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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

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

THE LIMITS OF VENERATION

Public Support for a New Constitutional Convention

WILLIAM D. BLAKE[1]
SANFORD V. LEVINSON[2]

ABSTRACT

At the conclusion of *Our Undemocratic Constitution*, Sanford Levinson asks the American people to call a new constitutional convention. Levinson's critics dismissed this call as fanciful, not least because of the assumption that the populace unthinkingly venerates the Constitution too much to countenance the idea of a convention. We challenge the conventional wisdom on conventions by analyzing a 2011 *Time* magazine poll indicating one in three Americans would support such a call. While constitutional support remains high, we contend the cultural power of law allows citizens to have meaningful and sometimes critical constitutional attitudes. Logistic regression analysis indicates various personal attributes shape these attitudes, including ideology, race, age, income, and constitutional knowledge. Approval of Congress and preferred method of constitutional interpretation also structure convention support.

KEYWORDS: *Constitutional Convention, Constitutional Veneration, Legal Consciousness, Public Opinion*

1. Assistant Professor, Department of Political Science, University of Maryland, Baltimore County.

2. Professor of Government, University of Texas; W. St. John Garwood and W. St. John Garwood, Jr. Centennial Chair, University of Texas School of Law.

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INTRODUCTION

Sanford Levinson (2006; 2012; see also Mann and Ornstein 2013) has argued that the Constitution is fundamentally undemocratic and a contributing factor to the widespread impression that contemporary American politics, especially on the national stage, is seriously dysfunctional. Thus, he asserts that the American people should demand a new constitutional convention to consider major structural changes that might alleviate both its undemocratic and dysfunctional aspects. Some of Levinson's critics believe that it is pointless to contemplate a new convention because it would never garner sufficient public support. In this article, we challenge the strength of the assumption that the Constitution enjoys such overwhelming public support that major constitutional change is impossible.

Consider only that in the summer of 2016, the National Constitution Center hosted a meeting of the Assembly of State Legislatures, an organization of more than 100 state lawmakers from 30 states who favor calling a new constitutional convention. At present, twenty-eight state legislatures have passed resolutions calling for an Article V convention to propose constitutional amendments (Johnson 2016). Article V itself appears to mandate that Congress call a new constitutional convention upon the petition of two-thirds (34) of the states. Many of these states have passed these resolutions at the behest of the American Legislative Exchange Council, a conservative interest group seeking a balanced budget amendment to the Constitution (Natelson 2013). Ten more states had approved convention resolutions in recent years and have subsequently repealed them out of a fear of a "runaway convention."[3]

Across the country, state constitutional development has occurred with much more frequent and severe change than at the federal level. As John Dinan has noted in his authoritative book *The American State Constitutional Tradition* (2006, 7; see also Tarr 2015), there have been more than 230 such conventions since 1776, and many of them also supplanted existing constitutions with new ones. Even though the frequency of state conventions is lower than in the 19th century, several states have revised or replaced their constitutions through conventions since World War II (Grad and Williams 2006). Louisiana held the most recent convention in 1992. At the very least, these trends demonstrate that once one includes *state* constitutions within the

3. Indeed, a central question, beyond the scope of this paper, is whether the petitions of the states must be identical in form or, at least, substance and, additionally, whether any convention called at the behest of the states could be limited to considering only the topics of the petitions or, instead, would have the same near-plenary power to propose any and all amendments asserted by the original constitutional convention that took place in Philadelphia in 1787.

broader "American constitutional tradition," one cannot possibly argue that there is a general disposition to "venerate" all constitutions or believe they are impervious to change, including change through conventions. Still, one cannot deny that Americans' attitudes differ, depending on whether one is referring to the national or state constitutions.

What can we learn about levels of veneration from close analysis of the available data concerning public support for a new national convention? What if the magic number of 34 states is achieved? How might Americans in general respond to the possibility of a new convention? A recent *Time* magazine poll (see Stengel and Ford 2011) found one in three Americans favor calling a new constitutional convention. We begin by drawing upon the legal consciousness literature to conceptualize constitutional attitudes. We then generate a series of hypotheses concerning constitutional attitudes by connecting personal attributes to major themes in American political development and constitutional theory. Our quantitative analysis of the *Time* survey reveals that respondents' attitudes towards constitutional change are a predictable reflection of group identities, levels of constitutional knowledge, congressional approval, and ideological considerations. We conclude by reflecting on the implications of these findings for constitutional change and political polarization.

CONCEPTUALIZING CONSTITUTIONAL ATTITUDES

The 2011 *Time* survey is not the first data collected on support for a new constitutional convention. On at least three occasions in the 1930s and 1940s, Roper and *Fortune* magazine asked whether the Constitution "should be thoroughly revised to make it fit present day needs."[4] Five percent of respondents answering this question in December 1939 believed "[t]he systems of private capitalism and democracy are breaking down and we might as well accept the fact that sooner or later we will have to have a new form of government."[5] Turning to somewhat more modern times, in the run-up to the Constitution's Bicentennial in 1987, a number of media organizations polled on support for a new constitutional convention. These questions, which varied in the amount of information given to respondents and in the framing of the issue, revealed a range of support from 24%–61%. These older questions and findings are presented in the Appendix.

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4. See http://www.ropercenter.uconn.edu/CFIDE/cf/action/ipoll/ipollResult.cfm?keyword=constitution+revised%20&organization=Roper+Organization.

5. Notably, this survey also included the Socialist Party as an answer choice for party identification.

The concept of constitutional attitudes has received even less attention from legal scholars and political scientists than from media organizations. Larry Sabato (2008), one of the handful of academics who supports a new constitutional convention, conducted a poll measuring public opinion regarding various proposals to change the Constitution. The survey revealed strong support for congressional and judicial term limits, a mandatory retirement age for Supreme Court justices, direct election of the President, and reforms to the operation of political campaigns. Taking a somewhat different approach, Stephanopoulos and Versteeg (2016) studied public attitudes towards both the U.S. and state constitutions and found levels of specific support for American constitutions to be high overall, with support for the U.S. Constitution higher than state constitutions. These findings are similar to those of Zink and Dawes (2015), who found significantly higher levels of constitutional status quo bias at the federal level compared to state constitutions.

While Stephanopoulos and Versteeg (2016) found strong links between levels of constitutional knowledge and approval, demographic characteristics were not strongly determinative of constitutional support. Their study also revealed most Americans have very little idea of what concepts have been written into their constitutions. However, political or constitutional knowledge need not be necessary for the formation of meaningful constitutional attitudes. Defenders of direct democracy (Matsusaka 2005, 193) have noted, "Many issues [decided in ballot measures] are mainly about a community defining its values." Compared to ballot measures on more complex and technical policy issues, voters demonstrate higher levels of awareness of value-based referenda , and turnout rates for these referenda are also significantly higher than other ballot measures (Biggers 2014).

In the absence of specific knowledge, how do voters relate to constitutions? Ordinary citizens employ interpretive frameworks to give meaning to their law-related social interactions. Sociologists Patricia Ewick and Susan Silbey (1998, 22) define legal consciousness as "the meanings, sources of authority, and cultural practices that are commonly recognized as legal, regardless of who employs them or for what ends. In this rendering, people may invoke and enact legality in ways never approved nor acknowledged by the law." Conceptions about fairness and respect for others that guide social interactions are frequently constructed in terms of legal discourse. Legal consciousness also provides a schema through which citizens can evaluate their place within the political order.

Kathleen Hull (2006, 159) described the most common themes in letters to the editor to Hawaii's daily newspapers during the state's 1998 debate over a constitutional amendment to ban same-sex marriage. Amongst letters supporting same-sex marriage, the most common themes were: 1) rights, equality, justice,

and non-discrimination; 2) tolerance and anti-bigotry; 3) criticisms of the tactics of opponents of same-sex marriage; 4) comparison of gay rights to other rights movements; 5) limits on popular rule; and 6) the separation of church and state. Amongst these competing frames, only the third item requires political knowledge and the last requires much constitutional knowledge. The most common themes amongst letters opposing same-sex marriage were: 1) majority rule and judicial overreach, 2) criticizing the tactics of same-sex marriage supporters, 3) rejection of a rights framework being applicable, 4) homosexuality is a choice, 5) morality and God's will, and 6) support for a traditional definition of marriage. Once again, only the second frame requires political knowledge and only the third frame requires much constitutional knowledge. Instead, the majority of frames on both sides of this debate are informed by cultural understandings of social values, democracy, and the rule of law.

George Lovell (2006; 2012) analyzed a sample of over 500 letters sent by ordinary citizens to the Civil Rights Section of the Justice Department between 1939 and 1941. While some letters referenced specific portions of the text of the Constitution, many more invoked arguments couched in broader concepts of fairness and justice or made attempts to connect constitutional guarantees to a conception of the "good life." Many letter writers refused to treat judicial decisions or pronouncements from the Justice Department as authoritative, insisting instead on the legitimacy of their own constitutional understanding (Lovell 2012, 12). As Lovell (2006, 232) concludes, "The willingness of these citizens to challenge official legal pronouncements cautions against making broad generalizations about the capacity of ordinary people to respond effectively when government officials deploy legal rhetoric."

SOURCES OF CONSTITUTIONAL ATTITUDES

In this section, we evaluate how the cultural significance of law interacts with various personal attributes to create differing attitudes towards potential constitutional change. Because constitutions are designed to define a political community, our theory is premised on the notion that individuals will evaluate how they (and others similarly situated) are faring within the American polity. If the constitutional status quo offers them full political citizenship and opportunities to pursue the American dream, we predict they will be unlikely to support a convention. If not, we predict they will be more willing to experiment with constitutional change. Similarly, constitutions establish governing structures, and a constitutional convention provides an opportunity to consider how well government is functioning. Individuals who

feel the political process is broken should be more inclined to changing underlying governing structures. Below, we make more specific hypotheses using various individual-level characteristics.

There is little reason to assume, *a priori*, that support for a constitutional convention is related to party affiliation. A convention represents an open book, a process by which delegates can adopt new commitments or abandon old ones (Elkins, Ginsburg, and Melton 2009). These changes in constitutional commitments can have implications that benefit (or harm) either political party, both parties, or neither party. In fact, the proposed amendments that received the highest levels of support in the Sabato survey are structural changes to the operation of government and the conduct of campaigns and elections that would likely impede both parties equally (Sabato 2008).

The relationship between ideology and convention support may be a different matter. The rise of the Tea Party movement has resulted in the constitutionalization of conservative politics (Goldstein 2011). The very origin of the term conservative implies a resistance to socio-political change, at least if it is presented within the framework of a progressive teleology, which is exactly the goal of some supporters of a constitutional convention. But Jack Balkin (2011) has noted that the "redemptive" narrative usually adopted by political progressives is complemented (or, perhaps, contradicted) by a "restorative" one that might appeal more to political conservatives critical of those changes that have occurred over the years, whether through formal amendment or changes in legal doctrine.

One means by which many conservatives believe restoration can take place is by adopting originalism as a theory of constitutional interpretation. While the zeal of Robert Bork's commitment to the philosophy did not serve his confirmation well, from the vantage point of history, one could credit Bork and his supporters with a much larger victory. Not only have debates over philosophies of constitutional interpretation moved far beyond the walls of the legal academy into the Public Square, but it is also clear that many conservative pundits, columnists, and talk show hosts have publicized and lauded originalism as a bulwark against the growth of the modern, activist state (*e.g.*, Beck 2011; Levin 2010; Limbaugh 2005); in 2016 alone, originalism was a topic of discussion on 249 different Fox News Channel broadcasts.[6] Given the conservative commitment to a fixed and limited

6. This statement is based on a Lexis Academic search of all Fox News Channel transcripts in 2016 using the following search protocol: (founder* OR founding OR founded OR framer* OR original) AND constitution.

constitutional meaning, we predict conservatives and originalists will be significantly less supportive of a new convention.

Greene, Persily, and Ansolabehere (2011) investigated whether the public has any meaningful attitudes on originalism, textualism, or the "living Constitution" approach. Originalists tend to be conservative, white, male, older and more religious. While this profile appears very similar to the base constituency of the Republican Party, the authors found originalism exerts a significant and independent force in structuring many political and constitutional attitudes. Originalists also tend to adopt a cultural orientation toward moral traditionalism and libertarianism, even though these can be in considerable tension with one another. Perhaps the central point is that both libertarians and moral traditionalists can mine the historical record for material ostensibly supporting an "originalist" perspective.

Like originalists, individuals with higher levels of education may view the Constitution as possessing useful virtues, but for very different reasons. Elkins, Ginsburg, and Melton (2009) found national constitutions that are more specific and easier to amend tend to last longer; however, the United States is a rather glaring exception to this global theory.[7] Article V sets out an incredibly difficult process for a formal constitutional amendment. Yet the more highly educated are more likely to know that formal amendment is often unnecessary for the Constitution to "adapt to the various crises of human affairs." As a relatively short document containing open-textured language, the Constitution avoids "the prolixity of a legal code," allowing most constitutional disputes to be resolved through political compromise or judicial interpretation (McCulloch v. Maryland 1819, 17:415, 407).

Related to the aspirationalist narrative, faith in the democratic system structures support for governing institutions. David Easton's (1965, 437, 441) legitimacy theory contrasts two different forms of political support a community may express towards its governing institutions. Specific support refers to public approval of "outputs and performance of the political authorities." And the second, diffuse support, "consists of a reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed."[8] Gregory Caldeira and James

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7. To contextualize this outlier, the authors analogize the U.S. Constitution to the oldest living person in the world who survived on a steady diet of two pounds of chocolate a week and did not quit smoking until after she turned 115 years old. (Elkins, Ginsburg, and Melton 2009, 65).

8. Easton used a curious example from American constitutional history as a demonstration of his theory. During Prohibition, Easton argued Americans would disobey the 18th Amendment but still support the legitimacy of the Constitution itself (Easton 1975, 454). Some historians, however, believe Prohibition failed because the willful disobedience of alcohol laws threatened the rule of law more broadly (Rose 1996).

Gibson (1992; Gibson and Caldeira 2009b) have utilized Easton's framework to evaluate public support for the Supreme Court. These studies have consistently found that individuals with more knowledge of the Court are also significantly more likely to pledge institutional support. The link between knowledge of Congress and support for that institution, however, is precisely the opposite (Hibbing and Theiss-Morse 1995). Apparently, the more one knows about the workings of Congress, the more strongly one can detect the odor of sausage.[9]

Americans who think the government represents their point of view express higher levels of support for the Supreme Court (Hetherington and Smith 2007). This broader finding may explain why race plays such a strong role in evaluating governing institutions and the Constitution itself. African Americans are significantly less likely to support the Court than whites (Gibson and Caldeira 1992). African Americans also express lower levels of support for their state government than whites (Kelleher and Wolak 2007). Stephanopoulos and Versteeg (2016) found significantly lower levels of support for the U.S. Constitution and state constitutions amongst African Americans, while Sabato (2008) finds no significant difference in willingness to change the Constitution between whites and blacks.

We predict that women, racial and ethnic minorities will be more supportive of a new constitutional convention. When evaluating his own constitutional faith, Levinson (1988, 193) notes "[t]hat I—a white, male, well-paid law professor—would sign the Constitution surely can evoke little surprise. We (that is, persons with this collection of attributes) have done well under the Constitution." While the Constitution has been amended and interpreted to extend rights of citizenship, the franchise, and equal access to public accommodations regardless of race and gender, these groups were originally considered political outsiders. Because legal consciousness relies on a cultural understanding of law, the effects of exclusionary laws and practices are likely to linger long after being formally removed from the statute books.

Identity politics that takes place along class lines may also inform constitutional attitudes. Charles Beard (1913) and Howard Zinn (1991) amongst others, have described American constitutional life as hegemonic struggles to preserve property interests. A more modest connection between income levels and support for a constitutional convention can be drawn from the literature on risk-aversion in behavioral

9. Though widely attributed to Otto von Bismark, the first recorded instance of this phrase comes from the American poet John Godrey Saxe. In 1869, the University Chronicle at the University of Michigan quotes Saxe as saying, "Laws, like sausages, cease to inspire respect in proportion as we know how they are made." *See* https://books.google.com/books?id=cEHiAAAAMAAJ&pg=PA164.

economics and psychology. A constitutional convention may produce major political change, which could have profound economic consequences. Wealthier people tend to be significantly more risk-averse—that is, they tend to be more protective of the assets they already possess (Arrow 1965). Studies from an evolutionary biology and social identity theory perspective have found older individuals more risk-averse than younger persons (Halek and Eisenhauer 2001, 3–4). We expect these dynamics of risk tolerance to structure constitutional attitudes as well.

ANALYZING CONSTITUTIONAL ATTITUDES

We test our theory of constitutional attitudes on a *Time* magazine survey, made available by the Roper Center for Public Opinion Research.[10] Schulman, Ronca, & Bucuvalas, Inc. conducted the survey on behalf of the magazine on June 20 and 21, 2011. The survey consists of 1,003 interviews from a national adult sample, including limited interviews with cell phone respondents. The average respondent was between the ages of 45 and 54, had some college education, and earned $35,000 to $50,000 a year. The unweighted sample was 81% white and 51% female. The subsequent analysis, however, reflects the sampling weights included in the dataset. Table 1 presents the language of these questions in questionnaire order along with the corresponding response rates and summary statistics.

As this survey was not administered by public law scholars, the wording of these questions is not ideal. In particular, the originalism/living Constitution question lacks precision. First, the description of originalism includes an appeal to strict constructionism, which some originalists reject (Scalia 1998, 23–25). Second, the originalism answer prompt does not include the "framer's intent" language included in the question wording. Nonetheless, the wording of this question is fairly similar to that on the Constitutional Attitudes Survey conducted by Greene, Persily, and Ansolabehere (2011, 362). These authors, analyzing two iterations of their survey and a series of Quinnipiac University surveys with identical language, found support for originalism between 37% and 49% between 2003 and 2010. The 2011 *Time* survey finding of 43% support for originalism is consistent with these prior results.

The dependent variable is a dichotomous indicator of support for a new constitutional convention. Nineteen respondents volunteered an answer that the Constitution has held up well, but they nonetheless favored calling a convention. These

10. See http://www.ropercenter.uconn.edu/CFIDE/cf/action/ipoll/abstract.cfm?archno=USSRBI2011-5380&start=summary.

TABLE 1. Summary Statistics, In Questionnaire Order

How much would you say you know about the U.S. Constitution, which was ratified more than 200 years ago? N = 1,001 of 1,003			
A great deal	14.7%	Not much/Nothing at all	18.2%
Some	67.1%		
Would you say the U.S. Constitution has held up well as the basis for our government and laws and is in little need of change, or would you say that we should hold a new constitutional convention to update the Constitution? N = 954 of 1,003			
Held up well	66.7%	Hold a new constitutional convention	33.3%
Some people say that the courts should strictly follow the original intent of the founding fathers . . . That the federal government should be permitted to do ONLY what's exactly spelled out in the Constitution or was the intent of the framers of the Constitution. Others say that times have changed and that the Court should interpret the Constitution based upon changes in society, technology, and the U.S. role in the world. Which comes closest to your view if you had to choose? N = 966 of 1,003			
Only exactly what's spelled out in the Constitution	43.3%	Interpret Constitution based on changes	56.7%

respondents were recoded as supporting a constitutional convention, but the multivariate analysis does not reach substantially different findings if these respondents were treated as missing data. We suspect that these respondents felt that offering support for the Constitution as a caveat to their desire for change would be a more socially desirable answer in a survey interview (Finkel, Guterbock, and Borg 1991).

The summary statistics, reported in Table 1, indicate that the Constitution lacks as much support as scholars might assume—one in three Americans favors holding a new convention. The popularity of the living Constitution philosophy suggests this willingness to embrace change extends to constitutional interpretation. To better understand these dynamics, we proceed to the multivariate analysis. Table 2 reports the results of four logistic regression models analyzing support for a new constitutional convention. Model 1 includes only personal attributes of the respondents. Model 2 adds constitutional knowledge and education levels while Model 3 incorporates the respondent's approval of the three branches of government. Finally, Model 4 considers the respondent's preferred theory of constitutional interpretation. This final, comprehensive model reduces the error variance by 25.2% and correctly predicts the outcome of the dependent variable for 79.6% of respondents.

TABLE 2. Logistic Regression Model of Support for a New Constitutional Convention

	Model 1	Model 2	Model 3	Model 4
Partisanship	−0.104	−0.106	−0.163	−0.083
	(0.076)	(0.076)	(0.095)	(0.104)
Ideology	−0.554***	−0.558***	−0.396*	−0.117
	(0.197)	(0.201)	(0.230)	(0.243)
African American	1.478***	1.492***	1.390***	1.684***
	(0.343)	(0.361)	(0.391)	(0.445)
Asian American	0.539	0.492	0.526	0.505
	(0.523)	(0.516)	(0.624)	(0.702)
Hispanic	1.139***	1.016***	1.066***	1.109***
	(0.346)	(0.356)	(0.393)	(0.373)
Female	0.018	−0.012	−0.264	0.026
	(0.222)	(0.228)	(0.267)	(0.275)
Age	−0.218***	−0.235***	−0.337***	−0.269***
	(0.071)	(0.074)	(0.091)	(0.094)
Income	−0.137**	−0.058	−0.103	−0.114
	(0.061)	(0.070)	(0.085)	(0.087)
Education		−0.197*	−0.132	−0.213
		(0.112)	(0.122)	(0.133)
Constitutional Knowledge		−0.438**	−0.582**	−0.539**
		(0.204)	(0.227)	(0.248)
Congress Approve			−0.811**	−0.499
			(0.364)	(0.357)
President Approve			−0.068	−0.325
			(0.318)	(0.320)
SCOTUS Approve			−0.036	−0.330
			(0.244)	(0.265)
Originalist				−1.816***
				(0.351)
Constant	0.229	1.553**	2.405***	3.222***
	(0.417)	(0.671)	(0.793)	(0.807)
Observations	784	784	598	584
Pseudo R^2	0.148	0.162	0.178	0.252

Robust standard errors in parentheses
*** $p < 0.01$, ** $p < 0.05$, * $p < 0.10$

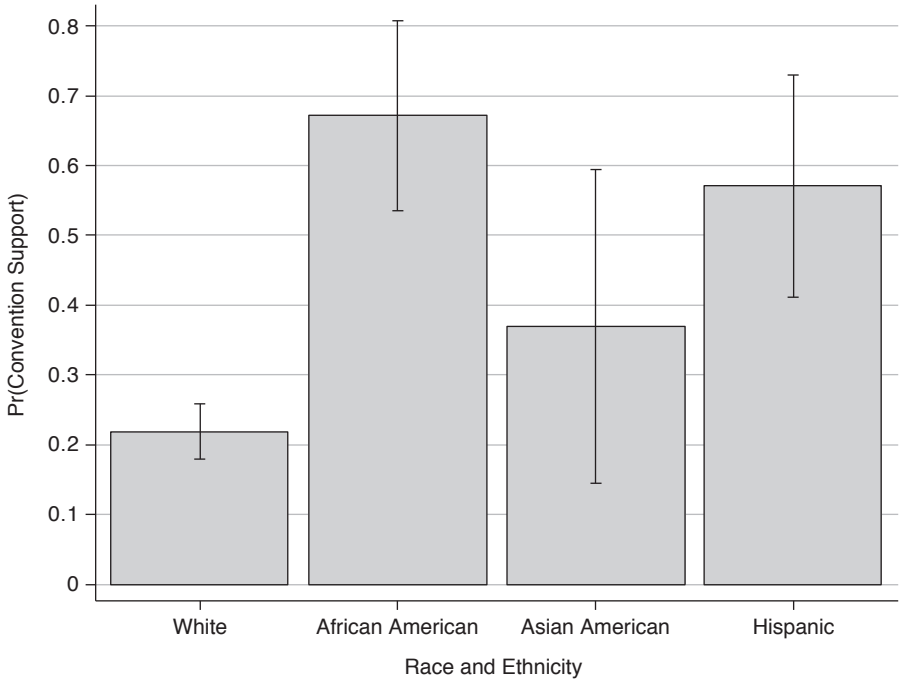

FIGURE 1. Race, Ethnicity and Constitutional Attitudes (from Model 1)

Several demographic factors significantly influence constitutional attitudes. Across all four models, African Americans and Hispanics express significantly more support for a constitutional convention than whites. Asian Americans are also more likely to favor constitutional change than whites, but none of these coefficients achieves statistical significance. Gender is not significantly related to convention support in any of the models. While women have struggled to achieve full citizenship over the course of American political history, this finding may be a product of the higher levels of risk-aversion among women (Halek and Eisenhauer 2001).

Figure 1 displays the predicted probability of supporting a convention call across racial and ethnic lines, based on predictions from Model 1. While the probability of whites favoring a convention is 0.22, the probability of convention support surges to 0.57 amongst Hispanics, and 0.67 amongst African Americans. These findings provide strong support for our hypothesis that segments of society who have often been viewed as outside "the true meaning of *Americanism*" are much less likely to support America's civic creed, the Constitution (Smith 1993, 549, emphasis original). Whites, on the other hand, have more generally benefitted from the American political system to a much higher degree, and constitutional change

threatens to undermine this tradition. One might recall Justice Thurgood Marshall's (1987) famous critique of the Bicentennial in 1987 and his suggestion that for him the only Constitution that he in fact was willing to celebrate was that created in 1865–1870 with the addition of the Reconstruction Amendments.

Support for constitutional change also diminishes over the course of a lifetime. The age cohort variable achieves statistical significance in each of the four models. Based on predictions from Model 1, young Americans, between the ages of 18 and 24, are 56% likely to favor a convention, and this rate of support sinks to 20% amongst Americans aged 65 or older. Because a new constitutional convention could pose a threat to the status quo, older Americans exhibit more risk-averse behavior. Also consistent with our prediction, respondent income affects convention attitudes. Based on Model 1 projections, Americans earning less than $20,000 a year are 41% likely to support a convention, while only 21% of those who earn more than $150,000 a year hold the same view. The largest change in constitutional attitudes occurs between individuals just below and just above national median household income—$35,000-$49,000 bracket and the $50,000–$75,000 bracket.[11] If the Constitution represents the American creed, economic success represents the American dream. The data suggest Americans who have not achieved the latter are more likely to favor changing the former.

Income fails to achieve statistical significance in Models 2–4 when education is included as a predictor. Of course, income is strongly correlated with formal education ($r = 0.515$). The variable for formal education achieves statistical significance in the predicted direction only in Model 2 and only at the $p < 0.10$ level. The constitutional knowledge measure performs better, achieving statistical significance in the predicted direction in each model in which it is included. As Figure 2 demonstrates, respondents with higher levels of constitutional knowledge are significantly less likely to favor a new convention, which suggests that civics education is successful in fostering stronger constitutional attachment.

In light of the constitutionalization of politics occurring on the American right, self-reported levels of constitutional knowledge may be biased towards Republicans or conservatives. An ordered logistic regression model of constitutional knowledge finds no statistically significant relationship with partisanship or ideology when education and income are included as controls. Self-reported levels of constitutional knowledge, thus, do not appear to be confounding effects of partisan or ideological considerations. The results of Model 2, visualized in Figure 2, are similar to Gibson

11. Median household income in the United States was $50,054 in 2011, the year in which this poll was conducted (U.S. Census Bureau 2011).

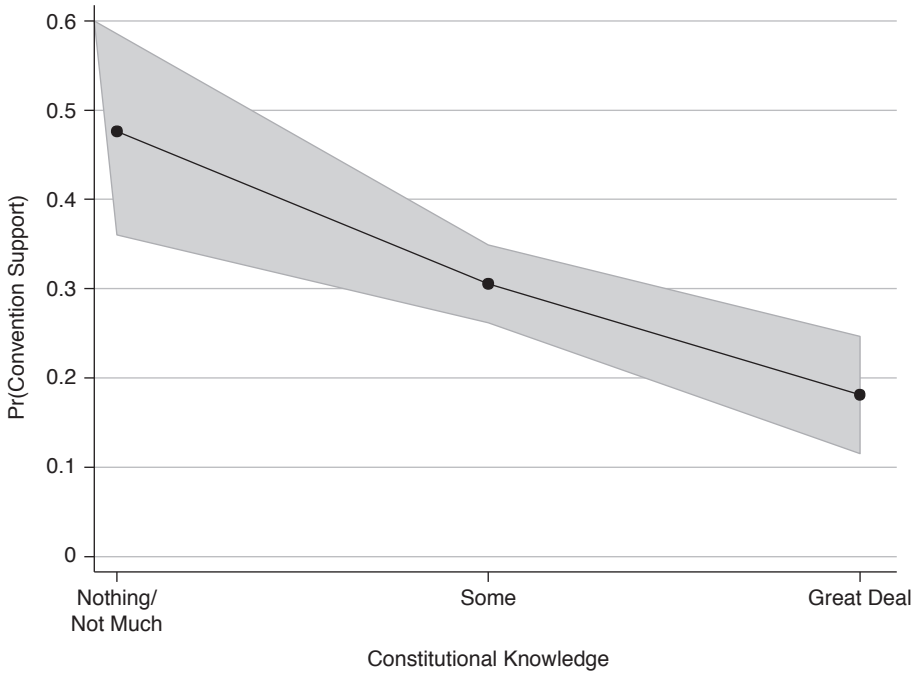

FIGURE 2. Constitutional Knowledge and Attitudes (from Model 2)

and Caldeira's (2009a, 437) findings about support for the Supreme Court—when it comes to the Constitution, "To know it is to love it."

Model 3 considers the relationship between specific support for the institutions of government established by the Constitution and diffuse support for the Constitution itself. Each of the three approval variables included in this model is a dichotomous measure. One may notice the N of this model falls considerably, as many respondents chose not to answer one of these questions, mainly approval of the Supreme Court. While approval of President Obama and the Supreme Court is not significantly related to support for a convention, respondents who approve of the way Congress was handling its job in June 2011 were 4% less supportive of calling a new constitutional convention.

