation-states does not mean their fundamental law is less of a constitution. The constitutions of the student governments in most public schools make no pretense to be documents rooted in a theory of human dignity, do not tell epic stories, or purport to constitute a people. Many state constitutions do not serve those functions. If the central elements of modern constitutions are “a hierarchy of legal authority, the rule of law, and limited government” (see Graber 2013, 24), then the constitution of the Student Council of Colonial High School and the constitution of New York are constitutions proper. “Constitutions,” Hans Linde writes in the context of state constitutions, are “charters for governing” (1993, 932). The same may be said for the constitutions of student governments and of many entities in civil society.

High school constitutions differ from the constitutions of nation-states, but similar differences characterize other common high school and adult activities without any felt need to dispute terminology. High school basketball is not played under the same rules as professional basketball.⁸ The high school musical often has a simpler score and different lyrics than the same musical performed on Broadway.⁹ Nevertheless, no one claims that the thirty-two minute game without a shot clock is

8. Compare the National Federation of State High School Associations’s *2014–15 Basketball Rules Book* (2014) with the National Basketball Association’s *Official Rules of the National Basketball Association, 2013–14* (2013).

9. See generally Music Theatre International (2016), providing 30 and 60 minute musicals for young performers. Thanks to Professor Naomi Graber for this source.

not basketball or that the students are not performing “Hairspray” because certain risqué lyrics have been cut. Even greater differences emerge when we consider the ways younger children perform certain activities. Sometime around the age of thirteen, all Jewish children have a bar or bat mitzvah and appear in some summer camp version of *Fiddler on the Roof* that bears only a family resemblance to the Broadway show. Children regularly play what they and others claim is “baseball” on less travelled streets, with three persons on a team and no pitcher.

High school activities are distinctive forms of a general activity, not simply slimmed down versions of the corresponding adult activity, such that analysis of the most robust version properly focuses solely on adult behavior. Participants in many high school activities are more likely to adhere strictly to the official rules or scripts than participants in the adult activity. Professional basketball players are less likely than college or high school players to be penalized for such violations as palming and travelling. Referees who are loath to blow the whistle when such superstars as Michael Jordan take an extra step to make a spectacular dunk shot adhere rigorously to the rules when high school players take the same extra step when showboating (see generally, Graber 1999). High school musical versions of Gilbert and Sullivan operettas are more likely to sing the words William Gilbert wrote than modernize the lyrics. Professional companies and community theaters performing “I’ve Got a Little List” from *The Mikado* are freer to sing about the persons their twenty-first century audiences might think “never would be missed”¹⁰ than high school students performing under the stern eye of the principal.¹¹ Professional theater companies are more inventive when staging such Shakespeare plays as “A Midsummer’s Night Dream” than high school theater teachers.¹²

Judged by Justice Antonin Scalia’s preferred standards, the constitutions of most student councils are more law-like than the constitutions of most nation-states. Scalia emphasized the rule function of constitutionalism. When possible, he insisted, law should aim for “exact pronouncements” that make clear what conduct is forbidden, what conduct is permitted and what conduct is mandatory (1989, 1182; quoting Aristotle). He would have “the *Rule* of law, the law of *rules* . . . extended as far as the nature of the question allows” (1187). Most constitutions of student

10. For instance, “[t]here is no song in the works of Gilbert and Sullivan that enjoys as rich a tradition having its lyrics revised as does Ko-Ko’s ‘I’ve Got a Little List’ song” (Gilbert & Sullivan 2016).

11. This is strictly impressionistic. The better claim may be that the student musical may change the lyrics but be far less risqué than the community theater or Broadway show.

12. As discussed earlier, most of this is impressionistic, based on personal observations and conversations with students.

councils meet this standard. Provisions tend to be clear and not subject to much interpretive dispute. The powers of the student council of Greenville High School, for example, include:

To consider all financial matters relating to Student Body funds.

To approve the spending of money by organizations at GHS by the Executive Secretary or Treasurer.

To approve the spending money by organizations at GHS unless said organization has a President (chairman) and/or Secretary/Treasurer. (2016)

The analogous provision in the Constitution of the United States, Article I, Section 8, paragraph 1 vests Congress with far more ambiguous powers to “provide for the common Defense and general Welfare of the United States.”¹³ The spending clause in the Constitution of the United States and similar provisions in the constitutions of most nation-states illustrates how the constitutions of nation-states fare worse when measured by Justice Scalia’s legal standards. Numerous provisions are vague and subject to substantial discretion. The Canadian Charter of Rights and Freedoms, for example, “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”¹⁴ Clearly, this and related provisions in other nation-state constitutions do little to advance the constitutional commitment to rule by clear law.¹⁵ No such provision appears in any constitution of a student council surveyed.

Adult activities garner more publicity and scholarly attention because they are usually more popular, more skillfully performed, and more salient to more lives than the corresponding youth activities, not because they are the pure form of that activity. More people follow LeBron James than the best high school basketball player in Ohio. The best authors write for the Broadway stage and not for the one-act festival in Des Moines, Iowa. The Constitution of the Republic of Ireland has had far more impact on far more people than the constitution of any student council framed under Section 27 (3) of the Education Act of 1998. Nevertheless, that LeBron James is a better basketball player than I was forty years ago and Steven

13. For some of the contemporary debates over the spending clause, see *National Federation of Independent Business v. Sebelius* 567 U.S. ____ (2012); *South Dakota v. Dole*, 483 U.S. 203 (1987).

14. Constitution Act, 1892, Part 1: Canadian Charter of Rights and Freedoms, Article 1.

15. For that constitutional commitment, see Graber (2013, 29–32).

Sondheim writes better musicals than I did in college does not entail that the game I played in high school was “basketball-minus” or the musical I wrote in college was a “musical-minus,” any more than the fundamental law of the student government of Mephram High School that I helped write is a constitution-minus because the Constitution of the United States created a more powerful and enduring government. Constitutions are not more or less constitutions in light of their influence, their prominence, and the skill of the drafting, otherwise the Constitution of Mali would almost certainly be less of a constitution than the Constitution of the United States. Good reasons exist for studying the category of constitutions that are constitutions of nation-states, but those reasons concern the importance of nation-states and not the pristine quality of their constitutional form.

Comparing all forms of basketball, musicals, constitutions, and other related activities engaged in by high school students and adults may improve analysis by increasing observations. Consider a statistically sophisticated professional basketball coach who is aware that different professional teams have different capacities to defend a play called the pick-and-roll. A statistical study of all 30 professional teams might provide some support for the conclusion that the ability to defend the pick and roll is correlated with the amount of practice time devoted to defending that offensive play. Such a study would nevertheless be handicapped by the limited number of professional teams, which limits the number of variables that can be considered and the confidence level of any conclusion. After noting a similar variance in capacity to defend the pick and roll among college and high school basketball teams, our coach might be able to conduct a more robust statistical study that demonstrates that, at all levels of basketball, teams whose players share the ball on offense defend the pick-and-roll better than teams whose offense revolves around one or two players.

Comparing the adult and youth forms of a common activity may also inform analysis by increasing variance. Consider the problems of studying the influence of the star-system on Broadway. We may not learn as much as we would like from examining only Broadway shows if the vast majority of Broadway musicals are vehicles for superstar actresses and actors. By including community theaters and high school productions, we can better see how musicals are selected and performed in the absence of a star system. We may learn, for example, that Broadway producers prefer shows that highlight particular stars and that shows on Broadway are performed in ways that highlight those stars, while high schools tend to select shows that are more ensemble oriented and are performed in ways that diminish attention on any one or two persons. Stars on Broadway sometimes perform monologues or sing encores not in the script. High school musicals more commonly “redistribute”

songs and lines from the star to other cast members. Without the variance provided by examining high school musicals that are not vehicles for stars, we cannot determine fully the myriad ways in which the star system structures professional musicals.

Including the constitutional experiences of public schools in the analysis may provide crucial perspectives on the constitutional experiences of nation-states and semi-sovereign entities during constitutional transitions and regime changes. We know that variance exists among nation-states in the relationship between constitutional transitions and regime changes. While constitutional transitions are commonly associated with regime changes, Americans after the Civil War experienced regime change without abandoning entirely their inherited constitutional text.¹⁶ Variance exists among American states in the extent to which constitutional transitions are disruptive. Louisianans experienced frequent and violent constitutional transitions in the decades after the Civil War, but as frequent but peaceful constitutional transitions during the twentieth century.¹⁷ During the later period, Louisianans experienced constitutional transition without regime change. As is the case with Louisiana and other American states, public school student councils experience frequent constitutional transitions and regime changes without experiencing much disruption, and constitutional transitions in public schools are frequently not associated with regime change. By identifying the common factors that ease constitutional transitions and regime changes in public school student councils and many American states, we may be able to learn more about the relationship between constitutional transitions and regime changes in nation-states, and why regime and constitutional change is more turbulent in nation-states than in civil society.

II. THE CONSTITUTIONS OF ADULT MARSHALLIANS

Chief Justice John Marshall in *McCulloch v. Maryland* spoke of “a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.”¹⁸ What Marshall regarded as the precise referent of “a constitution” in that sentence is unclear. “A constitution” might refer only to the Constitution of the United States, whose preamble declares an aspiration to “secure the Blessings of Liberty to ourselves and our Posterity.”¹⁹ More likely, Marshall

16. For a discussion in relation to Louisiana, see Dinan (2006, 12) and Hargrave (1991, 12–13).

17. For the constitutional history of Louisiana, see Hargrave (1991).

18. *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819).

19. Constitution of the United States, Preamble.

used “a constitution” generically, expressing his belief that one defining feature of a constitution is that the text is “intended to endure for ages to come.” That Marshall was speaking of constitutions generically is supported by the most famous sentence in *McCulloch*, “we must never forget that it is a constitution we are expounding,”²⁰ a sentence that plainly speaks of “constitution” as a generic.

Many commentaries agree that constitutions commit regimes to transgenerational projects. Claude Klein and Andras Sajó declare, “The stability of the constitution remains a characteristic aspiration: drafters intend to set values and institutions for generations to come” (2012, 421). Hannah Arendt described constitutions as attempts to arrest “the cycle of sempiternal change, the rise and fall of empires, and establish an immortal city” (1963, 231). Norms and laws that are not intended to be transgenerational, on this view, are not constitutional norms and laws.

Most national constitutions articulate the Marshallian ambition to endure for ages to come. Preambles commonly contain language expressing the framing intention to bind future generations. Preambles and subsequent provisions announce purposes that cannot be achieved during the lifespan of the founding generation. The constitutions of most nation-states aspire to fashion a people, as well as a polity.

Virtually all national constitutions are intended to be transgenerational. Preambles commonly maintain that the regime being established is intended to endure into the unforeseeable future, if not forever (Breslin 2009, 46–68). The preamble to the Constitution of Cambodia speaks of “the nation’s future destiny of moving toward perpetual progress, development, prosperity, and glory.”²¹ The Constitution of Uganda confidently proclaims that the people “solemnly adopt, enact and give to ourselves and our posterity this Constitution.”²² The Constitution of Spain “is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards.”²³ These transgenerational commitments are repeated in constitutional preambles despite the brute fact that most Marshallian constitutions in practice do not survive to adulthood (Elkins, Ginsburg, and Melton 2009). Iranians in 1979 adopted a constitution that spoke of “continuous leadership and perpetual guidance”²⁴ almost immediately after toppling a regime whose

20. *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819).

21. The Constitution of the Kingdom of Cambodia, Preamble.

22. The Constitution of the Republic of Uganda, 1995, Preamble.

23. The Constitution of Spain, Section 2.

24. The Constitution of Iran, 1979, Article 2.

constitution was designed to “continue unchanged until the appearance of His Holiness the Proof of the Age.”²⁵

The constitutions of nation-states do not have explicit or implicit expiration dates, and they lack provisions contemplating their possible demise. The constitutions of nation-states vary in their provisions for amendment, but do not contain provisions detailing how they are to be abandoned and replaced, or provisions indicating the conditions under which abandonment and replacement are legitimate. Few mandate periodic review to determine whether wholesale revision or replacement is necessary.²⁶ National constitutions do not contain the provision found in many state constitutions in the United States that declares, “That all Government of right originates from the People, is founded in compact only, and instituted solely for the good of the whole, and they have, at all times, the inalienable right to alter, reform, or abolish their Form of Government in such manner as they may deem expedient.”²⁷

The Marshallian constitutions of nation-states regularly commit regimes to transgenerational goals. These projects may be acquiescent or militant (see Jacobsohn 2010). Acquiescent constitutions seek to ensure that future generations do not abandon practices established in the past. Justice William O. Douglas in *Griswold v. Connecticut* spoke the language of acquiescent constitutionalism when protecting the right of married couples to use birth control. His opinion declared, “We deal here with a right of privacy older than the Bill of Rights.”²⁸ The Constitution of Iran engages in acquiescent constitutionalism when articulating a commitment to “longstanding belief[s] in the sovereignty of truth and Qur’anic justice.”²⁹ Militant constitutions seek to ensure that future generations achieve aspirations announced in the past. Justice Douglas in *Harper v. Virginia State Bd. of Elections* spoke the language of militant constitutionalism when protecting the right to vote. His opinion declared,

. . . the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have

25. The Constitution of Iran, 1906, The Supplementary Fundamental Laws of October 7, 1907, Article I.

26. Section 49 of the Constitution of Canada requires a review after fifteen years of the provisions for amendment but does not mandate review of other constitutional provisions.

27. Constitution of Maryland, Declaration of Rights, Article I.

28. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

29. Islamic Republic of Iran Constitution, Article I.

restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change.³⁰

The Constitution of Malawi engages in militant constitutionalism when committing the regime to “achieving . . . gender equality,” better nutrition, and health, improving the environment, rural life and education, and ensuring the peaceful settlement of disputes.³¹ Acquiescent and militant constitutions are united by their transgenerational ambitions. Both seek to shape the unforeseen future, even as they diverge on the degree to which they envision that ideal future as similar to the present.

The Marshallian constitutions of nation-states seek to forge and maintain national identities. The constitutions of nation-states conceive of citizens as sharing certain fundamental traits and not simply as people who find themselves in the same civic space with needs to form a common government. *Federalist* 2 celebrates “Providence” for giving “this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government” (Pole 2005, 6). Quite frequently, constitutional texts insist that their constituent people share a common history that informs their common values. The Constitution of France speaks of a “French people” who “solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789.”³² The Constitution of Saudi Arabia declares that “the family is the kernel of Saudi society, and its members shall be brought up on the basis of the Islamic faith, and loyalty and obedience to God, His Messenger, and to guardians, respect for and implementation of the law, and love of and pride in the homeland and its glorious history as the Islamic faith stipulates.”³³ While the Constitution of Saudi Arabia maintains that the Saudi Arabian people are united in their celebration of the past, the Constitution of South Africa maintains that the South African people are united in their repudiation of the past. The constitution of the latter nation-state begins by declaring “We, the people of South Africa, recognize the injustices of our past” and promises to “heal the divisions of the past

30. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 669 (1966).

31. The Constitution of Malawi, Chapter II, Section 13.

32. The Constitution of France, Preamble.

33. The Basic Law of Governance, Saudi Arabia, Chapter Three, Article 9.

and establish a society based on democratic values, social justice and fundamental human rights.”³⁴

Marshallian constitutions enjoy transgenerational support. The coalition that framed and ratified the constitution of the United States included Benjamin Franklin, who was 81 at the time of the constitutional convention, and James Madison, who was 36. The coalition that framed and ratified the Constitution of South Africa was similarly composed of seasoned veterans and political novices (see Klug 2000). When the older members of the pro-constitution coalition leave the political scene, they are replaced by younger coalitional partners as committed to the constitutional vision that animated their predecessors. Andrew Jackson in his “Farewell Address” spoke for the second generation of Marshallian constitutionalists in the United States when he declared: “Our Constitution is no longer a doubtful experiment; and, at the end of nearly a half a century, we find that it has preserved unimpaired the liberties of the people” (Williams 1847, 948). Generation gaps exist. Ran Hirschl details how constitutional politics is often a struggle between established coalitions who support the constitutional order and proponents of a different regime. Nevertheless, in none of the four countries Hirschl surveyed was the established coalition looking to retain power lacking in younger members prepared to carry the constitutional torch to the next generation of citizens (2007).

That Marshallian constitutions are created and maintained by transgenerational coalitions for the purpose of realizing transgenerational goals influences the processes of constitutional transition and regime change in Marshallian nation-states. Transitions from one constitution to another are disruptive.³⁵ Transitions from one constitution to another tend to occur only when regime change occurs. Disruptive regime changes sometimes occur in the absence of constitutional transformation, understood as the replacement of one foundational text with another.

Transitions from one constitution to another are likely to be disruptive when a constitution created and maintained by a transgenerational coalition is by definition or aspiration designed to “endure for ages to come.” Marshallian constitutions are designed to control the future. Marshallians have a vision of a particular future, a particular people who will flourish in that future, and a constitution designed to bring about that future. As such, Marshallian constitutions are thought

34. Constitution of the Republic of South Africa, 1996, Preamble.

35. Ran Hirschl offers an important corollary to the claim made in this paragraph. He observes that some political coalitions create constitutions and empower judiciaries in order to preserve an existing political regime (2007). Hence, the important of “transitions from one constitution to another” as opposed to “constitutional transitions.”

not to expire in the natural course of things or become outdated over time. Instead, Marshallian constitutions are the most salient manifestation and symbol of a transgenerational project (Corwin 1936). The constitution and the transgenerational project stand together. Given this central place of a Marshallian constitution in a political regime, persons are likely to call for constitutional replacement only when they wish to challenge a particular transgenerational project and not merely because they think a different constitution a better means for achieving existing constitutional aspirations. Constitutional transitions involve disruptive struggles between factions with inconsistent visions of the good polity rather than peaceful debates over how the national legislature might be structured to foster common values.

Constitutional transitions in Marshallian orders are almost always a consequence of regime change. Marshallian constitutions are sites for political struggles, as proponents of one constitutional vision seek to supplant proponents of another constitutional vision. The supporters of an existing political regime regard their Marshallian constitution as the important source and symbol of that regime's commitments, not a mere instrumental means of good governance. Hence, the only factions championing constitutional transition are likely to be those factions that simultaneously call for regime change. The Central American experience is typical. Zachary Elkins, Tom Ginsburg, and James Melton observe,

The Dominican Republic and Haiti represent cases of regular death and genetic defects. The pattern is one of churn: each incoming regime uses its power to adopt a new constitution, without inclusion of the other side. This in turn leads to a self-reinforcing pattern of constitutional death. Parties do not invest in negotiation, and constitution making becomes an all or nothing proposition. Constitutions are not devices for accommodation, but for dominance, and so are replaced whenever the particular dominant faction leaves. (2009, 188)

Americans replaced the Articles of Confederation with the Constitution of the United States when more nationalist oriented Federalists seized control over national affairs from more locally oriented anti-Federalists (see Jensen 1966). Charles de Gaulle rose to power in France by bringing about the death of the Constitution of 1946 and creating a strong presidentialist regime (Elkins, Ginsburg, and Melton 2009, 170–71). Both France and the United States have experienced regime change without constitutional transition, but neither has experienced constitutional transition without regime change (162–171).

Marshallian constitutions create dynamics that foster regime change without constitutional transition. Because the Marshallian constitution is intended to endure forever and constitute a distinct people with distinctive aspirations, pressures exist within a polity for all factions to present themselves as the party of the Constitution. Politics in a Marshallian regime may be structured by competition between different parties that dispute the proper interpretation of a constitution that is uniformly regarded as the most important symbol of national unity rather than by competition between pro-constitution and anti-constitution parties. Americans are particularly prone to invest their constitution with fundamentally inconsistent visions. Each of the three major political parties that structured constitutional politics before the Civil War claimed to be the party of the people who remained faithful to the Constitution. Jacksonian Democrats sought to preserve constitutional institutions from the money power. Whigs sought to preserve constitutional institutions from spoilsmen. Republicans sought to preserve constitutional institutions from the slave power (Leonard 2002; Graber 2014). When Republicans wrested control of the national government from Jacksonian Democrats immediately before, during, and immediately after the Civil War, fundamental regime change occurred, even though only three constitutional amendments were added to the Constitution (see Eisgruber 1995).

The United Kingdom presents an even starker example of how Marshallian constitutionalism encourages regime change without constitutional transition. The unwritten English Constitution is said to exist from time immemorial. As a result, throughout most of English history, political movements have presented their reforms as expressions or restorations of the ancient constitution rather than as constitutional amendments, constitutional reforms, or new constitutional commitments. During the debates leading up to the English Civil War, James Coke and other parliamentarians, when challenging what James I and Charles I thought were time-honored royal prerogatives, repeatedly invoked Magna Carta for the propositions that the king could not raise revenues in any way without permission of Parliament (Graber and Gilman 2015, 284–94) and that the king had to explain the cause of any detention in a habeas corpus procedure (470–80). The parliamentarians responsible for the Nineteen Propositions claimed that a legislative right to approve royal ministers and royal marriages was consistent with existing constitutional practice (276–79). This parliamentary vision triumphed in the English Civil War and Glorious Revolution. By the end of the seventeenth century, England had been transformed from a monarchy to a regime largely governed by Parliament without any claim by the winners of that struggle that the character of the regime had changed or that any constitutional transition had occurred.

III. THE CONSTITUTIONS OF YOUNG JEFFERSONIANS

Thomas Jefferson rejected the Marshallian vision of transgenerational constitutional projects and coalitions. The Sage of Monticello famously insisted that all constitutions expire after a short period of time. In a letter dated September 6, 1789, he informed James Madison,

No society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation. They may manage it then, and what proceeds from it, as they please, during their usufruct. . . . The constitution and the laws of their predecessors extinguished them, in their natural course, with those whose will gave them being. . . . Every constitution, then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force and not of right. (1999, 596)

This passage makes a normative and definitional claim. The well-known normative claim is that all constitutions expire after a short period of time. The lesser known definitional claim is that constitutions need not, indeed, cannot, be intended for ages to come. A text may count as a constitution even if that text is self-consciously designed “to set values and institutions” for only a limited period of time.

The constitutions of most student councils and organizations in civil society are quintessential Jeffersonian.³⁶ No one thinks the Constitution of the Mephram High School Student Council is intended to endure for ages to come or bind generations yet unborn. The constitutions of most student councils are neither acquiescent nor militant. They are instruments for governance rather than symbols of and foundations for transgenerational projects. The preambles to the constitutions of student councils are usually generic. The texts are limited to provisions that create

36. The following analysis relied on the sample constitutions prepared for Irish public schools noted in “Student Council Support” (2016), the 1973 Constitution of Mephram High School, which I helped write, and several constitutions of student governments taken from a random web search. They were the Student Council Constitution of Henry E. Harris School, the Constitution of Colonial High School Student Council, the Holleman Elementary Student Council Constitution, the Student Council Constitution of Horace Mann School, the John M. Bailey Student Council Constitution, the Student Council Constitution of I.M. Terrell Elementary, the John Will Elementary Student Council Constitution, the Student Council Constitution of Kay Granger Elementary, the Mansfield High School Student Council Constitution, the WHS (Weston High School) Student Council Constitution, the Greenville High School Constitution, the General Studies Student Council Constitution, the Lincoln East High School Student Council Constitution and ByLaws, and the MTI Student Council Constitution and ByLaws. In addition, for specific reasons explained in the text, the Constitution of the Little Rock Central High School Student Council was surveyed.

and empower governing institutions. Few if any call for future generations to join a common enterprise. Few if any seek to fashion a student body with a distinctive identity.

The Jeffersonian constitutions of student councils lack provisions that appeal to future generations. These texts do not contain expiration dates, but most date from the twenty-first century. No constitution surveyed made reference to posterity, perpetuity, or permanence. Some Jeffersonian constitutions that structure student governments contain provisions that clearly state the general expectation that the constitution will have a short shelf life. Many constitutions surveyed had provisions stating, “The Constitution must be reviewed on a yearly basis” (Lincoln East 2016, Article VII § 1D). This constitutional commitment to periodic revision and replacement partly reflects the common understanding that writing constitutions for a public school student council is a valuable educational opportunity that should be repeated often (see generally Kaminsky 1962). Still, given that writing a new constitution for a nation-state might seem to be as valuable an educational opportunity for adults, the provisions calling for periodic review in the constitutions of student councils also reflects the common understanding that nothing problematic exists with having each new generation of students make constitutional decisions for themselves.³⁷

The Jeffersonian constitutions of most student councils are remarkably generic in their ambitions. Those constitutions that express what might appear to be trans-generational aspirations state such purposes as preparing students for citizenship or fostering better cooperation between students and teachers, aspirations that characterize all public schools. The preamble of the Constitution of Marion Technical Institute is representative. That text declares:

We, the students of Marion Technical Institute, in order to:

- Provide a democratic forum in which students can address school-related issues that affect their lives;
- Maintain a continuous communication channel from students to both faculty and administration . . . ;

37. Remarkably, the constitutions of most student governments are among the most difficult to amend in the world. Most follow the United States in requiring strong supermajorities to make any changes (see Kaminsky 1962, 307). The best explanation for this may be that the constitutions of most student governments take the constitution of their nation-state as a default rule. Still, the constitutions of student governments suggest that the need to modify Donald Lutz’s acute observation that more flexible interpretation is associated with harder to amend constitutions (1995). The better rule may be that more flexible interpretation is associated with constitutions that are either hard to amend or hard to replace.

- Provide leadership training for students in the duties and responsibilities of good citizenship . . . ;

. . . .

do hereby establish and declare this, the official constitution of the Marion Technical Institute Student Council. (Marion 2006, 1)

None of the student council constitutions surveyed suggest that the school in question has a distinctive purpose that the student government was created to maintain and realize. No constitution announced a distinctive commitment to becoming better Eagles or Pirates, maintaining the proud traditions of that school, or abandoning the heinous school practices of the past. Virtually all constitutional provisions seem of the cookie-cutter variety, as if the students had before them several sample student council constitutions and choose a number of provisions from each. Constitutional borrowing, this brief survey indicates, is alive and well in American public schools largely because no one appears to believe that conditions in some public schools compel student leaders to adopt different institutions than those adopted by the student councils in the school districts to the immediate south or three thousand miles away.

The Jeffersonians constitutions of most student councils are as generic in their depiction of the student body. Readers will learn almost nothing about a school's demographics from reading the constitution of that school's student council. The texts surveyed present no information about the racial, gender, religious, social class, or ideological composition of the students at the school or in the school district. The constitutions of student governments are as oblivious to history. Over the past half-century, public schools have been the sites of bitter conflicts over race and religion. None of these conflicts appear to have left a mark on various student council constitutions. Most striking, perhaps, the Constitution of the Little Rock Central High School Student Council bears no trace of the racial controversies that wracked that school during the 1950s.³⁸

The Jeffersonian constitutions of most student governments are created and maintained by a distinctive and narrow generational cohort. Generational cohorts in public schools arrive and exit as a group. The coalition that framed the 1973 Constitution of the Mephram High School student council was composed of students in the tenth, eleventh, and twelfth grades. The majority of those students were seniors, who graduated at the end of the year. No prominent framer of that

38. See Little Rock (2016) and *Cooper v. Aaron*, 358 U.S. 1 (1958).

constitution was a member of the newly elected student council in the fall of 1974. By the fall of 1976, the entire cohort was in college. That framing generation made no effort to recruit entering tenth graders into a coalition committed to maintaining the constitutional order established three years earlier and failed to take any other step that might have preserved their constitution for their fifth or fiftieth reunion.

The young Jeffersonians responsible for the constitutions of student government appear to regard constitutional transitions and regime changes with equanimity. The best evidence, which is admittedly very limited, indicates that student governments change constitutions without a ripple. Educators who have a stake in preventing disruption regularly encourage students to write and replace constitutions for the student government.³⁹ Media reports indicate that struggles over the constitution of student governments are not the causes of the numerous disruptions that plague public schools. These peaceful constitutional transitions are no doubt partly rooted in the vastly lower stakes in the constitutional struggles that do take place in American public schools. No one's life or immortal soul is at stake when high school students abandon one constitution for another. Nevertheless, good reasons exist for thinking that Jeffersonian constitutional practices are partly responsible for the lower stakes in high school constitutional transitions and that these practices have additional dampening effects on any disruptive tendency of those constitutional transitions.

Jeffersonian constitutional orders in public schools are likely to experience smooth constitutional transitions and regime changes. Jeffersonians presume the new generation of leaders is entitled to govern as they see best, even if that means abandoning both the practices and the fundamental values of previous leadership. Graduating seniors rarely exhibit any interest in transforming the constitution they framed as an instrument of governance into the foundation of a transgenerational project. Neither constitutional transitions nor regime changes are inherently disruptive when John Smith and his senior class cohorts have no particular reason for thinking, no interest in ensuring, and no power to make sure that Mary Doe and her freshmen cohorts will operate the student council of their public school as they did.

Regime changes in Jeffersonian orders are likely to generate constitutional transitions. Student leaders do not regard the constitution of their student council as a sacred document to which all factions must pledge allegiance to have any hope of political success. In sharp contrast to the leaders of national political coalitions

39. See Kaminsky (1962, 305); the Republic of Ireland's Education Act, 1998, No. 51 of 1998; and "Student Council Support" (2016).

in Great Britain and the United States, student politicians do not score political points by painting themselves as the rightful heirs of forgotten founders who have graduated and lost interest in the constitutional affairs of the student council. When newly elected student leaders want to take the student council in a new direction, therefore, they have every incentive to change the constitution so as to facilitate that new direction and no incentive to pledge allegiance to the inherited constitution or reinterpret that constitution as consistent with their regime aims.

Jeffersonian constitutions create dynamics that foster constitutional transitions without regime changes. Jeffersonian constitutions that are instruments for governance are more easily replaceable than constitutions that are symbols of the deepest aspiration of a people. Constitutional reform is a far lower stakes game than when Marshallian constitutions are under attack. Jeffersonian constitutional reformers in public schools need ask only whether the existing constitution is serving regime ends, not whether a people or a people's fundamental commitments should be revisited and revised. When a new cohort wins a student government election, they are far freer than adult Marshallians to fashion a constitution that suits their needs. Should students conclude that a different system of elections will better prepare them for citizenship, they can replace the inherited constitution without challenging that inherited regime commitment.

IV. WHITHER STATE CONSTITUTIONS

The constitutions of such semi-sovereign entities as American states are neither fully Marshallian nor wholly Jeffersonian. State constitutions resemble the constitutions of nation-states in their detail, powers granted, and rights. They resemble the constitutions of student councils in their generic purposes and openness to revision. Unsurprisingly, given the combination of Marshallian and Jeffersonian elements in state constitutions, some constitutional transitions in American states are far more disruptive than others.

Prominent scholars are reviving the study of state constitutions. Revivalists highlight how the state constitutional experience is intrinsically important and point to the ways the state constitutional experience informs the constitutional experience more generally. Sanford Levinson writes,

If one is trying to understand the realities of “American constitutionalism,” it is essential to look beyond the U.S. Constitution to the many other constitutions that are part of the American political system. To identify a single constitution, however important it may be, with the entirety of American constitution thinking

about the constitutional enterprise is equivalent to offering a course on European art that turns out to focus entirely on the art of the Italian Renaissance. (2012, 28)

Many state constitutions have features and contain provisions similar to those of the constitutions of most nation-states, but not the Constitution of the United States. Mila Versteeg and Emily Zackin observe,

First, like most of the world's constitutions, state constitutions are rather long and elaborate, and they include detailed policy choices. The exceptional American taste for constitutional brevity, it turns out, is confined to the federal document alone. Second, like most of the world's constitutions, state constitutions are frequently amended, overhauled, and replaced. Thus, the textual stability of the over-two-century-old federal Constitution is exceptional compared not only to other national constitutions but also to the constitutions of the American states, which are characterized, in part, by a commitment to progress and change. Third, like most of the world's constitutions, state constitutions contain positive rights, such as a right to free education, labor rights, social welfare rights, and environmental rights. While the federal Constitution arguably omits explicit declarations of these rights, they are not foreign to the American constitutional tradition. On all these dimensions, it is at the federal level only that Americans' constitutional practices appear exceptional. (Versteeg and Zackin 2014, 1644–45)

State constitutions also have features that resemble the Jeffersonian constitutions that create and empower student councils. Most state constitutions are better conceptualized as instruments for governance than as symbols of transgenerational projects. Preambles to state constitutions tend to be generic, stating little or nothing about a distinctive state history, distinctive state constitutional purposes, or a distinctive state people. The Preamble to the Constitution of Ohio declares, “We, the people of the State of Ohio, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare, do establish this Constitution.”⁴⁰ The Preamble of the Constitution of Alaska has more to say about the distinctive heritage of the United States than the distinctive heritage of Alaska. The text states, “We the people of Alaska, grateful to God and to those who founded our nation and pioneered this great land, in order to secure and transmit to succeeding generations our heritage of political, civil, and religious liberty within the Union of

40. Ohio Constitution, Preamble.

States, do ordain and establish this constitution for the State of Alaska.”⁴¹ Alaska aside, most state constitutions abjure references to the distant future.

Many state constitutions clearly assert that state citizens have the right to abandon the present constitution for a different constitution or form of government (see Oulahan 1983, 702, 739). Article I of the Constitution of Wyoming is typical. That provision declares, “All power is inherent in the people, and all free governments are founded on their authority, and institution for their peace, safety and happiness; for the advancement of these ends they have at all times an inalienable and inde-feasible right to alter, reform or abolish the government in such a manner as they may think proper.”⁴² One-quarter of all state constitutions require each generation to vote on whether to call a constitutional convention (see Dinan 2006, 11). The Constitution of Missouri mandates that the secretary of state on a twenty-year basis “submit to the election of the state the question, ‘Shall there be a convention to revise and amend the constitution.’”⁴³

This combination of Marshallian and Jeffersonian elements may explain why substantial variance exists in the ease with which constitutional transitions take place in American states. When state constitutions are understood as advancing Marshallian commitments to transgenerational projects, constitutional transitions have been as bloody as the most disruptive constitutional transitions in nation-states. Considerable violence took place in the post-bellum south, when the victorious Union army imposed egalitarian constitutions on the former Confederate states, and afterwards, when terrorist groups composed of white supremacists overthrew those constitutions (Herron 2014). When state constitutions are understood as Jeffersonian instruments of governance, constitutional replacement occurs without disruption and often without any substantial change in the underlying regime. Most states have had more than one constitution. Several are in double figures (Dinan and the Council of State Governments 2014, 10). Transition is a consequence of regularly scheduled and peaceful constitutional conventions (see Dinan 2006, 29–63). With the exception of southern constitutional experience during and immediately after Reconstruction, hardly any state constitutional transition is associated with the sort of regime change that seems necessary for constitutions to be replaced in nation-states.

Constitutional transitions in some states occur as frequently and with as little cause as constitutional transitions in most public schools. Commentators note

41. Alaska Constitution, Preamble.

42. Wyoming Constitution, Article I.

43. Constitution, State of Missouri, Article XII, Section 3(a).

that “constitutional revision in Louisiana has been sufficiently continuous to justify including it with Mardi Gras, football, and corruption as one of the premier components of the state culture” (Dinan 2006, 12). The Louisiana Constitution of 1913 is a particularly vivid instance of constitutional replacement without substantial regime change. That constitution did little more than alter how sewers were regulated in New Orleans (Hargrave 1991, 12–13). We can learn more about the constitutional experience in Louisiana, these observations suggest, from studying the constitutional experience in Mephram High School than from studying the constitutional experience in the United States or Kenya. We may better understanding why constitutional transitions and regime changes in the United States and Kenya are typically disruptive, in turn, by understanding why constitutional transitions and regime changes in Louisiana and Mephram High School are often not.

V. WHITHER JEFFERSONIAN CONSTITUTIONS

One paradox of contemporary constitutional culture concerns the strong encouragement public schools provide students interested in drafting and ratifying constitutions that create and empower student councils. Ireland has even passed a law calling on educators to facilitate this action of student self-government. Mock constitutional conventions are a staple of social sciences classes in the United States. These exercises purportedly prepare students for citizenship. Nevertheless, once young Jeffersonians become adult Marshallians, they are actively discouraged from engaging in constitutional exercises. Marshallian constitutions are not to be tinkered with. Apparently the point of having students draft and ratify constitutions that create and empower student councils is to prepare them as adults to draft and ratify constitutions that create and empower parent-teacher associations.

These constitutional drafting and ratification exercises, at least in the United States, are not patriotic exercises designed to foster greater appreciation for the national constitution. Students who deliberate carefully do not always reproduce the Constitution of the United States in miniature, differing only on those matters where identity is impossible.⁴⁴ The constitutional drafting process in American public schools permits and encourages students to think that American constitutional institutions could be improved. The constitutions of student councils in the United States diverge from the Constitution of the United States both in their conception of the structure of different governing institutions and in the relationships between

44. Members of the student judiciary, for example, cannot hold lifetime appointments.

different governing institutions.⁴⁵ Some constitutions give the highest executive official veto powers. Others do not. Many do not have student judiciaries. Many more have an underdeveloped sense of federalism. One student, one-vote is more common than a bicameral legislature, one branch of which represents students and the other representing grade levels.

