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Secularizing a Religious Legal System: Ecclesiastical Jurisdiction in Early Eighteenth Century England

Troy L. Harris*

ABSTRACT

The early eighteenth-century English ecclesiastical courts are a case study in the secularization of a legal system. As demonstrated elsewhere, the courts were very busy. And yet the theoretical justification for their jurisdiction was very much a matter of debate throughout the period, with divine-right and voluntaristic conceptions vying for precedence. Placed in this context, the King's Bench decision in Middleton v Crofts (1736) represented an important step in the direction of limiting the reach of ecclesiastical jurisdiction, and did so on grounds that undermined divine-right justifications of the ecclesiastical court system as a whole.

KEYWORDS

Secularization, Eighteenth Century, Ecclesiastical Courts, Middleton v Crofts, Canon Law

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* Associate Professor of Law, University of Detroit Mercy School of Law. J.D. (Michigan); Ph.D. (Chicago).

I. Introduction

Explaining how religion goes from a significant and explicit force in public life to an essentially private affair is a complicated business. Political historians of early modern England divide into two camps on the matter. Until comparatively recently, the conventional answer was that religion ceased to be a significant force in public life after the Revolution of 1688.[1] Since the mid-1980s, a "revisionist" narrative has developed that places the date at 1750 or beyond.[2] Thus, the role of religion in early eighteenth century English life is a hotly debated topic among historians of the period. This article contributes to that debate. Specifically, it examines a range of contemporary printed sources showing that the constitutional position of the courts of the Church of England remained a divisive subject throughout the mid-1730s at least. At one level, the article represents a companion piece to earlier work quantifying the significant volume of litigation the church courts were handling during the period.[3] The fact that the ecclesiastical courts were as busy as they were throughout the country meant that the theoretical debate about whether they should exist at all had a very practical dimension. At another level, the article contributes to the historiographical debate noted above in a moderately revisionist direction. Finally, at the broader level suggested in the title, it provides a case study of one step in the secularization of a religious legal system.

What did the step toward secularization look like in 1730s England, and how did it happen? Three points emerge from the evidence surveyed here. First, as sketched in Section II, incompatible visions of religious authority in general and the legitimacy of the English ecclesiastical courts were publicly debated well before the 1730s. Second, as shown by the survey of printed literature in Section III, there was widespread support for voluntaristic and divine-right visions. Third, as explained in Section IV, a watershed moment occurred in 1736 when the King's Bench held, in *Middleton v. Crofts*, that the Church's canons of 1603 were not, by their own force, binding upon lay people in England. While defenders of the Church's courts may have had history on their side, the reformers had the politics of the moment on theirs. The decision was a victory for the newer, voluntaristic understanding of religious institutions over the older, divine right understanding. Viewed in that way, the decision represented a significant step in the secularization of English society.

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1 *See*, *e.g.*, David L. Keir, The Constitutional History of Modern Britain Since 1485, at 427 (D. Van Nostrand Co. 8th ed. 1966) ("As the sway of Latitudinarian ideas extended, questions of ecclesiastical organization and independence came to excite little interest among the clergy.").

2 *See*, *e.g.*, J.C.D. Clark, English Society, 1660–1832: Religion, Ideology and Politics During the Ancien Regime (2d ed. 2000); The Church of England, c. 1689–c. 1833: From Toleration to Tractarianism (John Walsh et al. eds., 1993).

3 *See* Troy L. Harris, *The Work of the Ecclesiastical Courts, 1725-1745*, *in*, Studies in Canon Law and Common Law in Honor of R.H. Helmholz (Troy L. Harris ed., 2015).

II. Background to the Debate over the Constitutional Position of the Eighteenth Century Church of England

As in earlier periods of political change, the proper jurisdictional boundaries between Church and State were very much a subject of discussion at the constitutional level in early eighteenth century England. The bloodless ouster of the Roman Catholic monarch James II and in favor of the Protestants William and Mary (dubbed "The Glorious Revolution" by later Whig historians) forced people to rethink the conceptual bases for many of the Church's institutions, including the ecclesiastical court system. Why this should have been so is not difficult to understand. If the Lord's anointed was not secure on his throne, was the one anointing any more secure on his? Stated in more traditional theological terms, was the government of the Church of divine or human establishment? The Act of Union of 1707 created one British state in which there were two established religions, the episcopalian Church of England in South Britain and the presbyterian Church of Scotland in North Britain, officially putting an end to hopes of one kingdom professing one official religion. If episcopal government were of divine origin, then why give up the fight to bring the Church of Scotland into line? If the Church of England's government were of merely human origin, then why did the Church possess powers not enjoyed by other voluntary associations? For example, by what right did the ecclesiastical court system exist, and by what right did it enforce against lay people the canons of 1603, to which Parliament had not assented? Although such ecclesiological questions had long been the staple of debates between Churchmen and dissenters, such questions now divided the Church of England bishops themselves. The nature and legitimate extent of ecclesiastical jurisdiction was therefore an important battleground in the struggle to define the constitutional position of the Church after 1688.

The starting point for understanding the constitutional role of the Church of England in the eighteenth century is the Act of Union of 1707 uniting the Kingdoms of England and Scotland. The essence of the eighteenth century British constitution, according to Blackstone, consisted in the sovereignty of Parliament.[4] However, Parliament's jurisdiction had a practical, if not theoretical, limit:

> Upon these articles, and act of union, it is to be observed, 1. That the two kingdoms are now so inseparably united, that nothing can ever disunite them again, but an infringement of those points which, when they were separate and independent nations, it was mutually stipulated should be "fundamental and essential conditions of the union." 2. That whatever else may be deemed "fundamental and essential conditions," the preservation of the two churches, of England and Scotland, in the same state that they were in at the time of the union, and the maintenance of the acts of uniformity which establish our common prayer, are expressly declared so to be. 3. That therefore any alteration in the constitutions of either of those churches, or in the liturgy of the church of England, would be an infringement of these "fundamental and essential conditions," and greatly endanger the union.[5]

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4 1 William Blackstone, Commentaries *142-43.

5 *Id.* at *97-98. To the same effect is Andrew MacDowall Bankton, 1 An Institute of the Laws of Scotland 22 (Stair Soc'y 1993) (1751); 2 *id.* at 453 (Stair Soc'y 1993) (1752).

Historians have largely ignored or minimized the role of the Church of England and controversy surrounding its courts in their accounts of the eighteenth century British constitution.[6] But if "the constitutions of either of those churches" could only be altered at the risk of destroying the union as Blackstone maintained, then it is little wonder that attempts to tinker with any fundamental feature of the Church of England, such as its court system, should be the subject of vigorous debate. One could view Blackstone's statements regarding the constitutional position of the Church of England as simply lip service to the text of the Act of Union. Alternatively, one could read Blackstone as alluding to deeply-felt religious sentiment. But both readings risk obscuring the elephant in the room, namely, the latent tension between Parliamentary sovereignty and the constitution of the Church of England as it existed in 1707.

The latent tension between Parliamentary sovereignty (premised upon a voluntaristic theory of government) and divine right episcopacy became patent in the Bangorian Controversy. Sir Leslie Stephen described the Bangorian Controversy as "one of the most intricate tangles of fruitless logomachy in the language."[7] Given this daunting assessment, it is no surprise that few historians have ventured into that particular theological thicket. Nor shall I rush in where others have feared to tread, except to show that the Bangorian Controversy was not simply a fight about words, it was also a fight about the ecclesiastical courts.

According to the conventional historiographical treatment of the Bangorian Controversy, it was an argument over the nature of the institutional Church, in which Benjamin Hoadly, then bishop of Bangor, challenged the legitimacy of divine right theories of episcopacy, arguing instead that the Church was a merely voluntary association.[8] His effort to extend Lockean contractarian theory to the Church was attacked by a coalition of nonjurors (*i.e.*, those unwilling to swear allegiance to the Hanoverian monarchs) and High Churchmen including William Law, Thomas Sherlock, and Andrew Snape. In the end, the passions ignited were so intense that Convocation (the Church's version of Parliament) had to be prorogued, thereby bringing the combatants in the Bangorian Controversy to an uneasy truce,[9] without resolving the points at issue. Historians have tended to treat the Bangorian Controversy as revolving around the abstract themes of Church "government" and "discipline." But those abstract themes were embodied in concrete ways, namely, the ecclesiastical courts. Indeed, the principal combatants in the Bangorian Controversy were well aware that their ideas had consequences for the Church's courts.

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6 *See*, *e.g.*, Albert V. Dicey & Robert S. Rait, Thoughts on the Union Between England and Scotland (Macmillan & Co. 1920); 10 William S. Holdsworth, A History of English Law 41-42, 241, 423-24 (6th ed. 1938); 11 William S. Holdsworth, A History of English Law 4-21 (6th ed. 1938); Keir, *supra* note 2, at 427; Frederick W. Maitland, The Constitutional History of England: A Course of Lectures 332 (Cambridge Univ. Press 1950); Norman Sykes, From Sheldon to Secker: Aspects of English Church History, 1660-1768 (Cambridge Univ. Press 1959).

7 Leslie Stephen, 2 History of English Thought in the Eighteenth Century 156 (Peter Smith 3d ed. 1949) (1876).

8 *Id.* at 157-60; *see also* Henry D. Rack, *"Christ's Kingdom Not of This World:" The Case of Benjamin Hoadly Versus William Law Reconsidered*, *in* Studies in Church History 275-91 (Derek Baker ed., 1975); Norman Sykes, Church and State in England in the XVIIIth Century 292-93 (Cambridge Univ. Press 1934).

9 Sykes, *supra* note 7, at 53.

The title of Hoadly's sermon ("The Nature of the Kingdom, or Church, of Christ") pointed to the fundamental premise of Hoadly's argument: the Church was nothing more nor less than the Kingdom of Christ, which, as Christ told Pilate, was not of this world.[10] Because Christ was the sovereign law-giver in the Church, human attempts to add to or detract from the laws Christ gave were attempts to erect an *imperium in imperio* in Christ's kingdom: "it evidently destroys the rule and authority of Jesus Christ, as King, to set up any other authority in his Kingdom."[11] The laws Christ gave were, according to Hoadly, entirely concerned with enabling the Christian to attain everlasting happiness in the next life, the granting or withholding of which was the only reward or punishment contemplated by Christ's law: "They are declarations of those conditions to be performed, in this world, on our part, without which God will not make us happy in that to come."[12] In case the implications of this argument were not clear enough already, Hoadly specifically described what situation was incompatible with his view of the Church:

> If any men upon earth have a right to add to the sanctions of his law; that is, to increase the number, or alter the nature, of the rewards and punishments of his subjects, in matters of conscience, or salvation: they are so far from kings in his stead; and reign in their own kingdom, and not in his. *So it is, whenever they erect tribunals, and exercise a judgment over the consciences of men; and assume to themselves the determination of such points, as cannot be determined, but by one who knows the hearts; or, when they make any of their own declarations, or decisions, to concern and affect the state of Christ's subjects, with regard to the favor of God: this is so far, the taking Christ's Kingdom out of his hands and placing it in their own.*[13]

Needless to say, there was not much room in this view of the Church for ecclesiastical courts judging the internal forum, nor their ultimate weapon, excommunication.

Although Hoadly ostensibly aimed his attack at the nonjurors' theory of the Church as a divinely-ordained institution, his denial of the powers claimed by Church of England clearly implicated the ecclesiology of High Church Tories and Whigs as well. Drawing out the antinomian implications of Hoadly's position, Sherlock claimed that Hoadly's heresy was dangerous to civil as well as religious society, arguing that Hoadly had sapped the foundations of the moral law and, therefore, the basis upon which magistrates of all sorts ensured the existence of moral society.[14] Like Sherlock, Snape engaged in a *reductio ad absurdum* attack upon Hoadly's position. If Hoadly's principles were carried to their logical conclusion, Snape argued, then:

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10 *John* 18:36.

11 Benjamin Hoadly, The Nature of the Kingdom, or Church, of Christ 28 (London, James Knapton & Timothy Childe 1717).

12 *Id.* at 17.

13 *Id.* at 14 (emphasis added).

14 Thomas Sherlock, Some Considerations Occasioned by a Postscript from the Lord Bishop of Bangor to the Dean of Chichester, Offered to His Lordship (London, John Pemberton 1718).

> [A]ll articles and creeds are destroyed at once, which were settled by men so assembled [i.e. "by legal authority, in due subordination to the civil magistrate"]. All acts of general councils were void and null from the beginning. Nay, even the decrees of the council at Jerusalem, held by the Apostles themselves, were never of any force; they sat there as usurpers, they never had a right to make any laws, which belongs solely and peculiarly to their King Christ Jesus. All, without exception, who have ever gathered themselves together in a synodical meeting, to join in the framing such canons, rules or ordinances, as have been thought proper to oblige others to a unity of profession, are, in your Lordship's notion, no better than invaders of Christ's Kingdoms, erectors of an illegal tribunal, and exercisers of an authority, that was never committed to them.
>
> Upon these principles, I do not see how your Lordship can offer to take your place in the provincial synod: how you can require subscriptions or declaration of those whom you ordain, or exercise almost any act of episcopal jurisdiction.[15]

In short, Snape implied, it was self-defeating for Hoadly to seize upon Christ's statement to Pilate because, on Hoadly's own terms, the council that decided to include the Gospel of John in the canon had no legitimate rule-making power. More to the point, Snape defended the legitimacy of "episcopal jurisdiction" as such, including the right to participate in making canons "to oblige others to a unity of profession."

A similar point in defense of the Church's coercive power was made by the nonjuror William Law. In his refutation of Hoadly's view that the Church's sentence of excommunication carried no weight with God, Law argued that

> the power of excommunication, is a judicial power, which belongs to particular persons which they have a right to exercise from the authority of Christ; and that persons so excommunicated are not to be looked upon [as Hoadly argued], as persons who are only to be abhorred and avoided by Christians, as any man may avoid those he dislikes, but as persons who are to be avoided by Christians, because they lie under the sentence of God, and are by his authority turned out of his Kingdom.[16]

Thus, Law rejected Hoadly's notion of the Church as a voluntary association and, with it, the idea that excommunication was an illegitimate, human invention. Quite the contrary, Law argued, the coercive authority of the Church was directly from God.

Although the Bangorian Controversy is generally taken to have died down as quickly as it erupted, such was not the case. To the contrary, one of the central themes of the Bangorian Controversy, the legitimacy of ecclesiastical jurisdiction,

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15 Andrew Snape, A Letter to the Bishop of Bangor, Occasioned by His Lordship's Sermon Preach'd Before the King at St. James's, March 31st, 1717, at 35-36 (London, Jonah Bowyer 1717).

16 William Law, Three Letters to the Bishop of Bangor 112 (London, W. Innys and J. Richardson 9th ed. 1753).

continued to be debated, albeit in different contexts, well after the prorogation of Convocation in 1717.

III. The Debate over Ecclesiastical Jurisdiction in the 1730s

There was widespread support for both the voluntaristic and divine-right view of ecclesiastical authority, and the legitimacy of the ecclesiastical courts was an important aspect of the debate in the 1730s over "Church power."[17] Much of the fight over the ecclesiastical courts was, no doubt, inspired by the rise of the courts' chief defender, Edmund Gibson, Bishop of London, as Prime Minister Sir Robert Walpole's ecclesiastical minister. But while one might have expected Gibson's enemies to attack his support of the ecclesiastical courts, it is rather more surprising to discover that the attacks were couched in terms drawn, more or less explicitly, from the Bangorian Controversy. This Section surveys a variety of printed sources in which the debate played out: bishops' visitation charges, treatises on English canon law, and pamphlets supporting or attacking Parliamentary proposals to reform the ecclesiastical courts.

A. Visitation Charges

One way in which political debates of the day were carried on outside London was through sermons, often printed for consumption by a wider audience than those present in person. What the assize sermon was to the assizes, the visitation charge was to the ecclesiastical courts. Not surprisingly, therefore, the visitation charge was often the occasion for clergy to reflect upon the nature of the post-Revolutionary Church and the place of the ecclesiastical courts in it. Bishops' and archdeacons' visitation charges to the clergy under their jurisdiction are of particular interest in this regard because the visitation was the occasion upon which the disciplinary jurisdiction of the ecclesiastical courts was exercised. Indeed, it is probably no coincidence that some of the most thorough defenses of the Church's government were published as visitation charges.[18] Those opposed to the Church's coercive

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[17] Clark, *supra* note 3, at 348-61; Norman Sykes, Edmund Gibson, Bishop of London, 1669-1748: A Study in Politics & Religion in the Eighteenth Century 150-51 (1926).

[18] For example, Edmund Gibson used a visitation charge to attack Matthew Tindal's *Christianity as Old as the Creation* because Tindal attempted to ground the moral law entirely upon unaided reason. *See* Edmund Gibson, The Charge of Edmund, Lord Bishop of London, to the Clergy of his Diocese; in His Visitation Begun in the Cathedral Church of St. Paul, the 28th Day of May, 1730. Concerning the Proper Methods of Opposing and Defeating the Present Attempts of Infidels Against the Christian Religion. (London, Sam Buckley 1731). Between 1717 and 1726, Roger Altham, Archdeacon of Middlesex published eight different charges to the clergy of his archdeaconry explicitly directed against the Hoadlyite vision of the Church, while his successor in that office, Daniel Waterland, regularly employed his visitation charges to Hoadly's views on the Trinity and the Lord's Supper. *See, e.g.*, Roger Altham, The Harmony of the Sacred and Civil Polity: Or, The Sovereignty of Jesus Christ no Injury to the Civil Power: A Third Charge Delivered to the Clergy of the Archdeaconry of Middlesex (London, G. Strahan 1719); Roger Altham, Church Authority Not an Universal

jurisdiction did not, on that account, refrain entirely from publishing visitation charges, but they generally stressed only the obligations voluntarily assumed by the clergy. After briefly explaining what visitations entailed, this section examines several visitation charges in detail.

Bishops were expected to visit their dioceses in the first year after their enthronement (the "primary visitation") and every third year thereafter (the "triennial visitation"), archdeacons conducting visitations in the years in which there were no episcopal visitations.[19] A "visitation" connoted something more specific than mere physical presence, however: "But a visitation, as we would use the word here, implies some act of jurisdiction and coercive authority and generally speaking has a cognizance of causes annexed to it."[20] Thus, visitations were primarily conceived of as judicial events in which coercive jurisdiction was exercised; as a result, the frequency with which bishops and archdeacons held visitations would seem to be one way of gauging beliefs about the legitimacy of ecclesiastical jurisdiction. In practice, however, the conduct of visitations was complicated by a variety of factors,[21] and just how faithful the eighteenth century episcopate was in fulfilling the expectation of triennial visitations is a matter of some debate.[22] However that may be, the printed visitation charges reveal two very different accounts of and justifications for the Church's coercive jurisdiction. Whereas High Churchmen tended to rely upon the traditional argument that the canon law received its legitimacy through ancient usage and confirmation by Convocation, Low Churchmen argued that only those laws to which individual clergymen had necessarily given their assent were binding.[23]

1. High Church Visitation Charges

Because the chief object of the visitation was the inspection of persons and things subject to ecclesiastical jurisdiction, the role of the ecclesiastical courts in the discipline and government of the Church was a recurring theme in visitation

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Supremacy: A Fourth Charge Delivered to the Clergy of the Archdeaconry of Middlesex (London, G. Strahan 1720); Daniel Waterland, The Sacramental Part of the Eucharist Explained in a Charge delivered in Part to the Clergy of Middlesex at the Easter Visitation, 1739 (London, Innys & Manby 1739).

19 *See Canon 60*, *in* Synodalia 281 (Edward Cardwell ed., Oxford, Oxford Univ. Press 1842).

20 John Ayliffe, *Of Visitations Provincial, Episcopal, &c.*, *in* Parergon Juris Canonici Anglicani 514 (London, 1726).

21 Sykes, *supra* note 9, at ch. 3.

22 Viviane Barrie-Curien, *The Clergy in the Diocese of London in the Eighteenth Century*, *in*, The Church of England, *supra* note 3, at 86; Jeremy Gregory, *The Eighteenth-Century Reformation: The Pastoral Task of Anglican Clergy After 1689*, *in*, The Church of England, *supra* note 3, at 67; Mark Smith, *The Reception of Richard Podmore: Anglicanism in Saddleworth, 1700-1830*, *in*, The Church of England, *supra* note 3, at 110; Sykes, *supra* note 9, at ch. 3.

23 To be sure, the distinction between "High" and "Low" is not a hard-and-fast one. I use the terms simply to designate two different ways of thinking about ecclesiastical jurisdiction. "High Churchmen" (equivalent modern terms would be "right-leaning," "conservative," or "traditional" Churchmen) were generally sympathetic to divine-right theories of ecclesiastical authority. "Low Churchmen" (whose counterparts today would be styled "left-leaning," "liberals" or "progressives"), on the other hand, viewed the Church as essentially human in origin and thus like other voluntary associations of people.

charges, particularly among High Churchmen such as Edmund Gibson and Richard Smalbroke. Indeed, Gibson devoted a great deal of attention to the subject of visitations early in his career, while Archdeacon of Surrey. A collection of Gibson's early writings on the subject published in 1717 contains themes that ran through many visitation charges.[24] In discussing archdeacons' supervision of parish church fabric, Gibson recommended proceeding informally at first:

> In laying out the several steps and methods to be taken in a parochial visitation, I have pursued the course which I conceive to be strictly legal; by a citation in form, and by the attendance of register and apparitor, as well to make due proof of the citation, as to render the admonition for repairs a proper foundation for proceeding directly to ecclesiastical censures, in case they are disobeyed. But I have found by experience, that it is in many respects much more for the ease and convenience of archdeacons, and not less for the benefit of the Church, to proceed in that work unattended by officers, at least for the first time: and if it shall appear, that the directions which the archdeacon gives for repairs, in his own person and upon his own view, are disregarded (as they very rarely will be,) then may he have recourse to the other more solemn and judicial way.[25]

Other bishops, too, used their visitation charges to encourage discriminating use of the Church's courts. Under Canon 109, the primary responsibility for initiating proceedings in the ecclesiastical courts for morals offenses within the parish lay with the churchwardens. In addition, however, the clergy themselves were authorized to present such offenders, under Canon 113. Richard Reynolds, Bishop of Lincoln, saw in this dual responsibility an opportunity to reform the manners of the people, although, like Gibson, Reynolds stressed the use of the ecclesiastical courts only as a last resort.[26]

Nor did Gibson shrink from suggesting how his clergy could make use of the ecclesiastical courts:

> Two vices I will name in particular, which are more common and more daring than the rest, drunkenness and swearing: But notwithstanding they are so very common, and that the Canon concerning presentments makes express mention of those two by name, yet I believe they are seldom found among the crimes presented: For what reason I cannot conceive, unless it be, that the laws of the state have appointed temporal penalties for them. But as there is nothing in those laws that has taken away the authority of the Church, so is there no cause why the exercise of that authority in these particulars should be discontinued; at least, till we see the temporal laws executed with greater zeal and better effect.[27]

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24 Edmund Gibson, Of Visitations Parochial and General (London, B. Barker & C. King 1717).

25 *Id.* at iv-v.

26 Richard Reynolds, The Bishop of Lincoln's Charge to the Clergy of the Archdeaconries of Huntington, Bucks, and Bedford 5-6 (John Wyat 1727).

27 Edmund Gibson, Directions Given to the Clergy of the Diocese of London, in the Year 1724, at 39 (London, Edward Owen 1744).

Visitation charges also frequently touched upon the importance of the payment of ecclesiastical revenues, particularly tithes. Gibson, for example, was concerned that clergy would allow themselves to be deprived of the ecclesiastical revenues that were their due, to their own prejudice and to the prejudice of their successors.[28] Similarly, Richard Smalbroke, while Bishop of St. David's, warned his clergy to be on their guard against spurious claims to a partial or total exemption from the payment of tithes (i.e. a *modus*).[29] The reasons offered for this advice suggest that bitter experience might have been Bishop Smalbroke's tutor in Clergymen's Law:

> This is a piece of prudence that would be extremely advantageous to the interests of the ecclesiastical body in general, of which every minister is a trustee as well as a member. And indeed, till this method be practiced more universally, every successor in a parochial cure is unavoidably in a state of ignorance for several years, and liable to be imposed on by those that are ready to make use of so inviting an opportunity; who, though very ignorant in other respects, are often very knowing in those affairs, within the narrow limits of their own parish, to which they have been bred and have confined their thoughts. Affairs, in which clergymen have been little instructed, and therefore come into an active state of life raw and unskillful in secular business, and that more especially from the retirements of the university. And if the impositions upon almost every clergyman during the first years of his incumbency on a parochial cure were duly computed, the benefit of the method now recommended would appear in a much clearer light.[30]

The efficacy of the ecclesiastical courts as an instrument of Church government was subject to practical limitations, however. Because the Toleration Act meant that Trinitarian Protestants were no longer obliged to worship in the Church of England, a too-ready use of the courts, for example to enforce payment of tithes, could backfire, as John Dudley, Archdeacon of Bedford, pointed out:

> If we betake ourselves to methods which the laws direct in vindication of our rights or injured characters, 'tis no unusual thing for the more obstinate and illiterate sort immediately to turn their backs upon the Church to desert and forsake its worship and communion. The next step is to shelter themselves in a conventicle, and by this means they imagine, they shall fully avenge themselves upon their own pastor, by running into the embraces of such as are industrious to promote separation from the Church, to foment and encourage divisions and schisms.[31]

In sum, many bishops and archdeacons used their visitations as opportunities to recommend the use of the Church's judicial machinery to carry out the twin goals

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28 *Id.* at 70-71.

29 Richard Smalbroke, The Charge of the Right Reverend, Richard, Lord Bishop of St. David's 33-34 (London, John Wyat 1726).

30 *Id.* at 34-35.

31 John Dudley, A Charge to the Clergy Within the Archdeaconry of Bedford 29 (London, 1736).

of inspection of persons and things. Significantly, the authority of the courts and canon law was not so much defended as assumed. The case was very different with other bishops and archdeacons, however.

2. Low Church Visitation Charges

One might expect Low Churchmen such as Hoadly to ignore or denounce the ecclesiastical courts in their visitation charges. In fact, however, their approach was rather more subtle. When Low Churchmen visited their jurisdictions at all, they tended to stress their view of the Church as a voluntary association, admitting the obligation of only those laws to which clergymen had explicitly assented. Hoadly, for example, plainly implied that, apart from the Act of Uniformity (which bound laity and clergy alike), clergymen were obliged to obey the law of the Church only insofar as they had voluntarily engaged to do so.[32]

A similar tack was taken by Thomas Sharp, Archdeacon of Northumberland. In his visitation charge of 1731 on the "Different Degrees of Obligation to the Ecclesiastical Laws," Sharp virtually rejected the authority of any laws to which individual clergy had not explicitly consented.[33] According to Sharp, the clergy's explicit agreement to observe the rubrics of the Prayer Book made that obligation of the highest order.[34] With respect to the rest of the ecclesiastical laws of England, however, Sharp treated them and the courts in which they were applied as virtually foreign to the concerns of the clergy:

> I apprehend we may look upon ourselves as discharged from all such [laws] as are by length of time, and through desuetude, antiquated and grown obsolete, though they were never actually repealed by any proper authority. . . . Of this sort are the provincial and legatine constitutions. . . . I should indeed except the spiritual courts. I do not know what weight the old constitutions may have in them. To those who study the canon law they may be perhaps of great service; but with respect to the parochial clergy, whose obligations I am now considering to conform themselves to the canon laws, these old constitutions seem to have lost their force and credit; and serve at present like old coins, rather for matter of curiosity or criticism, than for immediate use.[35]

The canons of 1603 stood midway between the Prayer Book and the "old constitutions," in point of obligation. However, even many of these, Sharp contended, were impracticable, and the clergy were not bound by such if they could claim an express or tacit dispensation from their observance.[36]

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32 Benjamin Hoadly, A Charge Delivered to the Clergy, At the Primary Visitation of the Diocese of Sarum, in the year MDCCXXVI, at 14 (London, James & John Knapton 1726).

33 Thomas Sharp, The Rubric in the Book of Common Prayer and the Canons of the Church of England 5 (London, J. & P. Knapton 1753).

34 *Id.* at 6.

35 *Id.* at 9-10.

36 *Id.* at 11-14.

That Low Churchmen saw visitation charges as a natural opportunity for reiterating their antipathy toward theories of divine-right episcopacy is shown with particular clarity in the 1731 charge of William Bowman, vicar of Dewsbury. In arguing that the clergy claimed powers they did not rightfully possess, Bowman echoed Hoadly's argument in the Bangorian Controversy that the existence in England of a Church with temporal authority created an *imperium in imperio*. He pointed to two powers in particular, the power to make laws for the Church and the power to excommunicate offending members. With respect to the first power, Bowman virtually quoted Hoadly, arguing that,

> If indeed the clergy of any nation have a power of making laws and canons independent of the civil powers, if they can assemble together in Convocation, when and where they think proper, to inquire into offenses and regulate the Church, they are so far from being subjects, that they are really the presidents and princes of the earth; kings of temporal kings, to whom all mankind are subjects. If they can do this, what should hinder them from unthroning majesty? What should hinder them from making laws contrary to laws, and overturning nations at pleasure?[37]

With respect to the power of excommunication, Bowman likewise endorsed Hoadly's position:

> By authoritative absolution and excommunication, the clergy sometimes mean an absolute power of admitting into, or excluding from, the kingdom of heaven, whom they think proper; at other times a power of admitting them into, or excluding them from their society upon earth, in a judicial way.
>
> In the later case, I have showed before they have no authority, but what they derive from the civil power; as it appears likewise from the procedure of all our ecclesiastical courts.[38]

To the contrary, Bowman argued, the power of excluding people from heaven belonged to God alone.[39] In this 1731 charge, therefore, one can see not only the continuation of the Bangorian Controversy into the 1730s but also its continuation in a context particularly related to the exercise of ecclesiastical jurisdiction, an archdeacon's visitation.

One wag published a versification of Bowman's sermon, in which the foregoing passage concerning Convocation's power of enacting canons was rendered thusly:

> Fine times indeed, were priests permitted
> To make what acts and laws best fitted
> Their int'rest or their inclination,

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37 William Bowman, The Traditions of the Clergy Destructive of Religion: With an Enquiry Into the Grounds and Reasons of Such Traditions 21-22 (London, Stephen Austen 1731).

38 *Id.* at 23.

39 *Id.* at 23-25.

> Without leave of the heads o' th' nation,
> In Convocation meet, debate,
> And what they pleas'd to regulate!
> For thus o'er princes they'd be Kings,
> And crowns and scepters useless things.
> This once allow'd, the rogues would soon
> Kick all their princes from the throne:
> Laws against laws they wou'd enact,
> And ev'ry nation be ransacked:
> All Kingdoms be turn'd topside turvy,
> To gratify their humour scurvy.[40]

Bowman's observations regarding excommunication received similarly witty treatment:

> Authoritative absolution
> Is ev'ry way a gross delusion;
> A saucy impudent pretension,
> An insolent high Church invention.
> Sometimes this term in clergy hands
> For pow'r without all limits stands,
> Of shutting out of, or admitting
> Such men to heav'n as they think fitting:
> It signifies, at other times,
> A pow'r, for some enourmous crimes,
> To vote men in the Church communion,
> Or seperated [sic] from its union.
> In one sense I've already shewn,
> Our bold pretenders pow'r have none,
> But what they from the state receive,
> Which pow'rs of every sort must give.
> No argument like matter of fact is;
> Remember therefore what's the practice
> O' th' courts ecclesiastical,
> Since popery receiv'd its fall;
> Then every word, I've utter'd here,
> True as the Gospel will appear.[41]

Not everyone was so sanguine about the import of Bowman's sermon, however. One anonymous author responded that the Church's authority over its members was entire, notwithstanding the legislative supremacy of Parliament.[42] Had Bowman responded to this argument, he might have pointed out that, even if all authority came from God, the question of who had authority to decide between conflicting claims of "ecclesiastical" and "civil" society remained.

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40 Christopher Crambo, Mr. Bowman's Sermon, preach'd at Wakefield in Yorkshire Versify'd 25 (London, H. Cook 1731).

41 *Id.* at 27.

42 Remarks on a Pamphlet Intitled, The Traditions of the Clergy Destructive of Religion, &c. 27-28 (London, J. Wilford 1731).

B. English Canon Law Texts

Visitation charges were not the only form of practical literature that implicated the constitutional position of the Church and its courts. A characteristic feature of eighteenth century legal literature in general and the literature of the canon law in particular was its use of historical evidence to lend legitimacy to a particular political viewpoint. This section takes a close look at the work of two of the most important practitioners of the craft, Edmund Gibson and John Ayliffe.

By the early eighteenth century there were numerous specialized treatises on aspects of ecclesiastical jurisdiction which often had a clear polemical element. For example, William Bohun's book, *The Law of Tithes*, carried on a tradition among common lawyers begun by John Selden (1584-1654),[43] of attacking the divine-right theory of tithes.[44] Other treatises addressed specific topics such as *quare impedit*,[45] testaments,[46] spousals,[47] and executors.[48]

The single most controversial defense of the ecclesiastical courts in the early eighteenth century was Edmund Gibson's "Introductory Discourse, concerning the Present State of the Power, Discipline, and Laws, of the Church of England," contained in his *Codex Juris Ecclesiastici Anglicani* (1713).[49] As Holdsworth noted, Michael Foster, later judge of the King's Bench, wrote a "very able pamphlet" attacking Gibson's high-flying view of the ecclesiastical courts.[50] What Holdsworth did not point out was, first, that Foster's attack came over twenty years after the *Codex* was first published, when Gibson was at the height of his political power as Walpole's ecclesiastical minister and, second, that Foster's attack repeated some of the most important arguments advanced by Hoadly during the Bangorian Controversy. Although Holdsworth made no mention of the fact, Foster's argument was itself subjected to a withering critique by John Andrews, an advocate of Doctors' Commons. Because the thrust-parry-riposte of the exchange illustrates the resilience of issues raised in the Bangorian Controversy, it is worth examining in some detail.

Like the Bangorian Controversy and the visitation charges, the Gibson-Foster-Andrews debate over the constitutional position of the Church revolved around two

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43 John Selden, The Historie of Tithes (Da Capo Press 1969) (1618).

44 William Bohun, Law of Tithes 13-14 (London, W. Meadows 4th ed. 1760). Blackstone, too, contributed his two-cents' worth on the subject. *See* 2 William Blackstone, Commentaries *25.

45 John Mallory, Quare Impedit (London, Thomas Astley 1737).

46 Henry Swinburne, A Brief Treatise of Testaments and Last Wills (Garland Pub. 1978) (1590).

47 Henry Swinburne, A Treatise of Spousals, or Matrimonial Contracts (London, Daniel Brown 2d ed. 1711).

48 Thomas Wentworth, The Office and Duty of Executors (London, Andrew Crooke 3d ed. 1641). This work originally appeared anonymously and is sometimes attributed to Sir John Doddrige; subsequent editions appeared as late as 1774.

49 Edmund Gibson, Codex Juris Ecclesiastici Anglicani: Or, the Statutes, Constitutions, Canons, Rubrics, and Articles of the Church of England, Methodically Digested Under Their Proper Heads, at xvii-xxxi (London, R. Whitledge 1713). For a brief account of Gibson and the context and contents of the *Codex* see J.H. Baker, Monuments of Endlesse Labours: English Canonists and Their Work, 1300-1900, at 95-107 (1998).

50 12 Holdsworth, *supra* note 7, at 136, 610.

related issues, the legitimacy of the Church's coercive jurisdiction and the authority of the canon law. Gibson made explicit the divine-right premise upon which his "Introductory Discourse" depended:

> The power which is vested in the bishops, for the due administration of government and discipline in the Church of England, appears by the form of consecration to have a twofold original, from the word of God, and from the laws of the land.[51]

As a result of this "twofold original," Gibson argued, the Church's coercive jurisdiction over spiritual matters existed by divine right, but the specific manner in which the Church exercised that jurisdiction was derived from the Crown.[52] The specific statutory basis of the courts' jurisdiction, Gibson argued, was the Henrician Statute of Appeals,[53] which recited that the body politic of England had two aspects, the spirituality and the temporality, each with its own sphere of jurisdiction derived from the royal duty to administer justice. These two jurisdictions, moreover, "do conjoin together in the due administration of justice, the one to help the other."[54] Thus, Gibson attempted to reconcile divine-right episcopacy and the jurisdiction it entailed with the authority of "the laws of the land" to declare how that jurisdiction could be exercised. So far, so good. But Gibson did not identify "the laws of the land" with Parliamentary statutes alone.