The non-finding for Presidential approval is likely a result of the strongly polarized view of President Obama (Hetherington and Weiler 2009), while the non-finding for Supreme Court approval likely reflects the high level of diffuse support enjoyed by that institution. The relationship between specific support for Congress and support for the Constitution, however, is a different story. Congress is near

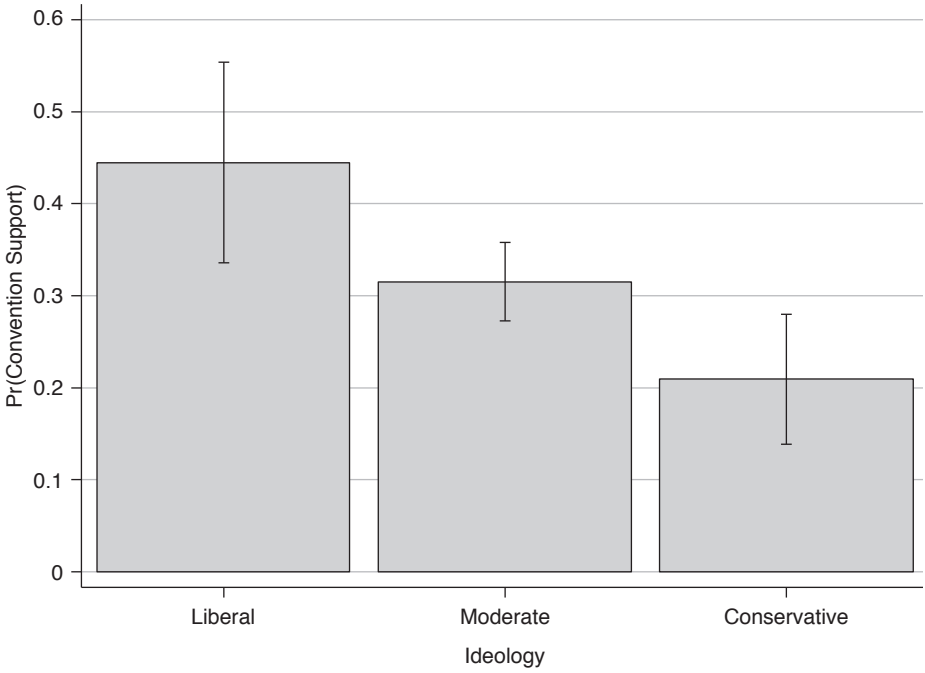

FIGURE 3. Political Ideology and Constitutional Attitudes (from Model 1)

universally disliked in this survey, receiving only 17% approval overall. Except for strong Democrats, who approve of Congress at a 25% rate, there is no meaningful difference in approval amongst respondents of other party affiliations. Although it is difficult to surmise based on the available data, one plausible interpretation of this finding is that frustration with the legislative process has reached a tipping point that only structural reforms through a constitutional convention could fix.

Finally, the connection between partisanship, ideology, and constitutional attitudes is a nuanced one. Party affiliation does not achieve statistical significance in any of the four models. Political ideology performs somewhat better, achieving statistical significance in the predicted direction in Models 1–3. Based on the results of Model 1, liberals are 45% likely to support a convention, while support amongst self-identified moderates and conservatives falls to 32% and 21%, respectively. These results are displayed graphically in Figure 3.

Model 4 includes the interpretive philosophy measure, which appears to trump the influence of both party affiliation and political ideology. While support for originalism is higher amongst Republicans and conservatives, the correlations with

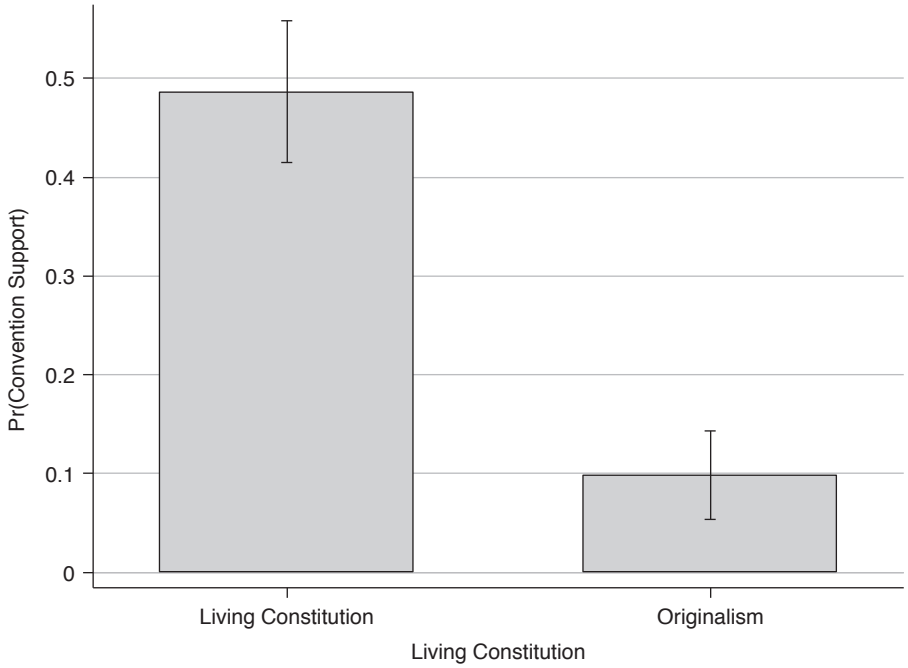

FIGURE 4. Interpretive Philosophies and Constitutional Attitudes (from Model 4)

party identification (r = 0.341) and political ideology (r = 0.392) are small enough to suggest that interpretive philosophy is a distinct concept. These correlations are somewhat smaller than those presented by Greene, Persily, and Ansolabehere (2011, 408), who found originalism to correlate with partisanship and ideology at r = 0.48 and 0.50, respectively. The contrast between interpretive philosophies is stark. As indicated in Figure 4, self-identified "living constitutionalists" are 49% likely to support a convention, while convention support amongst self-identified originalists falls to 10%. These results suggest that the academic debate over constitutional interpretation is hardly academic. Our findings echo those of Greene, Persily, and Ansolabehere (2011): the efforts of conservative newspaper columnists and talk show hosts to promote the virtues of originalism have been successful. A generation after the Bork confirmation hearings, the debate over originalism is one that is taking place in the Public Square with meaningful attitudinal consequences.

The interpretive philosophy finding is, at one level, somewhat perplexing. Originalists who lament the growth of federal power could use an Article V convention as a legitimate means of restoring their conception of the founding vision.

Sixteen states have amended their constitutions forbidding judges from considering foreign, international or religious law into account in their decisions (Farmer 2014). Many foreign constitutions include language instructing judges under what conditions judicial review is appropriate. For example, the rights in the Canadian Charter of Rights and Freedoms (1983, sec. 1) are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Living constitutionalists, who favor informal constitutional change, are also more supportive of formal constitutional change through a convention. There is no guarantee, however, that a new convention will preserve the flexibility of the current document that makes living constitutionalism possible.

CONCLUSION

These findings suggest ordinary Americans have meaningful attitudes towards the U.S. Constitution. Political sophistication and civic knowledge do not appear to be necessary conditions for individuals to evaluate the Constitution, although they are effective in increasing support for the current document. Rather, these attitudes stem from the cultural significance of law. Legal consciousness invites citizens to consider their place within the polity through the lens of their personal attributes and evaluate the effectiveness of governing institutions. Individuals presumably frustrated with the *status quo* tend to support a constitutional convention. Moreover, the data indicate ordinary citizens are capable of tracing the symptoms of political dysfunction to root causes in the Constitution.

While the overall level of support for a constitutional convention (33%) may appear too low to create a public mandate, our findings nonetheless provide a strong rejoinder to those who consider a convention fanciful. The process of constitutional veneration enshrines the constitutional status quo with a veneer of legitimacy. In a series of survey experiments, Zink and Dawes (2015) found resistance to policy changes increases when the proposed change requires a constitutional amendment. As Madison (as cited in Hamilton et al. 2003, 286) observed in *Federalist* 50, "long standing" constitutional defects are not easily fixed because they have taken "deep root."

Considering the unifying role the Constitution is supposed to play in American politics, it is somewhat surprising not to find uniformly-distributed and overpoweringly-high levels of resistance to constitutional change. Veneration of the Constitution begins in elementary school civics classes and continues every four years on the Presidential campaign trail. A vote of confidence in the Constitution from two-thirds of the people seems low, especially in comparison to other institutions

traditionally receiving a great deal of public support. A 2011 Gallup poll found 63% of Americans that same year expressed either a great deal or fair amount of trust and confidence in the federal judiciary and 57% of Americans held the same amount of trust in their state government.[12]

As noted earlier, those who take the possibility of a new constitutional convention seriously must address a variety of questions left unanswered by the text of Article V, including mechanisms by which delegates would be selected, the voting rules at any convention, and, perhaps most importantly, at least with regard to much public debate, the degree to which a convention can be "limited" or "sovereign" with regard to proposing new amendments. It is this latter concern that sparks fear by many of a "runaway convention" dominated by one's political opponents who will use their power to strip the Constitution of cherished protections. It may be that one perhaps ironic consequence of the increased polarization of American politics that could, under some circumstances, trigger more support for a new convention that might cut the Gordian knot of gridlock is the increased level of fear of "the Other," whose power may well be overestimated. In any event, the more one fears capture by demonized Others, the more that risk aversion would lead to rejection of calling a new constitutional convention.

Further research is also needed to illuminate what type of constitutional change convention supporters hope to achieve. Levinson's (2006; 2012) critique of the Constitution targets the political structures that provide a multitude of veto points serving to preserve the status quo against those seeking change. Presumably, individuals who disapprove of Congress are seeking structural reforms to the Constitution. The constitutional priorities of younger people, racial minorities, and living constitutionalists are less clear. Whatever the grounds for dissatisfaction, it is clear that veneration for the Constitution is limited.

12. See http://www.gallup.com/poll/5392/trust-government.aspx.

APPENDIX

Newsweek/Gallup, May 1987, N = 812

Do you believe that after 200 years the Constitution is still basically sound and meets the needs of our country, or do you think the Constitution is in need of some basic changes or amendments?

Basically sound	54%	Don't know	3%
Need changes or amendments	47%		

ABC News/Washington Post, April 1987, N = 1,509

On another subject, this year is the 200th anniversary of the signing of the U.S. Constitution. A number of states have proposed having a Constitutional convention to change the U.S. Constitution. Do you think that is a good idea or a bad idea?

Good idea	24%	Don't know	5%
Bad idea	71%		

Hearst Corporation, November 1986, N = 1,004

The U.S. Constitution states that a special constitutional convention may be called to consider amending that document when two-thirds of the states request it. Do you think a constitutional convention should be assembled in 1987, the bicentennial anniversary of the Constitution, to consider amendments dealing with contemporary issues such as prayer in public schools, abortion, freedom of the press, and other matters?

Yes	61%	Don't know	5%
No	34%		

Roper Report, October, 1985 N = 1,998

Twenty-eight states have passed legislation calling for a constitutional convention so that changes can be made in the United States Constitution. Some people favor a constitutional convention because they say it is the only way Congress can be forced to act on some important issues. Others are opposed to a constitutional convention because they say there might be a runaway convention which could fundamentally change the Constitution. How do you feel—that there should or should not be a constitutional convention in the next year or two?

Should	33%	Don't know	30%
Should not be	37%		

Roper/Fortune Survey, December 1939, N =5,214

Which one of the following most nearly represents your opinion of the American form of government?

A. Our form of government based on the Constitution is as near perfect as it can be and no important changes should be made in it.
B. The Constitution has served its purpose well, but it has not kept up with the times and should be thoroughly revised to make it fit present day needs.
C. The systems of private capitalism and democracy are breaking down and we might as well accept the fact that sooner or later we will have to have a new form of government.

A. No important changes	64%	C. Will have to have a new form of government	5%
B. Constitution should be thoroughly revised	19%	D. Don't know	11%

REFERENCES

Arrow, Kenneth Joseph. 1965. *Aspects of the Theory of Risk-Bearing*. Helsinki: Yrjö Jahnssonin Säätiö.

Balkin, Jack M. 2011. *Constitutional Redemption*. Cambridge, MA: Harvard University Press.

Beard, Charles Austin. 1913. *An Economic Interpretation of the Constitution of the United States*. 1st ed. New York: Macmillan.

Beck, Glenn. 2011. *The Original Argument: The Federalists' Case for the Constitution, Adapted for the 21st Century*. Original edition. New York: Threshold Editions.

Biggers, Daniel R. 2014. *Morality at the Ballot*. New York: Cambridge University Press.

Caldeira, Gregory A., and James L. Gibson. 1992. "The Etiology of Public Support for the Supreme Court." *American Journal of Political Science* 36 (3): 635–64.

"Canadian Charter of Rights and Freedoms." 1983. http://laws-lois.justice.gc.ca/eng/const/page-15.html.

Dinan, John J. 2006. *The American State Constitutional Tradition*. Lawrence, KS: University Press of Kansas.

Easton, David. 1965. *A System Analysis of Political Life*. 1st ed. New York: Wiley.

———. 1975. "A Re-Assessment of the Concept of Political Support." *British Journal of Political Science* 5 (4): 435–57.

Elkins, Zachary, Tom Ginsburg, and James Melton. 2009. *The Endurance of National Constitutions*. Cambridge, UK: Cambridge University Press.

Ewick, Patricia, and Susan S. Silbey. 1998. *The Common Place of Law: Stories from Everyday Life*. 1st edition. Chicago: University Of Chicago Press.

Farmer, Liz. 2014. "Alabama Is the Latest State to Try to Ban Foreign Law in Courts." *Governing*, August 29. http://www.governing.com/topics/politics/gov-is-alabamas-proposed-foreign-law-ban-anti-muslim.html.

Finkel, Steven E., Thomas M. Guterbock, and Marian J. Borg. 1991. "Race-of-Interviewer Effects in a Preelection Poll: Virginia 1989." *The Public Opinion Quarterly* 55 (3): 313–30.

Gibson, James L., and Gregory A. Caldeira. 1992. "Blacks and the United States Supreme Court: Models of Diffuse Support." *The Journal of Politics* 54 (4): 1120–45.

———. 2009a. "Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court." *The Journal of Politics* 71 (2): 429–441. doi:10.1017/S0022381609090379.

———. 2009b. *Citizens, Courts, and Confirmations: Positivity Theory and the Judgments of the American People*. Princeton: Princeton University Press.

Goldstein, Jared A. 2011. "The Tea Party Movement and the Perils of Popular Originalism." *Arizona Law Review* 53 (3): 827–66.

Grad, Frank P., and Robert F. Williams. 2006. *State Constitutions for the Twenty-First Century, Volume 2: Drafting State Constitutions, Revisions, and Amendments*. New York: SUNY Press.

Greene, Jamal, Nathaniel Persily, and Stephen Ansolabehere. 2011. "Profiling Originalism." *Columbia Law Review* 111 (2): 356–418.

Halek, Martin, and Joseph G. Eisenhauer. 2001. "Demography of Risk Aversion." *The Journal of Risk and Insurance* 68 (1): 1–24. doi:10.2307/2678130.

Hamilton, Alexander, James Madison, John Jay, and Clinton Rossiter. 2003. *The Federalist Papers*. New York: Signet Classics.

Hetherington, Marc J., and Joseph L. Smith. 2007. "Issue Preferences and Evaluations of the U.S. Supreme Court." *Public Opinion Quarterly* 71 (1): 40–66. doi:10.1093/poq/nfl044.

Hetherington, Marc J., and Jonathan D. Weiler. 2009. *Authoritarianism and Polarization in American Politics*. New York: Cambridge University Press.

Hibbing, John R., and Elizabeth Theiss-Morse. 1995. *Congress as Public Enemy: Public Attitudes Toward American Political Institutions*. Cambridge University Press.

Hull, Kathleen E. 2006. *Same-Sex Marriage: The Cultural Politics of Love and Law*. New York: Cambridge University Press.

Johnson, Shauna. 2016. "House Article V Convention Resolution Adopted Friday Night." West Virginia MetroNews. http://wvmetronews.com/2016/0/11/house-article-v-convention-resolution-is-more-limited-than-senates-version/ (January 5, 2017).

Kelleher, Christine A., and Jennifer Wolak. 2007. "Explaining Public Confidence in the Branches of State Government." *Political Research Quarterly* 60 (4): 707–21. doi:10.1177/1065912907304496.

Levin, Mark R. 2010. *Liberty and Tyranny: A Conservative Manifesto*. New York: Threshold Editions.

Levinson, Sanford. 1988. *Constitutional Faith*. Princeton, NJ: Princeton University Press.

———. 2006. *Our Undemocratic Constitution: Where the Constitution Goes Wrong*. New York: Oxford University Press, USA.

———. 2012. *Framed: America's 51 Constitutions and the Crisis of Governance*. New York: Oxford University Press, USA.

Limbaugh, Rush. 2005. "What Is Originalism." *The Limbaugh Letter*.

Lovell, George I. 2006. "Justice Excused: The Deployment of Law in Everyday Political Encounters." *Law & Society Review* 40 (2): 283–324. doi:10.1111/j.1540-5893.2006.00265.x.

———. 2012. *This Is Not Civil Rights: Discovering Rights Talk in 1939 America*. Chicago: University of Chicago Press.

Mann, Thomas E., and Norman J. Ornstein. 2013. *It's Even Worse Than It Looks: How the American Constitutional System Collided With the New Politics of Extremism*. New York: Basic Books.

Marshall, Thurgood. 1987. "Reflections on the Bicentennial of the United States Constitution." *Harvard Law Review* 101 (1): 1-5.

Matsusaka, John G. 2005. "Direct Democracy Works." *The Journal of Economic Perspectives* 19 (2): 185–206.

McCulloch v. Maryland. 1819, 17 U.S. 316.

Natelson, Rob. 2013. "Proposing Constitutional Amendments by a Convention of the States." Washington, D.C. Washington, D.C. http://www.alec.org/wp-content/uploads/article-five-handbook-1.pdf.

Rose, Kenneth D. 1996. *American Women and the Repeal of Prohibition*. New York: New York University Press.

Sabato, Larry J. 2008. *A More Perfect Constitution: Why the Constitution Must Be Revised: Ideas to Inspire a New Generation*. Reprint edition. New York: Walker & Company.

Scalia, Antonin. 1998. *A Matter of Interpretation: Federal Courts and the Law*. Princeton: Princeton University Press.

Smith, Rogers M. 1993. "Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America." *The American Political Science Review* 87 (3): 549–66. doi:10.2307/2938735.

Stengel, Richard, and Andrea Ford. 2011. "Does the Constitution Still Matter? One Document, Under Siege." *Time*, June 23.

Stephanopoulos, Nicolas O., and Mila Versteeg. 2016. "The Contours of Constitutional Support." *Washington University Law Review* 94 (1): 113-90.

Tarr, G. Alan. 2015. *The People's Constitutions*. New York: Oxford University Press.

U.S. Census Bureau. 2011. "Income, Poverty and Health Insurance Coverage in the United States." https://www.census.gov/newsroom/releases/archives/income_wealth/cb12-172.html.

Zink, James R., and Christopher T. Dawes. 2015. "The Dead Hand of the Past? Toward an Understanding of 'Constitutional Veneration.'" *Political Behavior* 38 (3): 535–60. doi:10.1007/s11109-015-9325-5.

Zinn, Howard. 1991. Declarations of Independence: Cross-Examining American Ideology. New York: Perennial.

SECESSION AND NULLIFICATION AS A GLOBAL TREND

RAN HIRSCHL[1]

ABSTRACT

Despite manifestations of constitutional convergence on a global scale, expressions of constitutional resistance or defiance in the form of secessionism and nullification have not subsided, and may in fact be regaining ground worldwide. Whereas at first glance the reemergence of such sentiments appears counterintuitive in an age of apparent globalization, it may actually reflect a predictable reaction to, perhaps even a backlash against, powerful global convergence vectors, the centralization of authority and the decline of the local in an increasingly—constitutionally and otherwise—universalized reality. When understood against the backdrop of formidable centripetal forces of political, cultural, and economic globalization, the rise of a new trans-national constitutional order and judicial class, and the corresponding decrease in the autonomy of "Westphalian" constitutionalism, as well as an ever-increasing deficit of democratic legitimacy, counter pressures for preserving a given sub-national unit's, region's, or community's unique constitutional legacy, cultural-linguistic heritage, and political voice seem destined to intensify, not to decline.

1. Professor of Political Science & Law, Canada Research Chair, University of Toronto; Fellow of the Royal Society of Canada (FRSC). I am grateful to the Journal's anonymous referees for their exceptionally helpful comments and suggestions, as well as to the participants of the Democracy and Constitutionalism conference held at the University of Maryland Carey School of Law (March 4–5, 2016) for their instructive queries. An earlier, much extended version of this essay appears in Levinson (2016), pp. 249–273.

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MUCH HAS BEEN WRITTEN about the global convergence on constitutional supremacy, perhaps even the emergence of a global constitutional order, and the corresponding rise of an Esperanto-like universal constitutional discourse, primarily visible in the context of rights (*e.g.*, Law 2005; Möller 2012). The ever-accelerating advance of these trends may be linked to broader trends of universalism, globalization, post-nationalism and the corresponding erosion of the local and the particular. Yet, a closer look suggests that while these convergence trends are undoubtedly extensive and readily visible, expressions of constitutional resistance or defiance in the form of secessionism and nullification may in fact be regaining ground worldwide.[2]

From the so-called "Brexit" referendum in Britain to all-out secessionist movements in Scotland, Catalonia, or Kurdistan, separatist sentiments are enjoying something of a heyday, rather than a decline, worldwide. And from Russia to Canada to the European Union (EU), the notion of an issue-based withdrawal from the overarching federal pact—what is often referred to in American constitutional thought as nullification—is commonly invoked. In fact, core elements of the "Quebec vs. Canada" constitutional saga, the struggle over the place of Chechnya in the Russian Federation, or the landmark German Federal Constitutional Court rulings on the constitutional status of Germany in relation to the Treaty of Maastricht or the Lisbon Treaty address the question of sub-national (or sub-supranational) constitutional sovereignty and the right to override centralizing legislative and regulatory authority.

Whereas at first glance the reemergence of such sentiments appears counter-intuitive in an age of apparent globalization, it may actually reflect a predictable reaction to, perhaps even a backlash against, powerful global convergence vectors. When understood against the backdrop of formidable centripetal forces of political, cultural, and economic globalization, the rise of a new trans-national constitutional order and judicial class and the corresponding decrease in the autonomy of "Westphalian" constitutionalism, as well as an ever-increasing deficit of democratic legitimacy, counter pressures for preserving a given sub-national unit's, region's, or community's unique constitutional legacy, cultural-linguistic heritage, and political voice seem destined to intensify, not to decline. Secession and nullification may thus

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2. For an overview, see Doyle (2010), Levinson (2016).

be viewed as a reaction against the centralization of authority and the decline of the local in an increasingly—constitutionally and otherwise—universalized reality.

SEPARATIST AND SECESSIONIST SENTIMENTS WORLDWIDE

Contrary to what many globalists and post-nationalists predicted or wished, not only have separatist impulses and aspirations failed to vanish, but have instead gained renewed momentum worldwide. Within barely a few weeks during the autumn of 2014, nearly half of Scottish voters expressed their desire for independence in a widely publicized referendum while Ukraine's leadership acknowledged the de-facto separation of the Donbas region. The Minsk Accord (2015) facilitated the granting of a special autonomous status to that region. Meanwhile, protestors in Hong Kong took to the streets demanding more political autonomy for the territory, just as opposition groups in Malaysia's Sabah and Sarawak region (formerly East Malaysia) resurrected partition claims. A Walloon-led coalition government was finally formed in Belgium after the country had functioned five months (and for the second time in several years) without an elected government, during which time the Flemish nationalist N-VA party headed the Flanders regional government. After government officials in Madrid turned to the Spanish Constitutional Court to successfully prevent a plebiscite on separation in Catalonia from taking place, in an explicit act of defiance—some might call it "nullification"—the government of Catalonia proceeded with a non-binding referendum. In September 2015, the separatist "Together for Yes" (JxSi) coalition won the Catalan regional elections, garnering approximately 40% of the popular vote. In short, secessionist movements are many, and spread in literally four corners of the world; the quest for subnational political autonomy is very much alive. In fact, it is hard to identify more than a handful of countries that have not witnessed secessionist upheaval of one sort or another during their history as independent polities.

Take Canada. Since the "Quiet Revolution" and the rise of Quebec nationalism in the early 1960s, Canada has seen its fair share of secessionist challenges. There have been five major attempts to overhaul the constitution to address Québec's "distinct society," "two founding peoples," and "special veto power" claims. All of these attempts were given added impetus and sense of urgency by the rise of the secessionist Parti Québécois (PQ) as a key actor in Québec politics. The PQ captured the provincial leadership in 1976 and Quebec's constitutional battle with the rest of Canada began. In the first Quebec referendum (May 1980), the PQ government sought a mandate to negotiate with the federal government about retaining limited sovereignty for the province. Approximately 60% of Québécois

casting ballots voted against the proposed negotiations. In the *Quebec Veto Reference* (1982), the Supreme Court of Canada (SCC) held that there was no constitutional convention awarding Quebec a special veto power; and that Québec's claim for a special veto power based on the "distinct society" and the "two founding peoples" arguments is not supported by any constitutional document or convention.[3] Despite this ruling, Québec continued to assert that its legislature could exercise the right to veto constitutional provisions. In other words: nullification, Québec style.

The constitutional battle over Québec reached its zenith in 1998 with the *Quebec Secession Reference*—the first time a democratic country had ever preemptively tested the legal terms of its own dissolution.[4] The case was launched at the request of the federal government following the slim 50.6% to 49.4% loss by the Québécois secessionist movement in the 1995 referendum. (A shift of approximately 50,000 votes would have pushed the pendulum in the separatist direction.) In a widely publicized ruling in August 1998, the SCC unanimously held that unilateral secession would be an unconstitutional act under domestic law and illegitimate under international law, and that a majority vote in Quebec was not sufficient to allow Quebec to legally separate from the rest of Canada. However, the Court also noted that if and when secession was approved by a clear majority of people in Québec voting in a referendum on a clear question, the parties should then negotiate the terms of the subsequent breakup in good faith. As for the question of unilateral secession under Canadian law, the Court's answer provided both federalists and separatists with congenial answers.

The government of Quebec responded to the judgment by arguing that if a majority of "50 percent plus one" of those Québecois who cast ballots in a provincial referendum on the future of Quebec supported the idea of secession, then this would satisfy the requirement for "a clear majority" set by the Court decision. For its part, the federal government (then led by the Liberal Party's PM Chrétien) responded by proposing the Clarity Bill (which was formally confirmed by parliament in summer 2000). In a nutshell, the bill states that only "a clear majority on a clear question" would require the federal government to negotiate the terms of separation with Quebec; that given the nature of the question at stake, the term "clear majority" should mean more than "50 percent plus one"; and that in any event the federal government reserves the right to determine whether the question posed by the Quebec government in a future referendum meets the "clear question" criterion.

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3. *Reference re Amendment to the Canadian Constitution* [1982] 2 S.C.R. 793 [Canada].

4. *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 [Canada].

Québec countered with Bill 99, emphasizing the right to self-determination according to international law. It states, "No other parliament or government may reduce the powers, authority, sovereignty or legitimacy of the National Assembly, or impose constraint on the democratic will of the Québec people to determine its own future."

Secessionist impulses have also been central in political debates in Northern Ireland, Scotland, and Wales. (International sports fans will note that each of these polities has long maintained its fully independent status with national teams for soccer, rugby, cricket, and an array of other sports, as is true, incidentally, of Puerto Rico, ostensibly a "commonwealth" under the sovereignty of the United States.) Meanwhile, in the EU, member states' secessionist voices abound. The 2016 Brexit referendum is a prime example, but nationalist opposition groups in other EU member-states, from the Nordic countries to Greece, have voiced grave concerns about the threat to national sovereignty posed by the pan-European constitutional project. The financial crisis of 2008, in particular, boosted public support for separatist parties that questioned the logic and future of the "ever closer union" project. As the voting patterns in the Brexit referendum indicate, material considerations alongside "periphery vs. center" or "the people versus the elites" sentiments play an important role in fueling these secessionist movements. In short, rumors of secession's demise in the age of global convergence have been greatly exaggerated; the list of secessionist movements and autonomy-aspiring regions and movements is as long today as it has ever been.

Around the world, separatist campaigns vary considerably in their outcomes. Whereas Belgium and Lebanon have remained formally undivided despite powerful secessionist pressures and fractured national identity, Czechoslovakia broke apart and Yugoslavia succumbed to "Balkanization." In the Russian Federation, there are secessionist movements that take up arms against the central government (*e.g.*, in Chechnya, Dagestan) and those outside the country that are supported by the same central government (*e.g.*, Georgia's Abkhazia and South Ossetia, Ukraine's Crimea). Approximately half of Bosnia & Herzegovina's territory is recognized as the semi-autonomous Republika Srpska ("Serb Republic") with secessionist aspirations, its own national meta-narrative, anthem, diplomatic posts overseas, and an outspoken pro-independence leadership. The Bosniaks and Croats that make up the rest of the country are not the closest of allies either. The result has been a very weak federal state where "the constituent units defiantly refuse to surrender their powers and competences to anemic and fragile central authority" (Woelk 2012, 109).

There are differences in the natures and levels of conflict as well. Not all tensions lead to violence: residents of the autonomous province of South Tyrol, Italy's richest province, continue to quietly harbor hopes for secession from Italy and

reunification with neighboring Austria. Whereas secessionist impulses in Corsica (France) have been crashed, in the Philippines' Bangsamoro region or Indonesia's Aceh, violent separatist struggle concluded with comprehensive agreement for certain regional legislative autonomy (in the case of Aceh, enhanced local control over mineral resources) as well as accommodation of a Sharia-friendly regime. Euskadi Ta Askatasuna's permanent ceasefire in 2011 brought political stability and economic prosperity in the Basque Country (Euskadi), an autonomous region in northern Spain. Meanwhile, the status of Kosovo's (ethnic Albanian population) self-professed independence and breakaway from Serbia remains unclear; the Brussels Agreement (2013) grants limited autonomous powers for Kosovo's Serb north, in exchange for Serb recognition of Kosovo's sovereignty.

India and Pakistan—themselves byproducts of political partition—are locked in a dispute over the political future of the Kashmir and Ladakh regions; autonomy-driven insurgency in Jammu and Kashmir (Muslim majority; granted certain autonomy under article 370 of the Indian constitution) has been taking place for decades, all while Pakistan's own North West Frontier province has advanced a call for greater jurisdictional autonomy under Islamic law precepts. A 25-year-long independence campaign in Sri Lanka's Tamil-populated Northern Province came to a sudden end in 2009 with the defeat of the Liberation Tigers of Tamil Eelam. A reconciliation process resulted in notable economic growth. Meanwhile, an equally vicious civil war in Sudan brought about a political split and the creation of South Sudan—the world's youngest independent country.

Some Kurdish nationalist organizations seek to create an independent Kurdistan, consisting of some or all of the areas with Kurdish majority across the Iraq/Turkey border, while others campaign for greater Kurdish autonomy within the existing Iraqi national borders. Radical Islamic forces have been pushing for political separation in Azawad (northeast Mali), Zanzibar (formed Tanzania with Tanganyika), the four southernmost provinces of Thailand, in the neighboring Malaysian state of Kelantan, and increasingly in several Northern Nigerian states. A fragile non-decision status quo is maintained through international diplomacy in the Nagorno-Karabakh region (within Azerbaijan; claimed by Armenia) and in the Cabinda region (which, while within the Democratic Republic of Congo, in fact, belongs to Angola; the region itself claims independence from both).

Whereas residents of Gibraltar and the Falkland Islands are adamant in their wish to stay under British rule, in Western Sahara and in Palestine ongoing struggles for independence have been taking place for decades. Massive secessionist protests have occurred in oil-rich provinces of Venezuela (Zulia) and Bolivia (Pando, Santa Cruz, Tarija). Indigenous rights movements—think of the Zapatista

Movement in the Mexican state of Chiapas—continue to actively resist federal authority. Amicable cooperation has led to the creation of Nunavut in arctic Canada, and to a friendly pact of joint governance between Greenland (*Kalaallit Nunaat*) and "mainland" Denmark; as of 2008 the former is "a constituent country within the Kingdom of Denmark."