Jefferson would have approved the practice of constitutionalism in public schools. He believed that each generation should decide for themselves the constitutional institutions and practices that best realize that generation's values and interests. Public school students do this on a regular basis when drafting constitutions. Past constitutions are relied on, if relied on at all, only as examples of choices the students might make. Some constitutions of student councils expire. Those that do not are not looked upon with any particular reverence. Students draft and ratify new constitutions whenever they feel a new constitution might better serve their purposes.

Constitutionalism in nation-states is far more Marshallian. Constitutions drafted by adult Marshallians announce transgenerational projects that bind the future. Those texts declare the existence of a particular people whose identity is rooted in the distant past and whose fate is tied to a distant future. Such constitutions are looked on as sacred symbols that can be abolished only at the cost of severe political disruption.

The Sage of Monticello recognized how the structure of political generations plays a crucial role transforming young Jeffersonians into adult Marshallians. Jefferson introduced his constitutional vision by imagining "a generation all arriving to self-government on the same day, & dying all on the same day" (Jefferson 1999, 594). The first generation would write a constitution when they entered the world, but both they and the constitution would expire at the same time. Members of the new generation "arriving to self-government on the same day" that every member of the old generation passed from the political scene would neither have to confront members of the first generation when creating and establishing institutions nor already be complicit in the constitutional politics of the past. They would write their new constitution on a clean political slate. Jefferson then acknowledged the practical problems that arise when generations do not arrive and exit at the same time. Transgenerational politics might prevent people from repealing a dysfunctional constitution. Jefferson pointed out, "Factions get possession of the public

45. See, i.e., the constitutions set out in note 36.

councils. Bribery corrupts them. Personal interests lead them astray from the general interests of their constituents” (Jefferson 1999, 597). This is why he insisted that constitutions expire rather than merely be subject to revision.

Jefferson’s proposal that constitutions naturally expire after nineteen years did not prove an adequate substitute for constitutions that could be repealed after nineteen years. The same constitutional politics that Jefferson acknowledged prevents the repeal of constitutional provisions that no longer serve majoritarian values and interests inhibits nation-states from abandoning or replacing constitutions that no longer serve majoritarian values and interests. Members of the framing generation and their transgenerational allies do not acknowledge that their constitutions naturally expire, regardless of what inherited theory might proclaim. Their constitutions must be overthrown, often by violence, if they are to be abandoned. Most constitutions live close to a Jeffersonian life span, but the cause of death is more often war or revolution than disease or old age (Elkins, Ginsburg, and Melton 2009).

Jefferson overlooked how constitutional ambitions also transform young Jeffersonians into adult Marshallians. He complained about “men” who “look at constitutions with sanctimonious reverence, and deem them like the arc of the covenant, too sacred to be touched.” In his view, constitutions were instruments of governance rather than hallowed symbols. In a letter to Samuel Kercheval, July 12, 1816, Jefferson wrote, “laws and institutions must go hand in hand with the progress of the human mind (Jefferson 1999, 2014).” The constitutions of student councils are mere instruments of governance that can be peaceably discarded whenever they become dysfunctional. The constitutions of nation-states are more. National constitutions aspire to fashion a people committed to transgenerational projects. The constitution of the nation-state is simultaneously an instrument for realizing that project, the foundation of that project, and the most sacred symbol of that project. While the instrumental and symbolic roles of the constitution can be separated in theory, they appear to be inextricably bound in practice. Attacks on the means employed by a Marshallian constitution are inevitably interpreted as attacks on the transgenerational ends of that Marshallian constitution. Regimes must be overthrown for constitutional transformations to occur. The Jeffersonian desire for peaceful constitutional transitions that recognize the right of each generation to govern themselves, this comparison of the constitutions of nation-states and student councils suggests, can be realized only in a regime in which each generation abjures the Marshallian project of fashioning a people whose commitments are expected “to endure for ages to come.”

REFERENCES

- Anderson, Benedict. 1983. *Imagined Communities*. New York: Verso.
- Arendt, Hannah. 1963. *On Revolution*. New York: Penguin Books.
- Armstrong, Robert L. 1970. "Student Council: Whither Goest Thou?" *The Clearing House* 44: 553–55.
- Balkin, Jack M. 1995. "Populism and Progressivism as Constitutional Categories." *Yale Law Journal* 104: 1935–2008.
- Breslin, Beau. 2009. *From Words to Worlds: Exploring Constitutional Functionality*. Baltimore: The Johns Hopkins University Press.
- Caplan, Aaron. 2015. "Constitution-Writing Exercise." Posted to conlawprof on March 23.
- Colonial High School Student Council. 2011. "Constitution of Colonial High School Student Council." <https://www.ocps.net/lc/southeast/hco/clubs/Documents/CONSTITUTION-OF-COLONIAL-HIGH-SCHOOL-STUDENT-COUNCIL-revised-09.pdf>.
- Corwin, Edward S. 1936. "The Constitution as Instrument and as Symbol." *American Political Science Review* 30: 1071–1085.
- Dinan, John J. 2006. *The American State Constitutional Tradition*. Lawrence: University Press of Kansas.
- Dinan, John J., and the Council of State Governments. 2014. "Chapter 1—State Constitutions." In *The Book of the States 2014*, edited by The Council of State Governments. Available on The Council of State Governments' Knowledge Center: <http://knowledgecenter.csg.org/kc/system/files/1.1%202014.pdf>.
- Eisgruber, Christopher L. "The Fourteenth Amendment's Constitution." *Southern California Law Review* 69: 47–103.
- Elkins, Zachary, Tom Ginsburg, and James Melton. 2009. *The Endurance of National Constitutions*. New York: Cambridge University Press.
- Elster, Jon. 1995. "Forces and Mechanisms in the Constitution-Making Process." *Duke Law Journal* 45: 364–396.
- Gardner, James A. 1993. "What is a State Constitution?" *Rutgers Law Journal* 24: 1025–1055.
- The Gilbert & Sullivan Very Light Opera Company. 2016. "Mikado." Accessed March 18. <http://gsvloc.org/about-us/gilbert-sullivan-revised/the-mikado/>.
- Graber, Mark A. 1999. "Law and Sports Officiating: A Misunderstood and Justly Neglected Relationship." *Constitutional Commentary* 16: 293–313.
- . 2013. *A New Introduction to American Constitutionalism*. New York: Oxford University Press.
- . 2014. "Constructing Constitutional Politics: Thaddeus Stevens, John Bingham, and the Forgotten Fourteenth Amendment." University of Maryland Legal Studies Research Paper No. 201437. Available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2483355.
- Graber, Mark A., and Howard Gillman. 2015. *The Complete American Constitutionalism*, Vol. 1. New York: Oxford University Press.

Greenville High School Student Council. 2016. "Greenville High School Constitution." Accessed March 18. <http://www.greenville.k12.mi.us/HighSchool.cfm?subpage=168398>.

Hargrave, Lee. 1991. *The Louisiana State Constitution: A Reference Guide*. New York: Greenwood Press.

Harvard Graduate Student Government of Harvard University. 2014. "The Constitution of the Harvard Graduate Student Government." March. <http://hgc.harvard.edu/wp-content/uploads/Constitution-HGSG-3-4-141.pdf>.

Herron, Paul E. 2014. "Revision and Reaction: Writing Constitutions in the Southern States, 1860–1902." Ph.D. dissertation, Brandeis University.

Hirschl, Ran. 2007. *Toward Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge, MA: Harvard University Press.

———. 2014. *Comparative Matters: The Renaissance of Comparative Constitutional Law*. New York: Oxford University Press.

Jacobsohn, Gary Jeffrey. 2010. *Constitutional Identity*. Cambridge, MA: Harvard University Press.

Jefferson, Thomas. 1999. *Jefferson: Political Writings*. Edited by Joyce Appleby and Terence Ball. New York: Cambridge University Press.

Jensen, Merrill. 1966. *The New Nation: A History of the United States During the Confederation, 1781–1789*. New York: Random House.

Kaminsky, Albert. 1962. "A School Constitution Used as a Functional Teaching Aid." *The Clearing House* 36: 305–305.

Klein, Claude, and Andras Sajo. 2012. "Constitution-Making: Process and Substance." In *The Oxford Handbook of Comparative Constitutional Law*, edited by Michel Rosenfeld and Andras Sajo, 419–441. New York: Oxford University Press.

Law, David S., and Mila Versteeg. 2013. "Sham Constitutions." *California Law Review* 101: 863–952.

Leonard, Gerald. 2002. *The Invention of Party Politics: Federalism, Popular Sovereignty, and Constitutional Development in Jacksonian Illinois*. Chapel Hill: University of North Carolina Press.

Levinson, Sanford. 2012. *Framed: America's Fifty-One Constitutions and the Crisis of Governance*. New York: Oxford University Press.

"Lincoln East High School Student Council Constitution and By-Laws." 2016. Accessed March 18. <http://isite.lps.org/mschlei/web/documents/Studentcouncilconstitutionandbylaws.pdf>.

Linde, Hans A. 1993. "State Constitutions are not Common Law: Comments on Gardner's Failed Discourse." *Rutgers Law Journal* 24: 927–956.

Little Rock Central High School students. 2016. "Constitution of the Little Rock Central High School Student Council." Little Rock Central High School Student Council. Accessed March 18. <http://centralhighstuco.weebly.com/constitution.html>.

Lutz, Donald S. 1995. "Toward a Theory of Constitutional Amendment." In *Responding to Imperfection*, edited by Sanford Levinson, 237–274. Princeton, NJ: Princeton University Press.

- McGinnis, W. C. 1944. "What Basis for Student Government?" *The Clearing House* 18: 463–464.
- Marion Technical Institute students. 2006. "MTI Student Council Constitution and By-Laws." Marion Technical Institute. <http://www.marionschools.net/cms/lib010/FL01903465/Centricity/domain/43/documents/MTI%20SGA%20Constitution.pdf>.
- Murphy, Walter F. 2007. *Constitutional Democracy: Creating and Maintaining a Just Political Order*. Baltimore: Johns Hopkins University Press.
- Music Theatre International. 2016. "Broadway Junior Collection." Accessed March 18. <http://www.broadwayjr.com>.
- National Basketball Association. 2013. *Official Rules of the National Basketball Association, 2013–14*. <http://www.nba.com/media/dleague/1314-nba-rule-book.pdf>.
- National Federation of State High School Associations. 2014. *2014–15 Basketball Rules Book*. Indianapolis, IN: National Federation of State High School Associations.
- Oulahan, Courts. 1983. "The Proposed New Columbia Constitution: Creating a 'Manacled State.'" *American University Law Review* 32: 635–716.
- Pole, J.R., ed. 2005. *The Federalist*. Indianapolis, IN: Hackett Publishing Company, Inc.
- Sartori, Giovanni. 1962. "Constitutionalism: A Preliminary Discussion." *American Political Science Review* 56: 853–864.
- Scalia, Antonin. 1989. "The Rule of Law as a Law of Rules." *University of Chicago Law Review* 56: 1175–1188.
- Smith, Rogers M. 2003. *Stories of Peoplehood: The Politics and Morals of Political Membership*. New York: Cambridge University Press.
- "Student Council Support." 2016. Republic of Ireland's Office of the Minister for Children and Youth Affairs. Accessed March 18. <http://www.studentcouncil.ie/Running>.
- Versteeg, Mila, and Emily Zackin. 2014. "American Constitutional Exceptionalism Revisited." *University of Chicago Law Review* 81: 1641–1707.
- Williams, Edwin, ed. 1847. *Presidents' Messages, Inaugural, Annual and Special, From 1789 to 1846*. New York: Edward Walker.
- Zackin, Emily. 2013. *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights*. Princeton, NJ: Princeton University Press.

RESTORING LOST LIBERTY

François Hotman and the Nationalist Origins of Constitutional Self-Government

ETHAN ALEXANDER-DAVEY

ABSTRACT

The rise of constitutional self-government in early modern Europe, I argue, owes much to a nationalist liberation narrative pioneered by French Huguenot François Hotman in *Francogallia* (1573). In response to appeals by absolutist thinkers to Roman law, which put the power of the king beyond legal or constitutional restraint, Hotman wove together tales of the heroism of ancient Gauls and Franks wresting their native liberties back from the Romans with a theory of constitutionally limited government grounded in the common law of France. This type of narrative was adapted by Dutch and English thinkers who sought to defend constitutionalism in their respective countries. Through this examination of early modern liberation narratives, I argue we can gain insight on the relationship between nationalism and resistance to autocratic governments and the formation of regimes consistent with the principles of constitutional self-government.

KEYWORDS: *Constitutionalism, Nationalism, Social Contract Theory, Common Law, Popular Sovereignty, Monarchomachs, François Hotman, Hugo Grotius, John Selden*

Constitutional Studies 1.1

©2016 by the Board of Regents of the University of Wisconsin System

This open access article is distributed under the terms of the CC BY-NC-ND 4.0 license (<https://creativecommons.org/licenses/by-nc-nd/4.0/>) and is freely available online at: <https://constitutionalstudies.wisc.edu> or <https://uwpress.wisc.edu/journals/journals/cs.html>

INTRODUCTION

Since the end of WWII, nationalism has had a bad reputation. While prominent liberal and cosmopolitan theorists have reformulated conceptions of constitutional democracy to transcend nationalism, important historians of political thought have effectively expunged nationalism from the history of constitutionalism, presenting the latter as a process that leads teleologically to John Locke's universalist, natural rights based theory of government, in which the concept of nationhood does not figure.¹ Other scholars who acknowledge the importance of nationalism to the development of constitutional self-government, or who posit a relationship between certain kinds of nationalism, nevertheless miss what is politically distinctive about early-modern nationalism.² The purpose of this essay is to show how nationalism grounded early-modern arguments for constitutional self-government. This study will demonstrate, at the least, that existing understandings of the growth of European constitutionalism should be reconsidered. Beyond this it is suggested that the examination of the link between nationalism and early modern constitutionalism may be of use to those engaged with the problems of preserving constitutional self-government where it now exists, or establishing or restoring it where it is now absent.

This essay proceeds in five parts. First I explore what is lacking in universalist accounts of constitutional self-government in general, and how the secondary literature on the monarchomachs, with its focus on Roman and natural law, tends to ignore the important question of what makes the notion of a permanent pre-political community with imprescriptible rights plausible. Second, I describe how the absolutist arguments of the period effectively denied the existence or the relevance of a pre-political community, and appealed specifically to Roman public law and Roman history to debunk common law restrictions on the power of princes, and the principle of government by the consent of the governed. Third, I demonstrate how Hotman's nationalist account supplies the conceptual and rhetorical deficiencies of abstract formulations of popular sovereignty and constitutionalism, drawn, in this case, from the abstractions of the Roman public and private law, and later from claims about the natural rights of human beings. I also point to some of the features of the nationalism of the *Francogallia* that make it compatible with a regime restrained by law and accountability to the people in ways that other forms of nationalism may not be. In the fourth section of this essay, I show how

1. Of the contemporary theorists, see Habermas (1996), Hayward (2007); Muller (2007). Of the historians, see Franklin (1979), Salmon (1959), Skinner (1978), Tuck (1982).

2. See Greenfeld (1992) and Hont (1994).

seminal texts in the development of Dutch and English constitutionalism, namely, Hugo Grotius' *Antiquity of the Batavian Republic* and John Selden's *The English Janus*, were modeled on the *Francogallia*. Finally, in the Conclusion, I suggest some possible valuable lessons that modern political theorists might learn from Hotman's form of nationalism.

I. THE FAILURES OF THE UNIVERSALIST ACCOUNT

My essential claim is that the national-historical arguments of thinkers such as François Hotman contributed to the development of modern constitutional self-government something fundamentally different from what has been acknowledged hitherto. Hotman was an important and influential member of a school of Huguenot thinkers known as “monarchomachs” who challenged the idea of absolute monarchy in the late 16th century, a group that included Theodore Beza and Phillippe de Mornay. For the monarchomach writers, a nation is not a voluntary association of individuals, and the attachments to it are not defined by individual self-interest or agreement on universal principles. The tradition of popular self-rule is thus associated not with individualism, but with the republican idea of civic virtue located in a pre-political community. (Canovan 1996, 22–3; Yack, 2001). In Hotman's account, in particular, liberty and self-rule require that citizens have a primordial attachment to a specific fatherland.

As Margaret Canovan observes, the Lockean liberal tradition has a tendency “to blur the differences between polities and voluntary associations, and to represent the democratic polity as a kind of expanded tennis club” (1996, 21).³ Hotman's account appealed not only to reason, but also to the common sentiments, experiences and memories that generate and sustain communities. Hotman and his imitators rhetorically reconstituted “confused multitudes” as “nations” who possessed sufficient solidarity, virtue, and experience to govern themselves, and mobilized support for specific established institutions which had real potential for the realization of restraint on political power and self-government.⁴ One should not overstate

3. See Locke ([1690] 1994): What “constitutes any *Political Society*, is nothing but the consent of any number of Freeman,” §89. See also §116: children are “born . . . Subject of no Country or Government.”

4. The phrase “confused multitude, without order or connexion” appears in the final chapter of Locke ([1690] 1994), §212, §219. There, in spite of the assertion that the “community,” once formed, is a permanent body, which continues even when government is in abeyance, Locke's rhetoric suggests that the dissolution of the legislative assembly or the non-enforcement of the laws by the executive is liable to cause the death and dissolution of the community as well. This actually makes sense, if, as Locke's

the value of Hotman and other similar writers to political theory. On broader questions of human nature, justice, and the good life, they cannot compete with more abstract thinkers, and their assertions are also often question-begging. But their focus on the relationship between general principles, national identity, and existing institutions provides a useful complement to the theories of more celebrated political philosophers.

Historical scholarship, especially that of Quentin Skinner, Richard Tuck, Julian Franklin, and John Salmon tends to treat monarchomach writers as figures who produced various conceptual nuggets all of which John Locke was able, in the fullness of time, to bring together in his universalist theory of human rights and constitutional government based on the consent of rational, rights-bearing individuals (Skinner 1978, vol. 2, 239–40, 318, 338; Franklin 1979, 71–79, 94–97).⁵ Franklin credits the monarchomachs’ bold assertion of two ideas: popular sovereignty and institutionalized restraint on royal power (1969, 12–13). In fact both ideas had been commonplace in mediaeval Europe, and, though not ascendant, were voiced frequently in early modern France (Ullman 1965; Church 1941, 86). Other scholars focus on the relationship between Hotman’s constitutional theory and Roman law (Lee, 2008). But in *Francogallia*, such arguments are overshadowed by appeals to native history and nativist sentiment.⁶ Rhetorically, in fact, Roman law and the Roman people are more useful to Hotman as enemies and oppressors of the French nation and their ancestral liberties, which is another reason why he “obscures his own reliance upon civil law concepts” (Giesey 1961, 20).⁷

theory suggests, the only bond of unity for a community is its members’ recognition of a common legislative power and obedience to the same laws.

5. Salmon (1959) mentions the nationalist cast of Hotman’s *Francogallia*, but he ignores how Dutch and English authors mimicked this kind of nationalist narrative. Tuck (1993) mentions Hotman’s Franks and Gauls, Grotius’ use of the Batavian myth, and Selden and Nathaniel Bacon’s use of the Anglo-Saxon myth, but these discourses are stops along the way to the “great natural law theories of the mid-century.”

6. Hotman’s emphasis is in contrast with the works of Beza (1576) and de Mornay ([1579] 1994), in which all sorts of arguments are employed in more or less equal measure, including a wide range of evidence from the Bible, histories of ancient Greece and Rome and of mediaeval European states, Roman law, and natural law. French history does not receive significantly more emphasis than other materials. *The Rights of Magistrates* does not have the nationalistic tone of Hotman’s *Francogallia* at all. The postscriptal poem of *Vindiciae Contra Tyrannos*, with its call to restore the ancient honor of Gaul, is reminiscent of *Francogallia*, but the rest of the work does not have this quality.

7. Hotman expends much more energy attacking the “foreign” Romans and the *Corpus Iuris Civilis* than putatively native sources of interpretations of French constitution unfavourable to his own, for instance the Salic Law, which is discussed only in chapter VIII (see Geisey 1961, 20–21). Although

John Pocock comes closest to appreciating the nationalist aspect of Hotman's work, discerning in it a precursor to romantic nationalism (1987, 15). However, the essence of ancient constitutionalism for Pocock is a kind of legal thinking in which legitimacy is conferred upon a regime by its immemoriality (1987, 17). It is true that much of Hotman's account is framed in this way, but the legal argument serves, for the most part, as a vehicle for deeper claims about the nature of political communities, the rights of nations, and the national character of the French. His argument is designed to answer precisely the sort of questions that theories limited to abstract rights and legal principles cannot and that, as some scholars argue, must be answered to make constitutional self-government tenable. One has to know who the people are, what the community of sentiment is within which men owe special duties to one another, within which there is indeed a common good to be sought. There must also be some common basis for agreement on the constitutional form and the basic laws.

Hotman's account of the national past would not meet the standards of modern historiography.⁸ But even if such stories can be shown to be mostly fictional, that does not mean that writers can invent effective political narratives *ex nihilo*, or even that such writers are aware that they are engaged in *mythopoesis*. If national identities are to some degree "constructed" by political entrepreneurs, this does not mean that nations can be "constructed, adapted, or dismantled to order" (Canovan 1996, 13). As Rogers Smith notes "forms of political peoplehood . . . are largely generated, motivated, and also meaningfully limited by the particular range of stories of possible political identity that they have inherited and long valued" (1999, 48). Political actors are largely constrained to work with narratives that are already familiar, both to themselves and to their intended audience. The same sort of genealogy of the French nation and constitution laid out by Hotman was arrived at independently by other political thinkers of his time who did not share his partisan commitments (Major 1980, 184–7). At least among the literate, there were some common ways of understanding the French past that did not accord with the universalist assumptions of Lockean liberalism.

Hotman also gives cause to re-examine some of the typologies of nationalism and the relationships some scholars have alleged between said typologies and

Hotman draws upon the constitutional tradition of the Roman republic, and certain aspects of Roman law, he rejects those parts of the *Corpus Iuris Civilis* from the period of the Empire, which royal officials had used to support absolutism (Kinneking 1997, 111–112, 244, 271).

8. Compare for instance, Hotman's account of the "War of the Common Weal" against Louis XI, summarized on page 51, to that of a modern historian: Major (1960, 54–58).

political regimes. Istvan Hont (1994) and Liah Greenfeld (1992) both characterize French nationalism as an ideology aimed at the centralization of political power and the homogenization of a population not yet sufficiently “national.” One of the more extreme forms of this nationalizing state is seen in Emmanuel Sieyès’s proposal to liquidate, redivide, and homogenize the old provinces of France (Hont 1994, 200).

Greenfeld contrasts “collectivist” nationalism, which she traces back to Hotman, with the purportedly “individualist” nationalism of England (1992, 30–31, 108–109). On her account, collectivist nationalisms lead to authoritarianism, and individualist ones to democracy and prosperity. A closer look at the nationalisms of Hotman, Grotius, and Selden casts doubt on the veracity of these distinctions and claims. Unlike the authoritarian nationalism that Hont and Greenfeld observe in late 18th century France, the early modern nationalism of Hotman and his Dutch and English imitators is opposed to a centralizing and homogenizing state, and while it leaves room for the rights of individual citizens, its distinctive feature, which reveals its mediaeval roots, is the dignity it accords to the settled rights and privileges of the estates, the provinces, and other corporate bodies of nation. Properly understood, the mediaeval and early modern nation is a community of communities.⁹ Historians of mediaeval nationalism argue that it was the enduring strength of such subordinate partialities, and the capacity of subnational communities to resist the central government, that prevented nationalism in the Middle Ages from developing into the extreme forms that appeared in the late 18th, 19th, and 20th centuries (Tipton 1972, 47, 88). Greenfeld sees a sort of Lockean individualism as the basis of a moderate nationalism consistent with constitutional restraint and protection of rights. But the influential early modern proponents of constitutional liberty examined here, in whose works no such individualism is evident, point to different conclusions.

II. HOTMAN’S REJECTION OF THE ABSOLUTIST POSITION

The *Francogallia* was written in response to narratives which declared the French king to be an absolute sovereign, accountable neither to the common law nor to the assembly of the estates. According to such stories the French people had no existence as a coherent body prior to the arrival of the ancestors of the present royal family, much less a power to rule themselves as one body. By this account the Franks were originally Trojans. Like those who went on to found Rome, these Frankish

9. See Althusius ([1601] 1995), and chapter 5 of Levy (2015).

Trojans conquered the territory that is now France and established their kingdom there. Being of the same lineage with the founders of Rome when the Roman Empire fell, the French descendants of the Trojans inherited the Roman *imperium* (Foucault 2003, 115–116). Hence, the French king could base his right to rule on two ancient lineages. First, the French king is a descendant of the Trojans, who founded France. Second, the French king is the inheritor of the Roman *imperium*. The implication of first lineage is that the royal family is, physically and juridically, the founder of the nation. The French people, then, “derive their origin from their kings—as the Roman people is said to have been created by Romulus because there had not been an original people before but a multitude scraped together from a variety of nations and peoples” (Beza [1576] 1956, 44).¹⁰ Before the first French King created the nation, as Romulus created the Romans, there was only a confused multitude of disparate tribes with no unity or coherence, no common customs or laws, and, hence, no capacity for self-rule. The implication of the second ancient lineage is that the relationship between the king and people in France is of the same character as that between the Roman emperors and the subjects of the empire (Foucault 2003, 116).

The essence of the absolutist doctrine, as formulated by such figures as Guillaume Bude, Michel de L'Hopital, and ultimately Jean Bodin, was the claim that kings had power to act as final interpreters of all laws, to take whatever measures they thought necessary for the common good without needing the consent of any other institution (Keohane 1980, 4). No absolutist claimed for the king a right to violate natural and divine law, but a king's submission to such strictures could only be understood as “voluntary,” for no other institution or person in the kingdom had a right to restrain or resist the king (Keohane 1980, 61, 66, 72; Allen 1941, 285, 292; Church 1941, 61–63).

One of the arguments employed by Hotman against absolutist claims was the assertion that the people, as a body, was immortal, and as such, its rights as a collective were imprescriptible (Hotman [1573] 1972, 399–401; Salmon 1959, 42; Lee 2008, 389). The assertion was an attempt to negate absolutist claims from *usucapion* according to which long possession established ownership, in this case, the king's ownership of, and hence, his absolute authority over the realm (Lee 2008, 388–389). Claiming that the people is an immortal body is a typical early modern way of asserting the state's accountability to a pre-political community. Yet there

10. Theodore Beza, fellow Huguenot and monarchomach, notes that this argument is deployed by absolutists, and takes pains to show that other nations, especially France, were *not* created by their kings as the Romans are said to have been (1576).

was something larger at stake. For if a people cannot exist as a coherent body without a king to bind its members together with his laws, if there was no French nation until ancient kings created it by imposing their will on confused multitudes, then it is absurd to speak of the original and imprescriptible rights of the people. For a people to have common rights, it first must *be* a people. In effect, the absolutist asks, The people has rights? What people? Hotman answers in the *Francogallia*—turning, as Bernard Yack puts it, to an “identification of the people with the nation” (Yack 2001, 524)—*this people here*, descended from these tribes, with this distinct national character, and these customs.

Similarly, Hotman asserts that the right of a people to government by the consent of the governed—based on the principle that “what touches all should be approved by all,” and the “celebrated liberty of holding of common council”—is part of the law of nations. Such natural rights belong, potentially, to all peoples, excepting “the Turks, or those like them” whose absolute monarchs treat their subjects “like slaves or cattle” (Hotman [1573] 1972, 297, 301, 305, 317).¹¹ But to exercise a right of nations, a multitude must *be* a nation. Thus, one of Hotman’s tasks is to show that the French have had such status since ancient times and do not owe their peoplehood to the genius or the violence of any king or lawgiver.

III. HOTMAN’S THEORY IN *FRANCOGALLIA*

In *Francogallia*, Hotman makes four major accomplishments. First, he substantiates the otherwise abstract notion of a pre-political community with a narrative about the origins and development of the French nation. Second, he grounds his arguments for a particular constitutional form on the immemorial traditions of the French nation, which many generations of courageous ancestors had fought to preserve, rather than in terms of a voluntarist narrative of self-interested agreement. By formulating his argument so, he transforms the nation and the constitution from abstractions into objects capable of engendering the sort of public affection and civic obligation which he regards as a necessity for citizens of a constitutional and self-governing polity. Third, Hotman gives an account of native liberty confronting foreign tyranny, using past examples of rebellion, deposition, and expulsion to inspire action against present tyrants who are shown to behave like the alien

11. Hotman uses the civil law axiom, *quod omnes tangit, ab omnibus approbetur*, but speaks of it in general terms as “an attribute of liberty”. All of his examples of peoples who have had or retain these rights are European: the ancient Greeks and Romans, the English, the Germans, the Spaniards (see [1573] 1972, 299–317).

oppressors of old. Finally, he defends a mixed constitution, in which sovereignty is shared between the provinces and the national government, and, at the national level, between the king and the three estates, as the ancient and authentic form of government of the French nation.

A. Hotman's Narrative of the Origin of the French Nation

Although Hotman uses various terms for “nation” or “people”, (*gens*, *patria*, *populus*, *universitas*), which can have different connotations, he holds consistently to a fundamental distinction between the nation and the state (*civitas* or *respublica*). Properly understood, a nation (*patria* or *gens*) is not a voluntary association of individuals; it is a given, a primordial, natural union based on blood, custom, language, and a tribal, familial affection for one's conationals. The state, on the other hand, is not a given; it is something that a nation, or nations choose to create. The nation is the permanent natural body and the state an impermanent artificial body. Hotman's claims about the pre-political unity of the ancient Gaullish and Frankish nations may strain our credulity, but one understands why he makes them. Given the absolutist theory that nations are, in essence, created by kings, and sustained in their unity by the power of kings, he cannot concede that having a king or common magistrates is a key factor in the creation of nations. It is therefore common ethnic factors, blood, custom, language, that are, in his account, constitutive of nationhood. This must be the case if the state is to be considered accountable to the nation, and it is on these assumptions that Hotman constructs his historical narrative.

In Hotman's account, the pre-political community has two different manifestations, first as the two nations described by Roman historians, the Gauls and the Franks, and second, as a French nation that developed over time from an amalgamation of Gauls and Franks. Hotman dismisses out of hand the absolutist Trojan myth of the origins of the French state, and begins his account with descriptions of these two nations (Hotman [1573] 1972, 197). Before the Roman conquest, says Hotman, the Gaulish nation (*gens Gallorum*) was divided into autonomous regions governed by individual princes or aristocratic assemblies. Yet Gaul was not merely a collection of autonomous communities; rather, there was much common to all: “they not only observed the same language, customs and laws but also recognized the same magistrates” (Hotman [1573] 1972, 149). The ancient Gauls were thus one nation, bound together in solidarity by common language, customs, laws, and leaders. The one thing they did not have was a king or sovereign of all the Gauls. Indeed, not only did they not require a sovereign to unify them as a nation, but they were intent on living without one. As Hotman affirms, “these people abhorred kingly rule. According to

Caesar, ‘when Celtillus, the father of Vercingetorix, held the supreme power and authority and obtained control of the whole of Gaul, his people put him to death for seeking to acquire a crown’ ” (Hotman [1573] 1972, 153).

Hotman also catalogues the references of ancient and mediaeval historians to the “Frankish nation” (*gens Francorum*). “[T]he original Franks,” he concludes, “came from that area lying between the Elbe, the Rhine and the sea . . . ‘a people (*populus*)’, as Tacitus says, ‘who were the most noble among the Germans, and maintained their greatness by following the path of justice’ ” (Hotman [1573] 1972, 191). This “people,” the Franks, who won Tacitus’ admiration, were like other Germans in that they elected their kings but unlike other Germans in that they refused to pay tribute to the Romans (Hotman [1573] 1972, 207). More will be said in section C (p. 47ff) about the characteristics Hotman ascribes to the Franks and the Gauls. At issue here is Hotman’s insistence that the ancestors of the French were established, self-conscious nations, each with its own customs and identity, rather than raw human material that could be moulded into whatever shape a royal or imperial master might wish.

B. The Roots of the French Constitution

These two nations, the Franks and the Gauls, were, by Hotman’s account, prior to the French state and the first “French” king. What would later be called the French state first arose from an alliance of the Franks and the Gauls against their common oppressor, the Romans. The first king of the Francogallia was elected at a public council of the “twin-born nations (*gemellae gentes*)” who had formed one state (Hotman [1573] 1972, 214):

By the time of [Merovech’s] death a single state had been created by the two peoples, the Gauls and the Franks (*e duabus Gallorum et Francorum gentibus civitate facta*), and with a common mind they all elected Childeric, the son of Merovech, as king. They placed him upon a shield according to their custom, bore him thrice upon their shoulders round the assembly and saluted him as king of Francogallia (Hotman [1573] 1972, 217).

Several aspects of this beginning merit attention, for Hotman’s account differs markedly from more abstract conceptualizations of the establishment of communities and states. According to Hotman the state was a creation of the two allied nations, two historic communities each with long established bonds of kinship and custom. There is no hint of the conceit of later social contract theorists, such as

Locke and Rousseau, that political communities were first formed by an act of consent of free individuals. Hotman, moreover, specifies no precise founding moment, no original act of consent. “By the time of Merovech’s death,” he says, “a single state had been created” (Hotman [1573] 1972, 217).

The election of a king by the two peoples is significant in several ways. First, it establishes historically the priority of the people over the king; they created him, and not he them. Yet, the argument concerns not the chronology only, but also the nature of the things. According to his conception of nationhood, no king could ever create a nation by imposing his will on a multitude of individuals. A nation is more permanent than a king precisely because a nation cannot be created by a single act of will or consent, whereas a king can. In Hotman’s conception, the members of the “pre-political” community have ties of kinship, common memories and experiences, heroes and villains, common customs and institutions. These are the sorts of things that make a nation. A body that has such bonds has already achieved a degree of permanence: no act of a conqueror or lawgiver can negate it or impose a new identity upon it.

The election of a king by the Gauls and Franks is significant, also, as a manifestation of the common experience and kindred political culture of the two nations, preserved through many generations, which allowed them to act “with one mind” on this occasion. This act by itself did not create the state, for it had already been created, nor, for that matter, did it weld the Gauls and Franks together into one nation. The creation of the Francogallican state was facilitated by the shared political traditions of the two nations, already so similar that it was “as if they were twin-born” (*quasi gemellae gentes*), and their long struggle against a common enemy (Hotman [1573] 1972, 284).

The creation of one French nation also cannot be attributed to any act of a lawgiver or to the will of an aggregate of individuals. “French” nationhood came about through intermingling and assimilation of the Gauls and Franks. Hotman quotes the observations of chronicler Hunibaldus: “the Franks intermingled with the Gauls and took their daughters to wife. The children of these unions assimilated both their language and their customs, with which they have become increasingly familiar down to the present day” (Hotman [1573] 1972, 217–219). Two nations, already similar in their customs, melded into one. This one nation, whose members are all bound by ties of kinship, “one language and one set of institutions and customs,” has, by Hotman’s account, persisted over a thousand years (Hotman [1573] 1972, 285).

Hotman’s account of the origins of French nationhood and statehood thus accomplishes at least two things. First, he gives substance to the abstract claim that the

common rights of the body of the nation ought to be understood as imprescriptible. The rights of the permanent body, the nation, are prior to those of the impermanent, the state. The reader knows the nation is the permanent body because Hotman has given it flesh and bones, he has traced its origins to historic communities, and he has shown the common endeavors of these communities—in this case the creation of a new state—and the continuity of the nation over time. Second, the defense of popular sovereignty in these terms before a mass audience, or at least before that portion of the population that is literate and participates in politics, will tend to inspire a deeper, more primordial national consciousness in the population.

Hotman's casting of the pre-political community, in which sovereignty ultimately resides, in racial, cultural, and historical terms suggests a relationship between the citizen and the community contrary to the individualism and voluntarism of the Lockean social contract. Membership in the nation, as Hotman understands it, is an inherited status and a feeling of connectedness akin to that of a tribe; it is not a matter of individual choice. Hotman makes this explicit in his preface to the *Francogallia*, where he argues that commitment to constitutional self-government requires that the citizens of a polity have a nationalist disposition. He refutes the old saying that "A man's country is wherever he finds content," an attitude he associates with Cynics, who style themselves citizens of the world free from obligations to any particular nation, and Epicureans, who value their own individual pleasure above all. Such a disposition is immoral:

For if it seem a crime, and all but blasphemy to bear impatiently the humours, and even the asperity, of family elders, how much greater is it an offence to resent our native country, which the wise have always unanimously preferred to natural parents. He is a foolish man who would calculate his affection for his country in proportion to the advantages it brings him (Hotman [1573] 1972, 137).