According to Gibson, the sources of English ecclesiastical law were three in number: the common law, the canon law, and the statute law. Consistent with Blackstone's later classification, Gibson treated the common law as the common custom of the realm and therefore part of the *jus non scriptum*: "And as the spirituality is an essential part of the English constitution, and of a distinct nature and administration from the temporality; so hath it its common customs, and *jura non scripta*, as well as the temporality."[55] The canon law had two aspects, according to Gibson, the foreign and the domestic. Prior to the Reformation the foreign canons were in force in England "by virtue of their own authority." After the Reformation those canons continued in force on the basis of consent, usage, and custom.[56] Domestic canons, by contrast, were those enacted by the provincial convocations and confirmed by the King. They were binding upon the whole realm, including the laity, Gibson argued.[57] Finally, statutes were, from the standpoint of the ecclesiastical law of England, Parliamentary enactments designed to supplement the law of the Church. In recognizing Parliament's authority over the Church, Gibson warned that all things are lawful but not all things are helpful. Indeed, usurpation of spiritual functions by the temporality posed a danger to the "general frame of our constitution."[58]

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51 Gibson, *supra* note 50, at xvii.
52 *Id.* at xvii-xviii.
53 Ecclesiastical Appeals Act 1532, 24 Hen. 8, c. 12 (Eng.); *see also* Submission of the Clergy Act 1533, 25 Hen. 8, c. 19 (Eng.).
54 Gibson, *supra* note 50, at xix (quoting Ecclesiastical Appeals Act 1532, 24 Hen. 8, c. 12 (Eng.)).
55 *Id.* at xxvii.
56 *Id.* at xxviii.
57 *Id.* at xxix-xxx.
58 *Id.* at xxxi.

Foster took issue with both of Gibson's arguments, denying that the Church had any power by divine right, much less the power to pass canons binding upon the laity without Parliamentary consent. He premised his attack on Gibson's *Codex* on grounds that plainly echoed Hoadly's famous sermon:

> When our blessed Savior was questioned by Pilate, concerning a kingdom he was charged to have aspired after, in opposition to the government under which he lived, he confessed that he came into the world in order to set up a kingdom in it; but he, at the same time, satisfied the Roman governor, that his kingdom could give no reasonable ground of jealousy to Caesar; for it would not interfere with any of Caesar's rights. It was not a kingdom of this world; it was the empire of truth and righteousness in the hearts of his faithful subjects; whose obedience he intended to reward in his kingdom, in the future invisible state.[59]

The result of this view of the Church was that any power the Church had was by virtue of human law alone. Indeed, a recurring theme in Foster's critique of Gibson's *Codex* generally and the "Introductory Discourse" in particular was that, by ascribing to the Church powers founded upon the divine law, Gibson was following in the footsteps of the medieval popes.[60] The end result of such an *imperium in imperio*, Foster warned, was popery: "And if the principle of a right of jurisdiction, underived from the civil magistrate, doth not always lead to the popery of the Church of Rome, it leads to a state of things, equally mischievous and more absurd; I mean popery at our doors."[61]

With respect to the authority of Convocation to adopt canons binding upon the laity, Foster again echoed themes of the Bangorian Controversy:

> If the *Codex* should ever fall into the hands of a person utterly unacquainted with the history and constitution of England, he would probably conclude from this, and other passages I shall have occasion to mention, that the two legislatures his Lordship [i.e. Gibson] speaks of have, from time to time, been assembled for the different ends mentioned by him, as often as the exigencies of Church or State required it; the one to frame laws for the Church, the other for the State. He would likewise conclude, that in point of authority, the two legislatures are equal, within their respective provinces; and that one hath not ordinarily intermeddled, in the proper business of the other. These conclusions, I think, a reader, utterly ignorant of our history and laws, would naturally draw from his Lordship's manner of expressing himself here, and in other places, concerning our two legislatures as now subsisting among us. But how would he be surprised to be told, that the present age is indebted to our spiritual legislature for no more than one short body of laws [i.e. the canons of 1603], compiled within these last 200 years? That, indeed, other canons and constitutions were framed by our ecclesiastical legislature, so long ago as the reigns

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59 Michael Foster, An Examination of the Scheme of Church-Power, Laid Down in the Codex Juris Eccelsiastici [sic] Anglicani, &c. 1 (London, J. Roberts 1735).

60 *Id.* at 4-5.

61 *Id.* at 23.

> of Queen Elizabeth and Charles I. But that the authority of the former [i.e. the canons of 1597], through some defect in the royal instrument of confirmation, expired with the Queen: And that the latter [i.e. the canons of 1640] were universally exploded as soon as made; and never had any other effect, than to draw a severe censure from the temporal, upon the spiritual legislature. These things, I say, would probably give some surprise to a person, who hath learned from his Lordship to conceive otherwise concerning our ecclesiastical legislature. But his surprise will be greatly increased, when he comes to be informed, that this legislature is absolutely under the control of the other; which hath set bounds to it, over which it dares not pass: That even the subjects of its inquiry and debate, as well as the extent of its ordinance in point of obligation, are prescribed by statute law, that it cannot so much as attempt any canons or constitutions, without a royal license: And that none of its ordinances are binding, even against the private customs of a single parish.[62]

The response to Foster's attack came not from Gibson himself but from one of the advocates of Doctors' Commons, John Andrews. Andrews rejected the premise of Foster's argument and, with it, the conclusions he derived:

> The first objection, then is, that his Lordship [i.e. Gibson] by deriving the episcopal power from a twofold original, viz. from the word of God, and from the laws of the land, is either contradictory, or setting up a claim of independency on all human authority.
>
> The law of God is one of the grounds of the laws of England, an essential and constituent part thereof, and by being incorporated therewith does not thereby lose its divine original, unless the author would insinuate that claiming a right from the law of God is setting up a foreign power. A recognition therefore of a right under a divine authority, cannot be called an original grant by the laws of the land; yet where a statute is declaratory, what is thereby declared may with great propriety be said to appear by that statute.[63]

Moreover, Andrews denied that basing the jurisdiction of the Church upon divine law entailed erecting an *imperium in imperio*:

> That the temporal and spiritual jurisdictions are separate and distinct, both flowing from the Crown, as the fountain of jurisdiction, and under his majesty as supreme head of both; is the language of all our laws, and the opinion of all our greatest lawyers.[64]

Thus, the basic issue was the constitutional position of the Church: did the sovereignty of the King-in-Parliament over temporal matters extend to ecclesiastical matters as

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62 *Id.* at 112-114.

63 John Andrews, An Answer to a Late Pamphlet Entitled An Examination of the Scheme of Church-Power Laid Down in the Codex Juris Ecclesiastici Anglicani, &c 5 (London, J. Roberts 1735).

64 *Id.* at 38.

well (as Foster argued) or did sovereignty over ecclesiastical matters reside in the King-in-Convocation (as Andrews maintained)?

Andrews also addressed the authority of Convocation to legislate for the country. Noting that Foster had asserted that, "the subject is bound by no laws, to which he is not a party in person or by representation," Andrews countered that,

> I believe he will hardly persuade the gentlemen of Great-Britain, especially those of the House of Commons, so far to part with their temporal rights, as to discharge all those subjects of Great-Britain from their obedience to the laws made by them in Parliament as part of the legislature, who have no vote in the choice of members, who are at least three parts in four, and are therefore not otherwise represented than by the implication of law.[65]

No, Andrews argued, the premise of Foster's attack on Convocation served equally to undermine the authority of Parliament. Nor did Foster's common law sources undermine Convocation's authority, Andrews maintained. After reviewing the cases upon which Foster relied, Andrews concluded that, "as I am informed, there never yet has been any one determination in our courts of justice, that in matters spiritual the laity are not bound by the canons: And if there had, the Examiner [i.e. Foster] is not guilty of concealments of that kind, and would, no doubt, have mentioned it."[66]

Not content to meet Foster on legal grounds alone, Andrews also published a considerably less technical (and more personal) attack. Seizing upon Foster's obvious allusion to Hoadly's sermon, Andrews began his sarcasm-laden attack:

> The author of the *Examination of the Scheme of Church-Power*, opens his scene as a divine, with the use and doctrine that an eminent prelate of our Church put our savior's words to Pilate to, when he said his Kingdom was not of this world, and he preached a famous sermon upon: his shewing himself the disciple of such a teacher, must recommend him, he knew, to the favorable opinion of a great many worthy persons; and dispose them to look upon him as some sort of Churchman, or Christian at least; and it is possible he may be one or the other. But it was proper for him, to prevent suspicions, to give us notice of it at his first setting out, because his whole design speaks him not to be the one, and several expressions which he lets fly, not too much of the other.[67]

In case Foster's guilt was not sufficiently established by his association with Hoadlian theology, Andrews made a point of further associating Foster with the disaffected Parliamentary opposition to Walpole's ministry generally. Thus, Foster

> discovers mines, catches the Bishop [i.e. Gibson] laying trains, sees him at work deep under-ground, undermining the laity; he shews the clergy in

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65 *Id.* at 93-94.

66 *Id.* at 100-01.

67 John Andrews, An Examination of the Scheme of Church-Power Laid Down in the Codex Juris Ecclesiastici Anglicani, &c Set in Its Proper Light 1 (London, J. Roberts 1736).

> all bad lights he can; thus acting, but stupidly, the Craftsman; the Bishop of London is his Sir R __ rt, and the Ministry his Ministry.[68]

As Andrews's allusion to Walpole suggested, ecclesiastical jurisdiction was very much an issue in Parliament as well as the press in the 1730s.

John Ayliffe (1676-1732) shared much of Foster's view of the constitutional position of the post-Revolutionary Church. Ayliffe's *Parergon Juris Canonici Anglicani* (1726; 2d ed. 1734) combined a mastery of the medieval *Corpus Iuris Canonici* and contemporary continental literature with a Whig prejudice in favor of the sovereignty of the common law and Parliament. The significance of Ayliffe's work has gone largely unnoticed by historians, however. Holdsworth recognized that Ayliffe's *Parergon* was a book "of great authority" and contained "full references . . . to the authorities in the civil and canon law, and to the English statutes and decisions."[69] Holdsworth did not, however, explore the connections between Ayliffe's work and the work of contemporary continental jurists nor did he consider what Ayliffe's use of English sources might reveal about his view of the post-Revolutionary Church. Ayliffe's work as a canonist has escaped the attention of other historians as well. G.D. Squibb focused upon the men of Doctors' Commons;[70] Ayliffe was an Oxonian. Daniel Coquillette and Peter Stein focused upon English writers on the civil law;[71] Ayliffe's work in the *Parergon* was as a canonist.

Ayliffe opened the *Parergon* with "An Historical Introduction," in which he reviewed the current state of historical scholarship regarding the development of the Roman canon law in England. It is a case study in the use of historical evidence in service of a political position regarding the constitutional role of the Church and its courts. Ayliffe's "Historical Introduction" shows the continuing engagement of English canonists with continental canonical learning, even as men like Ayliffe looked to Parliament and the common law courts for guidance about the development of the canon law.

The "Historical Introduction" merits detailed analysis for several reasons. First, as the name implied, it was a survey of the major historical sources of the canon law, from the Apostolic Constitutions to Ayliffe's own day, with a particular focus upon the canon law in force in England. Second, Ayliffe's citations revealed that many of the authors upon whom he relied were his contemporaries on the continent. Third, in addition to citing his contemporaries, Ayliffe also cited ancient and medieval authors as if they were his contemporaries, giving the work of his fellow canonists a certain timeless quality. Fourth, although the "Historical Introduction" shows that Ayliffe was well aware of the work of continental historians of the canon law, his substantive discussion of the canon law in England is almost

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68 *Id.* at 38.

69 12 Holdsworth, *supra* note 7, at 612.

70 George D. Squibb, Doctors' Commons: A History of the College of Advocates and Doctors of Law (1977).

71 Daniel Coquillette, The Civilian Writers of Doctors' Commons, London: Three Centuries of Juristic Innovation in Comparative, Commercial, and International Law (1988); Peter Stein, *Continental Influences on English Legal Thought, 1600-1900*, *in*, 3 La Formazione Storica del Diritto Moderno in Europa 1105-25 (B. Paradisi ed., 1977).

entirely devoid of reference to the continental canonists. The significance of this approach is that Ayliffe, like the canonists of the Reformation period,[72] remained in touch with continental developments, even as he recognized the emergence of a substantial body of native law. Fifth, in view of the substantial body of continental canonical scholarship that was available to him, Ayliffe's decision to focus upon the emergence of a native body of canon law clearly reflected his own staunchly Whig political principles.[73] English canon law was still part of the *ius commune*, but Ayliffe sought to move it toward a posture of greater insularity.

Ayliffe divided his "Historical Introduction" into three main topics: the canon law in general, the leading books on the canon law and their authors, and the canon law as it existed in England.[74] Throughout, Ayliffe's "Historical Introduction" was characterized by Whiggish anti-Catholicism and, at points, echoed the main themes of Hoadly's sermon. Nonetheless, Ayliffe argued for the power of Convocation to pass canons binding the laity, even without the consent of Parliament. In this regard, Ayliffe's position was closer to that of Gibson than Hoadly.

The central argument of the "Historical Introduction" is that the canon law of England predated the rise of the medieval papacy and therefore should not be confused with the "papal law." Thus, Ayliffe distinguished three aspects of the "canon law." First, there was the canon law "properly and strictly speaking . . . which consists only of the canons of general and provincial synods." Next was "papal-law, . . . [which] entirely depends upon papal usurpation and authority." Finally, the law of the Church (*jus ecclesiasticum*) "takes in the state and government of the Church, and the laws at this day received from and by the Church."[75] In the course of his discussion, Ayliffe cited numerous early modern canonists as well as several of his contemporaries: Hunold Plettenberg (1632-1696),[76] Henri Justel (1620-1693),[77] Pierre de Marca (1594-1662),[78] Jacques Sirmond (1559-1651),[79] Edmond Martene (1654-1739),[80] Jean Morin (1591-1659),[81] David Blondel (1591-1655),[82] Christian Thomasius (1655-1728),[83] and Marcus Antonius Cucchus (d. 1565).[84]

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72 Richard H. Helmholz, Roman Canon Law in Reformation England ch. 4 (1990).

73 Coquillette, *supra* note 72, at 209-14.

74 Ayliffe, *supra* note 21, at iii-iv.

75 *Id.* at vii.

76 Hunold Plettenberg, Introductio ad Jus Canonicum (n.p., Schlegel 1692).

77 Henri Justel, Bibliotheca Juris Canonici Veteris (Paris, Billaine 1661).

78 Pierre de Marca, Illustrissimi viri Petri de Marca archiepiscopi Parisiensis dissertationum De concordia sacerdotii et imperii, seu, De libertatibus ecclesiae Gallicanae libri octo (Paris, Cleri Gallicani 3d ed. 1704).

79 Jacques Sirmond, 1-4 Concilia Antiqua Galliae cum Epistolis Pontificum, Principum Constitutionibus, et Aliis Gallicanae Rei Ecclesiaticae Monumentis (Paris, Sebastiani Cramoisy 1629-1666).

80 Edmond Martene, 1-3 De Antiquis Ecclesiae Ritibus Libri Quatuor (Rouen, G. Behourt 1700-1702).

81 Jean Morin, Commentarius Historicus de Disciplina in Administratione Sacramenti Poenitentiae (Antwerp, Frederici à Metelen 1682).

82 David Blondel, Pseudo-Isidorus et Turrianus Vapulantes (Geneva, Petri Chouët 1628).

83 Christian Thomasius, Institutiones Jurisprudentiae Divinae (Frankfurt & Leipzig, Weidmannus 1688).

84 Marcus Antonius Cucchus, Institvtionvm Ivris Canonici Libri Qvatvor (Lyon, G. Rovillivm 1574).

With reference to the canon law "properly and strictly speaking," Ayliffe began by summarizing the available historical scholarship touching the Apostolic Constitutions (*Constitutiones apostolicae*), a collection of materials from the early Church. The Apostolic Constitutions were significant because they contained eighty-five canons, "the Apostolic Canons," fifty of which Dionysius Exiguus (d. *c.* 525) included in his influential collection of canons.[85] For Ayliffe's purposes, however, the significance of the Apostolic Canons lay in the fact that historical scholarship had shown that the canons were not of apostolic origin. Rather, "there have been several matters intermix'd therein, which are entirely foreign to their first state and purity, from whence papists at this day confirm their dogmas and opinions."[86] But while Ayliffe concurred with the conclusion of Bishop William Beveridge (1637-1708)[87] that the Apostolic Canons dated from the third century, he recognized that they were "one of the chief pillars on which the policy of the Church and the canon law itself is founded."[88] In his discussion of the Apostolic Canons, Ayliffe again cited a number of early modern and contemporary scholars of the canon law, including Caesar Cardinal Baronius (1538-1607),[89] Severin Binius (1573-1641),[90] Gregor Haloander (1501-1531),[91] Gerhard von Mastrict (1639-1721),[92] Melchior Canus (1525-1560),[93] Jean Cabassut (1604?-1685),[94] Lucas Osiander (1534-1604),[95] and Andre Rivet (1572-1651).[96]

Because of the persecution of Christians, Ayliffe argued, the Church was unable to legislate for itself prior to the reign of Constantine (306-337). The grant of Constantine's license to the Church to assemble and pass laws for its own regulation was a mixed blessing, however. In language that might have come straight from Benjamin Hoadly or Michael Foster, Ayliffe argued that, since Constantine's time, the clergy have "in several countries, contrary to the welfare and peace of the commonwealth, and the legal establishment of the civil power, erected themselves *into an independent state*, and do claim to assemble, whenever they think proper to disturb the quiet of the community."[97] Nonetheless, one result of such assemblies had been the creation of various local bodies of canons. Besides the canons adopted by General Councils and accepted throughout the Church, there

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85 *Law, Canon: To Gratian*, *in* 7 Dictionary of the Middle Ages 395-413 (Joseph R. Strayer ed., New York, Scribner 1986).

86 Ayliffe, *supra* note 21, at v-vi.

87 William Beveridge, Codex Canonum Ecclesiae Primitivae Vindicatus ac Illustratus (London, R. Scott 1697).

88 Ayliffe, *supra* note 21, at vi.

89 Antoine Pagi, 1-4 Critica Historico-Chronologica in Universos Annales Ecclesiasticos Caesaris cardinalis Baronii, ad annum 1198 (Antwerp, 1705).

90 Severin Binius, 1-37 Conciliorum Omnium Generalium et Prouincialium Collectio Regia (Paris, Typographia Regia 1644).

91 Gregor Haloander, 1-6 Corpus Iuris Civilis, 6 vols. (Basel, Hervagen 1575).

92 Gerhard von Mastrict, Historia Juris Ecclesiastici et Pontificii, Seu de Ortu, Progressu, Incremantis, Collectionibus, Auctoribusque Juris Ecclesiastici & Pontificii Tractatio (Halle, Zietleri 1719).

93 Melchior Canus, *Loci Theologici, in* Melchioris Cani Opera (Cologne, Mylius 1605).

94 Jean Cabassut, Notitia Conciliorum Sanctae Ecclesiae (Venice, Balleonium 1669).

95 Lucas Osiander, 1-6 Kurze Beschreibung der Kirchen History in Centurias (Frankfurt, Nicolaum Bassaeum 1597).

96 Andre Rivet, Critici Sacri Libri IV (Geneva, Iacobi Chouet 1642).

97 Ayliffe, *supra* note 21, at viii (emphasis added).

were various regional bodies of law, including collections of canons from Africa, France, Britain, and Spain.[98]

Having established that the English Church had its own canon law before the rise of papal lawmaking in the late eleventh-early twelfth centuries, Ayliffe surveyed the major texts and commentators associated with what he called the "papal law." The rise of papal lawmaking reflected the rise in papal claims and pretensions, Ayliffe suggested. The thin edge of the wedge, he claimed, was the mangling of Justinian's *Digest* by various of "the pope's creatures," particularly the clergy. Their purpose, Ayliffe maintained, was "to enlarge their rights and privileges by frequent interpolations and various readings of the text." The goal, predictably, was "to establish an independent power in the Church, and to call Kings and Princes before them for a pretended salvation of their souls."[99]

In England, the papal usurpation began with Augustine of Canterbury who succeeded in subverting the ancient Christianity of the noble Saxons.[100] This resulted in the reception of the bulk of the papal canon law, subject to the regulation of the common law:

> It likewise sufficiently appears that the canon law was received here in England, tho' under certain limitations and restrictions from the common law of the realm, since the greatest part of the decretal constitutions in the canon law have been found to have been sent hither by several popes upon controversies here among us in ecclesiastical causes.[101]

Ayliffe ended the "Historical Introduction" with a brief discussion of the place of the English canon law in the English legal system overall. Ayliffe identified the "three foundations" upon which the laws of England were built: general customs, statute law ("which is made by King, Lords, and Commons"), and foreign laws that have been received and "confirmed by usage and length of time."[102] On the basis of these foundations, Ayliffe argued that the canons of 1603 bound the clergy and laity alike,

> tho' not particularly confirmed by Parliament; because they were made in pursuance of the authority given by Parliament, and confirmed by Royal Assent. For tho' indeed no Canons of England stand confirmed by Parliament, yet they are the laws which bind and govern in ecclesiastical affairs. For the Convocation may with the King's License and assent had under the Great Seal, make canons for the regulation of the Church, and that as well concerning laics as ecclesiastics.[103]

Ayliffe's "Historical Introduction," like Gibson's "Introductory Discourse," reflected the balancing act carried on by High Church Whigs generally. They wanted to affirm both the sovereignty of the King-in-Parliament over temporal

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98 *Id.* at xiv-xv.
99 *Id.* at xxvii.
100 *Id.* at xxx.
101 *Id.* at xxix.
102 *Id.* at xxxiii.
103 *Id.* at xxxiv.

matters and the sovereignty of the King-in-Convocation over ecclesiastical matters. To avoid the problem of an *imperium in imperio* required a strong commitment to the idea of royal supremacy and the actual presence of a sitting Convocation. Both were lacking in the early eighteenth century. The precariousness of the High Church Whig constitutional theory was betrayed in Ayliffe's discussion of the substantive canon law, where he relied extensively upon common law decisions when considering disputed points. Although he was plainly aware of continental canonical scholarship, it was of interest to him only for its historical, not its legal, analysis.

C. The Ecclesiastical Courts in Parliament

The events of 1688 served to undermine the authority of the Church in a number of ways. For present purposes, suffice it to note that the ouster of James II in favor of William and Mary was accomplished with the support of those who dissented from the Church of England, and those dissenters were rewarded with the Toleration Act of 1689. That the Church experienced a number of additional Parliamentary assaults in the period 1731 to 1736 has been noted by several historians.[104] But little has been done to place those assaults in the context of the ongoing debate over the constitutional position of the post-Revolutionary Church of England in general and the status of the ecclesiastical courts in particular. Examination of the pamphlet literature surrounding the various proposals to limit the courts' jurisdiction, however, reveals that there are important affinities between the arguments in favor of those proposals, on the one hand, and arguments we have seen aired in the Bangorian Controversy.

1. The Bill to Prevent Suits for Tithes

The attacks of the 1730s upon "Church power" began with a frontal assault upon the clergy's chief source of financial support, namely, tithes. The nature of the obligation, if any, to pay tithes had been a point of contention for many years, the Quakers' insistence that ministry should be supported entirely by voluntary contributions being perhaps the most famous example of dissent from prevailing assumptions. But beneficed clergy were not the only ones entitled to receive tithes. Prior to the Reformation, tithes arising in many parishes had been "appropriated" to various religious houses. The right to continue receiving the tithes so appropriated passed with the former monastic lands into lay hands after the Reformation. According to Blackstone, more than one-third of the parishes in England had been appropriated to religious houses at the time of the dissolution.[105] Thus, the right to receive tithes was a matter of interest not only to the clergy but also to a good many landed proprietors, and thus of wider political significance than might first appear.

Early in 1730/1, a bill was introduced into Parliament that would, "prevent suits for tithes, where none, nor any composition for the same, have been paid

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[104] *See, e.g.*, Norman C. Hunt, Two Early Political Associations: The Quakers and the Dissenting Deputies in the Age of Sir Robert Walpole 72-112 (Clarendon Press 1961); Sykes, *supra* note 18, at 149-66; Stephen Taylor, *Sir Robert Walpole, the Church of England and the Quakers Tithe Bill of 1736*, 28 Hist. J. 51 (1985).

[105] 1 William Blackstone, Commentaries *374.

within a certain number of years."[106] All of the bill's sponsors appear to have been Whigs of one sort or another.[107] The ostensible problem at which the bill was directed was the difficulty of proving that no tithes were owed on certain lands. Under 2 & 3 Edw. 6, c. 13, suits could not be maintained where the land in question had been discharged from the payment of tithes. According to the preamble of the bill, however, the documents proving such discharge,

> are by length of time burnt, lost, destroyed or defaced, and the said lands, tenements and hereditaments altered, severed or divided, and held and enjoyed by distinct purchases, conveyances or descents, and their old names, boundaries and descriptions by enclosures or otherwise wholly lost, so as it would be difficult now, and impossible in time to come to make out such discharges.[108]

Thus, the bill to prevent suits for tithes, if passed, would have cut off all claims for tithes asserted by both laymen and the clergy, in both ecclesiastical and civil courts where the tithes had not been paid for a specified number of years. The bill was read for the first time on 4 March 1730/1,[109] and the bill's second reading was ordered twice, on 12 March and 18 March 1730/1. It was not heard from again.

Although the bill to prevent suits for tithes had a relatively short Parliamentary career, it was long enough to provoke several interesting publications. The first salvo was fired in an anonymous pamphlet, variously attributed to Edmund Gibson and Thomas Sherlock.[110] The author attacked both the ostensible evils at which the bill was directed as well as the proffered remedy therefor. Specifically, he denied that owners of lands exempt from tithes had been remiss in preserving the evidence necessary to prove their exemptions; even if they had, he pointed out, such evidence could be discovered in the records of the Chancery and Court of Augmentations.[111] Likewise, the author argued, the assertion that many tithe suits were frivolous and vexatious was itself frivolous, given that most such suits were successful and many of the plaintiffs were actually lay impropriators.[112]

Nor was the author impressed with the bill's proposed solution to the alleged evils. As he pointed out, "The law concerning exemption from tithe, as it stands at present, is thus: If tithe be demanded by the incumbent, and the proprietor of the lands pleads an exemption, the incumbent insists upon common right as the general rule of law; and it rests upon the proprietor to prove the exemption."[113] The reason for placing the burden of proving an exemption upon the landowner, the author argued, was that the landowner was in a comparatively better position

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106 21 HC Jour. (1730) 650 (Eng.).

107 Romney Sedgwick, 2 The House of Commons, 1715-1754, at 64, 123, 323, 357 (1970). *See also* Archibald S. Foord, His Majesty's Opposition, 1714-1830, at 125 (1964).

108 7 House of Commons Sessional Papers of the Eighteenth Century 33 (Sheila Lambert ed., 1975).

109 21 HC Jour. (1730) 659 (Eng.).

110 Thomas Sherlock, Remarks Upon a Bill Now Depending in Parliament, Entitled, A Bill to Prevent Suits for Tythes, Where None, nor Any Composition for the Same, Have Been Paid Within a Certain Number of Years (London, 1731).

111 *Id.* at 3.

112 *Id.*

113 *Id.* at 1.

than the incumbent to know if the land at issue was exempt from tithes. Moreover, he maintained, shifting the burden of proof from the landowner (to prove an exemption) to the incumbent (to prove the right of receipt) as the bill proposed was likely to result in the extinction of all tithes in many places because clergy were often unwilling to go to court to enforce their rights.

In a most revealing answer to the foregoing pamphlet, William Arnall, one of Walpole's own pamphleteers, argued that the question was not what the law was but what the law ought to be. Arnall maintained that the forced payment of tithes was not justified by nature and, indeed, was a violation of liberty of conscience.[114] More significant for our purposes was Arnall's argument that, contrary to conventional wisdom,[115] the right to receive tithes was not founded upon "common right" but only upon various Acts of Parliament.[116] Thus, Arnall explicitly challenged the notion that the Church had any enforceable right to tithes that was not given to it by Parliament. This argument, which was echoed by an anonymous author, was premised upon the same voluntaristic axioms about the respective powers of Church and State defended by Hoadly in the Bangorian Controversy.[117] In an anonymous reply to Arnall,[118] the author noted (accurately, if Blackstone is to be believed[119]) that the clergy's right to receive tithes was founded upon common right, as modified by specific Acts of Parliament.

2. The Petition from Derby

In 1732 and 1733 there continued to be much debate in the press over tithes generally as well as proposals to repeal the Test and Corporation Acts, but no new Parliamentary bills were introduced until 1733. With respect to the development of opposition politics, however, a significant change seems to have taken place. Whereas the opposition Whigs' 1731 bill to prevent suits for tithes had been a solo effort, by 1733 opposition Whigs and Tories had made common cause. The *Journals of the House of Commons* for 13 February 1732/3, state that the House received a petition from certain inhabitants of Derby, "complaining of the grievances occasioned by the administration of ecclesiastical jurisdiction" within the diocese of Coventry and Lichfield. The petition requested the Commons, "to take the same into consideration, and to provide such effectual remedy for the same, as shall most

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114 William Arnall, Animadversions on a Reverend Prelate's Remarks Upon the Bill Now Depending in Parliament, Entitled, A Bill to Prevent Suits for Tythes, Where None, nor Any Composition for the Same, Have Been Paid Within a Certain Number of Years 12-13 (London, J. Peele 1731).

115 *See, e.g.,* 2 William Blackstone, Commentaries *28 ("[I]t is now universally held, that tithes are due, of common right, to the parson of the parish, unless there be a special exemption." (citation omitted)).

116 Arnall, *supra* note 115, at 11-15.

117 An Answer to the Remarks Upon the Bill Now Depending in Parliament, Concerning Tythes, Lately Published in the Whitehall Evening-Post 2-3 (London, J. Roberts 1731).

118 Observations on the Animadversions on a Reverend Prelate's Remarks Upon the Bill Now Depending in Parliament, Entitled, A Bill to Prevent Suits for Tythes, Where None, nor Any Composition for the Same, Have Been Paid Within a Certain Number of Years 6 (London, J. Roberts 1731).

119 2 William Blackstone, Commentaries *28.

conduce to the public good of the said diocese, and as to the House shall seem meet."[120]

The petition was referred to a committee, one remarkable feature of which was its leadership.[121] Given Sykes's judgment that the ecclesiastical courts bill was "a thoroughgoing attack upon the jurisdiction of the Ecclesiastical Courts and might well cause a panic among their defenders,"[122] one might have expected the committee to have been dominated by Whigs. In fact, however, Sir Nathaniel Curzon, a Tory MP for Derbyshire was not only a member of the committee (along with a wide assortment of ministerial and opposition Whigs) but also chaired the committee and presented the bills that ultimately came out of that committee. Thus, a petition ostensibly from country gentlemen was referred to a committee of Whigs chaired by a well-known Tory. That the opposition Whigs were motivated by "liberal" anticlericalism is a plausible enough explanation for their actions, but why did Tories such as Curzon support an attack on ecclesiastical jurisdiction? A plausible explanation is that theirs was a "conservative" antipathy toward the instruments of (Whig) episcopal governance; they were Jacobites.

What began as a matter of local concern quickly mushroomed. On 15 February 1732/3, two days after receipt of the Derbyshire petition, the Commons voted to instruct the committee handling the petition to consider not only the abuses alleged in the Lichfield consistory court, but also alleged abuses in the ecclesiastical court system throughout England. On 9 March 1732/3, the committee issued its report which recommended, *inter alia*, that three separate proposals, each aimed at changing some aspect of the ecclesiastical court system, be introduced into the Commons. The first proposal eventually ripened into "A Bill for the Better Regulating the Proceedings of Ecclesiastical Courts" (the "Church courts bill"). The second proposal resulted in "A Bill for Settling Rates for the Better Repairs of Churches and Chapels, and Providing Ornaments for the Same" (the "Church rates bill"). The third proposal did not reach the bill stage, but would have restrained clandestine marriages, in many ways a precursor of Hardwicke's Marriage Act of 1753.[123]

a. The Church Courts Bill

The Church courts bill would have changed the procedures followed in the ecclesiastical courts in seven important ways. First, it would have eliminated any criminal suits begun by inquisition or denunciation; the only such suits that would have remained would have been those begun by accusation, with the accuser required to post with the court a bond promising "to prosecute such suit or information with effect, and to pay _____ costs to the defendant or party accused, in case such defendant shall not be found guilty; or if the suit or prosecution be abated or discontinued for the space of _____."[124] Second, it would have eliminated

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120 22 HC Jour. (1732) 37 (Eng.). No copy of the original petition appears to have survived.

121 *Id.*

122 Sykes, *supra* note 18, at 151.

123 Marriage Act 1753, 26 Geo. 2, c. 32 (Eng.); *see* R.B. Outhwaite, Clandestine Marriage in England, 1500-1850, at 75-97 (1995).

124 7 House of Commons Sessional Papers of the Eighteenth Century, *supra* note 109, at 119.

the ecclesiastical judge's fact-finding role in criminal cases by authorizing "any of his Majesty's courts of record" to issue prohibitions to any ecclesiastical court, upon the suggestion of the defendant that he was innocent. After the issuance of such a prohibition, the record in the ecclesiastical court was to be certified to the court issuing the prohibition, where the issue of guilt would be determined in a trial by jury; if the defendant were found guilty, the case would then be sent back to the ecclesiastical court *via* a writ of consultation, where the judge of the ecclesiastical court would impose his sentence. If the defendant were acquitted in the jury trial, then he was entitled to his costs in both courts.[125] Third, the courts bill would have changed the procedure regarding excommunication in criminal causes. Specifically, under the bill an ecclesiastical judge could refer a contumacious defendant to the Chancery only after he had been cited twice. The Chancery was to then issue a "writ of contumacy" compelling the defendant to appear before the ecclesiastical judge. That this writ would have been all bark and no bite is suggested by the bill's provision that, if the defendant ignore the writ, "a second writ of contumacy shall issue, and so from time to time, until the defendant or defendants" shall appear. Moreover, the worst that a contumacious defendant faced was attachment of his goods and chattels, not imprisonment. Fourth, the bill provided that all money received in commutation of penance was to be given to the overseers of the poor to be distributed in accordance with the orders of the justices of the peace, rather than the judges of the ecclesiastical courts. Fifth, the bill proposed an unspecified statute of limitations on all criminal actions and a prohibition against being prosecuted twice for the same offense. Sixth, the bill would have removed all civil disabilities attaching to excommunication.[126] Finally, the bill would have prohibited the *ex officio* issuance of any process to compel the proving of a will or the taking out of letters of administration; only upon the application of a party interested in the decedent's estate could any such process issue.

Edmund Gibson responded anonymously to the Parliamentary scheme regarding the Church courts, leveling four specific objections against the bill. First, he pointed out that the fact-finding procedure of the ecclesiastical courts was no different from that of the Chancery, in which the Chancellor alone determined disputed issues of fact. Second, he argued that the temporal courts themselves recognized the validity of the canonical procedure. For example:

> When a cause of property is depending before them, and is found to turn upon the point of marriage or no marriage, the judges of Westminster-hall do not send that fact to be tried by a jury, but they send it to the ecclesiastical court, to be examined and determined by the rules and methods of that court, to which the cognizance of matrimonial causes properly belongs.[127]

Third, Gibson suggested that the ineffectiveness of the temporal courts in executing the laws against vice that were already on the books counseled against enlisting

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[125] *Id.* at 120.

[126] *Id.* at 121.

[127] Edmund Gibson, Remarks upon a Bill now Depending in Parliament, For the Better Regulating the Proceedings of the Ecclesiastical Courts 2 (London, G. Sumptor 1733).

those courts' help in enforcing all the other crimes of which the ecclesiastical courts had cognizance. Finally, Gibson argued that curtailing the ecclesiastical courts' criminal jurisdiction would hamstring the ability of bishops to discipline their clergy:

> it is easy to foresee what the consequences must be, if negligent or irregular incumbents were allowed to go on securely, as long as they can prevail with the churchwardens not to present them; when they know at the same time that the hands of the bishop are tied up, and have no cause to apprehend that any other accuser will be found, so zealously disposed, as to undertake the prosecution at his own charge.[128]

Consistent with his earlier published reform proposals, Gibson had no objection to limiting the use of excommunication to spiritual causes. But the bill was ambiguous, arguably eliminating the availability of excommunication in both temporal and spiritual causes. If the more expansive reading were adopted, Gibson argued,

> the Church of England will be thenceforth deprived of a right which belongs to every Christian church, and which all other churches actually enjoy at this day, viz. the right of judging what persons are fit or unfit to be excluded from Christian communion, and restored to it.[129]

That the True Church had any such right to judge "what persons are fit or unfit to be excluded from Christian communion, and restored to it" was, of course, precisely what Benjamin Hoadly had denied in the Bangorian Controversy.