In a different setting, the Holy See reformed its legal system so that, with effect from January 1, 2009, Italian laws no longer automatically apply to the Vatican state, thereby reversing the Lateran Pacts of 1929 and the revised concordat of 1984. Instead, pertinent Italian laws will be examined by Vatican clerics to determine their compatibility with canon law and Catholic moral principles. This historic departure was at least in part a reaction to a controversial 2008 ruling of the Milan Court of Appeal and later Italy's Court of Cassation (upheld by the Constitutional Court) in the Eluana Englaro case, resulting in the discontinuation of life-support to a young woman in a permanent vegetative state following a vicious car accident.[5] The Vatican reaction, alongside the radical right resistance to the *Obergefell v. Hodges* ruling in the United States, illustrates how the rise of liberal constitutional jurisprudence and rights discourse may itself trigger secession—or nullification-like reactions. Meanwhile, from the other end of the political spectrum, anti-globalization activists oppose what they term the "new constitutionalism" (see, *e.g.*, Gill and Cutler 2014)—the largely pernicious spread of a set of quasi-constitutional supranational treaties and institutions that place global economic governance beyond democratic reach and promote uneven development by privileging transnational corporations at the expense of the world's economic hinterlands. Withdrawal threats and constitutional court challenges abound.[6]

THE "NULLIFICATION" ALTERNATIVE

Nullification—the idea that sub-national units can, and perhaps even ought to, refuse to enforce federal laws that they deem unconstitutional—is a somewhat different impulse within the broad class of separatist political voices. It lies in the fuzzy

5. See, Italian Court of Cassation, Decree no. 21748 of 16 October 2007; Italian Constitutional Court, Ordinance no. 334 of 8 October 2008. In the Vatican's view, Italian laws often conflict with the moral teachings of the Catholic Church. In 2016, to take one example, Italy recognized same-sex civil unions.

6. See, *e.g.*, recent challenge to the Canada-EU Comprehensive Economic and Trade Agreement (CETA) before the German Federal Constitutional Court, *CETA Case*, 2 BvR 1368/16, 2 BvR 1444/16, 2 BvR 1823/16, 2 BvR 1482/16, 2 BvE 3/16 (decision released October 13, 2016) [Germany].

conceptual area between calls for all-out secession on the one hand and common displeasure expressed by sub-national units against unwelcome federal policies, laws and regulations on the other. It is a recalcitrant gesture against central political authority by people who nevertheless do not want to slam the door shut on a political union or entity. Nullification, at least in its "classical" meaning, is the argument that a sub-national unit can declare legislation or a judicial decision from the central authority "null and void" because, according to the unit, such a decision violates the constitution regardless of whether or not the legitimate federal legislature and apex court of that polity consider it valid. It reflects a strong belief in subsidiarity (or its relatives: "states' rights" or "the states preceded the Union," "compound theory" and "dual federalism") as a core principle of political confederations and the source of constitutional sovereignty and authority more broadly. Nullification also bodes well with sentiments of "distinct society," authentic "local traditions" or "community values" that are dear to the unit's heart, and an overarching disdain for the supposedly elitist, inattentive, and detached central government. Nullification arguments are not invoked with respect to every disagreement between a sub-unit and a central authority; they are reserved for situations where a given sub-unit objects to a supposedly intrusive, centrally-imposed regulatory measure that is perceived to illegitimately infringe on an inviolable constitutional principle or belief indispensable to the sub-unit's fundamental identity.

Nullificationist voices have staged a certain comeback in American constitutional discourse.[7] But the nullification yen is not an exclusively American response; it has been repeatedly advanced, drawn upon and debated in numerous other polities, near and far. One of the clearest examples outside of the United States for an interchangeable separatist-nullificationist discourse is Western Australia—Australia's western-most state, covering a third of the country's area. Western Australia (capital: Perth) was reluctant to enter the Commonwealth of Australia in the first place, and had been toying with secession since the moment of federation (1901).

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7. In October 2015, to pick one example, a group named *The American Principles Project* http://americanprinciplesproject.org/ reacted to the United States Supreme Court pro same-sex marriage ruling in *Obergefell v. Hodges* by publishing an online manifesto, "Calling for Constitutional Resistance to *Obergefell v. Hodges*." The statement, signed by dozens of academics, stated, *inter alia*, that: "We stand with James Madison and Abraham Lincoln in recognizing that the Constitution is not whatever a majority of Supreme Court justices say it is. We remind all officeholders in the United States that they are pledged to uphold the Constitution of the United States, not the will of the five members of the Supreme Court. We call on all federal and state officeholders to refuse to accept *Obergefell* as binding precedent for all but the specific plaintiffs in that case [and] to recognize the authority of states to define marriage, and the right of federal and state officeholders to act in accordance with those definitions."

The Great Depression and the economic misery that followed pushed Western Australia toward secession. Two-thirds of the ballots cast in a 1933 referendum favored separation. A delegation was sent to the United Kingdom's Privy Council to request permission for withdrawal from the Commonwealth. However, the British government refused to grant Western Australia's request to rejoin the British Empire as an autonomous territory. Instead, it accepted the Commonwealth of Australia's argument that the Imperial Parliament in London could not assent to Western Australia's petition without the express consent of the dominion as whole, since agreeing to the separation request would alter the nature of the entire federation. More than eight decades later, Western Australia's separatist sentiment has not diminished. Claims of structural fiscal imbalance, unfair distribution of grants, loss of autonomy in key policy areas and systematic political marginalization abound. Reference to United States arguments in favor of "state rights," the so-called "compact theory" of constitutional authority (*e.g.*, as expressed in Thomas Jefferson's *Kentucky Resolutions* of 1798 or James Madison's notion that states were "duty bound to resist" what they viewed as the federal government's violation of the constitution), and nullification are common. Before resorting to an all-out secession, argues a recent pro-separation account, Western Australia "should first exhaust other potential options—most obviously nullification" (Sabhlok 2013, 29).

Oftentimes, nullification-like sentiments arise in certain sub-national units as a reaction to controversial high court rulings that are perceived by the sub-national unit as unacceptable. In its historic ruling *Mabo v. Queensland II* (1992), the High Court of Australia abandoned the legal concept of *terra nullius* ("vacant land") that had served for centuries as the basis for the institutional denial of Aboriginal title. The Court established native title as a basis for proprietary rights in land, and held that Aboriginal title was not extinguished by the change in sovereignty.[8] In *Wik Peoples v. Queensland* (1996), the High Court went on to hold that leases of pastoral land by the government to private third parties did not necessarily extinguish native title. Such extinguishment would depend on the specific terms of the pastoral lease and the legislation under which it was granted. The potentially far-reaching redistributive implications of *Mabo II* and *Wik* prompted an immediate popular backlash; the powerful agricultural and mining sectors, backed by the governments of Queensland, Western Australia, and the Northern Territory, demanded an across-the-board statutory extinguishment of native title. One Nation—a populist, far right, anti-immigration and anti-Aboriginal people political party led by the

8. *Mabo v. Queensland II* (1992) 175 C.L.R. 1 [Australia]; *Wik Peoples v. Queensland* (1996) 187 C.L.R. 1 [Australia].

colorful Pauline Hanson—was formed in Queensland in 1997, and gained instant support nationwide. The conservative government under John Howard willingly bowed to the counter-court political backlash by introducing amendments to the Native Title Act that, for all intents and purposes, overrode *Wik*.

Nullificationist sentiments are often tied to a given political or territorial sub-unit, but may also take the form of struggles over maintaining jurisdictional boundaries within pluri-legal regimes. In dozens of countries around the world (*e.g.*, India, Indonesia, Israel) certain religious groups are granted varied measures of jurisdictional autonomy in matters of family and personal status law as well as in matters of denominational education. Attempts by central governments or national high courts to tamper with the jurisdictional autonomy of such groups have often been met with stern resistance, at times even sectarian violence and blatant non-compliance, by the affected minority religious groups. The oft-cited *Shah Bano* saga (triggered by the Supreme Court of India's scrutiny of India's longstanding practice of Muslim self-jurisdiction in personal status matters) is a good illustration of such nullification-like reaction advanced through "legal pluralism" discourse.[9]

THE EUROPEAN ANGLE

Separation and nullification debates within federal or "pluri-national" states have interesting equivalents at the supra-national level of governance. In fact, precisely because the units in supra-national political associations preceded the association, and because such associations allow for multiple and parallel projects of national identity promotion, they are more likely than other political formations to experience secessionist or nullificationist pressures (Shorten 2014). The heated debate among EU law experts concerning the implications of the putative secessions of Catalonia and Scotland—potential sub-national unit exit from member states—confirms the prevalence of constitutional discourse of sub-unit emancipation within supra-national entities (Weiler 2014).

Since the 1950s, Europe has been witnessing what is arguably the largest experiment with multi-level governance in modern history. The quest for, and accompanying opposition to, the political and constitutional unification of Europe has been among the perennial sources of contention in virtually every member state of the now 28-country-strong European Union, in several EU aspirants, as well as in the 47-member Council of Europe with its comprehensive pan-European human rights regime—the European Convention of Human Rights (ECHR).

9. *Mohammed Ahmed Khan v. Shah Bano Begum*, A.I.R. 1985 S.C. 945 [India].

As many observers (*e.g.*, Weiler 1991) have noted, trans-national constitutionalism has been a key concept in the quest for a unified Europe. In its case-law starting with the landmark *Van Gend and Loos* ruling (1963), the European Court of Justice (ECJ, the highest court of the EU) introduced the principle of the direct effect of Community law on the Member States, which now enables European citizens to rely directly on rules of European Union law in their national courts.[10] In its 1964 ruling in the *Costa* case, the ECJ went on to establish the primacy of Community law over domestic law.[11] In 1991, (*Francovich, Bonifaci and others v Italy*), the ECJ established the liability of a Member State to individuals for damage caused to them by a breach of Community law by that State.[12] Since 1991, European citizens have been able to bring an action for damages against a Member State that infringes a Community rule. The unification-through-constitutionalization project gained further momentum with the signings of the Maastricht Treaty (1992) and the Lisbon Treaty (2009) that effectively establish a trans-national quasi-constitutional regime in the EU. Meanwhile, the European Court of Human Rights (ECtHR, the apex forum for deciding ECHR-based claims made by residents of the Council of Europe countries) has become one of the busiest apex courts on the planet. This enormous unification-through-constitutionalization project now directly affects the lives of over 800 million people and indirectly impacts the lives of hundreds of millions more. In light of this, it is hardly surprising that strong resentment has fomented throughout Europe; a quick survey would yield a list of several hundred active separatist movements in Europe, stretching from Moravia and the Republic of Crimea to Schleswig-Holstein and the Faroe Islands.

From a comparative constitutional law standpoint, the emerging European constitutional order adds at least two interesting twists to the American nullification storyline. First, national high court rulings in Europe seem to reject the notion of unconditional subjection of Member State law to European trans-national law. Instead, a notion of duality of constitutional authority (national and supra-national) first introduced by the German Federal Constitutional Court (FCC) in its landmark *Maastricht Case* ruling (1993) has become the mainstream vision of national/supra-national constitutional relations in the EU.[13] In its judgment, the FCC advanced a

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10. *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963) [ECJ Case 26/62].

11. *Flaminio Costa v ENEL* (1964) [ECJ Case 6/64].

12. *Francovich, Bonifaci and others v Italy* (1990) [ECJ Case 6/90].

13. See, *e.g.*, *Hanne Norup Carlsen et al. v. Prime Minister of Denmark*, "Maastricht Decision" of 6 April 1998, Ugeskrift for Retsvaesen H 800 [1999] 3 CMLR 854 [Denmark]; Décision 92-308 DC of

statist conception of the EU in which each member state is an autonomous unit that retains its self-determination and sovereignty, including the ability to revoke its consent to participate in international organizations (Halberstam and Möllers 2009, 1247). The FCC is clear that "[i]n contrast to the federal parliament, the 'European Community legislator' does not possess any direct democratic legitimation" (Id.). Adamant that member state sovereignty be maintained, the FCC warns that "[i]f sovereign rights are granted to supra-national organizations, then the representative body elected by the people, *i.e.*, the German Federal Parliament . . . necessarily lose[s] some of their influence upon the processes of decision-making and the formation of political will" (Id.). En route, the FCC confirmed the principle of subsidiarity as a core element of EU law; the EU may only act or legislate where action of individual member states is insufficient.

The ruling's "bottom-line" is that the FCC affirmed the legitimacy and constitutionality (with respect to German law) of the Maastricht Treaty, yet reserved to itself the right to "examine whether legal acts of the European institutions and organs are within or exceed the sovereign powers transferred to them" (Boom 1995, 177). In other words, the FCC, not the European Court of Justice, will decide where the limits to European power lie, at least with respect to Germany. Furthermore, the Court stated that legal acts of the Union determined by the German Court to lie outside the competences delineated in the Treaty, will not be legally binding in Germany. In so deciding, the FCC maintained the authority to examine the applicability of EU law in Germany, thus posing a permanent Member State-based challenge to the overarching competence of EU laws and institutions. Implicit in the FCC's ruling, though not fully endorsed, is the notion that member states are to be pardoned for not enforcing what they regard an imposed supplementary condition in a sphere not explicitly transferred from the sub-units to the central EU authority. As one observer has noted, a comparison to the Virginia situation of 1798 is not an implausible one (Id.).

In its subsequent decision in the *Lisbon Treaty Case* (2009),[14] arguably one of the most significant political rulings in its history, the FCC held that Germany must maintain its constitutional sovereignty within the emerging European constitution. The case involved a claim by German nationals that an unconditional ratification of the Lisbon Treaty would jeopardize and unreasonably limit German constitutional autonomy and self-determination. The Court agreed that European con-

9 April 1992, "Maastricht I," Recueil des Décisions du Conseil Constitutionnel 55, [1992] RJC I-496, [1993] 3 CMLR 345 [France].

14. *Lisbon Treaty Case*, BVerfG, 2 BvE/08 (30 June 2009) [Germany].

stitutional integration is not an automatic and inescapable process; under certain circumstances, the Court may review the implications of such integration on German constitutional sovereignty, and, when needed, opt out on an issue-by-issue basis. The judges wrote that "if obvious transgressions of boundaries take place when the European Union claims competences," then they will call for a review to "preserve the inviolable core content of the [German] Basic Law's constitutional identity" (Tomuschat 2009, 1260). Moreover, EU institutions must respect the non-transferable identity of member states' constitutions and the principles they enshrine, as well as a minimum core of sovereignty vested in national political institutions. Specifically, the FCC identified five areas of competence where full subjection of national power to EU authorities could seriously erode German sovereignty: armed forces' monopoly of the use of force; criminal law; fundamental fiscal policy decisions, and state budgetary autonomy more generally; substantive understanding of what constitutes a just social order; and most importantly, the preservation of national identity, especially through state control over the education system. When it comes to these areas, held the FCC, legitimate and accountable national political institutions must retain the ability to effectively determine policy and maintain state autonomy. At the more abstract level, the Court held that "a will aiming at founding a [federal] state in Europe could not be ascertained," and that, as Kommers and Miller point out, "the civil society, or demos, essential to democracy . . . still is centered on the nation-state, framed by a common language, culture, and history" (Kommers and Miller 2012, 349).

To be sure, the FCC's judgment may easily be interpreted as suggesting both solid German constitutional sovereignty vis-à-vis the emerging European constitutional order, as well as provisional subjection of the former to the latter. Either way, for the purposes of our comparative discussion, it is evident that that the FCC did not endorse the Euro-centric view of unconditional subjection of any given Member State's constitutional order and identity to the emerging trans-national European constitution. We may call it nullification, or perhaps German-style nullification, *in potentia*.

The multi-layered, fragmented structure of the emerging pan-European constitutional framework and the corresponding eminence of the pan-European rights regime have given rise to a second uniquely European addition to the American nullification narrative—the theoretical posture known as *constitutional pluralism*. Building on the German Federal Constitutional Court's *Maastricht Case* articulation of dual (EU and German) constitutional authority, proponents of this view describe a reality of, and provide normative justification for, a post-national, multifocal constitutional order (at least with respect to the distribution of constitutional

authority in Europe) in which there is no single legal center or hierarchy, and "where there is a plurality of institutional normative orders, each with its functioning constitution" (MacCormick 1999, 104; Krisch 2010; but see Weiler 2011; Loughlin 2014).

This stance is reflected in the jurisprudence of the ECtHR, as it walks a fine line between fostering a robust pan-European human rights regime while at the same time averting "backlashes" against its rulings, when these are perceived as encroaching too heavily on established local traditions. *Lautsi v. Italy* (2011) offers a textbook example to illustrate the tension between cosmopolitan theory and local traditions in contemporary European rights jurisprudence. In the earlier decision of the ECtHR's 7-judge Chamber (*Lautsi I*), it was held that the mandatory display of the crucifix in Italian public school classrooms breached Italy's obligations under the ECHR. This ruling was portrayed in Italy as an all-out war against Italy's national meta-narrative and religious heritage, and provoked widespread nullification-like outrage. The Italian Prime Minister, for example, stated that "[T]his decision is not acceptable for us Italians. It is one of those decisions that make us doubt Europe's common sense" (Mancini 2010, 6). The Vatican accused the Court of having delivered a "short sighted and ideological" decision. As Susanna Mancini colorfully chronicles, the backlash spread to the Italian political sphere. The populist right-wing Northern League distributed crucifixes in backcountry towns and villages, and bylaws were enacted to oblige shopkeepers to display the crucifix. The judges who wrote the decision were subject to unforgiving personal attacks (Id.).

In *Lautsi II*, the ECtHR's 17-member Grand Chamber overturned the Chamber's ruling in *Lautsi I*. It rejected the human rights claim of a Finnish-born mother residing in Italy who objected to the display of religious symbols (crucifixes) in her sons' public school.[15] Rather than requiring state schools to observe confessional neutrality, the Court upheld the right of Italy to display the crucifix, an identity-laden symbol of the country's majority community, in the classrooms of public schools. Using the margin-of-appreciation concept, Europe's highest human rights court held that it is up to each signatory state to determine whether to perpetuate this (majority) tradition. The crucifix was taken to be so central to Italian collective identity that it was up to Italians themselves to decide on its status. The ECtHR's ruling in *Lautsi v. Italy* gave precedent to the particular over the universal, in part

15. *Lautsi and Others v. Italy*, Application No. 30814/06 (ECtHR, Grand Chamber, judgment of Mar. 18, 2011) [Council of Europe].

by ruling that in the EU context there was no "universal" posture on the subject. In the face of such multiplicity, the ECtHR elected to avoid imposing a one-rule-fits-all policy on all Council of Europe member states (with their combined 800 million strong population), and instead deferred to local values. In other words, the default in no-consensus situations should be a preference for national (in the European context, sub-unit) constitutional sovereignty vis-à-vis a largely fictitious supra-national consensus.

A key concept that guides such rulings is the "margin of appreciation." The Council of Europe defines "margin of appreciation" as the space for maneuver that the Strasbourg organs are willing to grant national authorities, in fulfilling their obligations under the European Convention on Human Rights (Legg 2012). From a jurisprudential standpoint, the margin of appreciation is a judicial doctrine whereby supra-national courts allow states to have a measure of diversity in their interpretation of human rights treaty obligations, based on local traditions, heritage, and context. Essentially a concept of qualified and reasoned deference, margin of appreciation is at the core of some of the most important rulings of the European Court of Human Rights.

Let us consider another illustrative example. In *Leyla Şahin v. Turkey* (2005), one of the most significant European cases to date dealing with the issue of religious attire in the education system, the ECtHR was asked to determine whether restrictions on wearing Islamic headscarves in institutions of higher education in Turkey violated religious freedoms guaranteed under Article 9(2) of the European Convention on Human Rights (ECHR), as well as under Article 2 of Protocol No. 1 regarding the right to education.[16] In order to determine whether there is an emerging pan-European consensus on the use of religious attire by students at higher learning institutions, the ECtHR surveyed constitutional practices across the continent.[17] The Court examined the relevant state of affairs in no less than twenty member states of the Council of Europe (in the order of their treatment in the judgment: Turkey, Azerbaijan, Albania, France, Belgium, Austria, Germany, the Netherlands, Spain, Finland, Sweden, Switzerland, the United Kingdom, Russia, Romania, Hungary, Greece, the Czech Republic, Slovakia, and Poland). Having determined that no consensus exists on the matter, the Court applied a generous "margin of appreciation" approach, essentially adopting the argument of

16. *Şahin v. Turkey*, Applicaton No. 44774/98 (ECtHR, Grand Chamber, judgment of Nov. 10, 2005) [Council of Europe].

17. *Id.*, paras. 55–65.

(pre-AKP) Turkey that its situation was sufficiently unique to justify deference to its national authorities (again, sub-national in the European context) when it comes to regulating religious attire in Turkish institutions of higher learning.[18]

In summary, the evolving pan-European constitutional order is a living laboratory for studying nullification-like ideas (and creative legal and institutional responses to them) from a comparative perspective. The political project of a unified Europe and the corresponding eminence of the pan-European rights regime have generated renewed interest in comparative constitutional inquiry among European jurists. Landmark constitutional court decisions such as the FCC's Maastricht or Lisbon rulings, and concepts such as "constitutional pluralism" or the "margin of appreciation," quickly evolved to help reconcile the centripetal forces of constitutional convergence with the unabating centrifugal forces of constitutional divergence, and to help make sense of the multiplicity of constitutional authority and traditions in Europe.

CONCLUSION

While Texas and Arizona make very "photogenic" settings for American constitutional discourse, equally if not more scintillating separatist skirmishes can be found in Quebec, Western Australia, Republika Srpska, Chechnya, or Jammu and Kashmir, to name but a few examples. A comparable, if admittedly more subtle nullificationist discourse, is common within the emerging pan-European constitutional order. As these examples illustrate, secession and nullification impulses have not vanished in the age of constitutional globalization. In fact, evidence may suggest that powerful centripetal forces of political, economic, and cultural convergence have triggered more, not less, separatist talk (and, oftentimes, actual walk) in national and supra-national sub-units worldwide.

This general trend is driven by different impulses in different times and places. Some secessionist and nullificationist inclinations are guided by ethnic, cultural, linguistic, or religious difference sentiments that draw on some historical records of sub-national unit sovereignty marked along these ascriptive lines; other separatist sentiments are driven by ideological resentment of "big government," elite-rule or a "corrupt center" as opposed to supposedly authentic localism, or are powered by clashes over material interests (*e.g.*, revenue or resource allocation, access to and

18. As is well-known, the moderately-religious Adalet ve Kalkinma Partisi (AKP) or, as translated in English, the "Justice and Development Party," has won the five most recent national elections in Turkey.

position within the labor market); and yet others pit liberal or neoliberal, self-professed cosmopolitan elites (often perceived as occupying a given polity's political or symbolic "center") against less liberal, localist voices (often perceived as occupying or representing that polity's socio-political "hinterlands" or cultural "periphery").[19] Obviously, there is much more at stake in any of these debates than whether the local, the national, or the global is the proper locus of sovereignty.

And to be sure, there are differences between a scenario whereby anti-centrist sentiment is advanced in a longstanding nation-state (*e.g.*, France) that has just recently signed up for a larger, supra-national entity (the EU), in an occupied or annexed territory (*e.g.*, Western Sahara), or in a region that has never previously had full sovereignty or a distinct identity. And there are other pertinent differences of scale and scope: in the United States, secession and nullification claims are raised by fringe movements or appear occasionally in law review articles. In other instances (*e.g.*, Québec, Scotland, Catalonia), full-blown secessionist claims were put forth by mainstream, widely popular political actors within the sub-national unit, and have attracted attention worldwide. But these differences notwithstanding, the general trend towards political convergence, globalism and supra-nationalism have spawned an array of localist counter-movements that profess to represent a given polity's, region's or community's "genuine" identity.[20]

Finally, we may speculate that, as internationalization and global convergence processes march on, it may be the case that debates over nullification-like constitutional devices become even more prevalent, as well thought-out, "selective" invalidation and repudiation mechanisms offer a more realistic means to enhancing unit autonomy in a globalized world than the bolder, yet ultimately impracticable, notion of full-blooded secession.

REFERENCES

Boom, Steve J. 1995. "The European Union After the Maastricht Decision: Will Germany Be the 'Virginia of Europe?"' *American Journal of Comparative Law* 43:177–226.

Doyle, Don H., ed. 2010. *Secession as an International Phenomenon*. Athens, GA: University of Georgia Press.

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19. These sentiments are also evident in other socio-political struggles over the construction of a given polity's collective identity, constitutional commitments, or over the scope and nature of judicial review. See, *e.g.*, Hirschl (2004, 2010); Jacobsohn (2010).

20. A similar trend may be seen in the rise of extended "local news" sections in numerous national and international media outlets. The more "global," "cosmopolitan," and "international" things get, the more interested people become in their immediate surroundings, from communities and neighborhoods to cities, sub-national units, or regions.

Gill, Stephen and A. Claire Cutler, eds. 2014. *New Constitutionalism and World Order.* Cambridge: Cambridge University Press.

Halberstam, Daniel and Cristoph Möllers. 2009. "The German Constitutional Court Says 'Ja Zu Deutschland!'" *German Law Journal* 10:1241–1258.

Hirschl, Ran. 2004. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism.* Cambridge, MA: Harvard University Press.

———. 2010. *Constitutional Theocracy.* Cambridge, MA: Harvard University Press.

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

Kommers, Donald Kommers and Russell Miller. 2012. *The Constitutional Jurisprudence of the Federal Republic of Germany.* Durham, NC: Duke University Press.

Krisch, Nico. 2010. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law.* Oxford: Oxford University Press.

Law, David S. 2005. "Generic Constitutional Law." *Minnesota Law Review* 89:652–742.

Legg, Andrew. 2012. *The Margin of Appreciation in International Human Rights Law.* Oxford: Oxford University Press.

Levinson, Sanford, ed. 2016. *Nullification and Secession in 21st Century Constitutional Thought.* Lawrence, KS: University Press of Kansas.

Loughlin, Martin. 2014. "Constitutional Pluralism: An Oxymoron?" *Global Constitutionalism* 3:9–30.

MacCormick, Neil. 1999. *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth.* Oxford: Oxford University Press.

Mancini, Susanna. 2010. "The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty." *European Constitutional Law Review* 6:6–27.

Möller, Kai. 2012. *The Global Model of Constitutional Rights.* Oxford: Oxford University Press.

Sabhlok, Sukrit. 2013. "Secession as Political Reform: The Case of Western Australia." *Policy* 28: 22–31.

Shorten, Andrew. 2014. "Constitutional Secession Rights, Exit Threats and Multinational Democracy." *Political Studies* 62:99–115.

Tomuschat, Christian. 2009. "The Ruling of the German Constitutional Court on the Treaty of Lisbon." *German Law Journal* 10:1259–1262.

Weiler, Joseph H. H. 1991. "The Transformation of Europe." *Yale Law Journal* 100:2403–2483.

———. 2011. "Prologue: Global and Pluralist Constitutionalism: Some Doubts" in Gráinne de Búrca and Joseph H. H. Weiler, eds., *The World of European Constitutionalism.* Cambridge: Cambridge University Press.

———. 2014. "Scottish Independence and the European Union." *International Journal of Constitutional Law* 12:507–510.

Woelk, Jens. 2012. "Bosnia-Herzegovina: Trying to Build a Federal State on Paradoxes" in Michael Burgess and G. Alan Tarr, eds., *Constitutional Dynamics in Federal Systems: Sub-national Perspectives.* Montreal: McGill-Queen's University Press.

CHALLENGING CONSTITUTIONALISM IN POST-APARTHEID SOUTH AFRICA

HEINZ KLUG[1]

ABSTRACT

Twenty years after the adoption of South Africa's "final" post-apartheid constitution there are increasing demands for constitutional change. Political parties, both in and out of power, challenge the legitimacy of the constitutional order and assert that its failures are a product of its origins rather than its implementation. This paper explores the attack on post-apartheid constitutionalism as a form of nullification in which critics are using both the constitution's origins and the failures of governance over the last twenty years to reject the existing constitution and to demand a new order. Arguing that the constitution is fundamentally flawed, these critics question the legitimacy of the constitution implying that nullifying the present constitutional order will offer a means to address the legacies of apartheid that continue to dominate the daily lives of most South Africans.

KEYWORDS: *Apartheid, Constitutional Principles, Constitutionalism, Expropriation, Post-Apartheid, Post-Colonial, South Africa*

TWENTY YEARS after the adoption of South Africa's "final" post-apartheid constitution there are increasing demands for constitutional change. Political parties, both in and out of power, challenge the legitimacy of the constitutional order and assert that its failures are a product of its origins rather than its implementation.

1. University of Wisconsin Law School; University of the Witwatersrand

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From Julius Malema and his Economic Freedom Front (EFF) calling for radical redistribution to the ruling African National Congress (ANC) suggesting the need for a "second transition," the claim is that present failings in governance and particularly increasing inequality is attributable to the "negotiated" status of the Constitution. While these claims fail to distinguish between the "interim" 1993 Constitution, which was the product of a negotiated transition from Apartheid, and the "final" 1996 Constitution that was produced by a democratically-elected Constitutional Assembly, the resulting challenge to the legitimacy of the constitutional order, and constitutionalism more generally, remains.

Critical debate over South Africa's post-colonial legal order has increasingly devolved into two broad camps. On the one hand there is anxiety over what are perceived to be increasing threats to a "liberal" legal order that was the celebrated outcome of the 1994 "miracle" credited with saving the country from what many political analysts predicted would be a "blood bath," or as Mahmood Mamdani noted, "[I]f Rwanda was the genocide that happened, then South Africa was the genocide that didn't" (2001, 185). On the other hand there is increasing criticism of what is perceived to be the "liberal" legal order created by the historic transition from apartheid and now blamed for its failure to address the legacies of racism and economic inequality that survived the democratic transition. These latter concerns are reflected both in discussion within the ruling ANC about the need for a "second transition" and in the patterns of increasing political protest and conflict that erupt across the South African landscape—from Parliament and social media to the streets of towns and cities across the land.

Central to these divergent views of South Africa's post-colonial legal order is a questioning of the "negotiated revolution" that enabled the democratic transition in South Africa. Speaking to the Oxford Union in late November 2015 Julius Malema, former President of the ANC Youth League and now leader of the opposition EFF in South Africa's Parliament, criticized the legacy of Nelson Mandela stating that, "the Nelson we celebrate now is a stage-managed Mandela who compromised the principles of the revolution, which are captured in the Freedom Charter." Explaining this characterization of Mandela and his assertion that, "[t]he deviation from the freedom charter was the beginning of selling out of the revolution," Malema argued that while "perhaps it was necessary to have a cooling off period . . . we cooled off for too long—21 years." The EFF, he continued, is "not going to compromise like Madiba did" (Meintjies 2015).