In this analogy, typical of both ancient republicanism and modern nationalism, the duty of a citizen to his fatherland (*patria*) is like the duty of the son to his father.¹² Though the fatherland may provide fewer advantages to its native sons than other polities, or, worse, inflict undeserved torments on them, they still have irrecusable duties to it, just as sons have to their fathers, who raised and nurtured them.

On Hotman's account, such a commitment, irrespective of individual self-interest, is necessary for the preservation of liberty. Alluding to "the many monstrous

12. The family is, for obvious reasons, the most common metaphor for the nation (see Grosby 2005, 43–56).

tyrants in Rome, who afflicted ordinary men, as well as those citizens deserving well of their fatherland,” he asks rhetorically, “Should good citizens reject all care and solicitude for their country on that account?” If the Cynics and the Epicureans are right, then this is precisely what oppressed citizens should do: leave their fatherland, and settle wherever they find the most advantages, pleasures, and comforts. But such a philosophy hands victory to tyrants. Citizens should care for their fatherland “as one who is oppressed and unfortunate, and implores the aid of its native born” (Hotman [1573] 1972, 139). The suppression of tyranny and the preservation of liberty in a particular place require that citizens be patriots, that they value the liberty and the honor of their nation more than their own pleasure and comfort, more, even, than their own lives. Such patriotism is based on a primal affection and attachment to one’s native land and people. The good citizen is like Odysseus “who preferred his native land of Ithica, fixed like some tiny nest to its harsh and jagged rock, to all the delights, and to the very kingdom, which Calypso offered him” (Hotman [1573] 1972, 137).

This primordial attachment of the citizen to his native people and land is central to Hotman’s project in at least two respects. First, liberty is taken to be something that can be secured only in a *national* community, where most citizens have an affection for their conationals based on their shared national inheritance, where most possess “a certain inborn love of fatherland which can no more be renounced than any other human attribute” (Hotman [1573] 1972, 137). Second, the core of Hotman’s rhetorical strategy is an appeal to citizens’ piety for the “homes of their fathers and ancestors,” and to the outrage they would feel if they saw them violated (Hotman [1573] 1972, 139). The text is meant to cultivate in his readers the same feeling for the “ancient constitution” he would have them “restore.”

C. Native Liberty and Foreign Tyranny

In his historical account, Hotman establishes the Gauls and the Franks to have been valiant lovers of liberty, who won their independence at great cost from the tyrannical Roman Empire. He traces this theme through subsequent French history underlining the bravery of the French in preserving their birthright, a native constitution that protected their liberties and advanced the common good, in the face of corrupt kings who attempted to impose despotic Roman laws upon them. It is, in essence, a story of pristine native freedom holding out against depraved foreign tyranny. The call to restore the ancient constitution, and with it, the liberty and welfare of the nation, is framed as an appeal to expel a poisonous foreign element,

which in recent times has crept in, and to take inspiration from courageous ancestors who won such battles before.

The first few chapters of the *Francogallia* provide lineages of the Gauls and Franks as heroic races that loved liberty and as nations with recognized national institutions of popular government. The Gauls and Franks had a character suitable to self-government, a character which the French nation inherited. According to Hotman, all the regions of Gaul “accepted the general practice of holding a public council of the nation at a fixed time of the year . . . [where] they decided whatever seemed appropriate for the greatest good of the commonwealth” (Hotman [1573] 1972, 147). The existence of this national institution was confirmed by passages from Caesar: “They asked whether it was permitted to proclaim a council of the whole of Gaul for a certain day . . . A council of all Gaul was summoned at Bilbrax, and there a great multitude assembled” (Hotman [1573] 1972, 149). The ancient Gauls, then, in Hotman’s interpretation of the ancient texts, had nascent national institutions of self-government, which they insisted on exercising even after the Romans had come among them. The regional princes and magistrates of Gaul, furthermore, exercised no authority like that of the Roman emperors. They did not inherit their power, and “did not possess an unlimited, free and uncontrolled authority, but were so circumscribed by specific laws that they were no less under the authority and power of the people than the people were under theirs” (Hotman [1573] 1972, 155). In ancient Gaul, then, the rule of kings was circumscribed by law and subject to the consent of the people, expressed at annual public councils.

Hotman also asserts that this political liberty was the key to the power and success of the ancient Gauls. While they remained free, they were among the most fearsome of the European nations in war. Even “the Romans feared the armed strength of no other nation as they did that of Gaul.” He cites the judgment of Tacitus that “there was a time when the Gauls exceeded even the Germans in valour, and carried war to their furthest boundaries, sending colonies across the Rhine because of the pressure of their own numbers” (Hotman [1573] 1972, 173). Furthermore, the Gauls continued valiant in war as long as they remained free. Once they lost their liberty, however, their valor disappeared also (Hotman [1573] 1972, 175).

The Franks were no less to be admired for their political liberty, courage and martial prowess than the Gauls. The very name of the Franks indicates their freedom: “those who declared themselves foremost in the recovery of liberty called themselves FRANKS, by which they were understood among the Germans to mean free men, exempt from servitude” (Hotman [1573] 1972, 201). The Franks had the same relation to their kings as the Gauls had to theirs: “they considered

it their duty to keep their honest liberty, even when they were under the authority of kings . . . When they appointed kings for themselves, they were not appointing tyrants and butchers, but rather guardians, governors and tutors for their liberty” (Hotman [1573] 1972, 205). In the chapter on the deposition of kings Hotman recites at great length all the recorded instances of the Franks removing their kings for abuse of power or incompetence (Hotman [1573] 1972, 235–245). Frankish kings also possessed nothing resembling the Roman *imperium*. They were permitted to rule only if they protected the liberty of the people. Like the Gauls, the free Franks were also fierce in warfare. According to one account: “When the passions of Franks turn to war, their strength exceeds that of other peoples, and it propels them on with a surge of fury beyond the narrow seas, so that they have even infested the coasts of Spain with their armed might” (Hotman [1573] 1972, 195).

In these chapters on the history of the ancient Gauls and Franks Hotman breaks the chain tying the French political order to that of Rome by pointing to the pre-Roman origins of a distinctive tradition of political liberty in the practices of the two ancient nations that later formed France. In addition, he shows that the liberty-loving ancestors of the French were able to make good use of their liberty; they were admired and feared by others for their strength and prowess. Such a portrait of these ferocious and free ancestors would also make them admirable to their descendants.

Hotman’s account of the encounter of the Gauls and the Franks with the Romans is perhaps the most rabble-rousing portion of the text. It is a symbolic rejection of arguments for absolute monarchy derived from the conquest thesis and Roman law presented in the form of a paean to courageous ancestors who rebelled against a foreign oppressor and expelled the foe from their country. Though the Romans, under the command of Julius Caesar, managed to subdue Gaul, it was a feat that was accomplished only after many “disastrous setbacks” in a war that continued almost ten years. Gaul was reduced to a “threefold servitude” by the Romans. First, “they were held down by a garrison quartered upon them.” Second, “they were obliged to receive tax-gatherers, or rather, harpies and leeches, who sucked out the blood of the provinces” (Hotman [1573] 1972, 177). “The third form of servitude,” he continues, “was the prohibition of native provincial laws and the imposition of magistrates bearing the authority and insignia of the Roman people, with the power to declare law in the provinces” (Hotman [1573] 1972, 179). In some of Hotman’s exchanges with critics, he makes the analogy between past and present even more explicit. Just as Gaul was once subject to Roman tyranny, today, he says, France is infested by Italian mercenaries and tax collectors and subject to the will of an Italian tyrant, Catherine de Medici (Kelley 1973, 242, 257).

Hotman insists that the Gauls did not endure the Roman yoke easily but in fact frequently rebelled against their conquerors: “Tacitus relates that when Tiberius was Emperor, not so very long after Caesar’s conquests, the states of Gaul rebelled against the continuation of the tribute moneys, the ferocity of the extortioners, and the proud insolence of the soldiery.” Hotman also credits the Gauls as the first within the Roman empire to rebel against Emperor Nero: “We cannot offer sufficiently high praise for the worth of our ancestors because they were the first in the world to begin to remove from their necks the yoke of so powerful a tyrant, and to claim for themselves release from so monstrous an oppressor” (Hotman [1573] 1972, 179).

Although the Gauls never lost hope of recovering their liberty, they did not have enough fighting men to throw off the Roman yoke, and for that reason “they took to that ancient custom of hiring German mercenaries to come to their aid. In this way the first Frankish colonies began” (Hotman [1573] 1972, 179). “Our Franks” were also victims of Roman tyranny and sought the recovery of their own liberty and independence: “When the Franks had left their own territories with this intent, they freed Gaul as well as their own German fatherland from Roman tyranny” (Hotman [1573] 1972, 209). The struggle of the Gauls and Franks for their liberty lasted some 200 years until at last, in 450 AD, they succeeded in driving the Romans out.

The ancestors of the French, the Franks and the Gauls succeeded in throwing off the yoke of the world’s greatest empire, which had long robbed them of their freedom to rule themselves through their public councils and live in accordance with their own native laws. If they could recover their liberty then, the French nation today may do so again, and, unless the present generation wishes to dishonor and disgrace the ancestors, it must do so. The account is a call to arms to expel foreign occupiers and restore the ancient liberties of the nation, just as the ancestors did. Moreover, the authority and legitimacy of Roman law in France, alleged by absolutists because it put the king above the law, is overthrown. From the legal point of view, there could be no claim that Roman law continued to be in force in France, for it was expelled from France together with the Romans themselves.¹³ But there is also a more emotive aspect to Hotman’s answer to those who claim that the king of France should be absolute, just as the Roman emperors were above the law. It is as if to say “which laws would you have us adopt, the tyrannical laws of the Roman emperors, under which our great-souled ancestors groaned, until, at

13. This is one reason it was important that Hotman show “French, (or Francogallican) fundamental law developed autochthonously” (Giesey 1967, 587).

last, driven by the memory of their former glory and pent up resentment, they rose up against these foreigners and their foreign laws and sent them packing out of our country?” The expulsion of the Romans negates the absolutist argument from conquest. Having seen their former conquerors off, the Franks and the Gauls were free to form a new state and constitution on the basis of their own native customs.

The constitution of France, according to Hotman, was preserved, in the same essential form since the Gauls and Franks threw off the Roman yoke, owing to their nation’s courage and zeal for liberty. “Our commonwealth,” he says, “which was founded and established upon liberty, retained that free and holy condition for more than eleven centuries, and even resisted the power of tyrants by armed force” (Hotman [1573] 1972, 447). The ancestors, then, throughout the ages, had been precisely the sort of citizens described in his preface: men who loved the fatherland as much as Odysseus did his Ithaca, and who, therefore, would not, for the sake of personal pleasure or comfort, abandon it, or its free constitution, to the tyranny of an ambitious or corrupt king. Members of all three of the great dynasties of French kings, the Merovingians, the Carolingians, and the Capetians had presented challenges to French liberty, but the nation held its own against them all. Charlemagne “acquired nearly all Europe as his kingdom,” yet he was “unable to deprive the Franks of their pristine right and liberty” (Hotman [1573] 1972, 393). Most recently, in 1460 “the magnates of the kingdom . . . aroused by the continued queries and complaints of the common people” against the corruption of King Louis XI, assembled an army to prosecute what became known as “the War of the Common Weal” (Hotman [1573] 1972, 441–443). Their first demand had been to convoke the assembly of the three estates to redress the grievances of the commonwealth. This, he says, was done, following which, the assembly chose twelve guardians from each of the three estates with “authority to reform the commonwealth, and relieve the common people of the burden of taxes and exactions.” King Louis XI agreed to abide by the decisions of the guardians and, when he broke his promise, was met with further armed resistance that continued for years. All of this, says Hotman, is proof that “less than century ago the liberty of Francogallia and the authority of the solemn council flourished” (Hotman [1573] 1972, 447).

In the final chapter of *Francogallia*, Hotman presents the reader with a new example of Roman tyranny, the current condition of France. Although he generally avoids explicitly Protestant polemic, here the Church of Rome is represented as a conduit for tyrannical and corrupt political practices based on Roman law. The Popes brought back to France the laws of the Roman emperors that the ancient Gauls and Franks had expunged. Hotman refers to a letter of Pope Leo to Louis II, in which he “begs that same emperor for his clemency and wishes the constitutions

of Roman Law everywhere to be observed” (Hotman [1573] 1972, 523). The popes kept Roman law alive and spread it, like an infection, to France by pleading that “the constitutions of Roman law be everywhere observed.” The present institutional embodiment of Roman Law and Roman tyranny for Hotman is the *parlements* and chief among them the *parlement* of Paris. He compares the *parlement* to the Senate in imperial Rome, an assembly composed of lawyers who have gained the wealth and power of “satraps and kings” owing to privileges afforded them by their proximity to the imperial court. The *parlement* began as an attempt by the Capetian kings to increase their own power by subverting the ancient constitution of France: “As the authority of the council [the Estates General] was supreme, the Capetians endeavoured to diminish it and substitute a number of approved judges for the council. Then they transferred the august name of parliament to the Senate. . . .” (Hotman [1573] 1972, 503). The assembly of the three estates has been supplanted by a “spurious senate” not representative of or accountable to the nation (Hotman [1573] 1972, 499).

The ancient free constitution of Francogallia, Hotman concludes, has been utterly subverted and replaced with something like the tyrannical regime of the Roman Empire. The solution is announced already in the preface: the cause of France’s present troubles is the subversion, some one hundred years earlier, of “the excellent institutions designed by our ancestors . . . our commonwealth will return to health when it is restored by some divine act of beneficence into its ancient, and, so to speak, natural state” (Hotman [1573] 1972, 143). Now, at the end, the reader is left to conclude that, just as eleven decades before, the French nation is afflicted by the same foreign tyranny. It becomes, therefore, a sacred duty for true sons of the fatherland, whose ancestors preserved their native, authentic liberty against tyrants foreign and domestic, to remember the unity and patriotic zeal their nation once possessed, to throw off that foreign yoke again and restore ancient French liberty.

D. Representing the Nation: the Francogallican Mixed Constitution

Not only did the Gauls and Franks elect their first king, Childeric I, but having found him to be given to insolence, luxury, and debauchery, they deposed him. Hotman comments: “this celebrated and remarkable deed of our ancestors should be noted all the more carefully because it was done near the beginning and in the infancy of the monarchy, as if it were a witness and declaration that in Francogallia kings were created by fixed laws and were not constituted as tyrants with unbridled, free and unlimited authority” (Hotman [1573] 1972, 237). From the first, then,

owing to the traditions of the Gauls and Franks, their courage and their love of liberty, the government of Francogallia was established and maintained as a limited monarchy. Nor did the commitment of the Francogallican nation to this form of government abate with the passage of time. Hotman recounts many subsequent instances in which kings of Francogallia were deposed by the leading men for arbitrary rule, sloth, or failure to preserve the territorial integrity of the kingdom (Hotman [1573] 1972, 239).

For Hotman, the public council, or assembly of the three estates, was much more than a “bridle” to constrain the king or to depose him in an extreme case: it was “the highest administrative authority in the kingdom of Francogallia” (Hotman [1573] 1972, 291).¹⁴ “The royal majesty,” he says “resides in that place where counsel is taken for the welfare of the commonwealth,” that is, in the assembly, which, like the public councils of Gaul before the Roman conquest, met annually. This assembly possessed all the powers of sovereignty which absolutists attributed to the king alone: the power to decide all questions of war and peace; the making of public laws; the appointment of honours, offices, and regencies; and, generally, “all those issues which in popular speech are now commonly called affairs of state, since, by the highest authority of many generations there was . . . no right for any part of the commonwealth to be dealt with except in the council of estates or orders” (Hotman [1573] 1972, 333). By the highest authority of many generations, that is to say, by the common law of Francogallia, and, ultimately, France, the sovereignty of the nation lay in the council of the three estates, whose members, assembled together, represented the nation as a whole.

Hotman stresses the representative character of the assembly. The Estates General of France is not like a senate, which may offer advice to the king but, in practice, has no power. Such councils are not beholden to the nation and thus end up serving “the profit and convenience of a single man.” The assembly of the three estates is superior because of the “amplitude of advice” from a “large number of men of prudence” drawn from “all the estates.” Those office-holders “foremost in the great affairs of government” are “held in fear of this council, in which the requests of the provinces are freely heard” (Hotman [1573] 1972, 297, 299). Such a constitution as this was consistent with the principle of government by the consent of the governed, which, he affirms, was explicitly acknowledged by the ancient

14. The other French monarchomachs, Beza and Du Plessis Mornay, emphasize the role of the estates chiefly as a “bridle” to the king, although both also describe the former legislative and administrative powers of the Estates and, like Hotman, lament their decline (Beza [1576] 1956, 60–61; de Mornay [1579] 1994, 86, 103, 117–118).

kings of France. For evidence he cites Charlemagne's Capitulary: "that, if any new clauses be added to the law, the people should be consulted about them and, when all consented to the additions, they should sign their names in confirmation of these clauses." Hotman interprets: "It is manifest from these words that the people of France were formerly bound only by those laws which they had approved by their own votes in the assemblies" (Hotman [1573] 1972, 347).

The ancient constitution was also a composite regime, like those described by the ancients and "approved before all others by Cicero in his *Republic*," "mixed and tempered from the three elements of monarchy, aristocracy and democracy" (Hotman, 293). The division of sovereignty among the king and the three estates, who sat and deliberated separately, is essential for a "tempered" government. Hotman concurs with Claude de Seyssel that such a constitution protects the interest of all: "so long as the legal right and dignity of each order is preserved, it is difficult for the kingdom to be overthrown. Each order has its fixed prerogative, and while that is maintained, one order cannot subvert the other. . . ." These estates were, in the earliest times, the nobility and two orders of deputies from the towns and provinces, one composed of merchants and lawyers, and the other of artisans and farmers (Hotman [1573] 1972, 293). Later, the clergy became one of the estates, and the two orders of commoners were merged to form the third estate (Hotman [1573] 1972, 445). The nobility play an essential role as intermediaries between the king and commoners since they "approach the status of royalty" in virtue of "the splendour and antiquity of their stock" but at the same time share with those of plebeian birth the status of subjects. The common good is better served when sovereign decisions require the consent of different orders with different interests and dispositions. As Cicero put it, "harmonious and agreeable concord is produced . . . through the consent of dissimilar elements, drawn, like the sounds, from the highest and the middling orders, from the lowest and the intermediate estates" (Hotman [1573] 1972, 295).

The notion of a mixed regime, promoted here by Hotman, in which the estates share sovereignty between them and watch over each other lest any one of them attempt to subvert the powers of the others or usurp all the sovereign powers for itself, is the source of the idea of constitutional checks and balances. In this, and in other descriptions of the ancient constitution of France, Hotman's debt to the Roman republican tradition is evident (Kinneging 1997). But he is keen to show that this is an ancient and authentically French practice. Hotman added to the 1586 edition of the *Francogallia* an excerpt from a speech of King Louis the Pious delivered to an assembly of the three estates:

[H]owever mighty this royal office may seem to be in our person, our office is known by both divine authority and human ordinance to be so divided throughout its parts that each one of you in his own place and rank may be recognised as possessing a piece. Hence it seems that we should be your counselor, and all of you should be our deputies. And we are aware that it is fitting for each one of you to have a piece of authority vested in you (Hotman [1573] 1972, 295).

By the testimony of the ancient kings of France themselves, then, the sovereignty of the nation was divided between the king and the three estates.

Hotman's notion of mixed government also reflects a view of the state as a community of communities, rather than as a mass of individuals with a "general will." This is brought out further by his remarks on the rights of the provinces according to the ancient constitution. "It is clear," he says, that no province "of France was reserved or granted to the king, and in this respect all power was not bestowed upon him in the manner which the Roman people gave it to the emperors" (Hotman [1573] 1972, 417). Citing a description of the provincial charters of Toulouse and Languedoc concerning their union with France, Hotman makes it clear that the provinces reserve certain corporate rights within the kingdom, of which, in addition to the most fundamental one, that is, the right of each province to summon assemblies "to take public council for the benefit of the province as a whole," three are listed: first, that all provincial privileges and local law will be preserved inviolate; second, that the king will appoint no governor who is not a member of a provincial family; third, that no taxes or other subsidies can be levied on the province by the king without the consent of the provincial estates (Hotman [1573] 1972, 417). The provinces remain in obedience to the king provided that he does not violate their privileges. If he does, then they have a right to disobey. It is clear, then, that Hotman's conception of nationhood and his understanding of the ancient constitution in no way imply centralization of authority or a power in the national government to dispense with or transform existing institutions, traditional customs, and rights. The French are all one nation (*gens*), but that nation is also divided into regions, each with variations in custom and law that are their own and with rights to local self-government. The public power to act in the name of the nation, or its various parts, is spread among the orders and provinces of which it is composed.¹⁵

15. Hotman did support a plan to codify French national law (concerning which, see Geisey 1961, and Davis 2006), but this is a far cry from the programs of national homogenization of the French Revolution.

IV. THE LEGACY OF THE *FRANCOGALLIA*: GROTIUS AND SELDEN

Hotman's argument for constitutional government did not prevail in 16th century France, but the *Francogallia* proved influential on a variety of English and Dutch thinkers. (Salmon, 1959; Hotman [1573] 1972, 107–128). I focus on two important pro-constitutionalist texts in which the influence of the *Francogallia* is obvious: Hugo Grotius' *The Antiquity of the Batavian Republic*, and John Selden's *The Reverse of the English Janus*. Several scholars have perceived that these texts were modeled on the *Francogallia* and have catalogued their authors' various borrowings from Hotman (Christianson 1996, 13–15, Hotman [1573] 1972, 120; Toomer 2009, 102, 128). The same four nationalist themes seen in *Francogallia* appear here for Dutch and English audiences: Grotius and Selden both give flesh and bones to the pre-political community, the Batavians and the Saxons respectively; they describe community and citizenship in ethnocultural rather than in individualist or voluntarist terms; they tell a tale of native liberty confronting foreign tyranny; and they defend a mixed constitution as the ancient and authentic form of government of their respective nations. On the last aspect it should be noted that Grotius and Selden were themselves as familiar with original sources on the constitutional theory of the Roman Republic, especially the works of Cicero, as was Hotman. Like Hotman, they adapt the theory of the Roman mixed constitution to fit native institutions. Grotius' Latin text was immediately translated into Dutch and printed several times throughout the 17th century. Though Selden's text appeared in 1610 only in Latin, its contents were popularized in English by members of parliament and many other writers.

Grotius' *The Antiquity of the Batavian Republic* was commissioned by the States of Holland and West-Friesland, the government of the largest and most powerful province of the Dutch Republic. Grotius defends the mixed federal constitution of the Dutch against absolute monarchy, which, in spite of the struggle for independence from Spain, had many supporters at Dutch universities and among prominent citizens in general. Grotius begins with the origins of the community in ancient times. The people of the Dutch provinces descend from the Batavians, and other kindred Germanic tribes such as Frisians and Mattiaci. The only natural right mentioned is that whereby "a people of free origins" is entitled to take possession of unoccupied land, a right that he says the Batavians exercised as a community (Grotius [1610] 2000, 57). In Grotius' account, freedom is a thing that belongs to tribes and nations, and to citizens as members of those communities.

Grotius contrasts Batavian liberty with foreign tyranny. Unlike slavish Oriental nations, who submit to a sovereign master, says Grotius, the Batavians elected their

kings, and made decisions for their republic in public councils composed of nobles and deputies of the people (Grotius [1610] 2000, 57, 59). The Batavians, he notes, were famous for their martial prowess and courage (Grotius [1610] 2000, 73). The tyrannical enemy who threatened Batavian liberty and tested Batavian courage, however, was the Roman Empire. Grotius recounts the already well-known story of the uprising, led by the Batavian general Claudius Civilis in AD 69, to restore his nation's freedom and independence from Rome. This narrative had been used to inspire Dutch resistance against the King of Spain as early as 1575, by Janus Dousa, Grotius' predecessor as historiographer of Holland and a colleague of François Hotman. Dousa himself may have been taking a page from the *Francogallia* when he composed his poem praising the lifting of the Spanish siege of Leiden as a feat worthy of the Batavian ancestors who had repelled the Roman onslaught many centuries ago (Grotius [1610] 2000, 9). Grotius uses the story for an additional purpose: a defense of the constitution, noting that Civilis did not go to war against the Romans until the public council of the two estates, nobility and people, had been convoked and had given him a mandate (Grotius [1610] 2000, 65).

The constitution that Grotius defends is a mixed regime, a council of nobility and deputies from the towns "combined with a principate, subject to laws" (Grotius [1610] 2000, 55). The legislative assembly in each province was the provincial States. Executive power belonged to the provincial standing committees and, where applicable, to the prince, called the Stadholder. The Federal government, whose responsibilities were war, peace, and foreign alliances, had a similar structure: the States General, composed of deputies from the provincial States, was the national legislative body. Executive power was in the hands of the Stadholder, who was commander-in-chief of the army and navy, and his Council of State (Grotius [1610] 2000, 109–111). This constitution, Grotius insists, closely resembled that of the ancient Batavians. It avoided the abuses and errors that result from concentrating all power in one place and provided for the protection of the rights of citizens, the rights of towns and provinces to local self-government, and the defense of the nation from its enemies. National experience and national honor demand, concludes Grotius, that the Dutch maintain the constitutional order they inherited from their illustrious ancestors.¹⁶

While Grotius was defending the constitution of the Netherlands on Hotmanesque grounds, John Selden was formulating similar arguments about the ancient constitution of England. Two of his early works were modeled on the *Francogallia*:

16. For a more thorough examination of Grotius' constitutionalism, see Alexander-Davey 2016.

Analecton Anglo-Britannicon (1605) and *Jani Anglorum Altera Facies* (1610). The former undermined the British version of the Trojan myth supporting absolute monarchy by describing the aristocratic constitutions of the ancient nations of Anglo-Britain: the Britons and the Anglo-Saxons. As in the *Francogallia*, the Romans are described as conquerors who robbed the natives of their ancestral liberty (Christianson 1996, 13–14). In *English Janus*, there is a shift in emphasis, reflected in the title, to the Anglo-Saxons. The account of the ancient Britons is not omitted, but Selden makes it clear that it is from the “Saxon Nation” that Englishmen inherit their customs and laws as well as their blood and bones. The first wave of Saxons, led by Hengist and Horsa, was followed by successive waves from other Saxon regions of the continent, who together conquered Britain and established in a new clime the customs and institutions by which they had lived in Germany (Selden 1683, 29). Here stands the pre-political community of the English state.¹⁷

The germ of Saxon liberty and Saxon government, says Selden, is the ancient public assembly which Tacitus had observed among the Germanic tribes on the continent. At these assemblies, the chief person would stand before his fellow citizens and “use the art of perswading, rather than the power of commanding” (1683, 32). Public decisions depended on the approval of those assembled. Such councils formed the basis of the local, provincial, and national governments of the Saxons in England. At the local level, a chief person administered justice together with a hundred associates chosen “out of the Commonalty.” This institution survived in Selden’s day as the Hundred Courts (Selden 1683, 32). English kings governed the nation together with *Wittena Gemotes*, councils of wisemen, and *Micel Gemotes*, Great councils (Selden 1683, 94). These practices were observed as customs of the nation for centuries: the constitution and the laws were finally collected and written down by order of King Edward the Confessor and known thereafter as St. Edward’s Laws (Selden 1683, 38).

The foreign challenge to Saxon liberty came with the Norman invasion. King James I had published, before his accession to the English throne, *The Trew Law of Free Monarchies* (1598), in which he claimed that William the Conqueror had overturned the Saxon constitution and established an absolute monarchy in England (Alexander-Davey 2014, 465–469). Selden, like his elder and more prominent colleague, Sir Edward Coke, who had for several years asserted that the common law of England had survived the Conquest, rejects King James’s account and offers

17. George Lawson, a critic of the theories of Thomas Hobbes, would later treat the concept of the pre-political community with greater theoretical sophistication than either Selden or Hotman (Alexander-Davey 2014).

his own: that although William of Normandy desired to dispense with England's constitution and rule according to laws of his own choosing, he was thwarted by English Barons who demanded that he govern in accordance with St. Edward's Laws, in which point William acquiesced (Selden 1683, 48–49).¹⁸ The Norman King failed to live up to his agreement, as did his successors, William Rufus and Stephen, but as England proved ungovernable without its ancient constitution, Henry I, in his first act as king, restored St. Edward's Laws (Selden 1683, 62). By Selden's account, then, liberty was preserved by the vigilance and the persistence of the English nation.

According to the mixed constitution that had survived from Saxon times, the law-making power in England is vested in a “General Assembly” of “the Three Estates, the *King*, the *Lords*, and the *Commons*, or Deputies of the People” (Selden 1683, 93–94). Selden quotes King Ina, in the original Anglo-Saxon, to show that the Saxon Kings did not make law without the consent of the assembled estates. He also quotes the same passage from Cicero that appears in the *Francogallia* (see page 54) to make the same point: that harmony and security are the fruits of a government that takes account of the will and the interests of the different orders that compose the nation. Selden gives no call to action in the *English Janus*, but his narrative appears repeatedly in the political speeches and tracts of other Englishmen throughout the century. In 1610, William Hakewill, Member of Parliament (MP) for Bossiney, challenged King James I's assertion of a right to impose taxes without consent of parliament on grounds that the power to tax, like other legislative powers, was vested jointly in King, Lords, and Commons (Greenberg 2001, 162). Several MPs appealed to the “laws of St. Edward the Confessor” in the debates on the Petition of Right in 1628 (Greenberg 2001, 166–168). After the conflict between King Charles and parliament had erupted into violence, William Prynne was commissioned by parliament to make a constitutional case for resistance against the King. Prynne, who also cites the *Francogallia* in his series of tracts, *The Sovereigne Power of Parliaments and Kingdomes* (1643), intensifies Selden's story about Saxon vigilance before Norman kings. William of Normandy acquiesced, says Prynne, because he feared he would be deposed and killed by Saxons who had begun a rebellion against him (Greenberg 2001, 220). Any King who denied the English nation its ancestral rights ought to fear the same fate. Prynne also later penned a

18. See the prefaces to Sir Edward Coke's *Reports*. Selden's Saxon barons standing up for their native laws, however, have no part in Coke's telling of the story (Coke 2003, Vol. 1, 245–248). On the differences between Coke's account of the Norman Conquest, and that of Selden and other parliamentarians, see Sommerville (1986).

Hotmanesque defense of the rights of English counties and corporations to local self-government, free from the meddling of king or parliament (Prynne 1656, 34). Thus, in England also, constitutional liberty was defended by appeals to the honor, courage, and vigor of ancestors.

V. CONCLUSION: WHAT MODERNS MAY LEARN FROM FRANCOIS HOTMAN

The rise of constitutional self-government in early modern Europe owes much to a nationalist liberation narrative pioneered by François Hotman in the *Francogallia*. The text itself was influential in the battles for sovereignty in England and the Netherlands. For the political theorist it is a particularly useful text, for it presents with remarkable clarity and explicitness the whole range of nationalistic arguments and rhetorical devices employed by early-modern thinkers in support of constitutional liberty.

The fact that nationalist narratives such as that of *Francogallia* played an important role in the early modern battle for constitutional self-government lends additional support to many of the assertions of scholars of nationalism such as Canovan and Yack, that constitutional self-government, even in those countries where it has long been established, depends on feelings of national solidarity, that defenses of popular sovereignty tend to turn to the nation as a concrete historical entity with ethnic components, and that it is therefore problematic to assume that democratic politics can transcend nationalism or that nationalism can be fully transformed in the direction of liberal inclusivity.

The *Francogallia* also reflects a conception of nationhood much less given to the extremes of the nationalism that developed in late 18th century France and evolved into even more dangerous forms in the 19th and 20th centuries. The understanding of the nation as a society of orders or estates, with different humors and interests and as a body composed of provinces, each with their own variations on national customs, their own local interests and reserved rights and privileges, is not compatible with the rationalistic, homogenizing, and centralizing nationalism of Emmanuel Sieyès. For Hotman, and for his counterparts in the Netherlands and England, the latter form of nationalism was not even a possibility. Later thinkers, such as Montesquieu, Burke, and Tocqueville would explicitly defend a conception of nationhood in which the *corps intermédiaires* were essential to preserving the liberties of the nation and its members. Indeed, this is the conception of nationhood that underlay the struggle for national independence in the Netherlands and for limited monarchy in England. It is perhaps here that we should look for the

difference between a moderate nationalism, compatible with the idea of constitutional government, and the extreme forms born of Enlightenment rationalism that Hont and Greenfeld describe, rather than in a turn away from a possibly mythical early-modern individualism to collectivism.

For those interested in the preservation and promotion of constitutional self-government, the *Francogallia* may merit study and contemplation. Without making any suggestion that Hotman's 16th century nationalism could or ought to be resurrected, it may be appropriate to consider some of the advantages of his conception. To speak of the advantages of a particular variety of nationalism is not to deny the dangers of nationalism as such. One could catalogue instances of nationalist violence through the ages *ad infinitum* and *ad nauseam*. The important question for the political theorist is how to respond to such historical facts. One possible response is to become a cosmopolitan and insist that national identities be overcome, or be so attenuated that no-one can be excluded from them, and no-one will wish to fight over them. Another is to conclude that the history of nations and nationalism points to an enduring quality in human nature, which cannot be expunged and therefore must be, as far as possible, contained and channelled toward positive political ends. The latter is the view of many scholars of nationalism, such as Steven Grosby (1994) and Walker Connor (1994). Hotman and those who wrote tracts like his in the Netherlands and England take it for granted that man is "a national animal" and make their appeals on that basis (Connor 1994, 195).

For its time, the nationalism of Hotman is a good example of one that is both contained and channeled toward positive political ends. In the first place, it is a telluric rather than a messianic nationalism. Telluric nationalism is concerned merely with the preservation of a people's way of life within its national boundaries (Schmitt 1962, 92). Messianic nationalism posits the superiority of a chosen nation, whether on account of divine favor, racial and cultural qualities, or a more advanced stage of enlightenment, and assumes a special duty and a unique ability to spread the true religion, to impose order or visit destruction upon the inferior, or to bring enlightenment to ignorant nations. Such nationalisms, which Eric Voegelin termed "political religions," are less susceptible to being contained, for their aspirations are universal and dogmatic (Voegelin 2000).

Although Hotman, Grotius, and Selden do not draw distinctions between different kinds of nationalism, there are explicit and implied moral judgments in the comparisons they make between their ancestors and the Romans. The Gauls, Franks, Batavians, and Anglo-Saxons, they tell us, were fierce and brave conquerors, but the signal achievement of these tribes was their success in carving out for themselves a national territory in which they could live in freedom and in accordance

with their own customs and laws. To preserve their distinctive way of life on their land these nations had to repel, subdue, or assimilate invaders, but they were not like the Romans who sought conquest throughout the known world and gloried in their dominion over other nations. Theirs is thus a telluric, a defensive, and not a messianic nationalism.

The other potentially advantageous features of Hotman's conception are disclosed more clearly in the texts. His nationalism is restrained by the mediaeval conception of the nation as a community of communities, in which the subordinate communities have strong claims on the loyalty of citizens and the institutional capacity to mobilize them. It assumes that national unity is maintained, in large part, by the good feelings of citizens for their conationals, by their recognition of what they have in common, by shared memories of past victories and sorrows, such that they have no need of a Louis XIV, much less a Robespierre, to tell them who they are and what they should do. Finally, and this is the central matter of the present essay, it is a nationalism whose energy is channeled toward a positive political end: the maintenance of constitutional liberty and self-government.

REFERENCES

- Alexander-Davey, Ethan. 2014. "Constitutional Self-Government and Nationalism: Hobbes, Locke and George Lawson." *History of Political Thought* 35 (3): 458–484.
- . 2016. "Nationhood and Constitutionalism in the Dutch Republic: An Examination of Grotius' *Antiquity of the Batavian Republic*." *History of Political Thought* 37 (3): 1–28.
- Allen, John. 1941. *A History of Political Thought in the Sixteenth Century*. London: Methuen & Co. Ltd.
- Althusius, Johannes. (1601) 1995. *Politica*. Translated by Frederick S. Carney. Indianapolis, IN: Liberty Fund. Citations refer to the Liberty Fund edition.
- Beza, Theodore. (1576) 1956. *Concerning the Rights of Rulers over their Subjects and the Duty of Subjects toward their Rulers*. Translated by Henri-Louis Gonin. Cape Town: H.A.U.M. Citations refer to the H.A.U.M. edition.
- Canovan, Margaret. 1996. *Nationhood and Political Theory*. Cheltenham, UK: Edward Elgar Publishing Ltd.
- Christianson, Paul. 1996. *Discourse on History, Law, and Governance in the Public Career of John Selden, 1610–1635*. Toronto: University of Toronto Press.
- Church, William. 1941. *Constitutional Thought in Sixteenth Century France*. Cambridge, MA: Harvard University Press.
- Coke, Edward. 2003. *The Selected Writings of Sir Edward Coke*, 3 vols. Edited by Steve Sheppard. Indianapolis, IN: Liberty Fund.