The Church courts bill was not only unnecessary but also unwise, some authors argued. Gibson gave two practical reasons why passage of the bill would be imprudent: failing to require the probating of wills would prejudice individuals' property rights and effective elimination of the ecclesiastical courts' jurisdiction would discourage the study of the civil law, the knowledge of which "is so useful and even necessary in all transactions with foreign powers, as being the known rule of conducting public treaties, and the only rule in which the several powers in Europe agree." An anonymous author repeated may of Gibson's arguments and added that tinkering with the ecclesiastical courts in the manner proposed would upset the nation's delicately-balanced constitution:

> But if be enacted, that the same fact, now triable by the ecclesiastical judge be tried by a jury, according to the customs of Westminster-hall, all contests relating to the regularity or validity of any controverted verdict, and indeed every dispute that arises while the cause is under jurisdiction of the secular court, will be determinable in the House of Lords, and is therefore depriving his Majesty of a part of his supremacy and ultimate jurisdiction, to the increase of power in other branches of the legislature. And such alteration, by enervating the power of the Crown, and throwing too much into another scale, must necessarily tend to the destroying of

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128 *Id.* at 3.
129 *Id.*

> that balance, by the due preservation of which, we can alone be free from any apprehensions of anarchy on the one hand or tyranny on the other.[130]

Moreover, the author argued, the bill exposed subjects to a greater danger of frivolous criminal prosecution, due to the difference in evidentiary standards of the common law and ecclesiastical courts:

> the courts of common law admit of one evidence only, and convict upon the bare testimony of one single witness; whereas, by the civil and ecclesiastical law, no man can be convicted of any fact, but by the concurrent attestation of two credible persons. Many therefore would be convicted in the common law, where there is only one evidence to a fact, who would never have been so much as prosecuted in the ecclesiastical court, under its present situation and economy; since it is notorious, men cannot be convicted there upon the bare testimony of one single evidence.[131]

Arguing in support of the bill's proposed alterations, William Bohun sought to focus attention upon the alleged financial burden of the ecclesiastical courts.[132] In the end, the bill passed the Commons and was sent to the Lords, where it died after the second reading. The bill was reintroduced after the 1734 election and elicited many of the same objections that had been advanced against it the year before. [133] But the moment had passed, and nothing came of the effort.

b. The Church Rates Bill

Compared with the Church courts bill, the Church rates bill was a model of simplicity. It contained three major provisions, each of which increased the responsibilities of the justices of the peace at the expense of the ecclesiastical courts. First, it transferred authority for confirming Church rates from the ecclesiastical courts to the JPs, with a right of appeal to the Quarter Sessions. Likewise, it shifted jurisdiction for the prosecution of those who failed to pay their assessments from the ecclesiastical courts to the JPs. Third, it required the churchwardens to lay their accounts before the JPs, rather than any ecclesiastical authority.[134]

The Church rates bill excited relatively little attention in the press, possibly because the bill did not propose abolishing Church rates altogether, only changing the mechanism for their confirmation and collection. While such a transferal of jurisdiction from the ecclesiastical courts to the justices of the peace would seem to be entirely to the disadvantage of the former, disadvantaging the Church courts was

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130 The State of the Ecclesiastical Courts Delineated 6-7 (London, J. Brotherton 1733).

131 *Id.* at 17.

132 William Bohun, A Brief View of Ecclesiastical Jurisdiction As It Is at This Day Practised in England 1 (London, J. Peele 1733).

133 *See, e.g.*, Some Thoughts on Last Year's Scheme For the Better Regulating Proceedings in the Ecclesiastical Courts; Put Together on Occasion of An Appearance of the Revival of It (London, J. Roberts 1734).

134 7 House of Commons Sessional Papers of the Eighteenth Century, *supra* note 109, at 123.

not necessarily the same thing as conferring a positive benefit upon the JPs. Quite the contrary, a reasonable justice might well have regarded refereeing disputes over Church rates as an unwelcome addition to his judicial burden, especially if there were "frequent differences . . . which occasion great delays" over the collection of Church rates, as the bill asserted.

Gibson published a brief response to the bill, arguing that confirmation of rates had always been part of the bishop's jurisdiction, pursuant to his duty to ensure that churches were kept in good repair.[135] Moreover, he suggested, if proceedings in the ecclesiastical courts were too slow, as the bill's preamble asserted, then the proper remedy was to make Church rate causes subject to summary procedure in the ecclesiastical courts, not to transfer jurisdiction over them to the JPs.[136] No one seems to have replied to Gibson's pamphlet and, in the end, the Church rates bill was defeated at its third reading in the Commons.

c. The Clandestine Marriage Recommendations

The third proposal that came out of the Derbyshire petition was for a bill to prevent clandestine marriages. The same Committee that produced the Church courts bill and the Church rates bill presented four specific recommendations to be included in a bill on clandestine marriage, three of which the Commons voted to approve. The first proposal was that no marriage license be issued without the affidavit of one of the parties to be married, specifying their ages, qualities, and parishes. The second was that anyone seeking a marriage license should post a bond, which would be forfeitable in the event that the license had been procured on the basis of false information. Third, the committee proposed that no marriage license should be granted to anyone under age without the consent of that person's parent or guardian. Finally, it was proposed that no clergy in prison or subject to the rules of any prison (*e.g.*, the Ordinary of Newgate) should be allowed to perform the office of matrimony.[137] The Commons rejected only the third proposal. Although the Commons voted to receive a bill, none was ever introduced, and no published debate regarding this bill or its 1735/6 reincarnation appears to have taken place.[138]

3. The Quakers' Tithe Bill

As the proximate cause of the failure of the Church-Whig alliance, the Quakers' tithe bill of 1736 has received more scholarly attention than the other Parliamentary assaults upon the ecclesiastical courts of the 1730s.[139] Suffice it to say that this bill successfully combined the strategic advantages of several earlier proposals. It provided that, with respect to tithes under an unspecified amount, Quakers could be prosecuted only before the justices of the peace, with an appeal lying to the Quarter Sessions. The JPs were not allowed, however, to hear suits where the

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135 Edmund Gibson, Remarks Upon a Bill Now Depending in Parliament, Intituled, A Bill for Settling Rates for the Better Repairing of Churches and Chapels, and Providing Ornaments for the Same 1 (London, 1733).

136 *Id.* at 3.

137 22 HC Jour. (1733) 125 (Eng.).

138 *See* Outhwaite, *supra* note 124, at 16.

139 Sykes, *supra* note 18, at 163-66; Taylor, *supra* note 105.

Quaker challenged the underlying right to receive tithes.[140] Thus, the bill drew upon venerable dissenting rhetoric against paying tithes and against the power of the ecclesiastical courts while not actually endangering anyone's right to receive tithes and, in fact, enlarging the JPs' jurisdiction over tithe cases—all while forcing Walpole to choose between his Quaker allies who naturally favored the measure and his episcopal allies who did not. Indeed, the bill's coalition of supporters was formidable enough to get the bill through the Commons, but not strong enough to secure passage in the Lords. That the Quakers' tithe bill was understood to represent an attack upon, *inter alia*, the ecclesiastical courts—an attack during which Benjamin Hoadly was conspicuously absent without leave—has been amply demonstrated elsewhere.[141] Suffice it to say that the debate surrounding this bill, like the other debates we have examined, reflected the same fundamental cleavage between voluntaristic and divine-right views of ecclesiastical jurisdiction that characterized the Bangorian Controversy.[142]

IV. Middleton v. Crofts: A Hoadlyite Court Victory

Lord Chief Justice Hardwicke's opinion for a unanimous Court of King's Bench in *Middleton v. Crofts* vindicated Hoadly's vision of the Church as a voluntary association by denying Convocation a status equal to that of Parliament. Although the specific question in the case was whether the canons of 1603 bound the laity, the underlying issue was the lawmaking authority of the monarch acting through Convocation. The traditionalist argument that the canons were binding upon the laity was that the monarch had authorized Convocation to make laws regarding spiritual matters and that the authority to do so was valid regardless of whether the laws regulated the belief and practices of clergy or laity. If the monarch had such power, then the conclusion followed. But, to the reformers, to admit the authority of the monarch to legislate for the laity through Convocation was to deny the principle that Parliamentary was the sovereign lawgiver. As other historians have demonstrated,[143] Gibson, Andrews, and the other traditionalists probably had the better legal and historical arguments. But Hardwicke had the advantage of an idea whose time had come.

The facts of the case were these: Thomas Crofts promoted a cause against John and Ann Middleton in the consistory court of the diocese of Hereford, alleging that the Middletons were married clandestinely, without banns or license as required by the canons of 1603. The Middletons sought a prohibition from the King's Bench, on the basis that the statute 7 & 8 Will. 3, c. 35, which provided for recovery in the temporal courts of penalties against parties to a clandestine marriage, was the sole remedy in such cases. The first issue Hardwicke addressed in *Middleton v. Crofts*

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140 7 House of Commons Sessional Papers of the Eighteenth Century, *supra* note 109, at 259-65.

141 Taylor, *supra* note 105, at 66-68.

142 *Id.* at 65-66.

143 *See*, *e.g.*, George R. Bush, *Dr. Codex Silenced:* Middleton v. Crofts *Revisited*, 24 J. Legal Hist. 23 (2003); Richard H. Helmholz, *The Canons of 1603*, *in*, English Canon Law: Essays in Honour of Bishop Eric Kemp 23, 25 (Norman Doe et al. eds., 1998) ("The argument most forcefully pressed in *Middleton* was based on logic, not precedent.").

was whether the canons of 1603 bound the laity, and he held that they did not, because they had not been confirmed by Parliament:

> Now the constant practice ever since the Reformation (for there is no occasion to go further back) has been, that when any material ordinances or regulations have been made to bind the laity as well as the clergy in matters ecclesiastical, they have been either enacted or confirmed by parliament; of this proposition the several acts of uniformity are so many proofs; for by these the whole doctrine and worship, the very rites and ceremonies of the Church, and the literal form of public prayers are prescribed and established.[144]

But Hardwicke stopped short of denuding the ecclesiastical courts of all non-Parliamentary authority. Quite the contrary, Hardwicke's answer to the second issue raised in *Middleton* left most of the ecclesiastical courts' jurisdiction intact. That issue, Hardwicke stated, was,

> If lay persons cannot be prosecuted or punished by force of these canons, whether the [ecclesiastical] court had jurisdiction of such a cause against them by the ancient canon law, received and allowed within the realm of England.[145]

Hardwicke's discussion of this issue reflected the conventional wisdom of the eighteenth century: to the extent that the Roman canon law had been received in England it was to be given effect:

> I have had occasion already to mention the rule laid down by my Lord Coke in Cawdrie's case, that such canons and constitutions ecclesiastical as have been allowed by general consent and custom within the realm, and are not contrary or repugnant to the laws, statutes and customs thereof, nor to the damage or hurt of the King's prerogative, are still in force within this realm, as the King's ecclesiastical laws of the same.
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> * * *
>
> It remains then to be inquired, whether that part of the canon law which prohibits clandestine marriages, hath been received and allowed in England.
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> * * *
>
> That the jurisdiction of proceeding by ecclesiastical censures against lay persons marrying clandestinely, has been received, used, and allowed, in England, was said, by Dr. Andrews in his argument to appear by many entries in the registry of the see of Canterbury, some whereof he

144 Middleton v. Crofts (1736) 26 Eng. Rep. 788, 792.
145 *Id.* at 789.

> cited particularly; and it must be admitted, that a long course of such precedents would be of great weight in a case of this nature, though a few instances would not, because they might pass *sub silentio*, and the parties might choose to submit, rather than undergo the expense and clamor of a suit for a prohibition.
>
> It is therefore more material, that this jurisdiction hath received the sanction of a judgment of this court in the case of *Mattingley* versus *Martins*, Pasc. 8, Ca. 1, Jones, 257.
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> * * *
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> This resolution is in point, and I can find no authority against it; it is also supported by the stronger reason, because though clandestine marriages have always been complained of as a great grievance, and highly detrimental to the public and private families, yet lay persons contracting such marriages, must, without such a jurisdiction in the spiritual court have been absolutely unpunished, until the late statute of W. 3, cap. 35, was made; which is not to be believed.[146]

The significance of this part of the opinion should not be overlooked. Hardwicke treated the canon law as part of English customary law, thereby putting it on an equal footing—so far as Parliamentary sanction was concerned—with the common law. Blackstone echoed this view:

> The *lex non scripta*, or unwritten law, includes not only general customs, or the common law properly so called; but also the particular customs of certain parts of the kingdom; and likewise those particular laws, that are by custom observed only in certain courts and jurisdictions.
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> * * *
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> The third branch of [the *leges non scriptae*] are those peculiar laws, which by custom are adopted and used only in certain peculiar courts and jurisdictions. And by these I understand the civil and canon laws.[147]

To be sure, when called upon to resolve a doubtful point regarding the ecclesiastical courts' jurisdiction, common lawyers such as Hardwicke were more impressed by precedents from their own courts, such as *Mattingley v. Martins*, than a list of precedents from the ecclesiastical courts. Nonetheless, even after *Middleton v Crofts*, the center of the Church courts' criminal jurisdiction, the ancient canon law, held.

That the decision in *Middleton v Crofts* was fundamentally at odds with Gibson's view of the relationship between Parliament and Convocation hardly needs to be pointed out. Interestingly enough, one of the Church's defenders before

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146 *Id.* at 798-800.

147 1 William Blackstone, Commentaries *63, *79.

the judges of the King's Bench was none other than Dr. John Andrews, advocate of Doctors' Commons and defender of Gibson's *Codex* in the controversy with Michael Foster. Indeed, Andrews advanced, and the court rejected, several of the same arguments in *Middleton* that he had used against Foster. Although Gibson himself prepared an answer to Hardwicke's arguments against the binding force of the canons of 1603, he ultimately chose not to pursue the matter.[148]

While *Middleton v. Crofts* was consistent with the view of the Church as a voluntary association, it was primarily a victory for Parliamentary sovereignty over ecclesiastical legislation authorized merely by the monarch and Convocation. The step, while a significant one, was not a leap toward a secular society. Ecclesiastical legislation was only one source of legal obligation. Indeed, it is doubtful that, in the early eighteenth century, legislation occupied as significant a place in the life of the law as customary law. Certainly, the canons of 1603 were only a tiny part of the "king's ecclesiastical law," the vast bulk of which even Hardwicke acknowledged to be in force, even though it had not been ratified by Parliament. Nor does the decision appear to have had a significant effect upon the actual work of the ecclesiastical courts, most of which consisted of property-related litigation of one sort or another.[149] Indeed, the very fact that much of the litigation in the eighteenth century ecclesiastical courts was property-related suggests that opposition to tinkering with ecclesiastical jurisdiction may have owed as much to concern for the security of property as it did to concern for true religion. Nevertheless, by recognizing Parliamentary sovereignty over legislation affecting conduct of the laity, *Middleton v. Crofts* represented an important step toward secularization of English society.

V. Conclusion

The Bangorian Controversy and the debate over Parliamentary proposals to alter the jurisdiction of the ecclesiastical courts raised fundamental questions about the constitutional position of the post-1688 Church in general and its courts in particular. These questions were also discussed in the less overtly polemical literature of visitation charges and legal treatises, and there were very real disagreements regarding the legitimacy of the ecclesiastical courts and the canon law they applied. Everyone who wrote on the subject had an opinion, it seems, and there were many people writing on it. Men such as Gibson and Ayliffe attempted, explicitly or implicitly, to reconcile the contractarian political implications of the Hanoverian succession with divine-right theories of episcopal authority, while others such as Hoadly attempted to extend Lockean contractarian ideas from the state to the Church and its courts.

Hardwicke's innovation in *Middleton v. Crofts* was, within a generation, accepted as authoritative in the ecclesiastical courts themselves.[150] But its conclusion was neither obvious nor inevitable in 1736. To understand how this particular step toward secularization came about requires an appreciation of the four points traced in this article: (1) the voluntaristic view of religious authority

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148 Bush, *supra* note 144; Sykes, *supra* note 7, at 203-04.
149 Harris, *supra* note 4.
150 *See* Lloyd v. Owen (1753) 161 Eng. Rep. 161; Bush, *supra* note 144, at 24.

had a long and distinguished intellectual pedigree; (2) it had widespread support; (3) while historical authority was against such voluntarism, (4) the politics of the moment (including a precarious hold on power by a coalition including legally-protected dissenters from the traditional view of authority) favored it.

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Sanctuary Cities: A Study in Modern Nullification?

Lorraine Marie A. Simonis*

ABSTRACT

Since Donald Trump's election as President of the United States, the sanctuary movement has gained prominence as a form of resistance to federal immigration policy. Sanctuary cities and states have attempted to frustrate the Trump administration's immigration agenda by refusing to cooperate with Immigration and Customs Enforcement's (ICE's) efforts to remove aliens illegally residing in the United States. Academics, pundits and politicians have compared this resistance and non-cooperation to "nullification," a doctrine typically associated with the South Carolina Nullification Crisis of the 1830s and the Virginia and Kentucky Resolutions of 1798.

This article rejects comparisons between the sanctuary movement and nullification as false equivalencies and explains why the sanctuary movement is not a form of modern nullification. Rather, it suggests the movement is better understood as being similar to "interposition"—a doctrine related to, but distinct from, nullification. In doing so, this paper will clarify the meaning of nullification and interposition by analyzing the developments of these doctrines. Part 1 of this article discusses the historical, theoretical and practical aspects of South Carolina-style nullification, and compares these to that of the sanctuary movement. Part 2 explores the development of nullification and interposition more broadly, with a particular focus on the Virginia and Kentucky Resolutions of 1798. Finally, Part 3 directly compares the sanctuary movement, nullification and interposition, and it connects the movement to the "anti-commandeering" doctrine articulated by the Supreme Court in the 1990s.

KEYWORDS

Nullification, Interposition, Sanctuary Cities, Virginia and Kentucky Resolutions, Anti-commandeering

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Introduction

What did South Carolinian John C. Calhoun (1782-1850) and San Francisco mayor Ed Lee (1952-2017) have in common? Both, apparently, adhered to the "discredited"[1] doctrine of nullification.

As United States President Donald Trump has initiated his promised crackdown on illegal immigration, localities across the America have attempted to frustrate his efforts through a combination of advocacy, activism and non-cooperation. Broadly speaking, these so-called "sanctuary cities"[2]—which actually include not just cities, but also states and counties—have limited local cooperation with federal immigration officials, particularly with regards to deportations.[3]

Because most U.S. jails are operated at the local level, ICE (Immigration and Customs Enforcement) relies on cities, counties and states to assist in its operations. After a person is arrested, he or she will typically be brought to a local jail.[4] In jail, that person will be fingerprinted, and those fingerprints will be shared with the FBI, who will then share the prints with ICE.[5] If ICE determines the person is undocumented, it will submit a "detainer request"—i.e. a request to detain the person in jail while ICE obtains permission to initiate deportation proceedings.[6] In sanctuary cities, local law enforcement typically has a policy of refusing these detainer requests, either routinely or selectively.[7]

Trump's allies and sympathizers have been particularly critical of the sanctuary movement. Both before and after the 2017 Presidential election, Trump and his surrogates consistently emphasized the danger posed by sanctuary cities and illegal immigrants. From a legal-historical perspective, the comparison of sanctuary cities to nullification—a doctrine holding that states may invalidate federal law—has been a particularly interesting line of attack. In an attempt to undermine the sanctuary movement's legality, certain commentators and scholars have compared sanctuary cities' non-cooperation with federal officials to nullification, as well as to secession and Civil War. Such comparisons have been made by academics and pundits alike, with varying levels of sophistication.

In a March 2018 speech to California law enforcement, for example, then-United States Attorney General Jeff Sessions compared California's sanctuary

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1 Christian G. Fritz, *Interposition: An Overlooked Tool of American Constitutionalism, in* Union & States' Rights: A History and Interpretation of Interposition, Nullification, and Secession 150 Years After Sumter (henceforth Union & States' Rights) 165, 165 (Neil H. Cogan, ed. 2014).

2 Some cities have preferred to term themselves "welcoming cities" rather than "sanctuary cities," but I will be using the term "sanctuary city" for clarity and consistency.

3 Jasmine C. Lee, Rudy Omri & Julia Preston, *What Are Sanctuary Cities?,* N. Y. Times (Feb. 6, 2017), https://www.nytimes.com/interactive/2016/09/02/us/sanctuary-cities.html.

4 Darla Cameron, *How Sanctuary Cities Work and How Trump's Blocked Executive Order Could Have Affected Them*, Wash. Post (Nov. 21, 2017), https://www.washingtonpost.com/graphics/national/sanctuary-cities/.

5 *Id.*

6 *Id*.

7 *Id.* An example of selective refusal would be refusing to honor detainer requests for persons with clean criminal records.

policy to nullification.[8] "There is no nullification," Sessions concluded; "any doubters" could "go to Gettysburg, to the tombstones of John C. Calhoun and Abraham Lincoln."[9] Similarly, radio personality Mark Levin equated San Francisco with Kentucky county clerk Kim Davis —of "no marriage licenses for gay couples" fame—before declaring that sanctuary cities and states are actually "confederate cities and confederate states because they obviously believe in a confederation of nullifying states and cities against the federal union."[10] "Didn't we fight a Civil War over this, ladies and gentlemen?," Levin incredulously asked his audience. Historian Victor David Hanson of Stanford University's Hoover Institution similarly raised the specter of Confederacy by linking supporters of sanctuary cities to "the illiberal pedigree of federal nullification, which was at the heart of the Confederate secessionist movement."[11] None other than John C. Calhoun, he declared, is "the spiritual godfather of sanctuary cities."[12] Not to be outdone, syndicated columnist Charles Krauthammer claimed that "these liberals, who want to do the sanctuary cities are speaking the language of the southern segregationists. The language of nullification and interposition, which incidentally, was the language of the Confederates."[13] Somewhat more reservedly, Seth Lipsky of the New York Post posed, "Is our country headed for a new nullification crisis?," presumably in reference to South Carolina's disagreements with the federal government during the 1830s. Yet Lipsky also mentioned Virginia and Kentucky's Resolutions of 1798 and states' resistance to the Fugitive Slave Act as instances of nullification.[14] Political strategist Karl Rove similarly branded Trump's opponents as "21st century nullifiers" in the mold of Calhoun.[15] Meanwhile, legal writer Thomas Ascik asserted that "sanctuary cities use legal tactics from the Civil War South," before stating, a line later, that nullification actually preceded the war.[16]

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8 Stephan Dinan, *Sessions Likens California Sanctuary Laws to Slave-State Nullification,* Wash. Times (March 7, 2018), https://www.washingtontimes.com/news/2018/mar/7/sessions-calif-sanctuary-slave-state-nullification/. Sessions resigned as Attorney General in November 2018.

9 *Id.*

10 Michael Morris, *Levin on Sanctuary Cities: They Are Nullifying Federal Law...Didn't We Fight Civil War Over This?,* Cns News (Dec. 1, 2016), https://www.cnsnews.com/blog/michael-morris/levin-sanctuary-cities-nullification-federal-law-didnt-we-fight-civil-war-over.

11 Victor David Hansen, *Are Sanctuary Cities the New Confederates?,* Nat. Rev. (Oct. 15, 2015), http://www.nationalreview.com/article/425564/are-sanctuary-cities-new-confederates-victor-davis-hanson.

12 *Id.*

13 Ian Hanchett, *Krauthammer: Sanctuary Cities Speaking the Language of Southern Segregationists*, Breitbart News (Dec. 5, 2016), http://www.breitbart.com/video/2016/12/05/krauthammer-sanctuary-cities-speaking-the-language-of-the-southern-segregationists/.

14 Seth Lipsky*, Sanctuary Cities Must Still Obey the Constitution*, N. Y. Post (Jan. 25, 2017), http://nypost.com/2017/01/25/sanctuary-cities-must-still-obey-the-constitution/.

15 Karl Rove, *Trump and the 21st Century Nullifiers*, Wall St. J. (Feb. 8, 2017), https://www.wsj.com/articles/trump-and-the-21st-century-nullifiers-1486597277.

16 Thomas Asick, *Sanctuary Cities Use Legal Tactics From the Civil War South*, The Federalist (Feb. 27, 2017), https://thefederalist.com/2017/02/27/leaders-sanctuary-cities-using-tactics-civil-war-south/.

Not all commentators, however, have accepted these comparisons between sanctuary cities and the (pre-)Civil War South. Unsurprisingly, perhaps, those sympathetic to the sanctuary movement have preferred dwelling on the supposed similarities between local resistance to immigration policy and local resistance to the Fugitive Slave Act, rather than on parallels to Calhoun or confederacy. Law professor Christopher Lasch of the University of Denver called those communities which resisted enforcement of the Fugitive Slave Act "a more meaningful historical analogue" to the sanctuary city situation.[17] "Sanctuary cities," he explained, "share with their abolitionist forebears a deep moral commitment to liberty and equality. And, when it comes to legal theory, sanctuary policy is rooted not in the nullification theory popular in the slaveholding South, but rather in the Tenth Amendment's prohibition on federal 'commandeering' of local government."[18] Somewhat more pragmatically, University of Florida history professor Sean Trainor compared the sanctuary city movement and Northern opposition to the Fugitive Slave Act by arguing that Trump's opposition "would also, like the 1850 law[19], create common ground between activists on the issue and those who are merely opponents of federal encroachment."[20]

So which is it? Are we in midst of a new nullification crisis, as Rove and the like suggest? Or, per Lasch, are comparisons between contemporary progressive enclaves and the antebellum South wholly inappropriate? Or yet still, have some scholars and commentators on all sides misunderstood the nature of nullification, and its relationship to civil liberties and local governance?

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Though no federal court today is likely to recognize nullification as a legitimate constitutional doctrine, the concept enjoyed a modest modern renaissance beginning during the Obama administration. State legislators across the country have appealed to nullification to resist federal involvement in spheres as diverse as health insurance[21] and gun control.[22] As a result, legal scholars of such renown as the University of Texas's Sanford Levinson have been prompted to reassess the doctrine's modern relevance—albeit skeptically and often unfavorably.[23]

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17 Christopher Lasch, *Resistance to the Fugitive Slave Act Gives Sanctuary Cities a Model for Resistance to Trump*, Raw Story (Feb. 22, 2017), https://www.rawstory.com/2017/02/resistance-to-the-fugitive-slave-act-gives-sanctuary-cities-a-model-for-resistance-to-trump/.

18 *Id.*

19 By "the 1850 law," the author is referring to the Fugitive Slave Act.

20 Sean Trainor, *What the Fugitive Slave Act Can Teach Us About Sanctuary Cities*, Time (Feb. 7, 2017), http://time.com/4659391/sanctuary-cities-fugitive-slave-act/.

21 *See e.g.* Richard Cauchi, *State Laws and Actions Challenging Certain Health Reforms,* National Conference of State Legislatures (March 25, 2017), http://www.ncsl.org/research/health/state-laws-and-actions-challenging-ppaca.aspx.

22 *See e.g.* Justine McDaniel et al., *In States, a Legislative Rush to Nullify Federal Gun Laws*, Wash. Post (Aug. 29, 2014), https://www.washingtonpost.com/blogs/govbeat/wp/2014/08/29/in-states-a-legislative-rush-to-nullify-federal-gun-laws/?utm_term=.777a7c7203f9; Sanford Levinson, *The Twenty-First Century Rediscovery of Nullification and Secession in American Political Rhetoric: Frivolousness Incarnate of Serious Arguments to Be Wrestled With*?, 67 Ark. L. Rev. 17, 18-19 (2014) (referring to Missouri and Kansas efforts to nullify federal gun control laws).

23 Levinson, *supra* note 22, at 27-28.

Nevertheless, nullification and its related doctrine of interposition remain poorly defined—complicating and confusing comparisons of nullification to modern phenomena such as the sanctuary movement.

The emergence of these comparisons between the sanctuary movement and nullification offers an opportunity to re-examine and define nullification and the related doctrine of interposition. While such re-examination and definition may eventually be extended to examining phenomena other than the sanctuary movement, clarifying the relationship between nullification and the sanctuary movement remains especially relevant. Precisely because most academics and judges have rejected nullification are the nullifying charges leveled against the movement so serious.

Despite some superficial similarities, however, the sanctuary movement is not an example of modern nullification. The sanctuary movement has adopted neither the constitutional arguments nor the political mechanisms of 19th century South Carolina.[24] Unlike the sanctuary movement, nullification relies on compact theory—the idea that the federal government is a creature of the still-sovereign states—and operates through state conventions. Nevertheless, the sanctuary movement arguably resembles nullification's related doctrine of interposition. Like 19th century advocates of interposition, today's sanctuary movement appeals to the importance of checks and balance and individual liberties to justify its opposition to federal law. Moreover, interposition is compatible with the contemporary and well-established anti-commandeering doctrine, which limits federal power over state officials.

This paper clarifies the meaning of nullification and interposition by analyzing the developments of these doctrines. It will also evaluate comparisons between the sanctuary movement, nullification, and interposition. Part 1 of this paper discusses the historical, theoretical and practical aspects of South Carolina-style nullification, and compares these to that of the sanctuary movement. Part 2 explores the development of nullification and interposition more broadly, with a particular focus on the Virginia and Kentucky Resolutions of 1798. Finally, it concludes that the sanctuary movement is not an instance of modern nullification—even excluding the South Carolina example. It will also suggest that the sanctuary movement is more compatible with the related concept of interposition.

I. Calhoun and Sanctuary Cities

Though the idea of nullification was developed by Thomas Jefferson in the 1790s, the doctrine is today primarily associated with John C. Calhoun and the South Carolina Nullification Crisis of the 1830s. If it is Calhoun rather than Jefferson who commentators claim as the "spiritual godfather" of the sanctuary movement, it is in part because the Crisis translated constitutional theory into concrete action. The historical record allows us to understand not only why Calhoun and the South Carolina nullifiers thought nullification legitimate and necessary, but also what nullification looked like in practice; we can thus compare their and the sanctuary

[24] For a condensed version of this argument, *see* William J. Watkins, Jr., *Sanctuary Cities Are Not the New Nullification Crisis*, Law360 (May 23, 2017), https://www.law360.com/articles/927395/sanctuary-cities-are-not-the-new-nullification-crisis.

movement's motivations and strategies. Such a comparison readily reveals that the South Carolina nullifiers and the sanctuary movement have little in common beyond the fact that both involved local disagreement with federal policy.

A. The South Carolina Nullification Crisis

The Nullification Crisis began as a debate over trade policy. After the War of 1812, the federal government passed a series of tariffs to protect and strengthen New England's fledgling industry. New England's industry prospered, but as a result, the price of foreign goods on the American market also increased. Initially, Americans across the country—Calhoun included—supported the measure.[25] Over the years, however, as the tariff not only persisted but increased, Southerners started to resent its operation. While the South was a primarily agricultural region dependent on the production of raw materials, the North was a primarily industrial region dependent on the manufacturing of goods. The tariff therefore raised the price of consumer goods in the South without providing a comparable boost to its economy. The impact of this imbalance was further exacerbated by a concurrent fall in the price of cotton, which crippled many farmers.[26]

By 1816, the tariff averaged 25 percent, and in 1824 it had risen to approximately 33 ½ percent.[27] Then, in 1828, Congress passed the so-called "Tariff of Abominations," which raised duties on imports to 50%.[28] Opponents objected to the tariff on two grounds. First, they argued that a protective tariff was unconstitutional, since the Constitution only explicitly authorized revenue tariffs.[29] Second, opponents decried the measure as an unjust redistribution scheme designed to "impoverish the planter, and to stretch the purse of the manufacturer."[30] Some even suggested secession from the perceived "most unequal alliance."[31] A great deal of the animosity and distrust between North and South during this period can thus be traced to the tariff controversy. As legal author William Watkins explained, "believing that they had made concessions to the Northern interest in order to serve the greater good in the postwar years, Southerners of the 1820s searched their memories for instances of Northern reciprocity. Recalling none, many Southerners again embraced the doctrines of strict constructionism and localism."[32]

The election of Andrew Jackson in 1828 temporarily cooled the controversy, as Southerners expected the Tennessean to reduce the tariff.[33] Their optimism was

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25 William J. Watkins, Jr., Reclaiming the American Revolution: The Virginia and Kentucky Resolutions and Their Legacy (henceforth Reclaiming) 97 (2004).

26 *Id.* at 98.

27 *Id.*

28 *Id.* at 99.

29 Art. 8, Sec. 8, cl. 1 reads: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." As in the 1798 controversy, however, proponents argued that the general welfare clause included unenumerated powers—here, the power to impose a protective tariff.

30 Thomas Cooper, Value of the Union Speech, *in* Reclaiming at 99.

31 Watkins, Reclaiming, *supra* note 25, at 99.

32 *Id.* at 101.

33 *Id.* at 99.

misplaced, however; Jackson showed little interest in pressing for a reduction.[34] That same year, the South Carolina legislature adopted the Exposition and Protest secretly drafted by Calhoun, which detailed South Carolina's discontent.[35]

In the Exposition and Protest, the sectional and counter-majoritarian nature of South Carolina's frustration becomes clear. "[T]he Tariff," Calhoun fumed, "gives *them* a prohibition against foreign competition in our own market, in the sale of *their* goods, and deprives *us* of the benefit of a competition of purchasers for *our* raw materials."[36] South Carolina also accused the North of hypocrisy:

> They assert that low prices are necessary consequences of excess of supply, and that the only proper correction is in diminishing the quantity… They also complained much of low prices, but instead of diminishing the supply as a remedy, they demanded an enlargement of their market by the exclusion of all competition in the home market.[37]

As a result of the conflict's sectional nature, South Carolina scoffed at the idea of proposing a constitutional amendment to remedy the situation. "How absurd then," Calhoun argued, "to compel one of the injured states, to attempt a remedy by proposing an amendment to be ratified by three fourths of the states, when there is by supposition a majority opposed to it."[38] Indeed, if the tariff persisted, it was because a majority in Congress—where Northern representatives outnumbered Southern representatives—supported it.

Ultimately, it is this sectionalism and counter-majoritarianism which pushed South Carolina to adopt nullification, allowing resistance by an individual state.[39] South Carolina's claim that the majority engaged in "despotism" was a direct challenge to James Madison's assurance in Federalist 50 that, under the Constitution, "the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority."[40] Angered by the North's perceived "interested combinations," South Carolinians began to derive greater and

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34 *Id.*

35 In doing so, Calhoun directly relied on Thomas Jefferson's Kentucky Resolutions—a copy of which he had requested to assist in his writing. *Id*. at 102.

36 Exposition and Protest Reported by the Special Committee of the House of Representative on the Tariff; Read and Ordered to be Printed, Dec. 19th 1828 (henceforth Exposition and Protest) 12 (Columbia, D.W. Sims 1829) (emphasis added).

37 *Id.* at 17-18.

38 *Id.* at 36.

39 Calhoun's solution to the constitutional instability inevitably provoked by nullification further highlights nullification's counter-majoritarian nature. Calhoun argued that "the States themselves may be appealed to, three-fourths of which, in fact, form a power, whose decrees are the Constitution itself, and whose voice can silence all discontent." James J. Kilpatrick, The Sovereign States: Notes of a Citizen of Virginia, 196 (1957). Under Calhoun's logic, a single state's interpretation of the Constitution remained legitimate until ¾ of the states overturned its interpretation by constitutional amendment; the disapproval of a simple majority would not suffice. The presumption of constitutionality favored the individual state rather than the collective. Nevertheless, Calhoun's solution recognized that state sovereignty under the Constitution was not unlimited.

40 The Federalist No. 50 (James Madison).

greater comfort from the idea that "the actual sovereign power, resides in the several states, who created it, in their separate and distinct political character,"[41] rather than in the assurance that ambition would counteract ambition through a federal system of checks and balances.[42] Believing that the Constitution was "a compact, to which each state is a party," it was a small stretch for South Carolinians to conclude that each state was entitled to interpret and uphold that compact for itself.[43]

Following the publication of the Exposition and Protest in 1828, the South Carolina legislature debated how to proceed. The "nullifiers" in the legislature advocated calling a state convention to arrest the tariff's operation in South Carolina. The nullifiers' insistence on calling a convention—rather than simply nullifying the tariff through the legislature—reflected their and Calhoun's belief that "[s]tates are [the] instruments by which the people may assert their rights."[44] A convention—in other words, a gathering of the people—embodied the idea that the states derived their authority from the people, but that the people expressed themselves politically through the states. Despite widespread discontent over the tariff, the legislature fell short of the two-thirds majority necessary to call a convention both in 1830 and 1831.

In 1831, during a statewide nullification campaign, then-Vice President Calhoun delivered his famous Fort Hill Address. In that address, he claimed Jefferson and Madison's 1798 writings on interposition and nullification as authority. He referred to both Madison's Report of 1800[45] and the "illustrious Mr. Jefferson" as authority for the idea that "[t]his right of interposition, thus solemnly asserted by the State of Virginia, be it called what it may,—State-right, veto, nullification, or by any other name,—I conceive to be the fundamental principle of our system."[46] Nullifiers also claimed as authority Madison's statement in the Virginia Resolutions that "the states…have the right and are in duty bound to interpose…for maintaining, within their respective limits, the authorities, rights, and liberties appertaining to them"—interpreting "respective" as an endorsement of individual state action.[47]

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41 Exposition and Protest at 36.

42 Madison, *supra* note 40.

43 John C. Calhoun, Fort Hill Address, *in* Nullification: How to Resist Federal Tyranny in the 21st Century (henceforth Nullification) 197, 199 (Thomas E. Woods, Jr. ed., 2010).

44 Clyde N. Wilson, *Nullification Reconsidered, in* Nullification: Reclaiming the Consent of the Governed 6, 8 (2016).

45 Madison wrote the Report of 1800 to respond to criticisms of his Virginia Resolutions of 1798.

46 Calhoun *supra* note 38 at 198-200. Though critics of Calhoun have claimed that his support for nullification was motivated by a desire to protect slavery rather than genuine opposition to the tariff, this view seems misplaced. *See e.g.* Keely N. Kight, *Note: Back to the Future: The Revival of the Theory of Nullification*, 65 Mercer. L. Rev. 521, 532 (2014). While it is likely true that Calhoun assumed nullification could be used to assert South Carolina's perceived interests in the future—such as slavery—there is little evidence to suggest that Calhoun's opposition to the tariff was disingenuous or pretextual. As explained in the Exposition and Protest and other documents, South Carolinians were angered by the tariff's quantifiable and dramatic effect on Southern prices. Politicians today are often motivated by a variety of concerns, and it is unclear why we should assume Calhoun and his contemporaries were different.