Less rhetorical but perhaps more threatening, given that the ANC remains the dominant political party in South Africa, have been the persistent attacks on the judiciary from within the ruling party as well as tensions over failure to follow the

laws governing state procurement, to respond to court orders meant to remedy government failures, or simple intransigence in the face of challenges to government malfeasance such as the refusal, until very recently, to properly address the findings of the Public Protector in the cases of Nkandla (in which President Zuma was found to have personally benefitted from security upgrades to his private residence) and Hlaudi Motseneng, the chief operating officer of the state broadcaster, the SABC (who was appointed despite not having the required formal qualifications for the position). It is in this context that concerns over the "rule of law" extend beyond individual legal challenges and begin to raise questions about constitutionalism and democracy in post-apartheid South Africa.

This paper explores the attack on post-apartheid constitutionalism as a form of nullification in which critics are using both the constitution's origins and the failures of governance over the last twenty years to reject the existing constitution and to demand a new order. Arguing that the constitution is fundamentally flawed these critics from both the political opposition and from within the governing party question the legitimacy of the constitution implying that nullifying the present constitutional order will offer a means to address the legacies of apartheid that continue to dominate the daily lives of most South Africans. Constitutionalism emerged as an integral part of South Africa's democratic transition both enabling the transition to democracy and framing the future constitutional order. A key element in this turn to constitutionalism was the debate over property rights and so this paper will focus in part on the question of expropriation as an example of how constitutionalism and democracy are increasingly entangled in struggles over the future of constitutionalism in South Africa. Before addressing this challenge to constitutionalism, the paper will first describe the emergence and role of constitutionalism in South Africa's democratic transition. Second, the paper explores the rising challenges to the constitution and role of the courts which gained the power of constitutional review as a product of the embrace of constitutional supremacy. Finally, the paper uses the example of the debate over the protection of property rights to demonstrate the tension between the rhetoric of nullification and the legitimacy of the post-apartheid constitutional order.

TRANSITIONAL CONSTITUTIONALISM

While the ANC's original conception of a constitutional order to dismantle apartheid—including a duty in Article 14(5) that "all organs of the state at the national, regional and local levels shall pursue policies and programmes aimed at redressing the consequences of past discriminatory laws and practices" (ANC Constitutional

Committee 1990, 30)—may have provided a promising basis of future legitimacy in a democratic South Africa, the ANC did not have the power to secure its immediate adoption. Instead, the transition unfolded through a series of negotiations held in the shadow of growing violence by those opposed to democracy. On the one hand the ANC, relying on the 1989 OAU-endorsed Harare Declaration as a blueprint for the democratic transition, called for particular steps—an all-party conference, the establishment of an interim government, and the holding of elections for a constituent assembly to draw up a new constitution. On the other hand, the apartheid government argued that legal continuity was essential and that any negotiated agreements had to be legally adopted by the undemocratic tricameral-Parliament, as required by the existing 1983 Constitution. Despite continuing violence the convening of multiparty talks, at the Convention for a Democratic South Africa (Codesa) in late 1991, gave the impression that the process of transition was well under way. However, it soon became clear that the government was determined to retain control of the process of transition and within six months the talks had broken down.

As a prerequisite to agreement on the nature of a future constitution-making body the apartheid government began to insist there be prior agreement that any future constitution be premised on a strictly "federal" system of government based on the Balkanization of the country into a number of all-but-independent regions. This demand and the regime's insistence that a new constitution be adopted by a seventy-five percent majority of a proportionally elected constitution-making body, as well as seventy-five percent of regionally elected delegates, led to the collapse of the second plenary session of Codesa in May 1992. The response of the ANC and its allies in the labor movement and the South African Communist Party was to mobilize their supporters in a campaign of mass action demanding a democratically-elected constituent assembly. This ANC initiative was met with an upsurge of violent attacks on communities culminating in the Boipatong massacre in June 1992. In response the ANC announced a formal suspension of negotiations and demanded that the government take action to halt the escalating violence.

With negotiations on the brink of collapse, the ANC and the government reached agreement in the Record of Understanding on 26 September 1992, setting the scene for the creation of a new negotiating process. The apartheid regime's concession of an elected constituent assembly and the ANC's acceptance of a government of national unity under a transitional constitution provided the key elements of this agreement. By accepting a democratic constitution-making process, the apartheid government made it possible for the ANC to agree to the adoption of a negotiated interim constitution which would entrench a government of national

unity for five years and ensure the legal continuity the government required. The architecture of this agreement, reflecting continuity and change, allowed the multi-party negotiations—which eventually became known as the Multi-Party Negotiating Forum—to resume at the World Trade Center outside Johannesburg in early 1993. It was this process that led to the adoption of the 1993 "interim" Constitution and the first democratic elections in April 1994.

The consequences of a negotiated process were evident in the "interim" Constitution of 1993. In some instances, this led to the inclusion of rights unique to the South African transition, such as the right to economic activity and the employer's right to lock out workers in the context of collective bargaining. In other aspects it led to a generous extension of rights and clarity of substantive issues such as the explicit recognition of sexual orientation among the grounds upon which unfair discrimination is prohibited; the specific provision guaranteeing affirmative action programs designed to enable full and equal enjoyment of rights; and the right to restitution of dispossessed land rights. Other consequences included the incorporation of conflicting elements and conceptions of the constitutional order being established. On the one hand, there was the tension between the guarantee of open and accountable government and the guarantee of existing civil service positions of bureaucrats whose training and professional culture had been opposed to openness and accountability. On the other hand, there was the inclusion of provisions empowering regions to establish their own constitutions subject to the terms of the Constitution; consociationalism was enforced at the local level through vetoes over local government budgets; and a Volkstaat Council was created whose constitutional mandate it was to consider the establishment of a "white homeland" or Volkstaat which its proponents would understand to be constitutionally autonomous from government at both the national and regional level.

Furthermore, confusion about the comparative meaning of particular constitutional terms led, for example, to the inclusion of a standard of permissible expropriation—"public purpose"—less empowering of government action than what was intended. The technical committee had incorrectly reported that the public purpose standard gave government more expansive powers of expropriation as compared with the public interest standard (Chaskalson 1995, 237–8). The outcome of this negotiated process was an "interim" Constitution which spliced together the different political and constitutional understandings of at least the three major power blocs engaged in the process. The effect was a Constitution which embraced competing constitutional traditions and principles (Klug 1994, 19–28). While this set the stage for vigorous debate over the true nature of the Constitution, these same tensions were extended into the next round of constitution-making

through the adoption of the Constitutional Principles set out in Schedule 4 to the Constitution, which were to guide the Constitutional Assembly in the writing of the "final" Constitution. Recognition of the importance of the Constitutional Principles deflected some of the different negotiating parties' concerns with the "interim" constitution as they pressed to get their version of the future into Schedule Four.

The thirty-four Constitutional Principles that made up Schedule 4 were the key to South Africa's two-stage constitution-making process. From the perspective of the different political parties who negotiated the democratic transition, these principles guaranteed that their primary objectives would be secured in the final outcome. For this reason, Schedule 4 and the requirement that the new Constitutional Court certify that the Constitutional Assembly abided by these principles in producing the final Constitution were the only parts of the "interim" Constitution that could not be amended by a two-thirds majority; in fact these provisions could not be amended or repealed and were thus set in stone as the core of the negotiated agreement. Among the general principles adopted by the parties were those guaranteeing a common citizenship and a "democratic system of government committed to achieving equality between men and women and people of all races" (Constitution 1993, Schedule 4, CP I), as well as the enjoyment of "all universally accepted fundamental rights" (CP II), the separation of powers (CP VI), and the supremacy of the Constitution (CP IV). In addition to principles protecting the political role of minority political parties (CP XIV) and special procedures and majorities for future constitutional amendments (CP XV), a large number of principles provided extraordinary detail on the structure of government, particularly on the definition and division of powers between the national, regional and local levels of government (CP XVI–XX).

Concern over the allocation of powers between the national and regional levels of government led to the inclusion of an elaborate set of criteria for determining the allocation of powers between these spheres of government (CP XXI). There were also a set of principles that ensured the establishment of a government of National Unity for five years and provided assurances to the civil service, police and military that these institutions would be non-partisan and that members of the public service would be "entitled to a fair pension" (CP XXIX–XXXIII). Most dramatic of the specific provisions were those requiring the recognition of "traditional leadership, according to indigenous law" (CP XIII) and "collective rights of self-determination" (CP XII). In addition recognition of the Zulu King and the provision of a Volkstaat Council were added by amendment to the main body of the constitution just prior to the April 1994 elections as a way to ensure participation of the Freedom Alliance, particularly the Inkatha Freedom Party (IFP) and

the Afrikaner right-wing led by ex-South African Defence Force General Constant Viljoen, in the elections. Finally, the constitutional principles were amended to provide that provincial recognition of a traditional monarch would be protected in a final Constitution (CP XIII(2) and that any territorial entity established through the assertion of a right to self-determination by "any community sharing a common culture and language heritage" (CP XXXIV(1)) shall be entrenched in the new Constitution (CP XXXIV(3)).

The predominant role of "constitutionalism" during the democratic transition in South Africa lay in the creation of institutional processes through which the opposing parties could seek common ground while continuing to pursue their often deeply conflicting goals. While the initial contacts and early negotiations may have been purely political in nature, as soon as the apartheid regime unbanned the ANC, and other liberation movements, there began a series of transitional legal processes—to free prisoners, enable the return of exiles, create legal institutions to provide forms of shared control over the transition, and ultimately to create an "interim" Constitution that would become the basic law of the transition to a democratic order. This "interim" Constitution was itself the epitome of a transitional law in that it was designed to have a limited lifespan and had at its core the provisions for achieving the creation of a democratically-constituted constitution-making body to produce a "final" Constitution. Three elements of the 1993 Constitution served as the basic structure of "constitutionalism" securing the transition to democracy in South Africa. First, the "interim" Constitution provided the legal basis for the election and empowerment of a democratic government. Second, it contained a number of provisions that ensured that there would be a process and framework for the creation of a "final" constitution to be written by a democratically-elected Constitutional Assembly—including the thirty-four Constitutional Principles contained in Schedule 4. Finally, in its postamble the "interim" Constitution promised that a new democratic legislature would pass legislation creating a process through which amnesty would be granted in the "pursuit of national unity" and out of a need to achieve national reconciliation.

The negotiation and adoption of various transitional laws also framed the context in which the democratic order would be initially constructed. The sunset clauses guaranteeing the official positions of apartheid bureaucrats as well as the local government law which ensured that fully democratic local government would only come into existence after the 1999 elections all added to the constraints that the new ANC government would face as it attempted to secure political, economic and social change at all levels of government. The subsequent passage of the Promotion of National Unity and Reconciliation Act in 1995 and the establishment

of the Truth and Reconciliation Commission (TRC) projected the process of transition and the role of transitional law into the democratic era (du Bois & du Bois-Pedain 2008). Although the TRC sought to achieve some level of national reconciliation through its three separate branches—the victims hearings, amnesty process and reparations committee—the focus of the TRC on the political conflicts of the past produced a process of limited amnesty, accountability and forgiveness but failed to address many of the fundamental injustices that the apartheid system produced (Mamdani 2002, 33–59). The refusal to address the harms of apartheid policies, including forced removals and the migrant labor system, may have facilitated the political transition but it has fundamentally undermined the legitimacy of the process in the eyes of many who recognize that the legacies of those policies continues to harm and affect the future of millions of South African citizens. It is in this context that the recognition of socioeconomic rights and the emphasis on restitution, employment equity and affirmative action, as means to address these legacies, gained greater political attention in the making and implementation of the "final" Constitution.

DEMOCRACY AND CONSTITUTIONALISM IN POST-APARTHEID SOUTH AFRICA

Unhappiness at the slow pace of social change and growing inequality has led both government and opposition parties to blame the Constitution and to imply that true democracy would produce a more equitable outcome. These claims are rooted in both the constitutional history of the country as well as the historic claims of the national liberation movement. On the one hand parliamentary sovereignty was central to the constitutional structure of the country from its founding in 1910 and the country's constitutional history is marked by repeated instances in which decisions by the courts to restrain or limit the racist policies of the white governments were simply overturned by Parliament in the name of democratic authority. On the other hand, even as opponents of apartheid called for inclusion in the democratic process or made claims against the government—such as the adoption by the ANC of an African Bill of Rights in 1923, the African Claims document based on the Atlantic Charter in 1943 and the Freedom Charter in 1955—they remained within the tradition of legislative or democratic supremacy and made no call for or promise of constitutional supremacy.

Even the Constitutional Principles adopted by the ANC in 1988 and incorporated into the Harare declaration and UN Declaration on Apartheid in 1989 do not embrace constitutional supremacy but rather a weaker form of constitutionalism

represented by the idea of a constitutionally protected bill of rights (ANC Constitutional Committee 1990, 34). It was only as the negotiations progressed that elements on both sides recognized that a strong form of constitutionalism represented by constitutional supremacy could provide both the means to secure agreement on the transition to democracy (Klug 2000) as well as to allay fears among those within the anti-apartheid and liberation movements who had witnessed abuses of human rights at home and around Africa and were concerned about guaranteeing the protection of human rights, even from themselves (de Toit 1991; Sachs 1992). It was however the decision to use the negotiated Constitutional Principles as a check on the future democratically-elected Constituent Assembly that required the full embrace of constitutional supremacy. Only if the courts would be empowered to decide on the constitutionality of the very structure of government could there be a guarantee that the new democratic majority could not simply dispense with the limits on democratic decision-making that were imposed by both the "interim" constitution itself as well as the constitutional principles contained in Schedule 4 of the "interim" constitution. To this end the Constitutional Principles guaranteed that the "Constitution shall be the supreme law of the land . . . binding on all organs of state at all levels of government" (CP IV) and that the judiciary "shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights" (CP VII).

While the empowerment of the judiciary was an unexpected outcome of the democratic transition in South Africa, it was one that was perfectly in tune with the global expansion of judicial power and constitutionalism in the aftermath of the cold war. As the new status of the judiciary became clear in the transition attention quickly shifted to the structure and personnel of the courts. Faced with the claim by the old judiciary that constitutional matters could be decided by a special panel of the existing Appellate Division of the Supreme Court the ANC called for the establishment of a Constitutional Court which as a new institution would not be automatically dominated by the existing judges. The creation of the Constitutional Court whose justices were appointed by Nelson Mandela as the first democratic President, even if according to a carefully constructed compromise in which at least four of the new appointments had to have previously served on the bench, provided the legitimacy needed for the introduction of constitutional review. The significance of this new power was highlighted by the constitutional requirement that the new Constitutional Court would have to certify that the "final" constitutional text produced by the Constituent Assembly did not stray outside of the negotiated Constitutional Principles contained in Schedule 4 of the "interim" Constitution. This process of "certification" of the final constitution would be very contentious and,

yet coming as it did in the wake of the Constitutional Court's first decision to strike down the death penalty, served only to bolster the legitimacy of this new institution.

Two decades later the Constitutional Court continues to enjoy enormous legitimacy yet it, and the courts more generally, have come under increasing criticism by the ruling ANC, particularly under the Presidency of Jacob Zuma. One source of complaint focuses on the fact that the courts have become the foci of administrative and political battles in which every new piece of legislation and nearly every major action by the government is challenged as being unconstitutional. At the same time there is increasing contestation within the government and ruling party that ends up before the courts. Embracing the term "lawfare", elements within the ruling ANC have argued that the courts are being used to frustrate democratic governance. Yet, it was President Thabo Mbeki's inability to address the HIV/AIDS crisis, opposition to the economic program of global integration embraced by the government, and pressures to address evidence of corruption related to the procurement of arms, that led to a dramatic fissure between different factions in the ruling ANC, and an increasing turn to the courts.

After Jacob Zuma's dismissal as Deputy-President, because of his implication in the corruption trial and conviction of his close comrade and associate Schabir Shaik (*S v Shaik* 2007 & 2008), and his subsequent acquittal in a rape trial, he emerged as the leader of a concerted effort to remove Mbeki. The success of this campaign, first in the arena of party politics when Zuma defeated Mbeki in an election for president of the ANC at the party's national conference at Polokwane in December 2007, and then in the subsequent resignation of Mbeki as president of the country in 2008—under threat of removal by parliament which was now dominated by Zuma supporters—demonstrated how the goals of particular political factions could be secured within the framework of legal conflict (Russell 2009, 246–260). The finding by a High Court Judge that there had been political interference in the corruption case against Jacob Zuma, a finding later reversed by the Supreme Court of Appeal, only highlighted the role of "lawfare" in these factional conflicts (*National Director of Public Prosecutions v Zuma* 2009). At the same time this focus on internal faction provided the space in which governance, particularly at the local and provincial level, has begun to fray—where through lack of capacity or simple malfeasance there is a failure to implement the promises of delivery and transformation. The outcome has been a parallel increase in local frustration manifested in public demonstrations and violence.

Despite this fraying of effective governance, the institutions that were created and which underpin the legal idealism of post-apartheid constitutionalism have continued to function and serve as tools in struggles between competing factions,

between and within: political parties; sections of government, including the national police force; as well as by a range of social, political and legal actors struggling to uphold the constitutional order. The result is a constant unevenness in which different government departments seem at times to succeed and at other times to fail in their respective realms, be it health, home affairs, police or education. Even the constitutional institutions designed to support democracy, such as the Human Rights Commission, Gender Commission and the Public Protector have all gone through phases of internal conflict, inactivity or even scandal as well as moments when they have achieved marked success. Within this unevenness there is constant recourse to the courts, employment arbitration mechanisms or complaints to the Public Protector as different factions engage in what is characterized as "lawfare" designed to achieve political advantage or access to government resources.

As the ANC moved towards its National Conference at the end of 2012 there were repeated calls for greater government intervention in the distribution of property, particularly land. In the lead-up to the organization's mid-year policy conference, which produced a draft policy document for the National Conference, there were repeated calls from various ANC constituencies, the youth league and trade unions in particular (Letsoalo 2012), for a constitutional amendment to remove what they understood to be a constitutional requirement of "willing buyer, willing seller" that they blamed for the slow pace of economic transformation and land reform in particular.[2] In response to these calls the official opposition, the Democratic Alliance, issued a press statement warning that the ANC government was "contemplating dramatic changes to the Constitution . . . which threatens the very foundation of our constitutional state" (Smuts 2012). Responding to these demands and concerns the Minister of Rural Development and Land Reform Gugile Nkwinti said the debate about changing the Constitution might be irrelevant, as "the ANC had come up with four proposals to transform land ownership in South Africa without changing the Constitution" (SAPA 2012). But at the same time the ANC Youth League called for "changing of the Constitution to do away with land expropriation with compensation" (Id).

Demands for constitutional amendments and threats that such amendments will undermine South Africa's constitutional democracy are at one level easily understood as the product of continuing contestation over the distribution of economic resources in post-apartheid South Africa. Less understandable is the focus

2. "Willing buyer, willing seller" is used as a short-hand for the requirement that compensation be based on the market value of expropriated property but is also understood by some to require the existing owner to agree to sell, which would negate the sovereign's power of eminent domain.

on "willing buyer, willing seller" as the target of vilification by those who feel that land reform has been hampered by the constitutional protection of property rights and as a marker of constitutional right by those who claim that the protection of property fundamentally underpins the country's constitutional democracy. The fact that the Constitution makes no reference to the "willing buyer, willing seller" standard is reflected in the argument by Minister Nkwinti, who acknowledged that a lot more can be done by the government within the confines of the Constitution to advance the goals of land redistribution. However, the government's own claims about the limits of land reform are questionable since the process of land restitution and redistribution has until now been largely carried out within the confines of a "willing buyer, willing seller" market-based policy approach. The puzzle then is to understand the persistence of this policy approach and the strength of the rhetoric that has until now undermined attempts, including legislative efforts, to shift towards a more aggressive use of state power, including using the power of eminent domain, to achieve the government's stated goals of agrarian reform.

However, once the focus shifts to the question of expropriation, the focus on "willing buyer, willing seller" becomes more understandable. Although the constitution may not include a "willing buyer, willing seller" standard, the apartheid era Expropriation Act 63 of 1975 does in fact include this standard as a basis for determining the compensation to be paid in the event of expropriation. While the constitution is supreme in South Africa and explicitly provides a set of criteria for determining compensation in the event of expropriation, in application the state may only exercise its power of eminent domain within the terms granted by the legislature in the expropriation statute. This explains in part why the "willing buyer, willing seller" standard has some resonance in the South African debate over expropriation. However, a broader view of the debate, which includes an understanding of the conflict over land in the Southern African region more generally, provides a much clearer perspective on why this standard has such resonance in the political debates over land and the possibility of constitutional change most specifically. Only once the history of struggle over land in Zimbabwe, as well as the pattern of constitutional amendment and crisis in Zimbabwe, is taken into account, does it become clear why the "willing buyer, willing seller" language has such power and relevance. In this context the possibility of constitutional change and land reform may be equally linked to domestic law and politics as to broader international and regional conditions that shape the ways in which constitutional options and land policy might be understood and contested (Klug 2016, 149–178).

South Africa's final 1996 Constitution protects the rights of property holders. Section 25(1) provides that "[n]o one may be deprived of property except in

terms of law of general application, and no law may permit arbitrary deprivation of property." The property clause also explicitly recognizes the state's power to expropriate property for "a public purpose or in the public interest . . . subject to compensation," and includes provisions that attempt to both protect land reform from constitutional challenge and to ensure that the payment of compensation is tied to a recognition of the history and use of the relevant property.[3] In the first major case challenging the failure of government to protect the rights of a landowner who had obtained an eviction order against thousands of settlers on his land, the Constitutional Court held that the state was under an obligation to either enforce the court-ordered eviction or else to expropriate the land and grant compensation to the land owner (*President v Modderklip Boerdery* 2005). In a second case the Constitutional Court was asked to decide whether the enforcement of a tax lien against an individual through the seizing of two vehicles amounted to a taking of the property of the bank which financed the purchase of the vehicles (*FNB v Commissioner, SARS* 2002). In this context the Constitutional Court laid out an elaborate scheme for deciding whether there had been an expropriation of property. First, the Court asked whether what was taken is recognized as property for the purposes of the constitutional protection of property. Second, if it was protected property did the actions of the government amount to a deprivation of that property? Third, if a deprivation is found then the Court will ask if the deprivation is consistent with the Constitution's requirement in §25(1) that it be "in terms of a law of general application" and is "not arbitrary." Fourth, if the Court finds there has been a deprivation but that it was not done in a manner consistent with §25(1) then the Court will enquire as to whether such a deprivation is justified as a limitation of rights provided for in §36 of the Constitution. Fifth, if the deprivation was consistent with §25(1), was the property expropriated under a law of general application as required by §25(2). Sixth, if so, then was the expropriation "for a public purpose or in the public interest" and was compensation, in which the amount, time and manner of payment was either "agreed to by those affected or decided or approved by a Court," provided. Finally,

3. Section 25(3) of the Constitution provides that, "The amount of the compensation and the time and manner of payment must be just and equitable reflecting an equitable balance between the public interest and the interests of those affected, having regard to the relevant circumstances, including:

(a) the current use of the property;
(b) the history of the acquisition and use of the property;
(c) the market value of the property;
(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
(e) the purpose of the expropriation."

if the expropriation did not comply with the requirements of §25(2)(a) and (b) could it nevertheless have been justified as a limitation of rights as provided for in §36.

Despite this elaborate constitutional schema for determining the constitutionality of any deprivation of property, the practice of expropriation continues to be governed by the pre-democratic statutory law of expropriation (Expropriation Act 1975). Although no expropriation may be carried out in violation of the Constitution, the question is not whether the government is providing too little protection but rather if the statutory framework created by the Expropriation Act of 1975 does not in fact place higher burdens upon the state than required by the Constitution. Under the 1975 statute an expropriation must be "for a public purpose" (id: section 2(1)) and compensation is determined by the "amount which the property would have realized if sold on the date of notice in the open market by a willing seller to a will buyer," plus an "amount to make good any actual financial loss or inconvenience caused by the expropriation" (id. sections 12(1)(a)(i) and (ii)). Public purpose however is defined quite broadly in the act as "including any purposes connected with the administration of the provisions of any law by an organ of state" (id: section 1, definitions: "public purposes"). The net effect however is that in the case of both the reason for the expropriation, as well as the standard of compensation that should be awarded, the statute privileges the existing holders of freehold title as against both the state and the Constitution's imperative to address past dispossession by providing the state with greater latitude and taking into consideration the benefits the previous owner may have accrued in a market, access to which was racially restricted and where the state often provided subsidies and other benefits to white land owners. The most important impact this continuance of past law has had on post-apartheid land law and policy has been the continued embrace of the notion of "willing buyer, willing seller," which is neither required by the Constitution nor has it been helpful in furthering the process of restitution—whether in its impact on the actual bargaining power of existing title deed holders or as a matter of perception among those who feel that the process of restitution and land reform has been unacceptably glacial.

In an attempt to address the inconsistency between the statutory law and what is arguably a more permissive constitutional requirement, the government first introduced a bill to reform the law of expropriation in April 2008. In its explanation for the bill the government argued that the new law would create a "framework to give effect to the Constitution" and in particular the state's "constitutional obligation to take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis" (Publication of Explanatory Summary of the Expropriation Bill 2008, 3).

The new statute would also require the recognition of unregistered rights (Expropriation Bill 16-2008, Chapter 4, section 10) as well as providing new institutional mechanisms to regulate expropriations (id: Chapter 3, section 6). Significantly the draft law also revised the standards for compensation, including the range of factors that had been negotiated for during the democratic transition. Reaction to the bill was vociferous, particularly from those interests who had fought so hard to protect their property interests during the transition from apartheid (Mail & Guardian June 25, 2008, and ABSA 2008).

Many of the objections to the proposed legal reforms mirrored those that had been rejected by the Constitutional Assembly, yet the government withdrew the bill and political tensions continued to rise around criticisms of the slow pace of land reform as well as demands to reject the policy and practice of "willing buyer, willing seller" which is rhetorically-blamed for the failures of the state and market to address continuing racial inequalities in land ownership. At its June 2012 policy conference the ANC responded to these popular concerns by making a number of land-related policy proposals including replacing "willing buyer, willing seller" with the "just and equitable" principle in the Constitution when the state is acquiring land for land reform purposes, expropriating without compensation land acquired through unlawful means or used for illegal purposes, and keeping nationalization as an option (ANC 2012, 37). At the same time, however, there continued to be more strident demands that there be a constitutional amendment to remove the "willing buyer, willing seller" principle or even abolish the requirement that the government pay compensation for land taken in the name of redistribution. Responding to these internal pressures the government reintroduced the Expropriation Bill in 2013 but again it failed to progress through the legislature.

While there continue to be claims that it is the constitution that is preventing a more effective and speedy process of land reform, there is increasing recognition that it is political failure rather than constitutional limitations that is preventing the necessary reform. Even if the demands for constitutional change were to be heeded, there is increasing recognition that it is highly unlikely that the ANC would be able to unilaterally change the property provisions in the Constitution since any change to the Bill of Rights requires a two-thirds majority vote in Parliament, a level of support which the ANC no longer commands. Understanding both the limitations of constitutional change and the existing space for statutory change within the ambit of the constitution, the government reintroduced the Expropriation Bill in early 2015. Even in its revised form the new bill recognizes that there is broad scope for a more aggressive land reform policy within the present constitutional framework

for property and land reform. The bill was finally passed by the National Assembly on January 23, 2016, and after passage through the National Council of Provinces was handed on to the presidency on May 26, 2016. The President has however not signed the bill into law and instead the presidency referred it back to Parliament to ask whether the correct legislative procedures had been followed, since the bill was not sent to the House of Traditional Leaders and if signed into law is bound to be challenged before the courts (Presidency 2016).

CONCLUSION

Despite these conflicts and the accusations of "lawfare," South Africa's government, as well as the political and legal institutions created in the post-apartheid era, continue to express public allegiance to the goal of creating and sustaining a constitutional democracy, the core element of the country's post-apartheid constitutional identity. Even as the political opposition as well as non-governmental and other social actors question the ANC government's commitment to the Constitution and often insinuate that the government is actively undermining these new institutions by appointing office bearers who the opposition does not feel are sufficiently distanced from the ruling party, there has been little evidence of a concerted effort to undermine the existing constitutional order. This does not mean that the government has not failed, repeatedly, to meet the constitutional ideals enshrined in the new order, or that the Constitutional Court has not repeatedly struck down government decisions or expressed its concern about government's failings. Rather, it is important to draw a distinction between the failings that are a result of incapacity or ineptitude and the structural or systemic disharmonies that are implicit in the various projects and processes of confrontation that have become such a prevalent part of the new constitutional order.

In this context the rhetoric of "nullification" continues to be a significant part of public discourse. Claims that the present order is illegitimate and thus "void"—as it is the product of a compromised negotiation process—is evident again in the recent university protests that have swept the country. It is however the repeated turning to the constitution and the courts, by all sides to these conflicts, that is enabling constitutionalism to become embedded in post-apartheid South Africa. Despite challenges to particular court decisions or to the application of apartheid era expropriation rules, it is the repeated reliance on legal challenges and the management of these challenges by the various institutions of constitutional democracy that is building constitutionalism in post-apartheid South Africa. From this

perspective, it is the very engagement in "lawfare" and its reliance on different interpretations of the constitution and law to support opposing positions that undercut the claims of nullification which threaten the very existence of the constitutional order.

REFERENCES

Chaskalson, Matthew, 1995. "Stumbling Towards Section 28: Negotiations over Property Rights at the Multiparty Talks." *South African Journal on Human Rights* 11: 222–240.

du Bois, Francois and Antje du Bois-Pedain, eds. 2008. *Justice and Reconciliation in Post-Apartheid South Africa*. Cambridge: Cambridge University Press.

du Toit, Andre, ed., 1991. *Towards Democracy: Building a Culture of Accountability in South Africa*. Cape Town: Idasa.

Klug, Heinz, 2016. "In the Shadow of Zimbabwe: Public Interest, Land Reform and the Transfer of Property to Third Parties in South Africa". In *Rethinking Expropriation Law: Public Interest in Expropriation*. Eds. B. Hoops, E.J. Marais, H. Mostert, Björn Hoops, Ernst Marais, Hanri Mostert, Jacques Sluysmans, Leon Verstappen. Eleven international publishing and Juta Publications.

———, 2000. *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*. Cambridge: Cambridge University Press.

———, 1994. Constitutional Law, Annual Survey of South African Law, 1993 Volume.

Mail and Guardian, 2008. F. W. De Klerk warns against Expropriation Bill, June 25, 2008, available at http://mg.co.za/article/2008-06-25-fw-de-klerk-warns-against-expropriation-bill.

Letsoalo, Matuma, 2012. "Numsa targets land reform, the Constitution—and Pravin." *Mail and Guardian*, June 4, 2012.

Mamdani, Mahmood, 2002. "Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)." *diacritics* Volume 32(3–4): 33–59.

———, 2001, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda*. Princeton N.J: Princeton University Press.

Meintjies, Marvin, 2015. EFF's Malema takes aim at "sellout black billionaires" in Oxford address, *Business Day,* 26 November 2015.

Russell, A., 2009. *Bring Me My Machinegun: The Battle for the Soul of South Africa from Mandela to Zuma*. New York: Public Affairs.

Sachs, Albie, 1992. *Advancing Human Rights in South Africa*. Cape Town: Oxford University Press.

