CONSTITUTIONAL STUDIES

Volume 3

Editors

editor: Howard Schweber

managing editor : Rebecca Anderson

Editorial Board

Jack Balkin / *Yale University*
Sotorios Barber / *University of Notre Dame*
Elizabeth Beaumont / *University of California, Santa Cruz*
Saul Cornell / *Fordham University*
John Ferejohn / *New York University*
Tom Ginsburg / *University of Chicago*
Mark Graber / *University of Maryland*
Ran Hirschl / *University of Toronto*
Gary Jacobsohn / *University of Texas at Austin*
András Jakab / *Hungarian Academy of Sciences*
Kenneth Kersch / *Boston College*
Heinz Klug / *University of Wisconsin–Madison*
Sanford Levinson / *University of Texas at Austin*
Michael Les Benedict / *The Ohio State Universit*
Maeva Marcus / *George Washington University*
Kenneth Mayer / *University of Wisconsin–Madison*
Mitch Pickerill / *Northern Illinois University*
Kim Scheppele / *Princeton University*
Miguel Schor / *Drake University*
Stephen Sheppard / *St. Mary's University*
Rogers Smith / *University of Pennsylvania*
Robert Tsai / *American University*
Mark Tushnet / *Harvard University*
Keith Whittington / *Princeton University*
Emily Zackin / *Johns Hopkins University*

Editorial Office

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

Business Office

Constitutional Studies
110 North Hall
1050 Bascom Mall
Madison, WI 53706
t : 608.263.2293
f : 608.265.2663
constitutional.studies@uwpress.wisc.edu

Constitutional Studies is published twice annually by the University of Wisconsin Press, 1930 Monroe Street, 3rd Floor, Madison, WI 53711-2059. Postage paid at Madison, WI and at additional mailing offices POSTMASTER: Send address changes to *Constitutional Studies*, 110 North Hall, 1050 Bascom Mall, Madison, WI 53706.

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

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

Mission Statement

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

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

Instructions for Authors

manuscr ipt submission and r ev iew: To submit a manuscript for consideration, please send an electronic file (formatted in Microsoft Word) via email to constitutional_studies@polisci.wisc.edu. The Editor will assign the manuscript to anonymous reviewers, and every effort will be made to provide the author with a review in a timely fashion.

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

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

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

manuscr ipt pr epara tio n and st yle: Submissions should follow the author-date system of documentation as outlined in the *Chicago Manual of Style* (16th ed., chapt. 15 or 15th ed., chapt. 16). The journal offic may request full revision of manuscripts not meeting the *Chicago Manual of Style* requirements for documentation.

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

TABLE OF CONTENTS

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

DYNAMICS OF CONSTITUTIONAL DEVELOPMENT AND THE CONSERVATIVE POTENTIAL OF U.S. SUPREME COURT GAY RIGHTS JURISPRUDENCE, OR WHY NEIL GORSUCH MAY STOP WORRYING AND LEARN TO LOVE SAME-SEX MARRIAGE

STEPHEN M. ENGEL[1]

ABSTRACT

Shortly after his presidential election, Donald Trump announced that same-sex marriage was settled law. His first Supreme Court nominee, Neil Gorsuch, took the same position. Both statements are in direct conflict with Republican orthodoxy. By taking a developmental approach to constitutional change—one that highlights instances of creative syncretism and entrepreneurial actions by justices—this article reveals the conservative legal potential of the underlying rationale of recent gay rights and same-sex marriage Supreme Court decisions. Because these rulings are grounded in a reading of the equal protection clause that emphasizes individual

1. Professor and chair of politics at Bates College. An earlier version of this research was presented at "States of Intimacy: Gender, Sexuality, and Governance in Modern U.S. History," a conference organized by Nancy Cott and Robert Self at the Radcliffe Institute for Advanced Study at Harvard University in July 2016. The author thanks Nancy Cott, Robert Self, and George Chauncey for immensely helpful critiques at that conference. He also thanks Sonu Bedi, Ken Kersch, Megan Ming Francis, Laura Beth Nielsen, Timothy Lyle, Bernadette Atuahene, Rebecca Herzig, Stephen Skowronek, Jeffrey Selinger, Howard Schweber, and two anonymous reviewers for helpful comments. Any deficiencies remain the author's alone.

Constitutional Studies, Volume 3
©2018 by the Board of Regents of the University of Wisconsin System

dignity and eschews more traditional scrutiny doctrine, they potentially push forward long-held conservative aims to curb judicial interventionism to achieve racial equality and to limit abortion access. This dignity doctrine, as mostly developed by Justice Anthony Kennedy, shows some indications of durability, particularly as it was invoked by the Obama Department of Justice to justify some actions late in that president's term. However, whether a profound shift in how governing authorities interpret and act upon the equal protection guarantee of the Fourteenth Amendment has taken place remains to be seen.

KEYWORDS: *dignity, scrutiny doctrine, same-sex marriage, gay rights, conservative legal movement, Anthony Kennedy*

SHORTLY AFTER HIS ELECTION to the presidency, Donald Trump sought to reassure LGBT Americans by stating that he was "fine" with the legalization of same-sex marriage in the United States. In an interview on the news program *60 Minutes*, the then-president-elect noted that his personal opinions on same-sex marriage were "irrelevant" and that the constitutional question of marriage equality was "done." He stated, "These cases have gone to the Supreme Court. They've been settled. And I'm—I'm fine with that" (Stokols 2016). This position stood in marked contrast to the Republican Party's 2016 national platform, which called for overturning the two Supreme Court decisions that recognized same-sex marriage: *United States v. Windsor* (2013), which ruled that the federal government must recognize marriages where they were already recognized by state governments, and *Obergefell v. Hodges* (2015), which required recognition of same-sex marriage throughout the United States. As stated in its 2016 national platform, the Republican Party

> condemn[s] the Supreme Court's ruling in *United States v. Windsor*, which wrongly removed the ability of Congress to define marriage policy in federal law. We also condemn the Supreme Court's lawless ruling in *Obergefell v. Hodges*, which in the words of the late Justice Antonin Scalia, was a "judicial Putsch"—full of "silly extravagances"—that reduced "the disciplined legal reasoning of John Marshall and Joseph Storey to the mystical aphorisms of a fortune cookie." In *Obergefell*, five unelected lawyers robbed 320 million Americans of their legitimate constitutional authority to define marriage as the union of one man and one woman.

To correct this perceived misstep, the platform called for the "appointment of justices and judges who respect the constitutional limits on their power and respect the authority of the states to decide such fundamental social questions."

In the context of this condemnation of the same-sex marriage decisions and the call to appoint justices willing to overturn these rulings, the position taken by Trump's first Supreme Court nominee, Neil Gorsuch, was all the more surprising. During hearings before the Senate Judiciary Committee, Gorsuch sided with the president against the Republican Party platform and was out of line with the justices who dissented in *Windsor* and *Obergefell*, namely Antonin Scalia, John Roberts, Samuel Alito, and Clarence Thomas. The then-nominee called same-sex marriage "absolutely settled law" (Bollinger 2016).

Why would the Republican president and his first Supreme Court nominee to the seat once held by the anchor of contemporary conservative jurisprudence, Antonin Scalia—who himself was a vociferous dissenter in critical gay rights decisions, such as *Romer v. Evans* (1996), which struck down state limits on anti-discrimination protections for lesbians, gays, and bisexuals, and *Lawrence v. Texas* (2003), which ruled criminalization of consensual adult same-sex intimacy unconstitutional, as well as the marriage rulings—take positions on same-sex marriage at odds with long-held Republican orthodoxy? Alignment with public opinion may suggest one strategic possibility. Public acceptance of same-sex marriage has skyrocketed in recent years (Harrison and Michelson 2017). And perhaps Gorsuch did not want to appear out of the mainstream, a criticism that Senate minority leader Chuck Schumer (D-NY) used to justify filibustering the confirmation vote (Hains 2017). However, Gorsuch and Trump held consistent with long-stated Republican opposition to abortion access despite nearly 80 percent of the U.S. public wanting abortion legal under some or all circumstances (Saad 2016). Strategic alignment with public opinion would appear not to be a driving factor. So why would a conservative jurist learn to love *Obergefell*?

Conservative thinkers, lawyers, and political actors may come to accept *Obergefell* because of how its underlying rationale, namely how it places dignity at the core of equal protection, can serve the ends of the conservative legal movement. By the conservative legal movement, I refer to interests that coalesced since the 1970s to challenge New Deal and Civil Rights-era liberalism. These include corporate interests seeking to limit federal regulatory authority of the economy (Whittington 2001; Clayton and Pickerill 2004); interests challenging remedial policies aimed at overcoming legacies of inequality maintained by deeply institutionalized racism (Balkin and Levinson 2001; Lowndes et al. 2008; Avery 2009); and religious interests enraged by the Supreme Court's sanctioning of contraception and abortion, decriminalization of homosexuality, and recognition of same-sex marriage on the one hand and its curbing of public prayer on the other (Keck 2004, 2015; Teles 2008; Hollis-Brusky 2011). I argue that while dignity in U.S. constitutional

jurisprudence has been primarily developed by Justice Anthony Kennedy in the context of recent gay rights and same-sex marriage rulings, the ill-defined notion of dignity is malleable and has been utilized by Kennedy to strike against affirmative action and abortion access, positions lauded by political conservatives. Dignity, the cornerstone of progressive rulings on gay rights, can ironically become the foundation of an equal protection jurisprudence that undermines strides toward other progressive objectives.[2]

Gorsuch hinted at how conservatives might utilize *Obergefell* when he stated, during his confirmation hearing, that he was not inclined to consider persons as fitting into a particular class. When Senator Dick Durbin (D-IL) asked, in reference to LGBT individuals, whether Gorsuch had any record of "standing up for those minorities who you believe are not being treated fairly" and whether the judge could "point to statements or cases you've ruled on relative to that class," Gorsuch rejected the notion of class or group identity entirely: "Senator, I've tried to treat each case and each person as a person—not a 'this kind of person,' not a 'that kind of person'—a person. Equal justice under the law. It is a radical promise in the history of mankind" (Pramuk 2017).

By making this statement Gorsuch challenged one of the defining frameworks of equal protection jurisprudence, namely suspect class and scrutiny doctrine. In doing so, he signaled his alignment with a conservative legal movement that has, since the late 1980s, reshaped this doctrine. Conservative jurists have not yet offered a full alternative to suspect class doctrine per se. Instead, they have, over time, shifted it from its original purpose of striking against subordination of discrete classes toward a doctrine that is skeptical of any identity-group classification of individuals. Suspect *class* has been replaced gradually with suspect *classification*; whereas the former might consider laws that harm African Americans or other discrete minorities constitutionally illegitimate, the latter considers any law that

2. In this article I am agnostic toward whether achieving gay and lesbian rights recognitions through the application of rational basis review and the failure to achieve a higher scrutiny level for laws that discriminate on the basis of sexual orientation is normatively good. Some scholars, including Bedi (2013b) and Shraub (2016), have argued compellingly that this outcome is good because it basically suggests that the state can put forward no legitimate reason to discriminate on the basis of sexual orientation. My aim, by contrast, is to suggest that while the rational basis standard is utilized, Kennedy's insertion of individual dignity as the operative concept of equality is doing something more. And dignity, as utilized by Kennedy, can ultimately strike down long-held liberal aims in the areas of racial integration and abortion access. Furthermore, dignity may be used to limit the exercise of the marriage right or other gay rights if, for example, participating in a same-sex marriage or providing other services to LGBT-identified individuals can plausibly be said to harm the dignity of another's (perhaps religious) identity.

classifies by race to be illegitimate (Bedi 2013a; Oh 2004). Whereas the former notion would compel striking against the domination of groups of people who have faced historic and ongoing discrimination, the latter would treat attempts to remedy that discrimination with identity-based policies, e.g., busing for school integration, as constitutionally suspect.

The Supreme Court's gay rights rulings since *Romer* have achieved equal rights recognition without relying on scrutiny doctrine, and as such, they may hint at a conservative alternative to suspect class/classification doctrine. These decisions have discussed how government regulations, such as criminalization statutes or marriage bans, harm the individual *dignity* of the gay or lesbian-identified individual rather than considering gays or lesbians a suspect class deserving of particular constitutional protections.

Dignity, as a constitutional right or value, is far more developed in international law and in constitutional traditions from Europe and South Africa than in United States constitutional jurisprudence (Resnik and Chi-hye Suk 2003; McCrudden 2008; Baer 2009; Hennette-Vauchez 2009; Carozza 2011; Rao 2011; Ackermann 2012; O'Regan 2013; Atuehene 2014). Nevertheless, dignity is not a wholly new concept in constitutional jurisprudence even as the U.S. Constitution contains no explicit textual right to human dignity. The term has appeared in Supreme Court rulings and dissents since at least *Skinner v. Oklahoma* (1942), in which the Court considered state-mandated sterilization to violate dignity (546), and Justice Frank Murphy's famous dissent in *Korematsu v. United States* (1944), in which internment was characterized as "destroy[ing] the dignity of the individual" (214). Yet, even as it has periodically cropped up in decisions by different justices, it has been nowhere more consistently relied upon than in Justice Kennedy's gay rights rulings: *Romer*, *Lawrence*, *Windsor*, and *Obergefell*. In addition, that equal protection for gays and lesbians rests on dignity rather than suspect class/scrutiny may be the very reason why conservative judges such as Gorsuch, who clerked for Kennedy, are willing to make their peace with *Obergefell*. It may offer a pathway to strike policies aimed at racial integration, abortion access, or even, ironically, marriage, in just the ways conservative jurists and policymakers might applaud.

Tracing the development of dignity within the gay rights jurisprudential tradition in the United States and particularly how it is distinct from traditional scrutiny doctrine reveals insights into broader processes of American constitutional and political development. A development is "a "durable shift in governing authority" (Orren and Skowronek 2004, 123). And the development of a new basis for challenging discrimination, i.e., a shift away from the twentieth-century doctrine of suspect class, may represent more than just a change in how the Constitution is

interpreted. As argued here, it could signal a move in how the Court has defined its place in a democracy—a role repeatedly questioned since its establishment (see Beard 1912; Bickel 1986; Chemerinsky 1989; Engel 2011). Any evidence of continued reliance on dignity rather than more traditional scrutiny doctrine may tell us something about changing notions of equality, i.e., ideational development, in the U.S. constitutional tradition and about how the Court invokes such ideas to justify its own purpose within a broader set of democratic institutions, i.e., institutional development.

Second, recent political development scholarship has called for more focus on tracing these types of processes of change (Skowronek and Orren 2016). The judicial articulation of dignity provides a case through which relevant mechanisms can be identified and explored. In particular, the abandonment of suspect class doctrine in the gay rights jurisprudence illustrates entrepreneurial work often cited as a crucial mechanism of political development (Sheingate 2003; Skowronek and Glassman 2007). But the reformulation of doctrine may signal more than just entrepreneurial interpretation. In a common law constitutional system, new ideas must align with precedent. As such, doctrinal development is fertile ground on which to explore creative syncretism, which is the idea that "all institutions are syncretic, that is, they are composed of an indeterminate number of features, which are decomposable and recombinable in unpredictable ways." An entrepreneurial actor can "draw on a wide variety of cultural and institutional resources to create novel combinations" and thereby break down an idea or doctrinal tradition and rebuild it to achieve new and unexpected interpretive outcomes (Berk and Galvin 2009, 543; see also Berk et al. 2013). Indeed, some outcomes may even be antithetical to the doctrine's original aims (Skowronek 2006).

Third, it may be difficult to demonstrate any durable shift given the relatively recent nature of the Court's rulings. It would also be difficult to prove that any durable shift is Justice Kennedy's intentional aim. As Rick Valelly (2012) notes, "LGBT politics may seem to be evolving so rapidly that it is too difficult to perceive and pick out the outcomes, periods, and dynamics that are 'in' that politics" (315). Nevertheless, as Theda Skocpol (2016) argued in her analysis of the value of developmental scholarship, "any analytical perspective that is truly powerful has to make sense of contemporary twists of history, not just explain events long past" (48). Furthermore, it is important to note that to posit ideational or institutional change over time actor intention need not be demonstrated; in his analysis of the changing arguments that justices may offer to articulate the Court's institutional legitimacy, legal scholar Or Bassok (2013) poignantly writes that the aim is not to "analyze the thoughts of certain members of the . . . Court on the issue of

legitimacy. My argument is not that certain Justices consciously adopted a certain legitimation theory, but how the Court and other institutions behaved" (168–69). In short, observable outcomes in rulings and how they may be used by other governing authorities—as opposed to any specific judicial intent—can be a measure of constitutional development.

If the turn to dignity represents a durable shift in how governing authorities understand equal rights claims, then it must be shown first that an existing paradigm, i.e., scrutiny doctrine, is under strain, second, that an alternative is offered, and third, that this alternative is taken up by other governing authorities in a deliberate effort to become entrenched, commonsensical, or hegemonic (Gramsci 1971; Plotke 1996; Teles 2008). This article discusses evidence of each of these steps. Durability means that an idea holds over *time*, and a precedent-based constitutional tradition is a potent framework for illustrating how certain ideas become entrenched or "the existence of a precedential spiral or sequence in the United States evolving in ways that over time provides increased legal foundations for judicial decisions" (Graber 2006, 36). But Orren and Skowronek remind us that to track durability in governance, we must also look beyond the Court's boundaries and attend to whether and how an idea spreads across and is accepted by distinct governing authorities that comprise the polity. In other words, durability can register over time and across space. Evidence that shifts prove durable is illustrated by "the extent to which shifts had the effect of bringing surrounding arrangements of authority into line with the new state of affairs. . . . [T]hey successfully over time preempt naysayers in positions of authority nearby; they engage ideologies . . . that declare the rightness of what has occurred" (Orren and Skowronek 2004, 129). This article points to some early evidence that Obama-era executive-branch actors adopted the Court's dignity framework.

To make this argument about how the rise of dignity in the gay rights rulings challenges traditional scrutiny doctrine, about the conservative potential of this doctrinal path, and about how this development brings to the fore broader underlying processes of American political and constitutional change, the article proceeds in the following manner. First, it highlights how many of the gay rights rulings since *Romer* are grounded in a jurisprudential logic conceptually distinct from traditional scrutiny doctrine. Second, it reviews the history of changes in that traditional doctrine not only to reveal how it increasingly differed from its original concept but also to highlight the creative syncretism at play and how entrepreneurial justices can rework a doctrinal tradition to achieve antithetical ends, a critical process discussed in developmental scholarship. Third, how Justice Kennedy developed dignity in the context of gay rights rulings is discussed. Fourth, how dignity has been

applied to challenge and negate policy attempts at racial integration and access to abortion is detailed. This section, in particular, is the heart of the argument that dignity defined in the context of progressive recognition of LGBT rights can be used toward antithetical ends, toward undermining policy aims liberals might value. Fifth, assessing whether dignity can be said to represent a durable shift, i.e., whether other governing authorities have utilized the concept to defend LGBT rights, is evaluated. Finally, the article concludes by assessing the underlying conservative logic of the liberal victory of same-sex marriage, which is to say, how the dignity doctrine embraces a notion of self and universality that decontextualizes the individual; ultimately and ironically that logic may restrict the recognition and exercise of the marriage right itself.

I. GAY RIGHTS RULINGS AND ABANDONING THE USUAL FRAMEWORK

When Chief Justice Roberts dissented in *Obergefell*, he claimed that the majority strayed from accepted norms for interpreting the Fourteenth Amendment's Equal Protection and Due Process clauses:

> [P]etitioners contend that the Equal Protection Clause requires their States to license and recognize same-sex marriages. The majority does not seriously engage with this claim. Its discussion is, quite frankly, difficult to follow. The central point seems to be that there is a "synergy between" the Equal Protection Clause and the Due Process Clause, and that some precedents relying on one Clause have also relied on the other. Absent from this portion of the opinion, however, is anything resembling our usual framework for deciding equal protection cases (23, citations omitted).

This "usual framework" refers to the doctrine of suspect class and tiered scrutiny. It holds that should a law affect a class of persons that is either or in combination identified as (1) having suffered a history of discrimination, (2) this discrimination is based on a distinguishable or immutable characteristic irrelevant to the policy objective, and (3) this discrimination has rendered the group politically powerless, then laws affecting this class must be evaluated with heightened scrutiny (*Bowen v. Gilliard* [1987], 602–3). To be constitutional, a law must be narrowly tailored to achieve a compelling government interest (strict scrutiny, which applies to racial classifications and fundamental rights) or substantially related to the achievement of an important government interest (intermediate scrutiny, which applies to sex

and gender classifications) (Fallon 2013, 139–89). Instead, the Court grounded the *Obergefell* decision in a vague if uplifting concept of dignity (see Cooper 2015). In so doing, it further developed dignity as a guiding jurisprudential principle that had earlier been used to anchor rulings in *Lawrence* and *Windsor*. In his dissent, Roberts echoed Scalia's dissent in *Windsor* offered two years earlier:

> [I]f this is meant to be an equal-protection opinion, it is a confusing one. The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality. In accord with my previously expressed skepticism about the Court's "tiers of scrutiny" approach, I would review this classification only for its rationality. As nearly as I can tell, the Court agrees with that. . . . The sum of all the Court's nonspecific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due process grounds, and perhaps with some amorphous federalism component playing a role) because it is motivated by a "'bare . . . desire to harm'" couples in same-sex marriages. (16–17, citations omitted)

All that confusion was captured by Judge Christopher Piazza of Arkansas when he struck down a state ban on marriage: "Attempting to find a legal label for what transpired in *Windsor* is difficult" (*Wright v. Arkansas* [2014], 11). The legal label is difficult to identify inasmuch as it does not comport with the traditional tiered-scrutiny approach. Nevertheless, there is an internal logic within *Lawrence*, *Windsor*, and *Obergefell* and a logic that connects each to the other, namely a dignity principle.

Most current scholarship on same-sex marriage litigation—and LGBT rights litigation more broadly—has focused on three areas. One school has assessed whether a litigation approach to social change promotes movement goals (Rosenberg 2008; Keck 2009; Nielsen 2009; Klarman 2012). Another has evaluated whether rulings linked to social reform are "activist" insofar as they may overturn the will of a democratic majority or, instead, appropriately capture democratic sentiment measured through public opinion, state law, or alignment with a political regime (Dahl 1957; Ackerman 1998; Whittington 2007; Friedman 2010; Engel 2011; Pildes 2011). A third area examines decision making on a multi-judge panel and evaluates whether judges decide in line with the political values of their appointing presidents, make strategic calculations that may curb their sincere beliefs, or respond to political and cultural changes in the broader society (Gillman and Clayton 1999; Maltzman et al. 2000; Segal and Spaeth 2002; Epstein and Segal 2005).

This article takes a different and distinctly developmental approach, which has not often been applied to questions regarding sexuality (see Novkov 2008 and Valelly 2012; notable exceptions include Canaday 2009 and Engel 2016). Nevertheless, by evaluating gay rights jurisprudence this way, namely as an ideational shift in our understanding of how equal rights are conceptualized as well as how that articulation signals any institutional repositioning by the Court, this article bridges the ideational and institutional schools that have defined approaches to American political and constitutional development (Smith 1988; Lieberman 2002; Glenn 2004; Kersch 2004; Kahn and Kersch 2006).

With regard to the ideational or doctrinal shift, legal scholars have suggested that recent gay rights rulings since *Romer* indicate that the Court often views anti-LGBT discrimination as grounded only in animus.[3] Gays, lesbians, and bisexuals, as a class of people who have suffered a history of discrimination and/or a history of political powerlessness grounded in an immutable trait—as scrutiny doctrine demands—have never been so identified.[4] Therefore, laws that have targeted gays and lesbians for unequal treatment have only been held to the lowest level of judicial review—rational basis—whereby a law must be rationally related to a legitimate government purpose. Because Justice Kennedy—who authored the majority rulings in *Romer*, *Lawrence*, *Windsor*, and *Obergefell*—sees only animus motivating anti-LGBT discrimination, scholars have contended that these decisions collectively indicate an anti-harm or anti-humiliation principle as the basis for rational basis review (Ackerman 2014; Carpenter 2014; Koppelman 2014; Yoshino 2014, 2015).[5] They suggest that traditional equal protection jurisprudence is intact, but they hold that these rulings may be more elegant than suspect class analysis since

---

3. Exceptions include *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* (1995) and *Boy Scouts of America v. Dale* (2000).

4. See, however, Kennedy's brief identification of gays and lesbians as having the elements of suspect class status, including an "immutable nature," but not applying higher scrutiny in *Obergefell*, as discussed in Section V of this article.

5. Associating an anti-harm principle as motivating *Obergefell* ignores the ways in which the decision's assumptions about what constitutes dignity, namely adherence to heteronormative coupling, actually do harm and make invisible members of the LGBT communities. As Yuvraj Joshi (2015) has cogently argued, "*Obergefell*'s reasoning inflicts its own dignitary harms. It affirms the dignity of married relationships, while dismissing the dignitary and material harms suffered by unmarried families. It demands that same-sex couples demonstrate the same love and commitment that are taken for granted in the case of heterosexual couples. And, it implies that legal protection of dignity depends on the prior social acceptance of gay persons and relationships. Put together, *Obergefell* disregards the idea that different forms of loving and commitment might be entitled to equal dignity and respect" (117–18). See also Ben-Asher (2014).

the dignity/anti-harm/anti-animus principle does not require the designation of suspect class status, which can prove exclusionary. As Kimberle Crenshaw (1989) famously critiqued: "the paradigm of sex discrimination tends to be based on the experiences of white women; the model of race discrimination tends to be based on the experiences of the most privileged Blacks" (151). In other words, the scrutiny doctrine does not recognize the intersectional nature of identity; discrimination is experienced either as a woman or as an African American, but often the experience of an African American woman goes unrecognized precisely because a discrimination claim cannot be proved on the singular counts of either race or sex.

Because the gay rights rulings do not invoke group identity as the operative concept but instead suggest that some individual level of human dignity is denied, the underlying logic of these rulings is often lauded. Lawrence Tribe's assessment of *Obergefell* is illustrative: "Justice Kennedy's decision represents the culmination of a decades-long project that has revolutionized the Court's fundamental rights jurisprudence. . . . *Obergefell* has definitively replaced . . . [the] wooden three-prong test focused on tradition, specificity, and negativity with the more holistic inquiry" (Tribe 2015, 16).

The gay rights jurisprudence, while it may articulate an anti-harm principle or, more robustly, an equal dignity principle as a foundation for rational basis review, in fact does much more. *Lawrence*, *Windsor*, and *Obergefell*'s dignity principle is not only an ideational turn from scrutiny but also suggests a different way that the Court is conceptualizing its role in the democratic matrix of separated branches. It indicates and underlies a profound *institutional* development regarding how the Court's decision rationales—the way it has approached and defined its purpose in a democracy—relate to and support its legitimacy.

Dignity is both individualized and universalized such that grappling with the context and structure of inequality is rendered unnecessary. When Kennedy states in *Lawrence* that the criminalization of same-sex sexual relations is unconstitutional, he does not suggest that the long history of discrimination against gays and lesbians, which he nevertheless traces, merits that the Court must be more skeptical of the statute than it would be otherwise. Instead, he states a universal principle, namely that "adults may choose to enter upon this relationship in the confines of their own homes and their private lives and still retain their dignity as free persons." The ruling does not apply to gays or lesbians as gays or lesbians but broadens out such that the historical context of discrimination proves almost unnecessary to the articulation of a libertarian principle. Similarly, in *Windsor*, Kennedy writes that the Court strikes down the Defense of Marriage Act because through it the federal government seeks only to "disparage and to injure those whom the State, by

its marriage laws, sought to protect in personhood and dignity." Dignity is again invoked as a universal good, one that follows for the nature of personhood itself, and as such, no complicated rubric of tiered scrutiny that requires attention to historical, political, or cultural context needs to be applied.

This *ideational* turn gestures toward an *institutional* development regarding the role the Court plays in a democracy. The gay rights rulings illustrate that to identify inequality, the Court no longer needs to examine the very factors that underlie scrutiny doctrine, namely histories of discrimination, powerlessness, etc. And this move repositions the Court's role in U.S. democracy, at least inasmuch as it has developed over the twentieth century. Indeed, when the Court's institutional legitimacy was challenged during the first third of the twentieth century, particularly as it struck down much of the economic regulation that attempted to mitigate the harm of the Great Depression, the Court shifted course to save itself from becoming politically manipulated by the other branches (Ross 1993). Over a series of rulings in the late 1930s, the Court conceded territory, so to speak, to the legislature on economic matters and instead staked out a distinct responsibility to review with higher skepticism those laws that regulated elements of democratic process, e.g., rights as protected in the Bill of Rights or laws that seemed to disproportionately target a discrete and insular minority (Eli 1981; Leucthenberg 1995). This role is captured in *United States v. Carolene Products* (1938), in which the Court laid out a theory of its role in a democratic polity. It would be grounded in a responsibility to ensure that democracy did not malfunction and that access to the pluralistic venues of legislative debate was protected (Eskridge 2005).

Recognizing that laws flowed from a flawed system in which not everyone had equal access to participate, the Court was more suspicious of laws that appeared to have a disproportionate impact on particular groups, especially groups that could demonstrate that their voice was not duly heard when the law was crafted and executed. The Court's institutional legitimacy, then, was not grounded in its position as a unique interpreter of constitutional text as it had been for much of the nineteenth century (O'Neill 2005). It was now grounded in the judge's unique position to ensure that pluralist democracy functioned or to intervene by being more skeptical of laws that seemed to target groups with a history of political powerlessness. That skepticism was institutionalized as tiered-scrutiny doctrine, which operated as the framework for mid- and late-twentieth-century Fourteenth Amendment equal protection interpretation.

The gay rights rulings, because they do not utilize the context-specific identification of suspect class designation or higher scrutiny and instead articulate a universal claim to human dignity, follow a discernably distinct logic and thus provide

a distinct basis for the unelected Court's institutional standing in a democracy. The twentieth-century interventionist frame grounded in assessment of democratic process competes with a universalism that is purposively abstract. The gay rights and marriage equality rulings, by advancing individual dignity as the core principle animating the Fourteenth Amendment, do more than offer an anti-harm principle as the foundation of rational basis review; they articulate a privatized, individualized, and abstractly universal notion of dignity that potentially curbs the Court's ability to recognize, regulate, and limit subordination. By grounding equal treatment in a "universal" notion of equal dignity, the Court can remove itself from the identity politics of suspect class, from the uncomfortable position of rank ordering who has suffered a long-enough history of political powerlessness to merit strict or intermediate scrutiny.

Dignity may do the work of appearing as a universalistic good. It may seem the self-evident foundation of equal treatment and due process. Precisely because it appears timeless, it can stand as a seemingly neutral concept. It may therefore help to reorient the legitimate role of the judge in a democracy, which, at least rhetorically, has been one objective of the conservative legal movement (see Teles 2008; Tamanaha 2010, 2016; Hollis-Brusky 2015). It did provide a way for Justice Kennedy to achieve his desired result in gay rights rulings without employing critiqued scrutiny doctrine. And, as discussed further in the next section, it gained traction at a moment when scrutiny doctrine was being creatively reworked by the justices to achieve ends seemingly antithetical to its purpose.

II. STRATEGIC REWORKING OF IDEAS TOWARD ANTITHETICAL ENDS: FROM CLASS TO CLASSIFICATION AND THE CONSERVATIVE REWORKING OF SCRUTINY DOCTRINE

Stephen Skowronek (2006) has argued that institutional and cultural developments follow from how ideas are put to use in distinct ways over time. Building on the notion that U.S. political culture is composed of multiple strands, e.g. liberal traditions, republican traditions, and a set of ascriptive prejudices (Smith 1993), Skowronek argues that governing institutions do not simply map on to one of those possible traditions but instead that institutional development follows from the exchange between ideas and the purposes for which actors seek to use them. According to Skowronek, entrepreneurial political actors can create "cultural composites, ideas characterized by the interpenetration of these antithetical ends" and thereby foster a new developmental trajectory; these new formulations are "constitutive of action along lines all their own" (386).

The "audacity to be found in the play of ideas over time" (386) is strongly illustrated in how some conservative justices have redefined scrutiny doctrine from an effort to remediate discrimination against particular suspect classes to an effort to call certain classifications in law constitutionally suspect, thereby undermining attempts to carry out targeted remedial policies. Indeed, between 1990 and 2003, 73 percent of race-conscious statutes were struck down through the use of strict scrutiny, and "almost every single law that was struck down in that period was one that sought to ameliorate the status or racial minorities such as affirmative action" (Winkler 2003; Bedi 2010, 543). In short, the idea of suspect class as developed in scrutiny doctrine has been put to antithetical effect. And that shift can be traced in the deliberate moves of particular justices.

That a precedential pathway can be carved to challenge the original meaning of the foundational precedent is not a particularly shocking idea. I trace this process to demonstrate how entrepreneurial actors can foster a durable shift in how governing authorities understand constitutional commitments, here the meaning of Fourteenth Amendment equal protection. I also hope to show that the shift from suspect class to suspect classification not only reveals a conservative aversion to identity group politics and privileges the individual but also that such privileging provides an opportunity to develop the doctrine of dignity.

How justices have relied on *Loving v. Virginia*, the decision striking down laws that banned interracial marriage, provides a useful illustration of the malleability of rulings to serve particular ideological aims. Liberals cheered the ruling, but it also ironically laid the foundations for later decisions that overturned policies meant to remedy racial inequality and subordination, later decisions that disappointed liberals. Historian Peggy Pascoe (2009) notes that while Chief Justice Earl Warren was careful in his ruling for the unanimous Court to stipulate that Virginia's miscegenation law was an invidious discrimination on its face and thus overruling that law constituted an anti-subordination act, she also notes "a tendency to regard the *Loving* decision as proof positive to Justice John Marshall Harlan's famous 1896 assertion that 'our constitution is colorblind' and, as such, *Loving* became useful to opponents of affirmative action in higher education admissions" (287).

Liberals had long touted colorblindness as a value and sought to overturn miscegenation laws because they racially classified in order to subordinate. The remedy was to declare the classification that enabled this subordination—that perpetuated systems of white supremacy—at odds with the Constitution's guarantee of equal protection. But, conservative jurists could utilize the anti-classificatory language of *Loving* to support a more blunt reading of the equal protection guarantee as simply

anti-classification altogether (something Kennedy would come to do). Insofar as the remedy in *Loving* required that states could no longer classify by race, conservatives on the Court could use *Loving* to challenge affirmative action and busing cases that relied on classification to function. As Pascoe notes,

> in several highly controversial cases on these issues, references to *Loving* lined both sides of a deep judicial divide. In affirmative action cases, liberal justices returned to the position Earl Warren had originally taken in *Loving*, and began to insist that when it came to race classifications, purpose really did matter. . . . Conservative justices, however, insisted on treating the race classifications in affirmative action programs as if they were exact parallels to the race classifications in segregation law. (305)

While affirmative action policies remain constitutional despite repeated challenges, that Justice Kennedy could cite *Loving* in his concurrence to strike down a busing policy in 2007 aimed at promoting public school integration only highlights how a ruling that liberals once cheered can be utilized to support interpretations long sought by the conservative legal movement (*Parents Involved in Community Schools v. Seattle School District No. 1* [2007]).

At the core of conservative reinterpretation of *Loving* is the conflation of suspect class with suspect classification. The Virginia ban on interracial marriages was unconstitutional not merely because it created racial classification but also because it did so with the purpose of maintaining racial hierarchy: "The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy" (8). As Pascoe suggests, the law is problematic because it subordinates via its classification. Conservatives have increasingly argued that any racial classification is illegitimate, whereas liberals on the Court have tried and failed to hold to the original idea that classification that might remedy discrimination was constitutionally permissible. A scrutiny developed to monitor the context in which law was crafted so that undemocratic subordination may be countered was transformed into a decontextualized doctrine of abstract principle to guard against any classification that indicated difference (Bedi 2013a).

The conflation of class with classification is illustrated by the 1989 ruling *City of Richmond v. J.A. Croson Company* (1989). The Court struck down Richmond's Minority Business Utilization Plan, which required that the city hire a certain percentage of minority business enterprises. Justice Sandra Day O'Connor, with separate concurrences from Justice Scalia and Kennedy, read the Fourteenth Amendment's equality

commitment not as a remedial responsibility but as requiring race neutrality. Any racial classification becomes suspect. According to O'Connor: "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification" (495). For Kennedy, "[t]he moral imperative of racial neutrality is the driving force of the Equal Protection Clause" (519). And, for Scalia, "strict scrutiny must be applied to all governmental classification by race, whether or not its asserted purpose is 'remedial' or 'benign' "(521).

In dissent, Justice Thurgood Marshall noted the significant redirection that *Croson* cast: "Today, for the first time, a majority of this Court has adopted strict scrutiny as its standard of Equal Protection Clause review of race-conscious remedial measures. This is an unwelcome development" (522). According to Marshall, "[a] profound difference separates government actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism" (552–53). Marshall criticized how O'Connor's ruling for the majority twists the metrics by which "suspect" class is determined. For example, O'Connor called into question that African Americans can be treated as a minority for the purposes of remedial legislation as they constitute 50 percent of the population of Richmond and hold a majority of five seats on the nine-member city council. But Marshall responded by noting that this conception of minority strays from the standard that the Court has applied in the development of the scrutiny doctrine. According to Marshall, "this Court has never held that numerical inferiority alone, makes a racial group 'suspect' and thus entitled to strict scrutiny review. Rather, we have identified other 'traditional indicia of suspectness': whether a group has been saddled with such disabilities, or subjected to a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection of the majoritarian political process" (525). Marshall clinged to the established understanding of scrutiny doctrine because it draws on the interventionist overseer legitimacy that flows from the *Carolene* footnote. But he went further to highlight how O'Connor's claim that the Fourteenth Amendment's equal protection command requires that states not classify by race or that any policy that classifies, even for remedial purposes, violates the meaning of that amendment. He forcefully argued that O'Connor's turn to see race as a suspect classification rather than African Americans as a suspect class reorients the Fourteenth Amendment toward an end antithetical to its original purpose:

> The fact is that Congress' concern in passing the Reconstruction Amendments, and particularly their congressional authorization provisions, was that States

> would not adequately respond to racial violence or discrimination against newly freed slaves. To interpret any aspect of these Amendments as proscribing state remedial responses to these very problems turns the Amendments on their heads. (526)

In other words, to read the Fourteenth Amendment as a ban on classification undermines the remedial aims of the framers of that text. And, in this way, Marshall highlighted the entrepreneurial construction that O'Connor and her fellow justices offered in their ruling for the Court.

What Marshall called "a full-scale retreat from the Court's longstanding solicitude to race-conscious remedial efforts" was followed by some attempts to reassert the traditional application of suspect class. Thus, the Court narrowly ruled that the federal government's use of preferences for minority businesses to achieve remedial effects in *Metro Broadcasting v. FCC* (1990) was constitutional. However, this reassertion of Marshall's allegiance to the original application of suspect class doctrine was overturned five years later when O'Connor ruled in *Adarand Constructors v. Pena* (1995). Asserting that *Crosson* established the principles that any racial or ethnic preference in the law must be reviewed with skepticism and that the standards of review under the Fourteenth Amendment must be consistent regardless of whether the statute in question is state or federal, O'Connor cemented the suspect classification rendering of the Fourteenth Amendment's command. Perhaps even more important, she stated that these principles are grounded in the fundamental principle that "the Fifth and Fourteenth Amendments to the Constitution protect persons, not groups" (201). That statement is a clear rejection of the *Carolene* notion that the Court would utilize a more searching scrutiny when the law disproportionately affects insular and discrete minorities. And it resonates with Gorsuch's assertion, offered during his confirmation hearings, that he sees individuals as persons and not as members of particular classes or groups.

If O'Connor represents the entrepreneurial jurist who illustrates the kind of creative syncretic approach of utilizing perhaps commonsensical notions of equality or of treating people the same in order to reconfigure the long understood and applied aims of the Fourteenth Amendment as Marshall defined them, then Kennedy stands as the innovator who grasps a seemingly new concept—dignity—to take O'Connor's move one step further. Where O'Connor moves from class to classification, Kennedy does not even seek to classify. If the Fourteenth Amendment only sees persons, then it cannot see the categories that might contextualize or classify. Nowhere is this universal aspiration to a purely individualized notion equal personhood more clearly evident than in Kennedy's repeated reliance on dignity in the gay rights rulings.

III. THE DIGNITY ALTERNATIVE: THE DISTINCT PATHWAY OF GAY RIGHTS JURISPRUDENCE

Human dignity as textual constitutional value, or "a social value that has been expressed—explicitly or implicitly—in the constitution of the state" is a recent phenomenon (Barak 2015, 12). It gained popularity in response to the atrocities associated with the Second World War. Postwar constitutions and international treaties are replete with references to dignity as the foundation for rights. Yet even as dignity has gained traction in national and international legal traditions, especially in Europe and post-apartheid South Africa, it has been roundly criticized as problematically vacuous, devoid of specific content, and all too elusive (Eberle 1997; Eckert 2002; Macklin 2003; Bagaric and Allan 2006; Rosen 2012).

In the United States, the Supreme Court has invoked the concept of dignity, perhaps more often in dissents than in majority rulings, since the 1940s. And the earliest uses hardly amounted to a consistent doctrine much less definition; scholars have called the treatment of dignity "episodic and underdeveloped," "tentative," and "fragmented" (Jackson 2004, 17; Rao 2008, 202; Barak 2015, 206). As legal scholar, Aharon Barak (2015) summarizes the trend of the Court: "The Justices point out that their decisions are an attempt to realize human dignity, but they do not explain what human dignity is, what it covers, and what are the elements that comprise it" (206). Barak points out that at least three Supreme Court justices are crucial to the articulation of dignity as a constitutional value: Frank Murphy, William Brennan, and Anthony Kennedy. And Kennedy has turned dignity into the rhetorical cornerstone of contemporary gay rights discourse in his authorship of *Romer*, *Lawrence*, *Windsor*, and *Obergefell*.