47 Abel P. Upshur, No. I, *in* Nullification, *supra* note 43, at 230.

That next year, in 1832, Congress passed a new tariff. Though it reduced the rate to 25 percent for certain goods, it retained the 50 percent rate for iron, wool and cotton; and, to add insult to injury for those who believed Congress could only collect duties to "pay Debts," the Treasury projected a surplus.[48] South Carolinian nullifiers soon after succeeded in calling the state convention which would ultimately issue the Nullification Ordinance.

In a document entitled "An Ordinance To Nullify Certain Acts of the Congress of the United States, Purporting to be Laws, Laying Duties and Imposts on the Importation of Foreign Commodities," the convention declared the tariff "null, void and no law, nor binding upon this State, its officers or its citizens."[49] This Ordinance did more than frustrate federal efforts to enforce the law in South Carolina; rather, it purported to invalidate the law completely. To enforce the Ordinance, the convention instructed the state legislature "to adopt such measures and pass such acts as may be necessary to give full effect to this Ordinance, and to prevent the enforcement and arrest the operation of the said acts and parts of acts of Congress of the United States within the limits of this State."[50] The Ordinance further disallowed appeals "draw[ing] in question the authority of this Ordinance" to the Supreme Court. State officials were to take an oath to uphold the ordinance or their offices were to be "vacated" and "filled up as if such person or persons were dead or resigned."[51] Finally, the convention declared, any coercive action by the federal government against South Carolina would be interpreted as "inconsistent with the longer continuance of South Carolina in the Union."[52] For South Carolina then, as it had been for Jefferson—who argued nullification would avoid "revolution and blood"[53]—nullification was an alternative to upheaval and secession.

B. Calhoun and the Sanctuary Movement

Comparisons between the sanctuary movement and the South Carolina nullifiers are thus inappropriate from both a theoretical and a practical perspective. Theoretically, South Carolina's actions were rooted in a version of compact theory which envisioned each individual state as a party to the Constitution. As such a party, South Carolina insisted on exercising its right to judge infractions of the constitutional compact. Practically, South Carolina's nullification operated through a convention, reflecting its conviction that the people act through the states, rather than directly through the federal government.[54] Only after the convention issued its "Nullification Ordinance" could the state's General Assembly then implement nullification legislatively.

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48 Watkins, Reclaiming, *supra* note 25, at 107.

49 An Ordinance To Nullify Certain Acts of the Congress of the United States, Purporting to be Laws, Laying Duties and Imposts on the Importation of Foreign Commodities, *in* State Documents on Federal Relations: The States and the United States (henceforth Documents), 170, 171 (Herman V. Ames ed., The Lawbook Exchange 2nd ed. 2007) (1906).

50 *Id.*

51 *Id.* at 171-72.

52 *Id.* at 172-73.

53 Woods, *supra* note 43, at 164.

54 Indeed, before the passage of the 17th Amendment, which allowed for the direct election of Senators, the Constitution more strongly reflected this view as well.

As of Spring 2019, neither California nor any other state appears to have any plans to call a nullification convention to address the sanctuary issue. Neither has any state or city formally appealed to compact theory to justify its opposition to federal immigration policy—much less a version of compact theory which denies the collective nature of the constitutional order. Without compact theory and without a state convention, any comparison to South Carolina's nullification is destined to be superficial at best. Compact theory and convention-calling were not mere "add-ons" or formalities—they represented the basis of South Carolina's entire theory of the Union, and of nullification.

Legal author William Watkins of the Independent Institute summarized the issue succinctly: "Sanctuary cities do not base their actions on the constituent power of the people of the states. No special conventions have been held…Put simply, there is no nullification."[55]

II. Jefferson, Madison and the Sanctuary Movement

Though the comparison between the South Carolina nullifiers and the sanctuary movement may be inapt, nullification—and the concerns underlying nullification—predated the 1833 Crisis. Nullification originated with Thomas Jefferson in the 1790s, along with the related doctrine of interposition developed by James Madison. Therefore, theoretically, the sanctuary movement could be an instance of modern nullification without being akin to South Carolina's *particular* adaptation of that doctrine. Yet, in reality—as analysis of the origins of nullification reveals—the sanctuary movement remains fundamentally incompatible with the pre-Crisis understanding of nullification as well. More promising, however, than comparison to either iteration of nullification is that between the sanctuary movement and another oft-forgotten doctrine: interposition.

Complicating this differentiation, however, is nullification and interposition's closely-related history; the origins and development of these doctrines has been intertwined from the beginning. Both nullification and interposition are rooted in the claim that states have rights "under or beyond the Constitution to oppose federal authority;"[56] and both are grounded in the text of the 1798 Virginia and Kentucky Resolutions opposing the Alien and Sedition Acts.

Despite these similarities, an analysis of the Resolutions' authors' original intent and of the Resolutions' contemporaries' original understanding exposes substantial differences between these two doctrines. By identifying both similarities and differences, we may better understand the doctrines themselves, and better assess their potential relevance in our contemporary legal and political culture.

A. Nullification and Interposition: Common Origins

Historian Thomas E. Woods Jr. describes the perennial controversy surrounding nullification and interposition as revolving around the following question: "What

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55 Watkins, *supra* note 24.

56 Neil H. Cogan, *Introduction, in* Union & States' Rights *supra* note 1, at 3.

was the United States supposed to be, anyway?"[57] He then continues, adding, "That may sound like an odd question. It is, in fact, the most important question of all."[58]

That important question is by no means a new one. From the moment the Revolution ended, people argued about what the United States was or should be. Nationalists and centralizers clashed with decentralizers and localists. The states' first governing documents—the Articles of Confederation—embodied decentralizing, localist ideals. Many—Madison included—quickly became frustrated by the Articles, however. When a convention gathered in Philadelphia during the summer of 1787 to discuss revising the Articles, delegates argued about the optimal distribution of power among the states, and between the states and the as-of-yet created federal—or "general"[59]—government.

The debate did not end with what ultimately became the Constitutional Convention, or with the drafting of the Constitution, however. Many were suspicious of the new document, which they believed vested "absolute and uncountrolable power" in the central government.[60] As economist Murray Rothbard noted, Anti-Federalists perceived their "resistance to the Constitution" as being rooted in "the very ideology of Liberty versus Power that had sparked and guided the American Revolution."[61]

Yet, just as the debate had not ended with the Constitution's drafting, it did not end with its ratification. Nineteenth-century journalist and Congressionalist minister Edmund Payson Powell described the perennial struggle as an inevitability, declaring: "It was destined that American history, down to the present time at least, should be a conflict of Hamiltonian and Jeffersonian ideas and methods"[62]—in other words, a conflict between centralizing and decentralizing visions. Whether or not the conflict was destined, it reignited with vigor in 1798, barely a decade after the Constitution had come into effect.[63]

The events of 1798 have their origins in the geopolitical conflict between Britain and France. Despite having declared—and secured—their independence from Britain, the American states remained subject to European influence at the close of the 18th century. A debate soon emerged in the young republic as to whether the United States should align itself with Britain or with France, particularly as France and Britain went to war in 1793.[64]

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57 Woods, *supra* note 43, at 87.

58 *Id.*

59 The founding generation often called what we now refer to as the "federal government" the "general government."

60 Brutus, Excerpts from *Brutus* No. 1 (Bill of Rights Institute ed.), https://docs-of-freedom.s3.amazonaws.com/uploads/document/attachment/440/Brutus_No_1_Excerpts_Annotated_Proof_3__1_.pdf.

61 Murray Rothbard, *Economic Determinism, Ideology, and the American Revolution*, The Rothbard Reader, 215, 225 (Joseph T. Salerno & Matthew McCaffrey, ed. 2016).

62 Edmund Payson Powell, Nullification and Secession in the United States: A History of the Six Attempts During the First Century of the Republic, 52 (New York, G.P. Putnam's Sons 1898).

63 The Constitution became operative on March 4, 1789.

64 Watkins, Reclaiming *supra* note 25, at 11-12.

In response to rising tensions with its former colonial master, the United States signed the Jay Treaty with Britain in 1795. Many Americans, still suspicious of the British and their sympathizers, felt the treaty failed to further American interests.[65] Furthermore, they associated sympathy with Britain with sympathy for British institutions, and so interpreted the treaty "as a desire to establish an aristocracy after the British pattern."[66] Meanwhile, they associated sympathy with the French, now in the midst of their own struggle for independence, with freedom and equality.[67] Such disagreements about the propriety of the Jay Treaty precipitated the formation of the first American political parties—the Federalists and the Republicans.[68] The Federalists became known as the party of the British, and the Republicans as the party of the French.[69] Thus, a geopolitical conflict also morphed into a conflict of ideologies.

As a result, the French Revolution—which in many Americans' minds, had fast turned from inspiring to horrifying—further exacerbated tensions between the pro-British and pro-French factions. Even erstwhile supporters of the French revolutionaries, such as Jefferson himself, disavowed the Revolution's transformation from struggle for independence to Reign of Terror; despite such disavowals, Federalists began branding Republicans as unpatriotic supporters of anarchy and bloodshed.[70]

John Adams assumed office in 1797 amid these rising tensions. Soon after the United States signed the Jay Treaty, France responded by harassing American ships.[71] By the summer of 1798, hostilities between the United States and France had degenerated into the "Quasi-War" "— an undeclared, primarily Naval conflict which lasted about two years.

In response and with Adams' support, the Federalist Congress began by tightening naturalization requirements in the Spring of '98. This first Federalist bill increased the pre-naturalization residency requirement from 5 to 14 years.[72] The Federalists likely hoped that these more stringent requirements would weaken the Republicans, who had been faring well among immigrant voters.[73] Naturalization reforms enacted, the Federalists turned their attention to "aliens"—i.e. foreigners—more generally.[74] To counter the supposed foreign threat, the Federalists proposed the Alien Enemies Act and Alien Friends Act.[75] According to the language of the

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65 Powell, at 56-57.

66 *Id.* at 57.

67 Watkins, Reclaiming at 11-12.

68 *Id.* at 1-2.

69 *Id.*

70 Powell, at 15; *See also* Luigi Marci Bassani, Liberty, State & Union: the Political Theory of Thomas Jefferson, 169 (2010).

71 Watkins, Reclaiming, *supra* note 25, at 20.

72 *Id.* at 29.

73 Watkins, Reclaiming, *supra* note 25, at 28-29. *See also* Bassani, *supra* note 70, at 165. ("The Federalists' aversion to aliens was, naturally, of a political nature, for the latter were drawn en masse towards Thomas Jefferson's Democratic-Republican party.") There is nothing new about using the franchise as a weapon of partisan warfare. For contemporary examples of this issue, *see e.g.* Trip Gabriel, *Voting Issues and Gerrymanders Are Now Key Political Battlegrounds*, N. Y. Times (Jan. 2, 2019).

74 *Id.* at 30.

75 *Id.*

day, "alien enemies," were citizens of nations with which the United States was formally at war, while "alien friends" were those from countries with which the Unites States was at peace.[76] Though ostensibly designed to target the French "the truth is that all immigrants were looked upon with the same attitude of mistrust."[77]

Republicans were particularly bothered by the Alien Friends Act, which they believed overstepped the Constitution. The Alien Friends Acts, signed into law in the summer of 1798, enabled the President to remove foreigners "dangerous to the peace and safety of the United States."[78] While both parties generally accepted that the President's war powers enabled him to remove Alien Enemies, Republicans denied any such authority over citizens of countries with which the United States was not at war.[79] Alien friends, they argued, "were exclusively subject to the sovereignty of the several individual states."[80] Federalists, meanwhile, argued that the President's war powers extended to undeclared wars, or that, at the very least, the "necessary and proper clause" filled in any gaps.[81]

The Federalists not only passed laws touching aliens, however, but also American citizens. The Sedition Act, signed a few weeks after the Alien Acts, targeted dissenters writ large.[82] The Act, which criminalized writing, printing, uttering or publishing "false, scandalous and malicious writing or writings against the government of the United States…with intent to defame said government," as well as material designed to bring the President or Congress "into contempt or disrepute," represented a striking curtailment of free speech.[83] Republicans objected, insisting that the First Amendment's protections did not end where poor taste began.[84] Nevertheless, Federalists argued that such measures were necessary to maintain order in chaotic times. Federalists also had an ingenious response to Republican's constitutional challenge: the Sedition Act did not contravene the First Amendment because the First Amendment only protected speech to the extent traditionally protected under the British common law.[85] The common law, meanwhile, criminalized "seditious libel" in terms similar to those of the Sedition

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76 Watkins, Reclaiming, *supra* note 25, at 30.

77 Bassani, *supra* note 70, at 165.

78 An Act Concerning Aliens, *in* The Virginia Report of 1799-1800, Touching the Alien and Sedition Laws; Together with the Virginia Resolutions of December 21, 1798, The Debate and Proceedings Thereon in the House of Delegates of Virginia, and Several Other Documents Illustrative of the Report and Resolutions (henceforth Randolph's Report) 2, 2 (J. W. Randolph ed., Philadelphia, C. Sherman 1850).

79 Watkins, Reclaiming, *supra* note 25, at 30-31.

80 William Ruffin, In the House of Delegates: Friday, December 14, 1798, *in* Randolph's Report 29 at 39. *See also* John Mercer, In the House of Delegates: Saturday, December 15, 1798, *in* Randolph's Report 40 at 44. Article I, Section 8 of the Constitution grants Congress the power "[t] establish a uniform rule of naturalization." Nowhere, however, does the Constitution explicitly grant Congress or the President power over the removal of foreigners—or any other aspect of immigration law.

81 Bassani, *supra* note 70, at 167.

82 *See generally* Sedition Act, *in* Randolph's Report 19 at 19-21.

83 *Id.* at 20. Conveniently, Republican Vice President Thomas Jefferson was not covered by the Sedition Act. Woods, *supra* note 43, at 43.

84 And some Republicans objections *were* truly in poor taste. Benjamin Franklin Bache, for example, derided Adams as being "blind, bald, crippled, toothless" and "querulous." Kilpatrick, at 67.

85 Bassani, *supra* note 70, at 166.

Act.[86] Federalists' argument rested on the assumption that the Constitution had in fact incorporated common law—by no means a foregone conclusion in that day.[87]

Compared to the Alien Acts, which were rarely if ever used, the Sedition Act claimed several high profile victims. All told, "at least 25 people were arrested for criticizing the government and approximately 14 were indicted."[88] While these numbers may seem low, their impact was widely felt. "[B]y targeting writers and editors…the Federalists made the most of" the Sedition Act; "[i]nformation was scarce in the early Republic, and the Federalists attempted to hamstring the opposition press."[89]

One early victim was Matthew Lyon, a bombastic and unyielding Congressman from Vermont.[90] Lyon was indicted on three counts for 1) writing that Adams had scarified the public welfare "in a continual grasp for power" and in "thirst[ing] for a ridiculous pomp, foolish adulation, and selfish avarice;" 2) publishing a letter where the author suggested Adams should be sent to "a mad house;" and 3) assisting in the publication of seditious material.[91] Lyon was sentenced to four months in prison and a $1000 fine, and Vermonters defiantly re-elected him as he served his sentence.[92] Shortly thereafter, Supreme Court Justice Salmon P. Chase sentenced prominent lawyer Thomas Cooper to six months in prison and a $400 fine for publishing a handbill critical of the Adams administration.[93] Chase also personally sentenced Scottish-born pamphleteer Thomas Callender to nine months in prison and a $200 fine for criticizing the administration.[94]

Though the Federalists and their judges scored temporary victories against Lyon and the like, their heavy-handed approach only fanned the flames of opposition, and convictions created a pantheon of Republican martyrs. If Adams hoped the Alien and Sedition Acts would encourage domestic tranquility, he was sorely mistaken. Most significantly, his actions directly inspired the Virginia and Kentucky Resolutions—and the resulting doctrines of interposition and nullification.

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86 *Id.*

87 *See e.g.* J.W. Randolph, Preface, *in* Randolph's Report i at xiv (writing that the incorporation of the common law "was regarded as an accumulation, at one stroke, of all authority in the hands of the Federal Government.") Contemporaries considered the issue of incorporation to be of critical importance. If British Common Law had simply been incorporated into the Constitution, Republicans argued, then America's prized written Constitution was little better than Britain's unwritten fundamental law. *But see* George K. Taylor, In the House of Delegates, Friday, December 21, 1798, *in* Randolph's Report 122 at 135 for a Federalist defense of incorporation.

88 Watkins, *supra* note 25, at 43.

89 *Id.* at 54.

90 Lyon was once reprimanded by the House for spitting tobacco juice at fellow Representative Roger Griswold (F – CT) in response to an insult, earning him the nickname "The Spitting Lyon." Griswold later retaliated by attacking Lyon with a cane—which attack Lyon deflected with a pair of fire tongs. Incivility, it would appear, is not a modern phenomenon. *See e.g.* Andrew Glass, *Griswold-Lyon Fight Erupts on House Floor, Feb. 15, 1798*, Politico (Feb. 15, 2011), https://www.politico.com/story/2011/02/griswold-lyon-fight-erupts-on-house-floor-feb-15-1798-049518.

91 Watkins, Reclaiming, *supra* note 25, at 45-46.

92 *Id.* at 47.

93 *Id.* at 48-51.

94 *Id.* at 51-53.

B. Nullification: Meanings and Application

Nullification's primary aim is the defense of state sovereignty. It holds that a state may, by right, strike unconstitutional federal laws within its territory. Not only may individual states decide whether or not federal laws are constitutional, but they may also invalidate laws they deem unconstitutional. As a useful analogy, constitutional scholar Sanford Levinson has compared nullification to "the authority to issue an injunction" against federal law.[95] A nullifying state acts as a kind of lower court, pending an appeal to the higher court of the states acting collectively to amend the Constitution.[96]

Underlying nullification are the concepts of consent, constitutionalism and compact theory. The doctrine itself was initially articulated by Thomas Jefferson in his draft of the Kentucky Resolutions of 1798, and then again by the Kentucky legislature in its Resolutions of 1799. Nullification was controversial from the beginning—even before the South Carolina Nullification Crisis. Then as now, both supporters and opponents understood nullification as embracing a strong role for the states, and a comparatively weaker role for the federal government.

1. Nullification's Theoretical Origins

The ideas underlying nullification predate the Quasi War, the tariff wars, or the Civil War. At its most basic, nullification rests on the idea of consent.[97] By nullifying a law, a state expresses that it does not consent to the federal government's actions. As a philosophical matter, nullification rests on the Enlightenment idea that because people enjoy certain natural rights—i.e. rights which human enjoy by virtue of being human, rather than by virtue of any law or decree—government requires the consent of the governed. According to philosopher John Locke, people form governments to protect their natural rights to life, liberty and property; meanwhile, governments which fail to protect those rights lose the legitimacy provided by the people's consent.[98]

Relatedly, nullification also rests on the concept of constitutionalism—the idea that all government authority should be subordinate to a consented-to body of fundamental law. In such a constitutional system, laws must accord with the fundamental law—or constitution—to be considered legitimate.[99] American constitutionalism inspired itself in part from the British constitutional tradition.[100] Though the UK lacked (and still lacks) a codified and supreme constitution, movements such as the Levellers—who were active during the English Civil War—

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95 Levinson, *supra* note 22, at 45.

96 Abel P. Upshur, No. I, *in* Nullification 217 at 220-21. Traditionally, the power to "nullify" had been associated with the judiciary.

97 *See e.g.* Brion McClanahan, *Podcast Episode 92: Nullification and Consent* (July 11, 2017), https://www.brionmcclanahan.com/blog/podcast-episode-92-nullification-and-consent/.

98 John Dunn, Locke: A Very Short Introduction 34 (1984).

99 Alexander Hamilton for example, had argued such a position in Federalist 78. According to Hamilton, "[t]here is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void." The Federalist No. 78 (Alexander Hamilton).

100 *See* E. A. Dick Howard, *The Bridge at Jamestown: The Virginia Charter of 1606 and Constitutionalism in the Modern World,* 42 U. Rich. L. Rev. 9, 12 (2007).

embraced the idea of constitutional supremacy, declaring in their "Agreement of the People" that "any laws made contrary to any part of the Agreement are null and void."[101] In ratifying the Constitution in 1787, the United States also embraced the idea of constitutional supremacy, preferring the security and consistency of a codified document to the British model of parliamentary supremacy.[102]

More recently, as Thomas E. Woods Jr. succinctly stated in the opening to his book, *Nullification: Reclaiming the Consent of the Governed*: "Nullification begins with the axiomatic point that a federal law that violates the Constitution is no law at all. It is void and of no effect."[103] The idea that unconstitutional laws are void is—in a rare instance of agreement between a libertarian like Woods and a liberal legal scholar like Sanford Levinson—"uncontroversial."[104] In 1798 as now, however, nullification is anything but uncontroversial. And, then as now, the controversy begins not with Woods's "axiomatic point," but with the "step further:" the idea that "if a law is unconstitutional and therefore void and of no effect, it is up to the states, the parties to the federal compact, to declare it so and thus refuse to enforce it."[105] As per Levinson, "presumably, the debate…is far more about who precisely gets to say whether—and when—a law is unconstitutional than about the abstract proposition that an unconstitutional law is really no law at all."[106] Is it the people, the states, the courts, the President, Congress, or someone else? Indeed, a nullifying state operates not unlike a court—opining on a law's constitutionality and pronouncing a judgment binding within its jurisdiction.[107]

Finally, nullification is rooted in compact theory.[108] Compact theory holds that "the United States had been formed when the people of each of the thirteen states, each acting in its sovereign capacity, ratified the Constitution," rather than from the action of "a single sovereign people."[109] And critically, under compact theory, the states ultimately retained their sovereign character after ratification—having only delegated, rather than relinquished, certain powers. As Woods explains, "[f]or compact theorists, therefore, nullification amounts to the legitimate exercise of sovereignty by sovereign bodies in defense of their liberties."[110] If the states themselves are not the parties to the compact, then their authority to judge infractions

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101 *Id*. at 16-17.

102 Under the British model, the Constitution may be altered through acts of Parliament.

103 Woods, *supra* note 43, at 3.

104 Woods, *supra* note 43, at 3; Levinson, *supra* note 22, at 19 (stating that a law which violated the Second Amendment was "obviously" "null, void, and unenforceable).

105 Woods, *supra* note 43, at 3. In its entirety, Woods' statement reads: "Nullification begins with the axiomatic point that a federal law that violates the Constitution is no law at all. It is void and of no effect. Nullification simply pushes this uncontroversial point a step further: if a law is unconstitutional and therefore void and of no effect, it is up to the states, the parties to the federal compact, to declare it so and thus refuse to enforce it."

106 Levinson, *supra* note 22, at 19.

107 Tellingly, the term "nullify" was initially associated with court judgments. *See e.g.* Legislature of the State of New Hampshire, First Remonstrance of the Legislature, February 20, 1794, *in* Documents 12 at 12 (using the term "nullify" to describe an adverse judgment of a federal court against the state).

108 Legislature of the Commonwealth of Kentucky, The Kentucky Resolutions of 1798, *in* Nullification, 157, 157.

109 Woods, *supra* note 43, at 88.

110 *Id.* at 89.

of that compact comes into question. In particular, however, nullification is rooted in a version of compact theory which conceives of the states individually, rather than collectively, as the parties to the compact.[111] Therefore, under such a compact theory, the authority to judge infractions belongs to each state.

2. Nullification's Textual Basis

a) Jefferson's Draft Resolves of 1798

Though later removed by the Kentucky legislature, Jefferson famously used the term "nullification" in his draft of the Resolutions. Like the final Resolutions, Jefferson's draft resolves[112] are organized into nine multi-paragraph sections called "resolves," each resolve addressing a distinct issue. Taken together, these resolves illustrate why Jefferson thought nullification useful, necessary, and justified.

Like the Resolutions, the draft resolves also open by declaring that the states "are not united on the principle of unlimited submission to their general government; but that, by compact…they constitute a general government for special purposes."[113] When that general government "assumes undelegated powers, its acts are unauthoritative, void, and of no force."[114] Furthermore, because there exists "no common judge" among the parties to the compact, "each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress."[115]

The resolves then transition to criticizing particular government actions. The second resolve opposes the federalization of certain crimes.[116] The third declares that the Sedition Act violates the First Amendment, while the fourth states that "alien friends are under the jurisdiction and protection of the laws of the state wherein they are."[117] The fifth states that the so called "Migration or Importation Clause"[118] further restricts federal power over immigration.[119] The sixth asserts that the Alien Act violates due process.[120] The seventh rejects the argument that the General Welfare or Necessary and Proper Clauses vest the government with any unenumerated powers.[121]

Jefferson's eighth resolve differs significantly from that adopted by the Kentucky legislature. In the Resolutions, the eighth resolve simply calls for the

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111 Watkins, Reclaiming, *supra* note 25, at 72.

112 I will be referring to Jefferson's draft of the Kentucky Resolutions as his "draft resolves" or "resolves," to differentiate them from the document ultimately adopted by the Kentucky legislature.

113 Thomas Jefferson, Jefferson's Draft, *in* The Papers of Thomas Jefferson, https://jeffersonpapers.princeton.edu/selected-documents/jefferson%E2%80%99s-draft.

114 *Id.*

115 *Id.*

116 *Id.*

117 *Id.*

118 *Id.* Art. 1, Sec. 9, cl. 1 reads: "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person."

119 *Id.*

120 *Id.*

121 *Id.*

document to be transmitted to Kentucky's Senators and Representative, and encourages these "to use their best endeavors to procure…a repeal of the aforesaid unconstitutional and obnoxious acts."[122] In the draft resolves, however, the eighth resolve is rather long and dense. Significantly, it is here that Jefferson explicitly espouses nullification, writing that "where powers are assumed which have not been delegated, a nullification of the act is the rightful remedy: that every State has a natural right in cases not within the compact…to nullify of their own authority all assumptions of power by others within their limits."[123] In other words, Jefferson states that each individual state may nullify—i.e. judge the constitutionality of federal laws—within its own jurisdiction. The right to nullify is essential, Jefferson argues, because "without this right, they [i.e. the states] would be under the dominion, absolute and unlimited, of whosoever might exercise this right of judgment for them."[124] Nullification is justified because the states "alone" are "parties to the compact, and solely authorized to judge in the last resort of the powers exercised under it, Congress being not a party, but merely the creature of the compact, and subject as to its assumptions of power to the final judgment of those by whom, and for whose use itself and its powers were all created and modified."[125] After reiterating the substance of Kentucky's disagreement with Congress, Jefferson's draft closes with this call—also omitted from the Resolutions:

> that the co-States, recurring to their natural right in cases not made federal, will concur in declaring these acts void, and of no force, and will each take measures of its own for providing that neither these acts, nor any others of the General Government not plainly and intentionally authorized by the Constitution, shall be exercised within their respective territories.[126]

Finally, the ninth resolve offers a sweeping indictment of both the spirit and substance of the Alien and Sedition Acts.[127] Unless these and other violations be "arrested on the threshold," the resolve predicts that these "may tend to drive these states into revolution and blood."[128] Furthermore, failure to condemn the Acts "would be to surrender the form of government we have chosen, and live under one deriving its powers from its own will."[129] Having cast the debate as one between peace and liberty, and violence and tyranny, the ninth and last resolve closes with a call for the co-states to recur "to their natural rights not made federal" and to concur in declaring the Acts "void and of no force."[130]

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122 *Id.*
123 *Id.*
124 *Id.*
125 *Id.*
126 *Id.*
127 *Id.*
128 *Id.*
129 *Id.*
130 *Id.*

b) The Kentucky Resolutions of 1799

Because Jefferson's draft resolves were neither adopted by the legislature, nor even available until after his death, the Kentucky Resolutions of 1799—which unlike the Resolutions of the previous year, actually refer to "nullification"—are a second important textual source for understanding nullification.

The Kentucky Resolutions of 1798 occasioned condemnation from state legislatures across the country; politicians in the sister states not only denounced the Resolutions, but state legislatures also issued "counter-resolutions" condemning the Kentucky document.[131] In response to these criticisms, the Kentucky legislature reaffirmed the '98 Resolutions in November 1799, "[l]est…the silence of this commonwealth should be construed into an acquiescence in the doctrines and principles advanced…by the said answers."[132] These '99 Resolutions reiterated Kentucky's continued attachment to the Union, adherence to compact theory and conviction that Alien and Sedition Acts were unconstitutional.

Most significantly, however, the '99 Resolutions explicitly use the Jeffersonian term "nullification," which they describe as "the rightful remedy" to constitutional infraction.[133] The Resolutions then assert that this remedy may be appealed to by an individual state. "[H]owever cheerfully it may be disposed to surrender its opinion to a majority of its sister states, in matters of ordinary or doubtful policy," Kentucky explains, "yet, in momentous regulations like the present…it would consider a silent acquiescence highly criminal."[134]

Why the '99 Resolutions included the term "nullification" while the '98 Resolutions omitted it is unclear.[135] Also unclear is the '99 Resolutions' authorship. They may have been drafted by Kentucky legislator John Breckenridge—who introduced them to the legislature—or by a committee of Kentucky notables.[136]

Indirectly, the '99 Resolutions may also have been influenced by Jefferson, whose comments regarding responses to sister-state criticism reached Breckenridge through Virginia legislator Wilson Cary Nicholas.[137] Jefferson had written to Nicholas in September 1799 to inform him that he had encouraged Madison to issue a defense of the Virginia Resolutions of 1798.[138] Such a response, Jefferson had suggested, should 1) answer sister-state objections, 2) reserve the right to respond to serious constitutional violations in the future, and 3) reiterate the state's attachment to the Union, and the constitution.[139] Though the Kentucky legislature declined "to again enter the field of argument" in 1799 by systematically refuting sister-state objections, it did adopt Jefferson's general encouragement to reaffirm its commitment to the '98 Resolutions.[140]

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131 *See e.g.* Replies of the States, *in* Documents 16 at 16-26.
132 Woods, *supra* note 43, at 169.
133 *Id.*
134 *Id.* at 170.
135 Bassani, *supra* note 70, at 169.
136 *Id.* at 168.
137 *Id.*
138 Thomas Jefferson, Thomas Jefferson to Wilson Cary Nicholas, September 5, 1799, *in* The Works of Thomas Jefferson in Twelve Volumes (Paul Leicester Ford, ed. 1904), http://memory.loc.gov/service/mss/mtj/mtj1/021/021_1004_1005.pdf.
139 *Id.*
140 The Legislature of the Commonwealth of Kentucky, The Kentucky Resolutions of 1799, *in* Nullification 167 at 168.

3. Jefferson's Intent

Jefferson intended the Resolutions as strong defenses of states' rights and constitutionalism, as well as of the individual liberties violated by the Alien and Sedition Acts.

First and foremost, however, in promoting nullification, Jefferson aimed to preserve what he considered to be the proper character of the United States: that of a federal union. As political theorist Luigi Marco Bassani has explained, "the resolutions can be deemed to be the core of Jefferson's federal idea, and they embody, in a nutshell, the whole of his constitutional doctrine."[141] They are "first and foremost, an acknowledgement of the irreplaceable role played by the states in safeguarding the constitutional balance against the risk of consolidation of federal power."[142] Specifically, they are an acknowledgment of the role to be played by individual states—rather than simply the states collectively, as would be the case in a constitutional convention. Furthermore, they also highlight the connection between natural rights and states' rights. Jefferson believed both that states themselves enjoyed a variant of the natural rights enjoyed by individuals—such as the right to consent to the exercise of power; and that individuals enjoyed certain rights—secured by, rather than created by, the constitutional order—by their very nature.[143]

Throughout his career, Jefferson championed limited and decentralized government. He was a localist skeptical of consolidated power, who believed government should operate at the lowest level possible.[144] As a result, Jefferson considered federalism—the separation of powers between the state and "general" governments—a fundamental feature of American republicanism.[145] A compact theorist, Jefferson considered the federal government an agent of the states, "subordinate to their own will."[146] The states, as Jefferson would write in a letter to the French philosopher Antoine Destutt de Tracy—were "the true barriers of

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141 Bassani, *supra* note 70, at 163.

142 *Id.* at 175.

143 As Bassani explains: "Despite the ratification of the federal Constitution, Jefferson believed that vis-à-vis each other, the States remained like individuals in the 'state of nature'" retaining "natural rights with respect to one another…Jefferson's appeal to nullification was a peculiar application of the theory of natural rights:...the right of nullification, was entirely within the realm of the federal compact, and was by no means an extra-constitutional remedy. In Jefferson's opinion, such a right derived entirely from the nature of the American union, as it had been historically constructed." Luigi Marco Bassani, *The Real Jefferson*, Mises Daily (May 23, 2002), https://mises.org/library/real-jefferson.

144 In his retirement from the presidency, for example, Jefferson promoted the idea of the "ward republic," whereby the majority of government functions would be performed at the level of the ward, i.e. a subdivision of a county. Thomas Jefferson, Thomas Jefferson to Joseph C. Cabell, Feb. 2, 1816, *in* The Writings of Thomas Jefferson (Andrew A. Lipscomb and Albert Ellery Bergh, eds., 1905), http://press-pubs.uchicago.edu/founders/documents/v1ch4s34.html. Jefferson was also open to the idea of partitioning the American continent into multiple, independent republics. Thomas Jefferson, Thomas Jefferson to Joseph Priestly, Jan. 29, 2014 *in supra* note 134, https://memory.loc.gov/service/mss/mtj//mtj1/029/029_0998_0999.pdf.

145 Bassani, *supra* note 70, at 163. ("Jefferson felt that federalism was so important that it could at times override individual rights.")

146 *Id.* at 194.

liberty."[147] In other words, the states were the institutions which protected the rights of the people.

For Jefferson, the vision of federal power embodied in the Alien and Sedition Acts presented not only an immediate threat to individual liberties, but also to the structure and purpose of the United States' system of government. Jefferson certainly considered the Alien and Sedition Acts objectionable in substance, and not simply in principle. For example, Jefferson highly valued freedom of the press, which the Sedition Act clearly limited.[148] Yet, Jefferson's aim in drafting the Kentucky Resolutions extended beyond his immediate concerns with the Acts themselves. In an October 1798 letter to Stevens T. Mason discussing the Alien and Sedition Acts, Jefferson wrote:

> For my own part, I consider those laws as merely an experiment on the American mind, to see how far it will bear an avowed violation of the constitution. If this goes down we shall immediately see attempted another act of Congress, declaring that the President shall continue in office during life, reserving to another occasion the transfer of the succession to his heirs, and the establishment of the Senate for life. [149]

Jefferson feared the Federalist legislation was just the first blow to the United States' republican structure, and that other blows would follow. Similarly, a little over a month later, in a letter to John Taylor, Jefferson wrote: "I know not which mortifies me most, that I should fear to write what I think, or my country bear such a state of things."[150] Jefferson was alarmed by the widespread acceptance of the Federalist measures, and thought it essential to inspire opposition to the Acts—as well as to other instances of federal overreach. Failure to oppose the Acts, Jefferson feared, would erode the foundations of the American experiment.

That Jefferson advocated nullification as a means of combating federal overreach in general—rather than simply in the specific case of the Alien and Sedition Acts, or even simply in cases immediately infringing upon individual rights—is further highlighted by his inclusion of such other instances of federal overreach in his resolves. In his second resolve, for example, Jefferson decried the practice of federalizing crimes beyond those enumerated in the Constitution;[151] in

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147 Thomas Jefferson, Thomas Jefferson to Destutt de Tracy, January 26, 1811, *in* The Papers of Thomas Jefferson (J. Jefferson Looney ed., 1811), https://founders.archives.gov/documents/Jefferson/03-03-02-0258.

148 In an 1799 letter, for example, Jefferson wrote that "to preserve the freedom of the human mind and freedom of the press, every spirit should be ready to devote itself to martyrdom; for as long as we may think as we will, and speak as we think the condition of man will proceed in improvements." Adrienne Koch & Harry Ammon, *The Virginia and Kentucky Resolutions: An Episode in Jefferson and Madison's Defense of Civil Liberties*, 5 Will. & Mary Quart. 145, 152, fn. 15 (1948).

149 Stevens T. Mason was a descendent of George Mason and the first governor of Michigan.

150 Thomas Jefferson, Thomas Jefferson to John Taylor, November 26, 1798, *in* The Papers of Thomas Jefferson (Barbara B. Oberg ed., 2003), https://founders.archives.gov/documents/Jefferson/01-30-02-0398.

151 Jefferson identified in the Constitution "a [federal] power to punish treason, counterfeiting the securities and current coin of the United States, piracies, and felonies committed on the high seas, and offences against the law of nations, *and no other crimes whatsoever*." Jefferson, *supra* note 109.

particular, he criticized and declared "void" Congress's recent law criminalizing frauds against the Bank of the United States.[152] Jefferson's seventh resolve also addressed constitutional interpretation, and advocated a narrow reading of phrases such as the General Welfare Clause.[153]

Though scholars such as Adrienne Koch and Harry Ammon have attempted to downplay the significance of states' rights and constitutionalism to Jefferson in drafting the Kentucky Resolutions,[154] Jefferson's own words—both in the Resolutions themselves and his other writings—as well as the thrust of his career as a politician and political theorist, suggest otherwise. Jefferson, who called on states to recur to their "natural rights not made federal" to resist federal overreach, considered the states the irreplaceable and inherently legitimate guardians of American liberty and the American constitutional order.