South African Press Association (SAPA), 2012. Changing Constitution not a solution to land problem: minister, June 12, 2012.

Dene Smuts, Dene, 2012. Property a Basic Right, Not a Sunset Clause, Democratic Alliance press release (Cape Town), March 4, 2012.

CASES

National Director of Public Prosecutions v Zuma (573/08) [2009] ZASCA 1 (12 Jan 2009).

S v Shaik 2007 (1) SACR 142 (D).

S v Shaik 2007 (1) SA 240; [2007] 2 All SA 9 (SCA).

S v Shaik 2008 (2) SA 208 (CC).

DOCUMENTS

ABSA 2008. ABSA submission regarding the Expropriation Bill, by SF Steve Booysen: ABSA: 9 June 2008, Concerns Regarding the Expropriation Bill, available at http://www.givengain.com/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=2137&news_id=72431

ANC, Recommendations from the 4th National Policy Conference June 2012, available at http://www.polity.org.za/article/recommendations-from-the-4th-african-national-congress-national-policy-conference-2012-09-28

ANC Constitutional Committee, 1990. A Bill of Rights for a New South Africa.

Constitution of the Republic of South Africa 1996.

Constitution of the Republic of South Africa 1993, Schedule 4 (Constitutional Principles) [CP]

Expropriation Act 63 of 1975

Expropriation Bill 16-2008, available at: http://www.polity.org.za/article/expropriation-bill-b-162008-2008-04-17

Presidency on Expropriation Bill Process, statement by the Presidency available at: http://www.gov.za/speeches/presidency-expropriation-bill-process-25-jul-2016-0000

Publication of Explanatory Summary of the Expropriation Bill, 2008, General Notice 440 of 2008, section 2, Government Gazette, 11 April 2008, No. 30963

DEMOCRACY BY LAWSUIT

Or, Can Litigation Alleviate the European Union's "Democratic Deficit?"

TOMMASO PAVONE[1]

ABSTRACT

Can legal mobilization be a source of democratic legitimation for polities lacking alternative sources of popular participation? In this brief article, I evaluate whether participation in the European Union (EU)'s legal order via litigation stands to assuage some of the concerns regarding the EU's "democratic deficit." I begin by charting the evolving scope of EU law and suggesting that EU competences now extend far beyond complex economic realms over which we might legitimately delegate authority to an insulated set of technocratic institutions. Consequently, greater popular engagement in the process of EU integration would indeed be desirable. I then suggest that electoral mobilization is unlikely to resolve this problem (at least in the EU), and pivot to ascertaining whether litigation is a more fertile path forward. I suggest that, while formalized engagement with the EU legal order might beneficially contribute greater citizen input over the process of European legal development, this form of *legal* participation should complement, rather than substitute for, *democratic* participation.

1. Ph.D. Candidate, Department of Politics, Princeton University, tpavone@princeton.edu. I would like to express gratitude to Howard Schweber for selecting this article as part of this symposium in *Constitutional Studies*, to Mark Graber and Keith Whittington for their kind invitation to the annual "Schmooze" held at the University of Maryland Law School in Baltimore, and to an anonymous reviewer for their constructive comments.

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KEYWORDS: *European Union, European Court of Justice, Legal Mobilization, Litigation, Rights, Democratic Deficit.*

INTRODUCTION: LITIGATION AND GOVERNANCE IN THE EUROPEAN UNION

Like all international organizations and most nascent federal states, the European Union (EU) is a decentralized polity that lacks the independent capacity to govern predominantly from the top down. Specifically, because the EU lacks a military, an independent tax system, and a large bureaucracy (Cappelletti et al. 1986),[2] it relies primarily on the decentralized enforcement of its legal rules, often by private parties. In fact, the EU is characterized by a participatory mode of "governance by lawsuit:" When a consumer, farmer, or import-export company lawyers up, sues a private party or the state for violating EU rules, and convinces the domestic judge that EU rules are binding, the EU's ability to govern effectively is bolstered from the bottom up (Kelemen 2009, 2011).

The central institutional mechanism for private actors to claim and expand their EU legal rights and for judicialized governance in Europe is known as the "preliminary reference procedure."[3] Established by Article 177 of the 1957 Treaty of Rome (and now governed by Article 267 of the Treaty on the Functioning of the EU),[4] the procedure provides that any domestic court facing a question that implicates EU law may (and sometimes must) temporarily stay the proceedings and refer the case to the EU's supreme court—the European Court of Justice (ECJ)—so

2. The EU's operating budget amounts to just 1% of Europe's GDP (compared to an average of 49% of GDP for member states)—only 6% of which is allocated to administration (EU Commission 2015a). EU funding relies upon customs duties and quasi-voluntary state contributions (EU Commission 2015b). The executive body of the EU—the European Commission—is staffed by just 33,000 employees, which is comparable to the civil service of a medium-sized city (EU Commission 2015c). No European army exists to coerce compliance with EU law (Hooghe and Marks 2001, 5; Sparrow 2015).

3. This mechanism is "central" not only because it is the primary source of opportunities for dispute-resolution for (and, consequently, law-making by) the ECJ, but also because a substantial body of empirical scholarship has demonstrated the degree to which the procedure is relatively insulated from influence by member state governments. Even the most powerful EU member states, such as France, Germany, and the United Kingdom lose more cases than they win before the ECJ (see Burley and Mattli 1993; Stone Sweet 2000; Cichowski 2007; Alter 2009; Stone Sweet and Brunell 2012; Kelemen 2012a).

4. Consolidated version of the Treaty on the Functioning of the European Union. *OJ C 326, 26.10.2012*: 47-390.

that it can interpret EU law. The ECJ then provides an interpretation and often suggests whether domestic law contravenes European rules, inviting the domestic judge to exercise judicial review powers usually denied them without reference to EU law (Weiler 1991, 1994; Alter 2001).[5] If it is unclear whether EU law applies, a judge should still refer the case to the ECJ.[6] This provision enables local judges to gain assistance from European judges, thereby generating EU standards for "naming, blaming and claiming" (Felstiner et al. 1980) that can reach local litigants in a uniform way across the EU (at least in theory).

The purpose of this brief article is to probe how the centrality of "governance by lawsuit" in the EU—which has engendered hundreds of lawsuits that are punted by domestic judges to the ECJ every year—interacts with another fundamental transformation of European politics: The growing perception of citizens, politicians, journalists, and academics that the EU suffers from a "democratic deficit." The core of this critique charges the EU with being a "distant" technocratic monster, insulated from popular participation, free of democratic accountability, and out of touch with the realities of everyday life (see Moravcsik 2002 for an overview). The multiple, interacting crises currently plaguing the EU—the legacy of the sovereign debt crisis, the migration crisis exacerbated by the conflict in Syria, the rule of law crisis in states like Hungary and Poland as they relapse towards authoritarianism, and the recent "Brexit" vote—have only exacerbated Euroskeptic sentiment (Greene and Kelemen 2016; Kelemen 2016a; 2016b).

This raises a critical question for constitutional scholars, democratic theorists, and analysts of European integration: To what extent does the growing vindication

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5. Recall that, in contrast to common law jurisdictions, the European civil law tradition has usually denied judges any judicial review power. Such power, where it existed, was usually monopolized by a single Kelsenian Constitutional Court, such as the Italian Constitutional Court and the German Federal Constitutional Court (Merryman and Perez-Perdomo 2007). Uniquely, in France the *Conseil Constitutionnel* was further limited to abstract review of legislation until 2008, when it was finally granted *a posteriori* review powers (Stone Sweet 2007; Fabbrini 2008).

6. In its 1978 *Simmenthal II* ruling, the ECJ held that lower courts necessitating the interpretation of EU law may leverage the procedure without first referring the case to their national supreme courts; in its 1982 *CILFIT* decision, the ECJ held that courts of last instance must use the procedure when necessitating the interpretation of EU law unless there exists a clear ECJ precedent governing the case (the so-called *Acte Clair* doctrine). More recently, in the 2006 *Traghetti del Mediterraneo* ruling the ECJ held that the State can be held liable for damages if a national court of last instance manifestly infringes EU law. See: Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, [1978], ECR 629; Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health*, [1982], ECR 3417; Case 173/03, *Traghetti del Mediterraneo SpA v. Repubblica Italiana*, [2006], ECR I-5204.

of EU rights in court not only bolster the EU's governance capacity, but also its democratic pedigree? Is the profusion of EU law litigation and referrals to the ECJ a sign that the EU is a more participatory and democratically legitimate polity than Euroskeptics may lead one to believe?

To begin to chart a tentative answer, this article is organized into three sections. Section II describes the expanding authority of the EU and the increasing number of issue areas regulated by the ECJ's case law. I suggest that EU competences now extend far beyond complex economic realms over which we might legitimately delegate authority to an insulated set of technocratic institutions. Section III then turns to adjudicating whether a judicialized mode of governance can serve as a democracy-enhancing "forum of principle." In so doing, I draw upon the law and society literature to paint a more realistic assessment of the variety of ways in which EU law litigation functions. Finally, Section IV concludes by arguing that while formalized engagement with the EU legal order might beneficially contribute greater citizen input over the process of European legal development, this form of *legal* participation is not a substitute for *democratic* participation.

DOES THE SCOPE OF EU AUTHORITY REQUIRE DEMOCRATIC INPUT?

The Pre-1980s Era: Technocratic Regulation of the Common Market

For a polity to suffer from a democratic deficit, it must possess jurisdiction over issue-areas that, under any realistic model of democratic governance, require some form of popular participation and accountability in policymaking. Yet in the first three decades following the founding of the European Economic Community (EEC) in the 1957 Treaty of Rome, most the EU rules that became focal points for dispute resolution, and which generated questions before domestic courts that were subsequently referred to the ECJ, were economic and technocratic in nature. That is to say, legal integration through the 1980s centered narrowly on the regulatory governance of the new European common market. As we will see, scholars have leveraged this historical fact to argue that the EU does not suffer from a democratic deficit.

Infrastructurally, it was trade and competition-based disputes that fostered political opportunities for the "constitutionalization" of the EU Treaties at the hands of the European Court of Justice (Mancini 1989, 595; Jacobs 1992, 25–32; Stone Sweet 2000). In 1962 an import-export company's challenge to a Dutch tariff invoking Article 12 of the Treaty of Rome spurred a reference to the ECJ wherein

it proclaimed that, indeed, EU law "produces direct effects and creates individual rights which national courts must protect."[7] Just one year later, an Italian citizen's challenge to the nationalization of an electric company generated a reference to the ECJ in which the European Court proclaimed that "the law stemming from the Treaty . . . could not . . . be overridden by domestic legal provisions, however framed."[8] These doctrines of "direct effect" and "supremacy" emerged as the institutional cornerstones of the ECJ's "law of integration" (Pescatore 1974) and as the mechanisms through which common market actors could partner with judges to challenge domestic regulations and expand the substantive scope of European economic governance.

Indeed, the wellsprings of European legal development through the 1980s centered almost exclusively on the economic provisions addressed by the Treaty of Rome. One fulcrum of litigation-induced legal development included the dismantling of quantitative restrictions and tariffs deemed to be protectionist in nature and disruptive of the free movement of goods. "All trading rules," the ECJ famously proclaimed in 1974, "enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions."[9] Another source of legal development encompassed the labeling requirements of food products: What constitutes "vinegar,"[10] "yogurt,"[11] and "sugar"?[12] Yet another comprised the shipping and handling of products circulating in the common market: How should margarine be packaged,[13] or wine bottled?[14] These examples illustrate how the EU's exclusive competence over the free movement of goods, services, people, and capital—sometimes referred to as the "four freedoms" of Europe's internal market—endowed the requisite discretion to the ECJ to construct

7. Case 26/62, *Van Gend en Loos v. Nederlandse Administratie Der Belastingen*, ECR 1, at operative part, paragraph 3.

8. Case 6/64, *Costa v. ENEL*, [1964], ECR 587, at page 594, paragraph 4.

9. Case 8/74, *Dassonville* [1974], ECR 837, at law part, paragraph 5. See also: Case 120/78 *Rewe-Zentral AG v. Bundermonopolverwaltung fur Branntwein (Cassis de Dijon)* [1979], ECR 749.

10. Case 193/80, *Commission v. Italy* [1981], ECR 3019.

11. Case 298/87, *Smanor* [1988], ECR 4489.

12. Case 241/89, *SARPP* [1990] ECR 4695.

13. Case 261/81, *Walter Rau* [1982], ECR 3961.

14. Case 176/84, *Commission v. Germany* [1986], ECR 3879.

what Miguel Maduro (1998) terms a "European economic constitution." And since most Europeans had little time or interest to contemplate "technical legal garb" (Burley and Mattli 1993, 70) detailing how margarine should be packaged, the primary beneficiaries of pre-1980s European legal development were those economic "repeat players" (Galanter 1975) with a stake in liberalizing the common market: Import-export companies, large-scale agricultural enterprises, and financial institutions.

In light of the foregoing set of technocratic competences focused on economic governance, Giandomenico Majone (1998) conceptualizes the EU as a narrowly-focused "regulatory state" rather than a full-fledged federal state necessitating democratic participation and accountability. Building on Majone, Andrew Moravcsik (2002, 606) argues that Europe is characterized by a "division of labour in which commonly delegated functions tend to be carried out by the EU, while those functions that inspire and induce popular participation remain largely national. This gives observers the impression that the EU is undemocratic, whereas it is simply specializing in those functions of modern democratic governance that tend to involve less direct political participation."

These arguments legitimate the EU by focusing on its limited competences and technocratic expertise, a move familiar to philosophers of law probing possible sources of obeisance to legal rules lacking in democratic authorship. "Imagine," writes Joseph Raz (1984, 146), "that I use in the course of my employment tools which may create a safety hazard . . . The government has issued safety regulations. The government experts who laid down these safety regulations are experts in their field. Their judgment is much more reliable than mine. I am therefore duty bound to obey the regulations which they have adopted." While the centrality of economic "repeat players" in providing the ECJ with opportunities to expand the reach of EU economic laws might give us pause, perhaps the EU's limited regulatory authority and expertise is nonetheless sufficient to counter critiques of its democratic *bona fides*.

The Post-1980s Era: Expansion to Social Policy and Fundamental Rights

Even if we accept the logic of the foregoing argument, the EU today can no longer be characterized as solely an economic union endowed with purely technocratic regulatory powers. Increasingly, the EU also possesses an extensive social- and rights-based corpus of regulatory provisions and case law.

Harbingers of this legal development date back to the early 1970s, when the ECJ timidly proclaimed that the protection of fundamental rights is one of the

governing principles of the Union.[15] Yet the ECJ's motives were more so grounded in political realism than rights-focused progressivism, seeking to assuage the German Constitutional Court's fears that European integration would trample over the civil rights of German citizens protected under Basic Law (Weiler 1986; Davies 2014). Further, such paeans to fundamental rights were at least a decade away from growing the teeth necessary to have a concrete impact on the lives of everyday citizens.

The origins of this incremental transformation are illustrated by the ECJ's pay equity case law in the late 1970s and 1980s. Upon the persistent invitation of pay equity advocates, the ECJ creatively leveraged the economic logic of market competition to dip its toe into the domain of social policy (Cichowski 2007). In 1976 the ECJ proclaimed equal pay for equal work as a binding principle of EU law, since one must "avoid a situation in which undertakings established in States [in this case, France] which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-Community competition . . . [T]his . . . forms part of the social objectives of the Community, which is not merely an economic union."[16] By 1990 the ECJ had established employment protections for pregnant workers,[17] and these rulings have since been bolstered by a series of directives drafted by the EU Parliament and the Council of Ministers promoting equal treatment in employment.[18]

More broadly, some commentators suggest that a "rights revolution" is in full swing in EU law: The protection of disabled workers[19] and transsexual workers against employment discrimination,[20] asylum rights for gay persons facing the threat of imprisonment,[21] and criminal defendant rights[22] have all seen expansion and explicit incorporation within EU law. Furthermore, in 2000 the EU's European

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15. Case 29/69, *Erich Stauder v. City of Ulm*, [1969], ECR 566; Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle fur Getreide und Futtermittel*, [1970], ECR 1126; Case 4/73, *Nold, Kohlen und Baustoffsgrohandlung v. Commission of the European Communities*. [1974], ECR 492.

16. Case 43/75, *Defrenne v Sabena* [1976], ECR 456, at law part, paragraph 10.

17. Case 177/88, *Dekker v. VJV-Centrum*, [1990], ECR I-3941

18. Directive 92/85/EEC [1992], OJ L348/1 (The Pregnancy Directive); Directive 2006/56/EC [2006], OJ L204/23 (The Equal Treatment Directive).

19. Case C-303/06, *Coleman v. Attridge Law* [2008], ECR I-5603.

20. Case 13/94, *P v. S and Cornwall County Council* [1996], ECR I-02143.

21. Joined Cases C-199/12, C-200/12, C-201/12, *X, Y, Z v Minister voor Immigratie en Asiel* [2013], OJ C-217.

22. Directive 2013/48/EU, OJ L294 (The Directive on Access to a Lawyer in Criminal Proceedings).

Council proclaimed a Charter of Fundamental Rights, and in 2007 Article 6 of the Treaty of Lisbon endowed it with the same legal status as the EU Treaties, meaning that it binds EU institutions as well as domestic states when implementing EU regulations and directives.[23] The ECJ has also begun to reference the extensive fundamental rights jurisprudence of the European Court of Human Rights (ECtHR) when interpreting EU law, enabling litigants to invoke ECJ case law to indirectly force states to comply with the European Convention on Human Rights.[24] It is hard to deny that something like a European social rights constitution is under construction alongside its longstanding economic counterpart.

The Resulting Problem

Yet this rosy narrative presents two problems. First, the EU's expansion of competences breaches the domain of those technocratic economic provisions that might plausibly be delegated to a political authority insulated from public deliberation, as Majone and Moravcsik contend. Second, it is dubious that the ECJ has substituted rights protection for market integration as its animating objective.

Consider, for example, the European Arrest Warrant (EAW)[25] instituted in 2002, which requires the courts of a given EU member state to surrender a citizen to their counterparts in another EU member state where the suspect is accused of committing a crime. In adjudicating cases implicating the EAW, the ECJ has refused to rule that a warrant need not be executed if a national court is concerned that the receiving state would fail to protect the rights of the criminal defendant.[26] Given the recent relapse to authoritarianism in Hungary under the nationalist-populist leadership of Viktor Orban (Scheppele 2015) and indications that Poland is following suit via the ruling Law and Justice Party's all-out assault on the Polish Constitutional Tribunal (Buckley and Foy 2016; Kelemen 2016b), any "mutual

23. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13 December 2007, OJ C306.

24. The first case explicitly referencing the ECtHR was Case 185/85, *Baustahlgewebe GmbH v. Commission of the European Communities* [1998], ECR I-08417. This path may be attractive to litigants, as opposed to a direct action before the ECtHR, because it does not require exhausting all domestic legal remedies as in the ECtHR framework, and because the ECtHR, unlike the ECJ, can only adjudicate the individual controversy rather than proclaim that domestic law being challenged should be set aside.

25. Council Framework Decision 2002/584/JHA [2002], OJ L190/1.

26. Case 303/05, *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007], ECR I-3633; See also Case C-399/11, *Stefano Melloni* [2013], ECLI:EU:C:2013:107.

trust" that all EU member states have comparable and adequate protections for criminal defendants rests on very shaky ground. Unfortunately, the ECJ has so far privileged bolstering inter-judicial cooperation via mutual recognition over safeguarding individual rights (Douglas Scott forthcoming, 38–39).

More broadly, even as the ECJ has advanced the rights of transsexuals, gay asylum seekers, and female employees, its jurisprudence is far from unequivocally progressive. It has refused to find that the Equal Treatment Directive protects gay persons from employment discrimination.[27] It has denied that women who have a child through a surrogate mother have the right to maternity or adoption leave.[28] Even though it has expansively interpreted that the Charter of Fundamental Rights applies when national laws fall "under the scope of EU law,"[29] so far it has invoked its protections narrowly and sparingly (de Burca 2013). Indeed, by underscoring that the ECJ is more eager to invoke fundamental rights to protect mobile common market actors (what of those European citizens lacking the means for cross-border mobility?), some have charged the ECJ's rights jurisprudence as amounting to the law of "taking a bus," "protecting the market from the citizens, rather than the other way round" (Kochenov forthcoming, 65; 6). Finally, the ECJ has vetoed a multi-year process of negotiations for the EU's accession to the European Convention of Human Rights, explicitly grounding its decision not in a logic of rights protection but in the defense of the EU legal order's autonomy and its own position as Europe's supreme court.[30] It is unsurprising, therefore, that expert observers have accused the ECJ of being more concerned with preserving its own power than promoting the rights of European citizens (Spaventa 2015; Douglas Scott forthcoming).

IS LITIGATION THE ANSWER TO THE EU'S DEMOCRATIC DEFICIT?

The foregoing discussion should render it clear that critics of the EU's democratic credentials have not been dealt anything like a *coup de grace*. The expansion of EU law in the criminal, social, and fundamental rights domains invalidates the claim

27. Case 249/96, *Lisa Jacqueline Grant v. South-West Trains Ltd* [1998], ECR I-621.

28. Case C-167/12, *C.D. v. S.T.* [2014], ECLI:EU:C:2014:169; and Case C-363/12, *Z v Government Department and the Board of Management of a Community School*, [2014], ECLI:EU:C:2014:159.

29. Case C-617/10, *Aklangaren v. Hans Akerberg Fransson* [2013], ECLI:EU:C:2013:105, at paragraph 19.

30. Opinion 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [2014] ECLI:EU:C:2014: 2454.

that the EU is merely a technocratic regulator of economic transactions in the common market. And it is tenuous to argue that supranational EU institutions—the ECJ included—should be trusted to handle these new issue areas on their own and in an enlightened way. The EU, now more than ever, stands to benefit from increased popular "voice" (Hirschman 1970) in decision-making.

That being said, the electoral mechanism seems like a poor means to bolster democracy in the EU. This is not only due to the fact that participation in elections to the European Parliament continues to decline (plunging to a record low 42% in the 2014 elections),[31] but also because, as R. Daniel Kelemen (2011) has written, legal development in the EU predominantly constitutes a judicialized form of governance authored in domestic courtrooms and the ECJ rather than the halls of the Parliament. Indeed, as we will see shortly, the European Parliament is far from the dominant policymaking institution in the EU. In this light, to what extent can litigation provide an alternative avenue for democratic engagement in, and popular authorship over, the process of European legal development? Can the *lawsuit* and the *courtroom* serve as functional equivalents to the *vote* and the *polling place* in legitimating the process and outcomes of European integration?

The Tenuous Dworkinian Legitimation of Judicialized Governance

At first glance, one strand of the philosophy of law literature, principally associated with Ronald Dworkin,[32] would be optimistic about the virtues of popular participation in the EU legal order via courtroom litigation.

For Dworkin, we must distinguish constitutional democracy from alternative forms of democratic rule. In defending the central role that judges play in the political life of the United States, Dworkin (1978, 142) notes that "constitutionalism—the theory that the majority must be restrained to protect individual rights—may be a good or bad political theory, but the United States has adopted that theory, and to make the majority judge in its own cause seems inconsistent and unjust. So principles of fairness seem to speak against, not for, the argument from democracy." Furthermore, "there is no reason to credit any other particular group with better facilities of moral argument" than judges (Dworkin 1978, 159). In fact, a good Dworkinian might praise a judicialized mode of governance precisely when a polity begins to enter the domain of social, economic, and political rights. As "fora

31. *EuroActiv*. "It's official: Last EU election had lowest-ever turnout." Aug. 7, 2014.

32. Other prominent legal theorists, like Christopher Eisgruber (2007), have made similar claims.

of principle," courts are better able to treat rights as "trumps" over utilitarian policy considerations, which are the domains of the political branches of government. In perhaps his most renown and poetic excursus of this view, Dworkin (1985, 71) writes: "We have an institution that calls some issues from the battleground of power politics to the forum of principle. It holds out the promise that the deepest, most fundamental conflicts between individual and society will once, someplace, finally, become questions of justice. I do not call that religion or prophecy. I call it law."

A Dworkinian approach might thus suggest that the EU's emergent social- and rights-based constitution should be constructed, interpreted, and applied precisely in judicial fora, where litigants bring rights claims before domestic and European judges who subsequently join together to incorporate principles of social justice within the economic *grundnorm* of the Union. Such an approach might even go so far as to flip the "democratic deficit" critiques on their head: Perhaps it was the early years of the economic policy-driven EU, rather than the contemporary era of social- and rights-based litigation, that suffered from a democratic deficit.

Yet beyond the empirical objection, noted earlier, that the ECJ does not currently appear willing to take on the role of fundamental rights protector, conceptually the validity of this approach depends on the comparability of the EU to a constitutional democracy like the United States. In point of fact, the first component of the premise—that the EU is a "constitutional" polity—seems to stand on solid ground. Observers on both sides of the "democratic deficit" debate, including Moravcsik (2002), Weiler (1991), Stone Sweet (2000), Kelemen (2006), and Mancini (1989), have noted a "remarkable process of constitutionalization" in the EU, "which has transformed it from a treaty-based international organization into a quasi-federal polity based on a set of treaties which is a constitution in all but name" (Kelemen 2006, 1302). Eschewing the traditional inter-state contract model of international law (Phelan 2016),[33] the doctrine of "direct effect" of EU law instead creates a "social contract" with "community citizens" (Burley and Mattli 1993, 61). This transformation is crucial, for as Weiler (2011, 263) has perceptively noted, "one of the things that happens in the move from the 'international' to the 'constitutional' is an important political shift: the bonds of the states which unite in a federal state are not only among such states, but among their citizens, jointly and

33. As Phelan (2016) has written, one of the foundational principles of the EU legal order that distinguishes it from other international organizations like the WTO is the fact that "self-help" countermeasures—"the principle that a contract does not need to be fulfilled in favor of a party that is themselves failing to execute it"—have been explicitly deemed illegal by the ECJ. See: Joined Cases 90/63 91/63, *Commission v. Luxembourg & Belgium* [1964], ECR 625.

severally." Indeed, the ECJ's jurisprudence has increasingly expanded not just the "vertical direct effect" of EU law—which enables European citizens to challenge state legislation contravening "higher" EU law—but also the "horizontal direct effect" of some EU legal provisions, enabling them to impose obligations upon private actors as well.[34] Furthermore, Stone Sweet has suggested that the growing centrality of fundamental rights in the EU, epitomized by the promulgation of the Charter of Fundamental Rights, demonstrates the EU's convergence upon the "basic formula" of post-World War II constitutionalism in Europe: "an entrenched, written constitution; a charter of rights; and a mode of constitutional judicial review" (Stone Sweet 2012, 65; 60).

The problem, however, arises with regards to the second necessary element for a Dworkinian theory to apply: If the EU is "constitutional," is it a "democracy"? It is true that one branch of the EU—the European Parliament—has been directly elected by European citizens since 1979. It is also true that the Parliament's power has been continuously expanded over time. Before 1986, the Parliament possessed merely a "consultative" role under the Treaty of Rome, and oftentimes the EU's Council of Ministers—the true legislative forum representing the intergovernmental interests of member state executives—did not even bother to go through the motions of consulting the Parliament.[35] In the 1986 Single European Act's "co-ordination procedure," the Parliament was endowed with the ability to demand a "second reading" of a majority of Council legislation, and its "assent" was now required before the Council could draft legislation (Hix and Hoyland 2011, 53). The 1993 Maastricht Treaty then replaced the "coordination" procedure with a "co-decision" procedure requiring both Parliamentary and Council assent for legislation to pass (Ibid). The 1999 Treaty of Amsterdam and 2007 Lisbon Treaty further extended the reach of the co-decision procedure to virtually all areas of EU law, such that it is now referred to as the "ordinary legislative procedure" (Ibid). Additionally, Hix et al. (2007) have found compelling empirical evidence that the legislative politics of the Parliament are increasingly ordered along cross-national partisan lines (crystallizing into the center-right European People's Party (EPP) and

34. For example, the equal pay principle was endowed with horizontal direct effect in the ECJ's *Defrenne II* ruling mentioned previously. As another example, treaty provisions concerning the free movement of persons were endowed with horizontal direct effect by the ECJ in: Case 281/98, *Angonese v Cassa di Riparmio di Bolzano SpA* [2000], ECR I-4139.

35. At one point it generated a lawsuit before the ECJ where it invalidated Council legislation for having failed to consult the Parliament: Case 138/79, *SA Roquette Freres v Council of the European Communities* [1980], ECR 3334.

the center-left Social Democratic Party (S&D)) rather than in ways that purely reflect member state interests. Finally, in the 2014 elections Parliamentarians succeeded in linking the selection of the European Commission president directly to the outcome of Parliamentary elections (Matthijs and Kelemen 2015). In short, the EU does contain a democratically elected and accountable institution with growing powers and whose political dynamics mirror those of ordinary legislatures.

And yet the EU is far from representing a model of "Parliamentary sovereignty," and it is difficult to argue that the Parliament lies at the heart of policymaking in the EU. Recent European crises—particularly the sovereign debt crisis and the migration crisis—have showcased the degree to which intergovernmental bargaining amongst the most powerful EU member states and the burgeoning agenda-setting powers of the heads of state (or government) in the European Council continue to out-shadow the Parliament when it matters most (Pavone 2012; Kelemen 2015). At best, then, the Parliament is an increasingly central veto-player in the politics of the EU but remains far from being "first among equals." Further, and as mentioned previously, popular participation in Parliamentary elections is in continuous decline, and what residual participation does occur often represents a referendum of the national government rather than a decision about the course of Parliamentary policymaking (Moravcsik 2002). In short, if the Parliament represents the democratic "heart" of the Union, then the EU is in serious need of a pacemaker.[36]

Hence a Dworkinian approach—justifying a judicialized mode of governance as a principled, constitutional check upon a pre-existing and robust apparatus for majoritarian democracy—does not seem to "fit" the institutional reality of the EU.

Insights from Law & Society: Varieties of Legal Mobilization in the EU

But perhaps one can draw from more sociological approaches, central to the law and society literature, and ask whether legal mobilization in the EU nonetheless

36. Of course, parliaments are not all-powerful even in domestic settings, and the combination of a global trend of "judicialization of politics" (Hirschl 2004) and the incremental growth of executive power (in part as a result of the centrality of executive-led intergovernmentalism in EU-style international organizations (see Moravcsik 1994)) should push us not to overstate the power of national parliaments. But, as a matter of degree, it is undeniable that the EU Parliament would be an exceptionally weak parliament if transplanted in a domestic setting; Contrariwise, the ECJ would be exceptionally strong—perhaps comparable in lawmaking power to the US Supreme Court—if transplanted to a domestic setting. The point is that legal integration in the EU has deepened and accelerated trends in judicialization and erosion of parliamentary sovereignty that, while a fairly general phenomenon, are much more pronounced in the EU.

enables European citizens to claim their EU legal rights, to push for vindication and expansion of these rights in court, and to foment a European "rights consciousness" via litigation (*a la* Felstiner, Abel, and Sarat 1980; McCann 1994). Here, however, the evidence appears contradictory *prima facie*.