"Equal Dignity," the banner headline of the *New York Times* on June 27, 2015, was taken from a powerful sentence in Kennedy's ruling for the Court in *Obergefell*. Kennedy characterized the plaintiff's desire for marriage as simply asking for "equal dignity in the eyes of the law. The Constitution grants them that right" (28). In *Obergefell*, the majority decision invoked "equal dignity" twice. And that phrase marked just how distinct *Obergefell* and other gay rights rulings seemed to be. For example, *Loving v. Virginia*, the decision that forty-eight years earlier had struck down state bans on interracial marriage, never used the word "dignity." The phrase "equal dignity" was used once in *United States v. Windsor*, the 2013 ruling that struck down the federal Defense of Marriage Act (DOMA), when the majority declared, "[t]he history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence" (21). The phrase was not used at all in *Lawrence v. Texas*. Nevertheless, *Lawrence* did mention "dignity" two times, *Windsor* nine times,

and *Obergefell* nine times. And while all of these cases discussed the dignity of gays and lesbians to love whom they choose, none identified gays and lesbians as a suspect class or sexual orientation to be a suspect classification.

The refusal to so identify gays and lesbians as a suspect class came on the heels of the Court's *Adarand* ruling that the Fourteenth Amendment protects persons, not groups. A year later, Kennedy would apply that interpretation in *Romer v. Evans* (1996). The Supreme Court struck down an amendment to the Colorado constitution that prohibited adoption or enforcement of any statute "whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any persons or class of persons to have or claim any minority status, quota, preferences, protected status or claim of discrimination" (624). Kennedy argued for the majority that the state constitutional amendment under review unconstitutionally "named class, a class we shall refer to as homosexual persons or gays and lesbians," and then restricted the rights of these persons and no other (624). The amendment unjustly imposed a "broad and undifferentiated disability on a single named group," essentially cutting that group out of any democratic process (632). And the imposition was so broad that it could not be explained by any other motive "but animus toward the class it affects" (632). While the Court appears to begin the process of characterizing gays, lesbians, and bisexuals as a suspect class by identifying these persons as a discriminated class, Kennedy clearly holds that the class status is created and imposed unconstitutionally by the state of Colorado. The state, in other words, created a class in order to discriminate against it. The Court, it would seem, had no intention of compounding this action by then utilizing traditional suspect class analysis. Instead, it merely stated that Colorado cannot put forward a legitimate interest to justify its constitutional amendment. The Court declared the amendment a "status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit" (635).

Kennedy's refusal to employ either suspect class or the suspect classification doctrine carried forward into *Lawrence*, *Windsor*, and *Obergefell*. That *Lawrence* failed to do so is evidenced by the scholarly calls that "the Supreme Court not only ought to make gay men and lesbians a suspect or quasi-suspect class, but that it has in practice already done so, albeit *without* the sufficient binding force of precedent" (Smith 2004, 2770; see also Roberts 1993). Legal scholars seemed to accept that LGBT persons fit the characteristics of a suspect class. And in the wake of *Lawrence*, as same-sex marriage cases proceeded through state courts, some of those courts independently considered gays and lesbians as comprising a protected class and

held laws classifying by sexual orientation, such as restrictions on same-sex marriage, to intermediate review.[6]

In *Lawrence*, *Windsor*, and *Obergefell*, the Court's reasoning relied less on a formulaic categorization of suspect class or classification and more on a claim of human dignity. *Lawrence* has been called the *Brown v. Board of Education* (1954) and the *Loving v. Virginia* (1967) moment of the LGBT rights movement (Eng 2010, 17, 41). Yet, unlike *Brown* and *Loving*, Kennedy explicitly ruled that *Lawrence* was not decided as a matter of equal protection.[7] Instead, he subsumed an equal protection claim under a construction of fundamental rights as protected under due process: "As an alternative argument in this case, counsel for the petitioners and some amici contend that *Romer* provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument, but we conclude the instant case requires us to address whether *Bowers* itself has continuing validity" (574–75). Kennedy sought to fully reverse *Bowers v. Hardwick* (1986), and to do so he had to engage *Bowers* on its own assumptions. But by subsuming equality under due process liberty, *Lawrence* stands primarily as a ruling about individual freedom, autonomy, and dignity rather than equality.

By avoiding an equal protection argument, the Court sidestepped the question of whether sexuality was a suspect classification, whether gays, lesbians, or bisexuals constituted a suspect class or whether and what kind of scrutiny need be applied. As Justice Scalia pointed out in his dissent:

> Though there is discussion of "fundamental proposition[s]" . . . and "fundamental decisions". . . nowhere does the Court's opinion declare that homosexual sodomy is a "fundamental right" under the Due Process Clause; nor does it subject the

6. See further discussion of these state rulings in Section V.

7. *Loving* contained an equal protection component *and* a fundamental rights component. The state law banning interracial marriage under review in *Loving* violated equal protection because the law only maintained white supremacy and the state's claim that it treated the races equally inasmuch as it banned each from marrying members of the race did not meet the standard or meaning of equal protection. As Chief Justice Warren stated in the Court's unanimous decision, "we reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations" (*Loving v. Virginia* [1967], 9). In addition, because marriage constituted a fundamental right, the ban also violated a basic due process consideration. Warren states: "These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival" (*Loving v. Virginia* [1967], 13; citations omitted).

> Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy *were* a "fundamental right." Thus, while overruling the *outcome* of *Bowers*, the Court leaves strangely untouched its central legal conclusion: "[R]espondents would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do." Instead the Court simply describes petitioners' conduct as "an exercise of their liberty"—which it undoubtedly is—and proceeds to apply an unheard-of form of rational-basis review that will have far reaching implications beyond this case. (586)

Indeed, rather than adhering to the language and formulaic construction of tiered scrutiny, Kennedy waxed poetic that the criminalization statutes in question denied gays and lesbians of dignity:

> It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice. (567)

The Court relied on dignity as an operative concept: laws that violate dignity are likely grounded in no other motivation than animus and thus unconstitutional.

Kennedy's reliance on dignity surfaced again in *Windsor*. When ruling that the federal government must recognize same-sex marriage where it is recognized by state governments, Kennedy framed the requirement as necessitated by dignity. He began by noting that "[i]t seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage" (13). He stipulated that when a state offers the recognition of marriage to a class of persons, it "confer[s] upon them a dignity and status of immense import" (18). In so doing, the state enhances the "recognition, dignity, and protection of the class in their own community" (18). He then characterized DOMA as creating an "injury and indignity" that "is a deprivation of an essential part of liberty protected by the Fifth Amendment" (19).

He considered New York's decision to recognize same-sex marriage as constituting "further protection and dignity to that bond" and that it represented a determination by the state that same-sex couples were "worthy of dignity in the community equal with all other marriages" (20). He contended that "[t]he history of DOMA's

enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute" (21). He argued that marriage creates responsibilities and rights that "enhance the dignity and integrity of the person" that DOMA denies (22). Finally, he declared the statute invalid because "no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity" (25–26). Although Kennedy used the phrase "legitimate purpose," his reliance on human dignity elides the formal structure of the scrutiny tiers.

Windsor did not compel states to recognize same-sex marriage. And, as in *Lawrence*, Kennedy again did not specify the level of review explicitly. Given his discussion of animus, dignity, and legitimate government purpose, the ruling, however, would seem to imply that there is no *rational basis* for the federal government not to recognize same-sex marriage. In short, gays, lesbians, and bisexuals are not, according to the Supreme Court, a suspect class, and neither is sexual orientation a suspect classification. Nor does such identification need to take place for the Court to view anti-gay laws as unconstitutional.

On June 26, 2015, the second anniversary of the *Windsor* ruling and the twelfth anniversary of the *Lawrence* ruling, Justice Kennedy issued yet another ruling that would endear him to gay and lesbian rights activists and secure his legacy as the stalwart promoter of legal equal treatment for gays and lesbians. Kennedy delivered the ruling for the five-justice majority in *Obergefell*, which held "that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them" (22–23). Just as in *Lawrence* and *Windsor*, Kennedy premised the *Obergefell* decision on claims to dignity; he defined marriage as a union that "always has promised nobility and dignity to all persons, without regard to their station in life" (3). In fact, he used the term no less than nine times: he discussed marriage has transformed over time to recognize the "equal dignity" of women in cross-sex marriages (6); he discussed the dignity of homosexuality as a personhood or identity rather than considering it a mere sexual act and that predominance of the latter social conception and indeed the criminalization of the act violated that dignity (7); he suggested, reiterating *Lawrence*, that personal intimate choice was a marker of that dignity (10); he suggested that marriage is one of those personal choices in which there is "dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices" (13); he suggested that state recognition of marriage constitutes a "basic dignity" (26). He also defined the action sought by petitioners—the recognition of their marriage—because "[t]hey ask for equal dignity in the eyes of the law. The Constitution grants them that

right." The word "scrutiny" appears once in the majority decision and then only in a description of the Hawaii ruling granting marriage recognition in 1993. The terms "suspect class" or "protected class" do not appear at all in the ruling.

IV. THE DIGNITY ALTERNATIVE: ITS USE FOR ANTI-LIBERAL ENDS

While dignity has been mostly drawn out in Kennedy's gay rights rulings, it has been referenced in other Court rulings, including but not limited to abortion rulings and affirmative action decisions. In these cases, Kennedy has invoked dignity to strike down policies aimed at racial integration and access to abortion. Consider Kennedy's invocation of dignity in his dissent in *Stenberg v. Carhart* (2000). In this case, the Court struck down a Nebraska prohibition on late-term abortions. In dissent, Kennedy considered the ban constitutional in part because he claimed the abortion procedures bore a striking relation to infanticide and thereby undermined the dignity of the physician performing the procedure as well as the dignity of the fetus: "A State may take measures to ensure the medical profession and its members are viewed as healers sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life, even life which cannot survive without the assistance of others" (962).

Kennedy revived this argument in his ruling for the Court seven years later in *Gonzalez v. Carhart* (2007), which upheld the Federal Partial-Birth Abortion Ban Act of 2003. That statute banned a particular late-term abortion procedure, known as dilate and extract (D&E). While abortion access had been, to this point, litigated under the fundamental right of privacy, and thus laws affecting it held to heightened scrutiny, Kennedy instead reviewed this federal statute under the lowest threshold of rational basis review. He justified this move by contending that at stake was not a right to abortion access but the state's right to ban a particular medical procedure. Such a ban fell within the domain of government power to regulate so long as the regulation had a rational relation to a legitimate purpose. Kennedy also spoke to the need of maintaining human dignity as this legitimate purpose. He characterized the federal statute as "express[ing] respect for the dignity of human life" and stated "[n]o one would dispute that, for many, D&E is a procedure itself laden with the power to devalue human life." Of course, Kennedy's dignity concern was limited in scope and application. According to one legal scholar, "the dignity interests of women confronted with an unwanted pregnancy went largely unacknowledged" (Meyer 2007, 59). Instead, Kennedy was concerned with the dignity of the physician—performing late-term abortions seemingly destroyed their humanity—the dignity of fetal life and the dignity of the woman but only insofar as she should be saved from the emotional trauma of choosing the procedure: "[I]t seems

unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained." Other legal scholars noted that the ruling is "remarkable" for "its almost complete indifference toward the holders of those rights: women" and that consequently, "[a]bortions seem only, in the eyes of the Supreme Court to involve the 'abortion doctor,' 'the fetus,' and 'the cervix'" (Grossman and McClain 2007).

Or consider how Kennedy has claimed that racial classifications undermine dignity. For example, when evaluating whether an individual suffered race-based discrimination in exercising the right to vote in *Rice v. Cayetano* (2000), Kennedy claimed: "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities" (962). Kennedy's hostility toward racial classifications regardless of whether the statute in question aims to remedy race-based subordination is also evident in his concurrence in *Parents Involved*: "To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in society" (797). Kennedy's aversion to classification would seem to suggest not only that it be treated as constitutionally suspect but also that the Court try to avoid reinforcing it through its particular rendering of the Fourteenth Amendment's equal protection guarantee as a group-based right, with groups defined either as classes or by classifications.

Instead, Kennedy sounds the conservative chord of equality at the level of individuals—that all individuals be treated as fundamentally the same before the law. Dignity, as expressed in the gay rights decisions, offers that potential. And, perhaps unsurprisingly, it also undergirds conservative aims to challenge abortion access and eliminate affirmative action. In short, Kennedy's emerging dignity doctrine, while it grounds the gay rights decisions in ways political progressives might applaud, has been the foundation of other rulings that conservatives have long sought.

V. A DURABLE SHIFT? EVIDENCE OVER TIME AND ACROSS SPACE

Will this shift toward dignity and away from more traditional (either suspect class or suspect classification) equal protection analysis prove durable? It is difficult to answer this question with any certainty. It is always possible that the Court's flirtation with dignity could be limited to the gay rights jurisprudence. The notion of dignity has thus far proven durable within the confines of LGBT rights jurisprudence, which is to say, no Supreme Court decision employed the more traditional analysis when it was clearly available to the justices. *Obergefell* came after a variety of state

supreme court rulings that invoked scrutiny doctrine. Some, such as the Connecticut and Iowa supreme courts, systematically determined gays and lesbians to constitute a suspect class by a standard multipronged test and struck down bans on same-sex marriage by invoking intermediate or higher scrutiny (*Kerrigan v. Commissioner of Public Health* [2008] and *Varnum v. Brien* [2009]). Others also considered marriage a fundamental right and struck the bans down by applying strict scrutiny (see *In re Marriage Cases* [2008]). Some federal courts did the same; some applied suspect class analysis and declared state bans on marriage to be violations of equal protection via intermediate scrutiny (*Wolf v. Walker* [2014] and *Latta v. Otter* [2014]), whereas others suggested that since marriage was a fundamental right state bans could not withstand strict scrutiny (*Kitchen v. Herbert* [2014] and *Bostic v. Shaefer* [2014]).

Kennedy did not take either route even as he hinted at some elements of suspect class analysis in *Obergefell*. That it was not taken may reflect the personal values of Kennedy himself (Segal and Spaeth 2002). Since *Romer*, *Lawrence*, *Windsor*, and *Obergefell* were all crafted by Kennedy, the repeated invocation of dignity could amount to no more than a personal decision, an attempt to fit LGBT equality within a set of personal political values that do not correspond to the rigid identity group politics upon which scrutiny doctrine rests. Second, scholars have pointed to Kennedy's Catholicism as a unique source for his invocation of dignity in his gay rights, abortion, and death penalty jurisprudence (Colucci 2009; Jelliff 2012; Moyn 2014). Third, it is possible—although much more investigation would be necessary into his own papers—that Kennedy's reliance on dignity purposively recalls the position of another Republican-appointed judge to the bench increasingly out of step with the ideological trajectory of the conservative movement, namely John Paul Stevens (Epstein and Segal 2005). Indeed, Stevens dissented in *Bowers*, the 1986 ruling that maintained a state government's ability to criminalize adult consensual same-sex sexual relations. In that dissent, Stevens wrote:

> These cases do not deal with the individual's interest in protection from unwarranted public attention, comment, or exploitation. They deal, rather, with the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny. The Court has referred to such decisions as implicating "basic values," as being "fundamental," and as being dignified by history and tradition. The character of the Court's language in these cases brings to mind the origins of the American heritage of freedom—the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable. Guided by history, our tradition of respect for the dignity of individual choice in matters of conscience and the restraints implicit in

> the federal system, federal judges have accepted the responsibility for recognition and protection of these rights in appropriate cases. (215)[8]

Stevens discussed a distinct conception of sexuality than the other justices, who held homosexuality to be a sexual act, either entitled or not to occur within the private domain of the home. Privacy was an inadequate concept for what was at stake in the question of whether a person should face criminal sanction for realizing their full self within the scope of intimacy. Instead, Stevens suggested that such sexual intimacy is an expression of human dignity. By replacing privacy with dignity, Stevens, if even only for himself and Justices Brennan and Marshall, who joined his dissent, moved beyond the limits of act and to a richer conception of how sexuality defines selfhood. Kennedy's gay rights jurisprudence clearly follows.

But if the gay rights jurisprudence tracks the thought of primarily one justice—even if it has roots in the writings of others—can it be called a development in as much as that term connotes a durable shift in ideational or institutional authority? Perhaps it is simply too early to tell. As constitutional legal development is, given the principle of *stare decisis*, a path-dependent endeavor grounded in precedent, the dignity doctrine is just too young. Not enough cases in not enough distinct constitutional realms have occurred in which the concept could be invoked.

Nevertheless, there are some signs that dignity may persist beyond the musings of a single justice. First, the Court issued no concurrence in *Obergefell* that employed scrutiny doctrine even as there were clear examples from lower federal and state courts that would have sufficed as models. Second, the executive branch under Barak Obama embraced the dignity rationale in its robust defense of transgender rights and importantly did not utilize the trappings of scrutiny doctrine. This is a profoundly different move compared with its explicit reliance on scrutiny doctrine in its earlier refusal to defend DOMA. This move from scrutiny to dignity beyond the judiciary suggested initial acceptance of the new paradigm by a presidential administration, even as this position has been reversed by the Trump administration.

The Court's refusal to apply suspect class analysis in *Obergefell* is all the more striking because the ruling identified many of the characteristics that define suspect class. First, Kennedy recognized a history of enduring unjust discrimination:

> Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the

8. This passage in *Bowers* is a quotation of an earlier statement by Justice Stevens offered in *Fitzgerald v. Porter Memorial Hospital* (cert. denied, 425 U.S. 916 [1976]).

> criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate. (7)

Second, unlike any previous ruling, Kennedy defines sexuality as an immutable trait: "Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their *immutable nature* dictates that same-sex marriage is their only real path to this profound commitment" (4). Despite making the beginnings of what would seem a systematic identification of suspect class characteristics, Kennedy grounds the ruling in the dignity that inheres in marriage. Despite recognizing histories of discrimination, there is no formulaic identification of the distinguishable traits that would render a class suspect and call for higher scrutiny of the state's reasons for limiting access to marriage. The Court has made a profound move to avoid scrutiny doctrine.

That avoidance is a marker of a durable shift in jurisprudential thinking from traditional equal protection analysis to a new dignity-based framework. Another indicator is the lack of a concurring opinion in *Obergefell*, signed by at least a minority of justices, that performs the traditional suspect class analysis. This absence is all the more striking since, leading up to *Obergefell*, multiple state courts had provided examples of how this analysis—determining gays and lesbians to make up a suspect class and thereby subjecting restrictions on marriage recognition to higher scrutiny—could have been done. In 2008, in *In re Marriage Cases*, the California Supreme Court analogized sexual orientation to race and sex in two ways, which thereby permitted and compelled the Court to evaluate the state's claims by strict scrutiny. First, the marriage statutes classify or discriminate "on the basis of sexual orientation, a characteristic that we conclude represents—like gender, race, and religion—a constitutionally suspect basis upon which to impose differential treatment" (10). Second, the Court determined that such treatment "impinges upon a same-sex couple's fundamental interest in having their family relationship accorded the same respect and dignity enjoyed by an opposite-sex couple" (10). The state's interest in distinguishing marriages from same-sex domestic partnerships, so as to

maintain "the traditional and well-established definition of marriage," was not considered to be compelling or that the existing exclusion was necessary to achieve this interest (11).

A few months later, the Connecticut Supreme Court engaged in a systematic analysis evaluating whether gays qualify as a quasi-suspect class and thus whether laws classifying so as to exclude that class are subject to heightened scrutiny. It found that gay persons endured a history of discrimination, that sexual orientation is unrelated to a person's ability to participate in or contribute to society, that the distinguishing characteristic of the class while not immutable is also not easily changed, and that the class has a history of political powerlessness (22–48). Because the immutability of sexual orientation is subject to debate, the Court's rumination on this point requires some detailing. The Court did not declare sexual orientation to be immutable; it did find that "it is not necessary for us to decide whether sexual orientation is immutable in the same way and to the same extent that race, national origin, and gender are immutable" (27). Instead, the Court declared that, as stipulated in *Lawrence*, sexual intimacy is so integral to personal identity and sexual orientation plays a "central role . . . in a person's fundamental right to self-determination" (28). Therefore, it operates as "the kind of distinguishing characteristic that defines them as a discrete group for purposes of determining whether that group should be afforded heightened protection under the equal protection provisions of the state constitution" (28). A year later, the Iowa Supreme Court conducted a similar analysis. Utilizing the four-pronged test to determine suspect class status, the Iowa Supreme Court recognized gay persons as a suspect class and sexual orientation as a suspect classification. In applying the intermediate scrutiny standard such that the statutory classification excluding gays and lesbians from marriage recognition must be substantially related to an important government interest, the U.S. Supreme Court determined that none of the five interests put forward by the state rose to that level.

Given all of these examples from state supreme courts, that there is no concurrence in *Obergefell* even among a minority of justices that lays out a similar argument is a striking example of how the Court refused or perhaps saw no need to pursue the traditional doctrinal path. In speaking to this omission, Justice Ruth Bader Ginsburg relied on the pragmatic and symbolic effects of a single decision:

> Perhaps because in this case it was more powerful to have the same, single opinion. . . . That kind of discipline is to say, "I'm not the queen and if the majority is close enough to what I think . . . then I don't have to have it exactly as I would have written it." . . . On the whole, we think of our consumers—other judges, lawyers, the

> public. The law that the Supreme Court establishes is the law that they must live by, so all things considered, it's better to have it clearer than confusing. (Stern 2015)

While a single rationale—the dignity claim—may be less confusing, the well-entrenched doctrine of tiered scrutiny as possibly applied to a marriage equality claim would hardly be difficult to follow. It had been articulated by legal scholars and lower courts for at least a decade. Without it, LGBT persons continue to go unrecognized as a suspect class, and the Court continues in deepening its commitment to rights grounded more explicitly in the rhetoric of individual autonomy and dignity than in the state's commitment to equality.

Finally, another aspect of durability is whether governing authorities accept a possible constitutional interpretation. Is the new approach used beyond the branch that has put it forward? Indeed, the executive branch has recently employed the dignity framework, tellingly abandoning the doctrine of tiered scrutiny, which it had pointedly relied on only a few years ago. In 2011, Attorney General Eric Holder announced that the administration would not defend DOMA in federal court (DOJ 2011). President Obama concluded that Section 3 of the law, which defined marriage as a union between one man and one woman, was unconstitutional. According to Holder, the president determined that gays and lesbians constituted a suspect class, that laws affecting that class should be held to heightened judicial scrutiny, and that DOMA would not survive that level of scrutiny: "[G]iven a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a more heightened standard of scrutiny." Holder's statement is significant because of how closely it held to the traditional equal protection analysis; it recognized gays and lesbians as a suspect class even as it acknowledged that the Supreme Court has not.

When Attorney General Loretta Lynch commented on whether and how a North Carolina law, HB2, violated existing federal civil rights statutes or the Fourteenth Amendment's guarantee of equal protection, she tellingly did not employ any of the trappings of scrutiny doctrine as had her predecessor. She did invoke the operative concept of *Obergefell*: dignity. The bill, which prevented municipalities from passing antidiscrimination ordinances that would include sexual orientation and gender identity and specifically banned transgender individuals from using public restrooms that correspond to their gender identity, was deemed "in direct opposition to federal laws prohibiting discrimination on the basis of sex and gender identity." Because North Carolina responded to the federal government's position by suing the federal government, the Department of Justice brought a countersuit. Explaining part of the rationale for that suit, Lynch stated:

> This action is about a great deal more than just bathrooms. This is about the dignity and respect we accord our fellow citizens and the laws that we, as a people and as a country, have enacted to protect them—indeed, to protect all of us. And it's about the founding ideals that have led this country—haltingly but inexorably—in the direction of fairness, inclusion and equality for all Americans.

She went on to invoke a long history of discrimination that the Court has invalidated ranging from Jim Crow laws to bans on same-sex marriage bans.

By framing HB2 as legislative backlash against inroads toward LGBT rights recognition, Lynch channeled Justice Kennedy. Lynch characterized the law as "inflict[ing] further indignity on a population that has already suffered far more than its fair share. This law provides no benefit to society—all it does is harm innocent Americans" (DOJ 2016). First, Lynch's rhetorical invocation of dignity, the way she defines dignity in exact parallel to how the Court did so in *Lawrence*, *Windsor*, and *Obergefell*, and the absence of any reference to suspect class or political powerlessness would all seem to indicate a durable shift in the making. Second, Lynch, just as Kennedy did in *Windsor*, indicated that LGBT persons have long suffered a history of discrimination but did not translate that recognition into a claim of suspect class or higher scrutiny as Holder had done in 2011. Third, Lynch referenced how an appeal to dignity was inherently not class-specific but instead the Department of Justice's actions were meant to "protect all of us." In short, the invocation of dignity refuses to consider discrimination in historical and cultural contexts as suspect class doctrine requires. Precisely because the Department of Justice has invoked the discursive and interpretive shifts innovated by Kennedy, this newer dignity approach to equality seemed on the cusp of developmental durability, at least until the election of Donald Trump.

Under the guidance of Trump's attorney general, Jeff Sessions, the Department of Justice dropped its lawsuit against North Carolina's HB2 in April 2017 (Drew 2017). The case relied on the Obama administration's guidelines issued jointly in May 2016 from the Departments of Justice and Education that transgender students be allowed to use the public bathrooms that align with their expressed gender identity. The administration maintained that schools that did not follow these guidelines violated Title IX of the Education Amendments of 1972, which banned discrimination on the basis of a student's sex. The Trump administration rescinded this guidance in March 2017, which then cleared the way for the Department of Justice to drop the lawsuit against North Carolina. Thus, it would seem that inroads to any durability of dignity were cut off when Trump won the presidential election. Yet, developmental paths are hardly linear. Rights recognitions, however they

may proceed over time, do not follow a steady pathway of teleological progress but instead illustrate "the trajectories of development taken by political institutions and protean intellectual currents, of chance, unintended consequences, developmental paths, and pockets of resistance" (Kersch 2004, 26). Even this suggests that dignity, which as Gorsuch hinted at, may be useful to conservative jurists, may ultimately, over time, not prove useful to the political or legal aims of LGBT rights activists.

VI. CONCLUSION: THE CONSERVATIVE LOGIC OF A LIBERAL RULING AND THE POSSIBILITIES OF CONSTITUTIONAL DEVELOPMENT

This article has illustrated how *Obergefell* could, through its articulation of dignity as an alternative doctrinal pathway for equal protection, accommodate and even facilitate outcomes that progressive jurists would seek to avoid. The Kennedy oeuvre of gay rights rulings—*Romer*, *Lawrence*, *Windsor*, and *Obergefell*—is not only made up of rational basis rulings within the traditional scrutiny doctrine of Fourteenth Amendment equal protection decisions. Rather, they also supplant tradition with a new possible paradigm grounded in dignity. Moreover, when we consider how Justice Kennedy has conceptualized dignity in other arenas of human liberty, particularly abortion access, it becomes all too clear how dignity may operate against the aims associated with the political left.

Ironically, *Obergefell* may open the door to opportunities to restrict LGBT rights. The dignity doctrine does not provide a clear answer to the new front in LGBT mobilization: equal treatment in employment, housing, and public accommodations. Kennedy's invention pits one conception of dignity—that of the religious believer—against another—that of the individual seeking to live and to earn a living free from discrimination. Who has a greater claim on free expression as constitutive of dignity—the gay or lesbian individual who seeks to live free from prejudice or the religious believer who seeks also to live openly and free from prejudice? Historically, when the Court has construed gay rights claims to conflict with First Amendment claims to freedom of expression, the latter have won out (see *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston* [1995] and *Boy Scouts of America et al. v. Dale* [2000]). Just as Kennedy's reliance on dignity as a substitute for the formulaic application of scrutiny curbed abortion access, it could be used to curb gay rights claims, particularly those that take expression of sexual identity beyond the conceptual bounds of the private heteronormative bedroom, household, and family. In this regard the coming Supreme Court ruling in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, which pits an expression claim against an

equal protection claim, could prove telling to whether and how the dignity doctrine is utilized.

The article has also shown how the same-sex marriage jurisprudence is not merely historically contingent—coming at a particular cultural point when the concept of gay rights is far more publicly accepted—but also does work within broader political and discursive efforts to ground the institutional authority of the Court to rule (Novkov 2001; Kersch 2004; Brandwein 2011). The underlying principle of dignity that courses through *Lawrence*, *Windsor*, and *Obergefell*, even as it is "responsive to political concerns, takes place within the available legal discursive frameworks of the jurisprudential movement in which it occurs" (Novkov 2015, 820). In other words, while we have tended to think of *Lawrence* and the marriage equality rulings as progressive victories, both the language and logic of dignity in these landmark rulings reflects a broader arc of conservative legal efforts to reshape how the equal protection clause is interpreted: from the application of scrutiny to suspect classes to the application of scrutiny to suspect classification (often with results antithetical to the original aspirations of the doctrine) and then to the refusal to apply higher scrutiny altogether by relying on some professed "universal" notion of dignity.

This ideational development aligns with a broader institutional shift in how the Court justifies its own place among three equal branches in a democracy. While the Court's institutional legitimacy for much of the twentieth century relied on its representation-reinforcing potential, on its unique ability to make democracy work by recognizing when it malfunctions and denies access to particular groups, the dignity framework points to a role that is less interventionist and comports with the broader aims of the conservative legal movement to curb judicial interventionism. To illustrate and defend these claims, the article detailed the erosion of scrutiny doctrine, described the emerging alternative in the gay rights rulings, showcased how dignity has been used to undercut liberal policies of racial integration and abortion access, and offered some evidence of how dignity has been used by distinct federal governing authorities.

Tiered scrutiny and suspect class/classification doctrine is a particular historical construction, and its maintenance over time is contingent, at least in part, on judicial appointment and the ongoing development of conservative legal infrastructure. Any newer doctrine of dignity will likely prove the same if it is to survive beyond the jurisprudential idiosyncrasies of one particular justice and the rollbacks of the Trump administration. Gorsuch's endorsement of *Obergefell* as "absolutely settled" and his claim to understand the Fourteenth Amendment to apply to individual persons rather than classes of people at least indicates some potential for

dignity to become entrenched. Ironically, dignity has been developed in the context of seemingly liberal gay rights victories, or, put differently, it is a liberal means to achieve a conservative end. We might, therefore, as Schopenhauer (1965) famously suggested, be cautious of treating dignity as an unalloyed good. We might be wary of judicial reliance on dignity precisely because, to this date, "that imposing expression" would appear to "lack of any real basis of morals, or, at any rate, one that had any meaning." Schopenhauer warned that people may "be glad to see themselves invested with such a dignity and would accordingly be quite satisfied with it" (100). Denied of dignity for so long, treated with moral and legal disgust (Nussbaum 2010), gays and lesbians rightfully celebrated when in June 2015, the *New York Times* splashed the banner headline of "Equal Dignity" across its front-page coverage of *Obergefell*. And, yet, dignity as a legal doctrine can support outcomes that might cause political liberals—long proponents of LGBT rights—to cringe.

REFERENCES

Ackerman, Bruce. 1998. *We the People: Transformations*. Cambridge, MA: Belknap Press of Harvard University.

Ackerman, Bruce. 2014. *We the People: The Civil Rights Revolution*. Cambridge, MA: Belknap Press of Harvard University.

Ackermann, Laurie. 2012. *Human Dignity: Lodestar for Equality in South Africa*. Claremont, South Africa: Juta.

Atuehene, Bernadette. 2014. *We Want What's Ours: Learning from South Africa's Land Restitution Program*. New York: Oxford University Press.

Avery, Michael. 2009. *We Dissent: Talking Back to the Rehnquist Court, Eight Cases That Subverted Civil Liberties and Civil Rights*. New York: NYU Press.

Balkin, Jack M., and Sanford Levinson. 2001. "Understanding the Constitutional Revolution." *Yale Law Journal* 87 (6): 1045–104.

Balkin, Jack M. 2011. *Living Originalism*. Cambridge, MA: Belknap Press of Harvard University.

Baer, Susanne. 2009. "Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism." *University of Toronto Law Journal* 59 (4): 417–68.

Bagaric, Mirko and James Allan. 2006. "The Vacuous Concept of Dignity." *The Journal of Human Rights* 5: 257–70.

Barak, Aharon. 2015. *Human Dignity: The Constitutional Value and the Constitutional Right*. New York: Cambridge University Press.

Berk, Gerald, and Dennis Galvan. 2009. "How People Experience and Change Institutions: A Field Guide to Creative Sycretism." *Theory and Society* 38 (6): 543–80.

Berk, Gerald, Dennis Galvan, and Victoria Hattam, ed. 2013. *Political Creativity: Reconfiguring Institutional Order and Change*. Philadelphia: University of Pennsylvania Press.

Bollinger, Alex. 2017. "Neil Gorsuch Said Same-Sex Marriage Is 'Absolutely Settled Law,'" *lgbtqnation.com*. March 22.

Bassok, Or. 2013. "The Supreme Court's New Source of Legitimacy." *Journal of Constitutional Law* 16 (October): 153–98.

Beard, Charles. 1912. "The Supreme Court—Usurper or Grantee?" *Political Science Quarterly* 27 (March).

Bedi, Sonu. 2010. "How Constitutional Law Rationalizes Racism." *Polity* 42 (4): 542–67.

Bedi, Sonu. 2013a. "Collapsing Suspect Class with Suspect Classification: Why Strict Scrutiny Is Too Strict and Maybe Not Strict Enough." *Georgia Law Review* 47 (2): 301–68.

Bedi, Sonu. 2013b. *Beyond Race, Sex, and Sexual Orientation: Equality without Identity*. New York: Cambridge University Press.

Ben-Asher, Noa. 2014. "Conferring Dignity: The Metamorphosis of the Legal Homosexual." *Harvard Journal of Law & Gender* 37: 243–84.

Bickel, Alexander. 1986. *The Least Dangerous Branch*. New Haven, CT: Yale University Press.

Brandwein, Pamela. 2011. *Rethinking the Judicial Settlement of Reconstruction*. New York: Cambridge University Press.

Canaday, Margot. 2009. *The Straight State: Sexuality and Citizenship in Twentieth-Century America*. Princeton, NJ: Princeton University Press.

Carozza, Paolo G. 2011. "Human Dignity in Constitutional Adjudication." In *Research Handbook in Comparative Constitutional Law*, ed. Tim Ginsburg and Rosalind Dixon. Northampton, MA: Edward Elgar: 359–472.

Carpenter, Dale. 2013. "Windsor Products: Equal Protection from Animus." *The Supreme Court Review* 2013 (1): 183–286.

Chemerinsky, Erwin. 1989. "The Supreme Court, 1988 Term—Forward: The Vanishing Constitution." *Harvard Law Review* 103: 43–104.

Clayton, Cornell W., and J. Mitchell Pickerill. 2004. "Guess What Happened on the Way to Revolution? Precursors to the Supreme Court's Federalism Revolution." *Publius: The Journal of Federalism* 34 (3): 85–114.

Colker, Ruth. 1986. "Anti-Subordination above All: Sex, Race, and Equal Protection." *NYU Law Review* 61: 1003–66.

Colucci, Frank. 2009. *Justice Kennedy's Jurisprudence: The Full and Necessary Meaning of Liberty*. Lawrence: University Press of Kansas.

Cooper, Elizabeth B. 2015. "The Power of Dignity." *Fordham Law Review* 84 (1): 3–24.

Crenshaw, Kimberle. 1989. "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics." *The University of Chicago Legal Forum* 1989 (1): 139–68.

Croly, Herbert. 1914. *The Promise of American Life*. New York: Macmillan.

Dahl, Robert. 1957. "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker." *Journal of Public Law* 6 (1): 279–95.

Department of Justice. 2011. "Statement of the Attorney General on Litigation Involving the Defense of Marriage Act." http://www.justice.gov/opa/pr/2011/February/11-ag-222.html.

Department of Justice. 2016. "Attorney General Loretta E. Lynch Remarks at Press Conference Announcing Complaint Against the State of North Carolina to Stop Discrimination Against Transgender Individuals." https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-press-conference-announcing-complaint.

Department of Justice. 2016. "U.S. Departments of Justice and Education Release Joint Guidance to Help Schools Ensure the Civil Rights of Transgender Students." https://www.justice.gov/opa/pr/us-departments-justice-and-education-release-joint-guidance-help-schools-ensure-civil-rights.

Drew, Jonathan. 2017. "Justice Department Backs off Request to Halt 'Bathroom Bill.'" *Associated Press*. March 6.

Drum, Kevin. 2010. "Balls and Strikes and the Roberts Court." *Mother Jones*. June 11.

Eberle, Edward J. 1997. "Human Dignity, Privacy and Personality in German and American Constitutional Law." *Utah Law Review* 4: 963–1056.

Eckert, Joern. 2002. "Legal Roots of Human Dignity in German Law." In *The Concept of Human Dignity in Human Rights Discourse*, ed. David Kretzmer and Eckart Klein. The Hague: Kluwer Law International.

Ely, John Hart. 1980. *Democracy and Distrust.* Cambridge, MA: Harvard University Press.

Eng, David L. 2010. *The Feeling of Kinship: Queer Liberalism and the Racialization of Intimacy*. Durham, NC: Duke University Press.

Engel, Stephen M. 2011. *American Politicians Confront the Court: Opposition Politics and Changing Responses to Judicial Power.* New York: Cambridge University Press.

Engel, Stephen M. 2016. *Fragmented Citizens: The Changing Landscape of Gay and Lesbian Lives*. New York: NYU Press.

Epstein, Lee, and Jeffrey A. Segal. 2005. *Advice and Consent: The Politics of Judicial Appointments*. New York: Oxford University Press.

Eskridge, Jr., William N. 2005. "Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics." *Yale Law Journal* 114 (April): 1279–328.

Fallon, Jr., Richard H. 2013. *The Dynamic Constitution: An Introduction to American Constitutional Law and Practice*, 2nd ed. New York: Cambridge University Press.

Friedman, Barry. 2010. *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution*. New York: Farrar, Strauss and Giroux.

Gillman, Howard, and Cornell Clayton. 1999. "Beyond Judicial Attitudes." In *Supreme Court Decision-Making: New Institutionalist Approaches*, ed. Cornell Clayton and Howard Gillman. Chicago: University of Chicago Press.

Glenn, Brian. 2004. "The Two Schools of American Political Development." *Political Studies Review* 2 (2): 153–65.

Graber, Mark. 2006. "Legal, Strategic or Legal Strategy: Deciding to Decide during the Civil War and Reconstruction." In *The Supreme Court in American Political Development*, ed. Ronald Kahn and Ken I. Kersch. Lawrence: University Press of Kansas: 33–66.

Gramsci, Antonio. 1971. *Selections from the Prison Notebooks*. Trans. Quentin Hoare and Geoffrey Nowell Smith. London: Lawrence and Wishart.

Grossman, Joanna, and Linda McClain. 2007. "*Gonzales v. Carhart*: How the Supreme Court's Validation of the Federal Partial-Birth Abortion Ban Act Affects Women's Constitutional Liberty and Equality: Part Two in a Two-Part Series." *Findlaw*. May 7. http://writ.news.findlaw.com/commentary/20070507_mcclain.html.

Harvey, David. 2005. *A Brief History of Neoliberalism*. New York: Oxford University Press.

Hennette-Vauchez, Stephanie. 2011. "A Human Dignitas? Remnants of the Ancient Legal Concept in Contemporary Dignity Jurisprudence." *International Journal of Constitutional Law* 9: 32–57.

Hollis-Brusky, Amanda. 2011. "Support Structures and Constitutional Change." *Law & Social Inquiry* 36 (Spring): 516–36.

Hollis-Brusky, Amanda. 2015. *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution*. New York: Oxford University Press.

Jackson, Vicki C. 2004. "Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse." *Montana Law Review* 65: 15–40.

Jelliff, Anne. 2012. "Catholic Values, Human Dignity, and the Moral Law in the United States Supreme Court: Justice Anthony Kennedy's Approach to the Constitution." *Albany Law Review* 76 (1): 335–65.

Joshi, Yuraj. 2015. "The Respectable Dignity of Obergefell v. Hodges." *California Law Review Circuit* 6 (November): 117–25.

Kahn, Ronald, and Ken I. Kersch, ed. 2006. *The Supreme Court in American Political Development*. Lawrence: University Press of Kansas.

Keck, Thomas M. 2009. "Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights." *Law & Society Review* 43 (1): 151–86.

Keck, Thomas M. 2015. "The Reagan Revolution to the Present." In *The Oxford Handbook of the U.S. Constitution*, ed. Mark Tushnet, Mark A. Graber, and Sanford Levinson. New York: Oxford University Press: 113–33.

Kersch, Kenneth. 2004. *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law*. New York: Cambridge University Press.

Klarman, Michael J. 2012. *From the Closet to the Alter: Courts, Backlash, and the Struggle for Same-Sex Marriage*. New York: Cambridge University Press.

Koppelman, Andrew. 2014. "Beyond Levels of Scrutiny: *Windsor* and 'Bare Desire to Harm.'" *Case Western Reserve Law Review* 64 (3): 1045–72.

Leuchtenberg, William E. 1995. *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt*. New York: Oxford University Press.

Lieberman, Robert C. 2002. "Ideas, Institutions, and Political Order: Explaining Political Order." *American Political Science Review* 96 (4): 697–712.

Lowndes, Joseph, Julie Novkov, and Dorian Warren, ed. 2008. *Race and American Political Development*. New York: Routledge.

Macklin, Ruth. 2003. "Dignity Is a Useless Concept." *British Medical Journal* 327: 1419–20.

Maltzman, Forrest, James F. Spriggs II, and Paul L. Wahlbeck. 2000. *Crafting Law on the Supreme Court: The Collegial Game*. New York: Cambridge University Press.

McCrudden, Christopher. 2008. "Human Dignity and Judicial Interpretation of Human Rights." *European Journal of International Law* 19 (4): 655–724.

Meyer, David D. 2007. "*Gonzales v. Carhart* and the Hazards of Muddled Scrutiny." *Journal of Law and Policy* 17 (1): 57–96.

Moyn, Samuel. 2014. "The Secret History of Constitutional Dignity." *Yale Human Rights and Development Journal* 17 (1): 39–73.