- Connor, Walker. 1994. *Ethnonationalism: The Quest for Understanding*. Princeton, NJ: Princeton University Press.
- Davis, Kathleen. 2006. "Sovereign Subjects, Feudal Law and the Writing of History." *Journal of Medieval and Modern Studies* 36 (2): 223–261.
- de Mornay, Philippe. (1579) 1994. *Brutus: Vindiciae, Contra Tyrannos: Or, Concerning the Legitimate Power of a Prince Over the People, and of the People Over a Prince*. Translated by George Garnett. Cambridge: Cambridge University Press. Citations refer to the Cambridge edition.
- Franklin, Julian. 1969. *Constitutionalism and Resistance in the 16th Century*. New York: Pegasus.
- . 1979. *John Locke and the Theory of Sovereignty*. Cambridge: Cambridge University Press.
- Foucault, Michel. 2003. *Society Must Be Defended: Lectures at the Collège de France*. Translated by David Macey. New York: Picador.
- Giesey, Ralph. 1961. "The Juristic Basis of Dynastic Right to the French Throne." *Transactions of the American Philosophical Society* 51 (5): 3–47.
- . 1967 "When and why Hotman wrote the *Francogallia*," *Bibliothèque d'Humanisme et Renaissance* 29 (3): 581–611.
- Greenberg, Janelle. 2001. *The Radical Face of the Ancient Constitution: St Edward's Laws in Early Modern Political Thought*. Cambridge: Cambridge University Press.
- Greenfeld, Liah. 1992. *Nationalism: Five Roads to Modernity*. Cambridge, MA: Harvard University Press.
- Grosby, Steven. 1994. "The Verdict of History: The Inexpungeable Tie of Primoridity." *Ethnic and Racial Studies* 17 (1): 164–171.
- . 2005. *Nationalism, A Very Short Introduction*. New York: Oxford University Press.
- Grotius, Hugo. (1610) 2000. *The Antiquity of the Batavian Republic*. Edited and translated by Jan Waszink. Assen, NL: Van Gorcum & Comp.
- Habermas, Jürgen. 1996. "The European Nation State. Its Achievements and Its Limitations. On the Past and Future of Sovereignty and Citizenship." *Ratio Juris* IX: 125–37.
- Hayward, Clarissa. 2007. "Democracy's Identity Problem: Is 'Constitutional Patriotism' the Answer?" *Constellations* XIV: 182–96.
- Hont, Istvan. 1994 "The Permanent Crisis of a Divided Mankind: Contemporary Crisis of the Nation State; in Historical Perspective." *Political Studies* 42 (1): 166–231.
- Hotman, François. (1573) 1972. *Francogallia*. Edited by Ralph Geisey. Translated by J. H. M. Salmon. Cambridge: Cambridge University Press. Citations refer to the Cambridge edition.
- Kelley, Donald. 1973. *A Revolutionary's Ordeal*. Princeton, NJ: Princeton University Press.
- Kcothane, Nannerl. 1980. *Philosophy and the State in France: The Renaissance to the Enlightenment*. Princeton, NJ: Princeton University Press.
- Kinneking, Andreas. 1997. *Aristocracy, Antiquity & History: Classicism in Political Thought*. New Brunswick, NY: Transactions Publishers.

- Lee, Daniel. 2008. "Private Law Models for Public Law Concepts: The Roman Law Theory of Domini-um in the Monarchomach Doctrine of Popular Sovereignty." *The Review of Politics* 70 (3): 370–399.
- Levy, Jacob. 2015. *Rationalism, Pluralism, and Freedom*. New York: Oxford University Press.
- Locke, John. (1690) 1994. *Two Treatises of Government*. Edited by Peter Laslett. Cambridge: Cambridge University Press. Citations refer to the Cambridge edition.
- Major, J. Russell. 1960. *Representative Institutions in Renaissance France*. Madison: University of Wisconsin Press.
- . 1980. *Representative Government in Early Modern France*. New Haven, CT: Yale University Press.
- Muller, Jan-Werner. 2007. *Constitutional Patriotism*. Princeton, NJ: Princeton University Press.
- Pocock, John. 1987. *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the 17th Century, a Reissue with a Retrospect*. Cambridge: Cambridge University Press.
- Prynne, William. 1643. *The Sovereigne Power of Parliaments and Kingdomes*. London.
- . 1656. *A Summary Collection of the Principal Fundamental Rights, Liberties, Proprieties of all English Freemen*. London.
- Salmon, John. 1959. *The French Religious Wars in English Political Thought*. Oxford: Clarendon Press.
- Schmitt, Carl. (1962) 2007. *Theory of the Partisan*. New York: Telos Press Publishing.
- Selden, John. 1683. *Jani Anglorum, or, The English Janus*. In *Tracts Written by John Selden of the Inner-Temple, Esquire*, translated by Redman Westcot. London: Thomas Basset and Richard Chiswell.
- Skinner, Quentin. 1978. *Foundations of Modern Political Thought*, Vol. 2. Cambridge: Cambridge University Press.
- Sommerville, Johann. 1986. "History and Theory: the Norman Conquest in Early Stuart Political Thought." *Political Studies* 34 (2): 249–61.
- Smith, Rogers. 1999. *Stories of Peoplehood: The Politics and Morals of Political Membership*. Cambridge: Cambridge University Press.
- Tipton, Charles. 1972. *Nationalism in the Middle Ages*. New York: Holt, Rinehart & Winston.
- Toomer, Gerald. 2009. *John Selden: A Life in Scholarship*. Oxford: Oxford University Press.
- Tuck, Richard. 1982. *Natural Rights Theories: Their Origin and Development*. Cambridge: Cambridge University Press.
- . 1993. *Philosophy and Government 1572–1651*. Cambridge: Cambridge University Press.
- Ullman, Walter. 1965. *A History of Political Thought: The Middle Ages*. Baltimore: Penguin Books.
- Voegelin, Eric. 2000. *Modernity without restraint*. Columbia: University of Missouri Press.
- Yack, Bernard. 1996. "The Myth of the Civic Nation." *Critical Review* 10 (2): 193–211.
- . 2001. "Popular Sovereignty and Nationalism." *Political Theory* 29 (4): 517–536.

JAMES MADISON AND THE EMERGENCY POWERS OF THE LEGISLATURE

CLEMENT FATOVIC

ABSTRACT

Prerogative, the power to take extra-legal measures in extraordinary circumstances, is generally considered to be the exclusive domain of the executive. This article shows that James Madison, who is widely regarded as hostile to discretionary power in the executive, not only endorsed exercises of prerogative by the executive but also took steps toward developing a model of prerogative that gives primacy to the legislature in times of emergency. Madison's views on "legislative prerogative" emerged in the context of congressional debates over avowedly unconstitutional proposals including a grant of military authority to seize private property during the revolutionary war, the creation of the Bank of North America under the Articles of Confederation, and the provision of financial assistance to refugees from St. Domingo. These cases reveal a strict constructionist resorting to extra-legal measures to pursue objectives not expressly authorized by the constitution then in place as a safer alternative to more permanent expansions of government power established through law.

KEYWORDS: *James Madison, Prerogative, Executive Power, Legislature, Rule of Law*

THE EXERCISE OF PREROGATIVE, or what John Locke described as the power to take extra-legal measures in extraordinary circumstances, has generally been regarded as the exclusive domain of the executive in liberal political thought. To the extent that liberal thinkers have defended the use of this power, they have

Constitutional Studies 1.1

©2016 by the Board of Regents of the University of Wisconsin System

This open access article is distributed under the terms of the CC BY-NC-ND 4.0 license (<https://creativecommons.org/licenses/by-nc-nd/4.0/>) and is freely available online at: <https://constitutionalstudies.wisc.edu> or <https://uwpress.wisc.edu/journals/journals/cs.html>

generally done so on the grounds that executives enjoy distinct institutional advantages that enable them to respond to emergencies with the required energy, dispatch, and decisiveness. Legislatures, in contrast, are relegated to a secondary role because, it is argued, their deliberative nature makes them ill-equipped to act in the midst of emergencies with the necessary speed and unity. Legislatures can take either prospective action by adopting enabling legislation that authorizes the executive to take measures that would not be permitted under normal circumstances or retrospective action by judging the validity of extra-legal measures taken by the executive, but they cannot take immediate action. Despite these supposed institutional disadvantages, James Madison contemplated a more direct role for the legislature in times of emergency. In contrast to the executive-centered model of prerogative that has dominated liberal political and constitutional thought, Madison's remarks in several legislative debates over admittedly unconstitutional proposals to deal with various kinds of emergencies provide the beginnings of what can be described as a model of "legislative prerogative."

The first part of this article examines Madison's views on the emergency powers of the executive against the background of more familiar accounts of executive prerogative. Madison is not generally regarded as a proponent of prerogative, but his record as a lawmaker during the early part of his political career reveals explicit—albeit reluctant and ad hoc—support for the use of executive prerogative under limited conditions. Despite his deep-seated suspicion of discretionary executive power, Madison did endorse a limited version of executive prerogative that relied on much the same sort of reasoning used by Locke and Thomas Jefferson in their more familiar justifications of prerogative. Madison's understanding of executive prerogative and the role of the legislature in serving as a check against abuses of this power was expressed most clearly in the context of a congressional debate over the legitimacy of Alexander Hamilton's legally questionable handling of funds as Secretary of the Treasury.

The second part of this article demonstrates that Madison employed many of the same arguments used to justify extra-legal action by the executive to justify unconstitutional measures taken by the national legislature. Madison developed his ideas on legislative prerogative during his time as lawmaker in the context of congressional debates over a grant of military authority to seize supplies required for the revolutionary war effort, the creation of the Bank of North America under the Articles of Confederation, and the provision of financial assistance to refugees from the Haitian Revolution. These cases reveal a strict constructionist resorting to extra-legal measures to pursue objectives that were not expressly authorized by the constitution then in place as a better alternative than more permanent expansions

of government power favored by thinkers such as Alexander Hamilton and his congressional allies. The model of emergency action that begins to emerge from Madison's remarks in these debates is one that stresses the primacy of the legislature either as a check on the prerogative powers of the executive or as a more direct and immediate actor in emergencies.

CONCEPTIONS OF PREROGATIVE

John Locke's account of prerogative in *The Second Treatise of Government* has provided a touchstone for nearly all scholarship on the emergency powers of the executive, especially since the terrorist attacks of September 11, 2001.¹ Locke defined prerogative as "the Power to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it." Ever since that classic formulation, prerogative has been identified almost exclusively with the executive (though some of Locke's own examples suggest that *anyone* might be entitled to take extra-legal action in case of genuine emergency). Unlike the legislature, which is not always in session and may be too slow to respond to "all Accidents and Necessities" because it is a numerous and deliberative body, the executive, which is "always in being," is capable of responding to unforeseen exigencies with the requisite "dispatch" because that office operates according to a single—and presumably undivided—will (Locke 1970, 375). Though it is preferable to provide for the public good through prospective laws crafted by the legislature, argued Locke, sometimes "the good of Society requires, that several things should be left to the discretion of him, that has the Executive Power" (Locke 1970, 374). For example, if a fire threatens to grow out of control, it would be permissible to violate the otherwise inviolable right to property by tearing "down an innocent Man's House" near the source of the conflagration "to stop the Fire" from spreading. As Locke explained, "'tis fit that the Laws themselves should in some Cases give way to the Executive Power" in order to fulfill the more fundamental law of nature that "*all* the Members of the Society are to be *preserved*" (Locke 1970, 375). In recognition of the dangers that such discretionary powers pose to the rule of law, Locke insisted that no individual act of prerogative, however necessary or justifiable in the circumstances, should be cited as a legal precedent for the general expansion of executive power or as a justification for any subsequent exercise of extra-legal power. That is, each exercise

1. This literature, which includes scholarship in law, political science, and philosophy, is vast. Some examples include Fatovic 2004a; Agamben 2005; Goldsmith 2007; Feldman 2008; Lazar 2009; and Kleinerman 2009.

of prerogative is to be judged strictly on a case-by-case basis by the people or their representatives.²

This executive-centered conception of prerogative has shaped subsequent understandings of extra-legal action in liberal constitutional thought, most notably among the American Founders (see Fatovic 2009). The most explicit statement of this doctrine among early American thinkers appears in Thomas Jefferson's response to a question from John B. Colvin about the validity of extra-legal action in extraordinary circumstances. "A strict observance of the written laws is doubtless *one* of the high duties of a good citizen," wrote the then-former president, "but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means." As illustrated by the real-world examples that Jefferson provided his correspondent, prerogative is justifiable in cases of military necessity and other existential threats, but it is available only to "officers of high trust," such as military commanders and chief executives (Jefferson 1984, 1231 and 1233). In Jefferson's view, the officer who acts outside the law is bound to do so "at his own peril, and throw himself on the justice of his country and the rectitude of his motives." Likewise, the people or their representatives who ultimately decide on the legitimacy of an extra-legal measure taken by the high officer are "bound to judge according to the circumstances under which he [*sic*] acted" (Jefferson 1984, 1233). As in Locke's model of prerogative, everything in Jefferson's conception depends on the specific concrete facts at hand and denies precedential value even to the most uncontroversial exercises of prerogative. Each exercise of prerogative must be judged on its own terms without reference to or reliance on previous examples.

Recent scholarship has uncovered support for some version of executive prerogative among important American political thinkers including not only Thomas Jefferson (Fatovic 2004b; Bailey 2004, 2007, 2013), but Alexander Hamilton (Fatovic 2004b; Thomas 2013) and Abraham Lincoln (Farber 2003; Kleinerman 2005; Curtis 2013), as well. By contrast, Madison is often presented as a critic of discretionary power who sought to curtail the powers of the executive as narrowly as possible. Scholars have noted that Madison, who arrived at the Constitutional Convention without very clear ideas about the meaning of executive power, remained

2. On the prospects and efficacy of popular judgment of prerogative, see Kleinerman (2007).

relatively inactive in early debates about its scope (Sedgwick 1988).³ According to Morton Frisch, the Virginia Plan Madison helped to devise “was characterized by a view of executive power which was simply ministerial or reactive as a check on the legislative assembly” (Frisch 1987, 281). Although Madison’s ideas, like those of many other participants in the Convention, would change over the course of the summer, there is a scholarly consensus that this framer was hostile to the expansive view of executive power favored by delegates such as Alexander Hamilton, James Wilson, and Gouverneur Morris. Even though he favored the creation of an independent executive, it is argued, the “heavy-handed” leadership style of Robert Morris as Superintendent of Finance in the early 1780s made Madison wary of allowing *any* executive officer too much latitude (Rakove and Zlomke 1987, 295).

Whatever Madison’s ideas about executive power at the Constitutional Convention, contemporary scholarship generally portrays him as the leading critic of executive power and discretionary action under the new system of government. Peter Shane describes the historical movement towards increasingly unilateral executive action as a radical departure from this framer’s vision of a constitutional system that relies on a complex structure of checks and balances to maintain accountability and encourage deliberation between different branches of government (Shane 2009). Eric Posner and Adrian Vermeule (2011) welcome the expansion of presidential power in the twentieth century, but they, too, characterize it as a shift away from the Madisonian ideal, which they identify with a system of legal constraints that prevents the executive from responding effectively to emergencies. Benjamin Kleinerman argues that as president Madison modeled a standard of presidential leadership that did not seek to maximize executive power, as has been the case with nearly all other occupants of the office, but to bring it under constitutional constraints instead, often deferring “to his cabinet, Congress, and even the states” (Kleinerman 2014, 8). Indeed, the idea that Article II confers powers on the president beyond the review of other branches might be considered antithetical to the inherently conflictual nature of Madison’s complex system of countervailing powers (Thomas 2008).

There is no question that Madison insisted on strict, and sometimes rigid, adherence to established rules of law throughout his political career, even going so far as to veto legislation on national funding for internal improvements that *he himself had proposed* because he believed that Congress lacked the authority to promote

3. Madison conceded as much in a letter to George Washington dated April 16, 1787 (see Madison 1999, 82–83).

the construction of roads and canals without a prior constitutional amendment.⁴ However, it would be a mistake to conclude that Madison ruled out in all cases government action that lacked clear and explicit constitutional authorization. Although he consistently refused to justify legislative or executive action by resorting to loose or elastic constructions of the Constitution, he acknowledged the necessity for extra-legal action in exigent circumstances where strict adherence to legal rules would do serious harm.⁵

Unlike Madison's well-known and carefully considered views on factions, religious liberty, checks and balances, and representative government, his stance on extra-legal action is not revealed in any of his published essays or presidential addresses. Instead, Madison developed his ideas on prerogative in piecemeal and rather ambivalent fashion during the course of legislative debates early in his career. Despite his repeated and emphatic insistence on the need to maintain strict fidelity to both the spirit and the letter of the law, Madison was prepared to step over legal boundaries in cases of emergency. In fact, there were several instances in his legislative career when he voted for legislation that he himself acknowledged exceeded the legal and constitutional powers of the lawmaking assembly. In his view, deviation from the letter of the law was a last resort that ought to be avoided whenever possible, but it was still preferable to emergency action that relied on expansive, or "loose," interpretations of existing legal authority that tend to expand power on a more permanent basis.

Like other liberal advocates of prerogative, Madison preferred to specify the powers and functions of government, including both its means and its ends, in advance. As he argued in support of the U.S. Constitution at the Virginia Ratifying Convention, "no government can exist, unless its powers extend to make provisions for every contingency" (Madison 1999, 364).⁶ However, Madison was enough of a realist to acknowledge that lawmakers—himself included—were far from perfect. His views on the cognitive limitations of legislators, including their inability to foresee and plan for anything the future might bring, are illustrative of what one biographer describes as his "characteristic attitude concerning human fallibility"

4. Compare Madison's "Seventh Annual Message to Congress" (1999, 716) and his Veto Message to Congress (1999, 718–720).

5. One of the only scholars to identify this feature of Madison's political thought is Lance Banning, who notes that the Virginian deviated from the principle of strict constructionism "when exigencies required. But he departed from the principle with obvious reluctance and concern" (1983, 239).

6. This is a sentiment that Madison would repeat more than once, remarking, "as I hope we are considering a government for a perpetual duration, we ought to provide for every future contingency" (1999, 371).

(Gutzman 2012, 141).⁷ Try as they might to provide for every contingency, they were bound to miss something. In spite of his own preference for carefully spelling out the powers of government to minimize if not prevent their abuse, he had to admit that in drafting the Constitution, for instance, “precision was not so easily obtained as may be imagined” (Madison 1999, 393).

Because of the unavoidable imperfections of the law—which in part reflect the faulty medium in which they are expressed⁸—Madison cautioned against the creation of excessive rigidity and absolutist restrictions. Strict legal boundaries ordinarily provide a strong if not impregnable line of defense against abuses of power in times of emergency, but Madison recognized that excessive restrictions could end up inviting the very abuses they were intended to thwart. “Absolute restrictions” were particularly problematic because violations of them were probably inevitable. Echoing Hamilton’s blunt claims in *Federalist 23* about the limits of limitations on the powers of national defense, Madison asserted in *Federalist 41* that “the means of security can only be regulated by the means and the danger of attack. They will in fact be ever determined by these rules, and by no others. It is in vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions” (Madison 1999, 228). Sooner or later, an unconditional prohibition on government would run up against real-world conditions that necessitate their suspension. As Madison explained in *Federalist 38*, the Articles of Confederation imposed so many limits on Congress that legislators were often forced to “overleap[] their constitutional limits” in cases of “necessity” (Madison 1999, 210).

In cases of genuine necessity, Madison warned, the people would ultimately approve the violation and begin to lose respect for a law that proved to be inadequate or even obstructive to the achievement of important ends. Madison explained his thinking on this matter most explicitly in a letter to Jefferson on the habeas corpus clause in the Constitution:

Supposing a bill of rights to be proper the articles which ought to compose it, admit of much discussion. I am inclined to think that absolute restrictions in cases

7. Garrett Ward Sheldon (2003) attributes Madison’s views on human frailty to a deep-seated Calvinist worldview.

8. See Madison’s remarks on the inherent limitations of human language, which render even God’s intended meaning “dim and doubtful” when “the Almighty himself condescends to address mankind in their own language” (1999, 198).

that are doubtful, or where emergencies may overrule them, ought to be avoided. The restrictions however strongly marked on paper will never be regarded when opposed to the decided sense of the public; and after repeated violations in extraordinary cases, they will lose even their ordinary efficacy. Should a Rebellion or insurrection alarm the people as well as the Government, and a suspension of the Hab. Corp. be dictated by the alarm, no written prohibitions on earth would prevent the measure. (Madison 1999, 422)

Madison would make a similar point in the debate over the constitutional amendments that would ultimately comprise the Bill of Rights. Although he would later insist that the federal government possesses only those powers “expressly” granted to it in the Constitution, Madison rejected a proposal to insert that word into the text of what would become the Tenth Amendment because “it was impossible to confine a Government to the exercise of express powers” (*Annals of Congress* 1789, 790). The very same line of reasoning found its way into Madison’s draft of a constitution for Virginia in the same month as his letter to Jefferson. In the final paragraph of that draft, Madison wrote: “The extension of the Habs. Corps. to the cases in which it has been usually suspended, merits consideration at least. If there be emergencies which call for such a suspension, it can have no effect to prohibit it, because the prohibition will assuredly give way to the impulse of the moment; or rather it will have the bad effect of facilitating other violations that may be less necessary” (Madison 1999, 417).

One possibility was to seek justification for extraordinary action in one of the Constitution’s many open-ended clauses (e.g., by exploiting the indeterminacy of language that Madison analyzed in *Federalist* 37 to expand the powers of government). Leading Federalists in Congress and in the executive branch often discovered all the constitutional authority they needed for both ordinary and extraordinary legislation in elastic readings of the necessary and proper clause and the general welfare clause. However, Madison refused to stretch the powers of Congress by resorting to loose constructions of these and other clauses.⁹ Nor was he willing to “discover” powers that were “implied” in the notion of sovereignty or in the overall structure or purpose of the Constitution as Federalists such as Fisher Ames and Alexander Hamilton were wont to do.¹⁰ To find powers through either

9. Banning (1983, 234–235) demonstrates that Madison had actually defended congressional use of coercive powers against the states through implication in the Articles of Confederation.

10. See, e.g., Alexander Hamilton’s “Opinion on the Constitutionality of a National Bank” and Fisher Ames’s defense of the Bank in House debates (*Annals of Congress* 1791, 1953–1959).

of these strategies where none were expressly granted would allow for precisely the kind of discretion that Madison believed the law is meant to curtail.¹¹ It was one thing to make explicit allowance for exceptions in extraordinary circumstances (as the suspension clause does in the case of the writ of habeas corpus), but it was quite another to make the Constitution fit circumstances that had not been foreseen because that would undermine the very purpose of a constitution. That left Madison with only one other option in dealing with an emergency: extra-legal action. Although he would not use the term himself, the position that Madison took on indispensable legislative action in the absence of an express grant of power could fairly be characterized as one in support of “legislative prerogative.”

When Madison did use the term “prerogative,” he did so in much the same way that his contemporaries did: to refer to the powers and privileges of the executive in a monarchy. Its association with the British monarchy was perhaps the most important reason that this Anglophobic thinker usually expressed such a dim view of prerogative. As he understood the constitutional history of England, royal prerogative was antithetical to republican ideals of the rule of law and popular sovereignty because it allowed the monarch to exercise discretionary powers without approval of or accountability to either the people or their representatives. In fact, its association with royal power was Madison’s stated reason for rejecting Locke’s more philosophical account of executive power. In a footnote to the first installment of *Helvidius*, Madison’s pseudonymous response to Hamilton’s vindication of Washington’s proclamation of neutrality in the war between England and France, the Virginia congressman dismissed Locke’s reflections on the subject of executive power because “the chapter on prerogative, shews how much the reason of the philosopher was clouded by the royalism of the Englishman” (Madison 1999, 540).

During the critical period just before the creation of the Constitution, Madison was more apt to express concerns about an overweening legislature than an overpowerful executive. As he put it at the Constitutional Convention, “Experience has proved a tendency in our governments to throw all power into the Legislative vortex” (Madison 1999, 127). However, once the Constitution was in place and Hamilton’s energetic leadership of the Treasury Department made manifest the full potential of the executive branch under the new system, Madison would come to view the executive as the far more dangerous threat to liberty. Much of Madison’s hostility stemmed from the tendency of executive power to expand in times

11. Despite his previous claims that a bill of rights was unnecessary, Madison ended up justifying the proposed amendments that would comprise the Bill of Rights on the grounds that they would provide additional security against just this sort of loose constructionism (see Madison 1999, 447).

of war. Reflecting on the sobering lessons of history, he noted that “the testimony of all ages forces us to admit, that war is among the most dangerous of all enemies to liberty; and that the executive is the most favored by it, of all the branches of power” (Madison 1999, 605). In a letter to Jefferson he confided that “the constitution supposes, what the History of all Govts. demonstrates, that the Ex. is the branch of power most interested in war, & most prone to it” (Madison 1999, 586).

In light of the dangers posed by executive power, Madison considered it necessary to establish clear legal boundaries that minimize the executive’s room to maneuver: “details should leave as little as possible to the discretion of those who are to apply and to execute the law” (Madison 1999, 630). If the powers of the executive were to be expanded, even on an ad hoc basis, that could not be done through construction or implication. Instead, it would have to follow the model of prerogative.

Madison provided his most explicit and fully developed statement on executive prerogative in a case where he actually denied its applicability. Like all of his positive statements in favor of extra-legal action, Madison articulated his views on the validity of executive prerogative only when he was compelled to do so in the heat of political controversy. The context was a highly partisan House investigation near the end of the Second Congress over the way Hamilton had handled funds designated for the repayment of debts.¹² Suspecting the Treasury Secretary of corruption and abuse of power, William Branch Giles of Virginia, one of the Washington administration’s most vehement and implacable critics, introduced a motion requiring Hamilton to provide a full accounting of the sources, uses, and balance of loans taken out to repay the country’s debts. With characteristic speed and efficiency, Hamilton complied with this demand, but the information he provided failed to satisfy Giles, so the arch-Republican introduced a number of resolutions that accused Hamilton of using funds in a manner that had not been authorized by law.

The Treasury Secretary was ultimately exonerated by substantial margins on all counts, but his actions did raise important questions about the ability of executive officers to circumvent legal instructions in the pursuit of otherwise legitimate ends. Giles’s resolutions charged Hamilton with using funds in a manner not approved by Congress (specifically, by using funds designated for the repayment of a loan to France for the repayment of domestic loans instead) and with borrowing more money from Holland than he had been authorized to do. Hamilton was able

12. One of the few scholarly accounts of this episode that focuses on Madison’s articulation of executive power and emergency action is Kleinerman (2009, 140–145).

to account for every cent that passed through the Treasury, but he acknowledged that he had shifted funds specifically designated for the repayment of one set of loans to the repayment of an entirely different set of loans.¹³ Many of Hamilton's supporters believed that his actions fell squarely within the discretionary powers of the Treasury Secretary, but not everyone was convinced that he had acted lawfully.

Some of Hamilton's defenders in the House invoked the idea of prerogative to justify his actions. Noting that there are cases "which cannot be foreseen by the Legislature nor guarded against," pro-administration representative William Smith of South Carolina echoed Locke in arguing that "a discretionary authority must be deemed to reside in the President, or some other Executive officer, to be exercised for the public good" (*Annals of Congress* 1793, 901). Because Hamilton's actions served the public good (shifting funds around the way he did saved the financially-strapped country money on its interest payments), Smith concluded that he should be indemnified against punishment.

There was no question in Madison's mind that Hamilton had violated the law and ignored the instructions of the president by treating funds interchangeably (*Annals of Congress* 1793, 938). Madison conceded that the Treasury Secretary enjoys some "important discretion" in the management of "ordinary revenues arising from taxation," but he contended that the laws specifying the terms of loans denied Hamilton the latitude that was being claimed by administration allies such as Smith (*Annals of Congress* 1793, 942). The question was whether Hamilton's actions were justified on other than legal grounds. At first, Madison seemed to stake out an absolutist position on the sanctity of law, suggesting that the violation of any particular law is never acceptable because it erodes respect for the rule of law in general. The Virginian expressed concern about maintaining "a proper respect for the authority of the laws" even if a good outcome results from violating them (*Annals of Congress* 1793, 939). In spite of this seemingly categorical stance against public officials ever defying the law, Madison acknowledged that there were exceptions that justified an executive officer in stepping outside the law.

Madison took a position very similar to the one that Jefferson would later articulate in his letter to John B. Colvin. Just as his mentor would argue that "officers of high trust" have a "higher obligation" to uphold natural laws of "self-preservation" than to follow positive laws when they interfere with vital ends (Jefferson 1984,

13. For details on the investigation into Hamilton's activities and his ultimate exoneration, see Elkins and McKittrick (1993, 295–302). On the constitutional questions raised by this episode, see Currie (1997, 164–168).

1231), Madison acknowledged that certain kinds of emergencies take precedence over strict obedience to law:

Much has been said on the necessity of sometimes departing from the strictness of legal appropriations, as a plea for any freedoms that may have been taken with them by the Secretary. He would not deny that there might be emergencies, in the course of human affairs, of so extraordinary and pressing a nature, as to absolve the Executive from an inflexible conformity to the injunctions of the law.

Having conceded that emergencies of a sufficiently exigent nature (which he never specified in further detail) justify departures from absolute adherence to the law, Madison then enumerated several principles that the executive ought to observe in taking extra-legal measures:

It was, nevertheless, as essential to remember, as it was obvious to remark, that in all such cases, the necessity should be palpable; that the Executive sanction should flow from the supreme source; and that the first opportunity should be seized for communicating to the Legislature the measure pursued, with the reasons explaining the necessity of them. This early communication was equally enforced by prudence and by duty. It was the best evidence of the motives for assuming the extraordinary power; it was a respect manifestly due to the Legislative authority; and it was more particularly indispensable, as that alone would enable the Legislature, by a provident amendment of the law, to accommodate it to like emergencies in the future (*Annals of Congress* 1793, 941).

In Madison's view, none of these principles were followed in this instance. Not only had Hamilton failed to inform Congress of his actions until he was forced to do so, but he had not provided a satisfactory account of his actions when he finally issued his response. To top it all off, the subordinate had not even sought the prior approval of "the supreme source" of executive authority (i.e., the president). But none of this really mattered because Hamilton had violated the first, and perhaps most crucial, criterion in Madison's guidelines: his actions were not taken in response to a genuine and "palpable" necessity. Much like other supporters of prerogative, Madison's position presupposed a categorical divide between states of emergency and states of normalcy, with different sets of rules governing each.¹⁴

14. Unfortunately, Madison also resembled other proponents of prerogative in failing to explain here or anywhere else exactly what qualifies as an emergency.

However, it was evident to him, at least, that the situation faced by Hamilton did not rise to the level of an “extraordinary and pressing” emergency. Because there was no real emergency, Hamilton’s actions fell well short of the standards required to justify an exercise of prerogative. This helps explain why Madison was one of only five members of the House to vote for all of the resolutions against Hamilton.

The significance of Madison’s remarks go well beyond this particular episode. They highlight the primacy of the legislature in cases of emergency. Even though the executive is usually the part of government that takes the initiative in responding to emergencies, Madison reminds us that the legislature is expected to pass judgment on the legitimacy of extra-legal action. As Madison explained, the executive is obligated to inform the legislature as soon as possible of the actions taken and the reasons behind them. This sort of inter-branch communication is critical to Madison’s republican conception of constitutional government.¹⁵ Without a full and immediate accounting to the legislature, the executive threatens to upset the entire constitutional order and system of republican government. A full and immediate report to the legislature is required not only to maintain the system of checks and balances but also to enable the legislature to determine if there is a defect or shortcoming in existing law that it ought to rectify.

The kind of legislative involvement Madison contemplated in this instance is basically identical to the role that Locke (and later Jefferson) envisioned. However, the legislature’s role in emergencies was not limited to giving retrospective approval (or disapproval) of extraordinary actions for Madison. The legislature could act in two other ways, as well. One would be to enact legislation that obviated the need for extra-legal executive action in the future, as Madison explained in his speech in the House. That is, it could act prospectively by creating laws that provide for emergencies that may arise in the future. The other would be for the legislature itself to take action in the present through more direct measures—including those that exceed its own legal or constitutional authority. That is a possibility that Madison pursued in other contexts. In doing so, he articulated the thinking of many of his contemporaries. Although Madison’s statements were occasioned by events that forced him to take positions he would clearly have preferred to avoid, these tentative remarks still represent the most fully developed articulation of legislative prerogative at that time.

15. Cf. Thomas (2008), who emphasizes the adversarial relation between the branches in Madison’s constitutional vision.

MADISON'S SUPPORT FOR LEGISLATIVE PREROGATIVE

The Seizure of Property in Wartime

As a member of the Confederation Congress during the later years of the American Revolution, Madison supported a wartime measure to allow Brigadier General Anthony Wayne to seize private property necessary to supply the army under his command in Pennsylvania. In fact, it was Madison who made the motion to authorize Wayne to “impress” supplies that “cannot be otherwise obtained” (Madison 1963, 124). The proposal was unanimously approved by all the delegates then in attendance—except for those representing Pennsylvania, whose residents would be directly impacted by any seizures undertaken by Wayne. The proposal to allow a general to seize private property by force was undoubtedly an extraordinary measure. Members of Congress knew they were exceeding their authority in permitting Wayne to impress supplies. As South Carolina delegate John Mathews, an attorney from Charleston, explained in a letter to Major General Nathanael Greene dated May 20, 1781, “there is no such power *literally* given to Congress by Confederation and to act up to the spirit of it, is a doctrine supposed to be big with many evils, therefore reprobated. I conceive it to be a great point gained, to drive them [the strict constructionists] from this ground; it looks like conceding the point, & that necessity will oblige them, to interpret the powers given by the Confederation in their utmost extent” (Smith 1990–91, 253).

Madison's exact reasons for supporting this wartime measure are unknown, but the circumstances leading up to his motion and the restrictive nature of the authorization itself are both telling. Like the rest of the revolutionary army, the soldiers under Wayne's command had been forced to contend with inadequate supplies and a lack of pay, owing in no small part to Congress' inability to raise revenue on its own authority under the restrictive terms of the Articles of Confederation.¹⁶ But the conditions faced by the Pennsylvania Line under Wayne's command were particularly deplorable even by the low standards of military life at the time. Many of the soldiers in the Pennsylvania Line had gone years without any compensation and received no reenlistment bonuses beyond an initial—and rather paltry—\$20 enlistment bounty (compared to enlistment bounties valued at hundreds of dollars in neighboring states). Frustration with their situation eventually boiled over into a mutiny that began on January 1, 1781. As Madison understood the situation, “The grievances complained of were principally, the detention of many in service beyond the term of enlistment, and the sufferings of all from a deficient supply

16. On the supply problems and other rough conditions faced by patriot forces, see Carp (1984).

of clothing and subsistence, and the long arrearage of pay” (Madison 1900, 120). The mutiny forced Congress to act. Despite the “humiliation” involved in sending a congressional committee to negotiate a settlement with the mutineers, Madison endorsed the use of “every expedient for putting a speedy end to the discontents” (Madison 1900, 121). The crisis sparked by the Pennsylvania Line Mutiny was resolved by January 8, when it was agreed that discontented soldiers would be discharged but given the opportunity to reenlist for a new bounty.

Two things are noteworthy about Madison’s motion on impressments of supplies. The first is that it arose in direct response to a very concrete problem that had become quite “palpable,” to use the term Madison would later employ in his comments during the debate over Hamilton’s use of funds. The delegates were not dealing with a hypothetical scenario, but an actual case of mutiny that threatened to derail the war effort. The stakes could not have been higher: many members of Congress feared that disgruntled soldiers in the Pennsylvania Line would defect to the British if the crisis were not resolved.

The other thing that is noteworthy about Madison’s motion is its specificity. It was a narrowly drawn measure limited in its application to General Wayne alone. Even though armies under the command of other officers faced similar supply problems, Madison opted against authorizing similarly situated commanders to seize necessary supplies. By restricting this extra-legal grant of authority to Wayne, Madison and the other delegates to the Confederation Congress minimized the damage to the law and the likelihood that the example would be cited as a precedent to justify seizures of private property in other places by other officers. The congressional measure was narrowly circumscribed to the immediate crisis at hand. Particularism of this sort would become a hallmark of Madison’s approach to emergency and extra-legal power, as evidenced in the next two examples.

The Bank of North America

The establishment of the Bank of North America presented another instance in which Madison used a rationale typically associated with executive prerogative to justify a constitutionally dubious action taken by the legislature. Although he initially opposed the creation of this bank, Madison would later defend its establishment as a matter of wartime necessity.