On the one hand, some scholars argue that the burgeoning participation of interest- groups, human rights NGOs, consumer protection associations, and ordinary citizens in the EU legal system promotes liberal democracy, namely by rendering it "more difficult for policy-makers to pursue policies formulated to serve general public interests where these might conflict with individual rights claims" (Kelemen 2012b, 63). This mode of governance can also empower marginalized groups in Europe: Rachel Cichowski (2006, 54), for example, argues that the "ECJ's gender equality case law is now heralded as having not only brought procedural and substantive change in EU law . . . but also having mobilized women to bring subsequent rights cases," thereby "[increasing] opportunities for participation through law enforcement, rights claiming, and expanded protection."

On the other hand, some scholars have pointed to a "paradox that may arise from EU legal institutions increasing opportunities for participation: The empowerment of the already powerful" (Borzel 2006, 130). Indeed, Lisa Conant (2002) demonstrates that "commercial enterprises, societal interest organizations and public enforcement agencies are most likely to gain access to courts to enforce EU legal norms because they are most likely to possess the knowledge and financing necessary for litigation."

So where does evidence from law and society scholars put us? In some of my own fieldwork (Pavone 2015), I tried to assess these two diametrically opposed evaluations of whether EU litigation is monopolized by the powerful or open to participation by the marginalized. By mapping the location and frequency of lawsuits referred to the ECJ by Italian courts, I demonstrated that through the 1990s, EU litigation was overwhelmingly concentrated in richer, northern Italian cities like Genoa and Milan, where interviewees highlighted the presence of an internationalized, resource-rich "litigation support structure" (Epp 1998) as a critical reason for the early reception and practice of EU law. In particular, most interviewees stressed the superior resources and "well-equipped law firms" "modeled on the Anglo-Saxon big-law template" available in northern Italy, "where money flows more freely" and "where inter-business disputes gravitate, and obviously . . . businesses can [then] empower themselves with more high-profile, specialized law firms, which have a greater possibility to discover a question of incompatibility [of

national law] with EU law . . . [because] they have more resources."[37] This evidence seems to accord with Conant (2002) and Borzel (2006)'s assessment that economic "repeat players" remain the primary beneficiaries of European legal integration.

Yet over the past 20 years, economically underdeveloped and marginal communities across southern Italy have also increasingly vindicated EU rights in court. Interviewees suggested that since the 1990s, efforts to organize training opportunities in EU law in the cities of Naples, Bari, and Palermo helped foment participation in the EU legal system. For example, one summer school institutionalized in the past fifteen years with the "goal of exchanging knowledge" and "supporting a Europeanist profession" is held yearly in the small Campanian town of Castellabate, an hour south of Naples: "Perhaps thirty people participated in the first iterations of the summer school . . . now 300 or 400 lawyers attend."[38] Lawyers who participated in this enterprise became convinced that "European law represented the future,"[39] and that, by gaining knowledge of EU law, southerners would be able to "reclaim the lost identity of the legal profession along with its centrality in society" (Senatore 2011, 183). Indeed, in southern Italian cities like Naples, lawyers and judges have increasingly leveraged EU litigation to protect the benefits of unemployed workers,[40] to defend the property rights of private citizens,[41] and to improve the provision of vital social services like waste collection.[42] This alternative narrative seems to accord more with Cichowski (2006) and Kelemen (2012b)'s assessment that litigation in the EU is expanding the ability of ordinary citizens to claim social, civil, and economic rights denied to them by the state.

The implications of the foregoing vignettes—northern Italian cities pregnant with economic "repeat players" and a robust, internationalized litigation support structure, and southern Italian professionals determined to claim their stake over EU law by fomenting local training opportunities in EU law—suggest that there exist varieties of legal engagement in the EU. If we only focus on EU litigation

37. Interview with Lawyer and Law Professor 6 (In-person, Naples, July 21, 2015); Interview with Judge 10 (On phone, September 1, 2015); Interview with Lawyer 8 (On phone, July 23, 2015); Interview with Lawyer 5 (In-person, Rome, June 25, 2015).

38. Fattibene 2013: XI-XII; Interview with Lawyer 12 (In-person, Naples, July 29, 2015).

39. Interview with Lawyer 12 (In-person, Naples, July 29, 2015).

40. Case 361/12, *Carratu v. Poste Italiane SpA* [2013], ECR 2013-00000.

41. Case 423/98, *Alfredo Albore* [2000], ECR I-5995.

42. Case 108/98, *RI.SAN v. Comune di Ischia and Others* [1998], ECR I-5238.

emerging from financial powerhouses like Milan, Frankfurt, and London, we might come to the Galanter-esque conclusion that in the EU it is the "haves" that come out ahead (Galanter 1975). But if we consider the emergence of a distinctly more social, rights-focused pattern of litigation across peripheral European communities like Naples and Palermo, we might note that the efforts of individuals determined to participate in a European community of law can make a difference. This becomes possible when the efforts of pioneers of EU legal practice are directed towards building the infrastructure necessary to remedy resource scarcities and when legal mobilization centers on the expansion of social and civil rights.

CONCLUSION: WHEN PARTICIPATION BY LAWSUIT DOES NOT EQUAL DEMOCRACY BY LAWSUIT

The social reality of legal mobilization in the EU is one filled with "equifinality" (Mahoney 2008, 424; Goertz and Mahoney 2012)—or the fact that there are many avenues for legal mobilization within the EU legal order. The expansion of EU legal provisions beyond the restricted and technocratic domain of common market regulation has bestowed upon a new class of social actors the incentive to participate in the process of "governance by lawsuit." This means that European legal development need not necessarily be a process monopolized by powerful interests, even if these actors' informational and material advantages will always provide them with a "head start" over the marginalized or the individual citizen. In this light, the judicialization of politics and the expansion of competences within the EU does present the opportunity of incorporating a greater diversity of actors within the legal governance of the Union, which is itself valuable.

But opportunities opened are not the same as opportunities realized. As Borzel (2006, 149) reminds us, "citizens and groups should not be treated as if they were equally endowed with the resources necessary to exploit the opportunities offered by the expansion of judicial power in international and domestic politics. As a result, the transformative effects of courts on democracy and participation may be less pervasive than expected." Put differently, whereas participation in elections in most modern democracies is governed by the principle of "one person, one vote" (and both formal and informal barriers to voting are usually few and far between), the material and informational pre-requisites for participation via litigation renders it difficult to posit the correlative principle of "one person, one lawsuit." "One-shotters" may well be able to join "repeat players" in vindicating their EU legal rights, but the efforts that must be undertaken to overcome their informational and resource disadvantage are considerable. Perhaps their disadvantage shows in

the correlative outcomes of their litigation efforts: Although the ECJ has enshrined social and fundamental rights protections as governing principles of the EU, as noted previously, it often turns a deaf ear on litigants asking it to place the protection of fundamental rights above the economic interest in market integration. In a full-fledged democracy, the "losers" in the judicial arena could shift their resources and mobilizational strategies to the electoral arena (McCann 1994). At the European level, however, this alternative democratic avenue is stymied by the circumscribed role that the European Parliament plays in EU policy making.

In short, although legal mobilization may offset declining electoral participation in European parliamentary elections by bolstering popular engagement with the EU's legal order, legal participation is not synonymous with or a substitute for democracy. Courts may well serve as "fora of principle," but they will only be democracy-enhancing to the extent that the political economy of litigation is free of major informational and material inequities and to the extent that robust democratic institutions operate alongside their judicial counterparts.[43]

REFERENCES

Alter, Karen. 2001. *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*. New York, NY: Oxford University Press.

Alter, Karen. 2009. *The European Court's Political Power: Selected Essays*. New York, NY: Oxford University Press.

Borzel, Tanja. 2006. "Participation Through Law Enforcement: The Case of the European Union." *Comparative Political Studies* 39 (1): 128–152.

Buckley, Neil, and Henry Foy. 2016. "Poland's New Government Finds a Model in Orban's Hungary." *Financial Times*, Jan. 6. Print.

Burley, Anne-Marie, and Walter Mattli. 1993. "Europe Before the Court: A Political Theory of Legal Integration." *International Organization* 47 (1): 41–76.

43. This conclusion is not meant to paint an idealized picture of democracy; it is merely meant to suggest that what makes constitutional democracy work is the counterbalancing interaction between rights-protecting institutions, like the judiciary, and more majoritarian, policymaking institutions, like representative parliaments. I share with Moravcsik (2002) a skepticism of arguments in favor of democratizing the EU by expanding direct democratic channels (one need only look to the misinformation that plagued the recent "Brexit" referendum to note how problematic it can be to put complex decision-making vis-à-vis the EU directly in the hands of citizens). But representative forms of democratic representation in the EU could certainly be strengthened, and the complex legislative process of the EU—whose opacity naturally favors special interests with the lobbying capacity and specialized knowledge to influence decision-making—could be simplified and streamlined to facilitate popular oversight and debate.

Cappelletti, Mauro, Seccombe, Monica, and Joseph Weiler (eds). 1986. *Integration Through Law: Europe and the American Federal Experience*, Vol. 3. New York, NY: Walter de Gruyter.

Cichowski, Rachel. 2006. "Courts, Rights, and Democratic Participation." *Comparative Political Studies* 39 (1): 50–75.

Cichowski, Rachel. 2007. *The European Court and Civil Society: Litigation, Mobilization, and Governance*. New York, NY: Cambridge University Press.

Conant, Lisa. 2002. *Justice Contained: Law and Politics in the European Union*. Ithaca, NY: Cornell University Press.

Consolidated version of the Treaty on the Functioning of the European Union. *OJ C 326, 26.10.2012*: 47–390.

Council Framework Decision 2002/584/JHA [2002], OJ L190/1.

Davies, Bill. 2014. *Resisting the European Court of Justice: West Germany's Confrontation with European Law, 1949–1979*. New York, NY: Cambridge University Press.

de Burca, Grainne. 2013. "After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?" NYU School of Law Public Law and Legal Theory Working Paper No. 13-51.

Directive 92/85/EEC [1992], OJ L348/1 (The Pregnancy Directive).

Directive 2006/56/EC [2006], OJ L204/23 (The Equal Treatment Directive).

Directive 2013/48/EU, OJ L294 (The Directive on Access to A Lawyer in Criminal Proceedings).

Douglas-Scott, Sionaidh. Forthcoming. "Autonomy and Fundamental Rights: The ECJ's *Opinion 2/13* on Accession of the EU to the ECHR." *Europarattslig Tidskrift*.

Dworkin, Ronald. 1978. *Taking Rights Seriously*. Cambridge, MA: Harvard University Press.

Dworkin, Ronald. 1985. *A Matter of Principle*. New York, NY: Oxford University Press.

Eisgruber, Christopher L. 2007. *Constitutional Self-Government*. Cambridge, MA: Harvard University Press.

EuroActiv. "It's official: Last EU election had lowest-ever turnout." Aug. 7, 2014, http://www.euractiv.com/section/eu-elections-2014/news/it-s-official-last-eu-election-had-lowest-ever-turnout/.

European Commission. 2015a. "Myths and Facts." Aug. 10, http://ec.europa.eu/budget/explained/myths/myths_en.cfm.

European Commission. 2015b. "Frequently asked questions." Aug. 13, http://ec.europa.eu/budget/explained/faq/faq_en.cfm.

European Commission. 2015c. "Who We Are." Mar. 14, http://ec.europa.eu/civil_service/about/who/index_en.htm.

Epp, Charles. 1998. *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. Chicago, IL: University of Chicago Press.

Fabbrini, Federico. 2008. "Kelsen in Paris: France's Constitutional Reform and the Introduction of *A Posteriori* Constitutional Review of Legislation." *German Law Journal* 9 (10): 1297–1312.

Fattibene, Rosanna. 2013. "Prefazione." In: Consiglio dell'Ordine Degli Avvocati di Napoli. *Raccolta Atti Dello Stage di Diritto Dell'Unione Europea "Andrea Cafiero."* Naples, IT: Giannini Editore.

Felstiner, William, Abel, Richard, and Austin Sarat. 1980. "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . ." *Law and Society Review* 15 (3/4): 631–654.

Galanter, Marc. 1975. "Why the "haves" come out ahead: Speculations on the limits of legal change." *Law and Society Review* 9 (1): 95–160.

Goertz, Gary, and James Mahoney. 2012. *A Tale of Two Cultures: Qualitative and Quantitative Research in the Social Sciences.* Princeton, NJ: Princeton University Press.

Greene, Megan, and R. Daniel Kelemen. 2016. "Europe's Failed Refugee Policy." *Foreign Affairs,* June 28, 2016. Available at: https://www.foreignaffairs.com/articles/europe/2016-06-28/europes-failed-refugee-policy

Hirschl, Ran. 2004. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism.* Cambridge, MA: Harvard University Press.

Hirschman, Albert O. *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States.* Cambridge, MA; Harvard University Press.

Hix, Simon, and Bjorn Hoyland. 2011. *The Political System of the European Union.* New York, NY: Palgrave Macmillan.

Hix, Simon, Noury, Abdul, and Gerard Roland. 2007. *Democratic Politics in the European Parliament.* New York, NY: Cambridge University Press.

Jacobs, Francis. 1992. "Is the Court of Justice of the European Communities a Constitutional Court?" in Curtin and O'Keefe, eds., *Constitutional Adjudication in European Community and National Law.* Dublin: Butterworth.

Kagan, Robert A. 2000. *Adversarial Legalism: The American Way of Law.* Cambridge, MA: Harvard University Press.

Kelemen, R. Daniel. 2006. "Comment: Shaming the Shameless? The constitutionalization of the European Union." *Journal of European Public Policy* 13 (8): 1302–1307.

Kelemen, R. Daniel. 2009. "The Strength of Weak States: Adversarial Legalism in the US and the EU." Paper presented at the 11th Biennial EUSA Conference.

Kelemen, R. Daniel. 2011. *Eurolegalism: The Transformation of Law and Regulation in the European Union.* Cambridge, MA: Harvard University Press.

Kelemen, R. Daniel. 2012a. "The Political Foundations of Judicial Independence in the European Union." *Journal of European Public Policy* 19 (1): 43–58.

Kelemen, R. Daniel. 2012b. "Eurolegalism and Democracy." *Journal of Common Market Studies* 50 (1): 55–71.

Kelemen, R. Daniel. 2015. "Allegory of the Caving: A New Deal for Greece?" *Foreign Affairs*, July 10, 2015.

Kelemen, R. Daniel. 2016a. "London Falling." *Foreign Affairs*, June 27, 2016. Available at: https://www.foreignaffairs.com/articles/united-kingdom/2016-06-27/london-falling.

Kelemen, R. Daniel. 2016b. "Poland's Constitutional Crisis." *Foreign Affairs*, August 25, 2016. Available at: https://www.foreignaffairs.com/articles/poland/2016-08-25/polands-constitutional-crisis.

Kochenov, Dimitry. Forthcoming. "On Tiles and Pillars: EU Citizenship as a Federal Denominator." In Kochenov, ed., *EU Citizenship and Federalism: The Role of Rights.* New York, NY: Cambridge University Press.

Maduro, Miguel Poiares. 1998. *We the Court: The European Court of Justice and the European Economic Constitution.* Portland, OR: Hart Publishing.

Mahoney, James. 2008. "Toward a Unified Theory of Causality." *Comparative Political Studies* 41 (4/5): 412–36.

Majone, Giandomenico. 1998. "Europe's 'Democratic Deficit': The Question of Standards." *European Law Journal* 4 (1): 5–28.

Mancini, G. Federico. 1989. "The Making of a Constitution for Europe." *Common Market Law Review* 24: 175–190.

Matthijs, Matthias, and R. Daniel Kelemen. 2015. "Europe Reborn: How to Save the European Union from Irrelevance." *Foreign Affairs* 94: 96.

McCann, Michael. 1994. *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization.* Chicago, IL: University of Chicago Press.

Merryman, John H., and Rogelio Perez-Perdomo. 2007. *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America.* Stanford, CA: Stanford University Press.

Moravcsik, Andrew. 1994. "Why the European Community Strengthens the State: Domestic Politics and International Cooperation." Minda de Gunzburg Center for European Studies, Harvard University: 1–52.

Moravcsik, Andrew. 2002. "In Defense of the Democratic Deficit: Reassessing legitimacy in the European Union." *Journal of Common Market Studies* 40 (4): 603–624.

Opinion 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [2014] ECLI:EU:C:2014: 2454.

Pavone, Tommaso. 2012. "The Dark Side of European Integration: Franco-German Dominance and the Structural Reproduction of Informal Empire." *Air and Space Power Journal—Africa & Francophonie* 4: 7896.

Pavone, Tommaso. 2015. "Law Deserts and Legal Battlefields: How Local Institutions Shape the Litigation of EU Law in Italy." Presented at the 2nd Annual University of Texas Graduate Conference in Public Law, Austin, TX.

Pescatore, Pierre. 1974. *Droit de l'Integration.* New York, NY: Kluwer Law International.

Phelan, William. 2016. "Supremacy, direct effect, and *Daily Products* in the early history of European law." *International Journal of Constitutional Law* 14 (1): 6–25.

Raz, Joseph. 1984. "Obligation to Obey: Revision and Tradition." *Notre Dame Journal of Ethics and Public Policy* 1: 139.

Scheppele, Kim Lane. 2015. "Enforcing the Basic Principles of EU Law Through Systemic Infringement Procedures." Presented at NYU School of Law, Aug. 2015.

Senatore, Alessandro. 2011. "Le Ragioni Dell'Attivita' Internazionale del Consiglio dell'Ordine Degli Avvocati di Napoli." In Consiglio dell'Ordine Degli Avvocati di Napoli. 2013. *Raccolta Atti Dello Stage di Diritto Dell'Unione Europea "Andrea Cafiero."* Naples, IT: Giannini Editore.

Sparrow, Andrew. 2015. "Jean-Claude Juncker calls for EU army." *The Guardian*, Mar. 8. http://www.theguardian.com/world/2015/mar/08/jean-claude-juncker-calls-for-eu-army-european-commission-miltary.

Spaventa, Eleanor. 2015. "A very fearful Court? The protection of fundamental rights in the European Union after Opinion 2/13." *Maastricht journal of European and comparative law* 22 (1): 35–56.

Stone Sweet, Alec. 2000. *Governing with Judges: Constitutional Politics in Europe.* New York, NY: Oxford University Press.

Sweet, Alec Stone. 2007. "The politics of constitutional review in France and Europe." *International Journal of Constitutional Law* 5 (1): 69–92.

Stone Sweet, Alec. 2012. "A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe." *Global Constitutionalism* 1 (1): 53–90.

Stone Sweet, Alec, and Thomas Brunell. 2012. "The European Court of Justice, State Noncompliance, and the Politics of Override." *American Political Science Review* 106 (1): 204–213.

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13 December 2007, OJ C306.

Weiler, Joseph H. H. 1986. "Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities." *Washington Law Review* 61: 1103.

Weiler, Joseph H. H. 1991. "The Transformation of Europe." *Yale Law Journal* 100 (8): 2403–2483.

Weiler, Joseph H. H. 1994. "A Quiet Revolution: The European Court of Justice and its Interlocutors." *Comparative Political Studies* 26 (4): 510–534.

Weiler, Joseph H. H. 2011. "Dialogical Epilogue: Chapter 1: Joseph H. H. Weiler and Bruno de Witte." In *The Worlds of European Constitutionalism*, de Burca & Weiler, eds. New York, NY: Cambridge University Press.

CASES

Case 26/62, *Van Gend en Loos v. Nederlandse Administratie Der Belastingen,* ECR 1.

Joined Cases 90/63 91/63, *Commission v. Luxembourg & Belgium* [1964], ECR 625.

Case 6/64, *Costa v. ENEL*, [1964], ECR 587.

Case 29/69, *Erich Stauder v. City of Ulm*, [1969], ECR 566.

Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle fur Getreide und Futtermittel*, [1970], ECR 1126.

Case 4/73, *Nold, Kohlen und Baustoffsgrohandlung v. Commission of the European Communities.* [1974], ECR 492.

Case 8/74, *Dassonville* [1974], ECR 837.

Case 43/75, *Defrenne v Sabena* [1976], ECR 456.

Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, [1978], ECR 629.

Case 120/78 *Rewe-Zentral AG v. Bundermonopolverwaltung fur Branntwein* (Cassis de Dijon) [1979], ECR 749.

Case 138/79, *SA Roquette Freres v Council of the European Communities* [1980], ECR 3334.

Case 193/80, *Commission v. Italy* [1981], ECR 3019.

Case 261/81, *Walter Rau* [1982], ECR 3961.

Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health*, [1982], ECR 3417.

Case 176/84, *Commission v. Germany* [1986], ECR 3879.

Case 185/85, *Baustahlgewebe GmbH v. Commission of the European Communities* [1998], ECR I-08417.

Case 298/87, *Smanor* [1988], ECR 4489.

Case 241/89, *SARPP* [1990] ECR 4695.

Case 13/94, *P v. S and Cornwall County Council* [1996], ECR I-02143.

Case 249/96, *Lisa Jacqueline Grant v. South-West Trains Ltd* [1998], ECR I-621.

Case 108/98, *RI.SAN v. Comune di Ischia and Others* [1998], ECR I-5238.

Case 281/98, *Angonese v Cassa di Riparmio di Bolzano SpA* [2000], ECR I-4139.

Case 423/98, *Alfredo Albore* [2000], ECR I-5995.

Case 173/03, *Traghetti del Mediterraneo SpA v. Repubblica Italiana*, [2006], ECR I-5204.

Case 303/05, *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007], ECR I-3633.

Case C-303/06, *Coleman v. Attridge Law* [2008], ECR I-5603.

Case C-617/10, *Aklangaren v. Hans Akerberg Fransson* [2013], ECLI:EU:C:2013:105.

Case C-399/11, *Stefano Melloni* [2013], ECLI:EU:C:2013:107.

Case C-167/12, *C.D. v. S.T.* [2014], ECLI:EU:C:2014:169.

Joined Cases C-199/12, C-200/12, C-201/12, *X, Y, Z v Minister voor Immigratie en Asiel* [2013], OJ C-217.

Case 361/12, *Carratu v. Poste Italiane SpA* [2013], ECR 2013-00000.

Case C-363/12, *Z v Government Department and the Board of Management of a Community School*, [2014], ECLI:EU:C:2014:159.

PRIVATE ENFORCEMENT OF CONSTITUTIONAL GUARANTEES IN THE KU KLUX ACT OF 1871

PAUL J. GARDNER[1]

ABSTRACT

When violations of constitutional guarantees are difficult to detect and enforce, Congress may be attracted to solutions which allow aggrieved individuals to bring their own actions to enforce the law, bypassing the need for federal enforcement efforts. While aggrieved individuals may be well-positioned to identify the constitutional harms perpetrated against them, it is much less clear that they have the resources and incentives necessary to advocate on their own behalf. The Ku Klux Act of 1871 demonstrates one such case. While members of Congress thought granting a private right of action would open the floodgates for protection of the new constitutional rights created by the Fourteenth Amendment, in fact, the vast majority of enforcement efforts were necessarily taken on by federal officials. It was not until much later that enterprising public interest lawyers revived the private enforcement regime, but in service to goals quite distant from the intentions of the framers of the Ku Klux Act. This development shows the weakness of private enforcement regimes in the absence of other support structures for litigation.

KEYWORDS: *Private Enforcement, Legal Claiming, Ku Klux Act of 1871, Enforcement Act of 1871, 42 U.S.C. §1983, Lynching, Voting Rights*

1. Postdoctoral Fellow, Syracuse University.

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FOLLOWING THE PASSAGE of the Fourteenth Amendment, promises of civil rights were challenged by terrorism of the Ku Klux Klan in the Reconstruction South. While the Amendment was aimed at state discrimination against freed slaves, the Ku Klux Klan largely operated with impunity in Southern states unwilling to punish their violent tactics. Reconstruction supporters feared that the inability of the federal government to end and prevent terror in the South would embolden segregationists and secessionists.[2]

Fear that the federal government would not have sufficient reach to stem the tide of violence led Congress to adopt a first of its kind "private enforcement regime" in which victims of racial violence and conspiracy were authorized to bring lawsuits in federal courts in order to enforce constitutional guarantees in the Ku Klux Act of 1871. Recent political science literature has explored the purpose and efficacy of statutorily created private rights of action, finding that courts and litigation can be sources of effective enforcement, especially in the face of executive-legislative conflict.[3] A close look at the first private enforcement regime in the Ku Klux Act challenges both of these findings.

While prevailing views of private enforcement regimes have suggested that Congress will favor them in an effort to insulate policy from Presidential power, the Ku Klux Act shows that Congress did not view private litigation as a substitute for executive action. And despite speculation by congressional opponents of a flood of enforcement litigation that would be produced by the new enforcement provision, scholars have agreed that the Ku Klux Act was mostly ineffective at producing private litigation. Instead, the reach of federal executive power was the most important factor in combating racial violence in the South.[4] I argue here that the lack of enforcement incentives led to the absence of private enforcement. Only after support structures for litigation were developed did constitutional litigation grow out of the Act, driven by entrepreneurial public interest attorneys who pushed past the boundaries of the framers intent. In the remainder of this short note, I recount the congressional motivations for the inclusion of a private enforcement regime in the Ku Klux Act of 1871. Next, I argue that the statutory structure that emerged from

2. Eric Foner, *Reconstruction: America's Unfinished Revolution*, (New York: Harper & Row: 1988), 454-455.

3. Paul Frymer, "Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935–85," *American Political Science Review* 97, no. 3 (2003):483–499; Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the United States* (Princeton, NJ: Princeton University Press, 2010).

4. Foner, 457.

Congress produced a legal environment in which private litigants lacked the necessary motivations to bring suit during Reconstruction. Lastly, I describe how entrepreneurial actors, with a different set of incentives, revived the act, albeit in a limited manner.

MOTIVATIONS FOR PASSAGE OF THE KU KLUX ACT

The first extension of a private right of action appears to have been the Ku Klux Act of 1871 (often referred to as the Third Enforcement Act, the Enforcement Act of 1871, or the Civil Rights Act of 1871, and today is often simply referred to as Section 1983 after its present location in the United States Federal Code at 42 U.S.C. §1983). Of a different mold from other private enforcement statutes in this early period, the Ku Klux Act was more radical in its objectives. Rather than extending presently existing and well-defined rights to private litigants, the 1871 Act grappled with the enforcement of the Civil War Amendments in states of the former Confederacy where freed slaves were aggressively terrorized by the Ku Klux Klan, often with the encouragement and complicity of local authorities.[5]

Recently, political scientists have argued that the main benefit to legislators of authorizing private litigation is that it keeps enforcement power from accruing solely and excessively to the President. In particular, Sean Farhang has claimed that concerns of Congress about over- and under-enforcement by chief executives drive them to adopt litigation that can operate independently of the President.[6] The development of the private enforcement regime in the Ku Klux Act, however, is inconsistent with this explanation. Private enforcement instead was a solution to the intransigence of Southern states, with private prosecution correcting for the absence of state action.

In authorizing such lawsuits, Congress reprised a common law practice of private prosecution that had fallen into disuse, but, by inscribing the private action in federal law, fundamentally altered its purpose. As a number of scholars have noted, private prosecutions of crimes were common practice beginning in colonial America and extending into the 19th century.[7] Individuals would regularly seek redress

5. *Congressional Globe*. 1871. 42nd Cong., 1st sess., vol. 44 pt. 1-2.

6. Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the United States* (Princeton, NJ: Princeton University Press, 2010).

7. This practice was an extension of English law, which required victims to initiate criminal trials in order to prevent government harassment or to facilitate vengeance. See Michael T. McCormack "The Need for Private Prosecutors: An Analysis of Massachusetts and New Hampshire Law" *Suffolk University*

for violent crimes by private cases, but this system of prosecution was on the decline as early as the 17th century as states shifted to professional, public prosecutions. The shift to public prosecutions was rapid, leaving behind private prosecutions as an uncommon historical vestige by the Reconstruction Era. As early as the 1850s, several states banned their use, and the practice was criticized by some state high courts because of the possibility that the practice was unjust to defendants.[8] Therefore, congressional creation of a new private right of action diverged from the trajectory of public prosecutions. Congress ratified the use of private enforcement to solve a uniquely intractable problem while simultaneously redirecting suits to more impartial tribunals. The shift to public prosecutions was intended to promote a more just legal process, but the revival of private enforcement by Congress acknowledged that private power could be used to correct for bias in systems of public law enforcement.

Bias in enforcement indeed appeared to drive the creation of statutory private enforcement in the Ku Klux Act, but, in contrast with executive conflict theories of private enforcement, the initial impetus for the inclusion of a private enforcement regime in the Ku Klux Act does not appear to have been the result of concerns over non-enforcement by the federal executive branch, but instead by the Southern states. Legislators noted the institutional weaknesses of Southern courts in dealing with the Southern outrages. Judge Thomas Settle of the North Carolina Supreme Court testified to Congress indicating why Southern courts were incapable of dealing with racial violence:

> I suppose any candid man in North Carolina would tell you it is impossible for the civil authorities, however vigilant they may be, to punish those who perpetrate these outrages. The defect lies not so much with the courts as with the juries. You cannot get a conviction [. . . because] it was the duty and obligation of members of [a] secret organization [the Ku Klux Klan] to put themselves in the way to be summoned as jurors, to acquit the accused, or to have themselves summoned as witnesses to prove an alibi. This they swore to [. . .] Of course it must be so, for there has not been a single instance of conviction in the State.[9]

Congress, in turn, sought to open the federal courts, in hopes that those courts would be less subject to undue influence by the Ku Klux Klan. While it was not the

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Law Review 37 (2004): 497; John D. Bessler "The Public Interest and the Unconstitutionality of Private Prosecutors." Arkansas Law Review 47, no. 3 (1994): 511–602.

8. Bessler, "The Public Interest and the Unconstitutionality of Private Prosecutors." See also, O'Neill, Michael Edmund. "Private Vengeance and the Public Good." *University of Pennsylvania Journal of Constitutional Law* 12 (2009): 659.

9. *Congressional Globe*, 320.

private enforcement provisions that inspired the most ire from Southern representatives and senators, they lodged their objections nonetheless.