Nielsen, Laura Beth. 2009. "Social Movements, Social Process: A Response to Gerald Rosenberg." *John Marshall Law Review* 42 (3): 671–83.

Novkov, Julie. 2001. *Constituting Workers, Protecting Women: Gender, Law, and Labor in the Progressive Era and the New Deal Years*. Ann Arbor: University of Michigan Press.

Novkov, Julie. 2008. "The Miscegenation/Same-Sex Marriage Analogy: What Can We Learn from Legal History?" *Law & Social Inquiry* 33 (2): 345–86.

Novkov, Julie. 2015. "Understanding Law as a Democratic Institution through U.S. Constitutional Development." *Law & Social Inquiry* 40 (3): 811–32.

Nussbaum, Martha C. 2010. *From Disgust to Humanity: Sexual Orientation and Constitutional Law*. New York: Oxford University Press.

Oh, Reginald C. 2004. "A Critical Linguistic Analysis of Equal Protection Doctrine: Are Whites a Suspect Class?" *Temple Political & Civil Rights Law Review* 13 (Spring): 583–610.

O'Regan, Kate. 2013. "Undoing Humiliation, Fostering Equal Citizenship: Human Dignity in South Africa's Sexual Orientation Equality Jurisprudence." *NYU Review of Law and Social Change* 37 (1): 307–14.

Orren, Karen, and Stephen Skowronek. 2004. *The Search for American Political Development*. New York: Cambridge University Press.

Pasco, Peggy. 2009. *What Comes Naturally: Miscegenation Law and the Making of Race in America*. New York: Oxford University Press.

Pierson, Paul. 2004. *Politics in Time*. Princeton, NJ: Princeton University Press.

Pildes, Richard H. 2011. "Is the Supreme Court a 'Majoritarian' Institution?" *The Supreme Court Review* (1): 103–58.

Plotke, David. 1996. *Building a Democratic Political Order: Reshaping American Liberalism in the 1930s and 1940s*. New York: Cambridge University Press.

Pramuk, Jacob. 2017. "Neil Gorsuch: Supreme Court Has Said Same-Sex Marriage Is 'Protected by the Constitution.'" *cnbc.com*. March 21.

Rao, Neomi. 2008. "On the Use and Abuse of Dignity in Constitutional Law." *Columbia Journal of European Law* 14 (2): 201–56.

Resnik, Judith, and Julie Chi-hye Suk. 2003. "Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty." *Stanford Law Review* 55 (5): 1921–62.

Roberts, Eric A. 1993. "Heightened Scrutiny under the Equal Protection Clause: A Remedy to Discrimination Based on Sexual Orientation." *Drake Law Review* 42 (2): 485–510.

Rosen, Michael. 2012. *Dignity: Its History and Meaning*. Cambridge, MA: Harvard University Press.

Rosenberg, Gerald. 2008. *The Hollow Hope: Can Courts Bring about Social Change*? 2nd ed. Chicago: University Of Chicago Press.

Ross, William G. 1993. *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Court, 1890–1937*. Princeton, NJ: Princeton University Press.

Schopenhauer, Arthur. 1965. *On the Basis of Morality*. Indianapolis, IN: Bobbs-Merrill.

Schraub, David. 2016. "The Siren Song of Strict Scrutiny." *University of Missouri Kansas City Law Review* 84 (3): 859–70.

Segal, Jeffrey A., and Harold J. Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited*. New York: Cambridge University Press.

Sheingate, Adam. 2003. "Political Entrepreneurship, Institutional Change, and American Political Development." *Studies in American Political Development* 17 (2): 185–203.

Siegel, Reva B. 2010. "*Roe's* Roots: The Women's Rights Claims That Engendered *Roe*." *Boston University Law Review* 90 (4): 1875–908.

Siegel, Reva B. 2012. "Dignity and Sexuality: Claims on Dignity in Transnational Debates over Abortion and Same-Sex Marriage." *International Journal of Constitutional Law* 10 (2): 355–79.

Skocpol, Theda. 2016. "Analyzing American Political Development as It Happens." In *The Oxford Handbook of American Political Development*, ed. Richard M. Valelly, Suzanne Mettler, and Robert C. Lieberman. New York: Oxford University Press: 48–68.

Skowronek, Stephen. 2006. "The Reassociation of Ideas and Purposes: Racism, Liberalism, and the American Political Tradition." *American Political Science Review* 100 (3): 385–401.

Skowronek, Stephen, and Matthew Glassman, ed. 2007. *Formative Acts: American Politics in the Making*. Philadelphia: University of Pennsylvania Press.

Skowronek, Stephen, and Karen Orren. 2016. "Pathways to the Present: Political Development in America." In *The Oxford Handbook of American Political Development*, ed. Richard M. Valelly, Suzanne Mettler, and Robert C. Lieberman. New York: Oxford University Press: 27–47.

Smith, Jeremy B. 2004. "The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation." *Fordham Law Review* 73 (6): 2769–814.

Smith, Rogers M. 1988. "Political Jurisprudence, the 'New Institutionalism,' and the Future of Public Law." *American Political Science Review* 82 (1): 89–108.

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

Stern, Mark Joseph. 2015. "Ruth Bader Ginsburg Reveals How She Would Have Written the Marriage Equality Decision." *Slate*. July 30. http://www.slate.com/blogs/the_slatest/2015/07/30/ruth_bader_ginsburg_on_marriage_equality_how_she_would_have_written_the.html.

Stokols, Eli. 2016. "Trump Says He's 'Fine' with Legalization of Same-Sex Marriage." *Politico* November 13. https://www.politico.com/story/2016/11/donald-trump-same-sex-marriage-231310.

Tamanaha, Brian. 2010. *Beyond the Formalist-Realist Divide*. Princeton, NJ: Princeton University Press.

Tamanaha, Brian. 2017. "The Progressive Struggle with the Court: A Problematic Assymetry." In *The Progressives' Century: Political Reform, Constitutional Government, and the Modern American State*. New Haven, CT: Yale University Press: 65–86.

Teles, Steven M. 2008. *The Rise of the Conservative Legal Movement: The Battle for Control of the Law*. Princeton, NJ: Princeton University Press.

Tribe, Lawrence H. 2015–2016. "Equal Dignity: Speaking Its Name." *Harvard Law Review Forum* 129 (1): 16–32.

Valelly, Richard M. 2012. "LGBT Politics and American Political Development." *Annual Review of Political Science* 15: 313–32.

Whittington, Keith. 2001. "Taking What They Give Us: Explaining the Court's Federalism Offensive." *Duke Law Journal* 51 (1): 477–520.

Whittington, Keith. 2007. *Political Foundations of Judicial Supremacy*. Princeton, NJ: Princeton University Press.

Winkler, Adam. 2006. "Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts." *Vanderbilt Law Review* 59 (3): 793–872.

Yoshino, Kenji. 2014. "The Anti-Humiliation Principle and Same-Sex Marriage." *The Yale Law Journal* 123 (8): 3076–103.

Yoshino, Kenji. 2015–2016. "A New Birth of Freedom? *Obergefell v. Hodges*." *Harvard Law Review* 129 (1): 147–80.

CASES CITED

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

Skinner v. Oklahoma, ex. rel. Williamson, 316 U.S. 535 (1942)

Koramatsu v. United States, 323 U.S. 214 (1944)

Brown v. Board of Education, 347 U.S. 483 (1954)

Loving v. Virginia, 388 U.S. 1 (1967)

Fitzgerald v. Porter Memorial Hospital, cert. denied, 425 U.S. 916 (1976)

Bowers v. Hardwick, 478 U.S. 186 (1986)

Bowen v Gilliard, 483 U.S. 587 (1987)

City of Richmond v. J.A. Croson Company, 488 U.S. 469 (1989)

Metro Broadcasting v. FCC, 497 U.S. 547 (1990)

J.E.B. v. Alabama, ex rel. T. B., 511 U.S. 127 (1994)

Adarand Constructors Inc. v. Pena, 515 U.S. 200 (1995)

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995)

Romer v. Evans, 517 U.S. 620 (1996)

Boy Scouts of America et al. v. Dale, 530 U.S. 640 (2000)

Rice v. Cayetano, 528 U.S. 495 (2000)

Stenberg v. Carhart, 530 U.S. 914 (2000)

Lawrence v. Texas, 539 U.S. 558 (2003)

Gonzalez v. Carhart, 550 U.S. 124 (2007)

Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007)

In re Marriage Cases, 43 Cal. 4th 757 (2008)

Kerrigan v. Commissioner of Public Health, 289 Conn. 135, 957 A.2d 407 (2008)

Varnum v. Brien, 763 N.W. 2d 862 (2009)

United States v. Windsor, 570 U.S. ___ (2013)

Bostic v. Shaefer, 760 F. 3d 352 (2014)

Kitchen v. Herbert, 755 F. 3d 1193 (2014)

Latta v. Otter, 771 F. 3d 456 (2014)

Wolf v. Walker, 986 F. Supp. 2d 982 (2014)

Wright, et al. v. State of Arkansas, et al. (Circuit Court of Pulaski, Arkansas, Second Division, Case No: 60CV-13-2662) (2014)

Obergefell v. Hodges, 576 U.S. ___ (2015)

NOT DEAD YET—OR NEVER BORN? THE REALITY OF THE NONDELEGATION DOCTRINE

JOSEPH POSTELL[1] AND PAUL D. MORENO[2]

ABSTRACT

Until recently, scholarship has concluded that the nondelegation doctrine limited delegations of power to administrative agencies until a shift that occurred in the early twentieth century. Recent revisionist scholarship has challenged that claim, often by noting that courts rarely invalidated statutes on nondelegation grounds. We challenge the revisionist view by examining the importance of the doctrine in early American legislative debates, in early state and federal cases that applied the nondelegation doctrine (even if they upheld the statutes in question), and by showing that leading legal scholars during the early twentieth century believed, contrary to the revisionists, that the doctrine was a powerful obstacle to legislative delegations to administrative agencies.

KEYWORDS: *administrative law, nondelegation doctrine, administrative power, Progressive Era, Wayman v. Southard, constitutional history*

SCHOLARS OF ADMINISTRATIVE LAW generally agree that the principle of "nondelegation"—that it is constitutionally illegitimate for legislators to delegate

1. Associate professor of political science at the University of Colorado–Colorado Springs.

2. William and Bernice Brewcock Chair in Constitutional History and dean of social sciences at Hillsdale College.

Constitutional Studies, Volume 3
©2018 by the Board of Regents of the University of Wisconsin System

their lawmaking power to others—is moribund if not quite dead.[3] Recently, Keith E. Whittington and Jason Iuliano have taken this argument a step further by denying that the not-quite-dead nondelegation was alive in the first place. In "The Myth of the Nondelegation Doctrine," Whittington and Iuliano argue that the prevailing narrative about the nondelegation doctrine is in need of dramatic revision. While the dominant view is that the nondelegation doctrine "served as a meaningful check on the unbridled expansion of the administrative state" during the nineteenth and early twentieth centuries, they maintain that a careful examination of the actual practice of the courts in the first century of the early republic reveals that "there was never a time in which the courts used the nondelegation doctrine to limit legislative delegations of power" (Whittington and Iuliano 2017, 380–81).

To demonstrate this, Whittington and Iuliano compiled a dataset of "every federal and state case that involved a nondelegation challenge between 1789 and 1940" that features over two thousand cases involving the nondelegation doctrine. This dataset shows that "[t]here was no golden age in which the courts enforced a robust nondelegation doctrine that compelled legislators to make hard policy choices." Of the 2,506 nondelegation cases they canvassed that were decided by federal or state courts between 1825 and 1940, only 421 cases "resulted in the partial or total invalidation of a statutory provision" (Whittington and Iuliano 2017, 383, 418).

With an invalidation rate of 17 percent (18 percent at the state level and 12 percent at the federal level), Whittington and Iuliano conclude that "the actual invalidation rate of litigated cases raising nondelegation challenges to legislation was generally low," which "suggests that the courts were increasingly accommodating to legislative innovations." In short, they conclude, "[n]either the state nor the federal courts were much of an obstacle to the delegation of legislative power to non-legislative actors." The narrative of a once-enforced nondelegation doctrine "is more mythic than historical. . . . Traditional constitutional principles were thought to be capacious enough to accommodate the new administrative structures" that state legislatures and Congress devised (Whittington and Iuliano 2017, 426, 429).

Whittington and Iuliano have amassed an impressive dataset of nondelegation cases, and their findings serve as an important contribution to the study of the nondelegation doctrine.[4] However, the conclusions they draw from the data are too strong. To infer from their observations that the nondelegation doctrine never

3. But see Alexander and Prakash (2003).

4. This conclusion is drawn from the data and conclusions presented in the article itself. The dataset upon which the article relies is still unpublished, but we anticipate that once made public it will greatly aid in future research.

"served as an important check on the unbridled expansion of the administrative state" and that "there was never a time in which the courts used the nondelegation doctrine to limit legislative delegations of power," three additional premises would have to be true, and none of them is.

First, to show that the nondelegation doctrine never checked delegations of *legislative* power, one would have to demonstrate that it was never used by legislatures to avoid delegating power in the first place. The historical record reveals that, on many important occasions, Congress and the state legislatures rewrote statutory provisions as a consequence of the nondelegation principle. Sometimes this occurred as a direct result of nondelegation objections. In many other cases the legislatures avoided delegating power simply because they were disinclined to do so, as if the nondelegation principle governed their conduct but did not need to be invoked (Alexander and Prakash 2003, 1327). We discuss these occasions in the first section of this article.

Second, to show that the nondelegation was seldom used by *courts* to limit legislative delegations of power, one would have to differentiate delegations of executive power and delegations of legislative power. Perhaps the government won nondelegation cases before 1900 because the delegations at issue were legitimate delegations of executive power, not illegitimate delegations of legislative power. They may have been, as Chief Justice John Marshall put it, not "important subjects, which must be entirely regulated by the legislature itself," but rather "those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details" (*Wayman v. Southard*, 25 U.S. 1 [1825], 43–46). We cannot infer that simply because nondelegation challenges failed that the nondelegation doctrine was not in force—just as we could not infer that if freedom of religion challenges to government policies generally fail there is no robust freedom of religion doctrine. We can only infer that the nondelegation doctrine was not robust if the courts were unwilling to enforce it in cases where a robust nondelegation doctrine would have been enforced. The second section of this article explores the substantive issues in many of the pre-1900 nondelegation cases to show that many statutes were upheld because they did not delegate legislative power in the first place. Therefore, the number of cases in which the statutes were upheld is not a sufficient indicator of the strength of the nondelegation doctrine in the nineteenth century.

Third, to show that the judiciary did not enforce a robust nondelegation principle, one would have to clearly define the concept of a robust nondelegation principle. An invalidation rate of 17 percent of statutes on nondelegation grounds might actually be indicative of a robust doctrine. (Indeed, progressive critics of

the Supreme Court often claimed that an almost identical invalidation rate was evidence of a dangerous and robust substantive due process doctrine.) Certainly the progressive reformers of the early twentieth century believed that there was a robust nondelegation doctrine and explained they were revising, not continuing, established constitutional doctrines. The third section of this article explains that reformers of the Progressive Era and New Deal periods believed that the courts had enforced the nondelegation doctrine and that they had to challenge the established understanding of the nondelegation doctrine to pave the way for a modern administrative state. While not dispositive, the testimony of these reformers suggests that the invalidation rate was high enough prior to 1940 to dramatically affect the status of delegations to the executive.

I. LEGISLATIVE ENFORCEMENT OF THE NONDELEGATION PRINCIPLE

Because legal academics dominate the discussion of the nondelegation doctrine, scholarly attention focuses on case law and judicial elucidation of the principle. This focuses too narrowly on the *litigation* of a constitutional principle. Constitutional principles bind not only courts of law but also all officials who take an oath to uphold the Constitution and to carry out its provisions. Perhaps nobody has been more influential than Whittington in calling attention to the importance of nonjudicial "construction" of constitutional meaning in American history (Whittington 1999). Therefore, any investigation into the application of the nondelegation doctrine in the early republic must begin not with the judiciary but with the legislatures that wrote statutes granting authority to the executive. A relatively brief examination of congressional debates in the first decades of American history reveals that, on many important questions, the nondelegation principle was employed to limit statutory delegations to the executive.

A. Congress's Confrontation with Nondelegation

The most famous and one of the most illustrative episodes involving delegation came in the Second Congress. From 1790 to 1792, members of Congress engaged in a vigorous debate on the specificity of the law establishing post roads. Did Congress itself have to specify the route of the roads in detail or could it delegate that authority to the president or postmaster general? As Leonard White, the great historian of administrative power in America, has explained, "With great persistence the Federalists tried on five successive occasions to vest the power in the executive

but without success" (White 1948/1965, 78). They introduced an amendment to a bill that, instead of specifically designating the route by which the mail was to be carried, would authorize mail carriage "by such route as the President of the United States shall, from time to time, cause to be established" (*Annals* III [1791], 229). Representative John Page of Virginia objected: "If the motion . . . succeeds," he said, "I shall make one which will save a great deal of time and money, by making a short session of it." If Congress can give this power to the president, he argued, "it may leave to him any other business of legislation, and I may move to adjourn and leave all the objects of legislation to his sole consideration and direction" (*Annals III* [1791], 233). Samuel Livermore of New Hampshire opposed the Federalists' amendment because Congress could not "with propriety delegate that power which they were themselves appointed to exercise."

Some Federalists took the nondelegation argument head on. Theodore Sedgwick argued that while "it was impossible precisely to define a boundary line between the business of Legislative and Executive," he believed that "as a general rule, the establishment of principles was the peculiar province of the former, and the execution of them, that of the latter" (*Annals III* [1791], 239–40). Sedgwick turned the opponents' *reductio ad absurdum* on its head. The Constitution empowered Congress to borrow money, "but is it understood that Congress are to go into a body to borrow every sum that may be required?" Congress can "coin money"; did this mean that "they might be obliged to turn coiners, and work the Mint themselves?" Even those who defended the delegation of this decision to the executive believed that there were limits to delegation. They simply denied that the specification of the postal routes was anything more than the execution of law. Nevertheless, as White indicates, the Federalists lost the argument, and the statute specified the route of the post roads in great detail.

Congress was reluctant to delegate legislative powers in other contexts and often invoked the nondelegation principle as a constraint on its ability to delegate. Referring matters to executive departments for reports and proposed legislation, common during the early republic, prompted much criticism from members of Congress on nondelegation grounds. In 1792, while debating one such reference, John Mercer took a swipe at Alexander Hamilton, saying that "I have long remarked in this House that the executive, or rather the Treasury Department, was really the efficient Legislature of this country" (*Annals III* [1792], 351). Madison agreed: "[A] reference to the Secretary of the Treasury on subjects of loans, taxes, and provision for loans . . . was, in fact, a delegation of the authority of the Legislature, although it would admit of much sophistical argument to the contrary" (*Annals III* [1792], 722).

In response, Federalists did not scoff at the notion of a nondelegation principle. Instead, they argued that referring matters to department heads was legitimate, as long as Congress has the final word in passing the legislation proposed. William Smith of North Carolina, for instance, responded that "[t]he ultimate decision . . . in no one point, is relinquished by such a reference. If such a reference was unconstitutional, he observed, much business had been conducted by the House in an unconstitutional manner, by repeated references to the Heads of Departments" (*Annals III* [1792]: 697). Again, both sides of the debate agreed that the nondelegation doctrine was legitimate; they simply disagreed about what the doctrine required. In this instance, the Federalists likely had the better of the argument. Congress was not delegating its power to decide on legislative matters but merely allowing an outside body to advise it. So while the practice was upheld, this would not be evidence that the members of Congress were not serious about the nondelegation doctrine.

Debates invoking the nondelegation principle as a check on lawmaking extended into the nineteenth century. In 1808, in the midst of war between France and Britain, Congress enacted a statute that allowed the president to suspend an embargo upon the suspension of hostilities or when one of the nations stopped violating the United States' neutral commerce. Philip Hamburger explains that this law "led to lengthy protests in the House of Representatives and in the press" (Hamburger 2014, 108). One representative, Philip Key, claimed that the law represented "the most anti-republican doctrine ever advanced on the floor of this House." He stressed that "to suspend or repeal a law is a legislative act, and we cannot transfer the power of legislating from ourselves to the president" (*Annals XVIII* [1808], 2125).[5]

The nondelegation principle was powerful enough during this legislative debate to persuade members who supported the policy of suspending the embargo nevertheless to oppose the measure. John Rowan, for instance, stated that "I believe . . . that the Constitution does not permit us to pass it, if expediency does. . . . I am willing to repeal [the embargo], or to define certain events upon which it shall be repealed; but I am unwilling to vest a discretionary power in the President to repeal or modify it" (*Annals XVIII* [1808], 2232).[6] "So far, then, as we choose to confine ourselves to

5. Key was joined by John Randolph in opposing the legislation, but the *Annals* merely state that "Mr. Randolph opposed the resolution at considerable length." Therefore, we cannot say whether Randolph voiced similar constitutional concerns.

6. Rowan also articulated the rationale for the nondelegation principle in the principal-agent theory undergirding the social compact: "I take it as correct, that our power is itself derivative. Those who

the Constitution for authority," he concluded, "it seems to me none will be found there which will sanction the delegation of the power contended for" (*Annals XVIII* [1808], 2234). It is true that Philip Key, John Rowan, and others were in the minority, and the measure passed, but as Philip Hamburger notes, "their logic prevailed for much of the rest [of] the century." Subsequent statutes clarified that the president could not suspend the law at his own discretion but was merely declaring the facts that Congress declared would trigger or suspend the law. These subsequent statutes, it could be argued, cured the legislation of its constitutional defect, so that when its constitutionality was challenged in the Supreme Court in the 1813 case *Cargo of the Brig Aurora v. United States* (discussed later in Section II), the law was allowed to stand. This episode illustrates an important context in which the nondelegation principle was applied. It was not immediately used to strike down legislation in the courts and did not even prevail initially within Congress itself, but over time, the argument changed the law, which avoided the necessity of judicial invalidation. Like the other episodes covered in this section, therefore, this debate reveals the importance of the nondelegation principle within Congress during the early republic.

Admittedly, as scholars have noted, many early statutes enacted by Congress granted power to the president to make regulations governing matters such as pensions for wounded soldiers, trade with Indian tribes, and foreign trade. In each of these cases, however, the regulatory powers granted were executive merely for the sake of carrying out the law contained in the statute. As Philip Hamburger summarizes in his treatment of these statutes, "All such executive regulations affected the public, but did not purport to bind them" (Hamburger 2014, 87). The kinds of regulations envisioned by the law, in other words, had to deal with matters that were properly executive, such as the methods for applying for pensions, the methods for estimating the value of goods to be subjected to tariffs, and the like.

It should not be surprising that we see a great deal of "legislative self-restraint" and few significant delegations in the early national period. The principal legislative pathology of the Confederation Period was not reckless delegation but the tendency of legislatures to suck executive and judicial powers into their "impetuous vortex," as James Madison colorfully wrote in *Federalist* no. 48. It was not until the twentieth century that legislators began to discern the advantages of delegation.

---

have given powers to us have carefully guarded them. . . . The people, then, are the fountain of power, and power must be derived from them by delegation or usurpation. If by delegation, it must be by a decided expression of their will. The Constitution is the instrument which contains this expression. . . . By this bill the responsibility is confounded, and the legislative responsibility committed to the Executive. Is there any such authority delegated by the Constitution?" (*Annals XVIII* [1808], 2233).

We can see the internalized nondelegation force at work on the subject that preoccupied Congress constantly throughout the nineteenth century: tariffs. Members of Congress wrote the tariff schedule in excruciating detail and kept tight control over the spending of the revenue that resulted from it. It was not until the 1890s that Congress began to delegate tariff discretion to the president and not until the 1920s that it established an "executive budget." Late into the nineteenth century proto-progressive reformers complained that Congress still meddled too much in the administrative details of government, as the title of Woodrow Wilson's first work, *Congressional Government*, indicates (Wilson 1885/1956).

Admittedly, the previous examples, spanning from the establishment of post roads and references to the executive to tariff and trade legislation, do not conclusively demonstrate that Congress never delegated its legislative powers or that the nondelegation doctrine was the sole basis for the outcomes of the debates. It is certainly plausible that Congress refused to delegate the details of tariff or post road legislation to the executive because it wanted to make those decisions itself for political reasons—namely to provide benefits to constituents through the designation of post roads or tariff rates. Still, these examples demonstrate that members of Congress repeatedly articulated the logic and basic principles of nondelegation in a variety of contexts and that these arguments correlated with actual legislative outcomes in which Congress did not delegate its powers. This is evidence that must be considered in determining whether the nondelegation doctrine was mythical or real.

B. State Legislatures and the Reluctance to Delegate

In short, Congress was generally reluctant to delegate discretionary power to the executive prior to the Civil War, a fact that scholars in many fields have long noted. The same was true at the state level as well. In most states during the antebellum period legislatures entered into the business of administration, assuming direct control over matters that could rightfully be considered executive, such as the establishment of prisons and the construction of canals. One economic history of New York State concludes that during the antebellum period the state legislature was "the principal regulatory agency in state government." The legislature "consumed countless hours and days overseeing the day-to-day affairs of counties, cities, and towns, administering the construction and maintenance of roads and highways, and supervising the collection of taxes" (Gunn 1988, 81, 84). Another writer observes that in New Jersey the state legislature directly administered debt relief and tax relief on particular commodities rather than leaving such activities to the executive (Shumer 1989, 79–80).

The great administrative law scholar Ernst Freund, writing at the end of the nineteenth century, explained why the state legislatures behaved this way. Unlike bureaucratic systems in France and Germany, where the chief executive possessed control over all subordinates, at the state level legislatures "withheld from the chief executive all the functions of control, direction and review, which in Europe and also in our federal government hold the administrative organization together." In short, the American states lacked "unitary executives"; and the chief executives in the states had no control over subordinates, "the laws are framed in such a manner that the duty of executing their provisions is laid upon ministerial officers directly, and upon them alone; that is to say, each officer has his specific and independent jurisdiction." Instead of a unified, hierarchical system of chief executive control over administration, state legislatures established a disjointed, individualized system of administrative offices. This meant that states' administrative officers were not held accountable by an elected chief executive and therefore could not be trusted with discretion. As Freund explained, "This system compels the legislature to specify in detail every power which it delegates to any authority" so that "the officer has no one to look to for instruction and guidance except the letter of the statute. Thus we arrive at the fundamental principles of our administrative system: no executive power without express statutory authority—the principle of enumeration; minute regulation of nearly all executive functions, so that they become mere ministerial acts" (Freund 1894, 409–10). Again, Freund's explanation for the refusal of state legislatures to grant discretion to administrative actors does not explicitly mention the nondelegation doctrine as a fundamental rationale. Nevertheless, Freund was able to articulate the broad and coherent vision of administrative law that prevailed in the states in the nineteenth century, one which relied upon specific statutory requirements and the reduction of discretion enforced by independent courts.

Given how frequently state legislatures constrained administrative discretion, it is little wonder that Alexis de Tocqueville observed that in antebellum America "the legislative power extends to more objects, than among us [in France]. The legislator penetrates in a way into the very heart of administration; the law descends to minute details . . . it thus encloses secondary bodies and their administrators in a multitude of strict and rigorously defined obligations" (Tocqueville 1835/2000, 69). A century later, the administrative law scholar Louis Jaffe similarly acknowledged that "[t]he nineteenth century expressed a preference for the specific rule, avowedly to promote certainty, but perhaps even more because it reduced the role of administration" (Jaffe 1947a, 364). As Congress handled the tariff, state legislatures passed highly detailed statutes in the antebellum period, often assuming

control over administrative details that could have been delegated to executive officials. The leading progressive legal scholar of his day and Dean of Harvard Law School Roscoe Pound noted in 1936 that "[i]n more than one of our states until well after the Revolution, legislatures claimed and exercised the plenary powers over adjudication and administration which belonged to the British Parliament" (Pound 1938, 42).[7] And in many instances, as shown previously, Congress discussed the nondelegation principle in its legislative debates. These cases display a general commitment to the nondelegation doctrine, and statutes were even revised in light of nondelegation objections. All of this is certainly admissible evidence that the nondelegation doctrine existed and affected the way laws were written and carried out, yet it goes unnoticed if one only looks at court cases in which the doctrine was litigated. Nevertheless, as the next section will demonstrate, the nondelegation doctrine's effect was not limited to legislative debates. It was also an important principle of constitutional law that influenced both state and federal legislative decisions.

II. JUDICIAL ENFORCEMENT OF THE NONDELEGATION PRINCIPLE

Whittington and Iuliano compiled their dataset by doing a Westlaw search of all federal and state cases with "delegation" and/or cognate terms and then excluding those that did not actually involve a nondelegation challenge (Whittington and Iuliano 2017, 418 n. 251). However, this method of searching might be insufficiently inclusive. It may fail to identify cases that do not contain "delegation" terms but that actually were, or could be interpreted as, nondelegation cases. A close look at some of the major federal and state cases that debated the nondelegation principle, which we undertake in this section, reveals that the doctrine was profoundly important and that the courts developed a jurisprudence that enforced it, even if imperfectly.

A. Federal Cases

Although significant congressional delegations were rare, the courts were not inattentive to the doctrine. Most often noted were John Marshall's decisions in *Aurora*

7. See also Pound (1938), 54–55: "there was a tendency of legislatures [in the nineteenth century] to interfere with executive administration. . . . There were legislative prescribings of appointment of particular persons to particular offices by the governor. There was special legislation as to local highway improvements where today we should leave the matter to a board or commission."

and *Wayman*. In 1810, trying to vindicate American neutral rights in the Anglo-French war, Congress enacted a law that opened American commerce with both Britain and France and let the president reinstate an embargo against either power thirty days after he determined that the other had stopped violating American rights. In November President Madison declared that France had complied, and so an embargo would be applied to Britain as of February 1811. The *Aurora* left Liverpool in December 1810, arrived in New Orleans in February 1811, and was seized and sold for violating the embargo. The Supreme Court rejected the owners' factual claim that the ship had left Britain before the president's declaration had been publicized, as well as their constitutional argument that Congress could not give the president the legislative power to impose an embargo. Justice William Johnson saw "no sufficient reason why the legislature should not exercise its discretion . . . either expressly or conditionally, as their judgment should direct" (*Cargo of the Brig Aurora v. United States*, 11 U.S. 382 [1813], 388).

The *Aurora* case concerned foreign policy where, as Locke theorized and history confirmed, constitutional limits are necessarily looser than in domestic policy (Schoenbrod 1993, 31). A decade later the Court addressed the delegation question in a domestic matter in what has become the most famous founding-era statement on the question. In the Judiciary Act of 1789 and subsequent acts, Congress empowered the courts to make rules concerning judicial proceedings. The Supreme Court used this to require that all court judgments be paid in gold or silver coin. This rule conflicted with a Kentucky law that made the paper notes of the Bank of Kentucky legal tender.[8] The defendants denied that the national government could limit state power in this matter. Or, if Congress did have the power, they argued that it could not constitutionally delegate this power to the courts.

Chief Justice John Marshall upheld the courts' power and Congress' power to delegate it. Congress could not delegate "powers which are strictly and exclusively legislative," he admitted, but it could delegate "powers which the legislature may rightfully exercise itself." Congress could have prescribed particular rules of judicial process because it could amend rules adopted by the courts. Similarly, it could coin money itself, or let the Mint do it. He distinguished "important subjects, which must be entirely regulated by the legislature itself" and "those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details." Marshall explained that

8. Five years later, the Court held that state bank notes were altogether unconstitutional, violating Article I, Section 10's prohibition of state "bills of credit." Seven years later the Court reversed that decision—*Craig v. Missouri*, 29 U.S. 410 (1830); *Briscoe v. Bank of Kentucky*, 26 U.S. 357 (1837).

"the maker of the law may commit something to the discretion of other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily" (*Wayman v. Southard*, 25 U.S. 1 [1825], 43–46).

Marshall's decision did hold that there was a line beyond which Congress could not delegate. It was similar to his ruling in *McCulloch v. Maryland* that, while the Court would give Congress the benefit of the doubt, it would declare laws that were "pretexts" for exercising unconstitutional powers "not the law of the land." Like the Constitution itself, a statute could never provide for every possible contingent case that might arise under it. As he stated in *McCulloch*:

> A Constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. (*McCulloch v. Maryland*, 17. U.S. 316 [1819], 407)

But the chief justice did not offer much guidance as to how to define the delegation limit. As one scholar put it, his decision was a tautology, that "Congress must make whatever decisions are important enough to the statutory scheme in question so that Congress must make them" (Lawson 2002, 358).[9] Marshall appeared to say that delegation was a "political question," one not justiciable, except perhaps in clear and egregious cases. This established the approach that the Supreme Court would take toward the question until the present day.

The *Aurora* and *Wayman* cases upheld acts challenged on nondelegation grounds, while confirming that there were *some* limits to delegation. In other cases, the nondelegation principle is discernable, though the case may not be classified as a nondelegation one. For example, during the 1790s "quasi-war" with France, Congress prohibited American trade with France, and empowered the president and the Navy to capture sell any vessels that were bound *to* French ports. President Adams issued an order directing American naval vessels to capture ships that had departed *from* French ports. In 1799 two American frigates intercepted the *Flying*

9. See also Ziaja (2008), 931.

Fish, which had left a French Caribbean port and was headed to the United States. They took her to Boston to be sold as a prize. The federal district court ruled that they had exceeded their authority under the act of Congress and restored the *Flying Fish* to her owners. The ship's owners then won an award of $8504 against Captain George Little of the frigate *Boston*. Little appealed that judgment to the Supreme Court.

Marshall upheld the award to the owners of the *Flying Fish*. He recognized that President Adams was only trying to help correct a hastily drafted piece of legislation. "It was so obvious that if only vessels sailing *to* a French port could be seized on the high seas, that the law would be very often evaded." The president's interpretation was "much better calculated to give it effect" (*Little v. Barreme*, 6. U.S. 170 [1804], 177). Nevertheless, the Court could not assume that Congress had not meant what it said. (Congress ultimately paid the judgment levied against Captain Little.) In cases like this, where the courts hold the executive to have exceeded power given to him by the legislature, the courts respect the nondelegation doctrine by holding that delegation is not to be implied. *Little* is usually seen as a case of *ultra vires*, simply holding that the president cannot exceed the power that Congress grants. But in a broader sense every such case contains a nondelegation kernel.

The Court was notably deferential to the federal government when it came to foreign policy and the related question of immigration. Indeed, it let immigration enforcement officers exercise powers to deport allegedly illegal aliens in ways that showed the danger of delegated power becoming arbitrary and capricious.[10] Anti-Chinese prejudice in California was potentially checked by the Reconstruction amendments, which prohibited the states from abridging the privileges and immunities of citizens; depriving any person of life, liberty, or property without due process; or denying to any person the equal protection of the law (Maltz 1994). To get around these constitutional guarantees, the city of San Francisco devised clever schemes of delegation to harass the Chinese. San Francisco required the approval of "twelve citizens and taxpayers in the block in which the laundry is to be established" as a way of driving the Chinese out of business. A federal circuit court voided this ordinance in 1882. Justice Stephen Field wrote that "the supervisors are, it is true, empowered to license . . . but their power cannot be delegated by them to others, or its exercise made dependent upon others' consent. The power of legislation vested in them is a public trust."[11]

---

10. See, for example, *United States v. Ju Toy*, 198 U.S. 253 (1905), especially Justice Brewer's dissenting opinion.

11. *In re Quong Woo*, 13 F. 229 (C.C. CA, 1882).

Undaunted, the city prohibited the operation of laundries in wooden buildings unless the owners secured a license from the Board of Supervisors. The Board granted these licenses to all but one white applicant and denied them to all Chinese operators. Yick Wo, who had operated a laundry for over twenty years with the approval of the city fire warden, was fined for continuing to work without a license. The California Supreme Court and a federal circuit court upheld the conviction, but the U.S. Supreme Court unanimously overturned it.

Yick Wo is not usually seen as a nondelegation case but could be classified as such. Justice Stanley Matthews wrote that the San Francisco ordinances "seem intended to confer, and actually do confer, not discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power." The law provided no standards to the supervisors. They could refuse licenses "without reason and without responsibility." This was not "discretion in the legal sense of the term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint." It offended the fundamental principle that we had "a government of laws and not of men." It practically invited discrimination against unpopular groups. So, although the law was neutral on its face, it still amounted to a denial of the equal protection of the laws (*Yick Wo v. Hopkins*, 118 U.S. 356 [1886], 366, 373). While deferential in foreign policy cases, the Court successfully resisted this effort to extend foreign prerogative to domestic affairs.

Yick Wo could be seen as a nondelegation case because the city had established a board to do indirectly what it knew it could not do directly. Certainly the Court would have struck down an ordinance that explicitly prohibited only Chinese from operating laundries in wooden buildings. It reinforces the point that legislators cannot delegate powers that they do not possess (see discussion of the Labor Board cases later in this section), akin to the holding in *Little* that the president cannot assume undelegated executive powers. Years later the Court similarly used the nondelegation principle to prevent Texas from disfranchising black voters.[12]

Similarly, the nondelegation principle can be seen at work in the creation and initial judicial review of the first independent regulatory commission, the Interstate Commerce Commission (ICC). Some members of Congress objected that the commission violated the principle of the separation of powers by combining legislative, executive, and judicial powers.[13] The commissioners were appointed by the president and confirmed by the Senate, which made them look like traditional

12. *Nixon v. Condon*, 286 U.S. 73 (1932).

13. See Haney, Lewis H. 1910. *A Congressional History of Railways in the United States*, Vol. 2. New York: Augustus M. Kelley, 308, 312.

executive-branch officers, but rate-making looked like a legislative function and the commission's determination of particular cases looked judicial. The commission could hear complaints, subpoena records and witnesses, and issue "cease and desist" orders if it found unreasonable rates, but the act did not explicitly give the commission the power to set reasonable rates in their place. Here too, as one historian has noted, "[n]obody really knew what the act meant or how it could be applied" (Jones 1966, 612).

But the federal courts kept the commission limited to executive functions, making it look like a parallel to the Justice Department (Ely 2012). In 1889 a federal circuit court indicated that the commission's findings of fact were not entitled to any judicial deference. The ICC was not an inferior court but was "invested with only administrative powers of supervision and investigation" (*Kentucky & Indiana Bridge Co. v. Louisville & Nashville Ry.*, 37 F. 567 [1889]). The Court regarded the commission as at best an advisory body to the judges, "in essence a master in chancery to the Court." The determination of whether a rate was "reasonable" was a judicial question, and the commission was not a court. The Supreme Court held that the commission had no power to fix rates after it had determined that a rate was unreasonable. The Court would not assume that Congress had given such power by implication. Rate-setting was a legislative power, and the commission was not a legislature (Prouty 1909). However, the Court did assume that Congress could delegate its rate-setting power to "some subordinate tribunal" if it chose (*ICC v. Cincinnati, New Orleans & Texas Pacific Ry.*, 167 U.S. 479 [1897], 494). The Court also held that attempts to compel shippers to testify violated the Fifth Amendment's protection against self-incrimination. Congress responded by providing for compulsory testimony with immunity, which the Court narrowly upheld.[14] The Court would eventually allow more explicit delegation of legislative power to the ICC under the Hepburn Act of 1906; these interpretations of the 1887 act show a lively suspicion of implied delegation.

Most scholars maintain that the U.S. Supreme Court only used the nondelegation principle to invalidate legislation in two cases—the *Panama Refining* and *Schechter* cases, both involving the National Industrial Recovery Act, in 1935.[15] This act was particularly egregious. Although the Court did explicitly invoke the nondelegation principle ("this is delegation run riot," as Justice Benjamin N. Cardozo famously put it), the act suffered from other constitutional infirmities that could have killed it

14. *Brown v. Walker*, 161 U.S. 591 (1896).

15. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Schechter v. United States*, 295 U.S. 495 (1935).

without such invocation. Sometimes the 1936 case of *Carter v. Carter Coal Co.* makes it onto the list as a third, as Justice George Sutherland condemned the challenged act as "legislative delegation in its most obnoxious form."[16] Yet almost nobody cites *United States v. L. Cohen Grocery*, in which the Court overturned a conviction under the World War One Lever Act, which punished people for charging "unjust or unreasonable prices," leaving to enforcement officers the definition of those terms.[17] One scholar has recently interpreted *Erie Railroad v. Tompkins* as a nondelegation case.[18] Though the Court did not put in such terms, it held that "Congress cannot empower federal courts to govern the nation's commercial law without providing an intelligible principle" (Nielson 2011). This famous (or infamous) decision, which even a sympathetic Brandeis scholar has called "Gnostic and pragmatic . . . abstract, abbreviated, and to some extent, purposely misleading" (Purcell 2000, 151, 195), and another has called "wrong, out of step, and pernicious . . . the worst decision of all time" (Sherry 2012), has been very difficult to categorize. An argument can be made that it fits into the penumbra of nondelegation cases.

Other New Deal cases followed a similar pattern of laws that violated the nondelegation principle but which the Court struck down on other grounds and therefore did not reach that issue. The dissenters in the Labor Board Cases (such as *Jones & Laughlin*) would have struck down the National Labor Relations Act on nondelegation grounds, but they instead focused on the limited nature of Congress's power to regulate interstate commerce. As they explained, Congress was delegating powers *that it did not have* (as in *Little* and *Yick Wo*) to the Labor Board. If Congress cannot delegate legislative powers that the people delegated to it through the Constitution, it certainly follows that Congress cannot delegate powers that were *not* given to it, they reasoned. In these cases, the doctrine of limited and enumerated powers precluded or eclipsed the nondelegation rationale, which would have otherwise applied.

In short, a narrow focus on the word "delegation" and its cognates potentially excludes a large body of law dealing with the nondelegation doctrine. Many of the cases discussed previously are overlooked as nondelegation cases in spite of the fact that the Courts applied some version of a nondelegation principle in resolving them. Overlooking these cases makes it easy to think that the federal courts refused to enforce the nondelegation doctrine outside of two cases decided in 1935, at the height of the New Deal. A more careful reading reveals a very different picture:

---

16. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

17. *United States v. L. Cohen Grocery*, 255 U.S. 81 (1921). See Schoenbrod (1993).