4. The Kentucky Legislature's Influence and Intent

As the original author of the Kentucky Resolutions, Jefferson is an indispensable player in the story of nullification. Nevertheless, this story is incomplete without the inclusion of three other characters: Wilson Cary Nicholas, John Breckenridge, and to a lesser extent, John Taylor of Caroline.[155] Nicholas passed on Jefferson's draft resolutions to Breckenridge, [156] Breckenridge edited and introduced Jefferson's resolves to the Kentucky legislature, [157] and Taylor assisted Jefferson in developing the idea of nullification (in addition to introducing Madison's draft resolutions in Virginia).[158] In particular, Breckenridge's changes to the Resolutions partly explain why confusion about nullification's meaning abounded in the 19th century, and continues to abound today.

Breckenridge's importance notwithstanding, there may never been "Kentucky" Resolutions without Nicholas. Jefferson had initially hoped that Nicholas, a member of the Virginia Senate with ties to North Carolina, would help introduce a draft of his Resolutions there. Nicholas, however, passed on the Resolutions to Breckenridge instead, apparently without Jefferson's prior knowledge.[159] In

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152 *Id.*

153 *Id.*

154 Koch & Ammon, *supra* note 148, at 174 ("However interesting these famous Resolutions may be for the constitutional doctrine they contain, they were intended *primarily* as a defense, practical and spirited, of civil liberties.").

155 Taylor, Nicholas, Breckenridge, Madison and Jefferson all belonged to the same social circle. Madison and Jefferson were, of course, neighbors and friends. Both Taylor and Nicholas were members of the Virginia legislature. Though Breckenridge was from Kentucky, he had practiced law in Jefferson's hometown of Charlottesville and had married into the Cabells, a prominent Virginia family. Ethelbert Dudley Warfield, The Kentucky Resolutions of 1798: An Historical Study, 54-55 (New York, G.P. Putnam's Sons 1887).

156 Thomas Jefferson, Thomas Jefferson to Wilson Cary Nicholas, October 5, 1798, *in* The Papers of Thomas Jefferson (Paul Leicester Ford ed., 1904), https://memory.loc.gov/service/mss/mtj//mtj1/021/021_0752_0752.pdf (*See also* Woods, *supra* note 43, at 46.

157 Bassani, *supra* note 70, at 173.

158 John Taylor, John Taylor to Thomas Jefferson, June 25, 1798, *in* The Papers of Thomas Jefferson (Barbara B. Oberg ed., 2003), https://founders.archives.gov/documents/Jefferson/01-30-02-0313.

159 Jefferson approved of Nicholas's decision to involve Breckenridge. In a letter dated October

addition, Nicholas acted as an intermediary between Jefferson and Madison.[160] Nicholas also seems to have passed information between Jefferson and members of the Virginia legislature.[161]

Taylor, meanwhile, may have influenced Jefferson before the Resolutions were even drafted. In a June 1798 letter to Jefferson, for example, Taylor suggested that the "right of the State governments to expound the constitution, might possibly be made the basis of a movement towards its amendment. If this is insufficient, the people in state conventions, are incontrovertibly the contracting parties, and possessing the impinging rights, may proceed by orderly steps to attain the object."[162]

Most dramatic, however, was Breckenridge's role. Breckenridge edited the text of Jefferson's draft resolves, all the while preserving much of the underlying theory. Most significantly, Breckenridge shortened Jefferson's eighth resolve, which contained the strongest expressions of state sovereignty of any version of the Resolutions. The version he introduced to the Kentucky legislature in November removed reference to the "rightful remedy" of "nullification," as well as some language suggesting that the states *individually* constituted the parties to the federal compact.[163] However, Breckenridge returned to nullification during the debates that fall, stating: "I hesitate not to declare it as my opinion that it is then the right and duty of the several states to nullify those acts, and to protect their citizens from their operation."[164] He also compared the federal government to an "agent," seemingly in agreement with the omitted section on the nature of the federal compact.[165]

5, 1798, Jefferson wrote: "I entirely approve of the confidence you have reposed in mr Brackenridge, as he possesses mine entirely. I had imagined it better those resolutions should have originated with N. Carolina. but perhaps the late changes in their representation may indicate some doubt whether they would have passed. in that case it is better they should come from Kentuckey." Jefferson, *supra* note 157.

160 Jefferson, *supra* note 131. In the aforementioned October 5 letter, Jefferson wrote to Nicholas: "I understand you intend soon to go as far as mr Madison's. you know of course I have no secrets for him. I wish him therefore to be consulted as to these resolutions." *Id*.

161 In a letter to Nicholas dated November 29, 1798, Jefferson suggests that his draft (i.e. those under consideration in Kentucky) be altered to read: "to concur with this commonwealth in declaring, as it does hereby declare, that the said acts are, and were ab initio, null, void and of no force, or effect." This language—not included in Madison's draft resolutions (i.e. those under consideration in Virginia)—later appeared in an intermediate version under discussion by the Virginia legislature. Thomas Jefferson, Thomas Jefferson to Wilson Cary Nicholas, November 28, 1798, *in* The Papers of Thomas Jefferson (Barbara B. Oberg ed., 2003), https://founders.archives.gov/documents/Jefferson/01-30-02-0399.

162 Taylor, *supra* note 153.

163 The relevant portion of the eighth resolve reads: "[T]hat in cases of an abuse of the delegated powers, the members of the General Government, being chosen by the people, a change by the people would be the constitutional remedy; but, where powers are assumed which have not been delegated, a nullification of the act is the rightful remedy: that every State has a natural right in cases not within the compact…*to nullify of their own authority all assumptions of power by others within their limits*: that without this right, they would be under the dominion, absolute and unlimited…" (emphasis added). Warfield, at 81.

164 *Id.* at 94.

165 *Id.* at 92.

Ethelbert Dudley Warfield—a Presbyterian minister, college president, and descendent of John Breckenridge—speculated somewhat vaguely that Breckenridge "used such freedom in changing [the draft resolutions] to suit his own views and the observed wants of Kentucky." [166] Indeed, that Breckenridge removed Jefferson's most radical language suggests either that he did not agree with the language himself, or that he thought it would impede the Resolutions' passage or acceptance. Breckenridge's own statements, as well as the use of the term "nullification" in the Kentucky Resolutions of 1799, suggest that his changes were more so motivated by the later than the former.[167]

Though Breckenridge's changes may have aided the Resolutions' passage, they created confusion. Before the discovery of the draft resolves following Jefferson's death, Breckenridge's removal of the term "nullification" cast doubt on whether Jefferson himself had actually developed or even supported the idea. His removal of other phrases heavily suggestive of a right to individual state action—such as the last portion of Jefferson's draft resolve[168]—also created doubt as to the practical aspects of nullification, such as the legitimacy of South Carolina's application of the doctrine.

5. Contemporary Reception of the Kentucky Resolutions

Because the Kentucky Resolutions of 1799 were issued the same week as George Washington's death, they attracted scant attention.[169] The '98 Resolutions, by contrast, elicited strong and swift responses.

Overall, contemporaries interpreted the Kentucky Resolutions of 1798 as challenges to federal authority generally, and judicial authority specifically; they also interpreted them as attacks on the Alien and Sedition Acts. The Pennsylvania House, for example, denounced the Kentucky legislature for challenging the people's representatives—the President and Congress—and "the supreme judiciary."[170] "The constitution," it concluded, "does not contemplate, as vested or residing in the Legislatures of the several states, any right or power of declaring that any act of the general government 'is not law, but is altogether void, and of no effect.'"[171] It then defended the Alien and Sedition Acts as "just rules of civil conduct, and as component parts of a system of defense against the aggressions of a nation, aiming at the dominion of the world"[172] and as containing "nothing terrifying, except to the flagitious and designing."[173]

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166 *Id.* at 166. Whatever Breckenridge's reasons, Warfield's conclusion that "Mr. Madison has expressed the most guarded sentiments. Mr. Breckenridge…holds a somewhat imperfectly defined middle ground, and Mr. Jefferson represents the most advanced type of States' rights" seems apt. *Id.* at 183-84.

167 Once it became clear that no state other than Virginia would join Kentucky in protest, the Kentucky legislature perhaps felt freer to express its feelings in stronger terms.

168 *See supra* note 109.

169 Watkins, Reclaiming, *supra* note 25, at 78.

170 The House of Representatives of the Commonwealth of Pennsylvania, Resolutions of the House of Representatives of Pennsylvania to Kentucky, February 9, 1799, *in* Documents at 20, 20.

171 *Id.*

172 *i.e.* France.

173 *Id.* at 21.

Because the Kentucky Resolutions were both substantially similar and contemporaneous to the Virginia Resolutions, the documents were often conflated. For example, both New York and New Hampshire responded jointly to Kentucky and Virginia. New York decried these states' assumption of judicial power,[174] while New Hampshire echoed these concerns, and also defended the Acts' constitutionality and expediency.[175] Despite these initial conflations, contemporaries would soon come to interpret nullification and interposition differently, as evidenced by their selective appeal to these doctrines.

6. Jefferson, the Kentucky Resolutions and the Sanctuary Movement

Like its South Carolinian corollary, Jefferson and Kentucky's conception of nullification relied on the idea that states individually are party to the federal compact, and that the federal government is the agent of the several states. This conception challenged judicial supremacy—a fact seized upon by the Kentucky Resolutions' critics.

The sanctuary movement, by contrast, has appealed neither to compact theory nor the agency view of government, either legally or rhetorically. The sanctuary movement has based its opposition to the federal government in "anti-commandeering"—a constitutional doctrine derived from the Tenth Amendment and articulated by the Supreme Court in the 1990s.[176] The anti-commandeering doctrine states that the federal government cannot require states or state officials "to participate…in the administration of a federally enacted regulatory scheme."[177] Anti-commandeering does not enable states to invalidate federal law. Neither does anti-commandeering depend on the unconstitutionality of the underlying law; it is state involvement in law enforcement, rather than the underlying law, which anti-commandeering addresses.[178] For example, supporters of California's sanctuary state law explicitly justified the bill with reference to anti-commandeering;[179] yet, Gov. Jerry Brown clarified that "[t]his bill does not prevent or prohibit Immigration and Customs Enforcement or the Department of Homeland Security from doing

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174 The Senate of the State of New York, Senate of New York to Virginia and Kentucky, *in* Documents at 22, 22.

175 The House of Representatives of the State of New Hampshire, New Hampshire to Virginia and Kentucky, June 15, 1799, *in* Documents 24 at 24.

176 *See e.g.* Complaint, at 38, *Chicago v. Sessions*, No. 1:17-cv-5720 (N. D. Ill. Aug. 7, 2017); Complaint, 43, *Philadelphia v. Sessions*, No. 2:17-cv-03894 (E. D. Pa. Aug. 30, 2017) (explicitly identifying anti-commandeering as a justification for non-cooperation with federal authorities); Complaint, at 16, *San Francisco v. Trump*, No. 4:17-cv-00458 (N. D. Cal. Jan. 31, 2017) (citing *Printz,* the Supreme Court case articulating the anti-commandeering doctrine, as a justification for not cooperating with federal authorities).

177 New York v. United States, 505 U.S. 144, 142 (1992); Printz v. United States, 521 U.S. 898 (1997)

178 For example, in the landmark anti-commandeering case Printz v. United States, petitioners challenged the Brady Act's enforcement mechanism—i.e. requiring local law enforcement to perform those checks—rather than the underlying constitutionality of background checks for gun sales. 521 U.S. at 904.

179 Taryn Luna, *California to Become a Sanctuary State in 2018*, The Sacramento Bee (October 5, 2017), http://www.sacbee.com/news/politics-government/capitol-alert/article177212866.html.

their own work in any way."[180] Similarly, sanctuary city Philadelphia's policies explain that "Philadelphia works with our federal partners and does not stop ICE from arresting Philadelphians whom they believe are undocumented."[181]

Practically, the sanctuary movement's primary mode of operation—city- or county-wide ordinances—also underscores the distance between its and the nullifiers' conception of the Union. Whether through the state legislature or a state-wide convention, nullification has always envisioned the state—rather than any of its municipalities or subdivisions—as the appropriate organ of protest; the necessity of state action flows logically from nullification's focus on state sovereignty. Even Jefferson, who suggested that laws could be nullified by state legislatures rather than through a convention,[182] saw nullification as something outside the normal law-making process—where a bill originates in the legislature and is then signed by the governor. Sanctuary state California, by contrast, used the normal law-making process to declare its sanctuary status.[183]

Finally, as exemplified by its reliance on judicially-articulated anti-commandeering doctrine, the sanctuary movement has appealed to, rather than rejected, judicial supremacy. Rather than attempting to circumvent the courts, sanctuary cities have attempted to enlist the judiciary as an ally—filing complains in federal courts repetitive with next sentence to combat the Trump administration.[184] This strategy has been largely successful, as sanctuary cities across the country have obtained injunctions barring the Trump administration from withholding federal funds from cities who limit their cooperation with ICE.[185]

Neither has the sanctuary movement asserted a general ability to ignore court orders. Philadelphia, for example, affirms its commitment to following court orders in the same document promoting its "Welcoming City" policy, explaining that

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[180] Jazmine Uolla, *California Becomes 'Sanctuary State' in Rebuke of Trump Immigration Policy*, The Los Angeles Times (October 5, 2017), http://www.latimes.com/politics/la-pol-ca-brown-california-sanctuary-state-bill-20171005-story.html.

[181] Stephanie Waters, Office of Immigration Affairs, *City of Philadelphia Action Guide: Immigration Policies* (Jan. 8, 2018), https://www.phila.gov/2018-01-08-immigration-policies/.

[182] The Kentucky Resolutions nowhere mention calling a state convention.

[183] Ulloa, *supra* note 180.

[184] *See supra* note 173.

[185] *See e.g.* City of Philadelphia v. Sessions, 280 F. Supp. 3d 579(E.D. Pa. 2017), appeal dismissed sub nom. City of Philadelphia v. Attorney Gen. United States, No. 18-1103, 2018 WL 3475491 (3d Cir. July 6, 2018); City of Chicago v. Sessions, 264 F. Supp. 3d 933 (N.D. Ill. 2017), *reconsideration denied*, No. 17 C 5720, 2017 WL 5499167 (N.D. Ill. Nov. 16, 2017), and aff'd, 888 F.3d 272 (7th Cir. 2018), reh'g en banc granted in part, opinion vacated in part, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), vacated, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018); States of New York v. Dep't of Justice, 343 F. Supp. 3d 213 (S.D.N.Y. 2018); City & Cty. of San Francisco v. Sessions, 349 F. Supp. 3d 924, 951 (N.D. Cal. 2018), judgment entered sub nom. California ex rel. Becerra v. Sessions, No. 3:17-CV-04701-WHO, 2018 WL 6069940 (N.D. Cal. Nov. 20, 2018); General City of Philadelphia v. Attorney Gen. of United States of Am., No. 18-2648, 2019 WL 638931 (3d Cir. Feb. 15, 2019) Notably, however, some courts have seemed suspicious of the anti-commandeering argument, preferring to issuing injunctions on other grounds. *See City of Philadelphia*, 280 F. Supp. At 652; *City of Chicago*, 264 F. Supp. 3d at 949. Others have embraced the anti-commandeering argument, however. *See States of New York*, 343 F. Supp. 3d at 237; *City & Cty. of San Francisco*, 349 F. Supp. 3d at 953.

"Philadelphia's policies follow judicial orders" and that city prisons comply with judicial warrants;[186] Los Angeles similarly affirms it will honor detainer requests "issued by a judicial body" in its February 2019 sanctuary resolution.[187] Sanctuary cities' willingness to appeal to the courts and comply with court orders highlights the fact that the sanctuary movement views the judiciary as legitimate, and unique in its ability to decide legal questions.

C. Interposition: Meanings and Application

Interposition's primary aim is the preservation of checks and balance and the protection of individual liberties.[188] It holds that a state may, by right, shield its citizens from unconstitutional federal laws. A state may opine on the constitutionality of federal laws, and then oppose unconstitutional laws by denouncing them, encouraging their repeal, frustrating their enforcement, or calling for an amendment to the Constitution. Interposition is not, however, invalidation or injunction. Rather than acting as an independent court, as in the case of a nullifying state, the interposing state adopts the role of an advocate, arguing its case before the states collectively, and protecting its citizens from abuse within the established judicial system.

Like nullification, interposition relies on constitutionalism and, to a lesser degree, compact theory. James Madison advocated interposition in his Virginia Resolutions of 1798, then further developed the concept in his Report of 1800. As with nullification, interposition was initially controversial in that it presented a challenge to judicial supremacy. The idea rapidly gained acceptance after the Alien and Sedition Crisis passed, however, and was repeatedly deployed to maintain the constitutional balance of power and resist federal encroachment on individual liberties.

1. Interposition's Theoretical Origins

Interposition is rooted in the idea that government must act within certain agreed-upon parameters—in other words, constitutionally. Interposition is also rooted in the idea that the states, rather than being mere administrative jurisdictions or geographical designations, enjoy an independent political personality. To the extent that compact theory holds that the states were parties to the constitution, interposition, like nullification, reflects compact theory; it rejects the nationalist view that the federal government was created solely by the people.

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186 Waters *supra* note 180.

187 City of Los Angeles, Resolution, http://clkrep.lacity.org/onlinedocs/2017/17-1040_reso_09-08-2017.pdf; *City Council Passes Resolution Declaring LA a Sanctuary City*, CBS L. A. (Feb. 8, 2019), https://losangeles.cbslocal.com/2019/02/08/city-council-resolution-la-sanctuary-city/. The resolution was introduced in 2017 but only formally approved in 2019.

188 In defining the primary aims of nullification and interposition differently, I am not suggesting that interposition does not aim to uphold state sovereignty, or that nullification does not aim to preserve checks and balances or protect individual liberties. Rather, it is a question of which aims predominate. Usually, all of these aims are compatible. Sometimes, however, these aims may clash: states may infringe on personal liberties, or one branch of government may act contrary to the popular will. Which party prevails depends on which aims decision-makers prioritize.

As legal historian Christian Fritz has explained, the concept of "interposition" came from the scientific thought of the day: "as used in astronomical and scientific texts of the period, it described the movement of something between two other things in a relationship so as to interrupt and bring attention to the essence of that relationship."[189] In the political context, interposition thus reflects the view that the states—one of the parties to the compact—play a central role in regulating the constitutionally prescribed relationship between the federal government and the people.

2. Interposition's Textual Basis

James Madison famously used the term "interpose" in his Virginia Resolutions of 1798.[190] The Virginia Resolutions are shorter than their companion documents in Kentucky, but adopt a similar structure; they are organized into ten short paragraphs.

In the first and second paragraphs, the Resolutions express the state's attachment to the Constitution and to the Union.[191] In the third paragraph, they introduce the idea of interposition. The Resolutions "explicitly and peremptorily declare" that the federal government's powers result from "the compact to which the states are parties," and that the states, as parties, "have the right,[192] and are duty bound, to interpose, for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights, and liberties, appertaining to them."[193]

Interposition has become necessary, the third paragraph explains, because of the government's tendency to "enlarge its powers by forced construction of the constitutional charters." Especially egregious has been the government's use of the constitution to justify the Alien and Sedition Acts. Both Acts, the Resolutions argue, exercise "power not delegated by the Constitution."[194] They particularly criticize the Sedition Acts, which attacked "the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian or every other right."[195]

In closing—and as a clue to what interposition could involve in practice—the Resolutions reassert Virginia's commitment to the Union before calling for the states to "concur with this commonwealth, as it does hereby declare, that the acts

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189 Fritz, *supra* note 1, at 2-3.

190 James Madison, Resolutions of Virginia of December 21, 1798, *in* Randolph's Report 22 at 22. Madison did not, however, invent the practice of using the state legislature to oppose unconstitutional actions. In 1790, the Virginia Assembly issued a "memorial" opposing the federal government's assumption of state debt. The Assembly described themselves as "guardians…of the rights and interests of their constituents, as sentinels placed by them over the ministers of the foederal [sic] government, to shield it from their encroachments, or at least to sound the alarm when it is threatened with invasion." According to the Assembly, the assumption of debts deserved "censure" because it was "not warranted by the constitution of the United States." The General Assembly of the Commonwealth of Virginia, Virginia On the Assumption of State Debt, December 16, 1790, *in* Documents 4 at 5-6.

191 *Id.*

192 Notably, however, the Virginia Resolutions do not refer to the right of interposition as being a "natural right" of the states.

193 *Id.*

194 *Id.* at 23.

195 *Id.*

aforesaid are unconstitutional" and requesting that the governor "transmit a copy of the foregoing resolutions to the executive authority of each of the other states."[196]

3. Madison's Intent

Madison intended the Virginia Resolutions as a defense of both individual liberties and checks and balances. Rather than seeking to encourage states to "annul" unconstitutional legislation within their borders, Madison meant the Resolutions as a "warning to call the federal government to a halt, made public in order to induce those who were originally party to the constitutional compact to join in… protest."[197] Though concerned by the constitutional implications of Federalist policies, Madison's primary aim was opposing the Alien and Sedition Acts.

In drafting the Resolutions, Madison adopted a cautious, consensus-building approach. While the Kentucky Resolutions opened by emphasizing the states' reserved power, the Virginia Resolutions opened on a cooperative and conciliatory note emphasizing their attachment to the Constitution and "to the union of the states."[198] And while Jefferson's draft resolves unequivocally pronounced the Acts "null and void" and embraced individual state resistance, Madison sidestepped such a robust embrace of state's rights. Madison also declined to elaborate on what "interpos[ing] for arresting the progress of…evil" would involve in practice. Indeed, in a December 20 letter to Jefferson, Madison wrote that he had purposefully used "general expressions that would leave to other States a choice of all the modes possible of concurring in the substance, and would shield the General Assembly [of Virginia] against the charge of usurpation."[199] In other words, Madison did not want disagreements about the nature of the federal compact to stop states otherwise opposed to the Acts from concurring with Virginia. "[B]y leaving the widest possible range of action for the states to take" Madison "sought to reach sympathizers in every state, provide them with a platform from which to attack the measures of the government, and thus leave to them the problem of the form their responses should take."[200] By remaining vague, Madison was able to craft resolutions acceptable to both himself, and, hopefully, to others.

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Madison lived until 1836, giving him the opportunity to witness—and denounce—South Carolina's adaptation of his and Jefferson's ideas in the early 1830s.[201] Though Madison's interpretation of interposition with 30+ years' hindsight could not on its own be decisive evidence of his intent in 1798, his 1830s' pronouncements were consistent with his overall political philosophy—lending credibility to his late-in-life claim that he had not intended interposition to involve invalidation of federal law by a single state. Rather, Madison claimed that he had intended his Resolutions as a call to collective action by the states, "conceiv[ing] of the issue as the right of the states to declare—that is, to make it publicly known

196 *Id.*
197 Bassani, *supra* note 70, at 94 (internal quotations removed).
198 Woods, *supra* note 43, at 147.
199 *Id.*
200 Editorial Note, Virginia Resolutions, *in* The Papers of James Madison (David B. Mattern et al., ed., 1991), http://founders.archives.gov/documents/Madison/01-17-02-0128.
201 Jefferson had died a decade earlier, in 1826.

…—that any laws of the United States found to overstep their delegated powers should be regarded as unconstitutional."[202]

Though Madison personally opposed the "Tariff of Abominations," he disavowed Calhoun's "novel and nullifying doctrine,"[203] which he feared not only misrepresented his work and Jefferson's work, but also the nature of the Union.[204] Madison penned his "Notes on Nullification" in 1835 in an attempt to discredit the claim that his and Jefferson's writings vindicated the South Carolinians. In that work, an exasperated Madison complained that despite the Virginia legislature's disavowal, the "resolutions are still appealed to as expressly or constructively favoring the doctrine" of nullification.[205] Madison criticized the nullifiers' view that "a single state has a constitutional right to annul or suspend the operation of a law of the U. S. within its limits" all the while "remaining a member of the Union, and admitting the Constitution to be in force;" rather than advocating such unilateral action, Madison insisted, both Resolutions aimed "to produce a conviction everywhere, that the Constitution had been violated by the obnoxious acts and to procure a concurrence and co-operation of the other States in effectuating a repeal of the acts." [206] The proper remedies to federal usurpations, Madison argued, were first "the checks provided among the constituted authorities, second "the Ballot-boxes," and third, constitutional amendment.[207]

Yet, beyond the vague calls for "concurrence and co-operation," Madison's Notes—like the Virginia Resolutions themselves—assiduously avoided defining "interposition" in unique and practical terms. Even in an 1833 letter to his friend William Cabell Rives, Madison remained vague, only explaining that

> The object of Virga. was to vindicate legislative declarations of opinion, to designate the several constitutional modes of interposition by the States agst. abuses of power; and to establish the ultimate authority of the States as parties to & members of the Constitution, to interpose agst. the decisions of the Judicial as well as other branches, of the Govt.[208]

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202 Bassani, *supra* note 70, at 194.

203 Madison to W. Rives, March 12, 1833; *see also* Watkins, *supra* note 24,, at 112-13.

204 As Christian Fritz explains: the Resolutions of '98 and the Nullification Crisis "were not exclusively about federalism. They also raised key questions of constitutionalism: Who were 'the people' that underlay the national constitution and how could that sovereign act and be recognized in action." Fritz, *supra* note 1, at 166.

205 James Madison, *Notes on Nullification (*henceforth *Notes*), *in* 9 The Writings of James Madison: Comprising his Public Papers and His Private Correspondence, Including Numerous Letters and Documents Now for the First Time Printed (Gaillard Hunt ed. 1900), 573, 574.

206 *Id.*

207 *Id.* at 597. Ironically, this argument approximates Federalist Henry Lee's argument *in opposition to* the Virginia Resolutions. See Henry Lee, In the House of Delegates, Thursday, December 20, 1798, *in* Randolph's Report 103 at 104, 108.

208 James Madison, James Madison to A. Rives, January 1, 1833, Early Access Version, *in* The Papers of James Madison, https://founders.archives.gov/documents/Madison/99-02-02-2655.

Though Madison blamed the nullifiers' "nullifying misconstruction"[209] on a deliberate misinterpretation of his statement that "the states…have the right and are in duty bound to interpose…for maintaining, within their *respective* limits, the authorities, rights, and liberties appertaining to them," Madison's intentionally capacious language is at least as much to blame. As Virginia judge Abel P. Upshur asked rhetorically in his "An Exposition of the Virginia Resolutions of 1798:" if a state could not act upon its determination that a law is unconstitutional, then "is its right of judgement any thing more than a mere liberty of speech and of opinion, and, therefore, no *available* right at all?"[210] Through an abundance of caution in 1798, Madison opened the door to misinterpretation in 1833. That South Carolina was not unique in construing Madison's words as an invitation to individual state action is also demonstrated by contemporaries' reactions.[211]

As a result, some scholars have criticized Madison for a perceived inconsistency, calling him "a superficial and inconsistent thinker" who contradicted "his own plain language" of 1798 by opposing state resistance in 1832.[212] Yet, an examination of Madison's writings and career suggests that while he may have somewhat mischaracterized the principles of '98,[213] his response to South Carolina was consistent with his own political philosophy. Throughout his career, Madison emphasized the importance of checks and balances in the pursuit of securing personal liberties. For Madison, state action was one of many means by which that balance and those liberties could be maintained.

Unlike Jefferson, who believed "the true barriers of our liberty in this country are our state-governments,"[214] Madison was often skeptical of the states. Madison repeatedly observed that state governments, rather than acting as "true barriers of liberty," often violated the rights of their citizens. In his 1787 "Vices of the Political System of the United States," for example, Madison criticized the power—and misuse of power—by state governments under the Articles of Confederation. Of state laws, he wrote, "their number is the price of liberty."[215] Part of the solution hinted at in "Vices" was that ultimately adopted in the Constitution: balancing competing interests through the separation of powers.[216] Only through such a balance could "private rights" be secure.[217] Madison dismissed the decentralized Articles as "nothing more than a treaty of amity of commerce and of alliance," and advocated

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209 Madison, *Notes* at 580.

210 Upshur, *supra* note 96 at 121.

211 *See supra*, notes 237-44.

212 Wilson, *Jefferson and Nullification, in* Nullification: Reclaiming the Consent of the Governed 1 at 3.

213 In his *Notes*, for example, Madison insists that Virginia was "so far…from countenancing the nullifying doctrine, that the occasion was viewed as a proper one for exemplifying its devotion to public order, and acquiescence in laws which it deemed unconstitutional, whilst those laws were not constitutionally repealed." Describing Virginia's spirited protest as "devotion" and "acquiescence" seems to misrepresent the spirit of the moment. Madison, *supra* note 185 at 192.

214 Jefferson, *supra* note 142.

215 Madison, Vices of the Political System of the United States, *in* The Papers of James Madison (William T. Hutchinson ed. 1962), 353, http://pjm.as.virginia.edu/sites/pjm.as.virginia.edu/files/vices-political-system-linked-pages.pdf.

216 *Id.* at 357.

217 *Id.*

for a more robust governing document.[218] Frustrated with state intransigence, Madison proposed amending the Articles to allow the federal government to compel states "to fulfill their federal engagements."[219] A few years later, Madison expressed similar skepticism of state governments at the Philadelphia Convention; there, he advocated a federal veto of state legislation.[220] Though Madison's federal veto was ultimately rejected, Madison continued to criticize state governments even as he urged the adoption of the Constitution.[221]

Furthermore, even in his own Virginia Resolutions, Madison arguably avoided the positions which the nullifiers ascribed to him. First, Madison never clearly called for states to invalidate federal law, preferring the term interpose—which suggests an intermediary role as an agent of protest, rather that of a final arbiter. Even Koch and Ammon, who conflate Madison and Jefferson's thought throughout their article, admit that Madison "did not think, as did Jefferson, that under the Constitution the state was justified in declaring federal laws 'null, void, and no effect.'[222] Nor did he believe that the state was the ultimate judge of both the violation and the mode of redress."[223] Second, Madison never clearly endorsed the individual-state view of compact theory, stating only that "the states"—in the plural—"are parties." Madison reiterated this position in his Report of 1800, writing: "The *states*, then, being the parties to the constitutional compact, and in *their* sovereign capacity, it follows of necessity, that there can be no tribunal above *their* authority…and consequently, that, as the *parties* to it, *they* must themselves decide, in the last resort, such questions as may be of sufficient magnitude to require *their* interpretation."[224] For Madison then, "[i]t was the collective nature of this compact as binding all states, rather than as a compact between each individual state and the Union, that exposed a decisive flaw in the South Carolina position."[225]

Madison's apparent reversal in 1798 was then not so much a change of mind as a change of strategy brought about by a change of circumstance. Unlike in 1787, it was the federal government, rather than the state governments, which appeared to pose the greatest danger to the people's liberties in 1798. As historian Kevin Gutzman has explained, Madison's thinking about federalism was "variable," and reflective of the relative strengths of the federal and state governments at different times."[226] Though Madison "pursued a consistent vision of the ideal polity," "[c]onsistent theory yielded to political imperative."[227] In 1798, "after a solid decade of political defeats, Madison was casting about for some means of protecting

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218 *Id.* at 351.

219 Jack N. Rakove, *"A Real Nondescript:" James Madison's Thoughts on States' Rights and Federalism*, *in* Union & States' Rights, *supra* note 1, at 16.

220 Hutchinson, *supra* note 215, at 347.

221 For example, Madison wrote in Federalist 51: "It can be little doubted that if the State of Rhode Island was separated from the Confederacy and left to itself, the insecurity of rights under the popular form of government within such narrow limits would be displayed by such reiterated oppressions of factious majorities." Federalist Papers No. 51 (James Madison).

222 Koch & Ammon, *supra* note 148, at 162.

223 *Id.*

224 Madison, in Woods, *supra* note 43, at 176 (emphasis added).

225 Rakove, *supra* note 219, at 26.

226 *Id.* at 570.

227 *Id.*

minority rights against what must have seemed a perpetual Federalist attack."[228] A "practical politician," Madison thus turned to states' rights in 1798, as it seemed the argument best suited to his aim of countering the Federalist assault on civil liberties.[229] Indeed, as Madison candidly admitted in a letter to Virginia Senator William Rives: "In explaining the proceedings of Virga. in 98–99, the state of things at that time was the more properly appealed to, as it has been too much overlooked. The doctrines combated are always a key to the arguments employed."[230]

While Madison was willing to use states' rights arguments in 1798 to protect civil liberties and restore the constitutional balance of power, he was not willing to deploy those arguments in defense of South Carolina's sectional interests. Unlike the Alien and Sedition Acts, the tariff did not encroach upon personal liberties, or an area reserved for state regulation.

Perhaps most revealing, however, was Madison's objection to the nullifiers' view that "the States have never parted with an Atom of their sovereignty; and consequently that the Constitutional hand which holds them together, is a mere league or partnership, without any of the characteristics of sovereignty or nationality."[231] He worried that "the discourse of federalism was degenerating into a contraposition of two absolute and simplistic formulas"—one based on the absolute sovereignty of the states, and the other on the existence of a unitary American people.[232] Rather than restoring the balance Madison so prized, South Carolina's actions seemed to Madison to threaten the stability of the Union by tilting the scales in favor of the states and turning back the clock to the Articles. The Father of the Constitution may have suddenly feared he would be remembered as the Father of Disunion.[233]

4. The Virginia Legislature's Influence and Intent

Overall, Virginia legislators appear to have been animated by a variety of concerns—asserting state sovereignty, upholding the Constitution, preserving the Union, and defending individual liberties. Like Madison, however, the Virginia legislature ultimately opted to issue resolutions which would inspire broad-based support, though some members also personally supported the more robust vision of resistance embodied in the Kentucky Resolutions.

The final edits to the Virginia Resolution distanced these from their companion documents in Kentucky by de-emphasizing the nullity of unconstitutional laws and the right to individual state action. First, the Virginia legislature voted to remove

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228 Kevin R. Gutzman, *A Troublesome Legacy: James Madison and "The Principles of '98"*, 15 (4) Journal of the Early Republic, 569, 579 (1995).

229 *Id.* at 571.

230 James Madison, James Madison to William C. Rives, March 12, 1833, *in* Hunt at 511, 514.

231 *Id.* Madison was likely not overstating the nullifiers' view. In his "Discourse on the Constitution and Government of the United States," Calhoun described the federal government's powers as "trust powers." He denied that the states had "absolutely transferred" their powers to the federal government, or that they had formed a "national" government. John C. Calhoun, *A Discourse on the Constitution and Government of the United States*, *in* 1 The Works of John C. Calhoun 111, 113, 143 (Columbia, A. S. Johnston, Richard K. Cralle ed., 1851).

232 Rakove, *supra* note 219, at 14.

233 For a similar conclusion *see* Kevin R. Gutzman, *From Interposition to Nullification: Peripheries and Center in the Thought of James Madison*, 46 Essays in History 89, 89 (1994).

language declaring the Alien and Seditions Acts "null, void, and of no force, or effect."[234] Significantly, the "null and void" language had not been in Madison's initial draft, but had been added at Jefferson's suggestion before the resolves were introduced in the legislature.[235] The legislature's "change of the change" therefore returned to Madison's original wording and intent.

While the removal of the "null and void" language is quite telling in regards to Madison's intent, it should not be interpreted as meaning that the legislature as a whole rejected the idea that unconstitutional laws were null and void. Virginia Del. Johnston, for example, stated that "whether the laws were said by the committee to be null and void, or not, was a matter, he thought, of little consequence. For if they were unconstitutional, they of course, were null and void."[236] Similarly, Del. Daniel explained that

> [i]t had been contended by gentlemen, that it was going too far to declare the acts in question, to be 'no law, null, void, and of no effect:' that it was sufficient to say they were unconstitutional. He said, if they were unconstitutional, if followed necessarily that they were 'not law, but null, void, and of no effect.' But, if those particular words were offensive to gentlemen he had no objections to any modification, so the principle was retained."[237]

Whether or not Dels. Johnston or Daniel considered the right of declaring laws "null and void" as belonging to individual states or the states collectively is unclear from these comments. Comments by other delegates, however, suggest sympathy towards the individual state action position. Del. Foushee, for example, supported the Resolutions by stating that "the states individually were sovereign before and at the time of the adoption of the Constitution…and still are."[238]

Also difficult to interpret is a second change to the Resolutions—the removal of the word "alone" from the statement that the "states alone are parties" to the compact;[239] the change was little discussed. Likely, however, the omission reflected the view of at least some in the legislature that *both* the states and the people were parties to the compact, while still rejecting the Federalist view that the people alone were parties.[240] Like the edits to Jefferson's draft resolutions, the Virginia changes

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234 In the House of Delegates, Friday, December 21, 1798, *in* Randolph's Report 122 at 150.