The controversy of the Ku Klux Act was not so much in its private enforcement regime, but in its extension of federal power overall, and especially executive power. Few mentions were made directly to the extension of judicial power, but the truism that private rights of action would lead to increased use of litigation, to the detriment of defendants, was expressed often. Opponents cited procedural concerns of litigation in federal courts rather than substantive concerns. Representative Henry D. McHenry (D-KY), for example, complained that

> The Federal Government has but two or three courts in any State, and in some only one. The contests among citizens under this provision will be numerous, and it is a tyranny to drag people hundreds of miles from their homes to have their cases tried before courts where the expense of litigation will be ruinous to them, instead of having them heard before their State courts, and where the facts will be determined by a jury of the vicinage.[10]

Mostly, opponents of the private right of action sought to maintain the power of local courts to deal with lynching and terrorism against black populations in the South, arguing, as did Representative Thomas Swann (D-MD), that "this law ignores the State tribunals as unworthy to be trusted, and confers jurisdiction upon the district and circuit courts of the United States, with and subject to the same right of appeal, review upon error and other remedies provided in like cases. . . ." Other members characterized damage awards for private actions as redundant ("The second section of this bill is but a provision for the punishment of crimes known to the common law and are punished by the laws and the tribunals of every state"[11]) and yet unprecedented ("To say the least of it, it is a strange; unusual, and hitherto unknown proceeding, and if acted upon will be productive of expense and annoyance without any compensation whatever"[12]). Still, trials for lynching in Southern local courts were exceedingly rare, and convictions nonexistent.[13]

In fact, insulation of the President was a concern for some members of Congress. *The Baltimore Sun* reported, "A substitute is now in course of preparation which meets with the approbation of the Southern republicans, proposing. . . . That any

10. Ibid, 429.

11. Ibid, 395.

12. Ibid, 337.

13. Ibid, 181.

State officer whose duty it is to afford equal protection to citizens shall, when he refuses or wrongfully neglects to do so, be liable in damages,"[14] suggesting that private enforcement would be used in place of more robust Presidential authority. While these Southern Republicans sought to restrict the power of the President, ultimately they were only successful in achieving the additional enforcement mechanism of private litigation, while the President retained the ability to employ militias in order to suppress "unlawful combinations" of Ku Klux groups (An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes 1871). Members expressed less concern about executive enforcement (though Democrats objected to executive enforcement features that were included anyway), and were more focused on practical and constitutional considerations. While radical Republicans favored all provisions of the bill, moderate Republicans were concerned that certain provisions were outside the bounds of what was allowed by the Fourteenth Amendment. Moreover, the *New York Tribune* reported that opposition to increased Presidential power for the enforcement of the Fourteenth Amendment was driven substantially by constitutional concerns. Though the sincerity and complexity of constitutional argument in Congress may be questioned,[15] the newspaper reported:

> The result has been two different interpretations of the meaning of the Amendment among Republicans. One party . . . maintain[s] that by virtue of this [the Fourteenth] Amendment, the United State Government is brought directly home to the citizens as never before, and it is bound to protect him in person and property, and in all his rights of citizenship . . . if the State Courts and laws do not afford him protection. The other party . . . believe[s] that the duty of protecting the lives and property of citizens, and to make and executive laws for that purpose devolves upon the State as fully as ever, with only this modification—the laws must be equal, affecting all classes alike. . . .[16]

With the central debates focusing on these issues for most Republicans, little distinction was drawn between the extension of courts and executive power, at least

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14. "More About the Ku-Klux Legislation—The Republicans Consulting." 1871. *The Baltimore Sun* April 4, 1871.

15. See, *e.g.*, J. Mitchell Pickerill, *Constitutional Deliberation in Congress: The Impact of Judicial Review in a Separated System*, (Durham, NC: Duke University Press Books, 2004).

16. "XLIID Congress—In Session: Continuation of the Ku Klux Debate in the House—The Democrats Driven Out by a Colored Orator—Congress Expected to Adjourn about the Middle of the Month." 1871. *New York Tribune* April 3, 1871.

when compared to the extension of federal power more generally. Representative McHenry emphasized a similar point, stating that the bill,

> . . . vests in the Federal courts jurisdiction to determine the individual rights of citizens of the same State; a jurisdiction which of right belongs only to the State tribunals, and to rob them of it by the power of the Federal Government is an infraction of the Constitution so flagrant that the people will hold to a strict accountability those men and that party who perpetrate the outrage. . . . No power is given Congress to enforce upon the citizen a punishment or penalty for the wrong and delinquency of a State. It is for the States to enforce this provision by abstaining from the enactment of such laws as conflict with it, and the courts to protect the citizen by upholding and regarding the higher law of the Constitution. Because the State is forbidden to pass such laws it does not follow that Congress has the right to enforce this provision in the States.[17]

Congress sought to pass some of the responsibility for enforcement of the Fourteenth Amendment to individuals who were harmed by state action. This private right of action extended to lawsuits against the Ku Klux Klan, insofar as the Klan exerted power over state officials in the conduct of their duties. The reason for the private right of action was not to insulate the President or because of a logroll with moderates—the President, in fact, would retain significant enforcement powers in the 1871 Act. Instead, it was a recognition that fair trials were elusive for black defendants in the South. Senator John Pool, a Republican from North Carolina, argued that the need for enforcement of state lynching laws in the federal courts was the widespread conspiracy against their enforcement.

> It requires not only judges, but sheriffs and jurors, to secure punishment in the courts. It is shown in the testimony reported by the majority of the committee that in several of the counties the sheriffs and the deputy sheriffs are members of the Ku Klux organization. The juries in North Carolina are not selected at the will of the sheriffs, as was intimated. If they were, the juries in the Ku Klux counties, where the sheriffs belong to the order, would be unanimously Ku Klux in all probability. . . . [I]t is said, why not remove the cases to some other county? For the simple reason that you cannot remove the trial of an indictment until some indictment is found. The grand jury is the great trouble in the way of prosecuting

17. *Congressional Globe*, 429.

> these men. . . . If a bill should pass a grand jury, and there should be a conviction by a petit jury and a sentence, then the criminal is in no danger, for he is sure to be rescued from prison. . . .[18]

With these types of conspiracies and the threat of physical violence, however, it was impractical for black plaintiffs to bring civil cases in federal court where criminal charges were unsuccessful. In fact, the provision would fail to produce any litigation of any import until the 1950s and 1960s, as I explore further below.[19] Congressional testimony indicates that those objecting to the enforcement of anti-lynching laws also objected to the inclusion of private enforcement provisions in the bill, mostly on objection to any federal intrusions in the South. Rep. James B. Beck (D-KY) argued that,

> Scarcely less frightful or less fatal to liberty are the provisions of the first and second sections, which undertake to transfer to the Federal courts all mere questions of personal difficulty or personal rights between citizens of the same State [. . .] Enact these provisions, and local State government is at an end; the States may as well make bonfires of their statutes-books and barracks of their court-houses, for their laws will be a mockery and their courts a farce.[20]

The objections to the private enforcement regime attacked both its wisdom and constitutionality. Southern objections denied that the Fourteenth Amendment conferred sufficient power to Congress to create such an expansive role for the U.S. courts. Rep. Beck continued:

> The smallest modicum of common sense would seem to me sufficient to enable any member to see the insane folly of conferring such jurisdiction on the Federal courts, even if the power to do so existed. With only one Federal court in some of our largest States, how could justice be administered, often five hundred miles from the venue, "without sale, denial, or delay?" What conqueror even, either in ancient or modern times, ever destroyed the local tribunals and laws of their provinces?[21]

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18. *Congressional Globe*, 172.

19. Love, Jean C. 1979. "Damages: A Remedy for the Violation of Constitutional Rights." *California Law Review* pp. 1242–1285; Niles, John G. 1966. "Civil Actions for Damages Under the Federal Civil Rights Statutes." *Tex. L. Rev.* 45:1015.

20. *Congressional Globe*, 352.

21. Ibid.

Yet, Republicans denied the veracity of the claims made by Southern Democrats. Not only was it apparent to most Republicans that the Fourteenth Amendment substantially expanded the role of federal power, it was also apparent that constitutional arguments were little more than window dressing to the South's desire to maintain white supremacy. According to Rep. William D. Kelley (R-PA), while the targets were changing, the goals of Southern legislators remained the same:

> The argument presented by the Democrats on this bill, except the suggestions of the gentleman from Tennessee, which I now leave, is to me an old and familiar one [. . .] [T]o those of us who have been here for the last ten years it is an old song, threadbare, and sadly monotonous. Its burden is the want of constitutional power. [. . .] But, sir, I may remind you each of the constitutional amendments has been met with the same absurd suggestion, that the Constitution could not be so amended; that it was not in the power of Congress and three fourths of the States, or of all the people of the States, so long as one citizen should dissent, to constitutionally adopt such amendments to the Constitution as these. [. . .] [S]hould [the Democratic Party] achieve the ascendency, it will endeavor, by force or otherwise, "stamping out," I think, is the expression, to repeal or nullify the thirteenth, fourteenth, and fifteenth amendments to the Constitution.[22]

Even in the face of these supposed constitutional obstacles, and while the expansion of the jurisdiction of federal court power would necessarily and by design be at the expense of the power of Southern state courts, Southern Republicans supported the private provisions, but also ultimately supported a bill with substantial executive powers, demonstrating that their concerns about Southern intransigence trumped any fear of executive overreach. Rather than a compromise provision, private rights of action appeared to be aimed at granting victims access to legal remedies in the face of state intransigence, *in addition to* robust executive enforcement power.

BARRIERS TO PRIVATE ENFORCEMENT OF CIVIL RIGHTS CLAIMS

While private enforcement provisions may on face have a "democratizing" effect on constitutional promises by providing more access to plaintiffs, the fact remains that claims under private enforcement regimes are substantially limited by the legal,

22. Ibid, 339.

political, and institutional environments faced by the plaintiffs. Private plaintiffs in the civil rights arena face substantial barriers to making constitutional claims. In addition to the chilling effect that violence itself likely had on claiming behavior, civil rights claimants in the South were poorly situated to bring civil actions in federal courts. This was in substantial part due to the lack of private incentives available to successful plaintiffs.

Private enforcement provisions place the burden on individuals to protect their own rights, a task that is both onerous and uncertain. The costs can be significant. For a person who experiences racial violence to bring a lawsuit, a number of sequential steps have to be taken. Law and society scholars have noted that even in the presence of "perceived injurious experiences," those experiences must be "transformed" in order to become lawsuit.[23] Felstiner, Abel, and Sarat (1980) argue that individuals must recognize injuries by "naming" them as such before "blaming" the responsible party, and "claiming" restitution of some kind against that party. This barrier is far from trivial in a legal system in which half of grievances are never translated into claims[24] and few victims of discrimination receive a satisfactory resolution of their claims.[25] It is not enough to entice victims with the potential for compensation. As Bumiller (1987) argues, victims fail to make legal claims less because of the lack of legal rights and remedies, and more often because the process for making legal claims is unfamiliar. Perhaps more importantly, formal legal claims threaten to "disrupt the delicate balance of power between themselves and their opponents."[26] While Bumiller is focused primarily on modern employment and housing claims, surely the same imbalances of power were operating in the case of racial violence as well. Moreover, the experience of racial violence in the South—and the lack of remedies experienced under the state legal systems—would have been unlikely to inspire confidence that courts of law were reliable forums for curbing white supremacist violence.

That is not to say, however, that successful claiming under the Ku Klux Act was impossible—only that the conditions did not exist during the Reconstruction period and for many years to follow. For private enforcement to be successful, there

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23. William L. F. Felstiner, Richard L. Abel, and Austin Sarat. "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . ." *Law & Society Review* 15, no. 3/4 (1980): 631.

24. As defined by Felstiner, et al., "The Emergence and Transformation of Disputes."

25. Kristin Bumiller, "Victims in the Shadow of the Law: A Critique of the Model of Legal Protection," *Signs: Journal of Women in Culture and Society* 12, no. 3 (1987): 421-39.

26. Ibid, 438.

must be additional political support for legal claiming—claims do not occur in a vacuum. At each step, the legal and political environment will affect the ability and inclination of a potential plaintiff to seek a lawsuit. That environment begins with the statute itself. Direct litigation incentives, like the availability of attorney's fees and damage multipliers directly affect the private benefits that accrue to plaintiffs. This has been acknowledged by scholars; Farhang focuses on statutory *incentives* to bring suits, rather than private enforcement regimes themselves.[27] Robert C. Lieberman similarly gives attention to the ways in which weak bureaucracies are able to transform their agendas to support private litigation. Focusing in particular on employment discrimination policy, scholars have argued that in the absence of strong enforcement powers at the Equal Employment Opportunity Commission (EEOC), bureaucratic effectiveness "depended heavily on its ability to persuade rather than coerce."[28] Statutory and bureaucratic incentives, however, are not necessarily sufficient to change the behavior of plaintiffs in a policy area that is not conducive to private claiming. Indeed, Lieberman notes that the EEOC depended significantly on outside political actors to enforce employment discrimination policy. In this vein, Paul Frymer has argued that friendly judges were essential to the success of employment discrimination plaintiffs, bolstering the benefits to legal claiming through the construction of favorable doctrine and through creative enforcement procedures.[29] In related work, I demonstrate that these effects exist across a number of policy areas, and that political partisanship of executive and judicial actors plays an important role in the amount of litigation that takes place under private enforcement statutes.[30]

Therefore, under the right circumstances, there may exist support structures that can encourage litigation under private enforcement regimes—changes to the political and institutional environment can make claiming easier for potential plaintiffs. Though support structures for litigation were absent for nearly a century following the passage of the Ku Klux Act, political interest groups developed

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27. Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the United States* (Princeton, NJ: Princeton University Press, 2010).

28. Robert C. Lieberman, *Shaping Race Policy: The United States in Comparative Perspective* (Princeton, NJ: Princeton University Press, 2005), 163.

29. Paul Frymer, "Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935–85," *American Political Science Review* 97, no. 3 (2003):483–499.

30. Paul J. Gardner, "Mobilizing Litigants: Private Enforcement of Public Laws" (Ph.D. diss., Princeton University, 2015).

strategies that made the private enforcement provisions of the Act more useful in the mid-twentieth century. I now explore how this shift occurred in the case of the Ku Klux Act, more than 80 years following its enactment.

VOTING RIGHTS AND SECTION 1983

Private enforcement of the Ku Klux Act (now better known as 42 U.S.C. §1983) reemerged in the late 1950s and 1960s, primarily due to the efforts of enterprising lawyers at the National Association for the Advancement of Colored People. Where earlier plaintiffs had statutory authority to bring their claims but lacked incentives and organizational structure, civil rights groups faced the opposite problem in challenging discriminatory voting laws. These groups sought to end disenfranchisement of black voters, but lacked the statutory tools necessary to make successful claims in court. In 1957, Congress adopted the first Civil Rights Act since Reconstruction, which was primarily focused on guaranteeing voting rights. Voting rights were a priority for civil rights groups and measures to uphold voting rights generally faced less opposition in Congress than other civil rights statutes, at least on the surface. Despite its limited nature (and echoing the 1871 debates), the 1957 bill faced significant opposition from Southern senators, who claimed that the provisions of the bill would allow the Attorney General sweeping powers to implement civil rights solutions in the South. As in the Ku Klux Act debates, legislators argued that executive action would be abused, and that civil rights legislation would lead to military occupations of the South.

These concerns, however, as in the case of the Ku Klux Act, were not prophetic, and the Civil Rights Act of 1957 was only weakly welcomed by civil rights groups who viewed the legislation as overly incremental and insufficient to address the needs of African Americans in their efforts to gain meaningful voting rights. This weakness was not limited to the 1957 law. Early voting rights legislation in the 1957, 1960, and 1964 versions of the Civil Right Act was largely unsuccessful in leading to the registration of substantial numbers of black voters,[31] in part due to the weakness of their enforcement procedures, at least in the view of civil rights advocates. The Civil Rights Act of 1957 provided that "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by

31. Charles S. Bullock and Ronald Keith Gaddie, *The Triumph of Voting Rights in the South* (Norman, OK: University of Oklahoma Press, 2009); Chandler Davidson, "The Voting Rights Act: A Brief History," in *Controversies in Minority Voting: The Voting Rights Act in Perspective*, ed. Bernard Grofman and Chandler Davidson (Washington, D.C.: The Brookings Institution, 1992): 7–34.

any person: [. . .] To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote",[32] and civil rights groups made some early use of those provisions. But the 1957 act was less useful to civil rights groups who instead revived the Ku Klux Act's enforcement provision, now referred to as Section 1983. The provision was more useful to groups because it had been interpreted to allow for the collection of damage awards (while the Civil Rights Act of 1957 did not allow for the collection of damage awards) in no small part due to the efforts of litigation by groups.[33] This meant that voting rights litigation under Section 1983 had an important feature that efforts to dampen criminal conspiracies in the Reconstruction South did not—committed and organized plaintiffs organizations.[34]

Still, the amount of litigation generated under Section 1983 was not substantial. When the Voting Rights Act of 1965 was reauthorized in 1975, civil rights interest groups lobbied for *automatic* awards of attorney's fees to mitigate the cost of the suits for public interest lawyers. Testifying before Congress, Armand Derfner of the Lawyers' Committee for Civil Rights Under Law stated,

> The Reconstruction Congress provided for attorneys' fees in voting rights cases under sections 2, 3, and 4 of the Civil Rights Act of 1865, and courts today frequently award fees in voting rights cases under the private attorney general theory but it would be useful for Congress to provide such fees automatically, as in equal employment cases, to those who prevail in claims arising under any portion of the Voting Rights Act.[35]

Even with interest group support structures in place, there needs to exist sufficient monetary awards to maintain private litigation supporting constitutional protections.

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32. "Civil Rights Act of 1957," *Congressional Record*, 85th Cong., 1st sess., 1957.

33. "Damage Awards for Constitutional Torts: A Reconsideration After *Carey v. Piphus*." *Harvard Law Review* 93 (1980).

34. See Paul J. Gardner, "Motivating Litigants to Enforce Public Goods: Evidence from Employment, Housing, and Voting Discrimination Policy," in *The Rights Revolution Revisited*, ed. Linda Dodd (New York: Cambridge University Press), *forthcoming*.

35. "Hearings of the Subcommittee on Constitutional Rights," *Congressional Record*, 94th Cong., 1st sess., 1975, 644.

CONCLUSION

This case study examines the operation of the private enforcement regime in the Ku Klux Act of 1871, but, more importantly, it is a study highlighting the problem of "democratizing" constitutionalism. Opening the federal courts to aggrieved individuals who otherwise lack political or legal remedies may appear to be a simple and effective solution, but that is not necessarily the case. While opening the courts to private actors can create access for aggrieved individuals who might otherwise lack access to remedies, we must consider the likelihood that the targeted plaintiffs will be situated to successfully use those private rights of action. Furthermore, when support structures are developed to bolster private litigation, interest group actors will bring ideological priorities to the enforcement of statutes that were not necessarily intended by the drafters of the legislation. The private enforcement provisions of the Ku Klux Act remained dormant for decades until enterprising interest groups transformed the statute, with the help of courts, to meet their immediate political needs.

More broadly, the study of private enforcement regimes in public law and political science seems a positive development insofar as it broadens the scope of political science research on law and courts beyond the study of judicial behavior and doctrinal developments in the appeals courts. The recognition that the institutional rules and environments of courts can importantly structure outcomes while still involving key actors like Congress and interest groups is important for understanding the full scope of the impact that law and courts has on politics and society. The consequence, however, may be that putting constitutional guarantees in the hands of individuals may not have a substantially democratizing effect, instead inviting familiar political actors into the legal arena, while placing the burdens of enforcement on aggrieved individuals.

REFERENCES

Bessler, John D. 1994. "The Public Interest and the Unconstitutionality of Private Prosecutors." *Arkansas Law Review* 47, no. 3: 511–602.

Bullock, Charles S. and Ronald Keith Gaddie. 2009. *The Triumph of Voting Rights in the South.* Norman, OK: University of Oklahoma Press.

Bumiller, Kristin. 1987. "Victims in the Shadow of the Law: A Critique of the Model of Legal Protection." *Signs* 12: 421–439.

"Civil Rights Act of 1957." *Congressional Record.* 85th Cong., 1st sess., 1957.

Congressional Globe. 42nd Cong., 1st sess., vol. 44 pt. 1–2, 1871.

"Damage Awards for Constitutional Torts: A Reconsideration After *Carey v. Piphus*." *Harvard Law Review* 93 (1980): 966–991.

Davidson, Chandler. 1992. "The Voting Rights Act: A Brief History." In *Controversies in Minority Voting: The Voting Rights Act in Perspective*, edited by Bernard Grofman and Chandler Davidson, 7–34. Washington, D.C.: The Brookings Institution.

Farhang, Sean. 2010. *The Litigation State: Public Regulation and Private Lawsuits in the U.S.* Princeton, NJ: Princeton University Press.

Felstiner, William L.F., Richard L. Abel and Austin Sarat. 1980. "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming." *Law & Society Review* 15, no. 3/4: 631–654.

Foner, Eric. 1988. *Reconstruction: America's Unfinished Revolution, 1863–1877*. New York: Harper & Row.

Frymer, Paul. 2003. "Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935–85." *American Political Science Review* 97, no. 3: 483–499.

Gardner, Paul J. 2015. "Mobilizing Litigants: Private Enforcement of Public Laws." PhD diss., Princeton University.

Gardner, Paul J. "Motivating Litigants to Enforce Public Goods: Evidence from Employment, Housing, and Voting Discrimination Policy," in *The Rights Revolution Revisited*, ed. Linda Dodd. New York: Cambridge University Press, forthcoming.

"Hearings of the Subcommittee on Constitutional Rights." *Congressional Record*. 94th Cong., 1st sess., 1975.

Lieberman, Robert C. 2005. *Shaping Race Policy: The United States in Comparative Perspective*. Princeton, NJ: Princeton University Press.

Love, Jean C. 1979. "Damages: A Remedy for the Violation of Constitutional Rights." *California Law Review* 67, no. 6: 1242–1285.

McCormack, Michael T. 2004. "The Need for Private Prosecutors: An Analysis of Massachusetts and New Hampshire Law" *Suffolk University Law Review* 37: 497.

"More About the Ku-Klux Legislation—The Republicans Consulting." 1871. *The Baltimore Sun* April 4, 1871.

Niles, John G. 1966. "Civil Actions for Damages Under the Federal Civil Rights Statutes." *Texas Law Review* 45: 1015.

O'Neill, Michael Edmund. 2009. "Private Vengeance and the Public Good." *University of Pennsylvania Journal of Constitutional Law* 12: 659.

Pickerill, J. Mitchell. 2004. *Constitutional Deliberation in Congress: The Impact of Judicial Review in a Separated System*. Durham: Duke University Press.

"XLIID Congress—In Session: Continuation of the Ku Klux Debate in the House—The Democrats Driven Out by a Colored Orator—Congress Expected to Adjourn about the Middle of the Month." 1871. *New York Tribune* April 3, 1871.

SOBER SECOND THOUGHTS

Evaluating the History of Horizontal Judicial Review by the U.S. Supreme Court

KEITH E. WHITTINGTON[1,2]

ABSTRACT

Normative theorizing about judicial review often proceeds with minimal attention to the overall record of how the U.S. Supreme Court has actually exercised the power of judicial review. This article assesses how well the historical record of the Court's invalidation of federal policies can be justified using only a minimalist theory of judicial review. Although some of the Court's cases can be justified in this way, most of the Court's work would require a more substantively thick and necessarily controversial theory in order to justify it.

KEYWORDS: *Judicial Review, United States Supreme Court, Minimalist Theory, History*

THERE ARE MANY THEORIES designed to justify the practice of American-style judicial review. Regardless of the details of the particular theory, the preferred mode of theorizing proceeds from a handful of critical cases. For many years political liberals took their bearings on judicial review from the positive example of *Brown v. Board of Education* (1954). For many years political conservatives took their bearings on judicial review from the negative example of *Roe v. Wade* (1973). The

1. Princeton University

2. I am grateful to Mark Graber for inspiring this article.

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challenge of constitutional theory has been to provide an overarching normative rationale that can account for a small set of canonical cases (*e.g.*, *Brown*; *West Coast Hotel v. Parrish* (1937)), while excluding a small set of anti-canonical cases (*e.g.*, *Dred Scott v. Sandford* (1857); *Lochner v. New York* (1905)).

What these theories rarely do, however, is grapple with the historical realities of how the institution of the U.S. Supreme Court has actually used the power of judicial review over time. If the Court in practice actually behaves in much the way that a normative theory would recommend, then that would be reassuring for the theory. On the other hand, if the Court rarely matches the ideal constructed by the normative theory, then we might further need to assess the implicit reform project that calls on the Court to behave in ways that would be historically unexpected. To what degree is a given normative theory concerned with justifying an actual institutional and political arrangement, and to what degree is it concerned with articulating a vision of a not-yet-realized arrangement and how realistic is the prospect of closing the gap between theory and practice?

In this article, I review the historical record of the Court in invalidating policies established by Congress. The article is particularly concerned with determining the extent to which the Court's decisions can be reasonably characterized as consistent with a minimalist theory of judicial review, that is whether they can in hindsight be regarded as substantively uncontroversial.[3] Whether considering the Court's actions across the long nineteenth century or its actions since it embraced a post-New Deal understanding of its institutional mission and the content of the constitutional rules, the Court's decisions striking down federal policies have only occasionally rested on judgments that can in hindsight be regarded as uncontroversial. The bulk of the Court's efforts might be of only marginal political or policy significance, but more often than not they advance contested and contestable constitutional and policy commitments. Justifying the Court's actual work would require a boldly countermajoritarian normative theory rather than a minimalist

3. A theory might be minimal or thin from a substantive normative perspective either because it relies on broadly shared substantive values and asks the Court to stick to enforcing those or it relies on primarily procedural values that are indifferent to the substantive content of the Court's decisions. This article primarily focuses on the first concern, though with obvious implications for a proceduralist theory of the type advocated by John Hart Ely (1980). It might be possible to reconcile the Court's track record with something like an originalist theory that is normatively focused on the procedures by which the constitutional rules have been adopted but agnostic about the substance of those constitutional rules, and this article does not attempt to assess how faithful the Court has been to that standard.

theory that empowers a friendly Court to dampen the passionate excesses of democratic politics.

A MINIMALIST THEORY OF JUDICIAL REVIEW

Most normative theories of judicial review also tend to be substantively controversial. That is, they rest the justification for the appropriate exercise of judicial review on a controversial set of substantive interests and values that the Court is supposed to advance. The more cases are taken to be canonical (or anti-canonical), the more contestable the normative judgement becomes. While there is widespread agreement that an appropriate practice of judicial review should be able to produce the results in *Brown*, the consensus quickly breaks down if *Roe* is added to the mix.

One approach to avoiding that problem is to reduce the ambitions of the theory. An ambitious theory that lays out an expansive agenda for the Court confronts a higher normative hurdle. But a minimalist theory might (at least preliminarily) seek to justify only a limited judicial portfolio and might face an easier argumentative task. Even here, however, there are challenges. Jeremy Waldron has unsettled the long-standing assumption that some form of judicial review must be justifiable. Instead, Waldron (1999, 102) has insisted that the Court should be understood to generally be operating within the "circumstances of politics," that is, to be intervening in matters of genuine and reasonable political disagreement. On that view, the Court can never be understood to be operating outside of politics, and judicial review should simply be understood as a practice that enables a small group of individuals to impose their policy preferences on society at large—or more starkly, to impose their will on the political majority.

This concern is at the heart of what Alexander Bickel (1962, 16) influentially called the "counter-majoritarian difficulty." Courts, in exercising the power of judicial review, frustrate and obstruct the democratic will. Unlike Waldron, Bickel thought it was possible to evade the counter-majoritarian difficulty and escape the circumstances of politics. While the details of Bickel's proposed solution have been less influential than his framing of the problem, he offered one version of a prominent type of justification for judicial review, or indeed for constitutionalism generally.

We might call this a "sober second thought" style of argument for constitutional checks on legislative majorities. The long-serving Republican Senator George F. Hoar (1897, 142) was fond of saying that the virtue of the U.S. Senate within the American constitutional scheme was that it provided a "sober, second thought."

The second legislative chamber represented the "deliberate, permanent, settled desire" of the American people, not the "immediate passion and desire of the passing hour" that might be expressed in a "pure Democracy." Jon Elster's (2000) metaphor of Ulysses at the mast similarly appeals to the idea that constitutions broadly can serve as a constraint on polities in the "grip of passion." The goal of constitutionalism is less to impose an "absolute limitation of the will of the people but merely a subordination of immediate objectives to long-term ones," to appeal from Peter drunk to Peter sober (Hayek 1960, 180).

The appeal to the value of sober second thoughts might be of particular significance to judicial review. Alexander Hamilton (1961, 468) proffered this argument early on. He warned against "those ill humors" that could temporarily seize even the people themselves and that could be oppressive in the short run even if "they speedily give place to better information, and more deliberate reflection." An "independent judiciary" could "guard the Constitution and the rights of individuals" from such ill-considered and dangerous legislative "innovations." Even Woodrow Wilson (1908, 172), a champion of living constitutionalism, emphasized that judges should be able to "discriminate between the opinion of the moment and the opinion of the age," between "enlightened judgment" and "impulse and impatience," and even when acting as the Bull Moose Theodore Roosevelt (1911, 384) insisted that a good judge must be able to resist "what popular opinion at the moment, with or without reason, may desire" and stand firm "in the face of a gust of mob feeling." Similarly, as the Supreme Court was retreating in the face of the New Deal, soon-to-be Chief Justice Harlan Fiske Stone (1936, 25) explained that the value of judicial review lay in the responsibility of judges to "control government action" on behalf of "the sober second thought of the community, which is the firm base on which all law must ultimately rest."

The sober second thought to be accessed and enforced through judicial review might be operationalized in a variety of ways. From a dualist democracy perspective, evidence of the people sober might be found in their deliberative past pronouncements (Ackerman 1991; Whittington 1999). From a living constitution perspective, the people sober might be discovered in the ever evolving "opinion of the age." Alexander Bickel (1962, 58) himself suggested that the sober second thought might be prospective, such that judges should act in anticipation of the view that the people would soon come to deliberately embrace. By putting "principle" above "the expedient and the agreeable" the Court vindicates the "long view." But, Bickel (1962, 239) cautioned, the Court "labors under the obligation to succeed"—the Court's actions are appropriate only if its constitutional judgments speedily "gain general assent." Regardless of how the idea is operationalized, however, judicial review as

sober second thought should produce results that consonant with long-run understandings of constitutional commitments.

We might think of this as a minimalist theory of judicial review. This is not to say that a sober second thought should necessarily lead to a particularly restrained court. A court might be quite active in striking down laws if the legislature were to frequently depart from settled principles. Regardless of how active the court might be in striking down laws, however, the sober second thought conception of judicial review puts minimal pressure on controversial normative theories. Where a maximalist theory might lean heavily on a variety of controversial normative assumptions and arguments in order to establish what the court should do, the minimalist theory eschews judicial reliance on controversial normative values and commitments.

EXAMINING HORIZONTAL JUDICIAL REVIEW

The U.S. Supreme Court exercises two distinct types of judicial review that raise distinctive normative issues. When the Court exercises vertical judicial review, it evaluates subnational political actions against the standard of the federal Constitution. While such cases are often politically salient and highly controversial, they do not engage Bickel's counter-majoritarian difficulty in a particularly direct way. Vertical judicial review pits a national judiciary against local political majorities, and as a result is as likely to raise basic questions of federalism as it is likely to raise questions of democracy as such. The Court often acts hand-in-hand with national political officials "by imposing their shared constitutional agenda on recalcitrant state actors who hamper national political goals" (Whittington 2005, 586). Although the federal review of state laws also involves a judicial body setting aside the actions of a legislative body, Bickel (1962, 33), along with many others, thought the more salient point was that the "Court represents the national will against local particularism." The difficulty of untangling the national will from local particularism makes vertical judicial review a problematic workspace for thinking about how judicial review fits within a democratic framework.