18. *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938).

the Supreme Court frequently discussed the nondelegation principle, consistently defended it, and applied it in many important cases to invalidate statutes or executive actions.

B. State Delegation Cases

The nondelegation principle was enforced even more widely at the state level, where most government activity was undertaken prior to the twentieth century. Many of the cases involved were "local option" laws or referenda. Under local option laws, state governments allowed local elections to determine whether a statewide law would be enforced within that municipality. (Today we are mostly familiar with these laws because they address the legality of liquor sales.) Referenda, of course, involve submissions of proposed laws by state legislatures to the people for an up-or-down vote in a statewide election. The nineteenth-century versions of these laws typically involved school taxes or bans on alcohol sales. As Whittington and Iuliano acknowledge, the preponderance of nondelegation cases prior to 1880 (74 percent) involved delegations either to local governments or to the voters themselves (Whittington and Iuliano 2017, 420). While they allege that "all these cases were understood to implicate the same basic principle of American constitutional law," namely "the extent to which legislatures could delegate power to other entities," the constitutional issues differ significantly when the legislature delegates back to the voters as opposed to the executive, the judiciary, or an administrative agency (Whittington and Iuliano 2017, 423). Therefore, citing the lower invalidation rate of local option laws and referenda under the nondelegation doctrine should not be accepted as evidence that the doctrine did not exist. Referenda are the opposite of nondelegation—the legislative agents are giving back to the constituent people a power that they did not wish to retain. It would be more accurate to examine the invalidation rate of cases where the legislature delegated power to the executive, judiciary, or an agency and then examine the facts of those cases to see whether the legislature truly delegated the power to make law.

Most courts prior to 1880 understood that the delegation analysis had to change when the legislature enacted local option laws or referenda. In *Barto v. Himrod* (1853), for instance, the New York Court of Appeals declared that a statewide referendum to establish free public schools throughout the state was unconstitutional. In the words of the court, "The Senate and Assembly are the only bodies of men clothed with the power of general legislation. . . . The people reserved no part of it to themselves, except in regard to laws creating a public debt, and can,

therefore, exercise it in no other case" (*Barto v. Himrod*, 8 N.Y. 483 [1853], 488).[19] This case, therefore, would count under Whittington and Iuliano's analysis as a nondelegation invalidation. However, because the delegation was to the people—to the principal that had established the agent legislature and that could never fully alienate its power—the analysis in this case was actually flawed. It was not a correct application of the nondelegation doctrine because the legislature returned the power back to the people rather than subdelegating it to another body.[20] The court struck down what might be called "supra-delegation" rather than "sub-delegation."

By contrast, the Supreme Court of Ohio correctly applied the nondelegation doctrine in this area in a prominent 1852 case that was eventually cited by the Supreme Court in *Field v. Clark* and *J. W. Hampton, Jr., & Co. v. United States*. In the Ohio case, involving a state law requiring county commissioners, after referendum, to subscribe to the stock of a company established to build a new railroad, the court affirmed that "the general assembly cannot surrender any portion of the legislative authority with which it is invested" and proclaimed that this "is a proposition too clear for argument, and is denied by no one" (*Cincinnati, Wilmington & Zanesville Railroad Co. v. Commissioners of Clinton Co.*, 1 Ohio St. 77 [1852], 87). Here, then, is a state case that *upheld* the statute but correctly applied the nondelegation doctrine and articulated its rationale. Like other cases that failed to overturn statutes because they were compatible with the nondelegation doctrine, Whittington and Iuliano's analysis would fail to account for this evidence.

In short, while Louis Jaffe explained that "a considerable majority of the state courts held a state-wide referendum unconstitutional" and added that "[f]or a time local option met the same fate," these cases should not be considered part of the overall nondelegation picture (Jaffe 1947b, 562–3). *Locke's Appeal*, one of the most famous nineteenth-century cases involving local option laws, like *Cincinnati, Wilmington & Zanesville Railroad*, applied the rationale correctly. In *Locke's Appeal*, the court acknowledged that "a power conferred upon an agent because of his fitness and the confidence reposed in him cannot be delegated by him to another." However, in this instance, the legislature did not delegate lawmaking power but merely gave the people the opportunity to say when the law takes effect. Under this rationale,

---

19. The New York State Constitution had a legislative "vesting" clause nearly identical to the U.S. Constitution's.

20. The language of "subdelegation" is used by Philip Hamburger (2014, 377ff). The subdelegation analysis, while accurate, must be buttressed by social compact theory, which holds that the people can never alienate their sovereign power to make the laws. This explains why delegations by the legislature back to the people are not subdelegations. "See Joseph Postell, "'The People Surrender Nothing': Social Compact Theory, Republicanism, and the Modern Administrative State," *Missouri Law Review* 81 (2016): 1003–1022.

the local option law was merely another example of "conditional legislation" that the Supreme Court upheld in *Brig Aurora* and *Field v. Clark*. The court explained that "[t]he law takes effect just as the judges determine, yet who says it is the Court that legislates?" (*Locke's Appeal*, 72 Pa. 491 [1873], 496, 498) Similarly, in this case, the court argued that the people did not write the law but merely determined whether it would take effect.

In short, to gain an accurate picture of the relevance of the nondelegation doctrine in the nineteenth century, one would have to disaggregate the conditional legislation, local option, and referenda cases out of the analysis. Those cases did not involve delegations analogous to those prevalent in statutes enacted in the twentieth and twenty-first centuries. And in many of these cases the courts laid out the nondelegation principle, grounded it in social compact theory and agency law, and then on those grounds proceeded to uphold the statute. These cases applied a real nondelegation doctrine, albeit not invalidating the statute. They did not ignore a fictional nondelegation doctrine. As Jaffe explains, "The local option cases gave us the inadequate terminology for which until very recent times there was no substitute" (1947b, 565). In other cases, where the delegation of power was to the executive or to an agency rather than the people, state courts often intervened to invalidate the laws. Jaffe observes, for instance, that "state legislatures originally delegating the preparation of standard fire insurance forms were forced by adverse judicial decision to do the work themselves" (1947a, 361–2).

While the nondelegation doctrine played a role in modifying state statutes prior to 1900, it played an even greater role in the states between 1900 and 1940. It was a major issue in late-nineteenth- and early-twentieth-century politics. In several cases courts struck down insurance laws on nondelegation grounds.[21] A 1936 case in New Hampshire invalidated a state law authorizing price fixing and general regulation of the milk industry.[22] Several other agricultural acts were invalidated in cases in Washington, Oregon, Connecticut, and Maryland.[23] Judge Rosenberry of the Wisconsin Supreme Court, a particularly prominent figure in the nondelegation debates, upheld insurance laws but invalidated a "Mini-NIRA"—a law authorizing an administrative officer to eliminate unfair competition in barbering. "If the legislature may delegate to an individual or a group legislative power to do what the administrative did in this case," he concluded, "we have taken a long step

21. See, for instance, *O'Neil v. American Fire Ins. Co.*, 166 Pa. 72 (1895); *Anderson v. Manchester Fire Ass. Co.*, 59 Minn. 182 (1895); and *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63 (1896).

22. *Ferretti v. Jackson*, 88 N.H. 296 (1936).

23. See Jaffe 1947b, n94, for cases.

in becoming a nation of licensees instead of a nation of freemen."[24] The Illinois Supreme Court, which Jaffe called "a veritable graveyard of delegation," struck down many statutes even after 1900.[25] In *People* ex. rel. *Gomber v. Sholem* the court invalidated a law authorizing fire marshals to order demolition or repair of buildings that posed a fire hazard on the grounds that the law offered no standards to guide the marshals' discretion.[26] After describing this and a litany of other cases, Jaffe concluded in a 1947 article that "[t]he judicial uncertainty and subjectivism shown by these cases is not restricted to Illinois, and is an undoubted weakness of the delegation doctrine as presently interpreted in the states" (Jaffe 1947b, 584). Even at this late date, Jaffe held, many of the state courts were using the nondelegation doctrine to invalidate statutes, causing much consternation. This is hardly the stuff of a mythical constitutional principle.[27]

III. THE ROBUSTNESS OF THE NONDELEGATION PRINCIPLE BEFORE AND DURING THE PROGRESSIVE ERA

The previous sections have attempted to demonstrate that the nondelegation doctrine served as a potent limit on legislative delegations to administrative actors by showing that the principle was invoked both during the legislative process and in some judicial decisions. In fact, because of the importance of nondelegation principles to legislatures, many potential delegations were prevented before they could become objects of constitutional litigation. Some scholars have claimed that, although judicial invalidation of progressive social welfare legislation on due process/liberty of contract grounds may not have been as numerous as Progressives complained, they were prophylactic, preventing legislatures from enacting them (Kens 1991). This section supplements this evidence in favor of the nondelegation doctrine's significance with Progressive Era statements by leading thinkers and jurists about the need to move away from the prevailing nineteenth-century understanding of the doctrine for the sake of constructing an administrative state. If the

24. *State v. Neveau*, 237 Wis. 85 (1940), *rehearing* 237 Wis. 108 (1941).

25. Jaffe, "Delegation of Legislative Power: II," 564.

26. *People* ex. rel. *Gomber v. Sholem*, 294 Ill. 204 (1920).

27. However, in fairness, Jaffe also concluded that "it cannot be justly charged that the doctrine has been essentially restrictive. . . . This judicial waywardness has promoted confusing and conflicting results, but it is not demonstrable that such decisions have, unless perhaps in Illinois, done more than temporarily delay reforms." He did warn, however, that "[t]here is nevertheless a danger that restrictive and negative conceptions concerning delegation will hamper its potentialities" (Jaffe 1947b, 593).

nondelegation doctrine were as toothless as Whittington and Iuliano suggest, there would have been no need for reformers to modify the doctrine in order to accommodate the administrative state. Nevertheless, reformers insisted upon the need to modify the doctrine.[28] This is perhaps the most compelling evidence against Whittington and Iuliano's thesis. After all, if the nondelegation doctrine were indeed mythical, Progressives would have not needed to be so concerned about it, nor would they have described the relaxed posture of twentieth-century courts as a fundamental change.

A. 17 Percent Is a Nondelegation Doctrine with Teeth

Whittington and Iuliano note that in their dataset of nondelegation cases, 17 percent of statutes were struck down by reviewing courts. While this percentage might appear small in the abstract, it could be interpreted as evidence of a robust nondelegation doctrine. If the federal courts invalidated regulatory statutes at a similar rate in the twenty-first century, it is likely that legal commentators would have noted the influence of the doctrine, not its irrelevance. Progressives, in fact, were highly concerned about a nearly identical invalidation rate in the "substantive due process" and "liberty of contract" arenas despite the fact that Harvard Law Professor Charles Warren believed such an invalidation rate showed "the progressiveness of the Supreme Court (Warren 1913a, 1913b, and 1922, II: 741). This article has already noted many cases in the first century of American history as evidence of a robust nondelegation doctrine. This section describes how some of these cases exercised a major influence on politics and policy during the Progressive Era before proceeding to examine major statements by leading thinkers and reformers that there was a powerful nondelegation doctrine, one which needed to be overcome to accommodate the modern state.

As Logan Sawyer has recently explained, the notion "that the nondelegation doctrine is merely a pass-through for functional concerns . . . would have surprised the government lawyers who fought for more than a decade to establish the constitutionality of what are now known as administrative crimes." After all, "every court that heard a criminal prosecution for violations of Interior's grazing regulations dismissed them as inimical to the nondelegation doctrine," and "Interior abandoned criminal prosecutions" as a result (Sawyer 2008, 172). In Sawyer's telling, the nondelegation doctrine "was a significant obstacle to the approval of an

28. See Duff, Patrick W., and Horace E. Whiteside. 1929. "*Delegata Potestas Non Potest Delagari*: A Maxim of American Constitutional Law." *Cornell Law Review* 14: 168–96.

authority widely recognized [by reformers] as necessary to advance an important government interest" (Sawyer 2008, 173). Over several years, federal district courts repeatedly dismissed cases where the Department of Interior brought a criminal prosecution for violating its grazing regulations, "because they applied the classical version of the nondelegation doctrine" (Sawyer 2008, 187).

As mentioned previously, in the early twentieth century the Illinois Supreme Court was responsible for striking down many statutes on nondelegation grounds, and agricultural statutes were struck down in many states. These state cases caused as much consternation to Progressives as the federal cases invalidating Department of Interior prosecutions. Yet if the 17 percent invalidation rate in substantive due process cases mirrored the invalidation rate of nondelegation cases, why did the Progressives focus so much more on the former? The reason is that as the prevalence of legislative delegation increased in the twentieth century, Progressives found that the courts were more willing to acquiesce in the practice of delegation. Instead of agitating for a change in nondelegation jurisprudence, they instead simply explained the shift from the old, robust nondelegation doctrine to the new, lax enforcement of the principle.

B. "The Administration Has Been Steadily Aggrandized"

Progressive Era reformers were frank and honest about the need to alter established understandings of American constitutionalism. They were more forthright than contemporary defenders of the administrative state. They accepted the tension between the modern administrative state and the traditional approach to America's political institutions. For the sake of clarity they even highlighted these tensions. As Herbert Croly explained in his 1914 book *Progressive Democracy*, since 1900 "the administration has been steadily aggrandized at the expense both of the legislature and of the courts. Legislatures have been compelled to delegate to administrative officials functions which two decades ago would have been considered essentially legislative, and which under the prevailing interpretation of the state constitutions could not have been legally delegated" (Croly 1914, 351). In his view, the nondelegation principle had been enforced up to the turn of the century, and it would have been used to invalidate many contemporary delegations had a significant change in the doctrine not occurred. The law, Croly claimed, had to change in order to accommodate the new administrative arrangements.

This argument—that necessity required that the law yield to the demands of modern government and society—was ubiquitous during the Progressive Era. As Charles Nagel, William Howard Taft's Secretary of Commerce and Labor declared, "the sharp distinction of three departments might be suitable for our

country in the early days; but as the conditions and need for their control became more complicated and novel . . . we bowed to necessity; and when the constitutional right to do this was challenged we had the letter of the Constitution yield to the spirit of the demand" (Nagel 1923, 203). Marvin Rosenberry, Chief Justice of the Wisconsin Supreme Court, wrote for the *American Political Science Review* that "[t]hose who have opposed the creation and extension of administrative tribunals have as a rule had the best of the argument on legal and constitutional grounds, but have been obliged to yield to an irresistible social pressure." In his view, the law was on the side of the nondelegation doctrine, but like Nagel, he believed that necessity was too overwhelming for the law to withstand. Unlike those who sought to fit the delegation of power to administrators within the existing legal and constitutional framework, he advocated for a frank acknowledgement and acceptance of the change in the law. "An attempt to fit administrative law into our legal system," he claimed, "without recognizing that there is no place for it if the doctrine of the separation of powers is to be applied as it was understood in the nineteenth century is an attempt to attain the unattainable." Rather than hide behind equivocations, such as the claim that administrative commissions are exercising "quasi-legislative" and "quasi-judicial" powers, Rosenberry acknowledged that "[t]he doctrine of the non-delegation of governmental power had sufficient force and vitality to set limits for a time," but that "these ideas have lost their vitality, and in many instance are frankly ignored" (Rosenberry 1929, 35–7, 40).

It was Rosenberry who, as Chief Justice of the Wisconsin Supreme Court, sustained the constitutionality of the delegation of the power to prescribe rules for an insurance rating bureau to the state's insurance commissioner in *State v. Whitman*. Writing for the Court, Rosenberry summarized the change that had occurred in the last over the past generation:

> Beginning with the creation of the Interstate Commerce Commission, which in the beginning was little more than an extra legislative committee, there has been a development in our law brought about chiefly by the creation of boards, bureaus and commissions, which has worked and is working a fundamental change. Not only are legislative and judicial powers delegated, but they are exercised in combination, and we not infrequently find powers belonging to the three co-ordinate branches of government combined in a single administrative agency. The change is fundamental, because the law at least in some of its aspects, no longer emanates from the legislature, is no longer wholly declared and enforced by the courts, and, to the extent that this is true, we have departed from the fundamental principles upon which our political institutions rest. (*State v. Whitman*, 220 N.W. 929 [1928])

Rosenberry's opinion three times highlighted the "fundamental change" that had occurred in this new acceptance of delegation to the administrative state. He did not oppose this change, but he also acknowledged that it was a significant departure from established principles of constitutional practice. While "we are on our way back to where we were when the doctrine of separation of powers was enunciated as a political theory," he concluded, "[a] refusal to recognize the facts as they exist and to give administrative law its rightful place in our legal theory has prevented a logical and symmetrical development of that law" (*State v. Whitman*).

Characteristic of all of these statements is a frank admission that something had changed dramatically in constitutional law. While in an earlier era the nondelegation principle would have, or did, stand in the way of the creation of modern administrative agencies, these authors openly acknowledged that the old way of understanding the nondelegation doctrine had been abandoned. As John B. Cheadle, a legal scholar who eventually became Dean of Oklahoma Law School, wrote in the *Yale Law Journal* in 1918:

> In order to legislate intelligently and in detail, the members of Congress individually must know more things and know them more accurately and intimately than is humanly possible. The result has been that Congress has increasingly delegated to others the duty of doing things which in the inception of the government it might have done itself. . . . For whenever a new rule of this type has been laid down an act essentially legislative in character has been done. (Cheadle 1918, 892)

Freund wrote in the *American Political Science Review* in 1915 that commissions governing utilities, industry, banking, insurance, and railroads "have indeed been vested with powers of a type hitherto withheld from administrative authorities under our system, powers which are not intended to serve as instruments of a fully expressed legislative will, but which are to aid the legislature in defining requirements that on the statute book appear merely as general principles." This, he concluded, "undoubtedly constitutes in a sense a delegation of legislative power," although he denied that the legislature refused in such cases to offer guidance on how the administration was to exercise its power (Freund 1915, 666). And Elihu Root famously observed in 1916 that "the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight" (Root 1916, 584). Those who favored and those who opposed the delegation of legislative power to modern administrative agencies equally recognized that the twentieth century ushered in a new era in constitutional law, where the nondelegation doctrine would be relaxed to accommodate the necessities of a complex society.

IV. CONCLUSION

Whittington and Iuliano are correct to suggest that there is a prevailing narrative about the nondelegation doctrine: that it was originally robust but at some point in the twentieth century the courts stopped enforcing it. They are not, however, the first to attack this narrative. Legal scholars have challenged it for some time. Jerry Mashaw has argued that "[f]rom the earliest days of the republic, Congress delegated broad authority to administrators, armed them with extrajudicial coercive powers, created systems of administrative adjudication, and specifically authorized administrative rulemaking" (Mashaw 2012, 5). Decades earlier, the great scholar of administrative law Kenneth Culp Davis examined several early American statutes and concluded that Congress delegated regulatory power to agencies from the very beginning (Davis 1969, 719–20). In response, several scholars have sought to distinguish between legitimate delegations of executive power and illegitimate delegations of legislative power to the executive and to show that early statutes merely granted the former (Lawson 2002; Hamburger 2014).

This article takes no position on the legitimacy of this sea change in constitutional and administrative law. It merely seeks to describe accurately the historical shift from the enforcement of the nondelegation doctrine to the accommodation of legislative delegation to the executive. The historical record is clear: for the first century of American history, legislatures wrote statutes that avoided delegating their powers to administrative actors to avoid violating the nondelegation doctrine, and courts enforced the principle in many cases. A dramatic shift away from this approach occurred sometime around 1900 and continues to the present day. There is no myth of the nondelegation doctrine—it is a principle that was once honored, eventually abandoned, and still contested today.

REFERENCES

Alexander, Larry, and Saikrishna Prakash. 2003. "Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated." *University of Chicago Law Review* 70: 1297–329.

Cheadle, John B. 1918. "The Delegation of Legislative Functions." *Yale Law Journal* 27: 892–923.

Croly, Herbert D. 1914. *Progressive Democracy*. New York: Macmillan Co.

Davis, Kenneth Culp. 1969. "A New Approach to Delegation." *University of Chicago Law Review* 36: 713–33.

Ely, James W., Jr. 2012. "The Troubled Beginning of the Interstate Commerce Act." *Marquette Law Review* 95: 1131–4.

Freund, Ernst. 1894. "The Law of the Administration in America." *Political Science Quarterly* 9: 403–25.

_____. 1915. "The Substitution of Rule for Discretion in Public Law." *American Political Science Review* 9: 666–76.

Gunn, L. Ray. 1988. *The Decline of Authority: Public Economic Policy and Political Development in New York State, 1800–1860*. Ithaca, NY: Cornell University Press.

Hamburger, Philip. 2015. *Is Administrative Law Unlawful?* Chicago: University of Chicago Press.

Jaffe, Louis L. 1947a. "An Essay on Delegation of Legislative Power: I. *Columbia Law Review* 47: 359–76.

_____. 1947b. "An Essay on Delegation of Legislative Power: II. *Columbia Law Review* 47: 561–93.

Jones, Alan. 1966. "Thomas M. Cooley and the Interstate Commerce Commission: Continuity and Change in the Doctrine of Equal Rights." *Political Science Quarterly* 81: 602–27.

Kens, Paul. 1991. "The Source of a Myth: Police Powers of the States and Laissez-Faire Constitutionalism." *American Journal of Legal History* 35: 70–98.

Lawson, Gary S. 2002. "Delegation and Original Meaning." *Virginia Law Review* 88: 327–404.

Maltz, Earl. 1994. "The Federal Government and the Problem of Chinese Rights in the Era of the Fourteenth Amendment." *Harvard Journal of Law and Public Policy* 17: 223–52.

Mashaw, Jerry L. 2012. *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law*. New Haven, CT: Yale University Press.

Nagel, Charles. "Federal Department Practice." *St. Louis Law Review* 8: 201–13.

Nielson, Aaron. 2011. "*Erie* as Nondelegation." *Ohio State Law Journal* 72: 239–302.

Postell, Joseph. 2016. "'The People Surrender Nothing': Social Compact Theory, Republicanism, and the Modern Administrative State." *Missouri Law Review* 81: 1003-1022.

Pound, Roscoe. 1938. *The Formative Era of American Law*. Boston: Brown & Little.

Prouty, Charles A. 1909. "Court Review of the Orders of the Interstate Commerce Commission." *Yale Law Journal* 18: 297–310.

Purcell, Edward A. 2000. *Brandeis and the Progressive Constitution: Erie, the Judicial Power and the Politics of the Federal Courts in Twentieth-Century America*. New Haven, CT: Yale University Press.

Root, Elihu. 1916. *Addresses on Government and Citizenship*. Cambridge, MA: Harvard University Press.

Rosenberry, Marvin B. 1929. "Administrative Law and the Constitution." *American Political Science Review* 23: 32–46.

Sawyer, Logan. 2008. "Grazing, *Grimaud*, and Gifford Pinchot: How the Forest Service Overcame the Classical Nondelegation Doctrine to Establish Administrative Crimes." *Journal of Law and Politics* 24: 171–210.

Schoenbrod, David. 1993. *Power without Responsibility: How Congress Abuses the People through Delegation*. New Haven: Yale University Press.

Sherry, Suzanna. 2012. "Wrong, Out of Step, and Pernicious: *Erie* as the Worst Decision of All Time." *Pepperdine Law Review* 39: 129–54.

Shumer, Sara M. 1989. "New Jersey: Property and the Price of Republican Politics. In *Ratifying the Constitution*, ed. Michael Allen Gillespie and Michael Lienesch. Lawrence: University Press of Kansas: 71–91.

Tocqueville, Alexis de. 1835/2000. *Democracy in America*. Trans. Harvey C. Mansfield and Delba Winthrop. Chicago: University of Chicago Press.

Warren, Charles. 1913a. "The Progressiveness of the United States Supreme Court." *Columbia Law Review* 13: 294–313.

_____. 1913b. "A Bulwark to the State Police Power—The United States Supreme Court." *Columbia Law Review* 13: 667–95.

_____. 1922. *The Supreme Court in United States History*. 2 vols. Boston: Little, Brown, and Co.

White, Leonard D. 1948/1965. *The Federalists: A Study in Administrative History, 1789–1801*. Repr. New York: The Free Press.

Whittington, Keith E. 1999. *Constitutional Construction: Divided Powers and Constitutional Meaning*. Cambridge, MA: Harvard University Press.

Whittington, Keith E., and Jason Iuliano. 2017. "The Myth of the Nondelegation Doctrine." *University of Pennsylvania Law Review* 165: 379–431

Wilson, Woodrow. 1885/1956. *Congressional Government: A Study in American Politics*. Repr. New York: Meridian.

Ziaja, Andrew J. 2008. "Hot Oil and Hot Air: The Development of the Nondelegation Doctrine through the New Deal: A History, 1813–1944. *Hastings Constitutional Law Quarterly* 35: 921–64.

ECUADOR'S 2008 CONSTITUTION: THE POLITICAL ECONOMY OF SECURING AN ASPIRATIONAL SOCIAL CONTRACT

ERIC ALSTON[1]

ABSTRACT

Ecuador's 2008 constitution is fundamentally aspirational in terms of the environmental rights it guarantees. In Ecuador, social rights have received immediate implementation priority, even though their implementation, financed through resource extraction revenues, has required the government to trade off against stringent enforcement of environmental rights. Thus, the enforcement of the rights of nature to date is more akin to executive enforcement of environmental regulation than that of a rigid constitutional assurance to a particular right. Such a tradeoff can be characterized as a political economy of constitutional rights implementation. The analysis of rights implementation in Ecuador further suggests that environmental rights provisions can be particularly subject to rights tradeoffs, and

1. Scholar in residence, Finance Division, Leeds School of Business, University of Colorado–Boulder; research associate, Comparative Constitutions Project. For comments, independent study credit at the University of Chicago Law School, and noteworthy levels of patience, I thank Tom Ginsburg. For workshop and guest lecture opportunities, I thank Mila Versteeg and her students at the University of Virginia Law School, Bruce Johnsen and the George Mason University School of Law, and Graham Davis and the Department of Economics and Business at the Colorado School of Mines. I also thank the Public Choice Society for conference selection, the Hernando de Soto Capital Markets Program for research and conference support, and Javari McGill and the University of Colorado's Undergraduate Research Opportunity Program for research assistance and funding. Finally, I am grateful to Lee Alston, Federica Carugati, and the students of the Ostrom Workshop at Indiana University for comments.

Constitutional Studies, Volume 3
©2018 by the Board of Regents of the University of Wisconsin System

regimes with a dominant veto player can be more able to engage in rights tradeoffs than others.

KEYWORDS: *constitutional law, comparative constitutional law, constitutional implementation, global constitutionalism, environmental rights, human rights, rights tradeoffs, political economy, Ecuador, natural resources, development economics*

IN 2008, ECUADOR'S CITIZENRY approved a new constitution by a resounding majority. The 2008 constitution was noteworthy across a number of dimensions, from its antecedents in a stream of political crises, to the scope and form of the rights it provided, to the international interest its passage and implementation generated. The constitution was a signal achievement of the Correa regime in the extent to which it proposed to fundamentally change the nation's governance institutions from those experienced under the preceding unstable and corrupt regimes. This meant that despite being the dominant political players in the country, Correa and his party could not ignore the constitution when it competed with their policy priorities. Instead, the Correa regime relied on the judiciary to rationalize its economic and social development priorities with the more aspirational environmental rights found in the constitution.

A core tension in the implementation of the 2008 constitution has been the uniform enforcement of rights guarantees. Despite the specification that rights are nonhierarchical, this principle can break down in the face of larger fiscal and political economic realities that require the prioritization of certain rights over others (Gearty 2010). The more aspirational a given constitution is compared to the existing situation that led to its development, the greater the cost and time required to implement such a constitution fully. Ecuador's 2008 constitution is unquestionably aspirational, both within the context of the country itself as well as compared to other countries' constitutions, especially in terms of the social and environmental rights it guarantees. Thus, the extent of change a new constitution contemplates can have important implications for the tradeoffs it forces the implementing government to make when wholesale implementation is not possible in the short term.

As the subsequent analysis will suggest, the gap between existing sociopolitical realities and new rights created generates a fundamental tension whose resolution is a function of which rights have the most popular support and how these rights must be financed given the existing structure of government. This suggests that just as institutions are a determinant of economic outcomes, a given nation's industrial organization can influence the extent of institutional change that is possible under a given regime change. In Ecuador, social rights and economic development have

received immediate priority, even though their implementation, financed through resource extraction revenues, has required the government to trade off against prioritizing the implementation of the most aspirational environmental rights. The case of Ecuador provides a clear example of where a more general rights tradeoff treated in the literature, human rights versus economic development, is given further detail in that environmental rights have had to trade off with economic development (and financing of social rights). Such a rights tradeoff can be seen in light of more classic interpretations of politicians catering to the majority demands of the constituents they represent, and as such, can be characterized as a political economy of constitutional rights implementation.

The analysis proceeds as follows. Section I reviews the literature regarding rights tradeoffs, environmental constitutionalism, and contemporary Latin American political models. Section II describes the political and social upheaval that culminated in a new constitution. Section III highlights the most notable aspects of the 2008 constitution, especially in terms of environmental rights and indigenous recognition. Section IV chronicles the implementation of the new constitution during its first nine years in force. Section V notes how immediate needs for revenues led to a mining law whose interpretation in the constitutional court granted considerable latitude to the government in terms of sidelining the rights of nature. Section VI examines the courts' treatment of rights of nature claims to date. Given the difficulties in implementation and enforcement, Section VII identifies a number of other constitutional infirmities that have emerged, suggesting that they are related to the tradeoffs the government has made in implementing the 2008 constitution.

I. HUMAN AND ENVIRONMENTAL RIGHTS TRADEOFFS AND NEO-BOLIVARIAN POLITICAL MOVEMENTS

A. Rights Tradeoffs and Environmental Constitutionalism

The development of the institution of constitutionalism over the course of twentieth century closely tracks the increasing global adoption of human rights instruments (Goderis and Versteeg 2014). This increased growth in constitutionalism around the world has had important effects in terms of the extent to which new constitutional processes are representative of the demand for change that led to the need for a new constitution. In contexts like Latin America, where executives are relatively unconstrained and governance problems such as corruption are prevalent, new constitutional processes have often been accompanied by the expectation for major change from that which came prior. Given how human rights diffusion

has tracked the emergence of a culture of constitutionalism around the globe, these reactionary constitutional processes have frequently enshrined new rights. However, the increased adoption of human rights, either via constitution or international treaty, has not necessarily led to uniform human rights improvements in adopting countries (Chilton and Versteeg 2016). This had led scholars to question whether a rights-focused approach is the best way to achieve sustainable human development outcomes.

This critique has been associated with Eric Posner, who argues that a focus on human welfare as opposed to human rights might better enable governments to improve outcomes for their citizens (Posner 2008, 2014). Posner's concern about the optimality of rights institutions culminated in a book that critiques human rights law's dominance in policy debates as the best means of achieving increases in human welfare. Importantly, however, Posner's critique is mainly reserved for international human rights treaties (Posner 2014). The critique is quite simple: rights-based protections are necessarily rigid, and given the underlying intent to improve human welfare, is such a rigid assurance the best way to achieve this intent? The rigidity of a rights-focused approach is argued to lead to considerable controversies surrounding which rights should be considered fundamental, how to prioritize the enforcement of rights, and how government resources should be allocated to address rights violations (Posner 2008, 1760).

The notion that human rights pose a necessary tradeoff with other desirable outcomes is not an uncontroversial one (Henkin et al. 2009, 107–109), but critiques of the inevitability of rights tradeoffs tend to focus on specific examples that show improvements in human rights occurring alongside economic growth (Donnelly 1984, 2013, 229–31). While these critiques show that achieving improvements in human rights are possible alongside periods of economic growth, they tend to ignore the obvious counterfactual: would greater economic growth have been possible absent as many human rights restrictions? A related concern is the general focus of the development and rights tradeoff debate.[2] While such a tradeoff may well exist, are there certain types of rights that are more or less likely to create the need for tradeoffs for the implementing government? This article proceeds to argue that Ecuador provides a case study where the government has faced a

2. While scholars approaching the question have long noted that specific countries or regions can be more subject to rights tradeoffs than others (Hewlett 1979), these analyses tended to be limited to the broad rights being traded off to facilitate economic development, as opposed to a specific sets of rights likely to be traded off with one another.

tradeoff between social rights and environmental rights because of the need to finance improvements in human welfare required by the 2008 constitution.

Despite the broad terms of the rights tradeoff debate, the constitutional rights literature has developed considerable granularity in regards to environmental rights. Constitutional treatment of environmental outcomes has increased significantly in the decades since environmental concerns came to the forefront of public concern during the latter half of the twentieth century (Boyd 2014; May and Daly 2015; Kotze 2016). Since 1972, when no constitution in force treated rights to the environment, 147 countries have included some reference to environmental protection in their constitutions (Boyd 2014). David Boyd's comprehensive study concluded that constitutional environmental protections correlate strongly with improved rankings on environmental indices, among other measurable environmental outcomes.

What remains an important question is the extent to which such correlation suggests causation, for countries that more highly value environmental sustainability are also more likely to enact legal protections to assure this outcome. In Ecuador's case, the demand for environmental improvements was arguably present, especially in debates over constitutional substance, but the extent to which the rights that emerged have resulted in meaningful restraint on the actors most likely to degrade the environment is a separate question with which this analysis is concerned. This concern as to causal mechanisms of environmental improvements mirrors the more general concern in the human rights scholarship as to whether formal rights protections are the means by which human rights improvements actually occur (Hafner-Burton and Tsutsui 2005; Posner 2008, 2014). Scholars of global environmental constitutionalism have posed the environmental rights tradeoff question (Bosselmann 2015, 177) but have not examined outcomes in specific nations to the extent that this analysis does.

Interestingly enough, environmental rights do not appear to emerge as the result of adoption of these measures by other countries in a given region (Gellers 2012). Nonetheless, scholars of environmental constitutionalism consistently note Latin America as a region where environmental rights have gained the most purchase in constitutional texts and subsequent jurisprudence (Boyd 2014; May and Daly 2015; Kotze 2016). Setting aside the question of whether Latin America is an exception to the empirical finding that regional diffusion is not operative in the adoption of constitutional environmental rights, there are a number of other aspects to the politics of the region that help to understand the implementation of Ecuador's constitutional project under Correa.

B. Neo-Bolivarian Constitutionalism and Populist Parties as Veto Players

The rise of Correa in Ecuador is part of a regional trend that bucked decades of political adherence to U.S.-influenced integration into global trade. The modern emergence of left-leaning populist political movements is first traced to the rise of Hugo Chavez in Venezuela in the 1990s, followed by Evo Morales in Bolivia, and subsequently Correa in Ecuador. The appeal of these movements lay in their rejection of what came prior, often labeled neoliberalism, neocolonialism (Moraña et al. 2008, 12), or neo-imperialism (Knauft 2007). Because of this notion of dependency upon colonial or imperial masters, the rejection of neoliberalism in the preceding countries was named neo-Bolivarianism after the father of numerous independence movements in the region, Simon Bolivar.

These neo-Bolivarian movements led to a distinct form of constitutionalism, characterized by three main features: a high degree of aspirational content, a radical departure from existing governance institutions, and a tension between conservative and liberal constitutional protections (King 2013, 369). This characterization is based in part upon the Ecuadorian constitution and so directly reflects the content that led to the challenges in implementation that this article subsequently describes. A high degree of aspirationalism, based in a departure from existing governance institutions, with significant conflicts in practice among constitutional provisions themselves is a direct description of Ecuador's experience surrounding the implementation of the 2008 constitution.

Beyond the constitutional context, the role of neo-Bolivarianism as a rejection of neoliberal policies has resulted in significantly empowered executives who came to office through populist movements. Although this rejection of neoliberalism is reflected in constitutional provisions treating the rights of indigenous groups and environmental protections, this trend had larger political implications that can be situated in the political science literature surrounding veto players. In these neo-Bolivarian regimes, the emergence of a charismatic leader not only led to electoral success in the executive but was also linked to the dominance of the legislative branch by this executive's party. It is important to note that the independence of political parties from their leaders in these countries is much lower than in other Latin American contexts (Sanchez 2008; Flores-Macías 2010). In such a context, the charismatic executive is the most powerful veto player in the political system because they effectively control the definition and execution of new legislation (Tsebelis 1995, 2002). Another way to characterize these political systems is "delegative democracies," which "rest on the premise that whoever wins election to the presidency is thereby entitled to govern as he or she sees fit, constrained only by the hard

facts of existing power relations and by a constitutionally limited term of office" (O'Donell 1994, 59).

Tsebelis's thesis regarding the potential for policy change focuses on the number of individual political actors that can veto a potential change, the extent to which these players' visions of policy change are congruent, and the amount of internal cohesion within each veto player's political party or interest group (Tsebelis 1995). The subsequent analysis will show that in the case of Ecuador, the nearly singular veto player, President Correa; the congruence between his party's vision for change and that of the population; and the cohesion his party displayed before and after constitutional enactment all point to a significant potential for policy change. This policy change potential, however, very much depended on the priorities defined by the Correa regime, which chose to emphasize human development as opposed to strict adherence to the environmental rights enshrined in the 2008 constitution.

II. THE RISE OF ALIANZA PAÍS AND THE 2008 CONSTITUTION

Between 1996 and 2006, Ecuador had seven different governments, each characterizing its policies as intended to create market liberalization and diminution of the state. These governments fell under distinct circumstances, but corruption played a role in the demise of each regime (Paz y Miño Cepeda 2009, 74). During this time, while some sectors of the population amassed a large amount of wealth, inequality rose considerably and other sectors of the population experienced high levels of unemployment and subemployment.

In short, much of the population increasingly began to question the legitimacy of the government prior to the rise of Correa and his party, Alianza País. The political turnover preceding Correa's regime resulted in the unification of diverse movements that were instrumental in nationwide protests against the corruption and inequality that characterized the seven regimes preceding that of Alianza País (Kauffman 2016, 87). By one estimate, 80 percent of the Ecuadorian population was excluded from the political process,[3] and this was the base that Correa effectively tapped for his rise to power and reframing of the Ecuadorian social contract (Becker 2011, 48). Correa leveraged the emergence of the neo-Bolivarian model

3. The post-constitutional electoral results in 2009 emphasize the extent of disillusionment with the traditional parties, with only 9 of 124 seats in the National Assembly going to the parties who had enjoyed a clear hegemony prior to 2002 (Pachano 2010, 308). A further indication of the decline of the prior parties is that none fielded a presidential candidate in the post-constitutional 2009 elections (Bowen 2010, 187).

of governance in his own campaigns, characterizing Alianza País as part of the regional turn to the left (Arsel 2012).

Correa's platform with Alianza País was a clear reaction to the preceding periods of instability, inequality, and corruption, utilizing language to characterize the prior period as the "long neoliberal night" and promising a "new Latin-american left" (Paz y Miño Cepeda 2009, 74), including the convocation of a constituent assembly to create a new constitution. Indicative of popular support for a fundamental change in the social contract was the referendum as to whether a new constitution was needed, in which Alianza País' position of yes received 82 percent of the vote, leading to the need to elect a constituent assembly.

The indigenous political coalitions who achieved representation in the constituent assembly valued both the indigenous and environmental ideals of "Pachamama"[4] and "sumak kawsay,"[5] as well as the leftist neo-Bolivarian ideals of rights to health care, education, and social security. Furthermore, indigenous communities sought recognition as nations in their own right, and so one of their chief aims was the declaration of Ecuador as a plurinational state, first and foremost. The indigenous communities also sought the recognition of indigenous languages as official languages of the government alongside Spanish. Ultimately, neither aim was realized, although each objective received modest treatment in the constitution.[6] These outcomes emphasize how it can be comparatively easier to make "minor cultural concessions" than to create the wholesale change demanded by many indigenous rights movements (Becker 2011, 56).

Despite the conflicts indigenous groups had with the constitutional provisions on language and the tension between the provisions on natural resources and recognition of Pachamama and sumak kawsay, "the indigenous movements decided to take what they could get rather than losing everything with a more principled stance" (Becker 2011, 59). In other words, indigenous groups saw the limits of their bargaining power in the diverse coalition within Correa's movement and prioritized the aims of increased political recognition and definition of environmental rights over the full suite of ideal outcomes they desired. Furthermore, the political context from which these groups emerged was one in which they had not previously

---

4. This term can loosely be thought of as "Mother Earth," with an emphasis on the nurturing role nature and a clean environment play on achieving sustainable public health outcomes.

5. This is an indigenous term whose equivalent in Spanish is *buen vivir*, which loosely translates to "good living" but has been more broadly translated in a policy sense to sustainable development outcomes from the perspective of health, education, and economic well-being.

6. 2008 Const. of the Rep. of Ecuador arts. 1 and 2.

been afforded a voice on the national level. Thus, even these qualified victories were quite significant compared to previous political outcomes and may have been preferable to presenting their supporters with defeat. This is perhaps due to the difficult position many groups found themselves in with respect to the draft that ultimately went to referendum: by not supporting a draft that was imperfect from their ideal perspective, they could well be supporting an outcome most conducive to their opposition's interests (Becker 2011, 58–59).

Finally, there is considerable variance as to the extent to which any given constitutional moment can rationally be expected by its constituents to produce an increase in constitutionalism. The study of constitutions in authoritarian regimes and their institutional functions that can be unconnected to traditional notions of constitutionalism (Ginsburg and Simpser 2013) suggests that countries' citizens can vary significantly in their perception of the fundamental importance of a new constitutional process. If expectations are lower as to the extent to which a given constitutional process is likely to bring improvements, this could also imply lower stakes at the constitutional drafting table as compared to other avenues through which a given interest group might seek to achieve its policy aims.

III. THE TERMS OF THE SOCIAL CONTRACT

The referendum for Ecuador's 2008 constitution took place on September 28 and was approved by 64 percent of voters (Gudynas 2009, 38). Social rights are treated in detail and range from health care (articulated as a broad concept of health, in addition to that contemplated in reference to sumak kawsay),[7] to social security,[8] education,[9] specific care for the elderly and youth,[10,11] rights of the disabled to nondiscrimination and adequate care,[12] etc. Many of these rights are ones that huge sectors of the population felt they had been denied under previous regimes and so were central among those demanded in the Constituent Assembly.