235 Watkins, Reclaiming, *supra* note 25, at 72.

236 Peter Johnston, In the House of Delegates, Thursday, December 20, 1798, *in* Randolph's Report 103 at 111.

237 William Daniel, Jr., In the House of Delegates, Thursday, December 19, 1798, *in* Randolph's Report 81 at 97.

238 William Foushee, In the House of Delegates, Thursday, December 18, 1798, *in* Randolph's Report 71 at 76.

239 *See* William B. Giles, In the House of Delegates, Friday, December 21, 1798, *in* Randolph's Report 122 at 149; Wilson C. Nicholas, In the House of Delegates, Friday, December 21, 1798, *in* Randolph's Report 122 at 149; Commentary to John Taylor, In the House of Delegates, Friday, December 21, 1798, *in* Randolph's Report 122 at 150.

240 Federalist Henry Lee was one of the most enthusiastic proponents of the "people alone" view. During the legislative debate, Lee "contended that the ruling principle in the resolutions was erroneous. They asserted as a fundamental position, that the existing Constitution was a compact of states. He denied that position: declaring the Constitution to be a compact

also betrayed a certain ambivalence, even among Republicans, towards the vigorous Jeffersonian version of states' rights. Nevertheless, even the comparatively more modest state role envisioned by Madison and the Virginia legislatures far exceeded that acceptable to the Federalists.

Indeed, Virginia legislators consistently highlighted the Federalists' perceived disregard for the separation of powers, which they considered not only constitutionally indefensible, but also dangerous. Del. Ruffin explained that "Congress alone could determine war or peace: consequently alien enemies were proper subjects for congressional approval: but that alien friends were exclusively subject to the sovereignty of the states."[241] Del. Allen insisted that the Migration and Importation Clauses disallowed congressional interference with immigration.[242] And, even if Congress could pass a law to remove alien friends, he argued, it had no right to vest that power in the President.[243] For these and other delegates, the balance of power would be preserved through a narrow, textualist reading of the Constitution.[244] Del. Daniel, for example, railed against the "doctrine of implication" (i.e. of implied constitutional powers) as he urged his colleagues to ratify the Virginia Resolutions.[245]

Furthermore, for Republicans, threatening the balance of power threatened the unity and security of the country itself. John Taylor, for example, warned "that *oppression* was the way to civil war…The way to stop civil war, would be to stop oppression."[246] The legislature's explanatory "Address of the General Assembly to the People of the Commonwealth of Virginia," issued in January 1799, also emphasized that "acquiescence of the states, under infractions of the federal compact, would … prepare the way for a revolution."[247] While commentators today often link interposition and nullification with secession, the Resolutions' supporters considered these doctrines as alternatives to disunion. Del. Mercer similarly argued that the Resolutions, by preserving the Constitution, were also preserving the Union.[248]

Yet as the delegates attacked the Acts' constitutional implications, they also decried their immediate effects on individuals. Del. Barbour justified the Resolutions in part by touting the states' roles as protectors of personal freedoms,

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among the people." *See* Henry Lee, In the House of Delegates, Thursday, December 20, 1798, *in* Randolph's Report, at 103, 104. Lee also proposed an amendment to the resolves reflecting his view. The amendment was rejected 104-60. *See supra* note 213 at 156.

241 William Ruffin, In the House of Delegates, Thursday, December 14, 1798, *in* Randolph's Report 29 at 39.

242 John Allen, In the House of Delegates, Thursday, December 16, 1798, *in* Randolph's Report 40 at 53.

243 *Id.*

244 *See generally* H. Jefferson Powell, *The Principles of '98: An Essay in Historical Retrieval*, 80 Va. L. Rev. 689 (1994) for argument that Virginia and Kentucky Resolutions 1798 promoted a textualist reading of the Constitution.

245 William Daniel Jr., In the House of Delegates, Thursday, December 19, 1798, *in* Randolph's Report 81 at 98.

246 John Taylor, In the House of Delegates, Thursday, December 13, 1798, *in* Randolph's Report 24 at 28.

247 Woods, *supra* note 43, at 152.

248 John Mercer, In the House of Delegates, Thursday, December 15, 1798, *in* Randolph's Report 40 at 41.

arguing that "state legislatures being the immediate representative of the people, and consequently the immediate guardians of their rights, should sound the tocsin of alarm at the approach of danger."[249] Failure to do so would result in the "liberties of the people" being "subverted."[250] Barbour also specifically expressed concern for the fate of aliens—a concern not necessarily shared by his colleagues[251]—when he pleaded: "But what good reason could America assign for refusing admittance to strangers, with a country extensive, fertile beyond exception, and uninhabited. Had not the persecuted alien, then, a claim upon us not to be frittered away by the ingenuity of sophistry?"[252] More typical was Del. Foushee's warning that if aliens could be persecuted, citizens soon would be as well.[253] Though motivated by varying concerns, the Virginia legislature's basic message was nonetheless clear: the Alien and Sedition Acts were dangerous, and ought to be opposed.

5. Contemporary Reception of the Virginia Resolutions

The Virginia Resolutions closed with a call for concurrence and cooperation from the sister-states. Though no legislature other than Kentucky's joined Virginia in condemning the Acts, several states responded to Virginia, and the Resolutions were widely discussed in the popular press. Generally, contemporaries interpreted the Virginia Resolutions as strong assertions of state sovereignty. Of these, some read them as endorsing individual state action, while even others implied that they encouraged disunion. This variety of responses in 1798-99 foreshadowed the conflicting interpretations of the 1830s.

Several states specifically rejected what they right perceived as Virginia's challenge to judicial supremacy. Massachusetts denied "the right of state legislatures to denounce the administration of that government to which the people, by a solemn compact, have exclusively committed their national concerns,"[254] while Vermont similarly stated that "[i]t belongs not to State Legislatures to decide on the constitutionality of laws made by the general government; this power being exclusively vested in the judiciary courts of the Union."[255]

Not only opponents of the Resolutions questioned the competence of state legislatures, however. In responding to both sets of Resolutions, New Jersey House

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249 Barbour, In the House of Delegates, Thursday, December 20, 1798, *in* Randolph's Report 53 at 55.

250 *Id.* at 70. The legislature's explanatory "Address of the General Assembly to the People of the Commonwealth of Virginia," issued in January 1799, also emphasized the state's warning role. Address of the General Assembly to the People of the Commonwealth of Virginia, *in* Woods, *supra* note 43, at 151.

251 Del. Mercer was clear, for example, that the Virginia Resolutions were meant to protect the Constitution, not to defend aliens. Mercer *supra* note 227 at 49.

252 Barbour, *supra* note 249 at 68.

253 *Id.* at 77. The Kentucky Resolutions themselves also directly embodied this sentiment. They warned that "the friendless alien has been selected as the safest subject of a first experiment; but the citizen will soon follow, or rather has already followed." The Kentucky Resolutions *supra* note 104 at 166.

254 The Senate of the Commonwealth of Massachusetts, Massachusetts to Virginia, *in* Documents 18 at 18-20.

255 The House of Representatives of the State of Vermont, Vermont to Virginia, October 30, 1799, *in* Documents 25 at 25.

Republicans, for example, requested that Congress call a convention to decide the constitutionality of the Acts. Though these Republicans rejected the Federalist argument that "the Supreme Court…is the final arbiter of differences between the federal government and the states," they also rejected the contention that "each state may judge for itself."[256] New York House Republicans also expressed concern at both Resolutions' seeming endorsement of individual state decision-making authority.[257] Though Madison himself would describe "the right to expunge an unconstitutional federal law" as "collective" rather than "individual," taken together, his and Jefferson's work suggested just such an individual right to some in 1798–99[258]—legitimizing the South Carolina nullifiers' claim. Whether or not Calhoun's interpretation of Madison's work was "correct," it was plausible and not unique.[259]

Pennsylvania, meanwhile, seemed more distressed that Virginia dared disagree with federal policy than by the state's particular path of resistance. Pennsylvania

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256 Frank Maloy Anderson, *Contemporary Opinions of the Virginia and Kentucky Resolutions*, 5 Am. Hist. Rev. 45, 55 (1899).

257 *Id.* at 56.

258 *See e.g.* Anderson, *supra* note 256, at 55. The New Jersey Republican writing under the name "Observor," for example, endorsed the Virginia and Kentucky Resolutions by arguing that "the constitution is a sovereign compact, made between the individual states, as sovereignties, and the U. States collectively." If, he warned, the "states, individually, have no right to judge when the constitution is violated by Congress, there is an end to all state sovereignty."

259 Most modern scholars have concluded that Calhoun and the South Carolina nullifiers misinterpreted the '98 and acted unconstitutionally—or 'heretically'—in nullifying the tariff. To a significant degree, one's assessment of South Carolina's actions depends on one's understanding of the Resolutions. In their influential article, "The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties," Adrienne Koch and Harry Ammon claimed that Jefferson and Madison promoted states' rights "as a practical means to protect the civil rights of living person." Koch & Ammon, *supra* note 148, at 146. In sum, they argued, "[h]owever interesting these famous Resolutions may be for the constitutional doctrine they contain, they were intended *primarily* as a defense, practical and spirited, of civil liberties." *Id*. at 174. Others, however, such as contemporary Calhoun scholar Clyde Wilson, have scoffed at the idea that Jefferson and Madison were *not* primarily motivated by a concern for states' rights. Wilson decries the scholars who "invented a self-flattering fable" which teaches that "Jefferson and Madison…really did not care about States' right. They were merely anticipating the great tradition of the American Civil Liberties Union." Wilson, *supra* note 44, at 2. "The Sedition Act," Wilson has offered as an explanatory note, "was not just an invasion of individual rights; it was an illegal invasion of a sphere that the people had left to the States." *Id*. In regards to the debate about Madison and Jefferson's intentions, the general implication seems to be that if Koch and Ammon are correct, and Madison and Jefferson indeed subordinated state sovereignty to personal liberties, than Calhoun is a 'heretic,' rather than their legitimate heir. If, however Wilson is correct, than Calhoun "revived and perfected" the Resolutions. Bassani, at *supra* note 143. An alternative option, however, is that both the personal liberties argument advanced by Koch and Ammon and the state sovereignty argument advanced by Wilson are partially correct. If we recognize Madison and the Virginia Resolution as belonging primarily to one tradition and Jefferson and the Kentucky Resolutions to another, than we can better understand how and why late-in-life Madison and the South Carolina nullifiers came to interpret the same documents and events so differently. And, we can better understand how modern movements, such as sanctuary movement, compare to other challenges to federal authority.

responded to Virginia with a mere sentence, criticizing the Resolutions as "calculated to excite unwarrantable discontents, and to destroy the very existence of our government."[260] Notably, two days before, the Pennsylvania legislature had issued a multi-paragraph denunciation of the Kentucky Resolutions which defended the Alien and Sedition Acts and denied that states possessed the right to declare any federal act to be "not law" but "void, and of no effect."[261] Pennsylvania's responses suggest that it, unlike the New Jersey Republicans, declined to interpret the Virginia Resolutions as advocating the invalidation of federal law by a single state;[262] nevertheless, it disapproved. Similarly, for Federalist newspaper edit John Fenno, "it was the possibility of resistance to the federal government rather than the cause of that opposition or the proposed method of resistance that…seemed the important side of the affair."[263]

6. Applications of the Virginia Resolutions

Despite the uproar caused by the '98 Resolutions, Federalist and Republican legislatures alike resorted to resolution-writing during the early 1800s. Many of these resolves echoed the Virginia Resolutions—and to a lesser degree the Kentucky Resolutions. Though erstwhile opponents' reimagining of resolution-writing as legitimate protest rather than subversive opposition may have been prompted in part by partisan convenience, the style of these resolves also suggests a genuine desire on the part of legislatures to balance effective local activism with deference to federal authority. Tellingly, while occasional mention was made of Madison or interposition, the word "nullification" appears to have been seldom used after 1799.[264] On the whole, these "inter-crisis" resolves—those written between the Alien and Sedition crisis of 1798 and the Nullification Crisis of the 1830s—aligned more closely with the Madisonian tradition of interposition than the Jeffersonian tradition of nullification.[265] These resolves cast state opposition as a means of maintaining checks and balances and personal liberties. Despite the initial conflation of Virginia

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260 The House of Representatives of the Commonwealth of Pennsylvania, Resolutions of the House of Representatives of Pennsylvania to Virginia, March 11, 1799, *in* Documents 22 at 22.

261 *See* Pennsylvania *supra* note 170.

262 Other states, however, appeared to interpret both sets of Resolutions as one and the same and responded to them together. *See* New York and New Hampshire *supra* notes 170-174.

263 Anderson, *supra* note 256, at 48.

264 I was unable to find a single instance of the word's use in all the resolves included in Herman V. Ames' multi-volume collection, State Documents on Federal Relations (herein Documents).

265 Law professor Christian Fritz's description of interposition aptly describes the approach taken by many state legislatures during this inter-crisis period. According to Fritz: "Interposition sought reversal of national laws that some thought unconstitutional or simply wrong-headed. It involved many potential instruments and actions to maintain the Constitution's health. It could involve individual citizens or groups of citizens. It might also involve the state legislatures, not acting as the sovereign but as an instrument of the people to communicate concerns about the national constitution." Christian G. Fritz, *Interposition and the Heresy of Nullification: James Madison and the Exercise of Constitutional Sovereign Powers*, 41 First Principles 1, 2 (2012).

and Kentucky's positions, the decades that followed highlighted the differences among the Resolutions, and the doctrines they advocated.

An early series of resolves opposing the Embargo Act displayed a basic willingness to challenge the federal government through state legislatures, but underplayed state sovereignty even relative to the Virginia Resolutions; these resolves emphasized the protection of personal liberties, and the maintenance of checks and balances. President Jefferson had signed the embargo—which closed ports and restricted trade—to retaliate against British and French attacks on American ships.[266] The Secretary of War had also requested governors to deploy their militias to aid in the enforcement of the embargo.[267] Though it initially enjoyed support, the embargo quickly became unpopular in those states whose economy depended on shipping and trade.

Federalists in the Delaware House drafted resolves calling for a repeal of the embargo in 1809;[268] though these followed the same structure as the Kentucky Resolutions, they explicitly rejected "open opposition to the laws," preferring to submit to the laws than "jeopardize the union of the States."[269] That same year, the Federalist Massachusetts House also sent a set of resolves to its Republican governor, condemning his unwillingness to oppose the embargo. [270] Responding to the governor's claim that the legislature should not criticize the government, the House stated: "We cannot agree with your Honour than in a free country there is any stage at which the constitutionality of an act may no longer be open to discussion or debate."[271] Nevertheless, the House stopped short of claiming the right of constitutional interpretation for itself, characterizing the right of "deliberation or remonstrance" as belonging to "the citizen."[272] And, rather than appealing to state sovereignty to justify their opposition, they cited an attachment to "balanced government" and "civil liberty."[273] Resolves adopted that same year in Rhode Island came closest to emphasizing state sovereignty, but characterized the federal government's overreach as infringing on the people's rights rather than the state's authority.[274]

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266 Embargo of 1807, Thomas Jefferson Encyclopedia, https://www.monticello.org/site/research-and-collections/embargo-1807.

267 Ames, *Connecticut and the Enforcement Act*, *in* Documents 38 at 38.

268 The resolves remained in draft form, however, as the House and Senate could not agree on a final version. Ames, *Delaware and the Embargo*, *in* Documents 36 at 36.

269 The House of Representatives of the State of Connecticut, Delaware Resolves, *in* Documents 36 at 37-38.

270 The governor, a Republican, supported the embargo contrary to the Federalist legislature's wishes. Ames, *The General Court of Massachusetts on the Embargo*, *in* Documents 26 at 26.

271 The House of Representatives of the Commonwealth of Massachusetts, Extract from the Answer of the House, *in* Documents 29 at 30.

272 *Id.* at 30-31.

273 *Id.* at 31.

274 The Rhode Island resolves read, in relevant part: "That to preserve the Union and to support the constitution of the United States, it becomes the duty of this General Assembly, while it is cautious not to infringe upon the constitutional and delegated powers and rights of the General Government, to be vigilant in guarding from usurpations and violations, those powers and rights which the good people of this State have expressly reserved to themselves, and have ever refused to delegate." The State of Rhode Island and Providence Plantations, Report and Resolutions of Rhode Island on the Embargo, *in* Documents 43, at 44.

Connecticut's resolves of that same year, along with an address from its governor, John Turnbull, also emphasized the state's role as a "protecting shield between the right and liberty of the people, and the assumed power of the General Government" and directly referenced the "right…to interpose."[275] The state legislature passed resolves the very same day as the governor's speech, praising his decision to "decline[] to designate persons to carry into effect, by the aid of *military power*, the act of the United States, enforcing the Embargo."[276] The legislature further declared that "the persons holding executive office under this State are restrained by the duties which they owe this State, from affording any official aid or co-operation in the execution of the act aforesaid."[277] In closing, Connecticut echoed Massachusetts in calling for "alterations in the constitution."[278] Connecticut's response, which foreshadowed the anti-commandeering doctrine articulated by the Supreme Court in *New York v. United States* and extended in *Printz*, offered an early example of what interposition might look like in practice.[279]

Resolves passed by Pennsylvania and Virginia in 1811 to oppose the renewal of the Bank of the United States, approximated aspects of the '98 Resolutions, but stopped short of adopting strong state-centric positions. Pennsylvania's resolves specifically referred to the "compact" and stated that "the general government… was not constituted the exclusive or final judge of the powers it was to exercise."[280] Tellingly, however, Pennsylvania identified "the people of the United States"

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275 Jonathan Turnbull, Speech of Governor Jonathan Turnbull at the Opening of the Special Session of the Legislature, February 23, 1809, *in* Documents 39 at 40.

276 The General Assembly of the State of Connecticut, Resolutions of the General Assembly, *in* Documents 40 at 41.

277 *Id.*

278 *Id.* at 42.

279 New York v. United States, 504 U.S. at 142; Printz, 51 U.S. at 898. Wisconsin and other northern states adopted a similar approach in opposing the Fugitive Slave Act. Several states passed "personal liberty laws" in the 1850s which restricted state cooperation with federal officials. Specifically, "[t]hese laws generally prohibited the use of the state's jails for detaining fugitives; provided state officers, under various names, throughout the state, to act as counsel for persons alleged to be fugitives; secured to all such persons the benefits of *habeas corpus* and trial by jury; required the identity [sic] of the fugitive to be proved by two witnesses; forbade state judges and officers to issue writs or give any assistance to the claimant; and imposed a heavy fine and imprisonment for the crime of forcibly seizing or representing as a slave any free person with intent to reduce him to slavery." As 19th c. historian Alexander Johnston noted in comparing South Carolina and Wisconsin's opposition to federal law: while "the latter absolutely prohibited the execution of the tariff act…the former only impeded the rendition of fugitive slaves;" Johnston thus concluded that Wisconsin's actions were not properly termed "nullification." Tellingly, in a set of resolves criticizing the Supreme Court's invalidation of its personal liberty laws, the Wisconsin legislature replaced the word "nullification" with the term "positive defiance" in the hallmark phrase "nullification is the rightful remedy." Later characterizations notwithstanding, the Wisconsinites seem to have been intent on differentiating between themselves and the South Carolinians. Alexander Johnston, 3 Cyclopaedia of Political Science, Political Economy, and of the Political History of the United States by the best American and European Authors (New York: Maynard, Merrill, & Co., John J. Lalor ed., 1899). *But see* Woods, *supra* note 43, at 79 (arguing Wisconsin engaged in nullification).

280 The General Assembly of the Commonwealth of Pennsylvania, Resolutions of Pennsylvania Against the Bank, *in* Documents 53 at 53.

rather that the states as reserving those powers not delegated in the Constitution. Though the resolve stated that "it rests with the states, and with the people, to apply suitable remedies" when the government "violate[d] the provisions of the constitution," Pennsylvania's proposed course of action—requesting that its Senators and representatives oppose the charter in Congress—recognized that authority ultimately rested with the federal government rather than the state in that matter.[281]

Massachusetts' 1814 Report and Resolutions against the embargo represented a high-point in Madisonian interposition. Not only did the Report and Resolutions use the term "interpose,"[282] but they also explicitly (if grudgingly) cited Madison as authority.[283] In interpreting Madison, Massachusetts expressed a view of states' rights which, unlike the state sovereignty-centric view embraced by South Carolina, prioritized checks and balances and personal liberties. Massachusetts explained its opposition not as much a defense of its own sovereignty, but rather as a defense of its people—explicitly describing interposition as the action by the state on behalf of the people.[284] The first resolve, for example, stated that the embargo "contains provisions not warranted by the Constitution of the United States, and violating the rights of the People of this Commonwealth Massachusetts;"[285] all further resolves also refer to the injustices done to the people, rather than to the state.[286] And, while Massachusetts does refer to itself once as the "free, sovereign and independent State of Massachusetts," the report's writers seem most concerned by the federal government's actions' effects on "the people."[287] In the American system of "concurrent sovereignty," Massachusetts explains, "[t]he sovereignty reserved to the States, was reserved to protect the Citizens from acts of violence by the United States."[288]

Most significantly, the report demonstrates that Massachusetts—at least at that time—understood Madison as having encouraged the states to call a convention for the purpose of amending the Constitution, rather than as having recognized a state veto on federal legislation, or some other form of individual state action. Though the Virginia Resolutions did not specifically call for a convention, Madison suggested in his 1799 defense of the Resolutions that "[t]he Article V Convention was a tool of potential state 'interposition' against congressional abuse."[289] The report stated: "This"—i.e. inviting other states to a convention—"was the mode proposed by *Mr. Madison* in answer to the objections made, as to the tendency of

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281 *Id.*

282 The Massachusetts resolves describe the state as "bound to interpose its powers, and wrest from the oppressor his victim." The General Court of the Commonwealth of Massachusetts, The General Court of Massachusetts on the Embargo, February 22, 1814, *in* Documents 69 at 72.

283 Though supportive of Madison's "mode" of opposing constitutional infractions, the Massachusetts legislature could not resist reminding the reader that, in the particular instance of the Alien and Sedition Acts, "opposition [was] without any justifiable cause." *Id.* at 73.

284 *Id.* at 74.

285 *Id.* at 71.

286 *Id.* at 74-75.

287 *Id.* at 71.

288 *Id.* at 73.

289 Robert Natelson, *James Madison and the Constitution's "Conventions for Proposing Amendments,"* in Union & States' Rights, *supra* note 1, at 37.

the general Government, to usurp upon that of the states."[290] This interpretation stands in stark contrast to South Carolina's interpretation of the same document; and, while Massachusetts's interpretation can neither prove nor disprove the legitimacy of South Carolina's, it does support Madison's later claim that the Resolutions should be understood as such—as do the many other resolves from that period which stopped well short of South Carolina's position.

7. Madison, Interposition and the Sanctuary Movement

Like the inter-Crisis interposers, the sanctuary movement has relied on personal liberties and checks and balances-type arguments. Sanctuary advocates have argued that sanctuary laws protect aliens from "arbitrary prosecutorial action,"[291] ensure "fair and equal" access to city services,[292] ensure the dignity and integrity of families,[293] and generally promote a culture of welcome and tolerance.[294] They have also argued that sanctuary policies respect state and local sovereignty and combat federal overreach; however, these appeals to state and local sovereignty have been in service of the underlying personal liberties and checks and balances-promoting goal.[295]

Likewise, anti-commandeering—the sanctuary movement's preferred means of challenging federal immigration policy in court—aims to promote personal liberties and checks and balances, rather than state sovereignty as such. In the landmark *New York v. United States*, the Supreme Court explained that "[t]he Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." [296] This is a far cry from the Calhounian or Jeffersonian understanding of state sovereignty as a worthy end in and of itself.

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290 *Id.* Here, the "answer" Massachusetts is referring to is Report of 1800, which Madison wrote as a defense of the Virginia Resolutions.

291 David Post, *Let's Call Them 'Constitutional Cities,' Not 'Sanctuary Cities,' Ok?*, The Washington Post (Mar. 30, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/30/lets-call-them-constitutional-cities-not-sanctuary-cities-okay/?utm_term=.b5b597ab5ed0.

292 Teaching Tolerance Staff, *What's a Sanctuary City Anyway?*, Teaching Tolerance (February 1, 2017), https://www.tolerance.org/magazine/whats-a-sanctuary-city-anyway.

293 Mollie Reilly, *California Turns Itself into a Sanctuary State*, The Huffington Post (Oct. 5, 2017), https://www.huffingtonpost.com/entry/california-sanctuary-state_us_59ce7423e4b05f005d341453. ("California's local law enforcement cannot be commandeered and used by the Trump Administration to tear families apart.")

294 *See* Rhea Mahbubani & Christie Smith, *"Being a Sanctuary City is in Our DNA:" San Francisco Mayor Reassures Residents After Trump's White House Win*," NBC, (Nov. 10, 2016) https://www.nbcbayarea.com/news/local/Being-a-Sanctuary-City-is-in-Our-DNA-San-Francisco-Mayor-Reassures-Residents-After-Trumps-White-House-Win-400728041.html.

295 *See e.g.* Complaint at 2, *San Francisco v. Trump*; Complaint at 24, *Chicago v. Sessions*.

296 *New York v. United States*, 505 U.S. at 181 (internal citations omitted).

Sanctuary advocates, like the interposers, have also stopped short of purporting to invalidate federal law, preferring to simply frustrate its application. San Francisco or other localities' refusal to assist federal immigration authorities is more akin to Connecticut's refusal to enforce the embargo than South Carolina's outright prohibition on tariff collection by both state *and federal* officers. In Connecticut's refusal to enlist its militia to enforce federal law may be seen the seeds of modern anti-commandeering doctrine, which the sanctuary movement has used to justify its non-cooperation with ICE officers.[297]

Nevertheless, important differences remain between the sanctuary movement and Madisonian interposition. In terms of theory, Madison and his successors regularly invoked the "compact." Though Madison and Jefferson's conception of the "compact" differed, both agreed that the federal government was to a certain extent the creation of the sovereign states—a concept which the sanctuary movement has not appealed to, even in its collective, Madisonian form. In terms of practice, interposers, like nullifiers, also typically issued resolves through state legislatures. By contrast, the sanctuary movement has been largely city-based, and has not engaged in widespread state-level resolve-writing—highlighting the movement's disinterest in compact theory. Ultimately, however, the comparison remains more apt—and less damning[298]— than that between nullification and the sanctuary movement.

Conclusion

Of all the men who could have been dubbed the "spiritual godfather" for the sanctuary city movement, John C. Calhoun is an odd choice indeed.[299] Madison himself, or perhaps Connecticut governor Jonathan Turnbull would have been better selections. While the sanctuary movement has declined to adopt much of Madison and his intellectual successor's theory and practice, the spirit of the movement nevertheless remains closer to Madison's interposition tradition than to Jefferson or Calhoun's nullification.

Nullification—the idea that a state can invalidate unconstitutional federal laws within its territory—has not been adopted by the sanctuary movement even in spirit, much less in practice. Sanctuary advocates have not primarily challenged the underlying constitutionality of federal immigration regulation; and they have not generally claimed authority to prevent federal officials from independently enforcing the law. Neither have they relied on compact theory, or the agency view of government. Rather, they have simply declined to assist the federal government with immigration enforcement.

It is true that both the sanctuary movement and nullification assume some level of disagreement with federal policy; there would be no need for sanctuary

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297 *See supra* notes 173-75.

298 Though infrequently discussed in the scholarly literature, interposition has received favorable treatment by some mainstream academics. *See e.g.* Christian Fritz, *Interposition: An Overlooked Tool of American Constitutionalism, in* Union & States' Rights, *supra* note 1, at 165. Nullification, by contrast, is generally regarded with suspicion.

299 In an article for National Review, Victor David Hansen referred to Calhoun as "the spiritual godfather of sanctuary cities." Hansen, *supra* note 11.

cities without federal immigration enforcement, and no need for nullification without a perceived constitutional infraction. It is also true that both the sanctuary movement and nullification rely on localities to manifest this disagreement. Yet local disagreement with federal policy does not nullification make. Nullification is a doctrine with a well-documented history, and well-defined political-philosophical underpinnings—neither of which are shared to any significant degree by the modern sanctuary movement.

Why then, in light of all this, has the sanctuary movement been so persistently compared to nullification? Perhaps it is because movement's opponents have been eager to connect it to a so-called "discredited constitutional heresy." If the sanctuary movement is to be credibly discredited, however, a more historically accurate line of attack may be advisable.

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Solving Child Statelessness: Disclosure, Reporting, and Corporate Responsibility

Mark K. Brewer* & Sue Turner**

ABSTRACT

Statelessness affects around 10 million people globally, many of whom are children. Many public law initiatives to diminish and eradicate statelessness exist, yet the problem persists. This article explores the potential for the private law to contribute to a solution to this problem, leading to increased awareness of the plight of stateless children among the public, investors, governments, and multinational corporations. In doing so, the article examines the role of the private law in regulating the use of so-called "conflict minerals" in the United States and internationally. It recognizes the contribution made by conflict minerals legislation towards finding an effective solution to the conflict in the Democratic Republic of the Congo. The article proposes, amongst other initiatives, a legislative solution to the enduring problem of child statelessness, adapting provisions of the Dodd-Frank Wall Street and Consumer Protection Act which requires corporate reporting and disclosure in relation to international supply chains of public limited companies in respect of conflict minerals, and applying them instead to the causes of child statelessness.

KEYWORDS

Child Statelessness, Corporate Social Responsibility, Dodd-Frank Act, Conflict Minerals, Modern Slavery

CONTENTS

* Assistant Dean, Sheffield Business School, Sheffield Hallam University; B.A., Samford University; Ph.D., University of St Andrew; J.D., Cornell University; M.LL.P., Humboldt Universität zu Berlin.

** Senior Lecturer, Northumbria Law School, Northumbria University; B.A., Lancaster University.

I. Introduction

Stateless children face a number of legal and practical challenges, including no legal identity, denial of healthcare, a lack of access to social welfare and child protection systems, limited assistance during emergencies, inadequate protection from violence and abuse, exploitation through child labor, and the lack of minor status vis-à-vis the law. Stateless children also lack the legal prerequisites to qualify for employment, to obtain travel documents, or even verify their age. Despite decades of international efforts accompanied by a proliferation of international law, statelessness remains a persistent problem,[1] with the United Nations High Commissioner for Refugees ("UNHCR") estimating that there are at least 10 million stateless people internationally.[2]

Just as the problem of stateless children is global, so too is the reach of many multinational corporations. There are some areas of the globe which are home to a specific and identifiable group of stateless individuals who fall within the reach of multinational corporations, whether directly or as part of an essential supply chain.[3] In the Dominican Republic, for example, a large number of stateless persons continue to work in the sugar cane industry despite the introduction of some local legal provisions intended to diminish this problem.[4] Likewise, a number of reports have highlighted the reliance on migrant labor which exacerbates issues of statelessness in the global palm oil industry.[5] The engagement of multinational corporations operating in affected areas could be the key to raising global awareness of statelessness and to driving and encouraging the success of local initiatives, education, and legal measures designed to alleviate statelessness.

The past few years have witnessed a number of initiatives, particularly Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act[6] (the "Dodd-Frank Act"), that combine elements of public and private law to address the long-standing conflict in the Democratic Republic of the Congo (the "DRC"), which often appeared beyond the reach of many international law initiatives. In

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1 Jacqueline Bhabha, *Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?*, 31 Hum. Rts. Q. 410, 411 (2009).

2 UNHCR, *Ending Statelessness within 10 Years, A Special Report*, available at http://www.unhcr.org/pages/49c3646c155.html (last visited Aug. 24, 2018).

3 *See* Mark K. Brewer, *Beyond International Law: The Role of Multinational Corporations in Reducing the Number of Stateless Children*, 19 Tilburg L. Rev. 64, 68 (2014).

4 *Id.* at 68.

5 *See generally* Dileep Kumar M., Noor Azizi Ismail & Normala S. Govindarajo, *Way to Measure the Concept Precarious Working Conditions in Oil Palm Plantations*, 10 Asian Soc. Sci. 1 (2014) (reviewing empirical data and concluding that the "living condition [of migrant workers in the industry] is unsafe, insecure and highly isolated" *id.* at 7; *Humans Taking Back Seat to Environment in Palm Oil Impact Talks, Activists Say*, Malay Mail (Nov. 10, 2015), https://www.malaymail.com/s/1002673/humans-taking-back-seat-to-environment-in-palm-oil-impact-talks-activists-s (noting that "stateless children. . . born to undocumented migrants . . . could not gain access to government services, which include health and education); and Pulitzer Center, *Lost in the Forest: Stateless Children in Borneo's Palm Oil Industry*, https://pulitzercenter.org/projects/malaysia-lost-forest-stateless-children-filipino-migrant-workers-palm-oil-industry-social-environmental-cost (last visited Feb. 18, 2019).

6 P.L. 111-203, 124 Stat. 1376 (2010), 15 U.S.C. Section 78m(p).

particular, these reforms require public disclosure of trade in so-called conflict minerals (i.e., tin, tungsten, tantalum, and gold[7]) which have been used to finance conflict in the DRC. In this manner, governments and investors have engaged with private law measures to contribute to a solution where public international law alone has failed to be effective. With on-going criticism of the Dodd-Frank Act and calls to dismantle large portions of it,[8] it is all the more important to emphasize the applicability of the current provisions as well as indicate their relevance to address other problems that have eluded traditional regulation. In the same way in which the conflict minerals laws and initiatives have targeted companies operating directly or indirectly in affected areas, so might laws and initiatives seek to engage multinational corporations in an effort to eradicate the risks of statelessness to the migrant workers and their families involved in the supply chains of such multinational corporations. Recognizing the difficulty in eradicating statelessness and the efficacy of Dodd-Frank's conflict mineral provisions, this article calls for specific legal reform to address the causes of child statelessness through a similar approach to that for conflict minerals.

Part II of this article initially provides an overview of citizenship and statelessness. Further, it explores the plight of stateless children, contending that public law initiatives alone to date have been unsuccessful in their attempt to address this problem. Thereafter, the article sets out the background to the sourcing and usage of conflict minerals from the DRC and considers legal responses to this situation by (1) Congress in the form of Section 1502 of the Dodd-Frank Act; (2) the United Kingdom and the European Union; (3) China; and (4) international initiatives. Part III of this article analyses a number of possibilities for engaging multinational corporations in a private law response to the plight of stateless children around the globe.

This article contributes to research into the persistent problem of statelessness by identifying and exploring ways in which the private law may complement public law initiatives in an effort to combat child statelessness. In particular, this article proposes original legislation, based on existing U.S. provisions which address human rights violations related to conflict minerals. Given the international nature of child statelessness and the multinational response to existing conflict minerals legislation, the proposed new legislation, while founded in U.S. law, has the potential for global application, impacting upon multinational corporations around the world. As will be demonstrated in respect of U.S. conflict minerals legislation, adoption of legislation within the United States may contribute to further international private law initiatives, including in the United Kingdom, the European Union, and China.

II. Background

Before examining particular mechanisms through which companies could potentially help alleviate child statelessness, this section provides an overview of citizenship,

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7 Karen E. Woody, *Conflict Minerals Legislation: The SEC's New Role as Diplomatic and Humanitarian Watchdog*, 81 Fordham L. Rev. 1315, 1319 (2013).

8 Nicola Dalla Via & Paolo Perego, *Determinants of Conflict Minerals Disclosure Under the Dodd-Frank Act*, Bus. Strat. Env. 1, 13 (2018).

the public international law regime relevant to statelessness, and conflict minerals. First, this section examines the concept of citizenship, its origins, and the manner in which it is acquired. Second, the section summarizes the principal international agreements establishing the minimum legal standards regarding statelessness, particularly with respect to children. Third, this section outlines the issue of conflict minerals and examines the response of the United States, the United Kingdom and the European Union, China, and other international bodies.

A. Citizenship

A "stateless person" is one "who is not considered a national by any State under the operation of its law."[9] Citizenship defines the relationship between the state and an individual.[10] Concepts of citizenship have presupposed an autonomous political entity since ancient Greece.[11] According to Aristotle, "[h]e who has the power to take part in the deliberative or judicial administration of any state is said by us to be a citizen of that state."[12] Further, citizens have particular rights and obligations vis-à-vis the state.[13] In Western thought, the state has served as the sovereign that guarantees the rights and enforces the obligations of citizens.[14] Classical theory holds that "[s]overeignty is universal, and accordingly, the whole world is divided into these territorial units."[15] Nevertheless, various regimes throughout history have attached different rights and obligations to citizenship.[16] As the first civilization to thoroughly explore citizenship, the ancient Greeks recognized specific responsibilities and rights compared to non-citizens.[17] Aristotle further noted that "[s]ince there are many forms of government there must be many varieties of citizens . . . so that under some government the mechanics and laborers

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9 U.N. General Assembly, *Convention Relating to the Status of Stateless Persons*, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117, Art 1(1).

10 Ediberto Roman, *Members and Outsiders: An Examination of the Models of United States Citizenship as Well as Questions Concerning European Union Citizenship*, 9 U. Miami Int'l & Comp. L. Rev. 81, 83 (2000/2001).

11 Kim Rubenstein & Daniel Adler, *International Citizenship: The Future of Nationality in a Globalized World*, 7 Ind. J. Global Legal Stud. 519, 520 (2000).

12 *See* Roman, *supra* note 10, at 83, quoting The Basic Work of Aristotle, Aristotle's Politics, Book II (Richard McKeon ed. 1941), 1178.

13 *See generally* Thomas Janoski, Citizenship and Civil Society: A Framework of Rights and Obligations in Liberal, Traditional, and Social Democratic Regimes (Cambridge University Press, 1998), 1-8.