Madison’s eventual position on the Bank of North America, which had been proposed by Superintendent of Finance Robert Morris and chartered by the Confederation Congress in 1781, stands in stark contrast to the position he took on Alexander Hamilton’s proposal to establish a similar institution shortly after the

U.S. Constitution took effect. When the House of Representatives began its deliberations on Hamilton's proposal for a Bank of the United States, Madison forcefully led the opposition. He and other critics objected to the bank on a number of economic and political grounds, but the decisive objection concerned its constitutionality. In fact, it was in the course of the protracted and often testy debates over the Bank of the United States that Madison most systematically articulated his theory of constitutional interpretation. Responding to suggestions by Federalist Fisher Ames and others that Congress had the authority to erect a bank thanks to the general grants of power contained in the necessary and proper clause, the general welfare clause, and even the common defense clause, Madison asserted that the Constitution established a limited government restricted to powers that were expressly enumerated. In his view, the interpretive approach adopted by supporters of the Bank was so loose that it made the very idea of a constitution utterly meaningless: "The essential characteristic of the Government, as composed of limited and enumerated powers, would be destroyed, if instead of direct and incidental means, any means could be used which, in the language of the preamble to the bill, 'might be conceived to be conducive to the successful conducting of the finances, or might be conceived to tend to give facility to the obtaining loans'" (*Annals of Congress* 1791, 1947–1948). To read the Constitution in the way Hamilton and his allies were doing "would give Congress an unlimited power; would render nugatory the enumeration of particular powers; [and] would supercede all the powers reserved to the State Governments" (*Annals of Congress* 1791, 1946).¹⁷

Supporters of the proposed Bank of the United States replied to Madison's strict reading of the Constitution by citing the Bank of North America as a precedent. The first bank, which went into operation while Madison was representing Virginia in the Confederation Congress, was established within the framework of the far more restrictive Articles of Confederation. If the Confederation Congress had the authority to charter that bank, then surely a Congress strengthened by the powers granted under the Constitution was authorized to charter a new bank now, reasoned champions of Hamilton's bank. John Laurance of New York reminded his colleagues that the Constitution was created to remedy the defects of the Articles of Confederation by making government more powerful, so denying that it

17. Madison would reiterate these points on numerous occasions in subsequent debates. During a prolonged discussion over bounties for cod fisheries, Madison reminded his colleagues "that this is not an indefinite Government, deriving its powers from the general terms prefixed to the specified powers, but a limited Government, tied down to the specified powers which explain and define the general terms" (*Annals of Congress* 1792, 386).

has “the powers for which the Constitution was adopted involves the grossest absurdity” (*Annals of Congress* 1791, 1965). New Jersey Representative Elias Boudinot noted that the first two years of legislative activity by the First Congress were full of exercises of power by implication and observed that even under the Articles of Confederation the government acted from implied powers (*Annals of Congress* 1791, 1975–1976).

Madison stuck to his guns and maintained that expanding the powers of government through implication was constitutionally invalid. However, he also insisted that each use of extraordinary power was one of a kind and established no precedent for the future. Responding to arguments that Congress had already adopted a liberal interpretation of the Constitution in dealing with the Western Territory, Madison essentially conceded the point but explained that Congress’s departure from proper constitutional principles in that instance was justifiable because that “was a case *sui generis*, and therefore cannot be cited with propriety” (*Annals of Congress* 1791, 2011). His reply to those who cited the establishment of the Bank of North America as a precedent was to admit that the Confederation Congress had exceeded its authority under the Articles of Confederation. However, rather than attack the creation of the first bank as an illegitimate and indefensible exercise of power that should be repudiated, he now defended the establishment of that institution as a necessary wartime measure. It was justified by the extraordinary and pressing circumstances created by the war for independence. Precisely because it could be construed as a matter of necessity within the context of an underfunded war, it should not be used as a precedent in peacetime. Madison was essentially making the Lockean point that extra-legal actions are extra-legal in terms of both their provenance and their effects: they neither arise from existing law nor create new law.¹⁸

Characterizing the Bank of North America as an extra-legal but necessary measure was not a politically expedient rationalization that Madison conjured up as a way to deprive supporters of Hamilton’s bank of a potentially useful precedent. The evidence indicates that Madison viewed Morris’s bank as an extraordinary wartime measure at the time it went into effect. In fact, it was precisely because

18. Madison would eventually reconcile himself to Hamilton’s bank, too, but his reasoning this time around would be very different. While the Bank of North America was justified as a wartime expedient, and therefore a temporary measure that should last only as long as the necessity did, the Bank of the United States *eventually* became an acceptable institution because it had been ratified by public opinion. Because the public had acquiesced in the existence of the Bank after two decades, Madison was willing to recharter it as president. On the role of public opinion in reshaping Madison’s attitude toward Hamilton’s bank, see Sheehan (2004, 414).

Madison believed the Bank of North America exceeded Congress's powers under the Articles of Confederation that he was one of only four members of the national legislature to vote against the initial resolution on incorporation. Madison eventually relented, in part because Congress urged each state government—which unquestionably had the power to incorporate a bank—to pass all legislation required to put the bank into operation. However, he never strayed from his position that Morris' bank was a strictly wartime expedient (see Gutzman 2012, 29–30; Banning 1983, 236). As he and other delegates from the Old Dominion state explained in a letter to Virginia Governor Benjamin Harrison dated January 8, 1782, some members of Congress assented to the bank out of a sense of “absolute necessity” (Smith 1990–91, 276).

Shortly after the Bank of North America went into operation, Madison wrote a letter to Edmund Pendleton in which he acknowledged that the “competency of Congress to such an act had been called in question in the first instance.” Indeed, he observed that “the general opinion” among members of Congress themselves “was, that the Confederation gave no such power, and that the exercise of it would not bear the test of a forensic disquisition, and consequently would not avail the Institution” (Madison 1900, 168). However, Madison explained, Congress pursued a “middle way” that gave “tacit admission of a defect of power” under the Articles of Confederation. The charter of incorporation was accompanied by “a recommendation to the States to give it all the necessary validity within their respective jurisdictions.” At the time, Madison expressed his hope that this tacit acknowledgment that Congress had acted extra-legally “will be an antidote against the poisonous tendency of precedents of usurpation” (Madison 1900, 169). In a follow-up letter to Pendleton a few weeks later, Madison clarified that the Bank “is to be considered only during the present war” (Madison 1900, 179), implying that its privileged functions would come to an end when the war did. Despite his own opposition to the establishment of the Bank of North America, Madison suggested it was possible to justify this extra-legal measure by the legislature in much the same way that executive prerogative could be justified.

Financial Assistance for Refugees from St. Domingo

Perhaps the most revealing example of Madison's understanding of the legislature's power to act outside the law occurred during a debate on whether or not to provide financial assistance to refugees from a slave uprising in the French West Indian colony of Saint-Domingue (also called St. Domingo). This congressional debate is important not just because it reveals Madison's thinking on the role of the

legislature in times of emergency, but because it shows that other lawmakers grappled with the idea of extra-legal legislative action, as well. The question legislators struggled to answer was not so much *whether* to provide aid to the Saint Dominguan refugees but *how* to justify it: as an exercise of one of Congress's implied or inherent constitutional powers, or as an exercise of extra-legal powers.

The refugee crisis Congress faced in 1794 originated in the summer of 1791 when residents fleeing the violence resulting from a slave uprising in the French possession began arriving in major seaport cities throughout the United States. From the very beginning, the mostly white and aristocratic refugees from what became the Haitian Revolution relied on various forms of public and private assistance. Moved by the horrific tales of mayhem and carnage told by these refugees and graphically described in lurid newspaper accounts, the citizens of cities that offered asylum organized relief committees and held fundraisers to assist these “unfortunate” exiles. Although local communities were managing well enough when the refugees first started arriving on American shores, the situation changed drastically after the fall of Cap François in the summer of 1793. As many as twenty-five thousand Saint Dominguans sought refuge in the United States after the fall of the former capital city. Overwhelmed by the numbers pouring in and unable to get support from the revolutionary French government, cities that offered asylum appealed to the states and to the federal government for financial help.¹⁹

Congress took up the matter in response to petitions it received from financially burdened communities such as Baltimore, which alone took in approximately 3,000 refugees. The debate in the House of Representatives took place over nearly two full days in January 1794. Thanks to the successful use of an emotionally charged “disaster narrative” to cast the Saint Dominguan refugees as helpless victims of sudden and unforeseeable forces beyond their control,²⁰ Madison and his colleagues agreed that the situation was an unquestionable emergency that demanded congressional action. The strong racial and cultural identification of southern slave-owners with the white exiles undoubtedly gave representatives from states with large slave populations added motivation to overcome whatever resistance they ordinarily harbored toward broad readings of the government's powers.²¹ However, even radical

19. On the reception, treatment, and activities of the St. Dominguan refugees in the United States, see Hunt (1988, 1–83) and White (2012).

20. On the use and development of “disaster narratives” to justify federal assistance to those who could be portrayed as blameless victims, see Dauber (2013).

21. On the role of racial and class solidarity in reinforcing sympathy toward white refugees—but not the blacks they had enslaved—see Hunt (1988, 30–31) and White (2012, 52–61). I am grateful to an

egalitarians such as Abraham Clark of New Jersey were moved by the plight of these refugees to overlook the fact that many of them were aristocrats and slave-owners (*Annals of Congress* 1794, 170).²² Despite this consensus on the need to assist the Saint Dominguan refugees, members of the House could not agree on the legal justification for this aid. Proponents of loose constructionism cited the general welfare clause and other all-purpose clauses in the Constitution as well as recent precedents on unrelated matters to justify congressional action in this instance. However, the advocates of strict constructionism—including Madison—resorted to a variety of extra-constitutional reasons to justify giving financial assistance.

Federalists such as Elias Boudinot believed the Constitution empowered Congress to provide financial aid. Although he appealed to his colleagues' sense of humanity and morality (*Annals of Congress* 1794, 172), Boudinot cited the general welfare clause and a number of recent congressional precedents in the hopes of overcoming any doubts they had concerning the constitutionality of spending federal funds to aid victims of disaster. Boudinot proclaimed that a refusal to provide assistance to the refugees

would be to act in direct opposition both to the theory and practice of the Constitution. In the first place, as to the practice, it had been said that nothing of this kind had ever occurred before under the Federal Constitution. He was astonished at such an affirmation. Did not the Indians frequently come down to this city, on embassies respecting the regulating of trade, and other business—and did not the Executive, without consulting Congress at all, pay their lodgings for weeks, nay for whole months together? and was not this merely because Indians were unable to pay for themselves? Nobody ever questioned the propriety of that act of charity. Again; when prisoners of war were taken, there was no clause in the Constitution authorizing Congress to provide for their subsistence; yet it was well known that they would not be suffered to starve. Provision was instantly made for them, before we could tell whether the nation to whom they belonged would pay such expenses, or would not pay them. It was very true that an instalment [sic] would soon be due to France, nor did he object to reimbursement in that way, if it could be so obtained. But, in the mean time, relief must be given, for he was convinced that we had still stronger obligations to support the citizens of our allies than either Indians or prisoners of war. In the second place, as to the theory of the Constitution,

anonymous reviewer for encouraging me to highlight the way that racial and class forms of identity contributed to the construction of the condition of exiles in the United States as an emergency.

22. On Clark's ordinary hostility to various forms of hierarchy and privilege, see Bogin (1982).

he referred gentlemen to the first clause of the eighth section of it. By that clause Congress were warranted to provide for exigencies regarding *the general welfare*, and he was sure this case came under that description (*Annals of Congress* 1794, 172).

It is not surprising that loose constructionists such as Boudinot were ready to vote for the funds necessary to assist the refugees. What is surprising is that many strict constructionists were searching for excuses to set aside their constitutional scruples in this instance. For instance, John Nicholas of Virginia maintained that “an act of charity, though it would be extremely laudable, was yet beyond their authority,” but he did not want to act on that conviction. Instead, he asked for more time “to form a deliberate opinion on the subject” in the hopes that someone could provide a constitutional justification that would satisfy him (*Annals of Congress* 1794, 170). Recognizing that such a justification might not be forthcoming, Nicholas left open the possibility of using legislative prerogative to take the action he believed was so desperately needed. Echoing the ideas that Madison had expressed in the debate over the resolutions censuring Hamilton for his handling of public funds, Nicholas indicated that he was prepared to vote for financial assistance for the refugees, but that he would admit that he had “exceeded his powers” and let his constituents judge the propriety of his actions (*Annals of Congress* 1794, 172).

Madison, like Nicholas, “wished to relieve the sufferers,” but he was unwilling to stretch the meaning of the Constitution to do so. In his view, there was nothing in that document that expressly authorized the federal government to spend funds for such a purpose. As much as Madison wanted to help the refugees, he

was afraid of establishing a dangerous precedent, which might hereafter be perverted to the countenance of purposes very different from those of charity. He acknowledged that he could not undertake to lay his finger on that article in the Federal Constitution which granted a right to Congress of expending, on objects of benevolence, the money of their constituents. And if once they broke down the line laid down before them, for the direction of their conduct, it was impossible to say to what lengths they might go, or to what extremities this practice might be carried (*Annals of Congress*, 1794, 170).

In response to those who cited some of President Washington’s actions as a precedent in this case, Madison denied that any exercise of prerogative in the past could justify an extra-legal action in the future. One of the major factors that distinguished this case from ones in which Washington provided assistance to those in need was that those cases qualified as genuine instances of “emergency,” because

“a delay would have been equivalent to a total denial” (*Annals of Congress* 1794, 171). The situation faced by the Saint Dominguans was certainly dire, but it did not rise to the level of an emergency—yet.

But rather than stick to his constitutional scruples and vote to deny federal aid to the refugees, Madison stated that he needed more time to decide “what line of conduct to pursue” (*Annals of Congress* 1794, 171). Enough congressmen agreed that more time was needed—and could be spared—that they put off the matter for another two weeks.

When the House took up the issue again on January 28, those who favored a narrow reading of the Constitution were still unable to identify a specific provision that would authorize Congress to spend money to aid the refugees. Still wracked by serious doubts about Congress’s powers, Nicholas reiterated his suggestion that representatives approve the funds “as an act of charity,” but admit that they were exceeding their constitutional authority in doing so (*Annals of Congress* 1794, 351).

Clark also used the legislative prerogative framework to help reluctant colleagues overcome any constitutional barriers to action. The Garden State representative explained that matters of life and death, which is exactly what the refugees were now facing, override ordinary limits on government. “In a case of this kind,” he pled, “we were not to be tied up by the Constitution” (*Annals of Congress* 1794, 350). Clark stressed the urgency of action because the funds the state of Maryland had appropriated for the relief of the refugees was about to expire on February 2, which was less than a week away. Now the situation was beginning to look a lot more like the kind of “extraordinary and pressing” emergency that Madison had indicated was required to justify departures from ordinary grants of power. Although Boudinot believed the Constitution gave Congress the right to spend money in this way, he understood that many of his colleagues still nursed doubts so he followed Clark’s cue. Many refugees would have perished if not for some private charity, the New Jersey Federalist maintained, but their situation was clearly a matter of necessity because they would “perish[] from cold and want” without further assistance (*Annals of Congress* 1794, 350). Time was beginning to erase the distinction that Madison drew on the first day of debate between the situation facing the refugees in mid-January and a case cited as precedent in which Washington advanced money on his own authority. As Madison explained the difference, “in that emergency, a delay would have been equivalent to a total denial” (*Annals of Congress* 1794, 171). That was the situation facing the refugees in late January.

From that point on, the arguments in favor of providing assistance began to proliferate. One line of reasoning relied on recent precedents, while three others resorted to a bit of legislative legerdemain. Jeffersonian representative Samuel Smith

of Maryland suggested that the question of Congress' powers had already been settled when it approved the expenditure of funds to repay both a British Consul who aided American captives held in Algiers and a private individual who assisted the crew of an American vessel that "shipwrecked on the coast of Portugal" (*Annals of Congress* 1794, 351). Others proposed reclassifying the assistance in order to circumvent constitutional hurdles. Thomas Scott, a Federalist from Pennsylvania, proposed that any funds approved could be construed as aid to the citizens of Baltimore rather than the refugees they were hosting if the former were also understood to be victims of emergency. If the federal government could provide financial aid to an America city facing "an army of fighters," then it could also assist an American city facing "an army of eaters" (*Annals of Congress* 1794, 351). Samuel Smith, following a suggestion Madison had offered on the first day of debate, proposed instead that any money approved could be classified not as charity but as a loan that would eventually be repaid by the French government (*Annals of Congress* 1794, 350). Madison offered yet a third way to reclassify the funds. Instead of describing funds for the refugees as a loan to the French, it could be characterized as partial payment of the loans made by the French during the revolutionary war (see Currie 1997, 189).

In the end, the House directed a committee to draft a bill appropriating money to aid the exiles. On February 12, 1794, without any debate the House approved a bill that authorized the president to spend up to \$15,000 to provide relief to the refugees, with the money provisionally charged to the government of France (*Annals of Congress* 1794, 1417–1418). Whichever argument ultimately persuaded strict constructionists such as Madison and Nicholas to vote for the bill, they never deviated from their position that providing financial assistance to the exiled Saint Dominguais exceeded the legal and constitutional authority of Congress. As Madison explained in the context of a completely unrelated debate over free trade around the same time that Congress was deciding what to do about the refugees from the French colony, in "all general rules, there might be exceptions" (*Annals of Congress* 1794, 209). As far as Madison was concerned, it was better to allow for an exception than to change a rule based on sound principles. What that meant as far as emergencies were concerned is that it would be better to resort to extra-legal action in "extraordinary and pressing" cases than to make a more permanent alteration to the powers of government.

CONCLUSION

Madison does not appear to have returned to the idea of legislative prerogative after his career as a lawmaker ended. This should come as no surprise because Madison's views on prerogative—much like particular exercises of prerogative

themselves—emerged only when demanded by pressing and unavoidable circumstances. As indicated by his reluctance to take action during the first day of debate over providing assistance to the St. Domingo refugees, Madison avoided taking a position on this dangerous exercise of power whenever he could. But when avoidance was no longer possible without risk of serious harm to discrete individuals or to public safety in general, this strict constructionist opted for ad hoc extra-legal action as a safer alternative to actions and arguments that would result in more permanent expansions of government power, whether through elastic construction of constitutional authority or the enactment of legislation that conferred new authority on military or executive officers.

The choice facing Madison as a legislator in the early years of the republic was not between action and inaction, but between action grounded in a permanent enlargement of power and action grounded in a temporary expansion of power. Like Hamilton, that consummate champion of energetic government, Madison recognized the need for flexibility in government. But unlike the man who became his political opponent, Madison believed that flexibility was most safely achieved not through broad constructions of open-ended clauses that resulted in permanent expansions of government authority but through limited and highly targeted exercises of extra-legal power. Madison's statements on emergency action suggest that occasional departures from the strict letter of the law are actually more compatible with the purposes and aims of a constitution than loose constructions that stretch and bend the constitution to fit every conceivable situation and meet every desired outcome. Indeed, Madison supported the use of prerogative in limited circumstances not in spite of but precisely because of his insistence on strict adherence to the law in ordinary circumstances. If an exercise of extraordinary power was justifiable, it had to be because the country was facing a genuine emergency of an "extraordinary and pressing" nature, not because any measures taken in the past served as valid precedents. In this insistence on the singularity of emergencies and the measures taken to address them, Madison may be the purest proponent of prerogative in the history of liberal political thought.

It is precisely in the purity (or perhaps absolutism) of Madison's demand that extraordinary measures be forthrightly acknowledged as extra-legal that certain shortcomings of prerogative come to light. In spite of his refusal to allow any past governmental action to serve as a precedent in the debate over aid to the Saint Dominguan exiles, it did not take long for his fear "of establishing a dangerous precedent, which might hereafter be perverted to the countenance of purposes very different from those of charity" to materialize. The assistance that was offered to the refugees from Santo Domingo in 1794 would become a precedent

cited again and again in future debates over relief to victims of various kinds of disaster.²³ Although the vote to assist these refugees did not move the majority in Congress to provide aid to the residents of Savannah, Georgia, after a catastrophic fire in late 1796 destroyed well over half the houses in this port city and left roughly 400 families homeless, that decision would get cited repeatedly—and with far more success—in debates over assistance to other victims of numerous other kinds of disaster throughout the nineteenth century. And despite Madison’s insistence that the Bank of North America should be viewed strictly as a wartime expedient, there is little doubt that the establishment of this bank under the severely limited powers Congress possessed under the Articles of Confederation persuaded at least some members of the Federal Congress that it had the authority to create the Bank of the United States.

But in politics (as in all areas of life) nothing comes without trade-offs. If the government is confronted with a genuine emergency so “extraordinary and pressing” that lives are at stake, the question Madison compels us to consider is not *whether* it should act but on what grounds and through which means it should act. If the use of emergency powers is justified through loose construction of the kind championed by Hamilton and his congressional allies or through the formal adoption of new legislation that survives long after the emergency that precipitated its adopted has passed, the threshold for their use is likely to be far lower than emergency action that has to be justified on a case-by-case basis without the support of the law. For Madison it boiled down to a question of which of two imperfect approaches better upholds respect for the rule of law as a meaningful and enduring limit on government power and which allows for more abuse and misuse in the long run. But whatever approach is selected, Madison reminds us that the legislature always has a crucial role to play. Whether it is overseeing the actions of the executive or acting in a more direct capacity, legislative involvement in emergency is critical to preventing the concentration of power in the executive that Madison came to see as one of the gravest threats to limited government.

REFERENCES

- Agamben, Giorgio. 2005. *State of Exception*. Translated by Kevin Attel. Chicago: The University of Chicago Press.
- Bailey, Jeremy D. 2004. “Executive Prerogative and the ‘Good Officer’ in Thomas Jefferson’s Letter to John Colvin.” *Presidential Studies Quarterly* 34: 732–54.

23. On the immediate aftermath of the relief bill, see White (2012, 73–78).

- . 2007. *Thomas Jefferson and Executive Power*. Cambridge: Cambridge University Press.
- . 2013. “The Jeffersonian Executive: More Energetic, More Responsible, and Less Stable.” In Fatovic and Kleinerman 2013, 117–138.
- Banning, Lance. 1983. “James Madison and the Nationalists, 1780–1783.” *The William and Mary Quarterly* 40 (2): 227–255.
- Bogin, Ruth. 1982. *Abraham Clark and the Quest for Equality in the Revolutionary Era, 1774–1794*. Rutherford, NJ: Farleigh Dickinson Press.
- Carp, E. Wayne. 1984. *To Starve the Army at Pleasure: Continental Army Administration and American Political Culture, 1775–1783*. Chapel Hill: University of North Carolina Press.
- Currie, David P. 1997. *The Constitution in Congress: The Federalist Period, 1789–1801*. Chicago: University of Chicago Press.
- Curtis, Michael Kent. 2013. “Lincoln and Executive Power During the Civil War: A Case Study.” In Fatovic and Kleinerman 2013, 139–165.
- Dauber, Michele Landis. 2013. *The Sympathetic State: Disaster Relief and the Origins of the American Welfare State*. Chicago: University of Chicago Press.
- Elkins, Stanley, and Eric McKittrick. 1993. *The Age of Federalism: The Early American Republic, 1788–1800*. New York: Oxford University Press.
- Farber, Daniel. 2003. *Lincoln’s Constitution*. Chicago: University of Chicago Press.
- Fatovic, Clement. 2004a. “Constitutionalism and Contingency: Locke’s Theory of Prerogative.” *History of Political Thought* 25: 276–297.
- . 2004b. “Constitutionalism and Presidential Prerogative: Jeffersonian and Hamiltonian Perspectives.” *American Journal of Political Science* 48: 429–444.
- . 2009. *Outside the Law: Emergency and Executive Power*. Baltimore: Johns Hopkins University Press.
- Fatovic, Clement, and Benjamin A. Kleinerman, eds. 2013. *Extra-Legal Power and Legitimacy: Perspectives on Prerogative*. Oxford: Oxford University Press.
- Feldman, Leonard C. 2008. “Judging Necessity: Democracy and Extra-Legalism.” *Political Theory* 36: 550–577.
- Frisch, Morton J. 1987. “Executive Power and Republican Government—1787.” *Presidential Studies Quarterly* 17: 281–291.
- Goldsmith, Jack. 2007. *The Terror Presidency: Law and Judgment Inside the Bush Administration*. New York: W. W. Norton & Company.
- Gutzman, Kevin R. C. 2012. *James Madison and the Making of America*. New York: St. Martin’s Press.
- Hunt, Alfred N. 1988. *Haiti’s Influence on Antebellum America: Slumbering Volcano in the Caribbean*. Baton Rouge: Louisiana State University Press.
- Jefferson, Thomas. 1984. *Jefferson: Writings*. Edited by Merrill D. Peterson. New York: Library of America.

- Kleinerman, Benjamin A. 2005. "Lincoln's Example: Executive Power and the Survival of Constitutionalism." *Perspectives on Politics* 3: 801–816.
- . 2007. "Can the Prince Really Be Tamed? Executive Prerogative, Popular Apathy, and the Constitutional Frame in Locke's *Second Treatise*." *American Political Science Review* 101: 209–222.
- . 2009. *The Discretionary President: The Promise and Peril of Executive Power*. Lawrence: University Press of Kansas.
- . 2014. "The Constitutional Ambitions of James Madison's Presidency." *Presidential Studies Quarterly* 44: 6–26.
- Lazar, Nomi Claire. 2009. *States of Emergency in Liberal Democracies*. Cambridge: Cambridge University Press.
- Locke, John. 1970. *Two Treatises of Government*. Edited by Peter Laslett. Cambridge: Cambridge University Press.
- Madison, James. 1900. *The Writings of James Madison*, Vol. 1. Edited by Gaillard Hunt. New York: G. P. Putnam's Sons.
- . 1963. *The Papers of James Madison: Vol. 3, 3 March 1781–31 December 1781*. Edited by William T. Hutchinson and William M. E. Rachal. Chicago: University of Chicago Press.
- . 1999. *Madison: Writings*. Edited by Jack Rakove. New York: Library of America.
- Posner, Eric, and Adrian Vermeule. 2011. *The Executive Unbound: After the Madisonian Republic*. Oxford: Oxford University Press.
- Rakove, Jack N., and Susan Zlomke. 1987. "James Madison and the Independent Executive." *Presidential Studies Quarterly* 17: 293–300.
- Sedgwick, Jeffrey Leigh. 1988. "James Madison and the Problem of Executive Character." *Polity* 21: 5–23.
- Shane, Peter M. 2009. *Madison's Nightmare: How Executive Power Threatens American Democracy*. Chicago: University of Chicago Press.
- Sheehan, Colleen A. 2004. "Madison v. Hamilton: The Battle over Republicanism and the Role of Public Opinion." *American Political Science Review* 98: 405–424.
- Sheldon, Garrett Ward. 2003. *The Political Philosophy of James Madison*. Baltimore: Johns Hopkins University Press.
- Smith, Paul H., ed. 1990–91. *Letters of Delegates to Congress: 1774–1789*. Vol. 17–18. Washington, D.C.: Library of Congress.
- Thomas, George. 2008. *The Madisonian Constitution*. Baltimore: Johns Hopkins University Press.
- . 2013. "The Limits of Constitutional Government: Alexander Hamilton on Extraordinary Power and Executive Discretion." In Fatovic and Kleinerman 2013, 97–116.
- United States. 1789, 1791–94. *Annals of Congress*. 1834. Washington, D.C.: Gales and Seaton.
- White, Ashli. 2012. *Encountering Revolution: Haiti and the Making of the Early Republic*. Baltimore: The Johns Hopkins University Press.

HATE SPEECH AND DOUBLE STANDARDS

THOMAS M. KECK

Michael O. Sawyer Chair of Constitutional Law and Politics
Maxwell School of Citizenship and Public Affairs
Syracuse University

ABSTRACT

Many European states ban the public expression of hateful speech directed at racial and religious minorities, and an increasing number do so for anti-gay speech as well. These laws have been subjected to a wide range of legal, philosophical, and empirical investigation, but this paper explores one potential cost that has not received much attention in the literature. Statutory bans on hate speech leave democratic societies with a Hobson's choice. If those societies ban incitements of hatred against some vulnerable groups, they will inevitably face parallel demands for protection of other such groups. If they accede to those demands, they will impose an ever-tightening vice on incontrovertible free expression values; if they do not, they will send clear signals of unequal citizenship to those groups excluded from the laws' protection. This paper elaborates this dilemma via exploration of a range of contemporary European legal responses to homophobic and Islamophobic speech.

KEYWORDS: *Hate Speech, Freedom of Speech, Civil Liberties, Islamophobia, Homophobia*

IN MARCH 2015, an English court convicted street preacher Michael Overd under the Public Order Act for publicly quoting Leviticus 20:13 in the course of denouncing homosexuality as sinful, while simultaneously acquitting him (under the same Act) for characterizing the Prophet Muhammed (peace be upon him) as

Constitutional Studies 1.1

©2016 by the Board of Regents of the University of Wisconsin System

This open access article is distributed under the terms of the CC BY-NC-ND 4.0 license (<https://creativecommons.org/licenses/by-nc-nd/4.0/>) and is freely available online at: <https://constitutionalstudies.wisc.edu> or <https://uwpress.wisc.edu/journals/journals/cs.html>

a pedophile (Bingham 2015).¹ Overd’s conviction was subsequently quashed, but the initial holding illustrates a central dilemma of the European approach to hate speech regulation. Statutory bans on hate speech leave democratic societies with a Hobson’s choice. If those societies ban incitements of hatred against some vulnerable groups, they will inevitably face parallel demands for protection of other such groups. If they accede to those demands, they will impose an ever-tightening vice on incontrovertible free expression values; if they do not, they will send clear signals of unequal citizenship to those groups who are excluded from the laws’ protection. The Overd trial calls attention to the democratic costs on both sides of this dilemma. Once England had banned public expression of racial and religious hatred, it faced a compelling case for doing the same with anti-gay hatred. Indeed, a growing number of European states have regulated such speech acts, sending an important message of equal citizenship to European gays and lesbians, but with the significant cost of infringing on core exercises of religious speech. Meanwhile, most European states have refrained from banning certain widespread forms of Islamophobic speech, thereby signaling to many European Muslims that they are not yet equal citizens.

THE HATE SPEECH DEBATE

In the second half of the twentieth century, European legislatures repeatedly banned the public expression of some forms of hateful speech, and international lawyers drafted multiple treaties, conventions, and resolutions calling on signatory states to adopt similar bans (Bleich 2011, 19–22; Heinze 2009). As Eric Heinze has noted, “[a]ll Western European states have [such] . . . bans . . . [and they all] share some core similarities, particularly insofar as they incorporate international and European norms requiring or authorizing bans on some forms of expression” (2007, 296). Despite this “common core of norms” (again quoting Heinze 2007, 296), these European hate speech laws vary across two key dimensions. First, some statutes ban only incitement to violence against members of vulnerable groups, while

1. The June 2014 public statement for which Overd was convicted was: “If a man sleeps with a man, they have both committed an abomination.” The July 2014 public statement for which he was acquitted was: “Noone has salvation unless you have Jesus Christ. You claim heaven on the back of Buddha, you’re going straight to hell. You claim heaven and paradise on the back of the teachings of Islam, you’re hell bound. If you believe the Prophet Mohammed was truly a prophet, you’re hell bound. He’s a liar and deceiver just like you and me folks. He had a wife at the age of nine. In this country that’s paedophilia. That’s a wicked immorality to have sex with a girl at the age of nine.” Both statements were delivered with the aid of a megaphone in Taunton Centre.

others reach more broadly in banning incitement to hatred and/or discrimination, and others more broadly still in banning group-based defamation, degradation, or abuse. Second, some limit their coverage to racist speech, while others include speech that is hateful on additional grounds such as religion or sexual orientation. Virtually all of these regulations have faced legal challenges based on constitutional or quasi-constitutional free expression principles, but European judges have by and large upheld them in both their narrower and their broader forms, though particular applications have sometimes been enjoined.²

Meanwhile, in the 1980s and '90s, critical race theorists in U.S. law schools endorsed and elaborated the European arguments in support of hate speech bans, making a case for their migration to U.S. law. In a series of influential essays—the most notable of which were reprinted in a 1993 edited volume that continues to be widely cited—Richard Delgado, Charles R. Lawrence III, and Mari J. Matsuda argued that racist hate speech, considered from the victims' perspective, has the capacity to inflict injuries on members of vulnerable minority groups. As such, judges should balance the constitutional values of free expression and equal protection against one another, and the latter should often win out (Delgado 1982; Lawrence 1990; Matsuda 1989; Matsuda, et al. 1993; see also Delgado and Stefancic 2004).

In 2009, Jeremy Waldron built on these arguments in a widely noted set of Holmes Lectures at Harvard Law School, subsequently revised and published as *The Harm in Hate Speech* (2012). In this book, Waldron's key move is to define hate speech as a form of group defamation and to compare the libel of members of vulnerable minority groups with other forms of libel that are (or have been) heavily regulated in many legal systems. With regard to seditious libel, for example, Waldron notes that we stopped regulating such speech in the United States and Britain when we realized that the state was not so vulnerable as to need such protection. Since racial and religious minorities remain pretty vulnerable in many democratic societies, hate speech regulations—understood as prohibitions on group libel—may be more justifiable. On Waldron's account, prohibitions on libelous statements directed against individual members of vulnerable minorities are important components of salutary legislative efforts to combat discrimination against such minorities. Waldron builds here on U.S.-based critical race theory, but his primary interest is in defending the legitimacy of hate speech statutes in Europe. As he notes, these

2. Note, for example, *Jersild v. Denmark*, Application no. 15890/89 (ECtHR 1994), in which the European Court of Human Rights affirmed convictions of the members of an extremist group who appeared in a televised interview, though it reversed the conviction of the Danish journalist who interviewed them.

statutes often use the language of group libel or defamation and are often located within broader statutory regulations of discrimination (Waldron 2012, 39–40).

Waldron repeatedly emphasizes that the goal of these statutes is not to protect people from offense, but to protect them from published assaults on their dignity, which ought to be understood as harms to society as a whole as well as to the individual targets of the hateful speech acts (2012, 105–130). In his words, “to protect people from offense or from being offended is to protect them from a certain sort of effect on their feelings. And that is different from protecting their dignity and the assurance of their decent treatment in society” (2012, 107). In Waldron’s view, “[t]he key to the matter is not to try to extirpate offense, but to drive a wedge between offense and harm, while at the same time maintaining an intelligent rather than a primitive view of what it is for a vulnerable person to be harmed in these circumstances” (2012, 129–30).

Waldron’s defense of hate speech bans has been challenged on a number of grounds, including the conventional civil libertarian conviction that democratic governments should rarely be allowed to silence speech acts on the basis of their viewpoint (Baker 2012; Dworkin 2009, 2012; K. Malik 2012). We are sure today—most of us—that racism is intolerable, but were 1950s Americans—most of them—any less sure that Communism was intolerable? Giving ourselves leeway to ban speech that we *know* to do more harm than good may well provide similar leeway to our progeny to ban speech that they *know* to be equally harmful. And if history is any guide, some such certainties will prove mistaken in the end. Most civil libertarians do not worry that our current conviction that racism is intolerable will turn out to be mistaken, but nor do they trust the leaders of present and future democratic states to mark out additional categories of intolerable speech. Likewise, many civil libertarians consider homophobia just as intolerable as racism, but it is clear that a substantial portion of the world’s population disagrees with them. Whenever LGBT rights advocates persuade enough people in any given society to their view of the matter, they can outlaw the public expression of homophobic as well as racist speech. But why would religious believers who denounce homosexuals as sinners think of such bans as anything other than efforts by the state to silence their unpopular views?

Moreover, even within the core of ostensible consensus that racism is intolerable, significant questions of application arise. French prosecutors and judges are convinced that the statutory ban on provocation of “discrimination, hatred or violence toward a person or group of people on grounds of their origin, their belonging or their not belonging to an ethnic group, a nation, a race or a certain religion”

authorizes criminal prosecution for peaceful advocacy of sanctions against Israel.³ Needless to say, this view is not universally held. On the basis of such applications, a number of critics have challenged Waldron's account by emphasizing that in actual practice, hate speech bans often sweep too broadly into the realm of legitimate political speech (Greenwald 2015b; Heinze 2006). Others have emphasized that such bans tend to draw further attention to the speech that they are attempting to silence; to be disproportionately used against the very minority groups whom they are ostensibly designed to protect; to encourage social groups to prosecute disagreements amongst one another in court, thereby increasing inter-group hostility; and to be unnecessary and hence "inappropriate for democratic societies that are sufficiently stable, mature and prosperous to be able to protect internal security and vulnerable individuals through other means, without having to ban ideas from public deliberation" (Heinze 2007, 298–99; see also Ahdar and Leigh 2005, 385–6; Baker 2012, 72–79; Greene 2012; Weinstein 1999). On this last point, the appropriateness of hate speech bans might be analogized to the use of military courts to try civilians. Such courts may sometimes be necessary in an immediate theater of war, but as the U.S. Supreme Court has held, they are of dubious legitimacy when and where civilian courts remain open and operating.⁴ Likewise, where a robust sphere of speech by government and civil society is able to effectively counter the public expression of hateful speech, the case for statutory bans on such speech seems weaker. In light of both the principled and pragmatic critiques that have been raised against hate speech regulation, Corey Brettschneider has argued that democratic states should not use their coercive capacities to silence hateful speech, but should use their expressive and funding capacities to counter and discourage it (2012; see also Heinze 2006, 578–81; 2013).