The 2008 constitution enshrines the environment using a particular Ecuadorian term, Pachamama, whose direct reference to maternity underscores the

7. Ibid. art. 32.

8. Ibid. art. 34.

9. Ibid. art. 32.

10. Ibid. arts. 36–38.

11. Ibid. arts. 39, 44–46.

12. Ibid. arts. 47–49.

indigenous (and Ecuadorian) belief in the central role of the environment in providing well-being for all living organisms within the nation. The use of this term was a departure from more typical occidental understandings of the environment and natural resources as existing for the support and well-being of humans.[13] There is a core distinction between Ecuador's environmental protections, which are legion from a collective perspective[14] (as opposed to an individual perspective),[15] and those seen in other Latin American constitutions considered progressive on this front. This distinction between environmental rights is because the guarantee to levels of environmental well-being and rights to life of organisms in Ecuador is independent from the impact resource use has on individual property rights to organisms or environmental spaces. As importantly, the 2008 constitution grants some form of standing to "all persons, communities, and nations" to bring claims regarding the infringement of nature's right to "the maintenance and regeneration of its life cycles, structure, functions, and evolutionary processes."[16] This suite of ambitious environmental protections has become known as the rights of nature.[17]

The preceding constitutional provisions resulted not only from community and indigenous movements but also from the preceding decades of Ecuador's experiences with foreign extractive industries. This focus on the right to be free from the environmental degradation that often comes alongside natural resource extraction in developing nations is understandable given Ecuador's history with Texaco. Texaco's extraction of oil in the Oriente region of Ecuador resulted in significant environmental degradation to the point where it greatly affected the health of indigenous communities (Kimerling 2006, 2013, 242–4). The decades of pollution created by Texaco led to a lawsuit in Ecuador, as well as abroad, the outcomes of which are discussed in Section VI.

---

13. Bolivia under Evo Morales's neo-Bolivarian regime has similarly emphasized the importance of sustainable environmental stewardship (Kennemore and Weeks 2011).

14. 2008 Const. of the Rep. of Ecuador arts. 14, 15, 57, 71–74.

15. Ibid. arts. 30, 66.

16. Ibid. art. 71.

17. Ecuador's protection of the environment does not limit itself to the enumeration of rights to a clean environment; it also imposes duties on citizens to adopt measures necessary to avoid negative environmental impacts from their actions (2008 Const. of the Rep. of Ecuador art. 83). Furthermore, environmental restoration in the case of degradation by extractive industries is an obligation required by the constitution in Article 72, specified as a right granted to nature apart from the compensation required of the state or private entities in the case of affected communities or individuals. Again, the distinction between an individual right and a collective right or one granted to nature is notable.

The highly progressive rights and duties associated with protecting the environment are not entirely in line with one immediately following in the same section. Article 74 guarantees individuals, communities, and ethnic groups "the right to benefit from the environment and the natural wealth enabling them to enjoy the good way of living."[18] Not all uses of natural resources are unsustainable, but beyond the immediate benefits of such uses there is clearly an upper limit on the extraction that can result from sustainable use, the profits from which can be applied to other social aims such as the implicitly costly social and economic rights highlighted in Articles 26, 32, 34, and 37–50. In a country fundamentally dependent on revenues from natural resource industries, the right to benefit from the environment directly reflects the underlying belief on the part of Ecuadorian citizens that all should share in the revenues derived from their country's natural wealth. This right, when considered alongside the rights of nature, provides a clear example of the rights tradeoffs that implementation of the 2008 constitution required of Correa's regime.

This move away from the governments prior to Correa was fundamentally anchored in the concept of sumak kawsay (Radcliffe 2012, 240). While originating with the indigenous communities in Ecuador, the term has taken on a broader meaning to indicate a rejection of that which came prior, especially the corrupt regimes of the decades before Correa's rise. However, as a term is coopted by a broader range of political interest groups, even if they are all grassroots, or counterhegemonic, it must sacrifice some of its core meaning to better encapsulate the range of needs espoused by different community movements. Indeed, the National Planning and Development Secretariat (SENPLADES) themselves labeled the concept of sumak kawsay or *buen vivir* as a social pact (SENPLADES 2010, 6). Moreover, a wide range of other government programs designed to effectuate the rights of nature and environmental improvements display the tradeoffs listed here between stringent enforcement and the costs to economic and social objectives this enforcement would require (Pietari 2016).

Ultimately, though, any social pact necessarily involves compromises among interests with divergent policy preferences, which can also require rights tradeoffs, depending upon the scope and magnitude of rights that a given constitutional order enshrines. The conceptual tension surrounding the meaning of sumak kawsay as implemented in government programs has proven to be a major theme in the years since constitutional enactment and reflects the fundamental dependence of the

18. 2008 Const. of the Rep. of Ecuador art. 74.

nation on natural resource extraction revenues for financing government programs such as infrastructure and social welfare provenance.

IV. IMPLEMENTING A NEW SOCIAL PACT

Ecuador's first post-constitutional presidential and legislative elections provided a number of electoral changes.[19] Under this altered set of electoral institutions, the growing pains experienced by Correa and Alianza País in terms of living up to the full suite of their constitutional promises may have led the party to subsequently receive less than a majority in the legislative election of 2009 (Bowen 2010, 188). Since then, however, Alianza País has gone on to make up this loss, as the party won a majority in the legislative elections in early 2013 (*El Universo* 2013), not to mention Correa being reelected resoundingly for his final term as president (Consejo Nacional Electoral 2013). Nonetheless, this variance in electoral outcomes for Alianza País has an important corollary point: the Ecuadorian electorate is capable of restraining the majority party in the country, and did so during Correa's regime. This means that despite the dominant position of Correa and his party, they were still subject to electoral constraint and so had to respond to popular pressures regarding the implementation of the 2008 constitution.

Beyond the environmental implementation issues treated in the preceding paragraphs, the immediate post-constitutional period also marked significant economic restructuring on the part of the government, including the repudiation of a large amount of externally held debt, as well as substantial increases in government expenditure in the areas of infrastructure, health care, and education. State control of previously privatized enterprises, the global economic crisis, and a decrease in domestic investment (likely in response to the nationalization of core industries), all led to several years of economic contraction. The repudiation of the debt reduced the national debt as a percentage of GDP from 23.2 and 18.3 percent in 2007 and 2008, respectively, to a level of 14.3 percent in 2009 (Pachano 2010, 303). Notably, Becker claims the repudiation of the debt was a political statement that was not tied to the ability of the government to actually pay the debt, and instead that a lack of action on this front would have borne significant political costs for Alianza

19. First, the 2008 constitution defined a mixed electoral system in which out of 124 representatives, 15 are elected by proportional representation from the nation as a whole, 103 are elected in first-past-the-post district elections from Ecuador's 24 provinces, and 6 are elected by Ecuadorians living abroad. Second, the legislative elections used primaries to determine Alianza País's candidates, a first in Ecuador (Bowen 2010, 187).

País (Becker 2013, 47). This rejection of perceived Western financial hegemony is directly in line with the rhetoric and actions of other neo-Bolivarian governments in the region, especially Venezuela.

Given Ecuador's dependence on resource extraction revenues,[20] high worldwide petroleum prices greatly aided the government's development agenda despite the negative growth of the economy during these initial phases of implementation. However, largely being limited to petroleum income sources, coupled with traditional sources of international funding drying up in the wake of repudiation, led to Correa's regime accepting a loan from China guaranteed in future petroleum sales (Pachano 2010, 303). These initial years of adjustment provide a marked contrast to the years following, in which "social spending on roads, hospitals, and schools had resulted in a growth rate of 8 percent for 2011, up from 3.6 percent the previous year and above the government's prediction of 6.5 percent" (Becker 2013, 43). Such economic performance, which boosted employment while ensuring the fiscal viability of the provenance of a number of core social rights enumerated in the 2008 constitution,[21] likely played a part in Alianza País' electoral success in 2013. Correa has continued to receive recognition for the success of this spending, which included income support programs, educational opportunities, and extensions in housing credit in addition to the health care and infrastructure improvements noted by other scholars (Larrea and Greene 2017). The direct effects of this spending also have a deeper implication in regards to the rights prioritization of the Correa regime. The repudiation of the external debt and dependence on resource extraction revenues point to a significant revenue constraint on government revenue sources. In such an environment, the government's choice of expenditure directly reflects its underlying policy prioritization.

Despite the high levels of popular support for Alianza País, the implementation of the 2008 constitution has not been without hiccoughs. The necessary compromises the constituent assembly made regarding indigenous and environmental demands led in part to Alianza País losing in 2009 elections the absolute majority it had enjoyed in the constitutional drafting process, as well as the fragmentation of larger coalitions[22] that had supported the Alianza País' program within the

---

20. In recent years, 50 to 60 percent of export earnings have come from the oil sector alone, and this same sector provided 30 to 40 percent of government revenues over the same period (Beittel 2013).

21. Such a spending pattern is consistent with the empirical finding that constitutionalization of rights to health care and education increases the likelihood of government expenditure on the provenance of health care and education (Kaletski et al. 2016).

22. The political fragmentation is also due in part to changes in political representation law on the lo-

constituent assembly (Bowen 2010, 187–8). Particularly important for subsequent outcomes is the divide that first emerged between indigenous groups and Alianza País during the enactment of the Mining Law, which was subsequently exacerbated by disputes over a water resources law (Pachano 2010, 300). This emphasizes that in a context of limited government capacity to implement costly structural changes in society contemplated in the new constitution, the Correa government had to trade off between implementation priorities, which necessarily involved a political economic calculus that had real electoral ramifications if they got it wrong.

V. THE MINING LAW AND THE CONSTITUTIONAL COURT'S INTERPRETATION

First reported in 2009, the difficulties in ensuring all environmental rights enshrined in the 2008 constitution have continued to this day. The central development authority's plans for improvements in education[23] and health care for the populace necessarily implied an increase in government expenditure (Paz y Miño Cepeda 2009, 75), and these revenues had to come from somewhere. Correa's answer was a revitalized, "socially responsible" mining sector (Dosh and Kligerman 2009, 22), the vision of which was legislated in the Mining Law passed in January 2009, which defined mining as a public activity and mandated state control of mines and oil fields, as well as ensuring the freedom of businesses to "liberally prospect for mineral substances" on communal and indigenous land (Dosh and Kligerman 2009, 22). As noted previously, a major portion of Ecuador's export earnings and government revenues come directly from natural resource extraction, most notably petroleum. Correa's ability to even pass this unpopular law displays the level of party cohesion and policy congruence that he commanded at this time; when the only veto players, President Correa and his Alianza País representatives in the legislature, wanted to achieve a controversial policy change, they were readily able to do so.

---

cal and subnational level, which required a much lower bar for candidates' appearance on ballots. This in turn resulted in a much larger number of political parties' candidates appearing on these ballots, which thus resulted in a larger number of parties represented in subnational and national governance structures. These parties were able to capitalize on minority dissatisfaction with individual constitutional outcomes (or in tradeoffs surrounding their implementation) to achieve legislative representation to the detriment of Alianza País.

23. Indeed, Ecuador's current incentive system to address child truancy among the poorest sectors has been characterized as superior to that present in the United States. It involves a similarity to the food stamps program currently in place in the United States, and as such, carries a significant level of expenditure for the government (Fischer 2013, 276).

Revenues for the implementation of government programs are not the only benefit identified by Alianza País associated with mineral extraction projects. These projects are often in remote and undeveloped regions of Ecuador, regions that Alianza País argues would economically and socially benefit from the additional employment and investment that these projects bring. These beneficial aspects of natural resource development highlight the tension within the constitution itself, where the environment is guaranteed strong protections in the same section where citizens are guaranteed the right to benefit from these natural resources.

The Mining Law led to significant protests from indigenous and environmental groups who were concerned how the law interacted with some of the 2008 constitution's well-regarded rights, such as access to clean drinking water and a healthy environment.[24] This resistance to the Mining Law was one of the first examples whereby a subset of the national-level interests that had been instrumental in bringing Correa into office, and subsequently approving the constitution, argued against outcomes advocated for by the Alianza País platform (Dosh and Kligerman 2009, 23). Because of the Mining Law's unpopularity, it was subject to challenge in the courts by some of the same indigenous groups that had been instrumental in Correa's rise to power. This dispute provided one of the first tests of the rights of nature against the government's affirmation that a significant measure of natural resource extraction would proceed. An important distinction, stressed by the government from the point that it nationalized much of the petroleum industry, was that the newly public stewardship would engage in natural resource development in a way that benefited the people and minimized environmental impacts. Nonetheless, financing government programs across a nation in its entirety implies an ongoing scale of resource extraction that in theory could have violated the rights of nature, and most especially, those pertaining to clean water. This was the argument put forward by claimants that composed a confederation of indigenous groups as well as local government bodies associated with water management and distribution.

This argument ultimately remained theoretical, for the Constitutional Court upheld the Mining Law, given the law's requirements that future resource extraction be supported by procedures designed to reduce environmental damages. The Court went even further, however, by noting that another constitutional provision allowed "the State the authority to make exceptions to constitutional restrictions on mining in environmentally sensitive areas when the government declares this to be in the national interest" (Kauffman and Martin, 2016). This is an explicit recognition by

24. This is not to mention the more extreme rights granted to the environment and individual organisms themselves.

the nation's highest court that the national interest may require a tradeoff regarding the enforcement of environmental rights. As importantly, it cedes the authority to make this determination to the government itself. Such an exemption for the government stands in direct contrast to notions of the "environmental rule of law" that requires that environmental law be applicable to anyone, including state actors (Magraw 2015; Kotze 2016). Although the judicialization of politics has played an increasing role in Latin American nations writ large, outcomes in Ecuador provide a different lens from the general role identified by scholars in which activist courts have tended to step in to hold politicians accountable (Sieder et al. 2016). In Ecuador, the Constitutional Court appears willing to facilitate the rights tradeoff the Correa government identified as central to its constitutional implementation program, perhaps because of the very strength of Alianza País and Correa as veto players within the system.

In relation to these outcomes, Sarah A. Radcliffe notes that despite how "in one respect the state has signed up to a series of major commitments, yet for political and institutional reasons it treats certain rights as more significant than others" (Radcliffe 2012, 245). Of authors who view the recognition of the rights of nature in Ecuador as a positive development, this is one of the most explicit recognitions of the political economy of rights implementation. This tradeoff in rights implementation has led to a significant political divide within the country surrounding the appropriate way to understand sumak kawsay. Alianza País and its supporters have argued that achievement of "the good life" is necessarily a confluence of increases in material well-being as well as a reasonable measure of environmental protections. Indigenous groups, increasingly in opposition to Correa's economic development agenda, argue that the concept fundamentally represents a community's relationship with the environment. To deprioritize environmental outcomes compared to increases in living standards is a tradeoff at odds with the very heart of sumak kawsay, the environmentalists and indigenous rights groups argue. Recent empirical work supports the interpretation that both conceptions of sumak kawsay receive considerable popular support within the country (Guardiola and Garcia-Quero 2014, 177–182).

Much of the optimism about the 2008 constitution depends upon the framing that the creation of new rights, while not yet enforced, does not necessarily destroy classical rights. From this perspective, the 2008 constitution has been argued to be a necessary innovation in the development of fundamental rights worldwide (Gudynas 2009, 44), or as a political roadmap more than a justiciable legal tool (Ruiz Giraldo 2013). It is important to note that both of these perspectives implicitly recognize the necessity to trade off between the rights enforcement priorities

articulated by the 2008 constitution. Not all constitutional drafters have agreed with the government's decisions, however, for a former president of Ecuador's Constitutional Assembly, Alberto Acosta, rendered a judgment against the Ecuadorian government for violation of the rights of nature due to ongoing petroleum extraction within the country. Acosta is a judge for the Tribunal for the Rights of Nature in Paris, which is a citizens' tribunal lacking legal authority (Pietari 2016, 84). Regardless of the lack of legal force, this pronouncement from a leader of the drafting process shows the tension that continued natural resource extraction creates between the rights of nature and Alianza País' system of government.

Recent events continue to show the delicate balancing act required of Alianza País between ensuring increased standards of living while still providing some measure of environmental protections (Rühs and Jones 2016). One of Correa's most lauded environmental projects preceded the enactment of the 2008 constitution. Announced in 2007, the Yasuní-ITT project was an unprecedented attempt to underwrite the costs of environmental protection by contributions from other nations. The project arose after the discovery of massive oil reserves, totaling nearly 20 percent of the country's known reserves, within the Ishpingo-Tambococha-Tiputini (ITT) region of the Yasuní National Park, one of the most biodiverse regions in the world (Arsel 2012, 157–159). The premise for international involvement was that the rest of the world has an interest in protecting biodiversity and reducing carbon emissions and in great part drives the demand for oil that led to the controversy surrounding extraction in the park in the first place. Correa agreed to leave the Yasuní oil in the ground if Ecuador would receive half the oil's value at 2007 price levels,[25] which was $7.2 billion. Like the 2008 constitution itself, the Yasuní-ITT project generated considerable scholarly applause (Larrea and Warnars 2009; Finer et al. 2010; Rival 2010; Arsel 2012; Arsel and Angel 2012).

However, in August 2013, Correa announced that Ecuador would abandon its commitments under the project, having only raised $13 million of the $3.6 billion they requested (Koenig 2014). Despite the Yasuní-ITT project's significant popularity within Ecuador, drilling in the ITT region had begun as of late October 2016 (Vidal 2016). Given that the Amazonian Yasuní -ITT region of Ecuador is now open to resource extraction and that Ecuador is among the most biodiverse countries in the world, it is difficult to imagine the development of petroleum there

25. Given shocks to world commodity prices since 2007, the sum requested may actually represent a larger percentage of the Yasuni reserve than when the project began. In this sense, the project was also innovative in that it would have provided Ecuador insurance against commodity price shocks, the effects of which the country's economy is currently enduring.

would not be at odds with some of the rights of nature, at least in principle. But given the power of the state to declare projects in the public interest as superseding these rights protections, it remains to be seen if any claims against the resource extraction in the Yasuní-ITT region will be brought, let alone prevail. Recent events suggest a movement against resource development in the region, though, for a popular referendum significantly reduced the size of the zone in which oil could be drilled, while simultaneously increasing the area which was off limits to such extraction (*El Espectador* 2018).

Thus, the realization of the neo-Bolivarian state from the legal construct the 2008 constitution creates is necessarily constrained by political and economic realities. These political realities include Ecuador's dependence on resource extraction as a means of revenue to support its development policies, notably the costly social rights articulated in the constitution. While direct taxation has played a significant role in financing these development policies (Radcliffe 2012, 242), Ecuador's level of development prior to Correa's rise to power implied that no amount of redistributionary tax policy could make gains to the extent required by the more than 100 rights enshrined in the 2008 constitution.

VI. LEGAL ENFORCEMENT OF ENVIRONMENTAL RIGHTS?

A more granular analysis of the courts' implementation of Ecuador's environmental rights also exposes weaknesses, most notably surrounding which claimants have proven successful in bringing rights of nature claims. One of the first critiques of the constitution surrounded the enforceability of its more aspirational provisions: "Without a deeper understanding of how nature can access justice and how Ecuador should enforce standing, the new provision will not translate into an applied substantial right" (Radcliffe 2012, 242). The provision under consideration here is Article 71, which is among those rights without an explicit grant of individual standing. In addition, the constitution lacks specification over what criteria dictate who can make a claim under other environmental rights guarantees, and this ambiguity has not since been clarified by the legislature (Whittemore 2011, 666–9). This leaves potential claimants not knowing exactly what it takes to show an injury to the environment and themselves and allows for considerable variance in how judges might treat any given claim emanating from these rights (Pietari 2016).

Such a drafting choice regarding rights standing is indicative of the compromises inherent to a drafting process whose controlling party enjoyed the support of a broad yet heterogeneous swath of society. The tension between granting individual standing to bring claims under the most progressive of Ecuador's environmental

rights, and the diminution in enforceability an explicitly narrow grant of standing would imply, may have led drafters to leave the standing for the most aspirational rights ambiguous. This could be because ambiguity would imply less negotiation costs at the drafting table (from the perspective of the opposing interests that want narrow and broad standing, respectively), as well inherently prioritize those rights in the constitution for which broad standing to bring claims is explicitly granted. Thus, Ecuador's modern constitutional history also provides an example of how drafters may engage in predictive rights tradeoffs by making some rights more actionable than others.

Judicial treatment of rights of nature claims provides an interesting study in the types of groups that have successfully brought claims, as well as who these claims were enforced against. Unclear standing is unlikely to remain so, nor does this uncertainty bind on all potential litigants equally. Ambiguous standing raises expected costs to potential litigants by both reducing the certainty that a claim will prevail and increasing the time required to clarify ambiguous standing procedurally before the courts. In theory, rights of nature claims brought by individuals who either could afford to weather this legal uncertainty or had other structural advantages would be more likely to prevail.

Ecuadorian courts have considered a number of claims brought under the rights of nature in Ecuador's 2008 constitution. As of early 2016, thirteen such claims had been identified (Kauffman and Martin 2017). Of these, ten prevailed, with seven of the cases in which rights prevailed involving a claimant that was a government official or ministry. The Ministry of the Environment makes up a large portion of these victorious claims, which prevailed against three classes of defendants: private individuals, private companies, and local government authorities. Taken together, this means claims under the rights of nature that were most likely to prevail through 2015 in Ecuador were ones brought by the national government against private actors or subnational governments. Those successful claims not brought by the government came from two groups of local citizens and one couple, Nora Huddle and Fredrick Wheeler[26] (Kauffman and Martin 2017). Given the lack

26. Interestingly enough, the facts of Huddle and Wheeler's case appear strikingly similar to property claims that would prevail under most developed nations' actions for damage to private property. After a construction crew working for the Loja provincial government dumped rock and gravel into a river, causing its flow to increase, the property of Wheeler and Huddle was flooded. Although the provincial court used the rights of nature in its ruling, it is not clear that absent the actionable injury to the plaintiffs, claimants would readily appear to contest rights of nature violations that to nonusers of a particular natural property would appear to be marginal changes. *Richard Frederick Wheeler y Eleanor Geer Huddle c/ Gobierno Provincial de Loja*, juicio 11121-2011-0010 (30 March 2011). By one report, damages

of independence of the judiciary, the choice of the Ministry of the Environment to proceed through the courts is itself significant. Such a choice indicates that the Correa regime independently values the judicial validation of environmental rights in those instances in which the administration chose to restrain a subnational or private actor's environmental rights violations.

Furthermore, the researchers engaged in synthesizing rights of nature claims note how civil society organizations have been comparatively unsuccessful in prevailing on rights of nature claims (Kauffman and Martin 2017), which again points to an increasing role for the government in using these protections in a way akin to environmental regulation, enforcing them against private actors while themselves remaining comparatively free of their constraint, if successful claims brought to date are any indication. Such a pattern of enforcement emphasizes the strength of Correa and Alianza País as veto players, especially compared to the judiciary. This perspective of judicial adherence to the dictates of the dominant veto player has empirical support in a series of studies noting that Constitutional Court judges in Ecuador lack independence from both the executive and the legislature, a pattern that has continued under the Correa regime (Basabe-Serrano 2012; Basabe-Serrano and Polga-Hecimovich 2013).

Nonetheless, this deficiency in judicial independence does not mean Correa and the Alianza País felt unconstrained by the 2008 constitution. The new constitution was the direct result of the party and President Correa's success in fomenting popular support for a neo-Bolivarian revolution similar to several other countries in the region. Alianza País is closely linked to the 2008 constitution itself, such that acting with impunity would have delegitimized one of their crowning political achievements. This view as to the need to achieve the party's agenda within the bounds of constitutionality is consistent with the 2009 ruling in favor of the Mining Law and the right of the government to declare certain environmental impacts as within the public interest and thus outside the realm of constitutional protection. Once again, given the amount of government revenues that result from natural resource extraction, and the central importance of these rents to financing increases in health care, education, and infrastructure, it appears unlikely that claims under the rights of nature will prevail in these scenarios in the short to medium term.[27]

---

spent repairing the property were upwards of $43,000 (Greene 2011), which is nearly nine times the GNI per capita in Ecuador in current U.S. dollars (World Bank 2017).

27. Nonetheless, the rights of nature have prevailed in cases of illegal mining, logging, fishing, and disposal of municipal construction materials, to name a few cases. This indicates that although certain classes of environmental impact may be exempted from rights of nature claims, it is not as if these rights have no purchase whatsoever. Similarly, it should be noted that from a comparative perspective

Nominally successful outcomes of claims against prior resource extraction by private companies have met with other difficulties given constraints unique to Ecuador's regime turnover. The decades of environmental degradation by Texaco resulted in several high-profile awards within Ecuadorian courts themselves. In 2011, an Ecuadorian court ordered Chevron (formerly Texaco) to pay damages and remediation costs for their activities in the Lago Agrio area (Romero and Krauss 2011). In 2013, Ecuador's Supreme Court ratified this ruling and set damages at $9.5 billion (Valencia 2013). Chevron refused to pay. Given this experience, Correa supported an indigenous groups' lawsuit against Chevron in the United States because Chevron no longer has any assets within the country that the government can seize in order to pay compensation to affected individuals. However, in August 2016, a United States court upheld a lower court's decision in favor of Chevron due to fraud and other misconduct on the part of the plaintiffs' attorney.[28]

The Chevron case, coupled with the limited set of actors against whom rights of nature claims have been enforced, highlights the difficult position of the Ecuadorian government when confronted with remedying past and current environmental rights infringements. This difficult position underscores a hidden cost to removing private companies who have engaged in resource extraction with a given country: such companies become considerably more judgment-proof within the country itself. With historical damages to the environment, the government has effectively removed the ability to award damages against these companies in the country's domestic courts, and the outcomes in other nations' courts where these companies still do business are not guaranteed, although in this instance Ecuadorian plaintiffs were more successful in Canada (Telesur 2015). As to possible rights infringements posed by the ongoing resource extraction necessary to ensure increased standards of living and positive rights provenance, these would potentially stymie the very development that Alianza País' conception of sumak kawsay requires and many citizens demand.

VII. CONSTITUTIONAL INFIRMITIES?

While suggestive of an underlying constitutional political economy itself, the inconsistent implementation of the environmental rights creates the possibility for

across Latin America, Ecuador has experienced significantly less conflicts between mining companies and the communities they affect (Svampa 2015, 69), which provides an indication that the implementation of the rights of nature, while imperfect, may result in less conflicts when the rents from natural resource extraction are associated with significant outlays on public welfare provision.

28. *Chevron Corp. v. Donziger*, No. 14-0826 (2d Cir 2016).

a larger set of downstream consequences. If the executive and legislative branch of government can prioritize the implementation of certain rights over others, this broadcasts a public signal as to the nature of constitutionalism writ large. This is arguably a suboptimal outcome, even in regimes whose constitutional turnover comes in places characterized by institutional deficiencies (Landau 2013). Although the evidence is still mixed, scholars and journalists have identified several ways in which the constitutional order could be weakening. In particular, the legislature amended the constitution to extend presidential term limits in December 2015, and a number of different outlets have criticized the troubling stance of the Alianza País government and the freedom of press.

Throughout 2015, President Correa and Alianza País explored several avenues for extending term limits. There were reports of a referendum on the issue, which received treatment in the international press as a troubling indication of the strength of the constitutional order in the country (Alvaro 2014). Alianza País' arguments for term-limit extension surrounded the importance of their program of government and how this might suffer if a weaker candidate than Correa lost to a challenger. The ultimate outcome was notable, for while term limits were extended through an amendment passed by the legislature, the law did not come into force until after the April 2017 presidential election,[29] which effectively barred Correa from being reelected for a third sequential term under the new constitution (Stratfor 2015). In the election, Correa's former vice president, Lenin Moreno, narrowly prevailed against his opponent, a conservative banker (*BBC News* 2017). Both the narrow victory and the popular and political pressure to amend the constitution to allow Correa to run again signal the fact that political outcomes for Alianza País within the country are not guaranteed, which in turn emphasizes the need for the party to cater to popular pressures in its decisions regarding how to prioritize rights implementation.

An additional area where the government has received significant criticism surrounds its treatment of the press. A police protest over pay and working conditions in September 2010 led to the deaths of five police officers. A newspaper that ran an editorial critical of Correa's handling of the protest lost a lawsuit brought by the government under a controversial communications law passed in 2013. The penalties for the author of the editorial and three of the newspaper's executives

29. This change suggests the regime may no longer satisfy the definition of delegative democracies referenced earlier, which require constitutionally defined term limits for the otherwise greatly empowered executive (O'Donell 1994). Whether Alianza Pais could argue that the departure of Correa exempts the nation from such an anti-democratic characterization is an open question.

were quite steep: a three-year jail sentence. The newspaper also received a fine of $40 million. These sanctions resulted in an outcry, and Correa subsequently pardoned everyone involved, avoiding the imposition of jail time or the large fine (Beittel 2013, 245). Nonetheless, such an outcome is likely to have a chilling effect. Reporters in the country now must consider what level of criticism is appropriate, because if they go beyond it they risk huge penalties in the event the presidential pardon power is not exercised.

The response to the police protests does not appear to be an isolated instance, for international oversight bodies have highlighted a pattern of reprimands and warnings emanating from the authority empowered by the Organic Communication Law passed in 2013. Both the United Nations Special Rapporteur and the Inter-American Commission on Human Rights (IACHR) have condemned the state of press freedoms within the country due to actions undertaken since the passage of the law in 2013.[30] As recently as January 2017, the government moved to dissolve one of the most prominent (and leftist) environmental activist groups in the country after violence that erupted at protests against the development of a Chinese copper mine (*Guardian* 2017). As of this writing, though, the Ministry of the Environment had dismissed the order to dissolve the activist organization (Aguilar 2017).

Regardless of the exact balance of journalistic and political motivations underlying press critiques of the regime, Alianza País has responded quite strongly in terms of its limitations on the continued ability of the press to level criticisms without fear of reprisal.[31] As with the case of term limits, these limitations on press freedoms signal a potential weakness in the constitutional order that outstrip the individual tradeoff wrought by the executive between positive rights provisions and employment versus the strict enforcement of environmental protections. While it is a stretch to argue that these constitutional infirmities are the direct result of the tradeoffs the regime has faced in implementing positive

30. These criticisms appear to be part of a large dispute Correa has had with IACHR through the governance mechanisms of OAS. Ecuador, Bolivia, and Venezuela, each countries with strong executives that faced criticisms by the IACHR, sought constraints, fiscal and otherwise, on the commission up until March 2013, when the proposed reforms were tabled due to the rejection by the majority of other OAS members (Meyer 2016; OAS IACHR 2016).

31. In the defense of the regime's position regarding the press, recent scholarship has identified how every press outlet in the country is owned by individuals and organizations whose power was greatly diminished during the rise of Alianza País and the subsequent enactment of the 2008 constitution (Checa-Godoy 2012). Thus, there is an argument that the press' critiques of the regime are not exclusively motivated by the desire to present important issues for public consideration.

social rights and environmental protections, it is arguable that these patterns are related. An executive empowered to prioritize some rights over others is one more likely to be sufficiently powerful to extend term limits and silence its critics, a pattern consistent with delegative democracies as they have been defined in the literature (O'Donell 1994). A related question is the extent to which decisions made by the regime in terms of which rights to prioritize are path-dependent (Hewlett 1979, 454); will rights deprioritized today ever experience increases in provenance or enforcement?

Recent events provide a partial answer to this question in the short term. Correa's successor, Lenín Moreno, was widely seen as a safe choice to allow Correa to ride out an economic downturn for one electoral period, to then return in the following election when his approval ratings had rebounded (and his absence had satisfied the restriction on sequential reelection found in the legislative term-limit amendment). Instead, Moreno has struck a conciliatory tone in comparison to the dominant executive role that defined the Correa administration. As importantly, Moreno put a number of controversial issues to popular referendum on February 4, 2018. Among the issues treated was a repeal of the term-limit removal, as well as several issues related to mining and environmental rights. In response to the threat to Correa that the referendum posed, he created a new party in a public split from Moreno and the party that Correa had been instrumental in founding. To Correa's dismay, the public's approval of the referendum was resounding, barring Correa (and any other president with similar tenure in the future) from reelection and significantly restricting the ability to mine in natural areas generally, as well as the Yasuni forest reserve specifically (Tegel 2018). The popular referendum can be seen as a correction to the most unpopular decisions the Correa administration made in the implementation of the 2008 constitution. The outcomes also suggest that initial implementation decisions, while undeniably important, are ultimately subject to the will of a given electorate if such decisions diverge sufficiently from enough constituents' ideal vision of the nation's constitutional future.

VIII. CONCLUSION

The political and social antecedents to Ecuador's 2008 constitution put in place a drafting body whose popular mandate was resoundingly counterhegemonic. A range of previously marginalized groups for the first time had their voices heard at the constitutional drafting table. Because of the diversity of interests represented, the constitution guaranteed rights governing most, if not all, of the principal aims of the groups that brought Alianza País to power in the years prior to 2008.

Such an ambitious blend of social, environmental, and indigenous rights implied an initial implementation schedule that would be challenging even for governments characterized by institutional efficiency and good governance. Ecuador's recent history of corruption, patronage, and rent-seeking politics begat an institutional environment at the time of the rise of Alianza País that was characterized by anything but efficiency and good governance. Simply put, the wholesale short-term implementation of the full set of rights treated in the 2008 constitution would have been impossible. This required President Correa and his party to trade off between the provenance of different rights enshrined in the 2008 constitution. Nonetheless, Correa and his party were not fully unconstrained, for they experienced electoral defeat in the years following constitutional enactment, faced revenue constraints that required a need to prioritize certain government programs over others, and viewed the constitution as a signal political achievement. These factors meant that the Correa regime had to make strategic tradeoffs as to which aspects of the constitution to prioritize in implementation.

Thus, Ecuador presents an interesting case study of the political economic dynamic underlying rights implementation of aspirational constitutions. Such constitutions afford considerable discretion to all branches of the government as a whole in choosing which aspects of the constitution receive priority in implementation. This discretion, greater in political systems such as Ecuador, where a single party is the dominant veto player, is likely to result in the implementation of those rights constituents value most. Ecuador's experience under Correa supports such a theory, where social development priorities have been the main priority of the Alianza País governments. These social development policies have had associated costs and embody a vision of economic growth that could only be viably achieved through resource extraction due to the nation's fundamental dependence on this extraction as a source of economic development. In order to finance, and hence, implement the most popular constitutional rights, the government, including the judiciary, has constitutionally rationalized the imperfect implementation of other rights, especially those for which enforcement standing is unclear. This suggests that environmental rights protections, especially sweeping ones such as the rights of nature in Ecuador, may be particularly subject to rights tradeoffs.

This analysis is not intended to paint the 2008 constitution in a negative light. The drafters chose to create an aspirational constitution, which is an established model of constitutional design that, although not without critics, represents the fundamental desire for progress. Such desires are present by definition in post-conflict and counterhegemonic periods of political turmoil that give rise to new constitutions, as is the case in neo-Bolivarian regimes in Latin America. Thus, an

aspirational constitution may be the most representative model for drafters, even if it leads to a gap between the rights enshrined and sociopolitical realities. The recent referendum correcting the most controversial actions of the Correa administration also indicates that popular constitutional adjustments can play an important role in the context of aspirational constitutional implementation.

Furthermore, the implementation of the 2008 constitution should be considered in light of the argument that rights are violated to some extent almost everywhere (including the United States),[32] and therefore that all rights are in some sense aspirational because perfect enforcement is impossible. In one sense, this is the point of all rights: to articulate them and to subsequently make progress toward their better and more frequent enforcement. From this perspective, a right being violated in certain instances is distinct from the right not existing at all. Therein lies much of the logic of aspirational constitutions, for such logic undergirds the ability of future governments to prioritize rights implementation according to the demands of their constituents. A future research question is whether constitutions that are more aspirational lead to a net positive trend in rights implementation and how such a trend compares to the rights improvements less aspirational constitutions tend to provide.

REFERENCES

Aguilar, Daniela. "Court Dismisses Ecuadorian Government Bid to Shut Down Environmental NGO." *Mongabay*. January 26, 2017. https://news.mongabay.com/2017/01/court-dismisses-ecuadorian-govt-bid-to-shut-down-environmental-ngo (accessed February 5, 2018).

Alvaro, Mercedes. "Ecuador's National Assembly to Vote on Term Limits." *Wall Street Journal*. November 1, 2014. http://www.wsj.com/articles/ecuadors-national-assembly-to-vote-on-term-limits-1414791747 (accessed January 20, 2017).

Arsel, Murat. 2012. "Between 'Marx and Markets'? The State, the 'Left Turn' and Nature in Ecuador." *Journal of Economic and Social Geography* 103 (2): 150–63.

Arsel, Murat, and Natalia Avila Angel. 2012. "'Stating' Nature's Role in Ecuadorian Development Civil Society and the Yasuní-ITT Initiative." *Journal of Developing Societies* 28 (2): 203–27.

Basabe-Serrano, Santiago. 2012. "Presidential Power and the Judicialization of Politics as Determinants of Institutional Change in the Judiciary: The Supreme Court of Ecuador (1979–2009)." *Politics & Policy* 40 (2): 339–61.

32. Such a stance regarding the U.S. human rights record has become a more formal one on the part of the Ecuadorian government. In the diplomatic fallout over the possibility of Ecuador granting Edward Snowden asylum, Ecuador offered $23 million to the United States "to provide human rights training to combat torture, illegal executions and attacks on peoples' privacy" (Gill 2013).

Basabe-Serrano, Santiago, and John Polga-Hecimovich. 2013. "Legislative Coalitions and Judicial Turnover under Political Uncertainty: The Case of Ecuador." *Political Research Quarterly* 66 (1): 154–66.

Bassi, Michelle P. 2009. "La Naturaleza O Pacha Mama de Ecuador: What Doctrine Should Grant Trees Standing?" *Oregon Review of International Law* 11: 461–77.

Becker, Marc. 2011. "Correa, Indigenous Movements, and the Writing of a New Constitution in Ecuador." *Latin American Perspectives* 38 (1): 47–62.

———. 2013. "The Stormy Relations between Rafael Correa and Social Movements in Ecuador." *Latin American Perspectives* 40 (3): 43–62.

Beittel, June S. 2013. "Ecuador: Political and Economic Conditions and U.S. Relations." *Current Politics and Economics of South and Central America* 6 (2): 243–54.

Bosselmann, Klaus. 2015. "Global Environmental Constitutionalism: Mapping the Terrain." *Widener Law Review* 21: 171–85.

Bowen, James D. 2010. "Ecuador's 2009 Presidential and Legislative Elections." *Electoral Studies* 29: 186–9.

Boyd, David R. 2011. *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*. Vancouver: UBC Press.

Checa-Godoy, Antonio. 2012. "The Banking Sector and Media Ownership: The Case of Ecuador." *Latin Review of Social Communication* 67: 125–47.

Chilton, Adam S., and Mila Versteeg. 2016. "Do Constitutional Rights Make a Difference?" *American Journal of Political Science* 60 (3): 575–89.

Donnelly, Jack. 1984. "Review: Human Rights and Development: Complementary or Competing Concerns?" *World Politics* 36 (2): 255–83.

———. 2013. *Universal Human Rights in Theory and Practice*. Ithaca, NY: Cornell University Press.

Dosh, Paul, and Nicole Kligerman. 2009. "Correa vs. Social Movements: Showdown in Ecuador." *NACLA Report on the Americas* 42 (5): 21–24.

"Ecuador: entregan firmas para cambiar la ley y permitir otra reelección de Rafael Correa." *Infobae*. August 16, 2016. http://www.infobae.com/america/america-latina/2016/08/16/ecuador-entregan-firmas-para-cambiar-la-ley-y-permitir-otra-reeleccion-de-rafael-correa (accessed January 20, 2017).

"Ecuador's Current President Will Not Be Its Next." *Stratfor*. December 8, 2015. https://www.stratfor.com/analysis/ecuadors-current-president-will-not-be-its-next (accessed January 20, 2017).

"Ecuador le dice no al petróleo en el Amazonas." *El Espectador*. February 5, 2018. https://www.elespectador.com/noticias/medio-ambiente/ecuador-le-dice-no-al-petroleo-en-el-amazonas-articulo-737357 (accessed February 5, 2018).

"Ecuador Names New Vice President; Correa Begins Campaign against Referendum to Limit Re-Election." *MercoPress*. January 7, 2018. http://en.mercopress.com/2018/01/07/ecuador-names-new-vice-president-correa-begins-campaign-against-referendum-to-limit-re-election (accessed January 10, 2018).

"Ecuador Recount Confirms Lenín Moreno Won Presidential Poll." *BBC News*. April 19, 2017. http://www.bbc.com/news/world-latin-america-39640144 (accessed September 13, 2017).

"Ecuador Victims Can Seek Compensation from Chevron, Canada Supreme Court Rules." *Telesur*. September 4, 2015. http://www.telesurtv.net/english/news/Canadian-Supreme-Court-Rules-Against-Chevron-in-Ecuador-Case-20150904-0009.html (accessed January 20, 2017).

"Elecciones 2013: 7 de Febrero." *Consejo Nacional Electoral*. April 1, 2013. http://resultados.cne.gob.ec/Results.html?RaceID=1&UnitID=1&IsPS=0&LangID=0 (accessed August 21, 2013).

Finer, Matt, Remi Moncel, and Clinton N. Jenkins. 2010. "Leaving the Oil Under the Amazon: Ecuador's Yasuní-ITT Initiative." *Biotropica* 42 (1): 63–66.

Fischer, William M. 2013. "Conditional Welfare Grants to Address Truancy and Child Educational Neglect: United States' Experiments and Ecuador's Mandates." *Journal of Law & Education* 42: 275–311.

Flores-Macías, Gustavo A. 2010. "Statist vs. Pro-Market: Explaining Leftist Governments' Economic Policies in Latin America." *Comparative Politics* 42 (4): 413–33.

Gearty, Conor. 2010. "Do Human Rights Help or Hinder Environmental Protection?" *Journal of Human Rights and the Environment* 1 (1): 7–22.