14 Steven J. Heyman, *The First Duty of Government Protection: Liability and the Fourteenth Amendment* 41 Duke L. J. (1991) 507, 513-520 (reviewing the common law tradition, the theory of natural rights and the social contract, and 18th Century constitutional theory).

15 Kim Rubenstein & Daniel Adler, *International Citizenship: The Future of Nationality in a Globalized World*, 7 Ind. J. Global Legal Stud. 519, 520 (2000).

16 *See generally* T.H. Marshall, *Citizenship and Social Class*, in Citizenship and Social Class (T.H. Marshall & Tom Bottomore eds. 1992) 8-17 (summarizing the historical development of citizenship in the England).

17 Derek Heater, Citizenship: The Civic Ideal in World History, Politics and Education (3d ed. 2004) 3-6.

will be citizens."[18] Likewise, the ancient Roman Empire classified citizens in different categories, including those who had the right to vote and those who had an obligation to pay taxes.[19]

For many centuries, the term "citizen" was not used in Europe outside the Byzantine Empire.[20] Instead, much of Europe used the term "subject," which reflected feudal law.[21] From feudal law, various regimes began to recognize citizenship based on either *jus soli* or *jus sanguinis*.[22] *Jus soli* requires that an individual be born in a territory over which the state maintains sovereignty, while *jus sanguinis* requires a blood tie to the state to acquire citizenship.[23] According to "feudal traditions that linked people to the lord who held the land on which they were born[,]" *jus soli* was the primary determinant of citizenship in Europe in the eighteenth century.[24] The French Revolution ushered in the reintroduction of the Roman concept of *jus sanguinis* with the French Civil Code of 1804, which precipitated its spread across continental Europe and, with some notable exceptions, to the colonies of the continental European powers.[25] In contrast, the United Kingdom retained the concept of *jus soli*, spreading this form of citizenship throughout its colonies.[26] In addition to the United Kingdom and Ireland, the United States and much of Latin America have exhibited *jus soli* in their concept of citizenship.[27] In the common law world, the seminal 1608 case *Calvin v. Smith*[28] provided the basis for *jus soli*.[29] Lord Coke, writing for the court, determined that Calvin, who was born in Scotland after the crown of England passed to King James VI of Scotland, was a natural born subject and could therefore assert claims for land in England.[30] The case firmly grounded territorial birth right citizenship (*jus soli*) in the common law.[31] The United Kingdom modified the principle through the British Nationality Act of 1981, restricting citizenship to children born in the United Kingdom with at least one parent who is either a British citizen or "settled" in the United Kingdom[32] Although the United States has traditionally followed *jus*

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18 *See* Roman, *supra* note 10, at 83, quoting The Basic Work of Aristotle's Politics, Book II 1178 (Richard McKeon ed. 1941).

19 *Id*. at 90.

20 Polly Price, *Natural Law and Birthright Citizenship in Calvin's Case*, 9 Yale J.L. & Human 73, 87 (1997).

21 *Id*. at 87-88. *See also* Justin Lewis, Constructing Public Opinion: How Political Elites Do What They Like and Why We Seem to Go along with It 22 (2001).

22 *See generally* John D. Snethen, *The Evolution of Sovereignty and Citizenship in Western Europe: Implications for Migration and Globalization,* 8 Ind. J. Global Legal Stud. 223 (2000).

23 *See* Thomas Alexander Alenikoff et al., Citizenship Today: Global Perspective and Practice 17 (2001).

24 Grazielle Bertocchi & Chiara Strozzi, *The Evolution of Citizenship: Economic and Institutional Determinants*, 53 J. L. & Econ. 95, 99 (2010).

25 *Id*. at 99-100.

26 *Id*.

27 *Id.*

28 Calvin v. Smith (1608) 77 Eng. Rep. 377.

29 *Id. 409.*

30 *Id. 408.*

31 Price, *supra* note 20.

32 British Nationality Act 1981, ch. 61, §§ 1, 3 (Eng.).

soli since its founding,[33] and codified the principle in 1868 through the Fourteenth Amendment to the Constitution, it incorporates elements of *jus sanguinis* for children of U.S. citizens born overseas.[34] Currently, *jus sanguinis* forms the most common means of determining citizenship among the countries of the world,[35] and a large number of countries have mixed regimes that combine elements of both *jus sanguinis* and *jus soli*.[36]

B. International Legal Framework for Protecting Human Rights and Alleviating Statelessness

A range of international treaties and agreements establish the minimum legal standards to which stateless children should be entitled. With the adoption of the United Nations Charter in 1945, the international community established a regime for the protection of basic human rights for all individuals against abuses by foreign sovereigns and by national governments themselves.[37] In the decades following, the Universal Declaration of Human Rights;[38] the International Covenant on Civil and Political Rights;[39] the International Covenant on Economic, Social, and Cultural Rights;[40] the Convention on the Elimination of All Forms of Discrimination Against Women;[41] the Convention on the Elimination on All Forms of Racial Discrimination;[42] the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment;[43] and the Convention on the Prevention and Punishment of the Crime of Genocide[44] have further strengthened rights of individuals against traditional notions of the unfettered power of sovereigns.

Further, a number of United Nations ("U.N.") treaties contain specific provisions offering protection against statelessness. The 1948 Universal

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33 *See generally* Nora V. Demleitner, *The Fallacy of Social 'Citizenship' or the Threat of Exclusion*, 12 Geo. Immigr. L.J. 35, 37 (1997).

34 Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 Cornell J. L. & Pub. Pol'y 267, 325 (2009).

35 Bertocchi & Strozzi, *supra* note 24, at 99-100. The authors note that 69 percent of African countries and 83 percent of Asian countries base their citizenship on *jus sanguinis*.

36 For a comparative analysis of the prevalence of *jus soli* and *jus sanguinis*, *see generally* Patrick Weil, *Access to Citizenship: A Comparison of Twenty-Five Nationality Laws,* in Citizenship Today: Global Perspectives and Practice (T. Alexander Alenikoff & Douglas Klusmeyer eds. 2001), 17-35.

37 *Id*.

38 Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GOAR, 3d sess., Supp. No. 13, U.N. Doc. A/810 (1948).

39 International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966).

40 International Covenant on Economic, Social, and Cultural Rights, G.A. res. 2200A (XXI), U.N. GAOR, Supp. No. 16, at 49, U.N. Doc. A/6316 (1966).

41 Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 19 I.L.M. 33.

42 International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 7, 1966, 5 I.L.M.

43 Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027, modified 24 I.L.M. 535.

44 Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

Declaration of Human Rights provides a general right to nationality and prohibits the arbitrary deprivation of nationality.[45] The 1954 Convention Relating to the Status of Stateless Persons (the "1954 Convention") defines statelessness and sets forth regulations for the treatment of stateless persons.[46] In particular, Article 7 of the 1954 Convention provides that states "shall accord to stateless persons the same treatment as is accorded to aliens generally."[47] Moreover, Articles 17-19 of the 1954 Convention ensure that stateless persons are treated no less favorably than aliens, in general, with respect to a number of employment considerations;[48] while further provisions address housing,[49] public education,[50] public relief,[51] and labor standards and social security.[52] The 1961 Convention for the Reduction of Statelessness (the "1961 Convention") provides for the "acquisition of nationality for those who would otherwise be stateless and who have an appropriate link with the State through factors of birth or descent."[53] There are currently 67 states party to the 1961 Convention[54] and 88 states party to the 1954 Convention.[55]

Several U.N. treaties address the issue of child statelessness in particular. The 1966 International Covenant on Civil and Political Rights recognizes the right of "[e]very child. . . to acquire a nationality,"[56] but it lacks any specific mechanism for compelling states to take responsibility for guaranteeing a stateless child's right to a nationality.[57] Additionally, the U.N. Convention on the Rights of the Child, adopted in 1989 and in force since 1990, guarantees a child's right to a nationality under Art. 7.[58] Additionally, Art. 8 provides that children have a right to preserve their identity, which includes their nationality.[59] The obligations created by the U.N. Convention on the Rights of the Child apply to both the child's country of birth and

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45 Universal Declaration of Human Rights, Dec. 10, 1948, U.N. General Assembly 217A, Art. 15.

46 Convention Relating to the Status of Stateless Persons, April 26, 1954, 189 U.N.T.S. 150.

47 *Id*.

48 *Id*.

49 *Id*. at Art. 21.

50 *Id*. at Art. 22.

51 *Id*. at Art. 23.

52 *Id*. at Art. 24.

53 U.N. High Commissioner for Refugees, *Objectives and Key Provisions of the 1961 Convention on the Reduction of Statelessness* (Oct. 1, 2001), *available at* http://www.unhcr.org/3bd7d3914.html (last visited Aug. 24, 2018).

54 United Nations Treaty Collection, Status of Treaties, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&lang=en (last visited Aug 24, 2018).

55 United Nations Treaty Collection, Status of Treaties, https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&clang=_en (last visited Aug. 24, 2018).

56 ICCPR, Article 24(3).

57 Human Rights Committee, General Comment 17, Article 24 (Thirty-fifth session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 23 (1994).

58 Convention on the Rights of the Child, United Nations General Assembly, 20 Nov. 1989, A/RES/44/25 Article 7.

59 Convention on the Rights of the Child, United Nations General Assembly, 20 Nov. 1989, A/RES/44/25 Article 8.

to "all countries with which a child has a link, e.g. by parentage."[60] Art. 1(3) of the Convention on the Rights of the Child provides that states must grant citizenship to children who otherwise would be stateless, addressing potential problems where national laws may not allow for a mother to transmit citizenship.[61] Finally, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, signed in 1990 and in force since 2003, provides that "[e]ach child of a migrant worker shall have the right to. . . a nationality."[62]

In addition to international treaties, a number of regional agreements protect the status of stateless children. For example, the Council of Europe adopted the European Convention on Nationality that recognizes a universal right to nationality and provides that "statelessness should be avoided."[63] Article 6 of the European Convention on Nationality includes specific protections that require each party to the agreement to "provide in . . . [its] internal law for its nationality to be acquired by children born on its territory who do not acquire at birth another nationality."[64]

Despite the array of public law initiatives that seek to alleviate the problem of statelessness, as stated above, the U.N. estimates that there are still around 10 million stateless people around the globe.[65] Many of these are children.[66] Not only may stateless children be deprived of basic medical care, state-supported educational programs, and other social programs, but they also lack the legal prerequisites to qualify for employment, to obtain travel documents, or even verify their age, which often exposes them to violence, exploitation, and abuse.[67]

Given the persistence of the problem of statelessness, this article proposes solutions beyond the realm of public international law by calling for the introduction of corporate disclosure requirements relating to statelessness in the supply chains of publicly listed companies similar to the reporting requirements relating to conflict minerals. Such a private law initiative would help supplement the protections offered by public international law.

C. Overview of Conflict Minerals

Concern over the ongoing conflict in the DRC, which has claimed over 5 million lives over the past few decades,[68] galvanized efforts to regulate conflict

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60 United Nations High Commissioner for Refugees, *Expert Meeting: Interpreting the 1961 Statelessness Convention Preventing Statelessness among Children: Summary Conclusions* (May 23-24, 2011), 2-3.

61 Convention on the Rights of the Child, G.A. Res. 44/25, Art. 1(3) (Nov. 20, 1989).

62 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Art. 29.

63 Council of Europe, *European Convention on Nationality*, (Nov. 6, 1997, E.T.S. 166), Art. 4.

64 *Id*. Art. 6.

65 UNHCR, *supra* note 2.

66 UNHR, Statelessness Around the World, available at http://www.unhcr.org/uk/statelessness-around-the-world.html (last visited Aug. 24, 2018).

67 *See generally* Jay Milbrandt, *Stateless*, 20 Cardozo J. Int'l & Comp. L. 75, 92-93 (2011-2012).

68 U.N. Economic Commission for Africa, Special report on "The ICGLR Regional Initiative against the Illegal Exploitation of Natural Resources (RINR) and other Certification Mechanisms in the Great Lakes Region: Lessons Learned and Best

minerals.[69] Conflict minerals are ores that, when sold or traded, play a key role in helping to fuel this conflict and extensive human rights abuses in the DRC.[70] Minerals in conflict areas within the DRC are often mined by artisanal and small-scale miners operating under severe working conditions.[71] The mines are strategically important for financing armed groups involved in the conflict, who tax mineral extraction and trade, while miners and their families are exposed to violence and human rights violations.[72] Conflict minerals are used extensively in jewelry as well as a variety of consumer products, particularly electronic items such as mobile phones and computers.[73] The awareness of end-users of such products, the efforts of governments, and the involvement of corporations themselves have brought the issue of conflict minerals to the fore, resulting in legislation, or steps being taken towards legislation, to prevent the use of conflict minerals by corporations across the globe, including in the United States, the United Kingdom, the European Union, and China.[74]

1. The United States Legal Response

Recognizing that the humanitarian crisis in the eastern part of the DRC was financed partially through the trade of certain minerals originating from the DRC,[75] Congress promulgated Section 1502 of the Dodd-Frank Act that President Obama signed into U.S. law on July 21, 2010.[76] Section 1504 of the Dodd-Frank Act

Practices," 7 (2013), available at https://repository.uneca.org/handle/10855/22274 (last visited Feb. 21, 2019).

69 *e.g.* (i) the explanatory note to H.R. 4173 – 838; and (i) European Commission Press Release, 16 June 2016, *EU political deal to curb trade in conflict minerals* available at http://europa.eu/rapid/press-release_IP-16-2231_en.htm (last visited Aug. 24, 2018).

70 U.N. Economic Commission for Africa Special report on the *The ICGLR Regional Initiative against the Illegal Exploitation of Natural Resources (RINR) and other Certification Mechanisms in the Great Lakes Region: Lessons Learned and Best Practices*, 5.

71 EC Directorate-General for Trade Assessment for due diligence cost, benefit and related effects on selected operators in relation to the responsible sourcing of selected minerals, Final Report, Sept. 25, 2013, 8.

72 *Id*.

73 Gudrun Franken et al., *Certified Trading Chains in Mineral Production: A Way to Improve Responsibility in Mining*, in Non-Renewable Resource Issues: 213 Geoscientific and Societal Challenges (R. Sinding-Larsen & F.-W. Wellmer eds. 2012) 213, 219.

74 For the United States, *see* H.R. 4173 – 833; for the European Union, *see* European Commission Press Release, 16 June 2016, *EU political deal to curb trade in conflict minerals* available at http://europa.eu/rapid/press-release_IP-16-2231_en.htm (last visited Aug. 24, 2018); for China, *see* Clause 2.4.6 *CCMC Guidelines for Social Responsibility for Outbound Mining Investments* available at https://www.globalwitness.org/sites/default/files/library/CCCMC%20Guidelines%20for%20Social%20Resposibility%20in%20Outbound%20Mining%20Investments%20Oct%202014%20CH-EN_1.pdf (last visited Aug. 24, 2018).

75 Section 1502(a), Dodd-Frank Act: "It is the sense of Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein, warranting the provisions of section 13(p) of the Securities Exchange Act of 1934."

76 The White House Office of the Press Secretary, Remarks by the President at Signing of Dodd-Frank Wall Street Reform and Consumer Protection Act (Jul. 21, 2010), available

mandates the U.S. Securities and Exchange Commission ("SEC") to require companies that file an annual report[77] with the SEC (hereinafter, "reporting companies") to disclose details of their purchase of columbite-tantalite (coltan from which tantalum is extracted), cassiterite (tin), gold, wolframite (tungsten), or their derivatives ("conflict minerals")[78] from the DRC and adjoining countries.[79] In addition, reporting companies must ensure their suppliers comply with guidelines for tracing the source of minerals they use in manufacturing the reporting companies' products.[80] Pursuant to Section 1502 of the Dodd-Frank Act, the SEC's final rules[81] have required reporting companies since January 1, 2013 to determine if conflict minerals are required for the functionality or production of the goods that the reporting companies manufacture.[82] The SEC final rules also require reporting companies to disclose any such conflict minerals on SEC Form SD by May 31 for the prior calendar year.[83]

2. The European Legal Response

Following a public consultation beginning in March 2013 to consider the sourcing of minerals from conflict zones or other high risk areas,[84] the European Commission proposed a voluntary self-certification scheme in March 2014 for importers of tin, tantalum, tungsten, and gold into the European Union.[85] In June 2016, the European Parliament, the European Commission, and relevant ministers reached an understanding that due diligence for all but the smallest importers would in fact be mandatory.[86] The law also encourages large U.K. manufacturers or sellers of goods which contain tin, tungsten, tantalum, or gold to report on their sourcing practices.[87] In the United Kingdom, the British Foreign and Commonwealth Office has issued

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at https://obamawhitehouse.archives.gov/the-press-office/remarks-president-signing-dodd-frank-wall-street-reform-and-consumer-protection-act (last visited Aug. 24, 2018).

77 *See* 15 U.S.C. 78m(p)(2)(A).

78 Section 1502(e)(4), Dodd-Frank Act.

79 Section 1502(e)(1), Dodd-Frank Act. Adjoining countries include Angola, Burundi, Central African Republic, the Republic of the Congo, Rwanda, South Sudan, Tanzania, Uganda, and Zambia.

80 *See* 15 U.S.C. 78m(p)(1)(A)(i).

81 Securities and Exchange Commission, Release No. 34-67716; File No. S7-40-10, 17 C.F.R. Parts 240 and 249b, available at http://www.sec.gov/rules/final/2012/34-67716.pdf (last visited Aug. 27, 2018).

82 17 C.F.R. Section 240.13p-1.

83 *Id.*

84 European Commission, *EU Calls for input on "conflict minerals"* (Mar. 27, 2013), http://trade.ec.europa.eu/doclib/press/index.cfm?id=882 (last visited Aug. 24, 2018.

85 European Commission, *EU proposes responsible trading strategy for minerals from conflict zones* (Mar. 5, 2014), http://europa.eu/rapid/press-release_IP-14-218_en.htm (last visited Aug. 24, 2018).

86 European Parliament, *Conflict minerals: MEPs Secure Mandatory Due Diligence for Importers* (June 16, 2016), http://www.europarl.europa.eu/news/en/news-room/20160615IPR32320/conflict-minerals-meps-secure-mandatory-due-diligence-for-importers (last visited Aug. 24, 2018).

87 *Id.*

guidance[88] to encourage companies which trade in minerals originating in the DRC to be "socially, economically and environmentally responsible, including adhering to the relevant voluntary . . . guidance and guidelines."[89]

3. The Chinese Legal Response

On October 24, 2014,[90] the China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters ("CCCMC") introduced its Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains (the "Chinese Guidelines") in support of Clause 2.4.6 of the CCCMC Guidelines for Social Responsibility for Outbound Mining Investments.[91] The Chinese Guidelines are based on the U.N. Guiding Principles on Business and Human Rights and the Organization for Economic Cooperation and Development ("OECD") Due Diligence Guidance on Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas and apply to "all Chinese companies which are extracting, trading, processing, transporting, and/or otherwise using mineral resources and their related products and are engaged at any point in the supply chain of mineral resources and their related products."[92]

The acknowledgement that adherence by Chinese companies will allow these companies to do business in a compliant fashion in jurisdictions which have their own conflict minerals laws and regulations "and/or achieve conformance with industry initiatives that improve market access"[93] suggests that global conflict minerals legislation such as the Dodd-Frank Act has prompted the promulgation of the Chinese Guidelines.[94]

4. Other International Initiatives

In addition to the Dodd-Frank Act and initiatives in the European Union, the United Kingdom, and China, various international organizations have produced guidelines relating to conflict minerals. First, the OECD has formulated its Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (the "OECD Due Diligence Guidance") as mentioned above.[95]

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88 Foreign & Commonwealth Office, *Conflict Minerals: Encouraging British Companies Trading in Minerals from the Democratic Republic of Congo to Be Socially, Economically and Environmentally Responsible* (Jun. 19, 2013), https://www.gov.uk/conflict-minerals (last visited Aug. 24, 2018).

89 *Id*.

90 China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters, *Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains*, 3, available at https://mneguidelines.oecd.org/chinese-due-diligence-guidelines-for-responsible-mineral-supply-chains.htm (last visited Aug. 24, 2018).

91 *Id.*

92 *Id.* at 10.

93 *Id.* at 8.

94 *Id.*

95 OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition*, 2016, available at http://dx.doi.org/10.1787/9789264252479-en (last visited Aug. 24, 2018).

Second, the World Gold Council Conflict-Free Gold Standard and the London Bullion Market Association (LBMA) Responsible Gold Guidance both have promulgated guidelines related to conflict minerals.[96]

III. Analysis

Having examined the issue of child statelessness, the challenges inherent in the public international law to fully alleviate the problem, and the manner in which the global community has responded to conflict minerals, this section analyzes a number of possibilities for engaging multinational corporations, including the potential for particular legislation to address the problem of statelessness. First, the section examines the relevance of corporate governance and corporate social responsibility in encouraging ethical behavior in companies. Second, the section analyzes the Dodd-Frank Act's approach to conflict minerals as a template for addressing the issue of statelessness, proposing a draft text as a means to encourage action as well as critically examining the suitability, challenges, and criticisms of such an approach.

A. A Private Law Solution Based on Initiatives and Corporate Co-operation

Although no one generally accepted definition exists,[97] corporate governance seeks to enhance transparency, efficiency, and accountability in organizations while making such organizations more responsive to their various stakeholders.[98] International corporate governance standards are a form of "soft law" formulated upon the recommendations of NGOs in consultation with national regulators.[99] Several international organizations, notably the OECD, have formulated international corporate governance standards which seek to identify best practices and to formulate model codes of principles that typically promote effective corporate governance through fair and transparent markets; promote the equitable treatment of shareholders; encourage disclosure and transparency of material information; address the roles of institutional investors, stock exchanges, and other institutions; protect minority shareholders; and promote the responsibility, effectiveness, and accountability of management boards.[100] International financial market integration,

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96 *See* World Gold Council, *Conflict-Free Gold Standard*, Oct. 2012, available at http://www.gold.org/sites/default/files/documents/Conflict_Free_Gold_Standard_English.pdf (last visited Aug. 24, 2018) and *LBMA Responsible Gold Guidance Version 6*, 14 Aug. 2015, available at http://www.lbma.org.uk/assets/market/gdl/RGG%20v6.0%20201508014.pdf (last visited Aug. 24, 2018).

97 Steven M. Mintz, *Corporate Governance in an International Context: Legal Systems, Financing Patterns and Cultural Variables*, 13 Corp. Governance 582, 584 (2005).

98 Klaus J. Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation*, 59 Am. J. Comp. L. 1, 6-7 (2011).

99 *See generally* Kevin Jackson, *Global Corporate Governance: Soft Law and Reputational Accountability*, 35 Brook. J. Int'l L., 41, 44-47 (2010).

100 OECD, G20/OECD Principles of Corporate Governance, 2015, available at http://dx.doi.org/10.1787/9789264236882-en (last visited Jan. 23, 2017).

competition among various national approaches to corporate governance, and harmonization of accounting standards have all contributed to convergence of international corporate governance best practices.[101]

While the dominant consensus in the Anglo-American concept of corporations has emphasized the maximization of shareholder value measured by share price,[102] increasingly companies are determining that many considerations other than maximizing short-term profits actually contribute to their medium- and long-term viability.[103] An appreciation of the various stakeholders in a company and their respective duties and obligations is fundamental to understanding the different constituents that may influence companies.[104] Such concepts of corporate social responsibility have also played an increasingly important role in effecting corporate behavior.[105] The growing interest in CSR has led to the launch of a number of stock market indices tracking companies that market participants identify with high standards of CSR, [106] including the Dow Jones Sustainability Index[107] and the FTSE4Good Index.[108] Depending on the success of such indices, investors may collectively indicate their preference for more enhanced corporate governance and CSR standards.[109]

As no international body has the authority to enforce a global set of corporate governance standards, the only effective means of regulatory enforcement remains at the national level where both the particular emphasis of codes and levels of adherence vary considerably.[110] Additionally, there is considerable variation in the administration and enforcement of codes in different countries, where codes may be mere recommendations or mandatory law and enforcement may be through stock exchanges or special commissions.[111] Despite these differences, corporate

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101 Toru Yoshikawa & Abdul A. Rasheed, *Convergence of Corporate Governance: Critical Review and Future Directions*, 17 Corp. Governance: An Int'l Rev. 388, 390-392 (2009).

102 *See generally* Lynn Stout, The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and The Public, 2012 (Professor Stout notes: "According to the doctrine of shareholder value, public corporations "belong" to their shareholders, and they exist for one purpose only, to maximize shareholders' wealth." *Id*. at 2).

103 *See generally* Manuela Weber, *The Business Case for Corporate Social Responsibility: A Company-Level Measurement Approach for CSR*, 26 Eur. Mgmt J. 247, 248-252 (2008).

104 *Id*. at 252-253.

105 Jose-Manuel Prado-Lorenzo, Isabel Gallego-Alvarez & Isabel M. Garcia-Sanchez, *Stakeholder Engagement and Corporate Social Responsibility Reporting: the Ownership Structure Effect*, 16 Corp. Soc. Resp. Envtl. Mgmt. 94, 94-95 (2009).

106 Michael Robinson, Anne Kleffner & Stephanie Bertels, *Signaling Sustainability Leadership: Empirical Evidence of the Value of DJSI Membership*, 101 J. Bus. Ethics 493, 493-496 (2011).

107 *See* DJSI Annual Review, available at http://www.robecosam.com/en/sustainability-insights/about-sustainability/corporate-sustainability-assessment/review.jsp (last visited Aug. 28, 2018).

108 *See* FTSE4Good Index Series, http://www.ftse.com/products/indices/FTSE4Good (last visited Aug. 28, 2018).

109 *See generally* M. Victoria López, Arminda Garcia & Lazaro Rodriguez, *Sustainable Development and Corporate Performance: A Study Based on the Dow Jones Sustainability Index*, 75 J. of Bus. Ethics 285, 286-287 (2007).

110 Hopt, *supra* note 98, at 13.

111 *Id*. at 14-15.

governance standards may provide a means to positively influence corporate behavior where traditional law has not been effective. Moreover, as "corporate governance becomes increasingly driven by ethical norms and the need for accountability,"[112] companies have become more willing to enhance stakeholder engagement and investor accountability.[113] In addition, governments could be prompted to formulate guidelines indicating how corporations may take positive steps to alleviate statelessness, similar to the British Foreign and Commonwealth Office guidelines[114] issued in respect to the conflict minerals trade.

The U.N. Guiding Principles on Business and Human Rights[115] (the "Guiding Principles") is an example of a set of international principles for states and businesses alike to meet the objective of "enhancing standards and practices with regard to business and human rights."[116] The Guiding Principles acknowledge that businesses have an impact on global human rights and are ideally placed to influence practices under either their direct or indirect control, and the direction within these Guiding Principles to businesses to respect human rights is clear and unequivocal.[117] By their nature as general guiding principles, no specific actions are required in relation to conflict minerals or other human rights abuses, leaving compliance with the Guiding Principles in this arena to the judgement of those states and businesses which may commit to follow them.[118]

Beyond compliance with corporate governance standards or guidance issued at governmental levels, corporations have adopted codes of ethics for decades although many "were adopted in response to highly publicized scandals and/or major legal developments."[119] Corporate codes often recognize the importance of "treat[ing] stakeholders and competitors with fairness and respect."[120] Even though corporate codes may be dismissed as "empty exercises in 'window dressing,"[121] they "are most often perceived as tangible evidence that an organization has recognized a need for,

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112 Amiram Gill, *Corporate Governance as Social Responsibility: A Research Agenda*, 26 Berkeley J. Int'l Law, 452, 463 (2008).

113 *Id*. at 454.

114 Foreign & Commonwealth Office, *Conflict Minerals: Encouraging British Companies Trading in Minerals from the Democratic Republic of Congo to Be Socially, Economically and Environmentally Responsible*, *supra* note 88.

115 United Nations, *Guiding Principles for Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework*, HR/PUB/11/04, https://www.unglobalcompact.org/library/2 (last visited Aug. 28, 2018).

116 *Id*. at 1.

117 For a list of companies who have issued company policy statements on human rights, *see* Business & Human Rights Resource Centre, *Company Policy Statements on Human Rights*, http://business-humanrights.org/en/company-policy-statements-on-human-rights (last visited Aug. 28, 2018).

118 Robert C. Blitt, *Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance*, 48 Tex. Int'l L.J. 33, 43-44 (2012).

119 Joshua A. Newberg, *Corporate Codes of Ethics, Mandatory Disclosure, and the Market for Ethical Conduct*, 29 Vt. L. Rev. 253, 255 (2004-2005).

120 *Id*. at 261.

121 *Id*. at 264-265. The author notes: "Enron Corporation, wherein a detailed and famously earnest code of ethics coexisted with a great deal of now infamously unethical conduct, could be offered as 'exhibit A' for the 'window dressing' view of corporate codes." *Id*. at 265.

and has made a commitment toward, ethical behavior."[122] Companies such as The Body Shop,[123] People Tree,[124] Ben & Jerry's,[125] and other companies with socially-conscious codes of ethics have been influential in addressing particular areas of concern to their stakeholders. While empirical data on the efficacy of codes is inconclusive,[126] there is evidence that credible information on ethical policies has a positive influence on consumer attitudes toward companies.[127] It follows that enhanced disclosure obligations on the problem of statelessness, together with other human rights abuses such as those arising out of the conflict minerals crisis would provide shareholders and other stakeholders the very type of information that can promote corporate transparency and reputation. Accordingly, there may be scope for multinational corporations to compile a corporate code or framework setting out steps they may realistically take to address the issue of statelessness.

B. A Private Law Solution Based on Section 1502 of the Dodd-Frank Act

1. Legislative Proposal

The precedent set by the SEC reporting obligations relating to conflict minerals provides a realistic and achievable way to engage multinational corporations in the effort to end statelessness. The wording of suggested legislation to achieve this aim is proposed below, adapted from the text of Section 1502 of the Dodd-Frank Act, replacing the original conflict minerals text with guidelines to address statelessness:

> (A) Not later than 270 days after the date of the enactment of this *provision*, the Securities and Exchange Commission shall promulgate regulations requiring any person *with an obligation to provide filings with the Commission* to disclose annually, beginning with the person's first full fiscal year that begins after the date of promulgation of such regulations, *whether employees of the person, employees within the supply chain of the person or children of such employees were stateless* and submit to the Commission a report that includes, with respect to the period covered by the report:[128]
>
> (i) a description of the measures taken by the person *(a) to exercise due diligence on the citizenship of their employees, the employees within their supply chains and the children of such employees; and (b) to work*

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122 Cynthia Stohl, Michael Stohl & Lucy Popova, *A New Generation of Corporate Codes of Ethics*, 90 J. Bus. Ethics, 607, 609 (2009).

123 The Body Shop, *Our Commitment*, https://www.thebodyshop.com/en-gb/about-us/our-commitment (last visited Aug. 28, 2018).

124 People Tree, *Our Story*, http://www.peopletree.co.uk/about-us/mission (last visited Aug. 28, 2018).

125 Ben & Jerry's, Values: *How We Do Business*, http://www.benjerry.com/values/how-we-do-business (last visited Aug. 28, 2018).

126 Newberg, *supra* note 119, at 266.

127 Lois A. Mohr & Deborah J. Webb, *The Effects of Corporate Social Responsibility and Price on Consumer Responses*, 39 J. Consumer Aff., 121, 142-143 (2005).

128 Adapted from 15 U.S.C. Section 78m(p)(1)(A).

> *with local communities, agencies, and other governmental authorities in regions where stateless persons or children have been disclosed pursuant to paragraph (A) to raise awareness of the presence of stateless persons and children and to encourage the implementation of policies to reduce the number of stateless persons and children*;[129] and
>
> (ii) a description of the *policies adopted by the person to (a) assist employees and the employees within their supply chain to register such employees and the children of such employees as citizens; and (b) to monitor the success rates of such efforts.* [130]
>
> (B) For the purposes of this paragraph, a person may declare that it is "*Supporting Stateless Children*" *if the measures and policies set out at paragraph (A) are implemented.* [131]
>
> (C) INFORMATION AVAILABLE TO THE PUBLIC.—Each person shall make available to the public on the Internet website of such person the information disclosed by such person under subparagraph (A). [132]

In order to comply with the ensuing reporting requirements, relevant multinational corporations would be required to carry out investigations for each fiscal year in order to conclude whether or not persons affected by statelessness are connected to that multinational corporation, whether directly or via a supply chain. The multinational corporations would also need to show how they have conducted the investigations into the problem of statelessness within or connected to their organization. They would also need to take steps to ensure employees have or obtain citizenship and any children the employees may have are registered with the proper authorities. In addition, such multinational corporations would need to monitor the success of their policies, and they also would need to engage with local communities, governments, and agencies to reduce the number of stateless children.

Finally, by way of incentive, multinational corporations may declare that they are "Supporting Stateless Children" if they comply with the disclosure requirements of the provisions. By enabling this declaration and by requiring public disclosure, multinational corporations are raising awareness of the plight of stateless persons and children and have the potential to encourage conscientious investment and consumer choices, while also benefiting from their status as socially conscious employers and organizations.

In the case of statelessness, where the human rights abuse is diverse and widespread, this has the potential to be a particularly effective solution. If part of the responsibility for resolving statelessness is transferred into the hands of multinational corporations, these corporations could help supplement weaknesses in the protection offered by public international law by carrying out the necessary due diligence and audits to determine the scale and causes of the problem persisting

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129 Adapted from 15 U.S.C. Section 78m(p)(1)(A)(i).
130 Adapted from 15 U.S.C. Section 78m(p)(1)(A)(ii).
131 Adapted from 15 U.S.C. Section 78m(p)(1)(D).
132 Adapted from 15 U.S.C. Section 78m(p)(1)(E).

in their areas of influence. Given their close connection with the host communities, these companies are in the best position to identify, influence, and drive solutions, which cannot be formulated effectively at an international level because of the practical need for diverse local responses.

For example, where the cause of a child's or other person's statelessness is legal or administrative deficiency,[133] perhaps as the result of the loss of documentation,[134] a multinational corporation may provide support for proving identity or applying for replacement documents. Where the cause is a lack of understanding or education of migrant workers, or weaknesses in national registration and documentation systems,[135] multinational corporations could be expected to provide guidance, explanations, and systems to ensure the registration of workers and their children. If there is a barrier in the form of a local law or discriminatory practice,[136] the multinational corporation could be expected to exert pressure on lawmakers to improve policies and to raise awareness among the local population and others to achieve change. While influence may be focused on the employees of multinational corporations and their children, actions taken and policies implemented by such multinational corporations may have the potential to achieve a positive effect beyond their direct sphere of influence.

2. Legal Precedent for Private Law Solutions for Public Law Challenges

Although the proposed provision set out in this part is based on conflict minerals legislation,[137] the existence of legislation designed to engage multinational corporations in combatting human rights abuses is not without precedent outside of the sphere of conflict minerals legislation. The California Transparency in Supply Chains Act of 2010 (the "California Act"),[138] with effect since January 2012,[139] seeks to ensure that certain large retailers and manufacturers[140] provide consumers with information relating to their efforts to eradicate slavery and human trafficking from their supply chains and educate consumers with the aim of improving the lives of victims of slavery and human trafficking.[141] This is achieved by requiring

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133 David Weissbrodt & Clay Collins, *The Human Rights of Stateless Persons*, 28 Hum. Rts. Q. 245, 253 (2006).

134 *Cf*. Jerrold W. Huguet & Sureeporn Punpuing, *Child Migrants and Children of Migrants in Thailand*, 20 Asia-Pacific Population J. 123, 136 (2005) (discussing the particular problems associated with a lack of documentation).

135 *See generally* Catherine A. Tobin, *No Child Is an Island: The Predicament of Statelessness for Children in the Caribbean*, 1 DePaul Int'l Hum. Rts. L.J. 1, 5-6 (2015) (focusing on "[t]he failure of national civil registration and documentation systems, most notably in Haiti).

136 Stacie Kosinski, *State of Uncertainty: Citizenship, Statelessness and Discrimination in the Dominican Republic* 32 B.C. Int'l & Comp. L. Rev. 377, 384-395 (2009) (discussing discriminatory practices in the Dominican Republic).

137 Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173.

138 Senate Bill No. 657, Chapter 556.

139 Section 3(c) California Transparency in Supply Chains Act 2010.

140 Those doing business in California with annual worldwide gross receipts in excess of $100,000,000, Section 3(a) California Transparency in Supply Chains Act 2010.