Some careful empirical scholars have dismissed the pragmatic concerns with hate speech bans as overstated (Bleich 2011; Gelber and McNamara 2015; see also Parekh 2012), but one argument that has not received adequate attention is that such laws "inevitably create two tiers of citizens—those who are protected from offensive speech, and those left unprotected from equally offensive speech" (Heinze 2006, 555).⁵ As a result of such distinctions, hate speech regulations sometimes send signals of unequal citizenship to relatively powerless groups who are

3. Appeal no. 1480020 (Court of Cassation, Criminal Chamber 2015).

4. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

5. In a thoughtful summary of, and response to, six standard arguments against hate speech bans, Bhikhu Parekh does not mention this one (2012, 47–54).

not included within the scope of their protection. That is, the legal protection of some vulnerable minorities from abusive speech is itself a message of unequal status directed toward other vulnerable minorities who do not receive such protection. Moreover, this defect is inextricable from the grounds on which hate speech bans are often defended. Consider Bhikhu Parekh's observation that "[w]hen hate speech is allowed uninhibited expression, its targets rightly conclude that the state either shares the implied sentiments or does not consider their dignity, self-respect, and well-being important enough to warrant action" (2012, 44). If this claim is persuasive, then state policies that protect some targets of hateful speech but not others are likely to signal that the state considers some people's dignity, self-respect, and well-being more important than others'.

To sum up the argument so far, the hate speech debates have proceeded on both consequentialist and deontological grounds. That is, opponents and proponents of hate speech regulation have offered competing accounts of the effects of democratic societies' decisions to enact and enforce such regulations (or their decisions not to do so), and they have also offered competing accounts of the fundamental democratic and/or dignitarian legitimacy of those decisions. With some frequency, the debate has proceeded on what may best be understood as hybrid consequentialist/deontological grounds, with proponents arguing that hate speech bans signal to members of vulnerable groups their equal status in democratic societies. Note, for example, Julie Suk's observation that the purpose of the French Holocaust denial law is not to suppress expression of Holocaust denial—which can be freely found in the Bibliothèque Nationale de France—but to express the state's disapproval of these ideas (2012, 153; see also Parekh 2012). This claim is consequentialist in form—legislative bans on hate speech will have the salutary effect of communicating a message of inclusion to vulnerable members of society—but is usually best understood as deontological at its root—because the value and effectiveness of this communication are typically assumed rather than demonstrated. In this paper, I argue that the hybrid case in favor of hate speech bans ought to be balanced against a parallel hybrid claim in opposition—namely, that legislative bans on hate speech communicate a message of exclusion to members of vulnerable groups who are left outside the scope of the bans' protection.

HATE SPEECH AND DOUBLE STANDARDS

The unequal coverage provided by existing hate speech regulations is potentially redressible in either of two ways. One option is an across-the-board, First-Amendment-style legal tolerance for public expressions of hatred. The second is a

continual incremental expansion of the scope of hate speech laws. If restrictions on hateful speech are understood as a form of antidiscrimination law, then all targets of such speech—like all victims of other forms of discrimination—will be incentivized to seek the protection of such laws. And if we fail to extend such protection to groups with legitimate claims, we send a signal of unequal citizenship to the members of those groups. Misogynist speech, for example, can be just as vile and denigrating as other forms of hate speech, and its exclusion from most existing hate speech laws has prompted recent calls for reform (Citron 2014). As a result of such dynamics, hate speech laws (like other antidiscrimination laws) are likely to be the focus of repeated calls for expansion over time.

Of course, countervailing calls from libertarians and others may create significant uncertainty as to whether, when, and how such expansion will actually unfold, but in post-war Western Europe, the political demands of vulnerable minorities have repeatedly led to incremental expansion, with hate speech laws drawn initially to protect racial minorities and subsequently expanded to protect other groups. Legislative restrictions on anti-Semitic speech (including Holocaust denial) are now widespread, and European lawmakers face regular calls to restrict Islamophobic and homophobic speech as well (Belavusau 2013, 166–200; Bleich 2011; Haraszti 2012; Kahn 2004; Langer 2014; Leigh 2009).

As such, I argue that democratic societies should be prepared to tolerate racist and anti-Semitic speech, unless they are willing to extend their intolerance to cover speech that incites hatred against Muslims and gays. I rest this claim not primarily on grounds of principled consistency, but on a pragmatic concern for how best to integrate diverse groups of citizens into contemporary democratic polities. Waldron himself emphasizes this concern throughout his *Holmes Lectures*, but he does not acknowledge one of its clear implications. If one key goal of hate speech policy is to better integrate vulnerable minorities into the democratic societies in which they live—by signaling to them that they are indeed welcome as full and equal members—then it must be the members of these vulnerable groups who decide which speech acts are the objectionable ones. If those decisions are made solely by European legislators and judges, and if those lawmakers fail adequately to attend to the understandings of the targets of hateful speech, then the signal will not work. Of course, European Muslims are as internally diverse as any other sizeable social group, so there is no “Muslim position” on free expression or any other complex policy or legal issue (K. Malik 2009, 121–3). But when democratic states ban racist and anti-Semitic speech, they send an important signal to racial minorities and Jews that their presence in these polities is valued and will be protected. And if they repeatedly refuse demands from their Muslim and LGBT members to expand

the scope of these bans to cover published caricatures of the Prophet Muhammad (PBUH) and religious denunciations of homosexuality as sinful, they will repeatedly signal that these groups are not full and equal members. On the other hand, if these polities respond to such demands by expanding their existing laws, these expansions would curb the liberty of religious expression—for both secular critics of Islam and Christian critics of homosexuality—to a degree that most democratic polities would (or should) find intolerable. As Heinze has put it, “[h]ate speech bans can only succeed either through enormous measures of censorship or through discriminatory selection of target categories or individuals” (2009, 279).

Waldron sometimes references homophobic and Islamophobic speech together with racist speech as proper subjects of regulation (2012, 65), but he devotes very little attention to homophobic speech and he generally tries to draw a sharp line between racist hate speech and religious dissent. On his account, the publication of racist epithets should be banned; the publication of blasphemous images should be tolerated (2012, 111–26). Waldron does not say on which side of this line he would place anti-gay readings from scripture, but he does indicate that legislators should be “vigilant” in ensuring that regulation of racist assaults on dignity does not lead to regulation of all speech that leads an identifiable group of citizens to take offense (2012, 114). He insists that this line is fundamentally clear, but some readers of his account remain unpersuaded. Brian Leiter (2012) notes that Waldron’s own rhetorical asides repeatedly illustrate that the harm in hate speech does in fact include psychological/emotional offense on the part of its targets. And Heinze observes that European judges have sometimes drawn the line differently than Waldron, as when the European Court of Human Rights (ECtHR) interpreted the European Convention on Human Rights (ECHR) “as protecting ‘the religious feelings of believers’ from ‘provocative portrayals of objects of religious veneration.’”⁶

The legal distinction between harm and offense is a longstanding one—indeed, it marks the core of Anglo-American libel law—but its social meaning when translated from the individual to the group libel context—i.e., when enacted into legislative bans on hate speech—is to signal that some harms to some groups are worthy of legal redress, while others are not. This sort of legal distinction is routine, but in this context, it tends to signal (or at least to be read as signaling) that some vulnerable groups are treated more favorably than others. For many European Muslims, the chief examples of public speech acts that they experience as harms are images (and especially offensive caricatures) of the Prophet Muhammad (PBUH); for many

6. Heinze (2006, 558), quoting *Otto-Preminger-Institut v. Austria*, Application no. 13470/87 (ECtHR 1994).

European gays, the chief examples are anti-gay readings of Leviticus. From their perspective, if we are in the business of banning hateful speech, then these examples are prime candidates. But restrictions on this sort of anti-Muslim and anti-gay speech would inevitably trench on serious commentary on matters of public concern.

Again, with regard to the scope of legal protection for free speech, the double-standard complaint could be addressed by either leveling up or leveling down. In contemporary Europe, national legislatures could choose to extend the same sort of bans to Islamophobic and homophobic speech that they have extended to racist and anti-Semitic speech or they could choose to relax their existing bans on racist and anti-Semitic speech. This latter course is politically unlikely, but it remains theoretically available. Likewise, the ECtHR could, in theory, try to nudge member states in either direction. In other words, ECtHR judges could find in ECHR Article 10's free expression provision a mandate that states provide greater freedom to express hateful ideas than they currently do.⁷ Or they could rely on Article 14's antidiscrimination provision and/or Article 17's prohibition on abuse of rights to mandate that states extend their existing regulations of some hateful speech acts to cover additional such acts directed against similarly vulnerable groups.⁸ The ECtHR's rights jurisprudence is tempered by a "margin of appreciation" for the legal norms of member states, but if something approaching continent-wide consensus began to emerge (in either direction), the Court could use its quasi-constitutional role to push holdout states to fall into line. In other words, it could seek to ensure that racist and anti-Semitic speech acts are suppressed no more than other, equally harmful speech acts targeting European Muslims and gays, either by cutting back on existing bans

7. Article 10 expressly provides that "[e]veryone has the right to freedom of expression," though it also notes a number of public purposes that sometimes justify restrictions on that freedom, including "the protection of the reputation or rights of others."

8. Article 14 provides that "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." Article 17 provides that "[n]othing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein." See *Aksu v. Turkey*, Application nos. 4149/04 41029/04 (ECtHR 2012) (dissenting opinion of Judge Gyulumyan); *Glimmerveen and Hagenbeek v. the Netherlands*, Application nos. 8348/78 and 8406/78 (Commission decision of 11 October 1979); *Norwood v. UK*, Application no. 23131/03 (ECtHR 2004); *Garaudy v. France*, Application no. 65831/01 (ECtHR 2003); *Kasymakhunov and Saybatalov v. Russia*, Application no. 26261/05 (ECtHR 2013); and *Perinçek v. Switzerland*, Application no. 27510/08 (ECtHR 2015) (dissenting opinion of Judge Silvis).

on racist and anti-Semitic speech or by developing new bans on Islamophobic and homophobic speech, depending which way the consensus had developed.

To date, what has actually emerged in practice is a complex and inconsistent pattern of both legislative restrictions and judicial evaluations of those restrictions—a pattern that cannot readily be defended and that may leave some vulnerable members of European societies feeling aggrieved. For example, a number of states have banned Holocaust denial, and European judges have sustained these bans. In *Garaudy v. France* (2003), the ECtHR held that

Denying the reality of clearly established historical facts . . . does not constitute historical research akin to a quest for the truth. The aim and the result of that approach are completely different, the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. . . . Such acts are incompatible with democracy and human rights because they infringe the rights of others.⁹

But when some states have extended such bans to cover denials of other crimes against humanity—most notably, the Ottoman Empire’s 1915 genocidal campaign against Armenians—European judges have invalidated such broader bans. In *Perinçek v. Switzerland* (2015), a Grand Chamber of the ECtHR noted that “many of the descendants of the victims of the events of 1915 and the following years—especially those in the Armenian diaspora—construct [their] identity around the perception that their community has been the victim of genocide.” The Grand Chamber noted further that the Swiss prosecution of Doğu Perinçek for publicly denying those genocidal events was intended to protect the “dignity” of the Armenian victims of 1915 and their present-day descendants, but the Court nonetheless held that the Swiss criminal ban on Armenian genocide denial was not “necessary in a democratic society” and hence was invalid under ECHR Article 10.¹⁰ In sup-

9. *Garaudy v. France*, Application no. 65831/01 (ECtHR 2003). See also *Witzsch v. Germany* (no. 1), Application no. 41448/98 (ECtHR 1999); *Schimanek v. Austria*, Application no. 32307/96 (ECtHR 2000); *Witzsch v. Germany* (no. 2), Application no. 7485/03 (ECtHR 2005); *Gollnisch v. France*, Application no. 48135/08 (ECtHR 2011); Holocaust Denial Case, (1994) 90 BVerfGE 241. See generally Bleich (2011, 44–61); Kahn (2004).

10. *Perinçek v. Switzerland*, Application no. 27510/08 (ECtHR 2015), para. 156. Note also Decision no. 2012647 DC (French Constitutional Council 2012).

port of this judgment, the Court indicated that Perinçek's statements, "read as a whole and taken in their immediate and wider context, cannot be seen as a call for hatred, violence or intolerance towards the Armenians," though it acknowledged that in cases involving Holocaust denial, such incitement has "invariably been presumed."¹¹ The Court's principal justification for this differential treatment was that historical memory laws are more readily defensible when enacted by states that have a close historical and geographic nexus with the genocidal crimes at issue. This nexus is present with regard to German or French laws governing Holocaust denial; it is absent with regard to the Swiss law governing Armenian genocide denial.¹²

The *Perinçek* case illustrates the difficult choice facing European judges in such disputes, which explains why the Grand Chamber was closely divided, resolving the case by a vote of 10–7. The seven dissenting judges argued that because ECtHR jurisprudence allows the criminalization of Holocaust denial, it is difficult to justify forbidding the criminalization of Armenian genocide denial. But the ten-judge majority argued that allowing criminalization in the latter context would unduly limit discussion of important matters of public concern. Both of these claims are persuasive.

Similar dilemmas have played out in the context of Islamophobic and homophobic speech, which are the focus of the remainder of this article. A steadily increasing number of European states have banned homophobic speech, and the ECtHR has so far allowed enforcement of these bans in ways that—at least from a U.S. First Amendment perspective—trench on clear free expression values. In other words, for European LGBT persons, current legal trends signal a message of inclusion, but these acts of inclusion have come at the cost of severe restrictions on the religious expression of Christian (and Muslim) opponents of homosexuality. Meanwhile, most European states have banned some forms of Islamophobic speech, but not the ones to which European Muslims themselves most object. The failure of these bans to cover published caricatures of the Prophet Muhammad (PBUH) has been a chief source of the double-standard complaint, an effect that has been exacerbated by the ECtHR's broad tolerance of enforcement of other speech-restricting laws against European Muslims themselves. As a result, for European Muslims, existing law sends a clear signal of unequal citizenship.

11. *Perinçek v. Switzerland*, Application no. 27510/08 (ECtHR 2015), para. 234, 239.

12. For a critique of such nexus arguments, see Kahn (2014).

ISLAMOPHOBIC (AND ISLAMIST) SPEECH

For at least the past decade, Islamophobic speech has occupied the epicenter of global free speech conflict. Following the September 2005 publication of the infamous cartoons caricaturing the Prophet Mohammed (PBUH) by the Danish newspaper *Jyllands-Posten*, a variety of Muslim organizations in Europe and around the world accelerated their preexisting efforts to appeal to both national legal institutions and international human rights bodies to regulate speech that blasphemes or defames the Islamic faith (Kahn 2011; Klausen 2009; Langer 2014). While some of this outrage was drummed up by leaders of Muslim states seeking to needle Western governments and/or stoke their own popularity at home (Klausen 2009), it is clear that Muslim objections to Western depictions of the Prophet (PBUH) are sincere, deeply rooted, and long felt, with the first such controversy dating to 1925 (Langer 2014).

Some European states regularly prosecute Islamophobic speech acts. The most well-known examples include the repeated French prosecutions of Brigitte Bardot and Marine Le Pen for harsh criticisms of Muslim religious practices; the Dutch prosecution of Geert Wilders, a sitting member of Parliament, for repeated public denunciations of Islam; and the English prosecution of Mark Anthony Norwood for displaying a small sign in the window of his flat declaring “Islam out of Britain—Protect the British people” (Bleich 2011, 29–36; Brettschneider 2012, 2; Nossiter 2015; Weinstein 2009, 44–52).¹³ Norwood was convicted of a “racially or religiously aggravated” violation of the Public Order Act, which prohibits the display of “any writing, sign or other visible representation which is threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.”¹⁴ At the time, England had no explicit ban on religious hate speech, but in 2006, Parliament prohibited the use of threatening words, behavior, or display of written material intended to stir up religious hatred. On Erik Bleich’s account, this legislative change was motivated in part by the fact that English courts were using the 1965 Race Relations Act to protect Jews and

13. Note also *Ugeskrift for Retsvæsen* 2004.734 H, 158/2003 (Denmark S. Ct. 2004); *Soulas and Others v. France*, Application no. 15948/03 (ECtHR 2008); *Féret v. Belgium*, Application no. 15615/07 (ECtHR 2009).

14. Public Order Act 1986, 1986 Chapter 64, sec. 5(1)(b), <http://www.legislation.gov.uk/ukpga/1986/64>. As provided by the Crime and Disorder Act 1998, “racially or religiously aggravated” instances of this offense are subject to increased sentences. Norwood appealed his conviction to the ECtHR, which found his application inadmissible in *Norwood v. United Kingdom*, Application no. 23131/03 (ECtHR 2004).

Sikhs—religious minorities defined at least partly on ethnic/racial lines—but not to protect other religious groups. This double standard was particularly acute in the case of British Muslims, because post-9/11 anti-terrorism legislation had led to increased policing of Islamist expression by Muslims themselves (Bleich 2011, 23–29; see also Ahdar and Leigh 2005, 379–80).

Despite legislative changes like the 2006 Racial and Religious Hatred Act in Britain, the years following publication of the Danish cartoons in 2005 witnessed virtually no success for Muslim appeals to national and international legal institutions to restrict the publication of caricatures of the Prophet (PBUH). Muslim governments and NGOs repeatedly sought to persuade Western states to include Islam within the protections of their existing blasphemy or hate speech laws or to create a new legal concept of religious insult or defamation of religion. But Danish prosecutors declined to indict the editors or cartoonists at *Jyllands-Posten* for blasphemy or hate speech, and the Danish courts then rejected a private defamation complaint (Langer 2014, 64–73). When the French satirical magazine *Charlie Hebdo* reprinted all of the cartoons in February 2006 (also adding a number of new ones of its own), the French courts likewise held that relevant provisions of defamation and hate speech law had not been violated (Langer 2014, 73–77). Similar disputes played out elsewhere, but on Lorenz Langer’s comprehensive account, “[i]n no Western jurisdiction did courts or legal proceedings bring the redress sought by Muslim applicants” (2014, 83). Indeed, a debate that had begun in various national legislatures and international human rights bodies several years before publication of the Danish cartoons culminated in October 2008 with a recommendation from the Venice Commission that the crime of blasphemy should be abolished and that “it is neither necessary nor desirable to create an offence of religious insult (that is, insult to religious feelings) simpliciter, without the element of incitement to hatred as an essential component” (McGonagle 2012, 496; see also Appiah 2012; Klausen 2009, 53–79; Langer 2014). As a result, and to paint with a broad brush, the existing state of European law is that public expressions of religious hatred are often prohibited under the same or similar statutes as public expressions of racial hatred, but publications like *Jyllands-Posten* and *Charlie Hebdo* remain free to caricature and satirize religious icons and doctrines of all faiths.

Whether or not this distinction is defensible on theoretical grounds, its enactment in law has the effect of signaling to many European Muslims that the speech acts which they find most hateful and offensive are permissible, and hence that their deeply held interests and identities are less worthy of protection than others’. This signal of unfairness is exacerbated by the fact that European Muslims have themselves run afoul of racial and religious hatred laws (when their speech acts are read

as inciting hatred against adherents of other religions), bans on homophobic speech (when they join conservative Christians in preaching that homosexuality is sinful) and anti-terrorism laws (when their speech acts are read as glorifying terrorism) (Ah-dar and Leigh 2005, 381; Greenwald 2015a, 2015b; Leigh 2007, 252–6, 2009, 382).

Indeed, following the January 2015 terrorist attack on the offices of *Charlie Hebdo* and a Kosher grocery store in Paris, the French celebration of the magazine's right to mock the powerful and powerless alike was juxtaposed—strangely, at least from a U.S. First Amendment perspective—with aggressive policing by French authorities of other forms of expression. In the very moment when so much of France was declaring “Je suis Charlie,” comedian Dieudonné M'bala M'bala was convicted for writing on Facebook, “Je me sens Charlie Coulibaly.” Playing on the widespread use of “Je suis Charlie” as a statement of solidarity with the victims, Dieudonné (as he is widely known in France) was referring to one of the perpetrators of the January 2015 terrorist attacks, Amedy Coulibaly. Dieudonné was convicted under a November 2014 anti-terrorism law that authorized sentences of up to seven years in prison and fines of up to 100,000 euros, but he was given a suspended sentence of two months (Breedon 2015). Within weeks of the attacks, French courts had meted out criminal sentences in scores of additional such cases under the November 2014 law, including sentences of six months for a French-Tunisian man who shouted support for the attackers as he drove past a police station—“They killed Charlie and I had a good laugh. In the past they killed Bin Laden, Saddam Hussein, Mohammed Merah and many brothers. If I didn't have a father or mother, I would train in Syria.”—and four years for a man who praised the attackers while being arrested for driving under the influence of alcohol (Carvajal and Cowell-jan 2015; Chrisafis 2015). Dieudonné's crime was “apology of terrorism,” but as Chrisje Brants and Eric Heinze have argued, “bans on glorifying terrorism [have increasingly] become akin to conventional hate speech bans, insofar as such bans would penalize even those utterances that are not made pursuant to any specific terrorist act, but purely because they express views that are deemed . . . to be dangerous, intolerant or provocative” (Heinze 2007, 295; see also Brants 2007).

Such speech-related prosecutions of French Islamists predated both the *Charlie Hebdo* attacks and the 2014 anti-terrorism law. Dieudonné himself has been charged at least 38 times with violating French bans on inciting racial hatred, denying the Holocaust, and threatening public order (Edinger 2008; Rubin 2014; Stille 2014, 2015; Waintrater 2005). In 2001, French cartoonist Denis Leroy was convicted of complicity in condoning terrorism for publishing, two days after the 9/11 attacks, a rendering of the planes hitting the World Trade Center in New York City, with a caption appearing to praise the attackers: “WE HAVE ALL DREAMT OF IT . . . HAMAS

DID IT.” (The caption was a parody of a well-known advertising slogan in France: “You have dreamt of it . . . Sony did it.”) Muslim expression is further curtailed by the French prohibition on wearing head scarves in schools (which dates to 2004) and wearing burqas anywhere in public (which dates to 2011). The ECtHR upheld Leroy’s conviction and has repeatedly upheld the French bans on religious dress.¹⁵

This conflict has played out elsewhere in Europe as well. No cartoonists or newspaper editors faced legal penalties for publishing caricatures of the Prophet (PBUH), but four British Muslims who protested against the cartoons outside the Danish Embassy in London were convicted and sentenced to four to six years in prison for inciting violence and/or racial hatred (Bleich 2011, 39; Evans 2007; Langer 2014, 81).

Surely the signal sent by these legal responses is that members of European society have the freedom to mock Islam but not to advocate radical Islamism (or to wear a burqa). Likewise, that Europeans have the freedom to mock Islam but not to mock minorities on the basis of race. This complaint about a double standard has been regularly voiced by European Muslims; indeed, on Jytte Klausen’s account, it was “a constant refrain in the cartoon controversy.” The lesson drawn from the conflict by many European Muslims was that “the Danish state and the newspaper did not extend the same protection against prejudice and defamation to Muslims as to Christians. It was not an antiliberal argument but an argument about the entitlements Muslims have in liberal democracies” (2009, 88, 130, see also 61–62).

The double-standard argument has received attention from a variety of Western commentators (Garton Ash 2006; Greenwald 2015b, 2015c; K. Malik 2015; Saletan 2012; Stille 2014, 2015), but with the notable exception of Eric Heinze’s work, it has not been integrated into the scholarly literature on the legitimacy of hate speech bans. Waldron’s response, often echoed by European lawyers, is to distinguish between incitements to hatred of racial and religious groups (which should be prohibited) and criticism of religious beliefs and practices (which should be allowed) (Waldron 2012; see also Carvajal and Cowelljan 2015; Kahn 2011; Stille 2015). Waldron explicitly endorses the non-prosecution of *Jyllands-Posten* for the cartoon depictions of Muhammed (PBUH), and he insists that the “distinction between an attack on a body of beliefs and an attack on the basic social standing

15. Leroy v. France, Application no. 36109/03 (ECtHR 2008); Dogru v. France, Application no. 27058/05 (ECtHR 2008); Kervanci v. France, Application no. 31645/04 (ECtHR 2008); S.A.S. v. France, Application no. 43835/11 (ECtHR 2014). But see Gündüz v. Turkey, Application no. 35071/97 (ECtHR 2003), in which the ECtHR found a violation of Article 10 in a case involving criminal prosecution of Islamist speech.

and reputation of a group of people is clear” (2012, 114–126). The distinction may be clear to Waldron, but many European Muslims seem unpersuaded by it. Its unpersuasive character is exacerbated by European laws prohibiting Holocaust denial, which are widespread and vigorously enforced, and which seem closer to hypothetical laws banning depictions of the Prophet (PBUH) than to actual laws banning racist hate speech (Bleich 2011, 44–61). As Bleich notes, this juxtaposition was particularly stark in February 2006 when, at the height of the Danish cartoon controversy, an Austrian court convicted David Irving of Holocaust denial and sentenced him to three years in prison (2011, 56–57). Banning Holocaust denial might make sense because such speech acts are deeply hurtful to many Jews and indeed are a leading mode for contemporary expressions of anti-Semitism (Kahn 2004; Suk 2012). But then why would we not also ban caricatures of the Prophet (PBUH), which are deeply hurtful to many Muslims and indeed are a leading mode for contemporary expressions of Islamophobia?

In sum, Waldron’s distinction between written epithets directed against racial and religious minorities (which should be banned) and written mockery of minority religious doctrines (which should be allowed) is reasonable in the abstract, but its social meaning when enacted into law by contemporary European states is to signal to vulnerable Muslim minorities that they are not equal citizens of those societies. One widespread Muslim response to these signals is to demand legal regulation of written mockery of their faith. European governments have generally been unwilling to accede to such demands, for the good reason that free and democratic societies require space to criticize religious doctrine. But this decision has resulted in a legal playing field that does not appear to be level, and European judges to date have proven unwilling or unable to level it. In addition to rejecting freedom-of-expression and freedom-of-religion challenges to French bans on Muslim clothing and other forms of Islamist expression (such as the Leroy cartoon), the ECtHR also rejected a Moroccan complaint about the Danish non-prosecution of *Jyllands-Posten*, though we do not know what it would have done if Danish Muslims had brought such a complaint.¹⁶ But this same court has repeatedly upheld legislative bans on racist hate speech, legislative bans on Holocaust denial, and in one substantive ruling to date, a legislative ban on anti-gay speech.¹⁷

16. The ECtHR held that the Moroccans’ application was inadmissible because “there is no jurisdictional link between any of the applicants and the relevant member State, namely Denmark.” Ben el Mahi v. Denmark, Application no. 5853/06 (ECtHR 2006).

17. In addition to the cases cited in note 9, see *Balsytė-Lideikienė v. Lithuania*, Application no. 72596/01 (ECtHR 2008); *Pavel Ivanov v. Russia*, Application no. 35222/04 (ECtHR 2007); *Hizb*

HOMOPHOBIC SPEECH

Like European Muslims, European LGBT communities have argued that the state's failure to protect them against hateful and abusive speech signals that their rights and security are less valuable than those of other minority communities. As a result, some LGBT rights advocates have called for legislative bans on such speech acts, some European states have heeded these calls, and some courts have allowed such bans to be enforced; these efforts almost inevitably trench on well-established spheres of protected religious and political speech.

For example, the Swedish parliament amended its hate speech law in 2003 to include sexual orientation. As amended, the Act prohibited any statement or communication that “threatens or expresses contempt for an ethnic group or any other group of people with reference to their race, skin colour, nationality or ethnic origin, religious belief or sexual orientation.”¹⁸ It authorized prison sentences of two years for violations, or longer if the speech act was especially threatening, extremely disrespectful, or widely disseminated. Despite requests from the Swedish Council of Free Churches, the statute did not exempt sermons, and the Swedish Minister of Justice indicated that some anti-gay sermons might well be prohibited (Bob 2014, 216). At the time of enactment, the Government issued a statement indicating that “the purpose of this legislative solution is [to] underscore that the same principles are to be used in considering whether an act against homosexuals, for example, is within the purview of the provisions regarding incitement against a group, as when considering an act against any of the other groups that are protected by these provisions.”¹⁹

This legislative change was supported by (some) LGBT rights advocates, both in Sweden and internationally. Key actors included the Stockholm-based Swedish Federation for Gay, Lesbian, Bisexual, and Transgender Rights and the International Lesbian and Gay Association (Bob 2014). As Ian Leigh has noted, LGBT organizations had “lobbied for an offence of this kind as an equalizing measure that would bring the treatment of sexual-orientation equality into line with race and religious equality” (2009, 384). Heeding such concerns, the European Parliament has passed repeated resolutions demanding an end to homophobic speech, and a number of national legislatures have followed suit (Bob 2014, 224). In 2008,

utTahrir and Others v. Germany, Application no. 31098/08 (ECtHR 2012); Kasymakhunov and Saybatalov v. Russia, Application nos. 26261/05 and 26377/06 (ECtHR 2013); and Vejdeland and Others v. Sweden, Application no. 1813/07 (ECtHR 2012).

18. Swedish Penal Code, Ch. 16, sec. 8, quoted in Prosecutor General v. Green, Case No. B 105005 (Supreme Court of Sweden 2005).

19. Quoted in Prosecutor General v. Green, Case No. B 105005 (Supreme Court of Sweden 2005).

England amended its law of incitement to provide that it would be illegal to use threatening words, behavior, or written material with intent to stir up hatred on the grounds of sexual orientation. In response to religious critics, the new provision was altered prior to enactment to provide that “the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred.”²⁰ Statutory bans on anti-gay speech have been enacted in Croatia, Denmark, Finland, France, Greece, Iceland, Ireland, Italy, Lithuania, the Netherlands, and Norway as well.²¹

Even before these legislative changes, anti-gay speakers were sometimes prosecuted under existing laws that did not reference sexual orientation directly. In 2001, for example, Harry Hammond was convicted under England’s Public Order Act for holding a sign in a town square with the message “Stop Immorality. Stop Homosexuality. Stop Lesbianism. Jesus is Lord.” In the U.S., such messages are a routine feature of sidewalk preaching in many college towns (and elsewhere), but in England, Hammond ran afoul of the Act’s ban on the display of “any writing, sign or other visible representation which is threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.”²² The English High Court held that Hammond’s freedom of expression was outweighed by the need to defend public order and protect the rights of gays and lesbians. Hammond died while his appeal was pending, and though his heirs sought to continue the case, the ECtHR ultimately declared it inadmissible on the grounds of his death.²³

Following the legislative change in Sweden, Pentecostal pastor Åke Green intentionally provoked a legal test of the new law by delivering a sermon entitled “Is homosexuality congenital or the powers of evil meddling with people?” During the course of the sermon, Green drew on scriptural readings of Leviticus

20. Criminal Justice and Immigration Act 2008, ch. 4, schedule 16; see Leigh (2009).

21. Croatian Penal Code, §174; Danish Penal Code, §266b; Finnish Criminal Code, ch. 11, sec. 10; French Penal Code, Article R.624 and 625; French Press Law of 1881, Article 24 (as amended 1972); Greek Law 4285/2014, Article 1; Icelandic General Penal Code No. 19, Article 233a; Irish Prohibition of Incitement to Hatred Act 1989; Lithuanian Criminal Code, Article 170, No. VIII-1968; Dutch Penal Code, sec. 137c and d; Norwegian General Civil Penal Code, §135a. See Bangstad (2014); Bleich (2011: 40–41); Langer (2014); Leigh (2007, 2009); Loof (2007); Saletan (2012); Mattijssen and Smith (1996).

22. Public Order Act 1986, 1986 Chapter 64, sec. 5(1)(b), <http://www.legislation.gov.uk/ukpga/1986/64>. See Weinstein (2009: 30–35).

23. *Fairfield and Others v. UK*, Application no. 24790/04 (ECtHR 2005).

and Paul's First Epistle to the Corinthians in preaching that legal recognition of same-sex relationships would "create unparalleled catastrophes," that "sexual abnormalities are a serious cancerous growth on the body of a society," and that "sexually perverse people will even force themselves upon animals."²⁴ As with the legislative change that enabled it, Green's prosecution was supported by (some) LGBT rights advocates, both in Sweden and internationally (Bob 2014). Green was convicted and sentenced to one month in prison. On appeal, the Swedish Supreme Court rejected his domestic constitutional speech and religious freedom arguments, but reversed the conviction on the grounds that it was inconsistent with ECHR Article 10.²⁵ This latter holding was a victory for free expression, but it left the statute in place for future prosecutions, with the Swedish Court appearing to indicate that some potential applications of the law remained legitimate.²⁶ In other words, in the absence of continental free speech norms, the Court would have upheld Green's conviction under Swedish law, despite its clear and sweeping infringement on religious speech; even with those norms in place, the Court signaled that it might uphold future such convictions where the infringement on speech was less severe.

The ECtHR itself did not weigh in on the merits of a homophobic speech case until 2012. In *Vejdeland and Others v. Sweden* (2012), the European Court rejected an Article 10 claim filed by a group of Swedes who had distributed anti-gay leaflets to students in an upper secondary school. The leaflets, produced by an organization called National Youth, characterized homosexuality as "deviant" and "morally destructive," urged students to tell their teachers that the AIDS epidemic was rooted in homosexuals' "promiscuous lifestyle," and suggested that homosexual lobby organizations were seeking to legalize pedophilia.²⁷ The avowed purpose of the leafletting was to initiate a debate regarding what the speech claimants saw as biased curricular content in the Swedish schools. The leafletters were convicted in Swedish courts of violating the national hate speech law, as amended in 2003, and two of them were initially sentenced to two months in jail. In July 2006, a divided Supreme Court upheld the convictions, but suspended the prison sentences. Four of those convicted then petitioned to the European Court on Article 10 grounds.

24. Prosecutor General v. Green, Case No. B 105005 (Supreme Court of Sweden 2005).

25. Prosecutor General v. Green, Case No. B 105005 (Supreme Court of Sweden 2005).

26. Prosecutor General v. Green, Case No. B 105005 (Supreme Court of Sweden 2005). See Bob (2014).

27. *Vejdeland and Others v. Sweden*, Application no. 1813/07 (ECtHR 2012), para. 8.

At the ECtHR, the International Centre for the Legal Protection of Human Rights and the International Commission of Jurists argued (as third-party intervenors) that

Sexual orientation should be treated in the same way as categories such as race, ethnicity and religion which are commonly covered by hate-speech and hate-crime laws, because sexual orientation is a characteristic that is fundamental to a person's sense of self. . . . When a particular group is singled out for victimisation and discrimination, hate-speech laws should protect those characteristics that are essential to a person's identity and that are used as evidence of belonging to a particular group. Restrictions on freedom of expression must therefore be permissible in instances where the aim of the speech is to degrade, insult or incite hatred against persons or a class of person on account of their sexual orientation, so long as such restrictions are in accordance with the Court's well-established principles.²⁸

Noting that “discrimination based on sexual orientation is as serious as discrimination based on ‘race, origin or colour’,” the Court agreed.²⁹

These arguments are understandable from the perspective of LGBT rights advocates seeking the same sort of legal protections that other vulnerable minority groups have won, but the ECtHR's holding opens the door to potentially significant infringements on Article 10 free speech rights. Given the limited doctrine to date, we do not yet know how far the ECtHR will allow such infringements to go. If the European judges had heard the *Green* case, for example, would they have reached the same judgment as the Swedish Supreme Court? In other words, are the different results in *Green* and *Vejdeland* the result of a national court adopting a broader reading of Article 10 than the European Court requires? Or a result of the cases' different fact patterns? In short, when the ECtHR faces a case like *Green's*—involving criminal prosecution for anti-gay readings of the Bible, delivered from the pulpit—will it find an Article 10 violation?

CONCLUSION

The European legal treatment of Islamophobic and homophobic speech illustrates the two horns of the dilemma faced by democratic states seeking to outlaw hateful

28. *Vejdeland and Others v. Sweden*, Application no. 1813/07 (ECtHR 2012), para. 45–46.

29. *Vejdeland and Others v. Sweden*, Application no. 1813/07 (ECtHR 2012), para. 55.

speech. With regard to satirical and offensive caricatures of the Prophet Mohammed (PBUH), Western European states have by and large erred on the side of defending free expression, at the cost of signaling to a vulnerable minority that they must tolerate what they see as hateful, discriminatory, and harmful speech acts. With regard to religiously motivated denunciations of homosexuality, European states have increasingly erred on the side of protecting vulnerable minorities from harmful speech, at the cost of signaling to religious conservatives that their deeply held views are not welcome in public debate.