Gellers, Joshua. 2012. "Greening Constitutions with Environmental Rights: Testing the Isomorphism Thesis." *Review of Policy Research* 29: 523–43.

Gill, Nathan. "Ecuador Scraps Trade Pact Over U.S. Threats in Snowden Case." *Bloomberg Businessweek*. June 27, 2013. https://www.bloomberg.com/news/articles/2013-06-27/ecuador-cancels-trade-pact-over-u-s-blackmail-in-snowden-case (accessed January 20, 2017).

Ginsburg, Tom, and Alberto Simpser, eds. 2013. *Constitutions in Authoritarian Regimes*. New York: Cambridge University Press.

Goderis, Benedikt, and Mila Versteeg. 2014. "The Diffusion of Constitutional Rights." *International Review of Law and Economics* 39: 1–19.

Greene, Natalia. "The First Successful Case of the Rights of Nature Implementation in Ecuador." http://therightsofnature.org/first-ron-case-ecuador (accessed January 20, 2017).

Guardiola, Jorge, and Fernando Garcia-Quero. 2014. "Buen Vivir (Living Well) in Ecuador: Community and Environmental Satisfaction without Household Material Prosperity?" *Ecological Economics* 107: 177–84.

Gudynas, Eduardo. 2009. "The Political Ecology of the Biocentric Turn in Ecuador's New Constitution." *Review of Social Studies* 32: 34–46.

Hafner-Burton, Emilie M., and Kiyoteru Tsutsui. 2005. "Human Rights in a Globalizing World: The Paradox of Empty Promises." *American Journal of Sociology* 110 (5): 1373–1411.

Henkin, Louis, Sarah Cleveland, Laurence Helfer, Gerald Neuman, and Diane Orentlicher. 2009. *Human Rights*. 2nd Edition. New York: Foundation Press.

Hewlett, Sylvia Ann. 1979. "Human Rights and Economic Realities: Tradeoffs in Historical Perspective." *Political Science Quarterly* 94 (3): 453–73.

Hill, David. "Ecuador's Leading Environmental Group Fights to Stop Forced Closure." *The Guardian*. January 7, 2017. https://www.theguardian.com/environment/andes-to-the-amazon/2017/jan/07/ecuadors-leading-environmental-group-fights-forced-closure (accessed February 5, 2017).

Kaletski, Elizabeth, Lanse Minkler, Nishith Prakash, and Susan Randolph. 2016. "Does Constitutionalizing Economic and Social Rights Promote Their Fulfillment?" *Journal of Human Rights* 15 (4): 433–53.

Kauffman, Craig. 2016. *Grassroots Global Governance: Local Watershed Management Experiments and the Evolution of Sustainable Development*. Oxford, UK: Oxford University Press.

Kauffman, Craig, and Pam Martin. 2017. "Can Rights of Nature Make Development More Sustainable? Why Some Ecuadorian Lawsuits Succeed and Others Fail." *World Development* 92: 130–42.

Kennemore, Amy, and Gregory Weeks. 2011. "Twenty-First Century Socialism? The Elusive Search for a Post-Neoliberal Development Model in Bolivia and Ecuador." *Bulletin of Latin American Research* 30 (3): 267–81.

Kimerling, Judith. 2006. "Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, Chevrontexaco, and Aguinda v. Texaco." *New York University Journal of International Law & Policy* 38: 449–68.

———. 2013. "Lessons from the Chevron Ecuador Litigation: The Proposed Intervenor's Perspective." *Stanford Journal of Complex Litigation* 1 (2): 241–94.

King, Phoebe. 2013. "Neo-Bolivarian Constitutional Design: Comparing the 1999 Venezuelan, 2008 Ecuadorian, and 2009 Bolivian Constitutions." In Denis J. Galligan and Mila Versteeg, eds. *Social and Political Foundations of Constitutions*. New York: Cambridge University Press: 366–97.

Knauft, Bruce M. 2007. "Provincializing America: Imperialism, Capitalism, and Counterhegemony in the Twenty-First Century." *Current Anthropology* 48 (6): 781–805.

Koenig, Kevin M. "Ecuador Breaks Its Amazon Deal." *New York Times*. June 11, 2014. https://www.nytimes.com/2014/06/12/opinion/ecuador-breaks-its-amazon-deal.html (accessed January 20, 2017).

Kotzé, Louis J. 2016. *Global Environmental Constitutionalism in the Anthropocene*. Portland, OR: Hart Publishing.

Landau, David. 2013. "Constitution-Making Gone Wrong." *Alabama Law Review* 64 (5): 923–79.

Larrea, Carlos, and Lavinia Warnars. 2009. "Ecuador's Yasuní-ITT Initiative: Avoiding Emissions by Keeping Petroleum Underground." *Energy for Sustainable Development* 13 (3): 219–23.

Larrea, Carlos A., and Natalia Greene. 2017. "Concentration of Assets and Poverty Reduction in Post-Neoliberal Ecuador." In Liisa L. North and Timothy D. Clark, eds. *Dominant Elites in Latin America: From Neo-Liberalism to the 'Pink Tide.'* Cham, Switzerland: Springer International Publishing: 93–118.

Magraw, Daniel B. 2015. "Rule of Law, Environment and Sustainable Development." *Southwestern Journal of International Law* 21: 277–81.

May, James R., and Erin Daly. 2014. *Global Environmental Constitutionalism*. New York: Cambridge University Press.

Meyer, Peter J. "Organization of American States: Background and Issues for Congress." Congressional Research Service, Library of Congress, 2012.

Moraña, Mabel, Enrique D. Dussel, and Carlos A. Jáuregui. 2008. "Colonialism and Its Replicants." In Mabel Moraña, Enrique D. Dussel, and Carlos A. Jáuregui, eds. *Coloniality at Large: Latin America and the Postcolonial Debate*. Durham, NC: Duke University Press: 1–20.

OAS IACHR. "UN and IACHR Rapporteurs Warn of Arbitrary Application of the Organic Communications Act." Organization of American States IACHR Joint Press Release R163/16. November 3, 2016. http://www.oas.org/en/iachr/expression/showarticle.asp?artID=1045&lID=1 (accessed January 20, 2017).

O'Donell, Guillermo A. 1994. "Delegative Democracy." *Journal of Democracy* 5 (1): 55–69.

Pachano, Simón. 2010. "Ecuador: New political System into Operation." *Review of Political Science* 30 (2): 297–317.

Paz y Miño Cepeda, Juan J., . 2009. "El Gobierno de Rafael Correa: Un nuevo ciclo en la historia de Ecuador." *Metapolítica* 65: 71–76.

Pietari, Kyle. 2016. "Ecuador's Constitutional Rights of Nature: Implementation, Impacts, and Lessons Learned." *Willamette Environmental Law Journal* 5: 37–94.

Posner, Eric A. 2008. "Human Welfare, Not Human Rights." *Columbia Law Review*: 1758–1801.

———. 2014. *The Twilight of Human Rights Law*. New York: Oxford University Press.

Radcliffe, Sarah A. 2012. "Development for a Postneoliberal Era? Sumak Kawsay, Living Well and the Limits to Decolonisation in Ecuador." *Geoforum* 43: 240–9.

"Resultados oficiales condicionan futuro de algunas agrupaciones." *El Universo*. March 31, 2013. http://www.eluniverso.com/2013/03/31/1/1355/resultados-oficiales-condicionan-futuro-algunas-agrupaciones.html (accessed January 20, 2017).

Rival, Laura. 2010. "Ecuador's Yasuní-ITT Initiative: The Old and New Values of Petroleum." *Ecological Economics* 70 (2): 358–65.

Romero, Simon, and Clifford Krauss. "Ecuador Judge Orders Chevron to Pay $9 Billion." *New York Times*. February 14, 2011. http://www.nytimes.com/2011/02/15/world/americas/15ecuador.html (accessed January 20, 2017).

Ruiz Giraldo, Carlos. "Does Nature Have Rights? Successes and Challenges in Implementing the Rights of Nature in Ecuador." *ConstitutionNet*. July 15, 2013. http://www.constitutionnet.org/news/does-nature-have-rights-successes-and-challenges-implementing-rights-nature-ecuador (accessed February 5, 2017).

Rühs, Nathalie, and Aled Jones. 2016. "The Implementation of Earth Jurisprudence through Substantive Constitutional Rights of Nature." *Sustainability* 8: 174–93.

Sanchez, Omar. 2008. "Transformation and Decay: The De-Institutionalisation of Party Systems in South America." *Third World Quarterly* 29 (2): 315–37.

Sieder, Rachel, Line Schjolden, and Alan Angell. 2016. "Introduction." In Rachel Sieder, Line Schjolden, and Alan Angell, eds. *The Judicialization of Politics in Latin America*. New York: Palgrave Macmillan: 1–20.

SENPLADES. 2010. "Los nuevos retos de América Latina: socialismo y sumak kawsay." SENPLADES, Quito.

Svampa, Maristella. 2015. "Commodities Consensus: Neoextractivism and Enclosure of the Commons in Latin America." *South Atlantic Quarterly* 114 (1): 65–82.

Tegel, Simeon. "A Referendum in Ecuador Is Another Defeat for South America's Left-Wing Populists." *Washington Post*. February 5, 2018. https://www.washingtonpost.com/news/worldviews/wp/2018/02/05/a-referendum-in-ecuador-is-another-defeat-for-south-americas-left-wing-populists (accessed February 5, 2018).

Tsebelis, George. 1995. "Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism." *British Journal of Political Science* 25 (3): 289–325.

Tsebelis, George. 2002. *Veto Players: How Political Institutions Work*. Princeton, NJ: Princeton University Press.

Valencia, Alexandra. "Ecuador High Court Upholds Chevron Verdict, Halves Fine." *Reuters*. November 13, 2013. http://www.reuters.com/article/us-chevron-ecuador-idUSBRE9AC0YY20131113 (accessed January 20, 2017).

Vidal, John. "Oil Drilling Underway beneath Ecuador's Yasuní National Park." *The Guardian*. October 26, 2016. https://www.theguardian.com/environment/2016/oct/26/oil-drilling-underway-beneath-ecuadors-Yasuní-national-park (accessed January 20, 2017).

Whittemore, Mary Elizabeth. 2011. "The Problem of Enforcing Nature's Rights under Ecuador's Constitution: Why the 2008 Environmental Amendments Have No Bite." *Pacific Rim Legal & Policy Journal* 20: 659–91.

The World Bank. 2017. "World Development Indicators." http://data.worldbank.org/indicator/NY.GNP.PCAP.CD?locations=EC (accessed February 5, 2017).

WHY MULTI-ETHNIC BELGIUM'S CONSTITUTIONAL COURT KEEPS MUM: THE CONSTITUTIONALIZATION OF ETHNICITY, JUDICIAL REVIEW, AND "PASSIVE VIRTUES"

JAN ERK[1]

ABSTRACT

The recent decades have witnessed the constitutionalization of ethnicity in various multi-ethnic countries. From Spain to Ethiopia, this has mostly been along a federal path. This global trend has also coincided with what might be called the judicialization of politics and, in particular, the global spread of constitutional review. Multi-ethnic Belgium's federalization process follows the first global trend but not the second. The constitutionalization of ethnicity has happened without the Belgian constitutional court's involvement. This is thus the first international study of not when constitutional courts act but when they do not and why this matters. The article builds on the notion of "passive virtues" Alexander M. Bickel coined in 1961 to explain how the U.S. Supreme Court had found ways to avoid, decline, or delay judgment on controversial and essentially political matters upon which it was asked to rule. During Belgian federalization, politics led and the constitutional court followed.

KEYWORDS: *constitutional courts, judicial review, comparative federalism, constitutionalization of ethnicity*

1. Stellenbosch Institute of Advanced Study (STIAS), Wallenberg Research Centre at Stellenbosch University, Stellenbosch 7600, South Africa.

Constitutional Studies, Volume 3
©2018 by the Board of Regents of the University of Wisconsin System

Detective: *Is there any other point to which you would wish to draw my attention?*
Sherlock Holmes: *To the curious incident of the dog in the night-time.*
Detective: *The dog did nothing in the night-time.*
Sherlock Holmes: *That was the curious incident.*
Sir Arthur Conan Doyle (1892), *Silver Haze*

The most important thing we do is not doing.
U.S. Supreme Court Justice Louis D. Brandeis in *Atherton Mills v. Johnston*[2]

I. JUDICIAL REVIEW AND "PASSIVE VIRTUES"

The recent decades have witnessed, in various forms and shapes, the constitutionalization of ethnicity in countries with multi-ethnic populations. Spain and Belgium are relative newcomers to this process in Europe, but both now have constitutions with federal characteristics recognizing ethnicity, territorial autonomy, and group rights. Through devolving power to Scotland, Wales, and Northern Ireland, the United Kingdom has also joined the list. Elsewhere, federal constitutions that were designed for other political purposes in the nineteenth century have become vehicles for the constitutionalization of ethnicity; Switzerland, and arguably Canada, are examples of this. Multi-ethnic countries that had been wrecked by civil war have also been experimenting with federal-type constitutional solutions; Bosnia Hercegovina and Ethiopia are the primary examples of this sort of constitutionalization, which might be labeled post-conflict federalism. In other places, former authoritarian political regimes have also remodeled their democratic future along the constitutionalization of ethnicity. Africa's two biggest countries, Nigeria and South Africa, lead this subgroup.[3] Parallel to this has been another development. The constitutionalization of ethnicity has gone hand in hand with a global embrace

2. Alexander M. Bickel collected, reviewed, and edited the unpublished material Brandeis had left with his colleagues on the bench after retiring from the U.S. Supreme Court. Brandeis's widely quoted assertion is in fact from one of his unpublished opinions in this volume (Bickel 1957; Franck 1958; Konefsy 1958). Incidentally, Bickel also happens to be the author of the notion of "passive virtues" (1961) guiding this article.

3. Nigerian federalism is more explicit in constitutionalizing ethnicity—particularly in terms of the so-called "federal principle" that calls for regional ethnic representation in employment and representation. Due to the apartheid practice of "ethnic homelands," in democratic South Africa the constitutional recognition of forms of ethnic/religious/cultural group rights and variations of ethnic quotas coexist with strong nationwide constitutional clauses on individual rights.

of judicial activism and the subsequent judicialization of politics (Tate and Vallinder 1995; Hirschl 2004; Hoennige 2011).

In most cases in which ethnicity has been constitutionalized, a constitutional high court acts as the defender of the constitution, an impartial arbiter among the various new subnational entities and the center and the final authority on the interpretation and application of the constitution. The Belgian constitutional court is formally one such institution. But the Belgian court has remained mostly absent from the country's debates over the essence of federalism, from jurisdictional issues over the competence of the new ethnic subnational entities, and indeed over the constitutionality of the state reforms that ushered in the recognition of ethnicity and subsequent federalization. This article is an examination of the potential reasons for the Belgian court punching below its weight. As ethnicity becomes constitutionalized in other parts of the world, it is imperative to learn from the experience of a country that underwent a gradual constitutionalization of ethnicity towards federalism.[4] From East Asia to Latin America, the lessons are particularly important for the developing world as new constitutions introducing judicial review—among other democratic reforms—have become the norm (Ginsburg 2003; Couso et al. 2010; Ingram 2015). In fact, many see close links between federalism and the global spread of constitutional review (Ginsburg 2008, 83–84; Halberstam 2008). It is for this reason that comparative constitutional law needs to make sense of why the Belgian court differs from the rest. But in order to explain the reasons behind the Belgian court's judicial (in)action, we have to first understand the political dynamics behind the constitutionalization of ethnicity in Belgium.

The Belgian state had started its life under a unitary constitution in 1831. After more than a century of containing the successive political challenges within this constitution, cracks within the unitary shell started to appear in the post Second World War years. Gradual federalization started in the 1960s with the creation of an internal linguistic border between the Dutch-speaking north and French-speaking south, while the capital Brussels in the middle of the country became officially bilingual. Until then, multi-ethnic Belgium had successfully continued its life

4. The constitutional recognition of ethnicity can take various forms that can be grouped under four general categories: (1) territorial autonomy in the form of federalism, devolution, or ethnic homelands; (2) non-territorial collective autonomy for ethnic groups in linguistic/cultural/religious/educational policy areas; (3) constitutionalized variations of consociational power sharing; and (4) constitutionalization of national and regional ethnic quotas in employment and representation. Constitutional recognition can also apply asymmetrically across different parts of a country. And it is not uncommon that forms of collective group rights for ethnic groups coexist with constitutionally entrenched individual rights.

within the unitary constitutional shell of 1831. For most of its constitutional history in the nineteenth century and early twentieth century, the main political cleavage of Belgium was between anti-clerical liberals (later joined by socialists as voting rights expanded to those without property and higher education) and conservative Catholics (later joined by the Christian labor movement similarly as a result of the expansion of suffrage). This cleavage did not have a clear territorial basis, so the unitary constitution was able to provide the rules of the game for political competition. By the late nineteenth century, Belgium had become the first country on the European continent to undergo rapid industrialization, with the consequences of urbanization, modernization, and indeed political competition for the electoral loyalty of the newly enfranchised working classes.[5] French was the language of the educated upper and middle classes, and the rest spoke various dialects; in the south of the country, these were various Walloon dialects of French, and in the north it was the Flemish dialects of Dutch. But notwithstanding such ethnolinguistic heterogeneity, it was social class and religiosity that defined the political identities and loyalties of the time. The political divide between the religious and the secular had congealed around the time of the introduction of universal suffrage in 1893 and continued to define Belgian politics well into the 1950s.

Following the end of the Second World War, a so-called "education peace" (*pacte scolaire/schoolspact*) was negotiated between the two political camps. The anti-clerical alliance of liberals and socialists and their Catholic opponents agreed to separate the country's educational system into two halves in the form of a secular public system and a Catholic one, both subsidized by the Belgian state. Once this deep and divisive issue defining both camps was settled in 1958, it soon became manifest that the religious/secular division had in fact ethnolinguistic undertones to it. The Flemings of the north were overrepresented within the Catholic camp, and Francophones were more likely to support either liberals or socialists—the two parties defined by political secularism. In the meantime, modernization and compulsory education had led to the standardization of regional dialects around international French and Dutch in written form (while the dialects proved to be a little more resilient in spoken form). By the 1960s, the country had become one with two ethnolinguistic communities: French-speaking Walloons in the south together with the mostly French-speaking Brussels and the Dutch-speaking Flemings of the north (the country also has a tiny German-speaking community in the east of the

5. What was then called universal suffrage (*suffrage universel/algemeen stemrecht*) was limited to male voters. There was also a class element to this in the form of the practice of plurality of votes; that is, male voters were given an additional one or two votes based on education and property.

country). Once put in place, the language laws of 1962/1963 became a bridgehead for the further federalization of the country.

Belgians prefer the term "communitarization"—instead of federalization—to describe the process of gradually changing the country's defining constitutional organizing principle from a unitary state to one defined by a federal union between Francophones and Flemings. And communitarization is indeed a more accurate term for what has what happened in the early episodes of Belgian state reform. The territorial element of federalism in fact came later. Formal constitutional change started with the establishment of so-called "cultural communities" in 1970. National policies closely associated with language—like education, culture, and media—were devolved to these two new subnational entities in the form of the French cultural community and the Flemish cultural community. The following decades witnessed successive state reforms in the direction of federalization. All this happened while Belgian judiciary remained conspicuously absent from this process. This is the main explanatory goal the article pursues—Sherlock Holmes's "curious incident of the dog in the night-time" in other words. Elsewhere, federal systems have strong and active constitutional high courts combined with an increased international recognition of the notion of judicial supremacy; i.e., the court has the "exclusive" power to determine the meaning of the constitution (Friedman and Delaney 2001, 1138). Not in Belgium. The question is why.

Explaining why things do not happen is sometimes as important as explaining why they do—particularly if the explanation for such judicial inaction carries with it potential lessons for other places where ethnicity is in the process of being constitutionalized. This is thus not a study of how and why constitutional high courts act but a quest to explain when they do not and why this matters. But before examining why the constitutionalization of ethnicity has remained insulated from the Belgium's highest court, it is imperative to sketch out the contours and nuances along which the process of Belgian federalization unfolded. With the risk of losing narrative suspense, at this point it might be necessary to give away the main conclusion that emerges from the examination of federalization and the court's behavior that accompanied this examination.

During the early stages of the federalization process, under the 1831 constitution, the Belgium's highest court—called the Court of Arbitration at the time—simply did not have the power to act. And when it eventually acquired the constitutional power for judicial review, it either excused itself, kept mum, dismissed cases on technicalities, or buried its decisions in wordy verdicts open to different interpretations. The Belgian court thus seems to go against other examples around the world, as constitutional courts—not only in federal systems but throughout the

democratic world—have been given or have assumed the role of being the final authority on interpreting the constitution, deciding the constitutionality of legislative and administrative acts, and determining the reach of the jurisdictional spheres of the subnational entities (for overviews see Hirschl 2008; Vanberg 2015). In addition to active and activist constitutional courts, many observers see a rise in judicial activism in general around the world in the last couple of decades. One observer claims this represents the "fall of the political question doctrine and the rise of judicial supremacy" (Barkow 2002, 237). For others, the global expansion of judicial power signifies the "judicialization of politics" (Tate and Vallinder 1995). In light of these works highlighting the global rise of judicial supremacy, it seems then we either have an outlier in the form of a quiet Belgian court, or existing explanations for judicial activism might have left some relevant parts of the comparative picture out. This means that explaining why the Belgian court punches below its weight can help fine-tune the claims that the world is headed toward a "juristocracy" (Hirschl 2004).

While studying constitutional high court inaction with comparative references to federal countries where ethnicity has been constitutionalized is new, studying judicial restraint and passivity has a longer pedigree in law going back to medieval times (Hershkoff 2001, 1941).[6] The prelude to the civil rights movement in the United States had also begotten one such study. In the foreword he wrote to the overview of the 1960 U.S. Supreme Court, Alexander M. Bickel coined the term "passive virtues" in order to explain how the Court had found ways to avoid, decline, or delay judgement on controversial, and essentially political, matters upon which it was asked to rule (Bickel 1961). In his nuanced and thoughtful overview, the U.S. legal scholar traced the origins of the judicial restraint to the political philosophy of Abraham Lincoln or, more precisely, to the "Lincolnian tension between principle and expediency" (Bickel 1961; also in Kronman 1985, 1581–82). The expediency inherent in a political compromise did not equal unprincipled politicking. Bickel had the coming civil rights movement in mind and the legal challenge having to rule on issues that will bind, constrain, and influence voters and governments while foundational changes were unfolding in American politics: "It is not for the Court to work out or even approve such compromises. That would be incompatible with the function of principled judgement. Nor is it automatically

6. Political scientists have also looked at the notion of strategic self-restraint, mostly by employing game-theoretic models and focusing on the attitudes of individual judges (Vanberg 2001; Santoni and Zucchini 2004; Brourard 2009).

true, however, that such compromises nullify the validity of the effectiveness of principle" (Bickel 1961, 50).

Despite his thoughtful and nuanced articulation of what judicial restraint means and why this indeed should be seen as a passive virtue, Bickel is not an isolated figure in this intellectual tradition. Yet another legal scholar, and indeed a past justice of the Supreme Court, Felix Frankfurter had earlier written about the inherently political role judicial review can come to play in federal systems: "in view of our federalism and the Court's peculiar function, questions of jurisdiction in constitutional adjudications imply questions of political power" (Frankfurter 1931, 308). In his overview of Justice Frankfurter's record on the bench Louis H. Pollack informs us that Frankfurter's views on judicial restraint were indeed influenced by a fellow legal scholar and Justice Felix Brandeis (Pollack 1957, 308). It is thus noteworthy that Justice Frankfurter had passed Justice Brandeis's unpublished works on to Bickel, who then edited and published these works, including the assertion "the most important thing we do is nothing" opening this article (Bickel 1957). According to Bickel's Yale Law School colleague Anthony Kronman, there are various ways to exercise these "passive virtues" of exercising judicial restraint:

> [The Court] may deny that it has jurisdiction to hear a case or assert that the plaintiff lacks standing to bring it; it may dismiss a case for lack of ripeness or refuse to hear it on the grounds that it raises a political question; and it may decide a case on some narrower basis than that proposed by the parties and thus avoid reaching any of the constitutional issues it would otherwise have to address. (Kronman 1985, 1585)

As we will see in Section II, all of these tactics the U.S. Supreme Court had employed have also been put to use by the Belgian court. The debates and discussions that took place in the United States from the early to mid-twentieth century thus helps shed light on why the Belgian court behaves the way it does today. It seems the Belgium's Constitutional Court is indeed exercising something akin to Bickel's "passive virtues," as it has decidedly left politics to take primacy over the law during times of foundational changes for the country. While this article is certainly not the first study of a reticent court, it is the first that situates the debate within the two global trends of constitutionalization of ethnicity and the spread of constitutional review. Despite having the formal powers to do so, the court has refrained from lending its judicial review powers to the process of constitutional change. The studied silence and ambiguity often displayed by the court on matters of federalization is

not an accident; and once again comparative insights from the United States help us decode the Belgian court's behavior.

According to the American legal scholar Jan G. Deutsch, the appearance of neutrality of the U.S. Supreme Court is inseparable from its perceived legitimacy; this means that the court tends to behave in a way cognizant of "[the] need to preserve its institutional capacity by avoiding needless public controversy" (Deutsch 1969, 218). Deutsch's observation seems to hold for other constitutional courts as well. Arthur Dyevre's work, for example, shows how the German court's preference for judicial activism and restraint follows the ebb and flow of public attitudes to the court and its decisions:

> In Germany, the Federal Constitutional Court saw its popularity drop significantly in the mid-1990s in the wake of the controversy sparked by a series of ruling on sensitive issues. To contain the backlash, the Karlsruhe judges kept a low profile and exerted more restraint until the Court's approval ratings recovered and the Court could be restored to its status as the most respected political institutions of post-war Germany. (Dyevre 2010, 317)

The behavior of the Supreme Court of Canada also fits in with Deutsch's reasoning. The Canadian court is yet another example of a court carefully navigating public opinion in a federation defined by what Sujit Choudhry and Robert Howse call a "clash of constitutional visions" (2000, 166). The court's verdict on the divisive Quebec secession reference is a prime example of this: "The creatively non-committal and ambiguous verdict the Court produced was a sign of its prudent desire to maintain the balance without favouring either side's view of the nature of the Canadian political union" (Erk 2011, 530).[7]

Insights gained from comparing Belgium with other cases and the teachings of the past scholarly literature also expose the need to qualify some of the existing assumptions in the comparative literature on constitutional courts. One such assumption is that when deep disagreements between the different political camps

7. One does not need a federal setup for comparative insights. Without any form of constitutional recognition of ethnicity, and indeed without federalism, France's *Conseil constitutionnel* still provides interesting parallels—especially considering how much of the 1831 constitution of Belgium draws on the French legal tradition (Erk 2013). What differs in the Belgian case is that in France's civil law legal system a strict separation between constitutional powers exists, so the French judiciary in principle lacks supervisory control over the executive because administrative matters are within the jurisdiction of separate administrative courts (Peeters and Mosselman 2017, 77). Another difference is that neither a concrete review nor individual complaint mechanism exists for the French court (Dyevre 2013, 740–43).

constituting a polity exist, there will be more room for judicial activism (Vanberg 2015). Conversely, when the level of the disagreement between the constituent political camps is low, "one should expect the court to be deferential and to refrain from issuing rulings likely to trigger a political backlash" (Dyevre 2013, 305). Accordingly, consensus among political camps on the nature of the country's constitutional setup is likely to lead to a prudent and cautious court showing deference to politics according to this line of reasoning. And by contrast, the court will be more active in countries where consensus seems to be lacking. A variation of this argument posits that political systems based on a constitutional division or separation of powers will likely have an active judiciary (Vanberg 2015, 172). For Keith E. Whittington, in such politically fragmented settings, an activist court simply provides a way of "overcoming gridlock" (Whittington 2007, 124). A variation of this argument is Joseph Weiler's 1991 observation that the European court has been more active during times of political deadlock.[8]

The Belgian case shows the very opposite proposed by these observers: political fragmentation and the lack of overall national consensus have in fact not opened up a political playing field for judicial activism to fill in; it has influenced the Belgian court to chart a path of restraint and prudence instead. This exposes the need for some fine-tuning of the scholarly literature in order to incorporate the observations on why a court that has the power judicial review refrains from exercising its constitutional powers—especially within the context of political fragmentation, widely viewed in the literature to be the enabling factor for an activist court. Belgium has lessons to teach.

The next section gives an overview of the constitutionalization process taking Belgium from a unitary to a federal state and the evolving powers of the country's highest court that accompanied this process. This is followed by an examination of a number of key cases tracking the (in)action of country's highest court. What defines the fifty years of Belgian federalization is how politics leads and formal constitutionalization follows. Constitutionalization of ethnicity, it appears from the examination, is a political rather than legal/technical matter in Belgium. And the comparative lesson seems to be that when deep disagreements between the constituent ethnolinguistic communities exist over the nature of country's political order and its corresponding constitutional foundations, politics trumps law.

---

8. It should be noted, however, that in a piece published three years afterward, Weiler predicts an end to this pattern because he expects the "court's pivotal role might come under strain." Consequently, "the Court will be unable to avoid trammelling on political sensibilities. . . . On a whole range of issues, any outcome is bound to anger certain constituencies" (Weiler 1994, 532).

II. FROM A UNITARY TO A FEDERAL CONSTITUTION AND THE NEED FOR A CONSTITUTIONAL COURT

All powers emanate from the Nation.
They are exercised in the manner established by the constitution.[9]

The secession of Belgium from the Kingdom of the Netherlands in 1830 rested on the idea of a single Belgian people as the *pouvoir constituant* of the Belgian Constitution. The parliament was where the nation's representatives sat, and the legislature was thus the embodiment of the general will of the nation. In such a constitutional order, there was no room for a high court to second-guess the supreme will of the nation represented through its representatives in the parliament. The highest court established by the 1831 Constitution was the so-called "Court of Cassation," which was established in order to ensure the uniform interpretation of laws in their application (Janssens 1977). The court's main role was to annul lower court decisions that failed to follow the letter of the statutes—hence the court's name that derives from the French verb *casser* (to break, to annul). There was, however, no high court above this one responsible for the judicial review of legislation. In a judgement delivered on July 23, 1849, the Court of Cassation itself added a legal endorsement to this constitutional setup, as it decided that it was not up to the courts to review the constitutionality of statutory legislation (Peeters 2005, 475). At a time when the legislature was at the center of Belgian politics and when it was deemed to represent the supreme will of the nation, there was of course no philosophical justification for reviewing the national will. In the constitutional architecture of 1831, legislation passed by the parliament was simply seen as the unadulterated true expression of the general will of the nation. According to Thomas Vandamme: "[I]n the old Belgian unitary state, a leading principle of Belgian constitutional law has always been that the legislator was infallible. . . . [N]o court was allowed to question Parliament's view on the constitutionality of statutes" (Vandamme 2008, 131).

For most of Belgium's nineteenth- and early twentieth-century history, things continued this way. The various political difficulties that the Belgian state faced—the challenges that accompanied the creation of a new state, industrialization and the subsequent class tensions, the expansion of suffrage that was in most part a response to these tensions, the secular versus religious conflict over education (known as the "school war"), questions over royal prerogatives and succession, and

9. Article 25, Belgian constitution of February 7, 1831.

even the early incidences of the ethnolinguistic conflict—were all tackled without a high court that examined and ensured the constitutionality of legislation. These political challenges and subsequent divisions were all addressed and contained within the confines of a unitary constitution.

The Flemings and Francophones cohabiting Belgium were able to live in a unitary setup as long as the country's political divisions were nationwide in terms of the religiousness and secularity of various social classes distributed throughout the country's territory. The extension of voting rights to those without property and higher education in 1893 and subsequent establishment of a workers' party and a Christian social movement affiliated with the Catholic party had been vehicles to address the class divisions. The school peace of 1958 guaranteeing recognition and state subsidies to both Catholic and public school systems had been the answer to the religious versus secular divide. Once school peace came into force and settled the long-simmering division in Belgian society, language emerged as the next national conflict; and this time, it came with a clear territorial character. In the north, the region of Flanders had become almost unilingual, adopting standardized Dutch, whereas in the south, in Wallonia, French had become the language through the standardization of various Walloon dialects and the integration of the successive waves of working-class migrants from the north of the country as well as from elsewhere in Europe.

The first formal recognition of two unilingual territories in the north and in the south came in 1962–1963 (while leaving the complex case of the mostly French-speaking city of Brussels situated in Flanders out). There was no explicit constitutionalization of ethnicity as the new organizing logic of the Belgian state, but it was a constitutional deviation from the foundational logic of 1831 nonetheless. In hindsight, it now appears that the language reform of 1962–1963 sealing most of the internal linguistic border in fact paved the future path for the constitutionalization of ethnicity. The state reform that followed in 1970 created two cultural communities: the Dutch cultural community that ran cultural policy areas such as education and media for Flemings—including the Flemings resident in Brussels—and the French cultural community for the Francophones of Brussels and Wallonia. A unilingual and Dutch-speaking Flanders in the north and a unilingual and Francophone Wallonia in the south would have made things very straightforward for state reforms, but Brussels proved to be the knot.[10] From the outset, the

10. The European Union plays an ever-present and seemingly irreversible role in the national laws of member states. As the host of a number of EU institutions, the presence of the European level of governance is particularly visible in Belgium's capital city. The impact of EU law and the European

capital city emerged as the main political hurdle to a quick solution, preventing a neat and symmetrical north-south division of the country in the form of a two-state solution. Geographically, within the region of Flanders, Brussels was a mostly French-speaking city with suburbs encroaching into Flemish rural communities in its periphery. While being the biggest city in Francophone Belgium, Brussels was territorially separated from Wallonia proper. What is more, Flemings also saw Brussels as their biggest city and indeed the capital of Flanders. The capital city and its constitutional fate was to remain one of the most contested points during the successive state reforms defining the rest of the twentieth century and the early twenty-first.

Once up and running, the cultural communities grew in political power and gradually assumed jurisdiction over areas that were no longer strictly cultural. With the 1980 state reform the formal titles of the cultural communities were shortened to the Flemish Community and the French Community of Belgium (there is also a much smaller third community for German speakers in the east of the country along the German border). The members of these constituent communities were initially drawn from within the ranks of Francophone and Flemish politicians in the national houses of parliament. That is, they had a double mandate: these politicians were directly elected to the country's two legislative bodies on a national mandate, but this was combined with an indirect subnational mandate to represent community interests. For more territorial matters, the 1980 state reform also established new constituent regions in the form of the Flemish Region (i.e., Flanders minus Brussels) and the Walloon Region—but constitutionally separate from the Flemish Community and French Community. The new regions were to have exclusive competence over regional economic development, employment, industrial restructuring, environment, land use, urban planning, road building, traffic, and agriculture, whereas the pre-existing communities continued to have exclusive competence over culture, language policies, education, health care, welfare, and family.

What had started with language laws in 1962–1963 and the communitization cultural policy areas in 1970 had soon afterward led to federalization and the establishment of new subnational entities with jurisdiction over a number of new issue areas in 1980. Even if one did not need a constitutional court to check the constitutionality of legislation under the 1831 Constitution, jurisdictional division of competences introduced the need for an umpire. A federal system—especially one that

Court of Justice on both national and subnational Belgian legislative politics is undeniable, yet this impact is applicable to all EU members states equally across the board.

has been in the process of constant change—inevitably came with the need to arbitrate the inevitable questions of jurisdiction between constituent units. The need to sort out the jurisdictional conflicts among the new subnational entities became particularly acute during the 1980 reforms that had empowered the three communities and regions with wide-ranging new competences. The first step toward creating a high court to adjudicate jurisdictional and technical issues accompanying federalization came in 1980. The state reform contained a constitutional amendment establishing a new court of arbitration (*Cour d'Arbitrage/Arbitragehof*) that was to rule on jurisdictional issues between the regions, the communities, and the central government. With the law of June 1983, the Court of Arbitration formally came into being the following year. Writing right after the establishment of the court, the Belgian constitutional law scholar and a member of the supreme administrative court (*Conseil d'État/Raad van Staat*) at the time, Francis Delpérée wrote a piece entitled "Supreme Court, Court of Arbitration, or Constitutional Court?" in which he pointed out how the process of federalization made such a constitutional court necessary: "[T]he moment when a real division of power was put place between the state and its components, it became clear that a new judicial entity, named the Court of Arbitration evoking its mandate, had to be created for settling the constitutional conflicts of jurisdiction between the state, its communities, and its regions" (Delpérée 1985, 207–8).

A new constitutional architecture was now giving shape to a new state structure, but the 1980 state reform still could not settle the constitutional status of Brussels. While historically being the more developed and industrialized part of the country, in the post-war decades Wallonia's traditional heavy industries had faced a steady downturn, while formerly rural Flanders had become economically more vibrant during the same period. What is more, the French language had lost the social and cultural primacy it had once enjoyed in unitary Belgium, and three million Walloons and a million Brussels Francophones were no demographic match to six million Flemings. Physically cut off from each other, the Francophone linguistic minority of Wallonia and Brussels was on the defensive throughout most of the state reforms. Eventually, Francophones had to accept the limitation of the Brussels-Capital Region to the nineteen municipal boroughs, effectively ending their claims to the Francophone suburbs into the surrounding region. In return, Flemings agreed to provide minority linguistic services in French in public policies to these areas adjacent to the new Brussels-Capital Region. The state reform of 1988–1990 introduced a new formal constitutional architecture based on three communities (Francophone, Flemish, and German-speaking) and three regions (Flanders, Wallonia, Brussels-Capital).

Despite the formal symmetrical facade of three constituent regions and three communities in constitutional terms, the country was already approaching reforms as if it were in fact a union of two peoples. State reforms were discussed and debated—on the basis of parity—between Francophones (of all political colors, including residents of Wallonia and Brussels Francophones) and Flemings (of all political colors, including the Flemings of Brussels and residents of the rest of Flanders). All the constitutional changes on internal borders, language laws, and the establishment of new constituent entities were brought in by special laws requiring double majorities—i.e., majorities within the two constituent ethnolinguistic communities (Vandamme 2008, 131).

The Francophone-Flemish divide is not a neatly symmetrical one, but it was nonetheless the political dynamic that defined the constitutionalization of ethnicity. Despite the constitutional facade of six symmetrical regions and communities, Belgian federalization unfolded in a way that reflected this underlying dynamic. Pitted against each other and overriding political party affiliation, the reform negotiations over state reforms were, according to Delpérée, one of *le fédéralisme de confrontation* (confrontational federalism) (Delpérée 1999). Francophones and Flemings of Belgium are asymmetrical counterparts—they differ over relative strength, internal cohesiveness, self-designation, as well as how they see the other. While Flemings do not hesitate to use the Dutch word *volk* (nation, people) for themselves, both Walloons as well as Brussels Francophones are more likely to opt for the softer self-designation of *communuaté* (community). The different political priorities and the subsequent choices in terminology are also visible in how state reforms are portrayed. While Francophones call the bilateral negotiations *communauté à communauté*, Flemings prefer using the much stronger formulation of *volk tot volk*. The choice of words reflects the asymmetry in the degree of ethno-nationalist sentiment and internal cohesion, as well as differences on whether a commonly agreed *finalité politique*, i.e., the eventual political order that will emerge from the federalization process, exists for the country.

Despite the underlying asymmetry, 1988 brought in a recognition that the country rested on an uncodified political union of two peoples; but this recognition came through indirect means. The 1988 state reform consolidated the Court of Arbitration's position in the new constitutional order (Suetens 1995). Yet the court's mandate remained mostly one of an umpire; its role in reviewing the constitutionality of legislation was still unaddressed. As Patricia Popelier puts it, "according to official doctrine, primary legislation was still immune from judicial control" (Popelier 2005, 22). Both the 1980 and 1988 state reforms had deliberately avoided naming the court a constitutional court and instead highlighted the arbitration role it was expected to play between various constituent units of the reformed Belgian

state. The 1988 reforms, however, introduced an important but indirect political acknowledgment of an underlying union of two peoples into the court's setup.

According to Article 32 of the special act passed on January 6, 1989, appointments to the court require approval by at least two-thirds majority of both houses of the Belgian federal parliament. There is a requirement for linguistic parity; i.e., six judges have to be Dutch-speaking and six French-speaking (with some minimum requirement for German proficiency in the court in order to address the concerns of the German-speaking minority in the east of the country). Half of these positions on the bench are reserved for those with judicial background; the other half are for former politicians who have served at least a five-year term in one of the country's national or subnational legislatures. According to Patrick Peeters, "the introduction of the latter category reflects the opinion that the Court of Arbitration should also take into account the 'political reality' when deciding on requests for annulment or questions submitted for preliminary ruling" (Peeters 2005, 478). The former president of the Belgian Court of Cassation, Ivan Verougstraete, calls this composition a "compromise": "there would be a limited review by a court whose members were pro parte former members of the parliament and pro parte members of the legal profession acceptable to the political parties" (Verougstraete 1992, 100). Furthermore, the composition of the judges reflects the proportional strength of Belgian political parties. All of this seems to underscore the fact that the court is a political rather than legal entity. True, six of the constitutional court judges have to have technical expertise in law, but even those seats have tended go to those with known political leanings. This means that most of the legal/technical work of the court is carried out by court clerks (*référandaires*).