By contrast, horizontal judicial review implicates democratic values more directly. In such cases, the Court reviews the actions of coordinate institutions, pitting its own authority specifically as a court against the authority of elected officials. It is in that context that the judiciary obstructs democratic decision-making as such. Horizontal judicial review strips away the side-issue of the extent to which the states should be brought in line with the policies of "the paramount government" and whether the federal courts are the best instrument for enforcing national commitments (Thayer 1893, 155). Horizontal judicial review puts the question squarely of

whether the Court should act simply as a "check against democracy" (Commager 1943, 27). The exercise of vertical judicial review has often raised the question of whether the Court is acting correctly, but the exercise of horizontal judicial review raises the question of whether the Court should be acting at all.

The U.S. Supreme Court has a rich history of exercising horizontal judicial review, and this history offers material with which to assess how well the actual practice of judicial review can be reasonably characterized as offering a sober second thought to tumultuous political missteps. It is relatively easy to identify particular cases where the Court seems to have played the role of the villain—or the role of the hero—and normative arguments about judicial review are often constructed from those examples. In order to assess the comparative institutional advantage of courts and judicial review, however, it would be more useful to think systematically about the Court's behavior (Tushnet 2000, 129–153).

One of the difficulties of rendering an institutional assessment of the Court is that it is hard to establish an uncontroversial normative perspective on the Court's work. That is, it is hard to get outside of Waldron's circumstances of politics, to find an external perspective from which to assess how the Court has resolved constitutional controversies. Establishing the core of the case for or against judicial review is easily bogged down in disagreements over what judicial invalidations would be a desirable.

The minimalist theory of the sober second thought would try to find such a perspective by identifying cases in which the Court's actions were, in hindsight, uncontroversial. Such an effort is easier said than done, however. The familiar cases are the ones about which there are controversy—and in part it is because they are controversial that we have heard of them. The "easy" cases get forgotten. The controversial cases get made into the canon.

There is, of course, a case in which the Court uncontroversially got it right: *Brown v. Board of Education* (1954). At least from the perspective of the twenty-first century, *Brown* is the quintessential case of a justified judicial invalidation of legislation. While *Brown* is also an instance of vertical judicial review, there is a horizontal analogue in *Bolling v. Sharpe* (1954), where the Court struck down the racial segregation of the public schools of the District of Columbia, which ultimately depended on the constitutional authority of Congress to authorize such a policy.

This raises the question of whether the Court had previously decided *any* cases that could be understood to fall within the same category as *Bolling*. For more than a century and a half prior to its decision in *Bolling*, the Court had heard cases raising doubts about the scope of congressional authority under the Constitution. In all

that time, had the Court rendered even a single decision that could similarly win the approval of a contemporary consensus?

ASSESSING THE HISTORICAL RECORD

The U.S. Supreme Court decided 157 cases between 1790 and 1953 that declared that a provision of a federal law exceeded the scope of the constitutional authority of Congress.[4] Surely there are at least some that would win the relatively unanimous support of the modern reader. At the outset, however, we should recognize that there is substantial reasonable disagreement among our own contemporaries about the substantive meaning of the Constitution. Given that ongoing disagreement, how much agreement might there be about the instances when the Court struck down a law as contrary to the Constitution? When the Court chose to intervene in the democratic process and obstruct the implementation of federal legislation, how often would we—even in hindsight—say that the Court was justified in doing so?

Reviewing every one of these cases in a short space is impractical, but some generalizations can be readily made that help make the task more manageable. First, we might distinguish among cases based on how important the policy in question was. Second, we might distinguish cases based on how the justices chose to confine the objectionable statutory provision. Third, we might distinguish cases based on the type of constitutional issue raised on the case.

Not every statutory provision invalidated by the Court is intrinsically important. The most politically salient cases are the ones that generate the most attention, both from contemporaries of the Court's action and from later observers. But most statutes and statutory provisions are not so important from either a policy or political perspective, and as a result their obstruction by the Court poses less of a challenge to the democratic will (such as it is). Routine instances of judicial review in low-profile cases are politically different than the exceptional instances of judicial review in high-profile cases. But if low-profile cases of judicial invalidation pose less of a challenge to democratic values, they must also count for less in

4. The cases considered here are drawn from the Judicial Review of Congress database. Although the Congressional Research Service (2014) maintains a list of cases invalidating provisions of federal statutes, there is reason to believe that the CRS list is underinclusive of the actual historical exercise of judicial review. See, *e.g.*, Graber (2000); Graber (2007). The Judicial Review of Congress database offers a more comprehensive portrait of the actual exercise of judicial review by the U.S. Supreme Court, both of cases refusing to apply statutes and cases upholding statutes against constitutional challenge. The database is described in Whittington (2009).

the historical ledger in favor of the significance and value of the power of judicial review. For present purposes, we might distinguish between important provisions of landmark statutes, marginal provisions of landmark statutes, and provisions of less important statutes.[5] If the Court were to strike down a central provision of an important statute, it makes a large policy and political splash. If the Court were to strike down a provision of an unimportant statute, it makes barely a ripple in the stream of contemporary policymaking and politics.[6]

In deciding cases, the Court does not treat every constitutional objection in the same way. The Court sometimes strikes down a statute in whole and sometimes strikes it down in part or as applied. Those differences partly reflect a judicial choice about how expansive of an opinion to hand down. Deciding "one case at a time" might allow the justices to commit themselves less and leave more space open for future deliberation (Sunstein 2001). To some degree those differences reflect variation in the legal posture by which cases reach the Supreme Court and with how close a given application falls to the core of the policy established by a statute. To some degree, those differences reflect variation in statutory language and draftsmanship. Short, precisely written statutes may force decisions that invalidate the statute in whole. Long, complex, broadly worded statutes may give the justices more room to invalidate some interpretations and applications of the statute and to circumscribe the constitutional authority of Congress without necessarily vetoing all possible applications of the statute at hand.

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5. I take advantage of Stathis (2014) to operationalize these distinctions. Stathis provides an inventory of every "landmark" statute passed by Congress in every Congress through the 112th. Moreover, Stathis provides a brief abstract describing the important provisions of each statute. Cases are distinguished based on whether they involve a challenge to one of these provisions or one of these statutes. Stathis takes a fairly capacious approach to identifying the national legislature's "most significant accomplishments," ranging across such framework statutes as the Judiciary Act of 1789 and the Budget and Accounting Act of 1921 and such pivotal policy enactments as the Morrill Land Grant College Act and the Sherman Antitrust Act, across such controversial laws as the Federal Reserve Act and the Smoot-Hawley Tariff and such bipartisan measures as the Federal Aid Highway Act of 1956 and the GI Bill, across such politically explosive statutes as the McCarran Internal Security Act and such politically mundane bills as the Postal Act of 1851, such legally salient acts as the Military Commissions Act of 2006 and such legally inert laws as the Coinage Act of 1837.

6. I bracket the possibility that a judicial ruling might have outsized importance for future cases or policy decisions. Given the precedential quality of judicial decisions, it is possible that a decision in a case involving an unimportant policy could have substantial consequences for later cases or legislative decisions involving important policies. As a practical matter, legally important constitutional rulings seem likely to arise most often from the consideration of important statutes, but for present purposes I simply note the qualification.

Finally, the exercise of judicial review involves constitutional issues as well as statutory provisions. Congress might run afoul of a variety of different constitutional objections arising from different constitutional provisions, rules and principles. For present purposes, we can abstract from the details of those myriad constitutional rules and construct broader categories of constitutional objections. Constitutional decisions implicate three types of constitutional issues: civil rights and liberties, economic, and structural.[7] The Court's own agenda and understanding of the constitutional rules have changed over time, altering the mix of the types of constitutional issues involved in the judicial invalidations of statutes.

The Supreme Court cases invalidating provisions of federal law decided between 1790 and 1953 are organized along these three dimensions in Table 1. As Table 1 indicates, the bulk of these cases tend to fall on the more modest end of

TABLE 1. U.S. Supreme Court Cases Invalidating Federal Statutory Provisions, 1790–1953.

	Struck in whole		Struck as applied	
Important provision/landmark statute	17		18	
Marginal provision/landmark statute	12		32	
Provisions of less important legislation	30		48	

Note: Graph shows issue area of constitutional decisions in each category. Due process, substantive rights, and equality are at the top of the column, economic issues are the middle bloc, and structural issues are at bottom.

7. Civil rights and liberties include claims involving substantive and procedural protections of personal liberty and requirements of equal treatment. Economic involve limitations on government imposition on economic affairs, including taxation, takings, and contracts. Structural issues include constitutional rules based on either federalism or the separation of powers.

the spectrum. A large majority of the cases struck statutory provisions only in part and as applied rather than in whole. Moreover, half of the cases involve relatively unimportant statutes, and less than a quarter involve a relatively important legislative provision. This suggests a Court more likely to be working on the margins of American politics than within its central core.

If any of the Court's cases invalidating federal laws were to gain our retrospective approval, they would be more likely found among those cases dealing with relatively unimportant federal policies. The Court's decisions striking down important federal policies are especially unlikely to win unanimous support now. The judicial nullification of major policies ranging from the ban on slavery in the territories, to wartime legal tender, to Reconstruction-era civil rights statutes, to the federal income tax, to the prohibition on child labor, to central components of the first New Deal were controversial at the time they were decided and have failed to gain much additional support from subsequent generations. If anything, such decisions are likely to look even worse in hindsight than they did to political leaders at the time.[8] From the perspective of the present, the Court was far more likely to get it wrong than to get it right when striking down an important federal policy and the power of judicial review would seem to have been more of a liability than an asset.

The constitutional issues that dominated the Court's docket in these cases also tend to work against a favorable historical reassessment of the Court's handiwork in its first century and a half of reviewing federal statutes. The Court's docket was crowded with cases challenging federal statutes on the grounds that Congress had violated structural features of the Constitution (primarily federalism) or limitations on its power to intervene in economic affairs. From a post-New Deal perspective, most of the Court's efforts to enforce structural or economic limits on congressional power are in bad odor. The Court spent the bulk of its time enforcing constitutional rules that have since been repudiated. Rather than defending widely accepted constitutional values against temporary political departures, the Court was more often advancing contested political values that have lost rather than gained support over time.

The corner of the Court's historical docket that was more likely to invoke enduring constitutional principles involved matters of legal procedure. Such cases were generally unlikely to involve challenges to important statutory provisions, however. Perhaps the sole exception came in *Ng Fung Ho v. White* (1922). *Ng Fung Ho*

8. The single exception, noted below, is *Ng Fung Ho v. White* (1922).

involved a challenge to a core provision of the General Immigration Act of 1917. Congress authorized the deportation of aliens by executive order, but Gin Sang Get claimed to be the child of a U.S. citizen and was therefore entitled under the Fifth Amendment to a judicial hearing before being subjected to deportation. Writing for a unanimous Court, Justice Brandeis agreed. Similarly, in *Wong Wing v. United States* (1896), the Court took up a more marginal provision of an earlier statute which authorized the sentencing of Chinese aliens found on American soil to imprisonment and hard labor after a summary hearing. The justices thought that imposition of such criminal punishment required a jury trial. Those decisions marked rare instances of the Court obstructing important policy decisions in the name of constitutional principles that remain vibrant today.

Other cases asserting procedural values tended to nibble at the margins of congressional statutes. When Congress declared that the inhabitants of the newly acquired Alaskan territory were not entitled to traditional jury trials, the Court objected in *Rasmussen v. United States* (1905). When Congress determined that the expediency of collecting taxes necessitated imposing time limits on trials to dispute tax assessments, the Court insisted in *United States v. Phelps* (1834) that the legislature could not interfere with continuances that judges thought might be necessary to insure a fair trial. Upon revising the internal duties on tobacco, Congress announced that only those who had already paid taxes under the old rate were exempt. When a Virginia tobacco trader objected to being fined for paying only the old duty rate on product that had already been stamped at the time that the law went into effect, the Court agreed that Congress had in effect adopted an *ex post facto* law that punished those who were in a state of compliance with the relevant laws at the time of the new statute's enactment (*Burgess v. Salmon* 1878).

Such marginal cases might also point to the instances in which the Court advanced protections for property and economic activities in ways that might still seem appealing. In several cases, the Court bridged between broader procedural concerns and specifically economic interests. At the end of the nineteenth century, for example, the Court insisted that Congress could not claim for itself the right to determine what constituted just compensation when the federal government seized private property. Congress could determine when private property was needed for a public purpose, but only a court could ascertain what the constitutionally required level of compensation should be (*Monongahela Navigation Co. v. United States* 1893). When the Marshall Court was asked to apply a federal statute that purported to resolve a disputed boundary line between territory controlled by Virginia and the United States government (in favor of land titles acquired from the

federal government), the Court observed that Congress could not constitutionally "adjudicate in the form of legislation" and as a consequence Congress could not be understood to have attempted such an impermissible action (*Reynolds v. M'Arthur* 1829, 435).

In a myriad of tax cases, the Court was called upon to determine whether Congress had accidentally (or perhaps not so accidentally) stumbled across a constitutional line. The principles at stake in those cases are unlikely to be of much greater political salience to us today than they were at the time, but the Court's effort to preserve them probably remain unobjectionable. The War Revenue Act of 1898, for example, generated a lengthy stream of constitutional litigation. In *Fairbank v. United States* (1901, 312), the Court pointed out that a stamp tax on a foreign bill of lading is "in substance and effect equivalent to a tax on the articles included in the bill of lading, and therefore a tax or duty on exports, and in conflict with the constitutional prohibition." Similarly, the Court applied the same prohibition to bar taxes on charters to foreign ports, taxes on marine insurance on cargo for export, and taxes on sales that were simply steps in the export process (*United States v. Hvoslef* 1915; *Thames & Mersey Marine Ins. Co., Ltd. v. United States* 1915; *A.G. Spalding & Bros. v. Edwards* 1923). Similarly, the Court held that Congress could not impose a gift tax on gifts that had already been fully consummated or an estate tax on land that had already been transferred (*Blodgett v. Holden* 1927; *Nichols v. Coolidge* 1927).

While the Court's decisions on structural issues generally ran against the grain of post-New Deal constitutional jurisprudence, there are some potential exceptions. The congressional struggle to identify how best to handle the transition from territorial to federal courts upon statehood is not of substantial modern significance. Even to those who more regularly made decisions on statehood, such issues were of minimal political significance. Perhaps as a consequence, the Court's determination that Congress could not authorize the U.S. Supreme Court to continue to hear cases on appeal from the Florida territorial court after Florida had become a state caused little more than embarrassment in the legislature (*Benner v. Porter* 1850). The problem of the judicial transition from territorial to state and federal courts was largely a matter of neglect. The congressional effort to specify that the capital of the state of Oklahoma could not be moved by the government or people of the state for several years after statehood cannot be chalked up to mere neglect. The Court's conclusion that this statutory provision violated the "constitutional equality of the States" is as persuasive now as it was at then (*Coyle v. Smith* 1911, 580).

IT GETS BETTER?

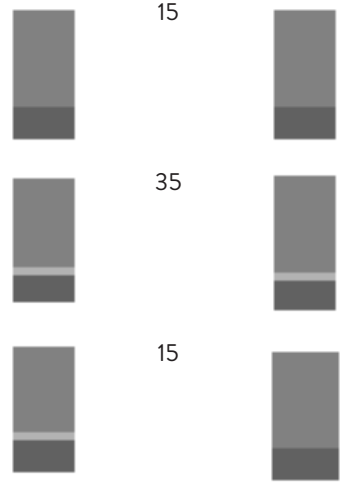
But perhaps *Bolling* is a critical break in the Court's practice. We might imagine the first century and a half of the Court's existence as an extended adolescence, in which the justices were still trying to figure out what kind of power they had and how it should be used. Perhaps in the post-New Deal era, the Court finally and for the first time got it right. *United States v. Carolene Products* (1938) marked a new age for the Court, promising that the Court would no longer make the mistakes of the past and in the future would focus its attention on a more normatively worthy project. While the initial thrust of *Carolene Products* was to emphasize judicial deference to congressional wishes, *Bolling* might mark the beginning of a period in which the Court moved more aggressively to police the national legislature. As important for present purposes, this new mission might also be embraced as politically uncontroversial and theoretically thin, carefully neutral to contested political programs and substantive values (Ely 1980).

There is some reason to be doubtful that the Court's history would end with such a happy conclusion. Dahlian theories of the U.S. Supreme Court as a partner and ally of national political leaders would counsel some skepticism of the view that the Court had changed its stripes in fundamental ways (Dahl 1957; Graber 1993). Justice Harlan Fiske Stone's Footnote Four in *Carolene Products* pointed the Court toward a new mission of protecting "discrete and insular minorities" and securing the workings of the political process. This mission might be most fully realized in the Court's review of state policies, perhaps because the states are more likely to abuse minorities in ways that James Madison would have expected but perhaps also because the justices are unlikely to disagree with federal policies that encroach upon minorities or the political process (Powe 1994). Moreover, the briefest consideration of the modern Court points out the fact that the Court is more likely to wade into controversy when striking down laws than remind the people of their deepest consensus values. Paper-thin majorities on a deeply divided Court might be reaching normatively desirable results, but they are poor indicators of judicial minimalism.

Table 2 repeats the categorization of cases found in Table 1, but shifts the time frame to the period after the *Bolling* decision. As a comparison between the two tables shows, the Court's exercise of judicial review has shifted significantly since the mid-twentieth century. The Court invalidated federal laws in roughly the same number of cases decided in the past six decades as it did in the prior sixteen, and the Court has become much more likely to strike down statutory provisions in their

TABLE 2. U.S. Supreme Court Cases Invalidating Federal Statutory Provisions, 1954–2015.

	Struck in whole	Struck as applied
Important provision/landmark statute	15	15
Marginal provision/landmark statute	32	35
Provisions of less important legislation	42	15



Note: Graph shows issue area of constitutional decisions in each category. Due process, substantive rights, and equality are at the top of the column, economic issues are the middle bloc, and structural issues are at bottom.

entirety rather than in part or as applied. The Court has also become less likely to strike down provisions of unimportant statutes; such cases were once half of the cases invalidating statutes, but they have been just over a third of the cases decided since mid-century. That does not necessarily mean that the Court has been focused on far more important policies, however, since the Court has mostly shifted its attention to less important provisions of landmark statutes but has seen little change in how often it strikes down core provisions of important statutes.

More striking than the shift in the importance of the policies nullified by the Court is the shift in the constitutional issues at stake in those cases. While the Court's work prior to *Bolling* was almost equally divided between civil rights and liberties, economic issues, and structural issues (though leaning toward the latter), the Court since mid-century has directed the bulk of its attention to the first class of issues. Economic issues have nearly disappeared from the Court's more recent agenda and federalism cases have been cut in half, while the number of civil rights and civil liberties cases has more than doubled. The shift away from economic and federalism issues and toward civil rights and liberties has been even more dramatic in the set of cases involving landmark statutes; when the Court invalidates statutory provisions

on federalism or economic grounds since the mid-twentieth century, those statutes are likely to be unimportant ones.

This shift in the Court's constitutional agenda might be a good sign for a minimalist theory of judicial review. To the extent that judicial review based on economic issues and federalism is unlikely to win much favor from modern commentators, then the Court might be avoiding some controversy by avoiding such issues. Unfortunately for a minimalist theory of judicial review, the types of civil rights and civil liberties issues that have absorbed the Court's attention in recent decades are themselves likely to be controversial, perhaps particularly when marshalled in the context of federal statutes.

Whether involving due process, substantive liberties, or civil rights, the Court's invalidations of federal policies in cases addressing these issues are frequently controversial. Probably leading the list of such controversial rulings would be the line of campaign finance cases that began with *Buckley v. Valeo* (1976). Although *United States v. Windsor* (2013) might eventually win consensus approval as public opinion continues to shift in support of same-sex marriage, we are clearly not yet to that point. The Court's invalidation of congressional funding restrictions on the Legal Services Corporation is probably just as controversial today as when it was decided (*Legal Services Corp. v. Velazquez* 2001). It seems likely that the Court's procedural objection to the use of dependent child income tax deductions to determine eligibility for food stamps would continue to attract dissents (*United States Dept. of Agriculture v. Murry* 1973). The Court's objection to warrantless OSHA inspections is likely still controversial (*Marshall v. Barlow's* 1978), and the Court's invalidation of a federal program to send public school teachers to provide remedial education services in parochial schools has been formally overruled (*Aguilar v. Felton* 1985). *Boumediene*'s objection to the Military Commissions Act of 2006 has been accommodated but hardly embraced (*Boumediene v. Bush* 2008). This, of course, says nothing about the controversies surrounding the Court's modern federalism and separation of powers decisions, from *INS v. Chadha* (1983) to *Clinton v. New York City* (1998) to *Shelby County v. Holder* (2013).

But perhaps there are still candidates for modern cases that in hindsight would win widespread support. In *Reno v. American Civil Liberties Union* (1997), a unanimous Court struck down a provision of the Communications Decency Act. Although the President Bill Clinton publicly bewailed the Court's action, administration officials privately recognized that the act was unconstitutional (Whittington 1999, 208–210). The same might be said for the invalidation of the Flag Protection Act of 1989, though it is not clear that mass opinion would readily align with elite opinion on the scope of constitutional protections to flag burners (*United States v.*

Eichman 1990). Similarly, the Court's unanimous decision to carve out a ministerial exception in the Americans with Disabilities Act is probably coherent with contemporary norms and might be regarded by Congress as a friendly amendment to the statute (*Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission* 2012). The once controversial early gender equity cases like *Califano v. Goldfarb* (1977) and some equality cases like *Jimenez v. Weinberger* (1974) would undoubtedly now win unanimous support. Timothy Leary's unanimous victory against the 1937 Marihuana Tax Act likely stands the test of time (*Leary v. United States* 1969). Despite the dissent of Justice Alito, the Court's decision striking down the initial effort by Congress at regulating depictions of animal cruelty might command general acceptance (*United States v. Stevens* 2010), as would the unanimous decision objecting to the effort to censor the federal mails (*Blount v. Rizzo* 1971) and the unanimous decision to extend First Amendment protections to protestors making use of public streets that run through an open military base (*Flower v. United States* 1972). The once controversial case of *Trop v. Dulles* (1958) determining that Congress could not use the revocation of U.S. citizenship as a criminal punishment is probably now beyond controversy, though it is hard to say whether the general public would uniformly line up behind that principle if the issue were to once again be made politically salient.

CONCLUSION

Whether from the political right or the political left, the Court's decisions invalidating federal policies routinely generate controversy. Even in hindsight, those decisions have often seemed misguided to large sectors of the political elites and of the mass public. Rather than providing a sober second thought, the Court is more likely to act as yet another partisan participant in the policy-making process, wielding a veto power to strike down policies that many would have preferred to leave in place in the name of constitutional values that many would reject. For much of its history, the Court regularly acted on constitutional principles that are now regarded as defunct. But even in the modern period, the Court routinely strikes down laws that it regards to be in conflict with principles that remain deeply controversial.

Even so, there are at least some instances in which the Court has acted in a way that would, at least in hindsight, win plaudits rather than denunciations. This is perhaps most true when dealing with cases involving largely procedural protections, whether narrowly within the scope of due process or more broadly involving free speech. Such values have proven to be particularly enduring, but they have come under pressure from precisely the kind of passionate politics that has often worried

democratic theorists. Specifically American-style judicial review might also be particularly useful in enforcing those principles since they often arise in the context of specific applications of broadly worded statutes. The Court has often stepped in to carve out exceptions to policies that were perhaps more broad-reaching than even the legislators themselves would have preferred. Being down in the trenches of legal applications allow judges to see the specific examples where policy and principle might come into conflict.

The historical record also suggests a possible addendum to the minimalist theory of judicial review. The sober second thought scenario emphasizes the possibility that a relatively insulated and detached judiciary can rise above tumultuous democratic passions and preserve enduring principles. But these instances of horizontal judicial review by the U.S. Supreme Court only occasionally evince either democratic turbulence or judicial steadfastness. The record does suggest a further possibility of how judicial review might be useful without having to appeal to thick and controversial normative theories, however. Often what the justices bring to the table of American politics appears to be less Bickelian principle than technical expertise about complicated but relatively uncontroversial constitutional rules. While we might imagine the possibility that the legislative branch could develop a comparable expertise so as to avoid constitutional errors, legislators might reasonably prefer to delegate that task to the courts and rely on friendly judges to correct their mistakes (Rogers 2001; Whittington 2003, 451–454). At the same time, legislators have repeatedly shown that other imperatives—such as extracting revenue—often take priority, making constitutional errors a systematic feature of the American governance. A judiciary that leans in favor of liberty just as much as the legislature leans in favor of national security, public morality, or material enrichment might serve a useful countervailing role without necessarily being broadly countermajoritarian.

On the whole, a minimalist theory of judicial review would have a difficult time accounting for most of the Court's actual work in exercising the power of horizontal judicial review. The Court on occasion intervenes in the political process in ways that would win widespread support. Far more often, however, the Court's actions are controversial, not only in the moment of decision but in hindsight as well. In order to justify the historical record of how the Court has used the power of judicial review, we would have to turn to a thicker—and more controversial—set of normative arguments. We would need to be able to justify a Court that was countermajoritarian in a deeper sense—a Court that does not merely formally obstruct the expressed legislative will, but a Court that blocks the substantive realization of democratic policy preferences as such.

REFERENCES

Ackerman, Bruce. *We the People, vol. 1: Foundations*. Cambridge: Harvard University Press.

Bickel, Alexander M. 1962. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. Indianapolis, IN: Bobbs-Merrill.

Commager, Henry Steele. 1943. *Majority Rule and Minority Rights*. New York: Oxford University Press.

Elster, Jon. 2000. *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints*. New York: Cambridge University Press.

Dahl, Robert A. 1957. "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," *Journal of Public Law* 9:279–295.

Ely, John Hart. 1980. *Democracy and Distrust: A Theory of Judicial Review*. Cambridge: Harvard University Press.

Graber, Mark A. 1993. "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary," *Studies in American Political Development* 7:36–73.

Graber, Mark A. 2000. "Naked Land Transfers and American Constitutional Development," *Vanderbilt Law Review* 53:73–121.

Graber, Mark. A. 2007. "New Fiction: *Dred Scott* and the Language of Judicial Authority," *Chicago-Kent Law Review* 82:177–208.

Hamilton, Alexander, James Madison, and John Jay. 1961. *The Federalist Papers*, ed. Clinton Rossiter. New York: Mentor.

Hayek, Friedrich A. 1960. *The Constitution of Liberty*. Chicago: University of Chicago Press.

Hoar, George F. 1897. "Has the Senate Degenerated?" *Forum* 23:129–144.

Powe, Lucas A. 1994. "Does Footnote Four Describe?" *Constitutional Commentary* 11:197–214.

Roosevelt, Theodore. 1911. "Nationalism and the Judiciary," *Outlook* 97:383–385.

Rogers, James R. 2001. "Information and Judicial Review: A Signaling Game of Legislative-Judicial Interaction," *American Journal of Political Science* 45:84–99.

Stathis, Stephen W. 2014. *Landmark Legislation, 1774–2012: Major U.S. Acts and Treaties*, 2nd ed. Washington, D.C. CQ Press.

Stone, Harlan Fiske. 1936. "The Common Law in the United States," *Harvard Law Review* 50:4–26.

Sunstein, Cass A. 2001. *One Case at a Time: Judicial Minimalism on the Supreme Court*. Cambridge: Harvard University Press.

Thayer, James Bradley. 1893. "The Origin and Scope of the American Doctrine of Constitutional Law," *Harvard Law Review* 7:129–156.

Tushnet, Mark V. 2000. *Taking the Constitution Away from the Court*. Princeton: Princeton University Press.

Waldron, Jeremy. 1999. *Law and Disagreement*. New York: Oxford University Press.

Whittington, Keith E. 1999. *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review*. Lawrence: University Press of Kansas.

Whittington, Keith E. 2003. "Legislative Sanctions and the Strategic Environment of Judicial Review," *I-CON: International Journal of Constitutional Law* 1:446–474.

Whittington, Keith E. 2005. "'Interpose Your Friendly Hand': Political Supports for the Exercise of Judicial Review by the United States Supreme Court," *American Political Science Review* 99:583–596.

Whittington, Keith E. 2009. "Judicial Review of Congress Before the Civil War," *Georgetown Law Journal* 97:1257–1332.

Wilson, Woodrow. 1908. *Constitutional Government of the United States*. New York: Columbia University Press.

CASES

A.G. Spalding & Bros. v. Edwards. 1923. 262 U.S. 66.

Aguilar v. Felton. 1985. 473 U.S. 402.

Benner v. Porter. 1850. 50 U.S. 235.

Blodgett v. Holden. 1927. 275 U.S. 142.

Blount v. Rizzo. 1971. 400 U.S. 410.

Bolling v. Sharpe. 1954. 347 U.S. 497.

Boumediene v. Bush. 2008. 553 U.S. 723.

Brown v. Board of Education. 1954. 347 U.S. 483.

Buckley v. Valeo. 1976. 424 U.S. 1.

Burgess v. Salmon. 1878. 97 U.S. 381.

Califano v. Goldfarb. 1977. 430 U.S. 199.

Clinton v. New York City. 1998. 524 U.S. 417.

Coyle v. Smith. 1911. 221 U.S. 559.

Dred Scott v. Sandford. 1857. 60 U.S. 393.

Fairbank v. United States. 1901. 181 U.S. 283.

Flower v. United States. 1972. 407 U.S. 197.

Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission. 2012. 565 U.S. __.

Immigration and Naturalization Service v. Chadha. 1983. 462 U.S. 919.

Jimenez v. Weinberg. 1974. 417 U.S. 628.

Leary v. United States. 1969. 395 U.S. 6.

Legal Services Corp. v. Velazquez. 2001. 531 U.S. 533.

Lochner v. New York. 1905. 198 U.S. 45.

Marshall v. Barlow's. 1978. 436 U.S. 307.

Monongahela Navigation Co. v. United States. 1893. 148 U.S. 312.

Ng Fung Ho v. White. 1922. 259 U.S. 276.

Nichols v. Coolidge. 1927. 274 U.S. 531.

Rassmussen v. United States. 1905. 197 U.S. 516.

Reno v. American Civil Liberties Union. 1997. 521 U.S. 844.

Reynolds v. M'Arthur. 1829. 27 U.S. 417.

Roe v. Wade. 1973. 410 U.S. 113.

Shelby County v. Holder. 2013. 570 U.S. __.

Thames & Mersey Marine Ins. Co., Ltd. v. United States. 1915. 237 U.S. 19.

Trop v. Dulles. 1958. 356 U.S. 86.

United States Dept. of Agriculture v. Murry. 1973. 413 U.S. 508.

United States v. Carolene Products Co. 1938. 304 U.S. 144.

United States v. Eichman. 1990. 496 U.S. 310.

United States v. Hvoslef. 1915. 237 U.S. 1.

United States v. Phelps. 1834. 33 U.S. 700.

United States v. Stevens. 2010. 559 U.S. 460.

United States v. Windsor. 2013. 570 U.S. __.

West Coast Hotel Co. v. Parrish. 1937. 300 U.S. 379.

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