From a U.S. First Amendment perspective, the European approach to speech involving Islam in particular seems to represent a worst-of-both-worlds stance. On the one hand, in an extension of their approach to racist hate speech, European legislators and judges have gone so far in banning both anti-Muslim and pro-terrorism speech that they have trenched on what seem like clear and fundamental democratic norms of free expression: note, for example, the convictions of Mark Norwood and Denis Leroy. On the other hand, the pervasive speech acts about which actual European Muslims express the greatest concern—mocking images of the Prophet (PBUH)—are tolerated as legitimate commentary on religious doctrine, with European lawmakers lecturing Muslims on the sorts of tolerance that are required in a diverse democratic society.

This dilemma has no easy solution. As Bleich has noted with regard to the Danish cartoons, “[t]he failed lawsuits in Denmark and France indicate to [Muslim] plaintiffs that their feelings are not given sufficient weight by the state. Yet if Muslim groups had won these cases, the ability to express controversial ideas in the public sphere would have been severely compromised” (2011, 40). If European legislatures and courts are unwilling—for good reason—to start banning published caricatures of Mohammed (PBUH), then their best bet may be to stop banning Islamist calls for violent resistance to the West—i.e., to stop banning such calls unless and until they rise to the level of true threats to individuals or otherwise incite one or more persons to engage in imminent violent action. (On speech acts that virtually everyone, including civil libertarians, believes can legitimately be regulated, see Heinze (2013, 590–95).) Particularly if combined with a relaxation of existing bans on racist, anti-Semitic, and homophobic speech, such deregulation of Islamist speech would moderate the signals of unequal status that are currently sent by the widespread failure to regulate caricatures of the Prophet (PBUH). If these deregulatory changes were accompanied by the rich array of non-coercive governmental efforts to promote egalitarianism that Brettschneider calls for, then the cost to those relatively powerless groups who are protected by existing hate speech laws could be moderated as well (Brettschneider 2012; see also Gelber 2012).

The ECtHR could use its Article 10 jurisprudence to force some steps in this direction. To the extent that it imposes some consistency on legal regulation of hateful speech directed at racial minorities, Jews, Muslims, and LGBT persons, it would dampen any signals of unequal citizenship that are sent by national laws of selective scope. To date, the ECtHR has largely failed to do so, and in so failing, it has echoed and amplified the signal sent by European states that their Muslim minorities are due less than fully equal protection of the laws.

* * *

The prosecution of right-wing extremists for saying or writing hateful things that fall short of direct incitements to violence has a number of potential downsides that have been rehearsed by other scholars. Such prosecutions may have a tendency to turn the haters into victims and martyrs, and they may sometimes drive hate organizations underground in ways that make them more difficult to monitor. These downsides are counterbalanced by the important symbolic message that the targets of the outlawed speech are full and equal members of the polity, whose safety and status will be protected by the state. But even this upside has a downside, in that it signals to other vulnerable groups—those targeted by hateful speech that has not been banned—that they are not yet full and equal members. The U.S. First Amendment approach, in which hateful speech acts are generally not prosecuted, has downsides too, such as forcing all of us to tolerate pickets at military funerals bearing messages like “God Hates Fags” and “Thank God for Dead Soldiers.”³⁰ But U.S. lawmakers are not faced with the European dilemma of whether to selectively protect some vulnerable groups from hateful speech or to accede to ever-proliferating reasonable demands to extend such protection to new and additional such groups, with an ever-constricting effect on the scope of free expression.

The most-cited passage in Waldron’s *Holmes Lectures* is his objection to white liberals’ too easy tolerance of racist speech, when they are not the ones who have to live with its consequences (2012, 33). But one could just as easily invoke civil libertarians of color to draw attention to white liberals’ too easy embrace of speech restrictions, when they are not the ones who have to live with the consequences of anti-racism campaigns that emphasize words over substance (Gates 1993; M. Malik 2009; Shaw 2012; see also Greene 2012; Kalven 1965; Walker 1994). The same could be said of LGBT civil libertarians (Eskridge 1999, 318–19; Rubenstein 1992; Tatchell 2007). Civil libertarians come in all shapes and sizes, as do advocates of

30. *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

further government restrictions on speech. The question for all of us is how best to protect the targets of hatred from violence and discrimination, to integrate them into democratic societies, and to signal that all members of such societies are entitled to equal concern and respect. Democratic states should certainly denounce hatred of vulnerable groups wherever and whenever it arises, but it is not clear that they can coercively suppress such hatred without sending inegalitarian signals of their own.

Acknowledgments

This article draws on research that has been supported by the National Science Foundation (Award No. 1535250). An earlier draft was presented at the Council for European Studies' 23rd International Conference of Europeanists. I would like to thank Brandon Metroka and Claire Sigsworth for invaluable research assistance. Brandon and Claire also provided helpful comments on earlier drafts, as did Sindre Bangstad, Erik Bleich, Keith Bybee, Kath Gelber, Rob Kahn, Marcel Maussen, Yuksel Sezgin, Jim Weinstein, and three anonymous reviewers. All errors are my own, but the paper is much improved as a result of their feedback.

REFERENCES

- Ahdar, Rex, and Ian Leigh. 2005. *Religious Freedom in the Liberal State*. Oxford: Oxford University Press.
- Appiah, Kwame Anthony. 2012. "What's Wrong with Defamation of Religion?" In Herz and Molnar 2012, 164–82.
- Baker, C. Edwin. 2012. "Hate Speech." In Herz and Molnar 2012, 57–80.
- Bangstad, Sindre. 2014. "Fighting Words: What's Wrong with Freedom of Expression?" *Journal of Ethnic and Migration Studies* 40 (February): 266–282.
- Belavusau, Uladzislau. 2013. *Freedom of Speech: Importing European and US Constitutional Models in Transitional Democracies*. New York: Routledge.
- Bingham, John. 2015. "Preacher Accuses Judge of 'Redacting' the Bible." *Telegraph* (March 30). <http://www.telegraph.co.uk/news/religion/11505466/Preacher-accuses-judge-of-redacting-the-Bible.html>.
- Bleich, Erik. 2011. *The Freedom to be Racist? How the United States and Europe Struggle to Preserve Freedom and Combat Racism*. New York: Oxford University Press.
- Bob, Clifford. 2014. "The Global Battle over Religious Expression: Sweden's Åke Green Case in Local and Transnational Perspective." *Journal of Ethnic and Migration Studies* 40 (2): 212–29.
- Brants, Chrisje. 2007. "Glorifying Terrorism." In Loenen and Goldschmidt 2007, 279–94.
- Breeden, Aurelien. 2015. "Dieudonné M'bala M'bala, French Comedian, Convicted of Condoning Terrorism." *New York Times* (March 18): A8.

- Brettschneider, Corey. 2012. *When the State Speaks, What Should it Say? How Democracies Can Protect Expression and Promote Equality*. Princeton: Princeton University Press.
- Carvajal, Doreen, and Alan Cowelljan. 2015. "French Rein in Speech Backing Acts of Terror." *New York Times* (January 15): A1.
- Chrisafis, Angelique. 2015. "French Dissenters Jailed After Crackdown on Speech that Glorifies Terrorism." *The Guardian* (January 30). <http://www.theguardian.com/world/2015/jan/30/french-jailed-crackdown-speech-glorifies-terrorism>.
- Citron, Danielle Keats. 2014. *Hate Crimes in Cyberspace*. Cambridge: Harvard University Press.
- Delgado, Richard. 1982. "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling." *Harvard Civil Rights-Civil Liberties Law Review* 17 (Spring): 133–181.
- Delgado, Richard, and Jean Stefancic. 2004. *Understanding Words that Wound*. Boulder, CO: Westview Press.
- Dworkin, Ronald. 2009. "Foreword." In Hare and Weinstein 2009, v–ix.
- . 2012. "Reply to Jeremy Waldron." In Herz and Molnar 2012, 341–44.
- Edinger, Bernard. 2008. "France." *American Jewish Year Book* 108: 371–398.
- Eskridge, William N., Jr. 1999. *Gaylaw: Challenging the Apartheid of the Closet*. Cambridge: Harvard University Press.
- Evans, Ian. 2007. "Cartoon protest Muslim is guilty of soliciting murder." *The Times* (March 8): 23.
- Garton Ash, Timothy. 2006. "This is the moment for Europe to dismantle taboos, not erect them." *Guardian* (October 18). <http://www.theguardian.com/commentisfree/2006/oct/19/comment.france>.
- Gates, Henry Louis, Jr. 1993. "Let them Talk: Why Civil Liberties Pose No Threat to Civil Rights." *New Republic* (September 20 & 27): 37–49.
- Gelber, Katharine. 2012. "Reconceptualizing Counterspeech in Hate Speech Policy (with a Focus on Australia)." In Herz and Molnar 2012, 198–216.
- Gelber, Katharine, and Luke McNamara. 2015. "The Effects of Civil Hate Speech Laws: Lessons from Australia." *Law & Society Review* 49 (3): 631–664.
- Greene, Jamal. 2012. "Hate Speech and the Demos." In Herz and Molnar 2012, 92–115.
- Greenwald, Glen. 2015a. "With Power of Social Media Growing, Police Now Monitoring and Criminalizing Online Speech." *The Intercept* (January 6). <https://theintercept.com/2015/01/06/police-increasingly-monitoring-criminalizing-online-speech/>.
- . 2015b. "France Arrests a Comedian for His Facebook Comments, Showing the Sham of the West's 'Free Speech' Celebration." *The Intercept* (January 14). <https://theintercept.com/2015/01/14/days-hosting-massive-free-speech-march-france-arrests-comedian-facebook-comments/>.
- . 2015c. "Anti-Israel Activism Criminalized in the Land of Charlie Hebdo and 'Free Speech.'" *The Intercept* (October 27). <https://theintercept.com/2015/10/27/criminalization-of-anti-israel-activism-escalates-this-time-in-the-land-of-the-charlie-hebdo-free-speech-march/>.

- Haraszti, Miklos. 2012. "Foreword: Hate Speech and the Coming Death of the International Standard before It Was Born (Complaints of a Watchdog)." In Herz and Molnar 2012, xiii–xviii.
- Hare, Ivan, and James Weinstein, eds. 2009. *Extreme Speech and Democracy*. New York: Oxford University Press.
- Heinze, Eric. 2006. "Viewpoint Absolutism and Hate Speech." *Modern Law Review* 69 (4): 543–582.
- . 2007. "Towards the Abolition of Hate Speech Bans: A 'Viewpoint Absolutist' Perspective." In Loenen and Goldschmidt, *Religious Pluralism and Human Rights in Europe*, 295–309. Antwerpen: Intersentia.
- . 2009. "Cumulative Jurisprudence and Hate Speech: Sexual Orientation and Analogies to Disability, Age, and Obesity." In Hare and Weinstein, *Extreme Speech and Democracy*, 265–85.
- . 2013. "Hate Speech and the Normative Foundations of Regulation." *International Journal of Law in Context* 9 (December): 590–617.
- Herz, Michael, and Peter Molnar, eds. 2012. *The Content and Context of Hate Speech: Rethinking Regulation and Responses*. New York: Cambridge University Press.
- Kahn, Robert A. 2004. *Holocaust Denial and the Law: A Comparative Study*. New York: Palgrave Macmillan.
- . 2011. "A Margin of Appreciation for Muslims? Viewing the Defamation of Religions Debate through *Otto-Preminger-Institut v. Austria*." *Charleston Law Review* 5: 401–455.
- . 2014. "Should it Matter Where Genocide Denial is Banned? A Critique of the Nexus Argument." University of St. Thomas Legal Studies Research Paper No. 14–32. <http://ssrn.com/abstract=2502912>.
- Kalven, Harry, Jr. 1965. *The Negro and the First Amendment*. Chicago: University of Chicago Press.
- Klausen, Jytte. 2009. *The Cartoons that Shook the World*. New Haven: Yale University Press.
- Langer, Lorenz. 2014. *Religious Offense and Human Rights: The Implications of Defamation of Religions*. Cambridge, UK: Cambridge University Press.
- Lawrence, Charles R., III. 1990. "If He Hollers Let Him Go: Regulating Racist Speech on Campus." *Duke Law Journal* 1990 (3): 431–483.
- Leigh, Ian. 2007. "Religiously-Motivated Discriminatory Speech: 'Homophobia' and Equality Denial." In Loenen and Goldschmidt 2007, 251–65.
- . 2009. "Homophobic Speech, Equality Denial, and Religious Expression." In Hare and Weinstein 2009, 375–99.
- Leiter, Brian. 2012. "Review of *The Harm in Hate Speech*, by Jeremy Waldron." *Notre Dame Philosophical Reviews* (July 29). <http://ndpr.nd.edu/news/32077-the-harm-in-hate-speech/>.
- Loenen, M.L.P., and J.E. Goldschmidt, eds. 2007. *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?* Antwerpen: Intersentia.
- Loof, Jan-Peter. 2007. "Freedom of Expression and Religiously-Based Ideas on Homosexuality: European and Dutch Standards." In Loenen and Goldschmidt 2007, 267–78.

Malik, Kenan. 2009. *From Fatwa to Jihad: The Rushdie Affair and its Aftermath*. Brooklyn, New York: Melville House Publishing.

———. 2012. “Interview with Kenan Malik.” By Peter Molnar. In Herz and Molnar 2012, 81–91.

———. 2015. “Don’t Limit Speech in France.” *New York Times* (January 16).

Malik, Maleiha. 2009. “Extreme Speech and Liberalism.” In Hare and Weinstein 2009, 96–120.

Matsuda, Mari J. 1989. “Public Response to Racist Speech: Considering the Victim’s Story.” *Michigan Law Review* 87 (8): 2320–2381.

Matsuda, Mari J., Charles R. Lawrence III, Richard Delgado, and Kimberle Williams Crenshaw. 1993. *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*. Boulder, CO: Westview Press.

Mattijssen, Astrid A.M., and Charlene Smith. 1996. “Dutch Treats: The Lessons the U.S. Can Learn from How the Netherlands Protects Lesbians and Gays.” *Journal of Gender & the Law* 4 (Spring): 303–33.

McGonagle, Tarlach. 2012. “A Survey and Critical Analysis of Council of Europe Strategies for Countering ‘Hate Speech.’” In Herz and Molnar 2012, 456–98.

Nossiter, Adam. 2015. “French Far-Right Leader Uses Trial as Stage for Views.” *New York Times* (October 21): A10.

Parekh, Bhikhu. 2012. “Is There a Case for Banning Hate Speech?” In Herz and Molnar 2012, 37–56.

Rubin, Alissa J. 2014. “For Hateful Comic in France, Muzzle Becomes a Megaphone.” *New York Times* (March 11): A1.

Rubenstein, William B. 1992. “Since When is the Fourteenth Amendment Our Route to Equality? Some Reflections on the Construction of the Hate Speech Debate from a Lesbian/Gay Perspective.” *Law & Sexuality* 2: 19–27.

Saletan, William. 2012. “Hate-Speech Hypocrites.” Slate.com (September 28). http://www.slate.com/articles/news_and_politics/frame_game/2012/09/free_speech_vs_hate_speech_why_is_it_legal_to_insult_muslims_but_not_jews_.html.

Shaw, Theodore. 2012. “Interview with Theodore Shaw.” In Herz and Molnar 2012, 399–413.

Stille, Alexander. 2014. “The Case of Dieudonné: A French Comedian’s Hate.” *New Yorker* (January 10). <http://www.newyorker.com/news/daily-comment/the-case-of-dieudonne-a-french-comedians-hate>.

———. 2015. “Why French Law Treats Dieudonné and Charlie Hebdo Differently.” *New Yorker* (January 15). <http://www.newyorker.com/news/news-desk/french-law-treats-dieudonne-charlie-hebdo-differently>.

Suk, Julie C. 2012. “Denying Experience: Holocaust Denial and the Free-Speech Theory of the State.” In Herz and Molnar 2012, 144–63.

Tatchell, Peter. 2007. “Hate Speech v. Free Speech.” *The Guardian* (10 October). <http://www.theguardian.com/commentisfree/2007/oct/10/hatespeechvreespeech>.

Waintrater, Meir. 2005. “France.” *American Jewish Year Book* 105: 336–350.

- Waldron, Jeremy. 2012. *The Harm in Hate Speech*. Cambridge: Harvard University Press.
- Walker, Samuel. 1994. *Hate Speech: The History of an American Controversy*. Lincoln, NE: University of Nebraska Press.
- Weinstein, James. 1999. *Hate Speech, Pornography, and the Radical Attack on Free Speech Doctrine*. Boulder, CO: Westview Press.
- . 2009. “Extreme Speech, Public Order, and Democracy: Lessons from *The Masses*.” In Hare and Weinstein 2009, 23–61.

THE POLITICAL ORIENTATION OF THE MEMBERS OF THE HUNGARIAN CONSTITUTIONAL COURT BETWEEN 2010 AND 2014

ZOLTÁN SZENTE¹

ABSTRACT

The article explores the political orientation of the members of the Hungarian Constitutional Court between 2010 and 2014, when the government had a two-thirds majority in Parliament, and, thereby, was able to influence the composition and the operation of the Court. First, the study describes the basic features of the Court as it was established at the dawn of the transition to democracy in 1989/1990. Then it analyses the institutional changes shortly after the overwhelming election victory of the conservative right in 2010, specifying the measures which dismantled the guarantees of the organisational and political independence of the Court. In the third part, the author presents an empirical research about the political orientation of the judges. He shows that constitutional judges vote more or less consistently for their nominating (left-liberal or conservative) party. Zoltán Szente argues that the most plausible explanation for the extremely strong correlation between the voting behavior of the judges and the political standpoints of their nominating parties is the political orientation of the members of the Court: the judges support the

1. Zoltán Szente is a professor of law at the National University of Public Service, Department of Constitutional Law, and a Research Chair, at the Hungarian Academy of Sciences, Institute for Legal Studies, Budapest, Hungary.

political parties that nominated them, because they agree with policy or ideology of these parties.

KEY WORDS: *Hungarian Constitutional Court, Political Orientation of Judges, Constitutional Jurisprudence, Empirical Research on Judicial Behavior, Political Bias*

INTRODUCTION

According to the traditional view, judges make their decisions only on the basis of what the law says. As Montesquieu famously said, the judges are “only the mouth that pronounces the words of the law” (Montesquieu 1980, 487). It is quite usual to take “judicial argument seriously as one of the major, if not the sole determinant of the decisions courts make” (Robertson 2010, 21). We can easily believe that this assertion was founded by judges, who did not want to seem to be politicians. However, the classical approach that only legal arguments are used in judicial decisions is no longer a universally accepted conception. Today, “there are probably no political scientists who would seriously suggest that judgments of constitutional courts can be unambiguously explained by the law” (Annus 2007, 24). The presumption of the politically neutral and impartial decision-making process, in which the moral value judgments of the judges do not have any role, is strongly needed for accepting the vast and legally uncontrolled power wielded by the constitutional courts. If we do not share this belief, it is hard to approve that an aristocratic and politically non-responsible body may repeal the policy decisions of the democratically elected representatives of the people on the basis of general and frequently elusive phrases of the constitution. The vision of the wise and unselfish judges who, taking apart their personal attitudes and feelings, always decide solely in behalf of the community, is a nice idea, as far as it seems to be from reality, at least in contemporary Hungary.

In general, constitutional law applies formal rules to legal institutions for many reasons. In the case of constitutional courts, for example, procedural guarantees, incompatibility rules, and other prescriptions are adopted for safeguarding the independence, impartiality, and legitimacy of these bodies, protecting them from external and unauthorized interventions of, among other things, politics. This formalism is often criticized by many as inadequate in a number of cases, and imperfect for attaining the goals for which it was adopted. These criticisms might sometimes be true, but the recent history of the Hungarian Constitutional Court provides an excellent example of how the destruction of these formal rules and institutional guarantees leads to the decline of the importance of a constitutional body, and, by this way, how the level of legal protection of rights and freedoms erodes. In addition, this special case exemplifies the way a strong, effective, and independent

counterbalance of the political power has been successfully neutralized or even occupied by a political supermajority in a consolidated democracy.

In any case, the question of whether the constitutional courts are political or strictly legal institutions (i.e., whether they may or may not legitimately use extra-legal—moral or political—arguments in their decision-making process) cannot be decided on a very formal basis, considering only their legal status or regulation, which highlights everywhere the independence, political neutrality, and impartiality of these bodies. Despite the clear legal status of the constitutional courts, there may still be some reasonable doubts as to whether a body can really make its decisions solely on legal/constitutional grounds, when its members are elected or appointed by politicians among their allies in order to decide the most important political controversies without any democratic accountability.

In the literature, there are three major theories of the decision-making of constitutional courts, which explain judicial behavior in different ways. Nevertheless, very recently, a new approach has emerged, as some scholars try to integrate the well-established theories.

The most traditional approach is the legal model, which was dominant for a long time. It postulates that judicial decision-making is based on legal reasons and considerations. When the court makes a decision, it takes only the facts of the case and the relevant law into account (Pacelle, Curry, and Marshall 2011, 32). The constitutional judges' activities differ from that of the elected officials' who bear political responsibility and make public policy. Even if we place the judiciary in political context, the judge still remains different from the legislator or other policy-maker, because the judge cannot choose so freely from the alternatives as the politician does. Thus, although constitutional interpretation usually provides some room for discretion, it is still judicial discretion, not policy-making (Pritchett 1969, 49).

The conventional approach has been sharply questioned by the so-called attitudinal model which openly criticized the “myth” of objective and impartial judging. While the well-known legal theories most often discuss normative requirements and rules, the ambition of the attitudinal doctrine is to explain the motifs and background of judicial behavior (Friedman 2005, 258–259). The attitudinal theory claims that judicial decisions are determined mostly (or exclusively) by the personal attitudes and preferences of the judges. In fact, judges follow their own policy goals (Segal and Spaeth 1993, 69; 2002, 86; Spaeth 2008, 760). The attitudinal model strongly relies on empirical surveys, seeking independent variables of the decisions of the individual judges.

Nevertheless, the convincing empirical evidence of the effects of personal preferences, attitudes, and ideological inclinations of judges has not persuaded

everybody. The advocates of the so-called strategic model of judicial decision-making emphasize the importance of other circumstances which can influence how judges decide (Spiller and Gely 2008, 41). Usually, the core thesis is that judges are motivated not only by their attitudes but by the fact that they think in a strategic way. As they are rational actors, they consider the reactions of other stakeholders to the court's decisions, and they take into consideration the institutional context of the particular cases. This theory often distinguishes internal factors (e.g., interpersonal relationships within the bench) and external impacts (e.g., the willingness of other power branches to execute the Court's rulings) (De Visser 2014, 334–337; Vanberg 2005, 14, 175).

Finally, it is worth referring to some new attempts to integrate the traditional approaches. The common starting point of the former ones is that although all conventional theories have some explanatory power, none are able to provide a comprehensive explanation for the decision-making process of constitutional tribunals. The typical method of the integrative theories is that the influencing variables are defined at various (micro, meso, and macro) levels,² and these theories always derive the factors affecting the final decision from the concrete institutional, legal, and other contexts. In this way, it is the common feature of these approaches that they do not exclude the possibility of the recognition of any potential impacts.

In this study, I examine whether political influences can be identified in the jurisprudence of the Hungarian Constitutional Court between 2010 and 2014, when the government coalition had a two-thirds majority in Parliament. For this purpose, I will analyse systematically the “voting behavior” of the constitutional judges. In particular, I am primarily interested in the significance of their political orientations, as we can draw some conclusions about the political preferences, attitudes, and ideologies of the individual judges if we compare their views represented in the Court with the positions of the political camp which had nominated them. In the context of judicial behavior, the “political orientation” of the judges means their support for particular political ideologies, values and attitudes, and/or political organisations. Political orientation is an explanatory variable of the “politically biased” judicial decisions or standpoints which embrace all judicial opinions or votes that cannot be justified purely by legal arguments, but they reflect—partly at least—the personal political preferences or value judgments of the judges.

First, I describe the basic features of the Hungarian Constitutional Court as it was established at the dawn of the transition to democracy in the 1980s and

2. The various authors define these factors in different ways. See for example Dyevre 2010, 317–318; Pacelle, Curry, and Marshall 2011, 49–50.

1990s. Then I will analyse the institutional changes shortly after the overwhelming election victory of the conservative right in 2010, specifying the measures which dismantled the guarantees of the organisational and political independence of the Court. Finally, I will examine the practical effects of these actions have had so far on the behavior of the judges of this Court.

I. THE GENESIS AND THE FIRST TWO DECADES OF THE HUNGARIAN CONSTITUTIONAL COURT

Before 1990, constitutional review had no traditions in Hungary. Although a so-called Council of Constitutional Law was set up in 1983, it had no power to annul unconstitutional statutes. The Constitutional Court was one of the new institutions established by the constitutional amendment of 1989. During the roundtable negotiations, both sides saw it as a guarantee for democracy, and, since then, the nomination has always been a complicated political bargaining process.

The distrust of judges by the communist party-state and the political mistrust between the negotiating parties during the transition period led to establishing an independent constitutional court with wide-ranging responsibilities. Basically, the Court was established on the pattern of the German *Bundesverfassungsgericht* (Halmai 2007, 693), establishing a “European” or “Kelsenian” model, that is a centralised system of constitutional review³: the Constitutional Court has exclusionary power to examine the constitutionality of legal acts through abstract judicial review.

The main task of the Constitutional Court was the *ex post* judicial review of legal rules. Since anybody could submit any statutory act to the Court for review (*actio popularis*), virtually all important laws landed before the body. In certain areas, *ex ante* examination of the constitutionality of legal acts (e.g., international treaties) fell also within the competence of the Court, which was also empowered to investigate conflicts between international treaties and the national law. The Court decided on individual constitutional complaints too, but in fact, this was an indirect judicial review of the statutes on which the individual judicial decisions were based.

The Court was established as a quasi-judicial organ; though it bore some characteristics of judicial tribunals (like the structural independence or the irremovable status of the judges), other classical judicial principles and guarantees were missing in its procedure (there is no adversarial procedure, for example) (Sólyom 2001, 114–115; Sólyom and Brunner 2000). The body consisted of eleven members, who were elected by a qualified majority of Members of Parliament (MPs).

3. On the major characteristic of this model, see Favoreu 1986, 16–31.

Parliament elected members of the Constitutional Court from among learned theoretical jurists (university professors or scholars having a doctorate degree from the Hungarian Academy of Sciences) and lawyers with at least twenty years of professional experience. They were elected for nine years and could be re-elected once. Although there were strict incompatibility rules, the objective of which was to keep party politics separate from the Court,⁴ the way of selecting its members (i.e., parliamentary nomination and election) brought the body close to party politics; actually, during its existence, only two or three judges were all-party candidates, while most justices were nominated by the government or the opposition parties.

From 1990 on, the Constitutional Court established a rich and extensive jurisprudence; virtually, it had dealt with almost all classical issues as is usual in those western countries which have much longer constitutional traditions. Undoubtedly, the Court reached a pre-eminent position in the Hungarian constitutional system and had a great performance in elaborating and standardizing the living constitutional law. It is a commonly shared view among scholars that the Court, in the first nine years of its operation (which period is generally called *Sólyom* Court after its first president) followed a strongly “activist” practice, relating both to its jurisdiction and to interpretive practice (Halmai 2002, 189–211; Schwartz 2000, 87–108).⁵ There is good reason to think that this activism was, to a degree, unavoidable; just as every attempt between 1990 and 2011 to make a new constitution proved to be unsuccessful, the legislature was not able to resolve certain constitutional conflicts, and it failed also to correct or modernize those basic institutions the regulation of which demanded a qualified majority in Parliament. Thus, the Court was the only institution to have enough power to solve the great constitutional (and, often, political) conflicts at a time when the institutional setting was paralyzed.⁶ The Court did not hesitate to play this role; since, from the very beginning of its existence, the

4. E.g., the members of the Constitutional Court may not pursue political activities or make political statements, and only those can be elected who have not filled leading political or governmental positions in the former four years.

5. In Hungarian literature, the term “jurisdictional activism” refers to the efforts of the Court to extend its powers, while “interpretive activism” means the practice that relies on extraconstitutional sources in the Court’s reasoning.

6. It is sure, however, that the Court acted as on a sovereign, quasi-lawmaker power in legal areas where it could also have grounded its reasoning on a well-established and crystallized body of law. The Court’s conceptual innovations have extended, for example, to criminal procedure and private law, stressing that constitutional concepts of property or guarantees of criminal law are independent from traditional approaches. See e.g. Balogh 2000, 123.

Court has made clear that the general and abstract concepts of the Constitution are not dead letters but real and living rules, and it is the primary task of the Court to determine and set out the exact content of these provisions from case to case. Although the Court was frequently criticized for its jurisdictional and interpretive activism, this conceptual approach soon became widely accepted, at least for two reasons. Firstly, all political actors believed that even the considerably revised constitution would only be a transitional one, as its preamble said, “in order to facilitate a peaceful political transition to a constitutional state”. The Parliament established the new text of the basic law, “until the country’s new constitution is adopted”. Secondly, due to the growing hostility between the rightist and leftist parties, there was no real chance for putting the issue of the new constitution on the political agenda, neither was it seen as an exigent political question; the most important modifications (which were necessary for Hungary’s accession to the NATO in 1997 or the European Union in 2004) were adopted, and the activist jurisprudence of the Constitutional Court filled the gaps of the old constitution.

Finally, the behavior of the Court was basically influenced by the dispute resolution approach of constitutional review, shared by the majority of the first Court. According to this view, the Court should decide all constitutional controversies which were submitted to it, rather than escape from the responsibility of the ultimate decision. The Court tenaciously persisted in this view throughout its working.

The Hungarian Constitutional Court regarded the Constitution as a holistic unity of principles and rules. This approach paved the way for the concept of the “invisible constitution”, even if it emerged firstly in a concurring opinion of the first president of the Court, László Sólyom.⁷ According to this theory, the invisible constitution embraces all the background or underlying principles that are necessary to understand the written constitution and makes a coherent body of constitutional law. It is to be noted that in the post-Sólyom era, the Court began to change its earlier activism, moving in a self-restraining direction. This image of moderate judicial behavior was strengthened as landmark decisions have already been taken earlier, and the Court frequently has sought middle-way solutions in the remaining hard cases. But the body, even if in a quiet way, continued its eclectic interpretive practice and largely based its jurisprudence on earlier decisions (Szente 2013).

7. Decision No 23/1990. (X. 31.) of the Constitutional Court, and Sajó 1995.

II. INSTITUTIONAL CHANGES SINCE 2010

The general elections of 2010 brought about a landslide victory for the conservative parties that had been in opposition for eight years beforehand. The main government party, the Fidesz and its satellite coalition partner, the Christian Democrats, owing to the disproportionate election system, gained a two-thirds parliamentary majority. Although the question of a new constitution was not a featured issue in the election campaign, the new coalition felt that their election victory provided a proper mandate for them to reorganise the whole state, including accepting a new basic law. The old constitution was replaced by a new one in the spring of 2011. But the new constitution has suffered the great and hardly remediable defect of being a partisan constitution, in a sense that the basic rules of the game were set unilaterally by the government majority. The circumstances of the constitution-making process might raise the issue of legitimacy, even if the Fundamental Law was approved by the two-thirds majority of the National Assembly, as required by the old constitution. Nevertheless, the original constitutional function of this majority requirement, namely enforcing a compromise between the government and opposition of the day, could not prevail because the government parties themselves were able to provide the formally necessary majority.⁸

Besides the legitimacy problems, the content of the Fundamental Law also generated huge conflicts in inner politics and heavy criticism in international fora. The curious paradox of the new constitutional regulation on the exercise of public power is that, while the state organisation system has changed only moderately, it has had significant political impacts in practice. In general, it can be said that the institutional balances of executive power have considerably weakened: some of the balances have lost their independence or some of their control powers.

All these defects and problems affected the Constitutional Court, which was for two decades the most effective and strongest counterbalance of the Executive. Just a few months after its formation, the new government, based on its two-thirds parliamentary majority, transformed the way of nominating Constitutional Court judges, practically introducing partisan elections of the members of the Court. Until the new regulation, the parliamentary majority and minority had been forced to compromise on the new members of the Court, as the composition of the parliamentary committee responsible for nominating Constitutional Court judges had

8. It is to be noted also that the opposition parties, with the exception of the extreme right *Jobbik*, boycotted the parliamentary discussions of the new constitutional text, saying that they did not want to assist in the backsliding of constitutional democracy.

been based on parity between the government and opposition parties, thus each candidate had to gain the support of both sides. According to the new rules, a parliamentary committee, composed in proportion to the members of the parties represented in Parliament, propose candidates, who are elected by Parliament with a qualified majority of two-thirds. In this way, the Fidesz government, enjoying such a parliamentary majority since autumn of 2010, has been able to appoint solely its own people to the Constitutional Court.

Besides all these changes, the number of constitutional judges was increased from eleven to fifteen. Although the explanation of this measure was to help the Court tackle its workload, which was expected to grow in parallel with the Court's new function of handling constitutional complaints, the measure was really a "court packing", as the government majority exploited the possibility to choose the new judges without opposition input. Thus, in 2010, two, and in the spring of 2011, five more justices were elected by the government party's MPs, ignoring the protest of the opposition parties.⁹ In this way, the government managed to place its loyal supporters on the Court, who reached a stable majority of the Court's members. As a matter of fact, all the nine new judges elected since 2010 were chosen by the government majority (see Table 1). This was possible because the law on the Constitutional Court contains a "cooling period" of four years only for leading officials of political parties as well as members of the government before they can be elected as judges to the Constitutional Court, but this incompatibility rule does not extend to party membership or parliamentary mandate, which means that even front-runner party politicians or backbenchers cannot be kept from the Court.

This partisan control of the Court was extended by the new Fundamental Law, empowering Parliament to elect the head of the Court (before that, he or she was elected by the justices themselves).¹⁰ The president of the Constitutional Court is elected by the Parliament as in some other countries, like Germany; still, this idea was strange in the Hungarian context, where the government parties themselves may decide who will chair the body without any compulsion to compromise with the opposition.

9. One of the reasons for the protests was that some nominees failed to meet qualification conditions set by law.

10. The political motivations for these changes can be demonstrated by the fact that the changes were enacted by modifying the old constitution, that is, not waiting for the effect of the new Fundamental Law. Otherwise, the Constitutional Court, in its old composition, would have been able to decide on some politically hot issues, and elect its own president for another three years.

TABLE 1. The division of members of the Court according to the parties nominating them before July 2010 . . .*

Left	Consensual	Right
András Bragyova, András Holló, László Kiss, Miklós Lévay	Péter Paczolay	Elemér Balogh, Péter Kovács, Barnabás Lenkovics, László Trócsányi
Total		
4	1	4

*There were two vacant positions when the new government was formed in 2010.

TABLE 2. . . . and after July 2010*

Left	Consensual	Right
András Bragyova, László Kiss, Miklós Lévay	Péter Paczolay	Elemér Balogh, <i>István Balsai, Mihály Bihari, Egon Dienes-Oehm, Imre Juhász, Péter Kovács, Barnabás Lenkovics, Béla Pokol, László Salamon, István Stumpf, Péter Szalay, Mária Szívós</i>
Total		
3	1	11

*The members elected after July 2010 are marked in italics

All these changes badly violated the independence of the Constitutional Court, as the goal of the special selection method of judges is just to guarantee the political neutrality and legitimacy of the Court. In contrast, the new regulation provides a unilateral and unjustified influence on the composition of the Constitutional Court from the executive branch. From a constitutional point of view, this is a self-contradiction, as one of the main functions of the Court should be the control and counterbalance of the executive. The only positive changes were the abolishment of the possibility of re-election for Constitutional Court judges and the simultaneous extension of the term of office for judges from nine to twelve years.

Besides these measures, when the Constitutional Court had declared unconstitutional and annulled a law that imposed with retroactive effect a ninety-eight percent tax on extreme severance payment, the government majority immediately curtailed the Court’s most important power of constitutional review.¹¹

11. The political pressure proved to be partly successful; after repealing two versions of the retroactive legislation introducing ninety-eight percent tax for earlier incomes [Decisions No 184/2010. (X. 28.)

Since then the Court has only been able to review and annul budgetary laws and acts on taxes, duties, pensions, customs or any kind of financial contributions to the state if they violate the right to life and human dignity; the right to the protection of personal data; freedom of thought, conscience, and religion; and the rights related to Hungarian citizenship. At first sight, this truncation of the Court's powers was only political revenge for an unfavourable decision, but it proved to be part of a long-term strategy to neutralize the Court's controlling role. One of the major instruments of the government coalition's financial recovery programme was to nationalize private pension funds, also expropriating their savings. Allegedly, if this measure was repealed as an unconstitutional one (feasible in normal circumstances), the budgetary deficit would jump to about seven percent instead of the three percent that Hungary undertook to keep as an EU member.