While Francophones and Flemings managed to negotiate successive state reforms and subsequent constitutional revisions, where all this was eventually headed was studiously sidestepped. That is, there was no discussion of what the final constitutional architecture that emerged from all these reforms would look like; questions around what Belgians would call the *finalité politique* were purposefully avoided. While there was yet no consensus over the details of what the eventual political order that will emerge from the federalization process would look like, the bilateralism of Francophones versus Flemings was the driving political dynamic underlying the process. The formal recognition of this uncodified union came with the 1993 state reform. The new Article 1 of the Constitution revised as part of the state reform now simply declared "Belgium is a federal state composed of communities and regions."[11]

11. The new Article 1 came in to force on February 17, 1994.

The 1993 state reform was more than a declaration of a new federal label, however; a number of secondary changes constitutionalized the machinery necessary for the functioning of federalism. The reforms introduced direct elections to the community and the region parliaments—including the assemblies of the Brussels-Capital Region and the small German-speaking community along the German border. In a separate agreement, the three main Francophone political parties agreed to delegate certain competences of the French community of Belgium to other subnational regional entities. The agreement allowed the Walloon Region and the Brussels-Capital Region Commission of the French Community (*Commission communautaire francophone de Bruxelles*; Cocof) to exercise the constitutional competences of the French Community. To be legally precise, using its newly acquired powers to delegate its competences under Article 138 of the Constitution, the Council of the French Community passed two decrees which allowed the Walloon Region and Brussels' Cocof to exercise an important bulk of its constitutional competences.[12] This transfer was formalized by a separate agreement known as the Saint Quentin Accord signed between the Francophone subnational entities, which came to effect on 1 January 1994. During this process members of Cocof started meeting as a separate legislature under the name of the Assembly of the Brussels-Capital Region French Community Commission (*Assemblée de la Commission communautaire française*; ACCF). In the meantime, the Flemish Region and the Flemish Community had already been acting as one entity under the name of *Vlaamse Raad* (the Flemish Council) with a common assembly and institutions. In 1995, the name of the plenary meetings of the Flemish Region and Flemish Community legislatures was officially changed to the Flemish Parliament (*Vlaamse Parlement*).

Constitutionalization of ethnicity had formally arrived with the new Article 1 declaring the country federal, but what the country had already been experiencing in the preceding years meant that this was more than a change in nominal labels. Furthermore, a set of secondary changes introduced in 1993 ensured that the machinery of federalism was consolidated. After all, real political change is only possible if there are also changes in the mechanics of the legislative process in a way that reflects the new federal principles defining the new constitutional order. There is thus a comparative lesson for other countries pursuing the constitutionalization of ethnicity here. One can change constitutional labels, but without changes in the political operating system, this rarely translates into real change. While formal

12. Decree II of the Council of the French Community, July 19, 1993, *Moniteur Belge*, September 10, 1993; Decree I of the Council of the French Community, July 5, 1993, *Moniteur Belge*, September 10, 1993.

constitutional declarations like the new Article 1 matter in terms of setting the course for multi-ethnic federations, real changes on the ground require constitutional revisions of not only *who does what* but also changes in the political mindset of *who can do what*. Arguably, the most important legal milestone on the way to an ethnic federation was not the new Article 1 but the change in the constitutional residual clause that was part of the same state reform.

According to a country's constitutional division of power, various political institutions enjoy codified powers over the respective policy areas entrusted to them. But it is the fate of policy areas that are not clearly enumerated in the constitution that more accurately reveal the underlying political logic guiding the constitutional order. The 1993 reforms introduced the constitutional principle of residual powers for the communities and regions. That is, if a particular policy area is not explicitly under the jurisdiction of an order of government, then by default, subnational authorities are assumed to have jurisdiction in these so-called "residual" policy areas that are not explicit enumerated.[13] When residual powers lay in the national legislature, the philosophical assumption was that Belgian democracy rested on a nationwide *demos* and that the *pouvoir constituant* of the constitutional order was the Belgian nation. Through its representatives in the national parliament, the nation would deal with future policy areas not explicitly enumerated in the constitution when needed. By empowering the constituent communities and the regions, the new residual clause effectively reversed the democratic foundations of the constitutional order.

The change in the residual clause was accompanied by yet another secondary change that ensured the mechanics of federalism was in place. The 1993 state reform also removed the legal hierarchy between the center and the subnational entities. Federal law was no longer to enjoy supremacy over subnational legislation. Consequently, the powers of the central government were now delimited to national policies for foreign affairs, defense, and monetary policy. The combination of the federal declaration in the new Article 1 and these secondary changes consolidating the federal machinery turned the logic of the Belgian constitutional

13. One noteworthy point is that the residual clause introduced by the new Article 35 of the Constitution (giving the constituent entities jurisdiction over any policy area not explicitly listed as federal jurisdiction) has still not been implemented—mostly because of the inability to find a political consensus among the different political camps over what remains under federal jurisdiction (Van Drooghenbroeck 2012, 239). In a recent overview, Peeters and Mosselman predict that, due to a deeply fragmented political landscape, it is unlikely that a special majority legislation establishing areas of exclusive federal jurisdiction will be agreed upon in the immediate future, rendering Article 35 inoperative (Peeters and Mosselman 2017, 73–74).

order upside down. The constitutional order of unitary Belgium and its political legitimacy thus no longer rested on a single national *demos* bringing top-down democratic legitimacy to the constitutional order; now there were multiple *demoi* providing bottom-up democratic legitimacy. With the 1993 reforms the *pouvoirs constituants* of the formal Belgian constitutional order have become Flemings and Francophones. But there was still a lot more to be negotiated and divided.

The next state reform continued the path set in 1993. A political compromise had been reached in 2000, but the requirement of a two-thirds parliamentary majority for approval delayed the formalization of the reforms. The 2001 state reform was mostly a housekeeping affair to iron out the creases in the process of federalization. Flemish representation at the Brussels-Capital regional assembly as well as in the police and municipal boards of the capital city were increased, new funds for education were allocated the French Community, and the regions acquired new international competences. During this state reform the ACCF also adopted a new title as the Brussels Francophone Parliament (*Parlement francophone Bruxellois*), albeit without formal constitutional changes. Once the constitutional revisions were put in place, under the new Article 141 the court formally acquired the power to be the final authority on the division of competences and the respective jurisdictional spheres of the federal government and the constituent entities. The court was renamed the Constitutional Court (*Grondwettelijke hof/ Cour constitutionelle*) in 2007.

In summary, recognizing the constituent ethnic communities as the *pouvoirs constituants* of Belgium and empowering the court to review the constitutional process establishing this have gone hand in hand. As a result of the successive state reforms, the Belgian court indeed enjoys the powers to review the compliance of statutory legislation with the constitution. But this is a culmination of a longer process. The court was initially envisaged as an umpire to review conflicts of competence among the newly created constituent entities. It was only with the 1989 state reform that the court was given the jurisdiction to review the constitutionality of statutory legislation along the three constitutional principles of non-discrimination, equality, and freedom of education. The 2003 state reform extended the court's jurisdiction to other articles of the constitution.

The last fifty years of federalization and the subsequent constitutional setup it has brought into being is not easy to follow for most Belgians, let alone for outsiders reading about all of these state reforms for the first time. But this is not an accident. There is a reason for the bewildering institutional complexity and the absence of the constitutional court from the federalization process. At the core of it all remains an unresolved conflict over the eventual political order that is expected to emerge

from the federalization process, the *finalité politique* in other words. Is Belgium going to be a multi-ethnic federation in which individuals retain constitutionally guaranteed linguistic rights wherever they reside and in which the federation ensures some form of fiscal equalization across the county's regions (a view more common among Francophones); or is Belgium going to be more of a multi-ethnic federation where territorial constituent units are autonomous within a looser, almost confederal, union (a view more common among Flemings); or is all this going to go down in history as a very long divorce delayed because of disagreements over how to divide up the living quarters while living within the same European house?

Despite the complexity, once we take a closer look at the last fifty years of constitutional reforms, we see two broad patterns emerging. The first one is the mismatch between the constitutional facade and the political workings of federalism. Despite attempts at constitutional symmetry in terms of creating six constituent entities in the form of three communities and three regions, the underlying political dynamics render the practice incongruent with this neat formulation. Federalization has led to the constitutional coexistence of eight different legislatures in the form of the Belgian Senate, the Belgian House of Representatives, the Walloon Region Parliament, the Flemish Region Parliament, the Flemish Community Parliament, the French Community Parliament, the Brussels-Capital Region Parliament, and the German Community Parliament. In political practice, however, things are more asymmetrical because the Flemish Community and the Flemish Region parliaments sit together under the name of the Flemish Parliament, while the Francophone members of the Brussels-Capital Region Parliament have their own assembly. Furthermore, the French Community of Belgium has delegated most of its competences to the Walloon Region and the Brussels-Capital Region French Community Commission. Underneath all this lies an uncodified union of two peoples, but one's capital speaks another language, while the other is united by language but divided by territory. This prevents a neat territorial split of the country into two constituent entities, a two-state solution in other words. As asymmetrical counterparts, Flemings and Francophones have been unable to agree on an appropriate constitutional embodiment reflecting the underlying union in a way that solves the fate of Brussels in a way that is acceptable to both sides. Furthermore, piecemeal and gradual reforms that often have an additional party politics layer of conflict and compromise to them have rendered the whole federalization process something akin to building a ship at sea. The second broad pattern—following closely from the first—is when politics leads and constitutionalization follows, the court either follows or keeps mum.

III. THE "PASSIVE VIRTUES" OF THE BELGIAN COURT

Belgian constitutional lawyers acknowledge that the court owes its existence to the federalization process (Claes and de Visser 2012, 87; Feyen 2012, 392), but the comparative reticence of the court is usually not picked up in comparative studies that set the Belgian court in a comparative context. Comparative studies by Belgian constitutional lawyers usually cover issues pertaining to the role of the court within a multilevel Europe, emphasizing the court's jurisdiction in the effect and applicability of European law in Belgian law and questions pertaining to individual rights, particularly in terms of equality and non-discrimination (Popelier et al. 2012). However, what is often acknowledged is that there is something similar to Bickel's "passive virtues" at play, as the court has found ways to avoid, decline, or delay judgement on controversial and essentially political matters; and when these options have been unavailable, it has tended to bury decisions in wordy and ambiguous judgments or has plainly acknowledged the fact that politics takes precedence and has come up with extra-constitutional principles justifying the political compromises. One of the current judges currently on the bench, and a scholar of Belgian constitutional law, André Alen, has written about how these tensions and ambiguities were an inevitable part of the gradual and uneven political processes of that defined federalization (Alen 1991, 155–81).

Some of the institutional characteristics of the court's composition and its decision making seem to underscore the tacit acknowledgment that the court is secondary to politics. One is the requirement of the linguistic parity of six Dutch-speaking and six French-speaking judges that was introduced with the 1988 state reform. The same state reform also brought in a distinction between the six judges on the bench who have legal backgrounds and six who are former politicians. It often falls on the shoulders of the law clerks to compile the legal basis of the court's decisions, but these reports are not made public. Furthermore, the deliberations of the court itself are not made public, which means dissenting opinions are not revealed. This seems to underscore once again the driving political logic and the need to preserve the fragile compromises the various political parties representing the various segments of Belgium have reached. In many ways, this is a reflection of the consociational political culture of Belgium that defined the relationship between different political camps and their political party representatives throughout the country's history. Liesbet Hooghe draws attention to the preference Belgian decision makers have for informal contacts over institutionalized exchange (Hooghe 1985, 143). However, what is different from the traditional practice of consociational compromises between political parties honed during Belgium's constitutionally unitary and

stable past is now this has to take place within an evolving constitution. The stability of political institutions and constitutional continuity that defined the earlier political episodes of Belgium are no longer a given. According to Wilfried Swenden, the dominance of political parties in the whole process of federalization has made the role of judiciary secondary: "broad, inclusive and congruent coalitions at the federal and regional levels of government facilitate the creation of compromises and have minimized the need for competence adjudication by judicial means" (Swenden 2005, 198). A combination of a number of factors therefore seems to explain the court punching below its weight and letting politics set the course.

When politics is in the driver's seat, and when the constitutional principles enshrined in the 1831 Constitution and the original intent of the founding fathers seem no longer valid (but without an agreed upon new constitutional spirit), constitutional review cannot bring the clarity and consistency expected of it. In their contribution to Bloombury's "Constitutions of the World" series, Patricia Popelier and Koen Lemmens examine the Belgian court in comparative context and acknowledge the underlying politics behind the court's (in)action:

> The clerks' (*référandaires*) reports are not published and the law requires that the deliberations are kept secret. Consociational arguments explain why the judgments do not reveal votes or dissenting opinions: the Court is composed of Dutch- and French-speaking judges who seek consensus in order for their decisions to find acceptance in both linguistic communities. Similar arguments may explain why judgements sometimes lack clarity as to their reasons or effects. (Popelier and Lemmens 2015, 212)

Explaining why something does not happen, or what some label "negative cases," is a challenge for all scholarly fields (Mahoney and Goetz 2004). This is particularly pressing for single-country studies because the general scholarly tendency in all disciplines is to explain what has happened and why. But once juxtaposed against the two global trends of constitutionalization of ethnicity and the spread of judicial review, it becomes clear that a reticent constitutional court cannot be an accident and that there has to be an active reason behind the Belgian court's inaction. One way to look at this is how the court declines to act.

The Belgian Constitutional Court often employs elaborate ways of arguing that the question it is supposed to rule on is irrelevant or it declares cases inadmissible. To this end, the court frequently uses a filtering process known as "preliminary proceedings." Preliminary proceedings are tests of admissibility where, instead of the full bench, the court sits as a smaller bench. Very often this filtering process

results in a decision stating that the court has no jurisdiction over the case. In one such case brought against the Flemish Region (concerning local authorities), the court declined jurisdiction, stating that to rule on this application would lead to judgment being passed on the drafters of the constitution (*Court of Arbitration No 11/2006*, 18 January 2006).

Another passive virtue of the court is to excuse itself out. When asked on the compatibility of a decree of the Dutch cultural community (later to be renamed Flemish Community) dated 19 July 1973 with the subsequent French Community decree of 30 June 1982, the court ruled that it was up to the lower court to decide which legal rule was applicable and that the Court of Arbitration would not interfere with the decision the lower court takes on the applicable legal rule (*Court of Arbitration No 12/86*, 25 March 1986). Once again, the court found the case inadmissible during the preliminary proceedings.

On some occasions the court is forced to admit its political *raison d'être*. When the impartiality of the three former Flemish politicians on the bench were questioned and were asked to withdraw from a case (concerning the constitutionality the Flemish decree of 2 July 1981 on waste management) on the grounds that they had participated as politicians and voted on the very legislation whose constitutionality they were now asked to review, the court decided that according to the legislation establishing the Court of Arbitration there were no sufficient grounds to challenge judges on the basis of whether or not in their previous capacity as politicians they had participated and voted on legislation they were later asked to assess (*Court of Arbitration No 32/1987*, 29 January 1987).

In other instances, the court has come up with extra-constitutional principles justifying political compromises. A year after the waste management case cited previously, the court invented the notion of the "global concept of the State" in order to limit the regions from unilaterally expanding their new competences to the fullest (*Court of Arbitration No 47/88*, 25 February 1988). The court reasoned that there was an unwritten assumption of a Belgian economic and monetary union that formed a global concept of the state, and this prevented the unilateral imposition of regional taxes on the transfer of water (Peeters and Mosselman 2017, 98). The invention of this extra-constitutional principle ensured that the delicate political negotiations underway were not derailed. Yet another judgement upholding the primacy of politics was delivered the following year. Asked to rule on the principles of individual equality and non-discrimination in light of recent community competences over education, the court ruled that these principles did not preclude differences in treatment provided there are objective and reasonable grounds for differentiation (*Court of Arbitration No 23/89*, 13 October 1989). The court went further in

acknowledging the primacy of politics by stating that it had to first ascertain what objective the legislature was pursuing when passing the said legislation in order to rule on its constitutionality.

One way the court has avoided being dragged into political debates over the constitutionality of legislation is by explicitly stating that legislators have acted in public interest and that it is not for the court to second-guess them. In its decision on the request to annul the 1988 legislation containing the special arrangement of Dutch-language requirements for the Walloon municipality of Comines-Warneton along the linguistic border, the court found that the constitutional principles of equality and non-discrimination did not preclude such differences since these were justified by the intention to protect a higher public interest (*Court of Arbitration No 18/90*, 23 April 1990). The legislation in question, the law of 9 August 1988, was also known as the "pacification" law because it aimed to pacify relations between Flemish and Francophone communities as a whole. Comines-Warnerton along the linguistic border was within the Walloon Region but had Dutch speakers; in contrast, the other border municipality Fourons/Voeren was in the Flemish Region but had French speakers. Together with the six municipalities in the Flemish Region around Brussels, these had special bilingual arrangements. In light of this so-called "higher public interest," in the same judgment the court acknowledged that it did not have jurisdiction over a choice made by a body that is empowered to amend the constitution, i.e., the national legislature. The 1988 pacification law came under scrutiny again following the 2001 state reform that placed municipalities under the jurisdiction of the regions. The court once again invoked higher public interest for the continuation of the different linguistic requirements for the municipalities included in the 1988 law (*Court of Arbitration No 35/2003*, 25 March 2003). This time linguistic requirements of the bilingual Brussels-Capital Region were also part of the challenge of constitutionality. In the same judgment, the court justified the special linguistic arrangements by the need to achieve a balance between Belgium's constituent entities.

As the previous section outlined, throughout successive state reforms the fate of Brussels had remained the barrier to a neat territorial solution of two states. One of the most complex issues in Belgian politics concerns the Brussels-Halle-Vilvoorde electoral district, which includes bilingual Brussels and Dutch-speaking Flanders. The presence of French speakers in Brussels' suburbs spilling into the surrounding Flemish Region and Flemings residing in Brussels bring in intractable complexities for both sides. The presence of a single electoral district containing both bilingual and monolingual regions creates differences in the application of electoral laws because Belgian political parties compete in linguistically separate lists. In its 1994

judgment, the court acknowledged that this combination brought in potential, but limited, violations of the constitutional principles of individual equality and non-discrimination; however, these measures were justified by the need to secure the general political compromise that allowed institutional reforms in Belgium (*Court of Arbitration No 90/94*, 22 December 1994). Moreover, the court admitted the primacy of the politics by stating that it was not competent to express a view on the composition or the functioning of the parliament.

IV. CONCLUSION

The previous section summed up the various ways the Belgian Constitutional Court exercises its passive virtues. In comparative terms, the Belgian court's reticence sets it apart from its international counterparts. The constitutionalization of ethnicity, especially when combined with the jurisdictional division of competences inherent in federalism, creates challenges for many countries around the world. The need for an arbiter among the various subnational entities and the center and the need to review the compliance of legislation with the constitutional division of powers, combined with the need for an impartial final authority on the interpretation and application of the constitution, calls for an active constitutional high court. All of these challenges are present in Belgium, but the country's constitutional court has let politics take primacy over the law.

Political compromises between Francophones and Flemings, or more precisely between the linguistically separate political parties representing the various political colors of the country, have first set the course of federalization; legislative and constitutional reforms necessary to this end have followed. All of this has taken place without a clear *finalité politique* for future Belgium. Moreover, the difficult and fragile political compromises between the political parties have caused the federalization process to unfold in a gradual, piecemeal, and often uneven fashion. For these reasons, Belgium seems to be so far immune to the global trends of "judicialization of politics," "the spread of constitutional review," and the "rise of judicial supremacy" toward some form of "juristocracy" identified by a number of scholars (Tate and Vallinder 1995; Barkow 2002, 237; Hirschl 2004; Ginsburg 2008, 83–84). The main reason why the Belgian court is an outlier is that there is still an unresolved conflict over the country's eventual political order—i.e., the nature of the federal union between the country's constituent ethnolinguistic communities—at the heart of the Belgian constitution. The court seems to be very careful to nurture a legal atmosphere that understands the difficult compromises necessary for the country's future, and in turn, lends constitutional legitimacy to this process by endorsing the

complex, and sometimes contradictory, political choices. This is not merely rubberstamping what politicians do but rather helping to legitimize the constitutional process of building the ship at sea. This must be the Lincolnian path between principle and expediency about which Alexander M. Bickel had written.

REFERENCES

Adams, Maurice. 2014. "Disabling Constitutionalism. Can the Politics of the Belgian Constitution be Explained?" *International Journal of Constitutional Law* 12 (2): 279–302.

Alen, André. 2013. "België, Quo Vadis?" *Federalisme* 3 (1): 155–81.

Barkow, Rachel E. 2002. "More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy." *Columbia Law Review* 111 (2): 237–336.

Bickel, Alexander M. 1961. "The Least Dangerous Branch: The Supreme Court at the Bar of Politics." *Harvard Law Review* 75 (2): 40–79.

Brouard, Sylvain. 2009. "The Politics of Constitutional Veto in France: Constitutional Council, Legislative Majority and Electoral Competition." *West European Politics* 32 (2): 384–403.

Choudhry, Sujit, and Robert Howse. 2000. "Constitutional Theory and the Quebec Secession Reference." *Canadian Journal of Law and Jurisprudence* 13 (2): 143–69.

Claes, Monica, and Maartje de Visser. 2012. "The Court of Justice as a Federal Court: A Comparative Perspective." In *Federalism in the European Union*, eds. Elke Cloots, Geert de Baere, and Stefan Sottiaux. Oxford, UK: Hart: 83–109.

Couso, Javier A., Alexandra Huneeus, and Rachel Sieder, eds. 2010. *Cultures of Legality: Judicialization and Political Activism in Latin America*. New York: Cambridge University Press.

Delpérée, Francis. 1999. "Le fédéralisme de confrontation." In *Gouverner la Belgique, Clivages et compromis dans une société complexe*, eds. Pascal Delwit, Jean-Michel De Waele, and Paul Magnette. Presses Universitaires de France: Paris: 53–70.

_____. 1985. "Cour suprême, Cour d'arbitrage ou Cour constitutionnelle?" *Les cahiers de droit* 26 (1): 205–16.

de Visser, Maartje. 2014. *Constitutional Review in Europe: A Comparative Analysis*. Oxford, UK: Hart.

Deutsch, Jan G. 1969. "Neutrality, Legitimacy, and the Supreme Court: Some Interactions between Law and Political Science." *Stanford Law Review* 20: 169–261.

Dyevre, Arthur. 2010. "Unifying the Field of Comparative Judicial Politics." *European Political Science Review* 2 (2): 297–327.

_____. 2013. "Filtered Constitutional Review and the Reconfiguration of Inter-Judicial Relations." *The American Journal of Comparative Law* 31: 729–56.

Ergec, Rusen. 1995. "The Emergence of Constitutional Justice in Belgium." In *Constitutional Justice under Old Constitutions*, ed. Eivind Smith. The Hague: Kluwer: 145–58.

Erk, Jan. 2011. "The Sociology of Constitutional Politics: Demos, Legitimacy, and Constitutional Courts in Canada and Germany." *Regional and Federal Studies* 21 (4–5): 523–38.

_____. 2013. "'*Two souls, alas, reside in my chest*': The Constitutional Foundations of New Belgium between a Popular Democracy and a Multination Federation." *The Political Quarterly* 84 (2): 278–88.

Feyen, Stef. 2013. *Beyond Federal Dogmatics: The Influence of EU Law on Belgian Constitutional Case Law Regarding Federalism*. Leuven, Belgium: Leuven University Press.

_____. 2012. "Economic and Monetary Union: Caught between Brussels and Luxemburg?" In *Federalism in the European Union*, eds. Elke Cloots, Geert de Baere, and Stefan Sottiaux. Oxford, UK: Hart: 392–404.

Franck, Alexander M. 1958. "The Unpublished Opinions of Mr. Justice Brandeis." *Journal of Legal Education* 10 (3): 401–5.

Frankfurter, Felix. 1931. "Mr. Justice Brandeis and the Constitution." *Harvard Law Review* 45 (1): 33–111.

Friedman, Barry, and Erin Delaney. 2011. "Becoming Supreme: The Federal Foundation of Judicial Supremacy." *Columbia Law Review* 111 (6): 1137–93.

Ginsburg, Tom. 2003. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. Cambridge, UK: Cambridge University Press.

_____. 2008. "The Global Spread of Constitutional Review." In *Oxford Handbook on Law and Politics*, eds. Keith E. Whittington, R. Daniel Kelemen, and Gregory Caldeira. Oxford, UK: Oxford University Press: 81–98.

Halberstam, Daniel. 2008. "Comparative Federalism and the Role of the Judiciary." In *Oxford Handbook on Law and Politics*, eds. Keith E. Whittington, R. Daniel Kelemen, and Gregory Caldeira. Oxford, UK: Oxford University Press: 142–64.

Hershkoff, Helen. 2001. "State Courts and 'Passive Virtues': Rethinking Judicial Function." *Harvard Law Review* 114 (7): 1833–941.

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

_____. 2008. "The Judicialization of Mega-Politics and the Rise of Political Courts." *Annual Review of Political Science* 11: 93–118.

Hooghe, Liesbet. 1995. "Belgian Federalism and the EC." In *The European Union and the Regions*, eds. Barry Jones and Michael Keating. Oxford, UK: Clarendon Press: 135–63.

Hoennige, Christoph. 2011. "Beyond Judicialization: Why We Need More Comparative Research about Constitutional Courts." *European Political Science* 10: 346–58.

Ingram, Matthew C. 2015. *Crafting Courts in New Democracies: The Politics of Subnational Judicial Reforms in Brazil and Mexico*. New York: Cambridge University Press.

Jakab, András. 2016. *European Constitutional Language*. Cambridge, UK: Cambridge University Press.

Janssens, R. 1977. "Het Hof van Cassatie van België: Enkele Hoofdmomenten van zijn Ontwikkeling." *The Legal History Review* 45 (1): 95–116.

Konefsky, Samuel J. 1958. "A Fresh Glimpse of Brandeis." *Virginia Law Review* 44 (7): 1093–7.

Kramer, Larry D. 2001. "The Supreme Court 2000 Term—Foreword: We the Court." *Harvard Law Review* 114 (4): 5–169.

Kronman, Anthony T. 1985. "Alexander Bickel's Philosophy of Prudence." *Yale Law Journal* 94 (7): 1567–616.

Mahoney, James, and Klaus Goetz. 2004. "The Possibility Principle: Choosing Negative Cases in Comparative Political Research." *American Political Science Review* 98 (4): 653–69.

Peeters, Patrick. 2005. "Expanding Constitutional Review by the Belgian 'Court of Arbitration.'" *European Public Law* 11 (4): 475–85.

Peeters, Patrick, and Jens Mosselmans. 2017. "The Constitutional Court of Belgium: Safeguard of the Autonomy of the Communities and Regions." In *Courts in Federal Countries: Federalists or Unitarists?* eds. Nicholas Aroney and John Kincaid. Toronto: University of Toronto Press: 69–102.

Pollack, Louis H. 1957. "Mr. Justice Frankfurter: Judgement and the Fourteenth Amendment." *Yale Law Journal* 67 (2): 304–23.

Popelier, Patricia. 2016. "Federalism Disputes and the Behavior of Courts: Explaining Variation in federal Courts' Support for Centralization." *Publius* 47 (1): 27–48.

_____. 2005. "The Role of the Belgian Constitutional Court in the Legislative Process." *Statute Law Review* 26 (1): 22–40.

Popelier, Patricia, and Koen Lemmens. 2015. *The Constitution of Belgium: A Contextual Analysis.* Oxford, UK: Hart.

Popelier, Patricia, Armen Mazmanyan, and Werner Vandenbruwaene, eds. 2012. *The Role of Constitutional Courts in Multilevel Governance.* Antwerp, Belgium: Intersentia.

Santoni, M., and F. Zucchini. 2004. "Does Policy Stability Increase the Constitutional Court's Independence? The Case of Italy during the First Republic." *Public Choice* 120 (3–4): 401–39.

Suetens, Louis Paul. 1995. "Judicial Review in Belgium." In *Constitutional Justice under Old Constitutions*, ed. Eivind Smith. The Hague: Kluwer: 319–30.

Swenden, Wilfried. 2005. "What—If Anything—Can the European Union Learn from Belgium?" *Regional and Federal Studies* 15 (2): 187–204.

Tate, Neal C., and Torbjörn Vallinder. 1995. "The Global Expansion of Judicial Power: The Judicialization of Politics." In *The Global Expansion of Judicial Power*, eds. Neal Tate and Torbjörn Vallinder. New York: New York University Press: 1–11.

Vallinder, Torbjörn. 1994. "The Judicialization of Politics. A World-Wide Phenomenon." *International Political Science Review* 15 (2): 91–99.

Vanberg, Georg. 2001. "Legislative-Judicial Relations: A Game Theoretic Approach to Constitutional Review." *American Journal of Political Science* 45 (2): 346–61.

_____. 2015. "Constitutional Courts in Comparative Perspective: A Theoretical Assessment." *Annual Review of Political Science* 18: 167–85.

Vandamme, Thomas. 2008. "Prochain Arrêt: la Belgique! Explaining Recent Preliminary References of the Belgian Constitutional Court." *European Constitutional Law Review* 4: 127–48.

Van Drooghenbroeck, Sébastien. 2012. "De la révolution copernicienne et des nouvelles forces motrices: Considérations diverses sur la répartition des compétences à l'aube de la sixième réforme de l'Etat." In *Belgie, quo vadis? Waarheen na de zesde staatshevorming?* eds. Patricia Popelier, Dave Sinardet, Jan Velaers, and Bea Cantillon. Antwerp, Belgium: Intersentia: 231–61.

Verougstraete, Ivan. 1992. "Judicial Politics in Belgium." *West European Politics* 15 (3): 93–108.

Weiler, Joseph H. H. 1994. "A Quiet Revolution: The European Court of Justice and Its Interlocutors." *Comparative Political Studies* 26 (4): 510–34.

_____. 1991. "The Transformation of Europe." *Yale Law Journal* 100 (8): 2403–83.

Whittington, Keith E. 2007. *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History*. Princeton, NJ: Princeton University Press.

COURT DECISIONS

Constitutional Court (*Grondwettelijk Hof/ Cour Constitutionelle*), Judgment number 101/2008, 10 July 2008.

Court of Arbitration (*Cour d'Arbitrage/Arbitragehof*), Judgment number 11/2006, 18 January 2006.

Court of Arbitration (*Cour d'Arbitrage/Arbitragehof*), Judgment number 35/2003, 25 March 2003.

Court of Arbitration (*Cour d'Arbitrage/Arbitragehof*), Judgment number 90/94, 22 December 1994.

Court of Arbitration (*Cour d'Arbitrage/Arbitragehof*), Judgment number 18/90, 23 April 1990.

Court of Arbitration (*Cour d'Arbitrage/Arbitragehof*), Judgment number 23/89, 13 October 1989.

Court of Arbitration (*Cour d'Arbitrage/Arbitragehof*), Judgment number 47/88, 25 February 1988.

Court of Arbitration (*Cour d'Arbitrage/Arbitragehof*), Judgment number 32/87, 29 January 1987.

Court of Arbitration (*Cour d'Arbitrage/Arbitragehof*), Judgment number 12/86, 25 March 1986.

DATING GOD: WHAT IS "YEAR OF OUR LORD" DOING IN THE U.S. CONSTITUTION?

ANDREW L. SEIDEL[1]

ABSTRACT

The U.S. Constitution is a godless document, except for an appended date: "the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven." Christian nationalists and zealous politicians use that date to argue that the United States is a Christian nation and to push legislative initiatives that promote religion. This article examines the legal and historical significance of that lordly date by piecing together how exactly it was added to the parchment during the Constitutional Convention, who added it, and what significance it may have had for the delegates and scribe. The article also traces the origins of the argument that "Year of our Lord" is consequential to a preacher writing fifty years after the Constitution was drafted. All the evidence strongly suggests that "Year of our Lord" has no legal, historical, or even religious significance.

KEYWORDS: *U.S. Constitution, Year of our Lord, religion, God, Christian nationalism, Constitutional Convention, date*

1. Andrew L. Seidel is a constitutional attorney and Director of Strategic Response at the Freedom From Religion Foundation. My thanks to Elizabeth Cavell, Rebecca Markert, Sam Grover, Patrick Elliott, Ryan Jayne, Annie Laurie Gaylor, John Dayton, Warren Throckmorton, Howard Schweber, John Kaminski, and Arthur Plotnik for their helpful feedback.

Constitutional Studies, Volume 3
©2018 by the Board of Regents of the University of Wisconsin System

GOD IS MAKING A COMEBACK in Kentucky. Governor Matt Bevin declared 2016 "the Year of the Bible." He did the same for 2017.[2] Bevin also launched a crime-fighting strategy that included prayer.[3] And when he took office, he ensured that a $100 million homage to the biblical story of Noah's Ark will receive millions in tax incentives by ending Kentucky's appeal of a decision upholding those incentives (Pilcher 2016).[4]

In March 2017, in the final hours of the session, the Kentucky legislature joined the revival and resolved to do its business "in the Year of our Lord."[5] The resolution was meant to "follow the lofty example set in the U.S. Constitution and other significant founding documents."[6]

"It's important for us to go back to the basics of our U.S. and state constitutions that used that phrase," explained Kentucky state senator Albert Robinson, who proposed the bill. "I'm also trying anywhere and everywhere I can to respect our creator" (Brammer 2017).[7]

Robinson is one of the latest in a line of politicians and others who are using these words to claim, as Congressman Randy Forbes did in 2009, that the

---

2. Commonwealth of Kentucky, gubernatorial proclamation of December 19, 2016, proclaiming 2017 as the year of the bible, available at http://apps.sos.ky.gov/Executive/Journal/execjournalimages/2016-PROC-247701.pdf. The proclamation refers to its 2016 counterpart: this "marks the second year Kentucky has led the nation in celebrating the Bible's significant impact on Kentucky and American institutions and culture by leaders in each county taking shifts to read through the entire Bible in Kentucky's Bible Reading Marathon beginning Jan. 1, 2017." Brammer (2016) quipped that "The 'Year of the Bible' will apparently last 24 months in Kentucky."

3. Announcing these prayer patrols, Bevin said: "The lieutenant governor and myself laid forth [a] very simple request to people and I'll share with you what that is: It is harnessing people of faith to pray for the community, engage with the community by physically walking blocks in that community, praying for the community, for the people in those communities, and engaging with them. . . . We need young and old people alike who genuinely believe in the power of prayer, who want to restore dignity and hope into these communities, and want to do that by physically being in those communities and walking around. . . . We ask people to spend no more than 30 minutes moving around the block. Go around the block, pause on each corner, pray for the people there, move to the next corner" (Sayers et al. 2017). This story includes the video of Bevin's speech, from which this transcript was taken.

4. I've had the displeasure of visiting the Ark Encounter and even filmed a commercial there: http://www.patheos.com/blogs/freethoughtnow/andrew-visits-ark.

5. SR 294 and HR 218 were passed by voice vote (see http://www.lrc.ky.gov/recorddocuments/bill/17RS/SR294/bill.pdf and http://www.lrc.ky.gov/record/17RS/SR294.htm).

6. Section 1 of the resolution: http://www.lrc.ky.gov/recorddocuments/bill/17RS/SR294/bill.pdf.

7. The resolution presents, with no apparent irony, the fact that "Kentucky's 1891 Constitution was dated in the Year of our Lord" as evidence for its need but neglects to mention that Kentucky's 1792 Constitution and 1799 Constitution did not use the phrase.

United States is a "Christian nation."[8] The argument is weak, but it's also a must win for the Christian nationalists. The United States cannot possibly be a Christian nation unless the founding document mentions the Christian god.

The U.S. Constitution is unique in its godlessness. Its only mentions of religion are exclusionary, keeping religion out of government and vice versa, except for a curious little appendage: the date, "the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven."

These days, "Year of our Lord" is a relic that has been mostly discarded. This anachronistic dating convention is, from time to time, reported to my organization, the Freedom From Religion Foundation,[9] and we've helped remove it from diplomas and other government documents. Often all it takes is a complaint. After all, more than 100 million Americans are not Christian[10] and having the Christian lord on their diploma or marriage certificate or bar admission is understandably a bit galling.

---

8. "When our constitution was signed," Forbes said, "the signers made sure that they punctuated the end of it by saying, 'in the year of our lord, 1787'" (https://www.c-span.org/video/?285755-1/house-session; https://web.archive.org/web/20090805083910/http://forbes.house.gov/uploadedfiles/ForbesTranscript050609.pdf). Forbes was the first to convene the Congressional Prayer Caucus. He's not alone in making these claims, however. Claims like this range from the fair-minded, such as Hutson (2007) ("The Constitution did, in fact, glance in the Almighty's direction—certifying in Article 7 that it was adopted 'in the Year of our Lord'. . ." [140]) to the vacuous. Examples of the latter include: "The Constitution is explicitly signed 'in the year of our Lord.' Not only does the Constitution mention God, but it affirms the deity of Jesus Christ, our Lord" (Kennedy 2005, 209; Barton 2011) and "Early laws written by the Colonists before America's Independence reveal that they looked to the Bible for the source of their laws and ordering of civil society. . . . The U.S. Constitution requires a Christian oath, acknowledges the Christian Sabbath, and is dated in the year of our Lord" (McDowell 2005, 12–15) and even, "Note: 'Year of our Lord' means Jesus Christ is Lord of the USA. (Founding fathers didn't use year of the Lord)" (Zamorano 2010, 26). In his March 23, 2012 broadcast (see https://youtu.be/zppg5J3Xaxo), Brian Fischer of American Family Association's Focal Point radio program was perhaps the most emphatic, "We even dated both the Declaration of Independence and the Constitution . . . to the year of the birth of Jesus Christ. In fact, when the Founders, when they dated the Constitution 'the year of our Lord, 1787,' they referred to Jesus as 'our Lord.' Don't let people tell you that Christ is not in the Constitution; He's in there.")

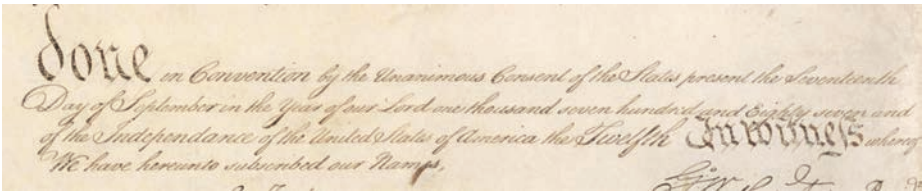
9. The Freedom From Religion Foundation (FFRF) is a national 501(c)(3) nonprofit with more than 32,000 members. FFRF works to educate the public about matters of nontheism and to keep state and church separate.

10. Robert P. Jones and Daniel Cox, *America's Changing Religious Identity*, Public Religion Research Institute (2017), available at https://www.prri.org/wp-content/uploads/2017/09/PRRI-Religion-Report.pdf. This study shows that 33 percent of the 325,000,000 Americans are not Christian.

Most institutions offer an alternative. For example, attorneys seeking admission to the U.S. Supreme Court are able to choose whether or not they want the "Year of our Lord" language on their admission certificate.[11]

Defenders of the "America is a Christian nation" trope occasionally cite the vestigial phrase as evidence to support their claim. These four words—"Year of our Lord"—allegedly show that, far from being godless, the Constitution is a deliberately Christian document.

This article will examine the legal and historical significance of the "Year of our Lord" language added to the U.S. Constitution. I conclude that this phrase has no real legal or historical value.


Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independance of the United States of America the Twelfth In witness whereof We have hereunto subscribed our Names

done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independance of the United States of America the Twelfth **In witness** whereof We have hereunto subscribed our Names

The facts bear out this conclusion. First, the "Year of our Lord" language is not actually part of the Constitution itself, which ends at Article VII. The phrase was not debated or ratified by the Constitutional Convention and it seems unlikely that the specific verbiage was even approved by the delegates. In all likelihood, it was a formalism unthinkingly added by the Constitution's scribe, Jacob Shallus. Perhaps most importantly, the language was not viewed as having any religious significance at the time.

I. THE DATE IS NOT PART OF THE CONSTITUTION

"Year of our Lord" is not actually *in* the Constitution. The legal document ends with the errata and words of Article VII: "The Ratification of the Conventions of

11. The Supreme Court's current bar admission instruction form reads: "BAR CERTIFICATE. The Certificate evidencing admission to the Bar of this Court contains the following words: '. . . in the year of our Lord, two thousand.' An alternate Certificate is available that omits the underlined words. If you want an alternate Certificate, check the block on the application form." See U.S. Supreme Court, "Instructions for Admission to the Bar," form number CLER-0078-5-13, available at https://www.supremecourt.gov/bar/barinstructions.pdf.

nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same." The fifty words of the attestation clause are not part of the legal document itself. Akhil Reed Amar clarified this point: "As it turns out—though this fact has until now not been widely understood—the 'our Lord' clause is not part of the official legal Constitution. The official Constitution's text ends just before these extra words of attestation—extra words that in fact were not ratified by various state conventions in 1787–88 (Amar 2016, 42). Amar also addressed this issue in his book *America's Unwritten Constitution*: "The words 'in the Year of our Lord' do not merely lie outside of Article VII. They lie outside of the official written Constitution—that is, the legal one—altogether" (Amar 2012, 71).

When you sign a contract, that signature is attesting to your consent—it is not part of the terms of the contract.[12] The signatures and dates are not part of the Constitution itself.

This point is bolstered by the document's subsequent ratification. When the printed text of the Constitution was sent to the states for ratification, five of the first nine states that would ratify it only ratified the language preceding the date. In other words, they ratified the text only up to the final sentence in Article VII and did not even consider the attestations of the witnesses because they did not have that language in front of them. "No matter how we count, this closing flourish was never ratified by the nine-state minimum required by Article VII," concludes Amar (2012, 73). Thus, those unratified words cannot be part of the legal Constitution according to the terms of the Constitution itself.[13]

The other dates in the Constitution also suggest that the lordly words were not part of the Constitution itself. The Constitution has several other years written out within the text, and none use the phrase "Year of our Lord."

Even though the word "slavery" is never used in the Constitution, slavery contaminated the delegates' debates on representation, taxation, and more. The slave trade could not be "prohibited by the Congress prior to the Year one thousand eight hundred and eight," according to Article 1, Section 9. Nor could the Constitution be amended in a way to prohibit the slave trade "prior to the Year one thousand eight hundred and eight," according to Article V.

---

12. Of course, the execution date (not part of the contract itself) is distinct from the effective date, duration dates, due dates, or other dates that are deliberately included within the terms of the contract itself. This is not to say that it is not legally important; cases can turn on the date a contract was signed, but that importance does not make it part of the contract itself.