In spite of promises that this limitation on the jurisdiction of the Court would be only a short-term solution, it was put in the new Fundamental Law as well, which stipulated that this restriction of the Court's power will last as long as state debt exceeds half of the GDP. Although pulling some issues out from judicial review is not unprecedented in Europe (Wheare 1966, 102), since constitutional review is an institutional guarantee of the rule of law, its elimination, even only for a deemed transitional period, brings up the assumption that constitutional constraints on the executive power can be put aside in economically difficult times.

In addition, the so-called *actio popularis* (i.e., everybody's right, even without any personal interest, to turn to the Court to review the constitutionality of a statutory act) was abolished, though it had been the most effective tool to launch a judicial review procedure in constitutionally controversial cases for a long time.

Nevertheless, the Constitutional Court has been compensated to a degree for the loss of its fundamental power; the new constitution, on German pattern, introduced the politically neutral institution of individual constitutional complaint.

The fourth amendment of the Fundamental Law in March 2013 struck the final blow on the Court's independence, repealing all Constitutional Court rulings prior to the entry into force of the new Fundamental Law.¹² The goal of the

and 37/2011. (V. 10.) of the Constitutional Court] the Court finally approved of a third law, declaring the constitutionality of the retroactive taxation if it extends only to the beginning of the current tax year.

12. It is worth noting here that this constitutional amendment virtually overturned a lot of decisions of the Court, as it incorporated many things into the constitutional text that had been objected to by the Court in its earlier rulings.

government majority was clear: to compel the Constitutional Court to change its jurisprudence, adapting it to the values of the new majority.¹³

III. EMPIRICAL RESEARCH ON THE POLITICAL ORIENTATIONS OF THE CONSTITUTIONAL JUDGES IN HUNGARY

While the formal safeguards for the institutional independence of constitutional tribunals cannot guarantee the political neutrality of these courts in every case, the recent trends in the jurisprudence of the Hungarian Constitutional Court provide a good opportunity for studying how the absence or distortion of these rules affect the interpretive practice of such a court. Notwithstanding, the real political attitudes of judges can hardly be measured with scientific accuracy. Even if the members of the Constitutional Court have political commitments and prejudices, they always deny them vehemently. Despite these obvious problems, the behavior of the judges can exactly be measured through classifying their positions in the Court's rulings, from which strong consequences can be drawn for their motives in exercising their high office.

A. Method

To achieve this goal, I made an empirical study examining the correlation between the voting behavior of the judges as the dependent variable and the political view of the political camps (governmental or opposition parties) that nominated the judges as the independent (explanatory) variable. In other words, I am interested knowing whether the members of the Constitutional Court meet the probable expectations of the parties which supported them in the nomination process. It is to be noted that in the Hungarian context, "voting behavior" is not a precise definition, because, while the Constitutional Court holds official voting on the merit of every case before it, the results of these votes are not public, and those judges who did not agree with the majority are not obliged (but are allowed) to prepare a dissenting opinion. Thus I reconstruct the judges' opinions, including concurring and dissenting opinions, from the final decisions of the Court, as published by the Official Gazette. Therefore, whenever I say "voting behavior" of the judges, I refer to their published position which is either confirmatory (joining the majority decision) or dissenting (attaching a dissenting opinion to the Court's ruling).

13. Most of these changes attracted heavy criticism not only in academic literature (see e.g. Müller 2011, 7; Bánkuti, Halmai, and Scheppele 2012b, 139–140; Jenne and Mudde 2012, 148, 152), but in international organisations (see e.g., Venice Commission) as well.

If the quantitative analysis shows a very strong correlation between the voting behavior of the judges and the positions of their nominators (in the same cases), it is enough evidence of the political orientation of the judges concerned.

I examined the constitutional review cases between 2010 and 2014, when the Court reviewed statutes or other legal acts approved by the new government majority. These rulings were adopted by the Constitutional Court mainly as the result of so-called abstract constitutional review, with the exception of some cases when the Court reviewed the constitutionality of a law in the course of constitutional complaints. Among these decisions, I took into account only those which were made by the full Court and in which the final vote was divided, because only these inform us about the ideological, political, or professional cleavages of the judges. Between the summer of 2010 and 2014 a total of thirty-seven cases met these criteria, of which twenty-nine rulings were made in constitutional review cases while eight decisions were taken in constitutional complaint procedures.

The selection of constitutional review cases has only instrumental function; the underlying presumption is that more often than not these have serious political implications. If the constitutional judges really have political preferences and policy goals, they can pursue them through these procedures. Although the political importance of various laws can be largely different, it is undeniable that most statutes that gave rise to constitutional disputes and were brought to the Court were highly important in those turbulent times. Between 2010 and 2014 the government majority approved a new constitution (Fundamental Law of 2011) and deeply transformed the whole legal system and the market economy. In this period, the Constitutional Court reviewed statutory acts regulating the liberty of conscience and the legal status of churches, the freedom of the press, the legal definition of families, the legal guarantees of judicial independence, the electoral system, the standing orders of Parliament, and other hot topics of politics and controversial moral questions. Under such circumstances, upholding of the constitutionality of disputed laws, or, conversely, the invalidation of them, even if only in formal sense through a constitutional review, could have demonstrated the political orientation of the judges—as long as this behavior was permanent and consequent. In fact, tendentious behavioral patterns are only proxy variables (Landfried 2006, 229–230; Spaeth 2008, 760), as the judges—understandably—always deny charges of political bias. On this ground, I coded pro-government standpoints with “1”, while opposition “votes” were indicated by “0”.

Although the cases examined here amounted only to a part of all cases with which the Court dealt in this period, every constitutional review was taken into account, so in this sense, the survey was complete.

In some cases, I cleaned the data; when the majority annulled some irrelevant small details of a law or when it approved the objective substance of the legislation under review, I counted the case as indicative of a pro-government viewpoint, provided that the minority would invalidate the whole law or its essential parts. Furthermore, sometimes those judges are on the same side, writing dissenting opinions to the ruling of the Court, for example, who really occupy extremely different positions in the particular controversy. The same instrument can be used to different purposes. Thus, when some judges may oppose the majority decision arguing for the overrule of a law because of its alleged unconstitutionality, others might write dissenting opinions for the full protection and upholding of the same legal act. In all such cases, the proper classification can be made only by qualitative analysis of the reasoning behind the judges' votes.

The applied methodology may raise some theoretical difficulties; ignoring consensual decisions, for instance, can conceal the judges' willingness to build compromises rather than insisting on a special political stance. To put it differently, the unanimously adopted Court rulings can give information about the judges' non-partisan attitudes, as the divided decisions can do for the opposite attitude. The high number or proportion of consensual rulings may be suitable to prove that members of the Constitutional Court do not form their own judicial opinions on political grounds, even if typical or recurring disagreements can occur.¹⁴ But it was not the case for constitutional review after 2010. In most of these rulings, there were dissents, so divided voting was typical, unlike consensual voting.¹⁵ So it is justified to draw the reverse conclusion: those few decisions, which were passed unanimously, cannot prove the political neutrality of the judges.

Another methodological consideration might be whether the constitutional review cases really have political implications from which the political orientation of judges can be inferred. To accept the constitutionality of a law is not the same as to support it in political terms.

14. This argument is, however, questionable because even a high proportion of unanimous decisions in itself would not indicate the political impartiality of the Court, as the Hungarian Constitutional Court cannot exclude the clear-cut or easy cases in which unanimous rulings should be made.

15. In the period under investigation, the Court issued only nine unanimous decisions (17.6% of all cases) of which seven rulings could be taken account applying the method of data cleaning (i.e., excluding the decisions about the same object). The major trends and indicators would have not changed significantly even if we would have calculated the unanimous decisions (in the extreme cases, the individual indicator would shift from 0.966 to 0.971 for judge Balsai, from 0.027 to 0.151 for András Bragyova, while the change would be minimal even in the case of the most balanced chief judge Péter Paczolay (0.432 and 0.478, respectively).

Nevertheless, the adoption of laws always requires political will behind them. In addition, the divided decisions of the Constitutional Court were made almost always in cases which have caused sharp political conflicts and confrontation between the government and opposition parties. Most of the legislation has raised serious constitutional concerns and has been criticized by a number of international organisation like various EU institutions or the Venice Commission of the Council of Europe, on the grounds that these laws brought about different constitutional problems from restrictions on freedom of the press and public media to the violation of the independence of the Judiciary.

So the argument is that if the viewpoints, represented by a judge in a whole series of the particular cases which are so extremely different in nature, strongly support the political side which nominated him, then the only plausible explanation for it is the background political orientations of the individual members of the Court.

B. Analysis

In the period under review, there were altogether eighteen members of the Court.¹⁶ Seventy percent of them were candidates of the conservative parties, four judges were elected after nomination from the left-liberal parties, while only one joined the body as a compromise candidate. It is to be noted that, whereas until 2010 the candidates had been only loosely linked to the parties nominating them, after the change of government in that year, the new members' linkages were much more direct and revealed. For example, one of the new judges was a minister in the first Orbán government between 1998 and 2002 and an adviser to the Prime Minister just before his nomination in 2010, while three other new judges were earlier MPs of the conservative coalition. In 2011, for the first time, a politician directly replaced his parliamentary mandate with the judicial robes (and another politician followed suit in 2012). Moreover, some of the new members of the Court had not been backbenchers in their parties but were influential and veteran party politicians who were directly involved in the ideological struggles of the political sphere.

Analysing the voting behavior of the judges, it is striking what a high proportion is of those cases in which the judges voted in favor of the political side that had nominated them. The record of those judges who were nominated (or, after

16. One of them, Mihály Bihari, the president of the Court between 2005 and 2008, for his first mandate between 1999 and 2008 was nominated by the leftist Hungarian Socialist Party. Another member, judge László Trócsányi, in October 2010 became the Minister for Justice of the Orbán government, so his record could not be evaluated throughout this study.

TABLE 3. The rate of support for the government’s policies through the voting behavior of the judges nominated by the rightist parties

Judges	Proportion pro government
<i>István Balsai (30)</i>	0.966
<i>Béla Pokol (34)</i>	0.911
<i>László Salamon (20)</i>	0.9
<i>Mária Szívós (35)</i>	0.885
<i>Egon Dienes-Ohm (35)</i>	0.828
<i>Imre Juhász (17)</i>	0.823
Barnabás Lenkovics (37)	0.783
Péter Szalay (33)	0.727
Elemér Balogh (37)	0.432
<i>István Stumpf (36)</i>	0.447
Péter Kovács (36)	0.361
<i>Mihály Bihari (12)</i>	0.25

Judges elected after July 2010 are in italics. The number of decisions in which the judge took part are in parentheses.

2010, practically appointed) by the rightist parties, shows that the judges really support the conservative government’s policies which emerge in laws reviewed by the Court. These members of the Court usually uphold the constitutionality of the newly adopted legislation, whatever its subject-matter is. Table 3 quantifies the extent to which the judges nominated by the rightist parties supported the government’s policies on a scale where “1” would mean the uphold of all new legislation, while “0” indicates the rate of denial.

It is clear that the newly elected judges are more loyal to the government’s policies, compared to the older ones, upholding the vast majority of the laws of the new government (see Figure 1). In fact, the three former members of Parliament (MP) unconditionally supported the constitutionality of all government sponsored laws. Actually, if we take only the judges elected after the conservative political turn (with the sole exception of Mihály Bihari who had been originally a Socialist MP and constitutional judge candidate between 1999 and 2008), there is an eighty-one percent chance that the new judges (nominated by the new selection system) will support the government side, regardless of the matter in the particular cases.

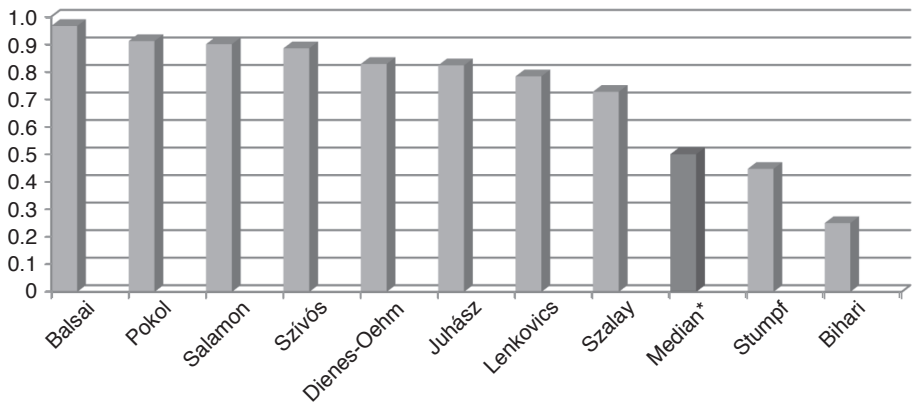


FIGURE 1 The rate of pro-government votes of the judges elected by the new government majority between 2010 and 2013

*For all possible opinions.

Similar tendencies can be observed in the case of those judges who were nominated by the leftist parties as Table 4 shows. In these cases, the probability that the leftist judges will vote against the constitutionality of any new legal act in the future is even higher than the support from rightist-nominated judges: eighty-five percent (Figure 2). In all likelihood, the behavior of these members of the Court was pushed towards a steady opposition by the emergence of the new generation of conservative-rightist judges.

The political orientation of the judges is also spectacular if we take our complete ranking according to their voting behavior in upholding or rejecting the constitutionality of the legislation of the new government in constitutional review cases.

All these results show that most members of the Constitutional Court follow the views of those political camps which nominated them.

TABLE 4. The rate of support for the government's policies through the voting behavior of the judges nominated by the leftist parties

Judges	Proportion pro government
András Bragyova (36)	0.027
Miklós Lévy (37)	0.135
László Kiss (27)	0.222
András Holló (18)	0.222

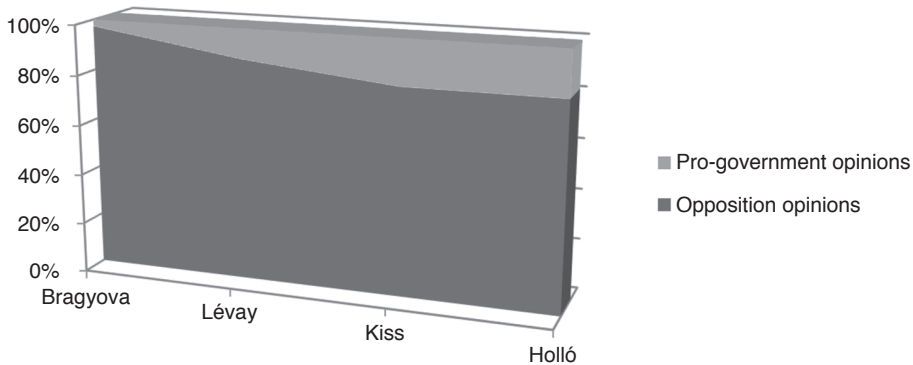


FIGURE 2 The rate of pro-government and opposition opinions of judges nominated by left-liberal parties, 2010–2014

TABLE 5. Absolute ranking of the judges according to their voting behavior

Judge	Nominating party	Proportion pro-government
István Balsai	Rightist	0.966
Béla Pokol	Rightist	0.911
László Salamon	Rightist	0.9
Mária Szívós	Rightist	0.885
Egon Dienes-Ohm	Rightist	0.828
Imre Juhász	Rightist	0.823
Barnabás Lenkovics	Rightist	0.783
Péter Szalay	Rightist	0.727
István Stumpf	Rightist	0.447
Péter Paczolay	Consensual	0.432
Elemér Balogh	Rightist	0.432
Péter Kovács	Rightist	0.361
Mihály Bihari	Rightist	0.25
András Holló	Left-Liberal	0.222
László Kiss	Left-Liberal	0.222
Miklós Lévy	Left-Liberal	0.135
András Bragyova	Left-Liberal	0.027

It is noteworthy that in case of some judges there is not a strong correlation between their behavior and the viewpoints of the political side which nominated them. It is not surprising as regards the president of the Court, Péter Paczolay, who was a consensual candidate. Two more judges, Elemér Balogh and István Stumpf also pursued a balanced behavior, voting alternately for upholding and rejecting the constitutionality of the new laws. However, István Stumpf, who had been a front-runner politician during the first Orbán government between 1998 and 2002 and a political advisor just before his nomination for constitutional judgeship in 2010, proceeded with a “swing policy”, supporting some emblematic laws of the conservative government and opposing other ideological issues. Furthermore, while he voted more frequently against the Fidesz government’s laws in the first two years of his mandate, since then, he has noticeably moved toward the position of the pro-government judges. Even more astonishing is Péter Kovács’s position, since he had been nominated by the conservative parties in 2005, but he took a moderate opposition line between 2010 and 2014.

In the light of the above mentioned data, it is not surprising that some strong personal “voting coalitions” developed between same-side judges. According to the stable political orientations of the judges, there were some firm covoting relationship on both sides. For example, András Bragyova and László Kiss took a similar position in 88.88% of cases, in which they both participated, while the strongest right-wing alliance was formed between Mária Szívós and Péter Szalay (78.78%).

Besides political orientation, it is striking how great a difference there is between the judicial behavior of the constitutional judges elected before and after the change of the nomination system in 2010, as Figure 3 demonstrates. Whereas the “old” judges, whose election had needed the support of both the government and opposition parties, were much more skeptical about the constitutional conformity of the legislation of the new government majority, the new members of the Court, who were selected and sent to the body unilaterally by the government parties, proved to be much more friendly towards the law-making of the conservative coalition. But this cleavage between the old and new judges does not refute the determining effect of political orientation on the decision-making process of the Court, as the latter’s impact prevails in both groups of judges.

In the period under review, there was only very moderate collegial congruence between the constitutional judges standing on opposing sides of political orientation. According to the data, the ideological distance between the judges nominated by the leftist or the rightist parties was so great that the chance for collegial consensus was low and continuously decreasing. Although initially the Court was able to make some unanimous decisions, after April 2013—when the judges appointed

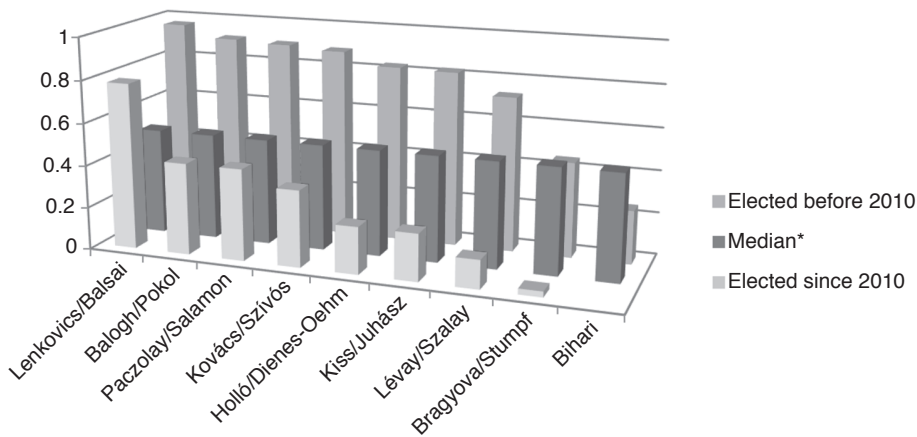


FIGURE 3 The opinions of the “old” and “new” judges (elected before and since 2010) according to the scale of the pro-government and opposition views (1.00–0.00)

*For all possible opinions

unilaterally by the government parties got a majority in the body—the rate of unanimous decisions drastically waned. So the term of 2010–2014 was not a static period, but as the Court was getting increasingly packed by the government majority, the rulings of the Constitutional Court became more and more favourable to the Fidesz government.

In contrast, the Constitutional Court showed an extremely strong polarization, as the opposing camps showed cohesion. This was due to steady conflict—and likely the ideological struggle—between the pro-government and the opposition judges, each group of which pushed the other to more extreme ideological positions.

Overall, the strong political alignment of the majority of constitutional judges is quite surprising; according to conventional wisdom, most candidate judges nominated to constitutional or higher courts generally tend to be more politically moderate (as it makes it easier for such candidates to be elected), and therefore may be more prone to compromise and to speak with one voice in order to preserve the Constitutional Court’s prestige and to ensure the implementation of the decisions of the Court (Sunstein et al. 2006, 83–85; Wesel 2004, 216). However, after 2010—and especially from April 2013 onwards—the situation was different in Hungary. Although it may well be argued that there was a cleavage between the “old” (consensual) and the “new” (unilaterally candidate) constitutional judges for a while, the significance of this presumed division was declining as the Court was dammed by the conservative coalition with new judges. As the analysis of the data reveals,

owing to the new, non-consensual selection system of judges, more partisan conservatives got onto the bench after 2010 than beforehand, when the other political side, having an absolute veto power in nominating process, had been able to eliminate the unqualified and extreme candidates.

As a result of the radical change in the composition of the Constitutional Court, and the upset of the internal balance of the body, there was simply no longer any constraint that would have led the new majority to seek a compromise. Thus, the collegial effect, which is so present in other constitutional courts, reduced to a minimum in Hungary, if there was any such effect at all.

It is notable also that the earlier jurisprudence of the Constitutional Court was not so strongly entrenched in the constitutional culture that it could eliminate the ideological differences between the judges on that base that if the law is clear, the judges will also agree even if they have significant differences in their individual perceptions and attitudes (Sunstein et al. 2006, 83). As a matter of fact, the political orientation of the constitutional judges overwrote almost all previous constitutional consensus and led to upholding some legal acts and measures which were previously considered seriously harmful for the rule of law.

It is important to note that it cannot be deduced from the data that the political orientation of the judges would be the only independent variable influencing their personal choices, and in the case of some judges, even its decisive role has not been justified. Since the opinions represented by constitutional judges are not entirely consistent with the interests of the political parties that nominated them, other factors must have motivating effects on the judges' personal decisions. Nevertheless, the empirical research presented here cannot be used to assess these impacts and their extent.

Even though the aggregate data of the voting behavior of the constitutional judges provide convincing evidence for the decisive impact of the political orientation of the judges' opinions, it is advisable to consider whether the data really measured what was intended; that is, we need to verify that the conclusions are reliable and credible. To consider possible doubts also provides an opportunity to carry out an in-depth analysis of this survey results.

Presumably, some scepticism might be raised against the conclusions of this analysis. One objection is whether the fact that there is a great coincidence between the judicial opinions of the individual judges and the political positions represented by those parties that promoted them indeed proves that these judges strongly support political standpoints of the respective parties. Perhaps this congruence is just the result of specific judicial philosophies with which judges identify themselves. In other words, the voting behavior of the judges, even if it is very close to the political

views of the government or the opposition side, can be guided by other, non-political variables like a special set of professional values or moral convictions. The constitutional arguments are always different from political considerations, even in the case where the same subject matter is concerned (Möller 2011, 317). But this is not a satisfactory alternative explanation compared to the independent variable of the political background. It is worth noting that in case of the most judges, there is an extremely strong correlation between their voting behavior and the standpoints of the political side that nominated them. If the constitutional judges would decide solely on the basis of constitutional text or legal considerations, their opinions would not coincide with the political viewpoints of their nominating parties to such a great extent. In reality, two-thirds of the judges represent almost the same positions (at an 80% ratio) as their nominating parties, no matter the subject matter or the constitutional problem in the individual cases. The battle lines between judges are anchored along the same cleavages. No ad hoc coalitions developed between them, but there are persistent associations.

Neither a coherent method of constitutional interpretation nor any particular judicial philosophy can be recognized from the majority or minority opinions. Simply, there is no other convincing explanation for the very strong correlation between judges' voting behavior and the political background of their election. The qualitative analyses of the mainstream majority and dissenting opinions do not show any strong commitment to a well-established legal method (see, for example, Halmai 2014). The only detectable organising principle for these groupings was, more or less, the origin of their seat: that is, their political support before and when they were elected.

As to the role of other possible factors and strategic behavior, including institutional context, dominant public opinion, the clarity of relevant law, etc., this research cannot exclude their effects on the decision-making process of the Constitutional Court. However, even if one supposes the influence of these effects, they do not explain the very strong correlation between the judges' personal opinions and the political interests of their nominating political sides. Perhaps some judges read their preferences into the constitutional text in good faith, but this does not make their choices less politically biased.

Actually, only the political orientation of the judges has real explanatory power to understand why constitutional judges support the political parties that nominated them. The explanation is simple: members of the Court occupy identical positions with the parties that nominated them because their political orientation is linked to those parties or to their ideology. Similar tendencies were shown by research on other countries, too (see, e.g., Segal and Cover 1989, 557–565; Hönnige

2007; Hönnige 2009, 963; Garoupa et al. 2013, 513–534; Garoupa 2010, 46, 48; Amaral-Garcia et al. 2009, 381; Franck 2009, 262). The alignment of judges to their nominating party also plausibly explains why political parties considered the nomination process of constitutional judges so important in the past.

Another question is whether the judges represent party interests or whether their voting behavior is determined by their personal preferences. In all likelihood these motivations cannot be separated from each other, but it is not necessary to separate them; the point is that judicial behavior is determined by political reasons, rather than legal considerations. For this conclusion, it is enough to prove that the political orientations of the judges have a decisive role in judicial decision-making, and it does not really matter why the judges do behave in this way. In fact, political orientation seems to be an intermediary concept in the sense that while it may give plausible explanation for judicial behavior, it does not reveal the deeper motivations of the particular judges (whether they support a political party or movement because of political/ideological commitment, opportunism or for personal gain).

Whatever the reason, the great majority of judges to a large extent adjust their views to those of their nominating political sides. Nevertheless, there might be an alternative explanation of behavior for the opposition judges. It can be said that these judges really do not adapt their opinions to their own political sympathy but they merely resisted the demolition of the rule of law. This approach relies on the assumption that the new government, exploiting its overwhelming majority, transformed the whole constitutional system and downgraded the constitutional democracy.¹⁷ This kind of argument can be strengthened by the fact that a number of laws that have been reviewed by the Constitutional Court were often criticized by international human rights organisations and the institutions of the European Union and the Council of Europe, which claimed that the laws did not conform with the values and principles of modern European constitutionalism. However, even if this argument can be true to a degree, it does not explain the strong correlation between the voting behavior of the “opposition judges” and the views of the left-liberal parties which nominated them. Besides, the international actors do not develop their own judgments on the basis of the Hungarian Fundamental Law (as Hungarian constitutional judges do), so similar stance of the leftist judges to these international bodies in many debated issues is not a compelling argument for the political neutrality of these members of the Court.

17. For a more detailed description of this process in English, see Kovács and Tóth 2011, 183–203; Jakab and Sonnevend 2013; Bánkuti, Halmai, and Scheppele 2012a, 2012b, 237–268; Pogány 2013; Müller 2011. For an apologetic presentation of the new Fundamental Law, see Csink et al. 2012.

CONCLUSION

It is remarkable that in the period of a two-thirds parliamentary majority, between 2010 and 2014, when the conservative political camp was able to prepare and approve a new constitution and to change the composition of the Constitutional Court, the judicial behavior of the most constitutional judges was favourable to those political parties that had nominated them. In fact, what had been planned by the Roosevelt presidency in the 1930s in the United States was achieved by the Orbán government in Hungary in this period: court packing by appointing as many new judges as necessary to assure the standing support for government policy. This effort proved to be successful as most constitutional judges' votes coincided to a great extent with the political views of their nominators, regardless of the particular constitutional problem or the subject matter of the case under investigation by the Court. There were only three judges of the seventeen, who voted alternately for and against the constitutionality of laws adopted by the new government majority after the spring of 2010. Consequently, political orientation played a decisive role in the judicial behavior of all judges nominated by the leftist or liberal parties and of almost all former conservative candidates. This is the only convincing and plausible explanation for the strong correlation described above. Accordingly, constitutional judges vote more or less consistently for their nominating (left-liberal or conservative) political side because they tend to agree with their policy goals and/or ideology. It does not exclude, but rather, in an indirect way, confirms, that besides the personal political orientation and preferences of the judges, there are some other factors and circumstances that influence their judicial behavior. So the attitudinal model (see the Introduction), even though it has persuasive power, does not provide a sufficient explanation for judicial behavior. However, this empirical research was not able to identify other relevant explanatory variables or assess their real impact on the decision-making of the Constitutional Court.

But it is sure that when members of the Constitutional Court, who are the ultimate arbiters of the most important political controversies, are selected by the political parties for political reasons, the personal choices of the constitutional judges will always be largely influenced by politics, whether that means the judges' own political preferences or the interests of the political actors who sent them to that body.

Certainly, we could say ironically that a partisan constitution deserves a partisan guardian—that is, a constitutional court with politically biased members—but it would be as sad as it is ironic. The recent trends in Hungarian constitutional development—the step-by-step limitation of the power of the Constitutional Court,

the openly political selection of its members, and, most of all, the recent trends towards politically motivated jurisprudence—can legitimately raise the question of what should be the way of constitutional review in the future, or, put it even more clearly, of whether it is worth preserving the Constitutional Court or accepting that this institution proved to be unsuccessful in Hungary.

REFERENCES

- Amaral-Garcia, Sophia, Garoupa, Nuno, and Grembi, Victoria. 2009. “Judicial Independence and Party Politics in the Kelsenian Constitutional Courts: The Case of Portugal.” *Journal of Empirical Legal Studies* 6(2): 381–404.
- Annus, Taavi. 2007. “Courts as Political Institutions.” *Juridica International* 9: 22–30.
- Bánkuti, Miklós, Halmai Gábor, and Kim Lane Scheppele. 2012a. “From Separation of Powers to a Government without Checks: Hungary’s Old and New Constitutions.” In *Constitution for a Disunited Nation. On Hungary’s 2011 Fundamental Law*, edited by Tóth Gábor Attila, 237–268. Budapest and New York: Central European University Press.
- Bánkuti, Miklós, Halmai Gábor, and Kim Lane Scheppele. 2012b. “Disabling the Constitution.” *Journal of Democracy* 23(3): 138–146.
- Csink, Lóránt, Schanda Balázs and Varga Zs. András. Eds. 2012. *The Basic Law of Hungary. A First Commentary*. Dublin and Budapest: Clarus Press, National Institute of Public Administration.
- De Visser, Maartje. 2014. *Constitutional Review in Europe. A Comparative Analysis*. Oxford and Portland: Hart Publishing.
- Dyevre, Arthur. 2010. “Unifying the field of comparative judicial politics: towards a general theory of judicial behaviour.” *European Political Science Review* 2(2): 297–327.
- Favoreu, Louis. 1986. *Les Cours constitutionnelles*. Paris: Presses Universitaires De France.
- Franck, Raphaël. 2009. “Judicial Independence under a Divided Polity: A Study of the Rulings of the French Constitutional Court, 1959–2009.” *Journal of Law, Economics and Organization* 25(1): 262–284.
- Friedman, Barry. 2005. “The Politics of Judicial Review.” *Texas Law Review* 84(2): 257–337.
- Garoupa, Nuno. 2010. “Empirical Legal Studies and Constitutional Courts.” *Indian Journal of Constitutional Law* 4(3): 26–54.
- Garoupa, Nuno, Gomez-Pomar, Fernando, and Grembi, Veronica. 2013. “Judging under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court.” *Journal of Law, Economics, and Organization* 29(3): 513–534.
- Halmai, Gábor. 2002. “The Hungarian Approach to Constitutional Review: The End of Activism? The First Decade of the Hungarian Constitutional Court.” In *Constitutional Justice, East and West. Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective*, edited by Wojciech Sadurski, 189–211. The Hague, London and New York: Kluwer Law International.

Halmai, Gábor. 2007. “Grundlagen und Grundzüge staatlichen Verfassungsrecht: Ungarn”. In *Handbuch Ius Publicum Europaeum*, vol. I., edited by Armin von Bogdandy, Pedro Cruz Villalón, and Peter M. Huber, 687–727. Heidelberg: C. F. Müller.

Halmai, Gábor. 2014. “In memoriam magyar alkotmánybíráskodás. A pártos alkotmánybíráskodás első éve.” *Fundamentum* 18(1–2): 36–64.

Hönnige, Cristoph. 2007. *Verfassungsgericht, Regierung, und Opposition—Die vergleichende Analyse eines Spannungsdreiecks*. Wiesbaden: VS Verlag.

Hönnige, Cristoph. 2009. “The Electoral Connection: How the Pivotal Judge affects Oppositional Success at European Constitutional Courts.” *West European Politics* 32(5): 963–984.

Jakab, András, and Sonnevend Pál. 2013. “Continuity with Deficiencies: The New Basic Law of Hungary.” *European Constitutional Law Review* 9(1): 102–138.

Jenne, Erin K., and Mudde. 2012. “Can Outsiders Help?” *Journal of Democracy* 23(3): 147–155.

Kovács, Kriszta, and Tóth Gábor Attila. 2011. “Hungary’s Constitutional Transformation.” *European Constitutional Law Review* 7(2): 183–203.

Landfried, Christine. 2006. “Die Wahl der Bundesverfassungsrichter und ihre Folgen für die Legitimität der Verfassungsgerichtsbarkeit”. In *Das Bundesverfassungsgericht im politischen System* edited by van Ooyen, Robert Chr., and Möllers, Martin H. W., 229–241. Wiesbaden: VS Verlag für Sozialwissenschaften.

Montesquieu, Charles secondat, baron de Montesquieu et de la Brède. 1980. *L’Esprit des Lois, Livre XI*. Paris: Éditions de Seuil.

Möllers, Christoph. 2011. “Legalität, Legitimität und Legitimation des Bundesverfassungsgerichts.” In *Das entgrenzte Gericht. Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht*, edited by Matthias Jestaedt, Oliver Lepsius, Christoph Möllers, and Christoph Schönberger, 281–422. Berlin: Suhrkamp Verlag.

Müller, Jan-Werner. 2011. “The Hungarian Tragedy.” *Dissent* 57(4): 5–10.

Pacelle, Richard L., Jr., Brett W. Curry, and Bryan W. Marshall. 2011. *Decision Making by the Modern Supreme Court*. New York: Cambridge University Press.

Pogány, István. 2013. “The Crisis of Democracy in East Central Europe: The ‘New Constitutionalism’ in Hungary.” *European Public Law* 19 (2): 341–367.

Pritchett, Herman C. 1969. “The development of judicial research.” In *Frontiers of Judicial Research*, edited by Joel B. Grossman and Joseph Tanenhaus, chap. 2. New York: Wiley.

Robertson, David. 2010. *The Judge as Political Theorist. Contemporary Constitutional Review*. Princeton and Oxford: Princeton University Press.

Sajó, András. 1995. “Reading the Invisible Constitution: Judicial Review in Hungary.” *Oxford Journal of Legal Studies* 15(2): 253–267.

Schwartz, Herman. 2000. *The Struggle for Constitutional Justice in Post-Communist Europe*. Chicago: The University of Chicago Press.

Segal, Jeffrey A., and Cover Albert D. 1989. “Ideological values and the votes of U.S. Supreme Court justices revisited.” *Political Science Review* 83(2): 557–565.

- Segal, Jeffrey A., and Spaeth, Harold J. 1993. *The Supreme Court and the Attitudinal Model*. New York: Cambridge University Press.
- . 2002. *The Supreme Court and the Attitudinal Model Revisited*. New York: Cambridge University Press.
- Spaeth, Harold J. 2008. “Reflections about Judicial Politics.” In *The Oxford Handbook of Law and Politics*, edited by Keith E. Whittington, Daniel R. Kelemen, and Gregory A. Caldeira. 752–766. Oxford and New York: Oxford University Press.
- Sólyom, László, and Georg Brunner. 2000. *Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court*. University of Michigan Press.
- Sólyom, László. 2001. *Az alkotmánybíráskodás kezdetei Magyarországon*. Budapest: Osiris.
- Spiller, Pablo T., and Rafael Gely. 2008. “Strategic Judicial Decision-Making.” In *The Oxford Handbook of Law and Politics*, edited by Keith E. Whittington, Daniel R. Kelemen, and Gregory A. Caldeira, 34–45. Oxford and New York: Oxford University Press.
- Sunstein, Cass R., David Schkade, Lisa M. Ellman, and Andres Sawicki. 2006. *Are Judges Political? An Empirical Analysis of the Federal Judiciary*. Washington, D.C.: Brookings Institution Press.
- Szente, Zoltán. 2013. “The Interpretive Practice of the Hungarian Constitutional Court: A Critical View.” *German Law Journal* 14 (8): 1591–1614.
- Vanberg, Georg. 2012. *The Politics of Constitutional Review in Germany*. Cambridge: Cambridge University Press.
- Venice Commission. 2012. Opinion of the European Commission for Democracy Through Law on Act CLI of 2011 on the Constitutional Court of Hungary, CDLAD (2012) 009.
- Wesel, Uwe. 2004. *Der Gang nach Karlsruhe. Das Bundesverfassungsgericht in der Geschichte der Bundesrepublik*. München: Karl Blessing Verlag.
- Wheare, Kenneth. 1966. *Modern Constitutions*. Oxford: Oxford University Press.