13. Article VII: "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same."

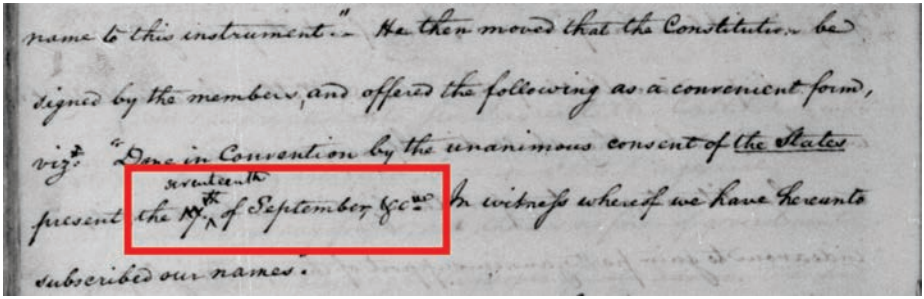
This is language that the founders debated bitterly—for days in August 1787. That exhaustive debate yielded godless dates. Thus, we know that when the framers were responsible for debating, approving, and voting on dating language, that language did not contain the religious convention—it was secular.

So, if the date is not part of the legal Constitution, was not ratified, and is not consistent in form with the other, heavily litigated dates, how did "Year of our Lord" come to be in the Constitution?

II. IT IS UNLIKELY THAT THE CONVENTION PROPOSED THE "YEAR OF OUR LORD" LANGUAGE

The phrase "Year of our Lord" does not appear in any records of the Constitutional Convention. James Madison recorded the proceedings of September 17, 1787, the day the Constitution is dated and presumably received the four words. He notes that Ben Franklin made a motion: "that the Constitution be signed by the members and offered the following as a convenient form viz. 'Done in Convention, by the unanimous consent of the States present the seventeenth of September, &c—In Witness whereof we have hereunto subscribed our names'" (Farrand 1911b, 643).

Here are Madison's original handwritten notes:[14]


name to this instrument." He then moved that the Constitution be signed by the members, and offered the following as a convenient form, viz: "Done in Convention by the unanimous consent of the States present the seventeenth of September &c. In witness whereof we have hereunto subscribed our names.

The actual words "Year of our Lord" are not present in Madison's notes before the final version of the Constitution appears.[15] Madison's abbreviation, "&c—"

14. *James Madison. John C. Payne's Copy of James Madison's Original Notes on Debates in the Federal Convention of 1787*. From the Library of Congress, https://www.loc.gov/item/mjm023110.

15. Madison's handwritten notes include the final version of the engrossed and signed Constitution that does include the explicit phrase, but he was copying directly from the final version so this does not change the analysis in this article (see https://www.loc.gov/resource/mjm.28_0270_1617/?sp=1294). We know Madison was copying from the final, signed version (after "Year of our Lord" was added)

and the appearance of "Year of our Lord" on the final Constitution gives two basic possibilities. First, it is possible that the delegates wanted this dating convention but that it was so common and unremarkable that Madison did not bother to record it verbatim. He lumped "Lord" in with a dry formality, an "etc." If this is true, and it may be, it seriously undercuts any claim that the founders meant the language to transform the entirely godless document into a Christian manifesto.

The second possibility is that the founders did not specifically or explicitly vote on or approve the "Year of our Lord" language, which was instead added later. This second possibility squares with the evidence better than the first.

A. "Year of Our Lord" Does Not Appear in Any of the Drafts of the Constitution

The first real draft of the Constitution came in early August of 1787. The Convention adjourned on July 27 for several days to allow the Committee of Detail to combine the disconnected votes and motions and principles into a coherent document. "On 6 Aug. John Rutledge delivered the report of the 'Committee of detail' in the form of a printed draft of the proposed federal constitution and provided copies for the members."[16] George Washington's copy of this early printed version of the Constitution (v1.0) can be viewed, along with all his handwritten annotations, on the National Archives website.[17] It does not contain that "Year of our Lord" verbiage.[18]

The Convention debated and edited v1.0 for more than a month and then passed it and the copious edits off to the Committee of Style. This committee, a political dream team that included James Madison, Alexander Hamilton, and Gouverneur Morris, would put a polish on the Constitution. The committee gave

---

because Madison's list of signers directly mirrors the engrossed version. Starting with Washington and moving down the right-hand column of signatures, Madison copied out the states—signing from north to south—and names, and then moved on to the left-hand column. The lists are identical and that could not have been possible had Madison not been copying from the final, which already contained the "Year of our Lord" language.

16. *Draft of the Federal Constitution: Report of Committee of Detail, 6 August 1787*, Founders Online, National Archives, last modified March 30, 2017, http://founders.archives.gov/documents/Washington/04-05-02-0261. Original source: *The Papers of George Washington, Confederation Series, Vol. 5, 1 February 1787–31 December 1787* (W. W. Abbot, ed., University Press of Virginia 1997).

17. Available at https://catalog.archives.gov/id/1501555.

18. Interestingly, this version of the Constitution does contain a handwritten note, complete with a date: "Printed draughts of the Constitution, received from the President of the United States, March 19. 1796, by Timothy Pickering Secy. of State."

the job to Morris, a peg-legged bon vivant who spoke more than any other delegate at the Convention. Morris gave us those famous first words, "We the People."[19]

The Committee of Style brought the refined product back to the whole convention on September 12, 1787. The delegates debated and edited this version, v2.0, for three days. George Washington's copy of this nearly final version of the Constitution and his handwritten edits are in the Library of Congress.[20] It runs to four pages and ends with Article VII; there is no lordly date.[21]

Three days later, on September 15, the Convention agreed on the complete text, what would become v3.0. They also agreed that 500 copies of v3.0 would be printed by Dunlap and Claypoole (Farrand 1911b, 634), and, for $30, hired someone, almost certainly Jacob Shallus, to engross (transcribe in legible, bold, and occasionally ornate lettering) v3.0 onto the four sheets of vellum that reside in that National Archives today (Fitzpatrick 1946, 761–69). Oddly, according to the National Archives, none of the 500 copies of v3.0 Dunlap and Claypoole printed for the Convention's use on September 17 survives.[22]

Shallus and Dunlap and Claypoole worked to complete their work over the September 15–16 weekend. The Convention met after the engrossing and printing was complete on Monday, September 17.

---

19. Morris made a significant change, dropping the various states. Originally it read: "We the People of the States of New-Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South-Carolina, and Georgia."

20. Draft of the U.S. Constitution 4 (September 12, 1787), available at http://memory.loc.gov/mss/mgw/mgw4/097/0200/0246.jpg.

21. Draft of the Federal Constitution, Report of Committee of Style, Washington Papers, available at http://gwpapers.virginia.edu/documents/draft-of-the-federal-constitution-report-of-committee-of-style.

22. This could be because fresh, correct versions were printed after the final version was signed, so the versions that contained old language were destroyed: "The text produced by Dunlap and Claypoole contained a few more flaws. It must have contained the uncorrected 'forty thousand'; it also cannot have had a correct list of the signers, for when the Convention began its final day, the members did not know precisely who was going to sign the document. There was a determined but unsuccessful effort, led by Benjamin Franklin, to bring aboard three delegates who had not committed themselves—Edmund Randolph, George Mason, and Elbridge Gerry. There was also some doubt, right up to the end, about another member—William Blount of North Carolina—who finally did sign. We do not know how the print of Monday, September 17, dealt with these uncertainties. No copy of that print has ever come to light. (We do know that the printing was done, for the archives contain a record of payment to the printers large enough to cover two jobs, each running to 500 copies or more.) Apparently the stack of 500 prints was held closely by someone and not distributed. Otherwise, a few copies would likely have migrated into the papers of some members and could now be found preserved in various archives" (Bain 2012).

"The engrossed Constitution being read . . ." was the first order of business; in other words, it was read aloud. Then, "Docr. Franklin rose with a speech in hand . . ." and delivered a duly famous speech—"Thus I consent, Sir, to this Constitution because I expect no better, and because I am not sure, that it is not the best." This was followed by Franklin's motion to add on the date and signatures. This is the motion that Madison recorded as: "offered the following as a convenient form . . . 'Done in Convention, by the unanimous consent of the States present the seventeenth of September, &c—' " (Farrand 1911b, 643).

It stands to reason that because Franklin's motion to add the signatures and date was made after v3.0 was read aloud, that v3.0 did not include that date, let alone "Year of our Lord," when it was read aloud. This also means it is highly unlikely that the printed version of v3.0, of which we have no copy, contained the language. This is even more likely for two additional reasons. First, the other drafts were undated.[23] Second, the printer and engrosser would not have known the actual date of the signing. The Convention was aiming for Monday, September 17, but the delegates had already overstayed their welcome.

In short, none of the drafts contains the "Year of our Lord." The absence of the date—"Year of our Lord" or otherwise—on the three drafts of the Constitution demonstrates that it was never debated. It also helps to illustrate the previous point: the date and signatures are not part of the Constitution itself.

B. The Delegates Were Not Focused on and May Not Have Even Noticed the Christian Addition to the Date

Daniel Dreisbach has pointed out what seems to be an inconsistency in the Constitution: "[I]f the Constitution was deliberately secular or hostile to traditional religion, the reference to Jesus Christ could have been avoided. The framers broke with tradition by omitting from the body of the text all references to the Deity, and they could have just as easily omitted the reference to Christ in the dating clause" (Dreisbach 1996, 967).

A fair point. But what if the framers didn't know about the "Year of our Lord" language? What if they did not propose the language, did not approve the language, and were busy debating important issues, such as what to do with the records of the Convention, while a scribe added the date in the most formal fashion he was accustomed to using? That would explain the apparent contradiction and that seems to be what happened.

---

23. See notes 16 and 20.

It might seem impossible that this could be the case, but the impossible becomes probable if we picture this formative moment in American history, if we actually imagine the scene as the framers signed the Constitution.[24] After the engrossed Constitution was read—without the "Year of our Lord" language as we have seen—Ben Franklin, the respected elder statesman, rose to urge unanimity and propose workable language for achieving that goal: "Done in Convention, by the unanimous consent of the States present." This language was subtle, sly, and extraordinarily important, but before the delegates debated it, a minor amendment to the upper limit on representational ratio was proposed and seconded. It would be changed from no more than one representative for every 40,000 people to one for every 30,000 people.[25]

George Washington, the Convention's president and future president of the nation, stood to his full imposing height, echoed Franklin, and asked the delegates to approve the minor amendment to congressional apportionment, which they did unanimously. At that point, Jacob Shallus, the engrosser, probably began making the approved edit, scraping off "forty" and writing in "thirty."

As Shallus was making the change, the heart of Franklin's motion was discussed. The delegates in that room were focused on the first bit of Franklin's language and not the language of the date. "Done in Convention, by the unanimous consent of the States present" was both clever and crucial to those delegates—the date was not. Gouverneur Morris conceived this ingeniously ambiguous language "in order to gain dissenting members" (Farrand 1911b, 643). Here's how Michael Meyerson describes the semantic maneuver:

> To create the appearance of unanimity . . . [t]hose individuals signing would not endorse the document itself, but only attest to the fact that the Constitution had been "Done in Convention by the *unanimous consent of the states present*." Since a majority of delegates of every state but New York supported the Constitution, and New York, with only one delegate in attendance, was not technically "present," the signers could truthfully declare there had been "unanimous consent" of "the states present." (Meyerson 2012, 143)

This language allowed Alexander Hamilton of New York to sign the Constitution, a document he had worked hard to bring about, even though his delegation had

---

24. The recounting of this moment can be found in Farrand (1911b, 643–47).

25. Article I, Section 2, Clause 3 now reads "The Number of Representatives shall not exceed one for every thirty Thousand." The Apportionment Acts of 1911 and 1929 essentially set the number of members in the House at 435 irrespective of population.

departed early to protest the proceedings.[26] Not everyone appreciated the dialectical dodge; several "disliked the equivocal form of the signing" (Farrand 1911b).[27]

So as Shallus was changing "forty" to "thirty" some of the most important delegates debated signing the document. Edmund Randolph of Virginia refused to sign. Gouverneur Morris admitted that he had objections and found faults but that he would sign it. Alexander Hamilton was anxious that all should sign, fearing that any opposition would "do infinite mischief." William Blount of North Carolina would not sign but would support it. Charles Cotesworth Pinckney thought the Convention "not likely to gain many converts by the ambiguity of the proposed form of signing." Eventually, the delegates, who must have been drained from the debates and relieved that the end of their labors was in sight, voted for Franklin's proposed language.

It was only then that Jacob Shallus, the penman of the Constitution, could begin to add the language that Madison recorded as "Done in Convention, by the unanimous consent of the States present the seventeenth of September, &c—" The delegates did not look over Shallus's shoulder while he wrote. Instead, they took up yet another debate: What was to be done with the journals of the Convention? Should they be destroyed or preserved in the custody of George Washington to be given to the new Congress if the Constitution were ratified? Only after that question was settled in favor of preservation, by which time Shallus was certainly done appending the date, did "the members then proceed to sign the instrument."

As the delegates signed by state, from north to south, Franklin, with his unerring sense of history, piled on additional drama and heft. Franklin pointed to the painting of the sun on the chair Washington had occupied as president of the Convention. Franklin explained that artists struggle to distinguish between rising and setting suns. Throughout the Convention, Franklin said that he had looked on the sun, "without being able to tell whether it was rising or setting: But now at length I have the happiness to know that it is a rising and not a setting Sun" (Farrand 1911b, 646–48).

The debate over destroying the journals and Franklin's poetic musings on the rising sun as a metaphor for a rising world power surely drew the delegates'

---

26. Washington would write in his diary that "the Constitution received the unanimous assent of 11 States and Colo. Hamilton's from New York (the only delegate from thence in Convention) and was subscribed to by every Member present except Govr. Randolph and Colo. Mason from Virginia—& Mr. Gerry from Massachusetts. The business being thus closed, the Members adjourned to the City Tavern, dined together and took a cordial leave of each other" (Farrand 1911c) (see http://oll.libertyfund.org/titles/1787#Farrand_0544-03_269).

27. Available at http://oll.libertyfund.org/titles/1786#Farrand_0544-02_4797.

attention, not Shallus's scratching quill. Nor were they likely to carefully reexamine a document they had debated for weeks and heard read a few minutes earlier. Exhausted, they simply stepped up and signed, as Hamilton hovered nearby to write in the names of the states beside the delegates' signatures, infamously misspelling Pennsylvania (Bain 2012).

The day after the engrossing and signing, the printers Dunlap and Claypoole gave the Convention a fresh batch of corrected, printed Constitutions[28]—this would be v4.0—and these contained the phrase "Year of our Lord." As we've seen, v1.0, v2.0, and v3.0 all omitted "Year of our Lord" when the framers were discussing, editing, and voting on the language. So it is virtually certain that it was not until after all the discussion was over and the framers were ready to sign that "Year of our Lord" was added.

C. Several Additional Pieces of Evidence Point to a Scrivener's Flourish Rather Than Proposed, Heavily Debated Language

Madison may have indeed lumped the Lord in with his "etc." notation. "Year of our Lord" appears in other documents from the era, including the Articles of Confederation and the Northwest Ordinance. But it was not used in the Declaration of Independence.[29] So it was a convention that might merit a Madisonian "etc." but was by no means universal.

Madison himself was not in the habit of writing "Year of our Lord," including on dates. In Gaillard Hunt's nine volumes of edited Madison papers, the phrase appears exactly once: in a copy of the engrossed Constitution.[30]

Some might be inclined to think that "etc." should include the reference to "our Lord" because Franklin made the motion on which Madison was taking notes and Franklin also made a motion for the Convention to say a prayer. If Franklin

---

28. "When Dunlap and Claypoole provided a fresh printing of the Constitution to the departing delegates on Tuesday morning, September 18, it contained a correct 'thirty thousand' and an accurate list of the signers" (Bain 2012).

29. Of course, the explanation for the Declaration's simple date might be that it was written by Thomas Jefferson, a man who cut the virgin birth, resurrection, and other supernatural nonsense out of the bible. See Jefferson's *The Life and Morals of Jesus of Nazareth Hardcover*, known as "The Jefferson Bible" (Smithsonian Edition 2011).

30. Madison (1900). Searchable set available at http://oll.libertyfund.org/titles/1933. Hunt introduced this version of the Constitution: "[Following is a literal copy of the engrossed Constitution as signed. It is in four sheets, with an additional sheet containing the resolutions of transmissal. The note indented at the end is in the original precisely as reproduced here.]"

wanted them to pray, proposing a date with a salting of religion might make sense. On the other hand, his prayer motion was so unimportant that the Constitutional Convention did not even bring it to a vote, let alone pass the resolution. "After several unsuccessful attempts for silently postponing the matter by adjourning," it failed. Franklin himself wrote that "The [Constitutional] Convention, except three or four persons, thought Prayers unnecessary" (Farrand 1911a, 452n15).[31] If anything, his prior experience with trying to inject religion into the proceedings ought to have dissuaded him from doing so here.[32]

Like Madison, Franklin typically did not employ "Year of our Lord" to date his own correspondence or documents that might have used that dating convention, including during the year in question, 1787.[33] The exception to Franklin's general practice are the documents he signed as President of the Supreme Executive Council of the Commonwealth of Pennsylvania, and they actually support the idea that the engrosser, Jacob Shallus, added "Year of our Lord" to the formal document out of habit, as we will see later.

It also seems unlikely Franklin would have recommended language that might be interpreted as calling Jesus Lord, given that his personal beliefs about Jesus were probably more like Jefferson's—at the very least, Franklin had "some Doubts as to his Divinity."[34]

---

31. Available at http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field%28DOCID+@lit%28fr001136%29%29.

32. Some scholars have questioned Franklin's motives. "Whether [he] spoke from a genuine faith in the efficacy of prayer or merely to shift attention from quarrelsome issues to more solemn reflections, his suggestion at the very least surely and forcefully reminded all delegates of the basic importance of their work" (Carr 1990).

33. See, e.g., Benjamin Franklin to Thomas Jefferson, October 14, 1787, retrieved from the Library of Congress, https://www.loc.gov/item/mtjbib003045; Benjamin Franklin to Thomas Jefferson, April 19, 1787, *Founders Online*, National Archives, http://founders.archives.gov/documents/Jefferson/01-11-02-0292; and Benjamin Franklin to John Adams, May 18, 1787, *Founders Online*, National Archives, http://founders.archives.gov/documents/Adams/99-02-02-0129. As to more formal documents, see, e.g., Pennsylvania Society for Promoting the Abolition Of Slavery, "An address to the public, from the Pennsylvania Society for promoting the abolition of slavery, and the relief of free negroes, unlawfully held in bondage . . . Signed by order of the Society, B. Franklin, President. Philadelphia, 9th of November," available at https://www.loc.gov/item/2005577131.

34. Both Jefferson and Franklin viewed Jesus as a moral teacher, but it is unlikely that they viewed him as a divine savior. In a letter to the Calvinist president of Yale, Ezra Stiles, Franklin addressed Christianity: "As to Jesus of Nazareth, my Opinion of whom you particularly desire, I think the System of Morals and his Religion as he left them to us, the best the World ever saw, or is likely to see; but I apprehend it has received various corrupting Changes, and I have with most of the present Dissenters in England, some Doubts as to his Divinity: tho' it is a Question I do not dogmatise upon, having

Thus, the evidence cuts against the idea that Franklin proposed the "Year of our Lord" language and that Madison simply lumped that proposal in with an "etc." Instead, the most likely explanation seems to be that the engrosser Jacob Shallus added the language of his own volition. The reference was, as Dreisbach (1996) has posited, "merely a scrivener's touch."

III. THE SCRIVENER

Jacob Shallus's important role in penning our founding document was not discovered until 1937, when Congress began investigating and preserving our constitutional history—i.e., that of the physical manuscript itself—for the document's 150th anniversary. Although we do not know much about Shallus, what we do know agrees with the hypothesis that he used a familiar, pro forma phrase that had little to no religious significance at the time, including for him.

Shallus himself does not appear to have been religious. His son made no mention of religion in Shallus's obituary (Plotnik 1987, 63–64). He was a Freemason, a member of Masonic Lodge 2 and even contributed funds for a new lodge (Plotnik 1987, 33). Freemasons have often been at odds with organized religion.

According to Arthur Plotnik, the intrepid researcher and author who has written the only biography of Shallus, *The Man Behind the Quill*, there are "no mentions of God" in Shallus's diary of the Revolutionary War or any of his other writings.[35] Even Shallus's more oblique mentions of religion in that diary, kept while campaigning with the First Pennsylvania Battalion in 1776 as a quartermaster under General Benedict Arnold, are sparse and impersonal. One of his only mentions of the ecclesiastical realm paints an unflattering picture. On the march through Canada, local priests "elegantly entertained" his company in "St. Anthony's Village" north of Montreal: "These priests live like Princes, while their poor Canadians are starving."

Returning south, Shallus was a bit more forgiving. "[F]rom Sorrell to st. Anns, and down again, I never was more kindly treated; the Clergy and Noblesse gave

never studied it, and think it needless to busy myself with it now, when I expect soon an Opportunity of knowing the Truth with less Trouble." Benjamin Franklin, letter to Ezra Stiles, March 9, 1790, available at http://franklinpapers.org/franklin/framedVolumes.jsp?vol=45&page=113. See also first and only footnote from Jefferson's "Letter to William Short, October 31, 1819." Image of page with footnote available at http://memory.loc.gov/cgi-bin/ampage?collId=mtj1&fileName=mtj1page051.db&recNum=891.

35. I have had the privilege and pleasure of corresponding with Mr. Plotnik for this article. A very warm thank you to Mr. Plotnik for his assistance and kindness.

us everything their Houses afforded; in short, we lived like Princes" (Plotnik 1987, 18–19).[36] As he was writing, the Declaration of Independence was being debated and adopted in Philadelphia, but Shallus would soldier on for another five months before returning home to Philadelphia.

After several attempts in business, including outfitting a privateer ship, the *Retrieve*, Shallus became the assistant clerk for the Pennsylvania Legislature in October 1783. He assisted Samuel Sterett, who succeeded Thomas Paine as clerk, and worked in the state house, the building we know as Independence Hall, where the Constitutional Convention also met. Thus, he was well placed to serve the Convention as an engrosser on that mid-September weekend. Shallus continued as an assistant clerk—a position the legislators filled by election—for the next decade. He also served as the assistant secretary in Pennsylvania's constitutional convention in 1790 (Plotnik 1987, 31–33).

So Shallus was not a particularly pious individual and probably considered himself a professional scribe, able to divorce his personal views from what he was required to write. This makes it unlikely that Shallus abused his unique position to sneak his personal religious conviction into a government document—a tactic that has borne such fruit as "In God We Trust" on our coinage and "under God" dividing an indivisible sentiment in the Pledge of Allegiance (both perpetrated during times of national fear and distraction, 1863 and 1954, the Civil War and Red Scare, respectively).

Despite his professionalism, Shallus may have brought a good deal of his own style into the small things of the Constitution. For instance, as the official Senate report on this very topic notes, "The capitalization of all nouns by Shallus in the engrossed copy may be dismissed as an innocent matter of style and its reproduction in some editions with the spelling 'Tranquillity' in the Preamble is indifferent" (Myers 1961, 46–65).[37] There are variations in punctuation, capitalization, and

---

36. Sorrell, likely now Sorel, is on the St. Lawrence River, about a fifty-mile march north of Montreal. St. Anns likely refers a fort of that name on Isle La Motte, an island in Lake Champlain just on the Vermont side of the modern New York/Vermont border. The fort was constructed in the mid-1660s. Sorel and St. Anns are connected by the Richelieu River, along which Shallus probably marched.

37. Available at http://www.greenbag.org/v11n2/v11n2_myers.pdf. There are, of course, other differences between Shallus's writing and the printed Constitution: "The main differences between the engrossed and printed archetypes are few by category. The Committee of Style and Arrangement allowed Shallus to capitalize every noun in his engrossing but it was restrained in using initial capitals in the printed copy for the Federal Convention. Abbreviation of "section" in the print accounts for 21 variations from the engrossed copy, which does not indicate italics for Latin words. The print closes the 17 short paragraphs enumerating the powers of Congress in Article I, Section 8, with colons; the engrossed copy uses semicolons. In Article I the sixth sentence in Section 9 and the third sentence in

formatting (Myers 1961). All seemingly minor things that were unlikely to preoccupy the convention delegates—which they were unlikely to notice, just like the language preceding the date.

As noted, "Year of our Lord" was a common though certainly not universal dating convention. Up to a few years ago this type of dating was the norm. A.D. as a dating system comes from the Latin *Anno Domini*, or Year of our Lord. This system was developed by Christians in the sixth century. The Articles of Confederation used the "Year of our Lord" dating custom. On the other hand, the phrase does not appear in the records of the First U.S Congress, except in correspondence from the states, Pennsylvania included, regarding ratification of the Bill of Rights.[38]

It looks like the Pennsylvania General Assembly, for which Shallus clerked, used this dating convention at more formal and ceremonial moments—to begin each session, for instance (Bloom 1940).[39] Shallus may simply have slipped into his habit of using "Year of our Lord" on important documents and because the delegates' attention was directed to more important debates, they didn't notice the addition, or found it unremarkable, when they were signing immediately after.

Plotnik's (1987) biography of Shallus reproduces two documents that indicate that "Year of our Lord" was both formal and formalistic. Both are fill-in-the-blank forms that, as reproduced in Plotnik's book, contain handwritten text in the blanks. The first form is a letter of marque Shallus signed as co-owner of the *Retrieve*, making him a privateer (26–28). That form read, "and dated the ___Day of ___in the Year of our Lord ___ and in the ___ Year of the Independence of the United States of America" (27). The second document is the Supreme Executive Council of the Commonwealth of Pennsylvania's certification that it hired Shallus and it is signed by Benjamin Franklin. Like the letter of marque, it's a printed form: "day of _____ in the Year of Our Lord, one thousand seven hundred and eighty" (42).

Section 10 are not set off as paragraphs, which is done in the engrossed copy. In the printed copy all the signatures are spelled out, though there are 25 abbreviations in the holograph originals and three misspellings on the engrossed parchment, which lacks 41 commas or periods."

38. *House Journal.* 1st Cong., 1st sess., 6 May 1789, 29; 2nd sess., 25 Jan. 1790, 145; 8 Mar. 1790, 170; 16 Mar. 1790, 175; *Senate Journal.* 1st Cong., 1st sess., 6 Apr. 1789, 9; 2nd sess., 8 Mar. 1790, 118; 16 Mar. 1790, 121; 14 June 1790, 156; 16 June 1790, 161; 6 Aug. 1790, 201; 3rd sess., 3 Jan. 1791 228; 9 Feb. 1791, 243–5.

39. As to the use of the dating convention at formal and ceremonial moments, see *Minutes of the General Assembly of the Commonwealth of Pennsylvania 1787–1790* (https://archive.org/details/minutesofgeneral-178790penn). This book includes the various sessions of the Twelfth through the Fourteenth General Assemblies. On the title pages of each session, "Year of our Lord" is used. See, e.g., pp. 103, 160, 201, 276, and 289.

In a remarkable historical coincidence, in November 1787, shortly after the Constitution was finalized, Shallus billed the American Philosophical Society without using the formal religious date, and Franklin, as president and founder of the APS, approved the expenditure on December 7, 1787, also without using that religious dating convention (Plotnik 1987).

What we know of Shallus means that it is unlikely he had any ulterior religious motive for using the lordly verbiage. It also appears likely that he used the phrase, a "grandiose mannerism" as Plotnik described it to me, as a formal date with no more religious significance than writing "January" would be meant to worship the Roman god Janus after whom that month is named or "Thursday" would be meant to revere Thor.

Treating "Year of our Lord" as an incidental addition by Shallus that had no religious significance agrees with all the evidence. More importantly, the conclusion that the lordly language should not taint the beautiful godlessness of our Constitution is bolstered by contemporaneous criticism of the Constitution.

IV. AT THAT TIME, SHALLUS'S "YEAR OF OUR LORD" ADDITION DID NOT MAKE THE GODLESS CONSTITUTION GODLY

Since the founders did not propose or vote on language that is not even part of the Constitution, claiming that this dating convention somehow injects religion into our godless Constitution is tenuous. Perhaps that's why no one argued for the Christian significance of the "Year of our Lord" until nearly fifty years after the Constitutional Convention. The argument was not made by a jurist or statesman or even a surviving constitutional delegate, but by a reverend giving a sermon.[40]

That reverend, Jasper Adams, argued that, by using this language in the date, "the people of the United States profess themselves to be a Christian nation" (Dreisbach 1996, 46). Adams was also struck by the mention of Sunday in Article I.[41] The reverend saw the mention of Sunday not as a societal custom or a standard dating convention but as a nod to his holy Sabbath.[42]

---

40. Reverend Jasper Adams of the St. Michael's Church in Charleston, South Carolina, on February 13, 1833. Dreisbach (1996) notes that Adams was the first to make the argument, at 141, and reproduces the sermon in which Adams does so, at 63–64.

41. §7 "If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law."

42. One could also argue that the mention is a recognition of the Sun god for whom the day is named

A day of mandatory rest is one of the Ten Commandments, and the Hebrew bible even dictates capital punishment for violators.[43] Though our courts have routinely rejected Rev. Adams's idea that Sunday closing laws are a codification of Christianity, the idea is worth addressing here because it is still raised by Christian nationalists.

The Supreme Court has catalogued "the evolution of Sunday Closing Laws from wholly religious sanctions to legislation concerned with the establishment of a day of community tranquility, respite and recreation, a day when the atmosphere is one of calm and relaxation rather than one of commercialism, as it is during the other six days of the week."[44] As early as 1885, the Supreme Court recognized that Sunday closings were not about the Sabbath:

> Laws setting aside Sunday as a day of rest are upheld not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor. Such laws have always been deemed beneficent and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops, and in the heated rooms of our cities, and their validity has been sustained by the highest courts of the states.[45]

In the early days of the United States Post Office, a debate erupted over the then-regular delivery of mail on Sundays. Congress would halt the practice, but it issued a report on the controversy on January 19, 1829, that specifically stated that religious reasons did not and, from a constitutional perspective, could not motivate

---

and that Adams should have applied the logic of this claim to argue that "Monday" in Article I is evidence of moon worship or paganism. And that he would also have to argue that the Twelfth Amendment honors the god of war, Mars, because it includes the month named after him; or that the Twentieth Amendment honors the two-faced Roman god, Janus for mentioning the month that honors him. These arguments would, of course, be risible; but so should those offering up the Christian dating convention to declare that America is "a Christian nation."

43. "When the Israelites were in the wilderness, they found a man gathering sticks on the sabbath day. Those who found him gathering sticks brought him to Moses, Aaron, and to the whole congregation. They put him in custody, because it was not clear what should be done to him. Then the Lord said to Moses, 'The man shall be put to death; all the congregation shall stone him outside the camp.' The whole congregation brought him outside the camp and stoned him to death, just as the Lord had commanded Moses." Num. 15:32–36.

44. *Braunfeld v. Brown*, 366 U.S. 599, 602 (1961), citing *McGowan v. Maryland*, 366 U.S. 420, 437–40 (1961).

45. *Soon Hing v. Crowley*, 113 U.S. 703, 710 (1885).

Sunday closings. The report explains that "some respite is required from the ordinary vocations of life, is an established principle, sanctioned by the usages of all nations, whether Christian or pagan. One day in seven has also been determined upon as the proportion of time; and, in conformity with the wishes of the great majority of citizens of this country, the first day of the week, commonly called Sunday, has been set apart to that object."[46] Thus, it was not for religious reasons that the government chose Sunday to close, but a matter of convenience. So despite their history, Sunday closings are not adopted for religious reasons. Any Sunday closing law would violate "the Establishment Clause if it can be demonstrated that its purpose . . . is to use the State's coercive power to aid religion."[47]

Interestingly, Rev. Adams sent a copy of his "Year of our Lord" sermon to James Madison who, at age 83, responded. Madison's response was to defend the separation of state and church, pointing out as he had on previous occasions that the religion and government are better off—more pure—the less they are mixed together (Dreisbach 1996, 117–21).[48]

The greatest point against Rev. Adams's argument is that if the framers really wanted the Christian god in the Constitution, it would have been easy enough to include him. Instead, they chose to exclude all gods. Indeed, at the time, the deliberate godlessness of the Constitution was lamented by some citizens. Had the "Year of our Lord" language had any genuine significance in contemporary eyes, this citizens' lament would not have been heard.

People at the time did not view the phrase "Year of our Lord" as significantly religious. "God and Christianity are nowhere to be found in the American Constitution, a reality that infuriated many at the time," write Isaac Kramnick and

---

46. Senator Richard Johnson made the Sunday Mails report to the Senate on January 19, 1829, the 20th Congress, 2nd session. In American State Papers, legislative and executive, of the Congress of the United States, from the first session of the First to the second session of the Twenty-Second Congress (Gales and Seaton, 1834) Class VII, Post Office Department, Document #74, pp. 211–12. See also Sunday Mail Report to House of Representatives, on the same date, Document #75, pp. 212–5.

47. *McGowan v. Maryland*, 366 U.S. 420, 453 (1961).

48. James Madison, letter to Japer Adams, September 1833. There is a beautiful line tucked into this letter: "I must admit, moreover, that it may not be easy, in every possible case, to trace the line of separation, between the rights of Religion & the Civil authority, with such distinctness, as to avoid collisions & doubts on unessential points. The tendency to a usurpation on one side, or the other, or to a corrupting coalition or alliance between them, will be best guarded against by an entire abstinence of the Government from interference, in any way whatever, beyond the necessity of preserving public order, & protecting each sect against trespass on its legal rights by others."

Laurence Moore in their seminal book, *The Godless Constitution*. In fact, "the Constitution was bitterly attacked for its failure to mention God or Christianity" (26–27).

When the proposed Constitution was announced and the debate over ratification began, people complained about the absence of religion. The ban on religious tests for public office was particularly troubling, but, as one anonymous Virginian complained, the "general disregard of religion" and the Constitution's "cold indifference towards religion" were issues too (33–37). Charles Turner of Massachusetts, later a U.S. Representative for that state, warned, "without the presence of Christian piety and morals the best Republican Constitution can never save us from slavery and ruin" (36). In Connecticut's ratifying convention, one delegate actually sought to inject god into the preamble, moving for new language:

> We the people of the United States in a firm belief of the being and perfection of the one living and true God, the creator and supreme Governor of the World, in His universal providence and the authority of His laws: that He will require of all moral agents an account of their conduct, that all rightful powers among men are ordained of, and mediately derived from God, therefore in a dependence on His blessing and acknowledgment of His efficient protection in establishing our Independence, whereby it is become necessary to agree upon and settle a Constitution of federal government for ourselves. (37)

That verbose ninety-five-word addition would nearly have doubled—and disfigured—Gouverneur Morris's admirably succinct and distinctly poetic 52-word preamble.

If the Constitution were already a Christian document because of the "Year of our Lord" addition, this fuss and opposition would not have occurred.

Until it became politically convenient to bolster a conservative religious agenda with the claim that our Constitution is a Christian document, church leaders actually worked to include god in the text via constitutional amendments. One of the most colorful calls was by Presbyterian pastor John T. Pressly:

> [A]ppended to the instrument we find the declaration that it was "done in Convention in the year of our Lord one thousand seven hundred and eighty seven." But surely something more than this is required of a Christian nation; a nation which God, by a mighty hand and outstretched arm, had delivered from the yoke of oppression and had blessed with the light and privileges of the Gospel. *Surely the national Constitution of such a people should have impressed upon its forehead*, a distinct acknowledgment of the God of the whole earth; an unequivocal testimony to all

> people that we are a Christian nation, who own subjection to Him to whom "all power in heaven and earth is given"—"the Prince of the kings of the earth."[49]

Fortunately, Pressly's Lord is not impressed on the Constitution's forehead. It didn't even make it to the document's vestigial tail.

V. CONCLUSION

The Kentucky Legislature found other examples to support dating its official business in the "Year of our Lord." The resolution included eleven "whereas" clauses, justifications that are highly selective. For instance, the fourth "whereas" in the resolution points out that "Kentucky's 1891 Constitution was dated in the Year of our Lord" but neglects to mention that Kentucky's 1792 Constitution and 1799 Constitution did not use the phrase.

The resolution cites an obscure government document—written permission for a ship named the *Herschel* to proceed to the Port of London—that Thomas Jefferson signed but which has no legal or historical relevance, instead of the Declaration of Independence, which does not use the "Year of our Lord" dating convention, or the "Jefferson Bible," a bible from which Jefferson excised with a razor every mention of Jesus as a divine lord and savior. Jefferson actually refused to issue religious proclamations because "the government of the U.S. as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. . . . Certainly no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the general government."[50]

Four of the resolution's eleven supporting examples date from before there was a federal Constitution—in other words, before there was a separation of state and church. The final "whereas" cites Governor Bevin's 2017 "Year of the Bible" proclamation.

Kentucky's resolution was ill conceived, poorly researched, and intended to promote Christianity. The Kentucky legislature was attempting to instill religious

---

49. John T. Pressly, "Address of the Committee appointed by the Convention composed of representatives from the different churches which met to confer in relation to certain proposed amendments to the National Constitution." From *The Evangelical Repository and United Presbyterian Review* (William Young printers, Philadelphia, June 1863) (Old Series Vol. XL; New Series Vol. II, pp 452–54) (emphasis added).

50. Thomas Jefferson, letter to Rev. Samuel Miller, January 23, 1808, available at http://press-pubs.uchicago.edu/founders/documents/amendI_religions60.html.

significance into a phrase that, in the eyes of our Framers, had none and to rewrite history in a way that is more pleasing to their personal beliefs.

The available evidence as to how "Year of our Lord" was appended to the Constitution undercuts any legal, historical, or religious significance the phrase "Year of our Lord" might add to the U.S. Constitution. The phrase certainly does not prove or evidence an intent to found a "Christian nation." Pious politicians ought to stop claiming otherwise and legislators should avoid citing this as evidentiary support for promoting their personal religion.

REFERENCES

Amar, Akhil Reed. 2012. *America's Unwritten Constitution: The Precedents and Principles We Live By*. New York: Basic Books.

_____. 2016. *The Constitution Today: Timeless Lessons for the Issues of Our Era*. New York: Basic Books.

Bain, Henry. 2012. "Errors in the Constitution." *Prologue Magazine*. https://www.archives.gov/publications/prologue/2012/fall/const-errors.html

Barton, David. 2011. "America Distinctly Christian." In *Christian America? Perspectives on Our Religious Heritage*, ed. Daryl C. Cornett. Nashville, TN: B & H Publishing Group.

Bloom, Sol, ed. 1946. *History of the Formation of the Union under the Constitution with Liberty Documents and Report of the Commission*. Washington, DC: U.S. Government Printing Office.

Brammer, Jack. 2016. "Bevin Declares 2017 the 'Year of the Bible' in Kentucky." *Lexington Herald Leader.* http://www.kentucky.com/news/politics-government/article122292969.html.

_____. 2017. "Lawmakers Want Their Documents Dated with "in the Year of Our Lord." *Lexington Herald Leader*. http://www.kentucky.com/news.politics-government/article144130479.html.

Carr, William George. 1990. *The Oldest Delegate: Franklin in the Constitutional Convention*. Newark: University of Delaware Press.

Dreisbach, Daniel. 1996. "In Search of a Christian Commonwealth: An Examination of Selected Nineteenth Century Commentaries on References to God and the Christian Religion in the United States Constitution." *Baylor Law Review* 48: 927–1000.

Farrand, Max, ed. 1911a. *The Records of the Federal Convention of 1787*. Vol. 1. New Haven, CT: Yale University Press.

_____. 1911b. *The Records of the Federal Convention of 1787*. Vol. 2. New Haven, CT: Yale University Press.

_____. 1911c. *The Records of the Federal Convention of 1787*. Vol. 3. New Haven, CT: Yale University Press.

Fitzpatrick, John. 1946. "The Man Who Engrossed the Constitution." In *History of the Formation of the Union under the Constitution with Liberty Documents and Report of the Commission*, ed. Sol Bloom. Washington, DC: U.S. Government Printing Office.

Hutson, James H. 2007. *Church and State in America: The First Two Centuries*. New York: Cambridge University Press.

Jefferson, Thomas. 1983. *Jefferson's Extracts from the Gospels: The Philosophy of Jesus and the Life and Morals of Jesus*, ed. Dickinson W. Adams. Princeton, NJ: Princeton University Press.

Kennedy, D. James. 2005. *What if America Were a Christian Nation Again?* Nashville, TN: Thomas Nelson.

Kramnick, Isaac, and R. Laurence Moore. 1996. *The Godless Constitution: A Moral Defense of the Secular State*. New York: W.W. Norton & Co.

Madison, James. 1900. *The Writings of James Madison, Comprising His Pubic Papers and His Private Correspondence*, ed. Gaillard Hunt. New York: G.P. Putnam's Sons.

McDowell, Stephen. 2005. *America a Christian Nation?* Charlottesville, VA: Providence Foundation.

Meyerson, Michael. 2012. *Endowed by Our Creator: The Birth of Religious Freedom in America*. New Haven, CT: Yale University Press.

Myers, Denys P. 1961. "History of the Printed Archetype of the Constitution of the United States of America." In *The Constitution of the United States of America*. Senate Document No. 49, 87th Congress, 1st Session.

Pilcher, James. 2016. "State Will Not Appeal Federal Court Ruling Allowing Ark Tax Credits." *Cincinnati.com*. https://www.cincinnati.com/story/news/politics/kentucky%20government/2016/01/27/state-not-appeal-federal-court-ruling-allowing-ark-tax-credits/79429384.

Plotnik, Arthur. 1987. *The Man Behind the Quill, Calligrapher of the United States Constitution*. Washington, DC: National Archives and Records Administration.

Sayers, Justin, Phillip M. Bailey, and Thomas Novelly. 2017. "Gov. Matt Bevin's Solution to Violence: West End Prayer Patrols." *The Courier-Journal*. https://www.courier-journal.com/story/news/crime/2017/06/01/gov-matt-bevin-meet-religious-leaders-family-members-murder-victims-thursday/360136001.

Zamorano, Carlos. 2010. *God Bless America: Foundation for Greatness*. Bloomington, IN: Xlibris Corporation.