141 *Id*. at Section 2(j).

disclosure via a "conspicuous and easily understood link"[142] on the homepage of the business website[143] of information relating to such business's supply chains, including verification and audits as well as internal policies and procedures relating to training and internal accountability.[144] The Modern Slavery Act 2015 (the "U.K. Act")[145] in the United Kingdom also contains a provision relating to transparency in supply chains.[146] Like the California Act, the U.K. Act requires certain commercial organizations[147] to publish a statement[148] relating to slavery and human trafficking for each financial year[149] which should include details of the steps taken by the organization to ensure slavery and human trafficking are not taking place in any of its supply chains and in any part of its own business or a statement that the organization has taken no such steps.[150] The statement, which must be approved and signed by a director, member, or partner of the organization,[151] may also include information relating to the structure, business, and supply chains of the organization, its policies and due diligence process in relation to slavery and human trafficking, risk areas, the effectiveness of measures taken, and training.[152]

3. Reporting under Section 1502 of the Dodd-Frank Act

Notwithstanding various criticisms,[153] mandatory disclosure remains the hallmark of financial regulation.[154] Compliance with the disclosure requirements set forth in the Dodd-Frank Act is enforced by the SEC under the Securities and Exchange Act 1934 (the "Exchange Act").[155] There are undoubtedly challenges associated with preparing and producing the reports required to comply with the Dodd-Frank Act.[156] In accordance with Section 1502(d)(3)(C) of the Dodd-Frank Act, the United States Department of Commerce has produced a report listing all known worldwide processing facilities for tin, tungsten, tantalum, and gold, but states that

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142 *Id*. at Section 3(b).
143 *Id*.
144 *Id*. at Section 3(c).
145 Modern Slavery Act 2015.
146 *Id*. at Section 54.
147 Commercial organizations carried on in the United Kingdom with a turnover of above £36 million as set out at Section 2 Modern Slavery Act (Transparency in Supply Chains) Regulations 2015.
148 The organization must make the statement available on its a website if there is one or, if there is not one, the statement must be made available on request. *See* Section 54(7) Modern Slavery Act 2015.
149 *Id*. at Section 54(1).
150 *Id*. at Section 54(4).
151 *Id*. at Section 54(6).
152 *Id*. at Section 54(5).
153 *See generally* Omri Ben-Shahar, *The Failure of Mandated Discourse*, 159 U. Pa. L. Rev. 647, (2010-2011).
154 Iris H-Y Chiu, *Delegated Regulatory Administration in Mandatory Disclosure—Some Observations from EU Securities Regulations*, 40 Int'l Law. 737, 739 (2006).
155 Woody, *supra* note 7, at 1327-32.
156 See, for example, the limitations and challenges set out *in The Department of Commerce Reporting Requirements under Section 1502(d(3)(c) of the Dodd-Frank Act: World-wide Conflict Mineral Processing*, available at http://www.trade.gov/industry/materials/Conflict_Mineral_Executive_Summary_2015.pdf (last visited Aug. 28, 2018).

it is unable to distinguish whether or not a particular facility processes conflict minerals.[157] The report states that "to . . . [the authors'] knowledge, the attached list is the most comprehensive list to date of all known processing facilities in the world"[158] but goes on to acknowledge the difficulties faced in compiling the list, noting among other challenges that "[the authors] observed that there is a considerable lack of publicly available information on processing facilities and that there are only a handful of smelter lists created by industry associations and private sector organizations, and publicly available in directories, publications and related resources."[159] The 2015 report is based on the previous year's report[160] and is subject to the same limitations.[161]

The difficulties faced by the Department of Commerce[162] are likely to be indicative of the challenges faced by multinational companies in identifying the source of minerals in order to comply with the disclosure requirements of the Securities Exchange Act.[163] Global Witness and Amnesty International have analyzed 100 conflict minerals reports[164] made in accordance with Rule 13p-1 under the Exchange Act and have found that 79% of those reports "do not meet the minimum reporting requirements."[165] Despite this, the analysis reveals that over 80% of companies acknowledged that reporting needed to be improved, and in many cases companies already have plans for making improvements,[166] suggesting a high level of engagement at a corporate level. Significantly, the report also acknowledges that the Dodd-Frank Act is having an impact in the DRC, where "the government, non-governmental organizations and private businesses have also ramped up efforts to clean up the mining sector, in part to meet the emerging international market demand for clean, 'conflict-free' minerals that has followed the passage of Section 1502."[167]

The OECD Due Diligence Guidance provides an agreed method for conducting due diligence into the source of minerals,[168] which is relied upon by reporting companies in accordance with the SEC Final Rule.[169] The Chinese Guidelines[170]

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157 *Id.*
158 *Id*.
159 *Id*.
160 *Id*.
161 *Id*.
162 *Id.*
163 Section 13(p)(1)(a) Securities Exchange Act 1934.
164 *Digging for Transparency: How U.S. Companies Are Only Scratching the Surface of Conflict Minerals Reporting*, April 2016, available at https://www.amnesty.org/download/Documents/AMR5114992015ENGLISH.PDF (last visited Aug. 28, 2018).
165 *Id.* at 5.
166 *Id*. at 29.
167 *Id*. at 32.
168 The OECD Due Diligence Guidance explains it is "*a collaborative government-backed multi-stakeholder initiative on responsible supply chain management of minerals from conflict-affected areas.*" *See* OECD *supra* note 95, at 99.
169 *See* Securities and Exchange Commission, *supra* note 81, which sets out that the OECD Due Diligence Guidance and is the only nationally or internationally due diligence framework available.
170 *See* China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters, *supra* note 90.

and the proposed E.U. legislation[171] also rely on the framework provided by the OECD. The SEC declares in the final rule that it was "persuaded by commentators" that use of the OECD Due Diligence Guidance is helpful to "enhance the quality of an issuer's due diligence, promote comparability of the Conflict Minerals Reports of different issuers, and provide a framework by which auditors can assess an issuer's due diligence."[172] While there is no such guidance in relation to statelessness for companies to base their due diligence investigations, measures, or reports upon, there may be potential to link statutory requirement to address statelessness to the four categories of activities of the UNHCR[173] relating to identification, prevention, reduction, and protection[174] in order to provide a framework for the corporate response. Furthermore, the UNHCR and Open Society Justice Initiative have produced a report which proposes solutions for reducing statelessness in the United States,[175] which makes of a number of recommendations[176] concerning stateless individuals in the United States which, while framed in the context of the United States, may prove useful as a basis for a more broadly applicable framework.

4. Declaration under Section 1502 of the Dodd-Frank Act

Section 1502 of the Dodd-Frank Act allows companies the use of the label "DRC conflict free" if its products do not contain conflict minerals that "directly or indirectly finance or benefit armed groups in the [DRC] or an adjoining country."[177] The attempt to use the SEC to require reporting of this nature is controversial.[178] In addition to fundamental concerns about the purpose of SEC disclosures or disclosure as a method of addressing human rights concerns,[179] the conflict minerals provisions of the Dodd-Frank Act have been challenged in the U.S. courts.[180] The National Association of Manufacturers and others challenged the SEC and Amnesty International in the D.C. Circuit. As a result of such litigation, the D.C. Court of Appeals ruled in favor of reporting companies challenging the SEC requirement for indicating that their products have "not been found to be DRC conflict free"

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171 *See* European Parliament, *supra* note 86.

172 *See* Securities and Exchange Commission, *supra* note 81.

173 *See generally* United Nations High Commissioner for Refugees, http://www.unhcr.org (last visited Aug. 28, 2018).

174 *See* UNHCR, *How UNHCR Helps Stateless People*, http://www.unhcr.org/uk/how-unhcr-helps-stateless-people.html (last visited Aug. 28, 2018).

175 *Citizens of Nowhere, Solutions for the Stateless in the US, A Report from the United Nations High Commissioner For Refugees and Open Society Justice Initiative* (December 2012), available at https://www.opensocietyfoundations.org/sites/default/files/citizens-of-nowhere-solutions-for-the-stateless-in-the-us-20121213.pdf (last visited Aug. 28, 2018).

176 *Id.* at 30-32.

177 15 U.S.C. Section 78m(p)(1)(D).

178 *See* 156 Cong. Rec. S3976, Part C, for a Summary of the Comments on the Proposed Rules.

179 Marcia Narine argues in *Disclosing Disclosure's Defects: Addressing Corporate Irresponsibility for Human Rights Impacts*, 47 Colum. Hum. Rts. L. Rev. 84 (2015) that disclosure is not an effective method to compel companies to act in respect of human rights violations, arguing that disclosures do not change behavior.

180 *National Association of Manufacturers v. Securities and Exchange Commission,* No. 13-5252, (D.C. Cir. 2014).

in 2014,[181] recognizing that such a requirement amounts to compelled commercial speech and hence breaches the First Amendment to the U.S. Constitution.[182] The 2014 ruling was the subject of a statement of the SEC,[183] confirming that reports required to be filed should "comply with and address those portions of Rule 13p-1 and Form SD that the Court upheld."[184] Notwithstanding the ruling in *National Association of Manufacturers v. SEC*,[185] the legislative proposal in respect of the "Supporting Stateless Children" declaration set out in this article should not amount to compelled commercial speech and thus would not be precluded by the decision given that the proposed declaration would be made on a voluntary basis only.

Disclosure under the Dodd-Frank Act enables investors and consumers to make informed choices about their investments and purchases if they choose to have regard to the reports issued with the SEC in accordance with the final rule.[186] Such disclosure can be used by companies complying with the requisite standards with the aim of having a positive impact on a particular abuse or injustice by raising awareness and guiding consumer and possibly investor behavior.[187]

5. Transparency

Like conflict minerals legislation and slavery and human trafficking provisions, the proposed provisions rely on public transparency: disclosure by multinational corporations of actions, policies, and procedures. The provisions do not seek to prescribe how multinational corporations should combat human rights abuses; their effectiveness in alleviating the abuse depends on the engagement and conscience of the investor, the reporting organization, and their consumers.

The incentive to comply on a meaningful level by multinational corporations is provided by investors and consumers who have the power to choose whether or not to support an organization according to their satisfaction with the level of compliance.[188] A 2015 Resource Guide relating to the California Act claims that "[a] recent law in California is poised to help California consumers make better and more informed purchasing choices."[189] Likewise, the guidance issued under

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181 This decision was re-affirmed on petition for panel rehearing by the U.S. Court of Appeals for the District of Columbia Circuit, decided Aug. 18, 2015.

182 *See National Association of Manufacturers v. Securities and Exchange Commission, supra* note 182 at 18-19 and 22; and *id*. at 18 and 25.

183 Statement on the Effect of the Recent Court of Appeals Decision on the Conflict Minerals Rule by Keith F. Higgins, Director, SEC Division of Corporation Finance, April 29, 2014.

184 *Id.*

185 *National Association of Manufacturers v. Securities and Exchange Commission*, *supra* note 182.

186 Securities and Exchange Commission, *supra* note 81.

187 For discussion of the role of disclosure and market forces in relation to conflict minerals sourcing, *see* Margaret Ryznar & Karen E. Woody, *A Framework on Mandating versus Incentivizing Corporate Social Responsibility,* 98 Marq. L. Rev. 1667 2014-2015 and 156 Cong. Rec. S3976 (May 19, 2010) (statement of Senator Feingold), quoted in the SEC Final Rule, *see* Securities and Exchange Commission, *supra* note 83.

188 *Id.*

189 *The California Transparency in Supply Chains Act, A Resource Guide*, 2015, Kamala D. Harris, Attorney General of the California Department of Justice, i, *available at* https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf (last visited Aug. 28, 2018).

Section 54(9) of the Modern Slavery Act 2015 notes that the legislation "increase[s] transparency by ensuring the public, consumers, employees and investors know what steps an organisation is taking to tackle modern slavery,"[190] which further "allows investors to move capital towards more sustainable, responsible organisations and strengthen the long-term ethical sustainability of the financial system."[191]

Although not perfect, empirical data indicate that Dodd-Frank's conflict mineral disclosure provisions have "been partially effective in ensuring increased levels of social disclosure."[192] Whether the "name and shame" approach of Dodd-Frank[193] or simple corporate altruism, the impact of the policies, reports, and actions are having on the ground in the DRC is crucial. Further, they may offer an effective template to address child statelessness in global supply chains in a manner in which public law alone cannot eradicate the problem. Indeed, if raising investor awareness and engaging multinational corporations in ethical campaigns can help to drive real change, then ethical codes should be applauded and encouraged. In the present case, raising awareness of the plight of stateless children among these global actors is the first step in this process.

IV. Conclusion

Responding to the complex global challenge of child statelessness requires awareness, engagement, and action. To date, given the myriad of causes and consequences of statelessness, an effective global response based on public law initiatives alone has proven elusive. This article has sought to identify and explore ways in which the private law may be harnessed to contribute to a solution to the persistent problem of child statelessness. How far, to what extent, and how successful any of the initiatives suggested in this article may be depend upon many factors, including not only the scope and reach of legislation or the particular barriers faced by stateless individuals in any given jurisdiction, but also the public awareness of the plight of stateless children and the appetite among the public, investors, governments, and multinational corporations for change. Nevertheless, the engagement of the corporate world offers a pragmatic approach, reaching those directly affected by statelessness, by looking to those multinational corporations active across the globe with the tools and incentives to engage in identifying and pursuing solutions. By emulating the global impact and influence of conflict minerals legislation, the combination of private law initiatives with the public law represents an ambitious and positive step towards the alleviation of child statelessness.

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190 UK Government, *Transparency in Supply Chains etc.: A Practical Guide, Guidance issued under section 54(9) of the Modern Slavery Act 2015*, *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/649906/Transparency_in_Supply_Chains_A_Practical_Guide_2017.pdf guide, 3.

191 *Id*. at 4.

192 Dalla Via & Perego, *supra* note 8.

193 *Id.*

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Declaration of War: A Dead Letter or An Invitation to Struggle?

Thomas Halper*

ABSTRACT

The Constitution's declaration of war requirement, superficially straightforward but actually full of ambiguities, originated in a fear of presidential usurpation and recklessness. Yet Congress has responded to political incentives and has declined the assertive role assigned to it. The check on usurpation and recklessness has eroded almost to the vanishing point.

KEYWORDS

Declaration of War, AUMF, President, Congress, Supreme Court

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* Professor, Political Science, Baruch College & CUNY Graduate Center. Thomas.Halper@baruch.cuny.edu. I am grateful to Benedetto Fontana and Stanley Renshon for their many insightful suggestions

I. Introduction

"North Korea best not make any more threats to the United States," warned President Trump. "They will be met by fire and fury like the world has never seen."[1] Congressional Democrats' reaction was apoplectic. Senator Dianne Feinstein (D-CA) called the remarks "bombastic"; Representative Eliot Engel (D-NY) thought the President was "unhinged"; Senator Ben Cardin (D-MD) denounced the talk as "bluster and provocative"; Senator Charles Schumer (D-NY) said it was "reckless rhetoric";[2] Representative David Cicillini (D-RI) criticized its "escalating rhetoric"; Representative Betty McCollum (D-MN) found it "dangerous"; and Representative Ted Lieu (D-CA) thought it was "provocative."[3] Could the President, entirely on his own, order such an attack? None of the Democratic critics, so unsparing in their condemnation, raised the question. Yet it would seem as obvious as a moose on a highway, for the Constitution announces that "The Congress shall have the power to . . . declare war"?[4] What could be simpler?

A. The Conventional View

The conventional view is that the Constitution, having "conferred virtually all of the war-making powers" upon Congress, leaves the President only the power "to repel 'sudden attacks.'"[5] Congress' power to start or enter an ongoing war, in turn, must take the form of an explicit resolution to that effect. The rationale, as Madison wrote Jefferson, is "that the executive is the branch of power most interested in war, and most prone to it. [The Constitution] has accordingly with studied care, vested the question of war in the legislature."[6] Madison, who feared war as expensive, corrupting, and destructive of the separation of powers, wrote these words while President Adams was waging a surreptitious war with France. A half century later, Lincoln, provoked by President Polk's Mexican War, explained, "Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This, our Constitution understood to be the most oppressive of all kingly oppressions; and they resolved to frame the Constitution so that *no one man* should hold the power of bringing this oppression

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1 Noah Bierman, *Trump Warns North Korea of Fire and Fury*, L.A. Times, Aug. 8, 2017.

2 Jeremy Herb, *Lawmakers Slam Trump's "Fire and Fury" toward North Korea*, CNN (Aug. 9, 2017), https://edition.cnn.com/2017/08/08/politics/lawmakers-trump-fire-fury-north-korea-mccain/index.html.

3 Rebecca Shabad, *Democrats Blast Trump's "Fire and Fury" Warning to North Korea*, CBS News, (Aug. 8, 2017), https://www.cbsnews.com/news/democrats-blast-trumps-fire-and-fury-warning-to-north-korea/.

4 U.S. Const. art. I, § 8.

5 Raoul Berger, *War-Making by the President*, 121 U. Pa. L. Rev. 29, 82 (1972).

6 Letter to Thomas Jefferson, Apr. 2, 1798, James Madison: Writings 586 (Jack Rakove ed. 1999). For Madison, the Constitution's two years appropriations rule for the army was "the best possible precaution against danger from standing armies." The Federalist 41, at 201 (James Madison) (George W. Carey & John McClellan eds. 2001/1787). Though Madison the Framer insisted that war be a last resort and be widely backed by Congress and the public, Madison the President stumbled into the War of 1812, which was neither.

upon us."[7] Or as one authority put it, "our system rests on the assumption that many minds are more trustworthy than one on questions of war and peace."[8] The President may recommend war, as Franklin Roosevelt did after the bombing of Pearl Harbor, but only Congress may declare war, which it promptly did in a pair of formal statutes.[9] The constitutional role of commander-in-chief, from this vantage point, "is simply one of the means to the fundamental purpose of the presidency, that is, seeing to the execution of the law."[10]

With the conventional view, "declare" is assumed to mean "initiate." But there are a pair of obvious problems here. First, in ordinary speech, "declare" does not mean "initiate." "Declare" means to make known or state emphatically; "initiate" means to start. The Declaration of Independence, for example, driven by "a decent respect to the opinions of mankind," explained why the American colonies had decided "to dissolve the political bands" which connected them with Britain.[11] Similarly, in ancient times, Thucydides reports that the Spartans, seeing their treaty with Athens broken, voted to declare war,[12] and the Roman Republic required that a *collegium* of priests certify wars, both to guarantee that the wars were just.[13] Second, if the Framers meant "initiate," why did they not use that word? Why assume that they really intended to use a word they failed to use? As a matter of fact, they first used "make," which is tolerably close to "initiate," but then decided to replace it with "declare,"[14] fearing that "make" might imply operational responsibility.

Those who believe that "declare" means "initiate" often go on to claim that the only valid constitutional declaration of war is one that is expressly labeled as such.[15] The purpose of the declaration, from this perspective, is to use the presumptive voice of the people to restrain the President, forge a presidential-congressional partnership, and legitimize the war effort. It then follows, like Polonius' night and

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7 Letter to William H. Herndon, Feb. 15, 1848. 1 The Collected Works of Abraham Lincoln 451-52 (Roy P. Basler ed. 1953) (emphasis in original). Like Madison, Lincoln did not always practice what he preached. As President, for example, he hired and fired generals, suspended habeas corpus, and freed the slaves in the rebellious states without pausing to consult with Congress, arguing that "by the law of war, property . . . may be taken as needed." Letter to James C. Conkling, Aug. 26, 1863, *id*. 6: 409.

8 Merlo J. Pusey, The Way We Go to War 5 (1969); Alexander George, *The Case for Multiple Advocacy in the Making of Foreign Policy*, 66 Am. Pol. Sci. Rev. 751 (1972).

9 Joint Resolution of Dec. 8 Pub. L. No. 77-328, 55 Stat. 795 (1941) (Japan) and Joint Resolution of Dec. 12 Pub. L. No. 77-331, 55 Stat. 796 (1941) (Germany). Fifty members of the House opposed Wilson's call for a declaration of war in 1917. Of course, nothing comparable to the Pearl Harbor attack had occurred.

10 Wilfred E. Binkley, The Man in the White House: His Powers and Duties 188 (rev. ed. 1964); Charles Fairman, *The President as Commander-in-Chief*, 11 J. Politics 145 (1949).

11 Declaration of Independence (U.S.1776).

12 Thucydides, History of the Peloponnesian War 187 (Richard Crawley trans., Penguin Classics rev. ed. 1972).

13 Francisco Pina Polo, The Consul at Rome: The Civil Functions of the Consuls in the Roman Republic 188-91 (2011).

14 2 The Records of the Federal Convention of 1787 318-19 (Max Farrand ed.1911).

15 *E.g.,* J. Gregory Sidak, *To Declare War*, 41 Duke L.J. 27 (1991); Michael J. Glennon, Constitutional Diplomacy 81 1990).

day, that with only eleven such declarations covering only five wars, the last in 1942,[16] but some 200 military actions, the declaration requirement is a dead letter.[17]

The war declaration provision, so important but also so cryptic, leaves an abundance of practical questions unanswered. For example, does Congress' power to declare war limit the President's power to wage war? Does a declaration of war compel the President to wage war? The President has a constitutional duty to "take care that the laws be faithfully executed,"[18] but as commander in chief[19] may he conclude that the war that Congress assigned him is a mistake? Does a congressional declaration require the President's signature, like ordinary laws,[20] or as its having been singled out in the Constitution, is it spared from this requirement?[21] The potentially overlapping responsibilities of a Congress declaring and funding war and a President serving as commander in chief seem guaranteed to result in conflict, confusion, misunderstanding, and deceit.

It is not even clear what constitutes a declaration. Must it be a formal, labeled declaration, like Roosevelt's? The Constitution does not say. But the necessary and proper clause gives Congress the authority to implement its powers, so that when it adopts an authorization for the use of military force or allocates funds for this purpose, it is formally, if implicitly, approving engaging in military conflict. That is, the act of implementing implies the prior existence of a larger decision to be implemented. In *Bas v. Tingy*[22] (1800), a salvage case that arose during hostilities with France, the Supreme Court held that as "Congress had raised an army, stopped all intercourse with France, dissolved our treaty, built and equipped ships of war, and commissioned private armed ships . . . the degree of hostility meant to be carried on was sufficiently described without declaring war or declaring that we were at war." [23] Absent a formal declaration of war, war existed and Congress had authorized it.

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16 Rumania on June 5. *See* Joint Resolution of June 5 1942, ch. 325, 56 Stat. 307 (1942). A few years earlier, fear that Congress could be pressured into declaring war led isolationists to propose a constitutional amendment providing that, except in case of invasion or attack, a declaration of war must be approved by a majority of the public in a national referendum.

17 *See*, *e.g.*, Brien Hallett, The Lost Art of Declaring War 34-36 (1998); David B. Sentelle, *National Security Law: More Questions than Answers*, 31 Fla. St. U. L. Rev. 1, 5-6 (2003). In the popular press, *see*, *e.g.*, Neil A. Lewis, *Mideast Tensions: Sorting Out Legal War Concerning Real War*, N.Y. Times, Nov. 15, 1990, at 18; Jonathan Schell*, When Is the End?* The Nation, June 13, 2011. The absence of formal war declarations is not a peculiarly American phenomenon.

18 U.S. Const. art. II, § 3.

19 U.S. Const. art. II, § 2.

20 Alexander Bickel et al., *Indochina: The Constitutional Crisis*, 116 Cong. Rec. 15,410 (1970); Simeon E. Baldwin, *The Share of the President of the United States in a Declaration of War*, 12 Am. J. Int'l. L 1 (1918).

21 Louis Henkin, Constitutionalism, Democracy, and Foreign Affairs 39 (1990); Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 Va. L. Rev. 101, 131 (1984). President John Adams successfully countered Congress' calls for a declaration of war against France. John Patrick Diggins, John Adams 55-80 (2003). But for many years, Presidents have taken the lead in urging wars. As none have refused to sign such declarations, the dispute is entirely speculative.

22 4 U.S. 37 (1800).

23 *Id*. at 41. A similar point was made in another salvage case arising out of the same hostilities, *Talbot v. Seeman*, 5 U.S. 1, 33 (1801), as well as in a case approving President Lincoln's blockade of Confederate ports. *Prize Cases*, 67 U.S. 635, 668 (1863).

B. Alternative Views

The alternative to the congressionally centered approach is one that is presidentially centered. Hamilton in Federalist 70 argued that a successful executive must have energy, which we would approximate as leadership, and energy, he maintained, presupposes unity, duration, and adequate provision for its support. Hence a President consisting of one person (and not a cabinet) and having its own basis of power (and not being a creature of the legislature).[24] Given these attributes, Hamilton believed, a President will have a decent chance at success, and given these, it makes sense to hold him responsible for his decisions. In foreign and security affairs, the argument goes, leadership is even more important, for it is necessary that the nation speak with one voice so that others do not exploit internal divisions, and so the President's role here is naturally magnified.

Where does this leave Congress? Since it controls the purse, it can alter or reverse any presidential policy at any time simply by refusing to fund it or it can seek to marshal public opinion against the policy through hearings, investigations, speeches, and so forth. In general, though, Congress is simply bypassed, like a rush hour traffic jam, with the observation that "most modern conflicts are not 'undeclared' wars, but rather wars declared by the President,"[25] who announces that war had begun and outlines its goals and justifications. A "well-accepted understanding of the President's powers," consistent "with the historical practice [and] the considered judgment of Congress," all point to greater presidential discretion.[26] Nor is this stress on executive authority a peculiarly modern phenomenon. From 1700-1787, the year of the constitutional convention, thirty-eight wars were fought in the Western world, of which precisely one was declared.[27] No wonder Hamilton in Federalist 25 observed that "the ceremony of a formal declaration of war has of late fallen into disuse."[28]

Yet while presidential acts may indeed constitute credible de facto declarations of war, it is hard to see how these extraconstitutional rationales can substitute for congressional authorizations, given that the Constitution makes no mention of presidential declarations; even a backer of this view concedes that the Constitution by implication "denies [the power] to the President."[29] Perhaps the point is that if Congress, the aggrieved party, does not object, neither should the courts. This, however, misconstrues the purpose of the Constitution, which is not to safeguard the interests of Congress, but instead the interests of the people.

John Yoo, a former deputy assistant attorney general in President George W. Bush's Office of Legal Counsel, took the presidentially centered alternative a step farther, attracting considerable attention along the way. Yoo, citing Samuel

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24 The Federalist 71 (Alexander Hamilton), *supra* note 6, at 365.

25 Michael D. Ramsey, *Presidential Declarations of War*, 37 U.C. Davis L. Rev. 321, 324 (2003).

26 Walter Dellinger, *War and Responsibility: A Symposium on Congress, the President, and the Authority to Initiate Hostilities*, 50 U. Miami L. Rev. 107, 113 (1995).

27 John F. Maurice, Hostilities without Declaration of War, from 1700 to 1865 12-27 (1883). *But cf*., Frederic J. Baumgartner, Declaring War in Early Modern Europe 1-7 (2011).

28 The Federalist 25 (Alexander Hamilton), *supra* note 6, at 124.

29 Ramsey, *supra* note 24, at 357.

Johnson's famous *Dictionary of the English Language*, which appeared in 1755,[30] maintained that Congress' power to declare war is merely the power to announce the existence of a state of war under international law, a power that historically has been exercised not to start wars, but instead once they are well underway to notify interested parties of the changed legal status.[31] President Truman, who evaded Congress by terming the Korean War a police action, might have embraced this view. Facing the onset of the Cold War, he favored a presidency with wide discretion and not confined by a Congress sometimes caught up in partisanship. Of Polk, who connived to start the Mexican War, Truman admired that he "regularly told Congress to go to hell on foreign policy matters."[32] The declare war clause, from this point of view, "does not add to Congress' store of war powers at the expense of the President,"[33] and the President would, therefore, retain the sole power to initiate war for any reason he found persuasive. Hence, the President, followed by an aide carrying a "football" containing launch codes, may on his own authority call for nuclear strikes at any target and at any time.

A "defining constitutional moment"[34] was *United States v. Curtiss-Wright Export Corp*. (1936),[35] which though it did not concern war powers, appeared to acknowledge vast areas of presidential discretion in this area. Congress, wishing to end the Chaco War between Paraguay and Bolivia, passed a resolution permitting the President to ban weapons sales to either country, if he finds that the ban "may contribute to the reestablishment of peace."[36] President Roosevelt declared the condition met and proclaimed the ban; Curtiss-Wright conspired to sell fifteen machine guns to Bolivia and was indicted for violating the ban; a lower court sided with Curtiss-Wright, calling the resolution "an invalid delegation of legislative power."[37]

The Supreme Court, in an opinion written by Justice Sutherland but likely shaped by Chief Justice Hughes,[38] distinguished between external and internal powers. The principle that power once delegated may not be re-delegated may apply to internal matters, Sutherland explained, but the national government is sovereign in external matters, its powers deriving not only from the Constitution, but also

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30 John Yoo, The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11 145 (2005). However, Yoo adduces no evidence that the Framers adopted Johnson's definition.

31 John Yoo, *War and the Constitutional Texts*, 69 U. Chi. L. Rev. 1639, 1698 (2002). A similar argument was made some years before by Eugene V. Rostow, *Once More Unto the Breach: The War Powers Act Revisited*, 21 Val. U. L. Rev. 1, 6 (1986).

32 Michael Beschloss, Presidents of War 462 (2018).

33 John Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 Cal. L. Rev. 167, 295 (1996). *See also,* Robert F. Turner, Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy 80-96 (1991); Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 Tex. L. Rev. 833 (1972).

34 Kimberley L. Fletcher, *The Court's Decisive Hand Shapes the Executive's Foreign Affairs Policymaking Power*, 73 Md. L. Rev. 247, 253 (2013).

35 299 U.S. 304 (1936).

36 Joint Resolution of May 28, ch. 365, 48 Stat. 811 (1934).

37 Fletcher, *supra* note 34, at 315.

38 Edward A. Purcell, Jr., *Understanding Curtiss-Wright,* 31 Law & Hist. Rev. 653, 667-78 (2013).

from the nature of sovereignty itself. As a practical matter, this meant that Congress "must often accord to the President a degree of freedom from statutory restriction . . . especially . . . in time of war."[39] Sutherland buttressed this claim by referring to an "unbroken legislative practice" of delegating authority to the President.[40] What later courts have not always acknowledged, however, is that Sutherland's arguments for presidential supremacy are mere unbinding dicta.[41] There was no conflict with Congress in *Curtiss-Wright*, for in its resolution Congress had authorized the presidential ban, and the long historical practice would have been sufficient to make Sutherland's argument without his presidential references.

With the important exception of the *Steel Seizure case*,[42] when the Court found neither constitutional nor statutory authorization for Truman's war time seizure of steel mills, the Court has generally been sympathetic toward the President. Even when it excoriated Lincoln for abusing his war powers by creating military tribunals where civilian courts were open and functioning, it waited till the war was over, eliminating the immediate practical effect of its decision.[43] Hamilton's Federalist 70 arguments about presidential energy,[44] made nearly two and a half centuries ago in a world without planes, missiles, and nuclear weapons, have carried the day.

And yet most of the Framers seem to have considered Congress the most powerful branch and to have been wary of presidential unilateralism, Edmund Randolph, for example, calling the executive "the foetus of monarchy."[45] Washington wrote that "no offensive expedition of importance can be undertaken until after [Congress] shall have deliberated upon the subject, and authorized such a measure."[46] Madison and James Wilson, an advocate of a strong presidency, stated that the President's powers "do not include the right of war and peace."[47] Marshall wrote, "The whole powers of war [in] the Constitution [are] vested in Congress."[48] Even Hamilton, the most prominent promoter of presidential power, conceded that the declaration clause meant "that it is the peculiar and exclusive province of Congress, when the nation is at peace, to change that to a state of war. . . it belongs

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39 Fletcher, *supra* note 34, at 320.

40 *Id.* at 320.

41 Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 635-36 n.2 (1952).

42 *Id.* To a much smaller degree, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) and *Boumediene v. Bush,* 553 U.S. 723 (2008) also saw the Court limit the President's war powers.

43 *Ex parte* Milligan, 71 U.S. 2, 127 (1866). Justice Davis declared, "No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of [the Constitution's] provisions can be suspended during any of the great exigencies of government." *See*, at 121. The same Court had passed on the opportunity to rule on the question during the war. *Ex parte* Vallandigham, 68 U.S. 243 (1864).

44 The Federalist 70, *supra* note 6.

45 The Records of the Federal Convention, *supra* note 14, at 168. Patrick Henry agreed that the Constitution "squints toward monarchy [because the] President may easily become king." Patrick Henry, Governor of Virginia, Address at the Virginia Ratifying Convention (Jun. 5, 1788). Virginia Convention, Debates and Other Proceedings of the Convention of Virginia 52 (1805).

46 33 The Writings of George Washington 73 (John C. Fitzpatrick ed. 1940).

47 The Records of the Federal Convention, *supra* note 14, at 319. Madison believed "[t]hat the power to declare war is fully and exclusively vested in the legislature; that the executive has no right . . . to decide the question, whether there is or is not cause for declaring war." 6 The Writings of James Madison 174 (Gaillard Hunt ed. 1906).

48 *See Talbot,* 5 U.S. 1 at 28.

to Congress only to go to war."[49] So widespread was the consensus that it became a point of contention at ratification, where Anti-Federalists challenged "the *wisdom* of granting Congress the war power, not *whether* Congress possessed the war power."[50] Thus, an originalist examination of the declare war clause concluded that "[b]ecause such a proclamation was thought to be the normal means by which war is created, Congress was thought to have the power to declare war."[51] Perhaps, modern courts have taken Hamilton's Federalist arguments more seriously than he did.

In any case, reading the clause like Yoo, as if it reduced Congress to the role of a dispensable bystander, simply does not accord with the structure the Framers sought to bring into being. The rejoinder, that Congress can check the President by refusing to fund the war, is hardly realistic.[52] If the President has committed troops to battle, Congress will find it exceedingly difficult to refuse to arm and support them, especially in the critical early days when patriotic fervor is likely to peak.[53] This is particularly true in a time of an all-volunteer army, for casualties among draftees could have a potent effect undermining popular support for war,[54] but this element no longer exists. Moreover, Yoo's argument would not only confer conventional military authority on the President, but would also carry with it a plenitude of related powers (trade restrictions,[55] weapons production,[56] electronic surveillance,[57] among others) to be added to the President's portfolio. The constitutional system of separation of powers, as a result, could under Yoo be stretched out of all recognition.

If the meaning of "declare" is contested, so, too, is the meaning of "war." The *Oxford English Dictionary* defines "war" as "any active hostility or struggle between living human beings; a conflict between opposing forces or principles." But this is far too loose to help us constitutionally, for it does not even distinguish between the metaphorical and the literal. Hobbes' famous definition — "war consisteth not in actual fighting, but in the known disposition thereto"[58] — also seems defective because it includes far too much and because the "disposition" is often known only in hindsight. (Hobbes' focus on an anarchic state of nature, however, plainly has implications for the international realm, which lacks an overarching power to enforce peace and order.) On the other hand, Grotius' by now conventional answer,[59] war as

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49 8 The Works of Alexander Hamilton 249 (Henry Cabot Lodge ed. 1971/1904).

50 Cameron O. Kistler, *The Anti-Federalists and Presidential War Powers*, 121 Yale L. J. 459, 467 (2011). Emphasis in original.

51 M. Andrew Campanelli, Kai Draper, & Jack Stucker, *The Congressional Understanding of the Declare War Clause,* 24 J.L. & Pol. 49 (2008). *See also,* Charles A. Lofgren, *War-Making under the Constitution: The Original Understanding*, 81 Yale L.J. 672 (1972).

52 Stephen L. Carter, *Going to War Over War Powers*, Wash. Post, Nov. 18, 1990.

53 On the other hand, if the war has dragged on and become unpopular, Congress may refuse to fund it, as it did in 1975 with the Vietnam War.

54 John E. Mueller, War, Presidents and Public Opinion (1985).

55 50 U.S.C. § 1702 (2012).

56 50 U.S.C.A. §§ 4517, 4531-34 (West 2018).

57 50 U.S.C. § 1802 (2012).

58 Thomas Hobbes, Leviathan ch. 13 (Michael Oakeshott ed. 1960/1651).

59 Francis A. Beer, How Much War in History: Definitions, Estimates, Extrapolations and Trends (1974); Bernard Brodie, War and Politics (1974); Karl Deutsch & Dieter Senghaas, A Framework for a Theory of War and Peace, in the Search for World Order: Festschrift for Quincy Wright 23-46 (Albert Lepawsky et al. eds. 1972).

"the condition of those contending by force"[60] or armed conflict, is rigidly narrow and fails to address war's infinite manifestations.

Which raises the question of the relation of *casus belli* to war. *Casus belli* may be used to justify a war, though a country need not act on them. But is the *casus belli* itself an act of war? The question is not only legal, but also empirical. Is supplying a naval escort for allied convoys on hostile seas[61] or offering money, arms, and advice to combatants an act of war?[62] Is a blockade, even if it is called a quarantine?[63] Is denying a foe access to essential goods, commodities, or financial markets? [64] What of toxic propaganda or cyberattacks?[65] Was the raid that killed Osama bin Laden an act of war?[66] If one party urges ordinary citizens to commit acts of violence against another nation, is the urging an act of war? Have the citizens' committed acts of war? If a partner in a mutual security pact is attacked, must a military response be authorized by Congress?[67] Even if the nation is halfway around the world and of little importance to the United States?[68]

The International Criminal Tribunal for the Former Yugoslavia defined war as "armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state."[69] In an age of terrorism, how do we distinguish protracted from sporadic violence? Suppose sporadic violence erupts over a protracted period. With states and their militant oppositions, each reserving legitimacy for themselves and denying it for the others, do we make the determination on the basis of ideals or self interest? Similarly, should we distinguish between offensive and defensive wars or does the distinction break down from the force of all sides invariably asserting only defensive motives? The George H. W. Bush administration justified the President's unilateral decision to send 28,000 troops to Somalia[70] in 1992 in terms of protecting "those engaged in relief work . . ., including members of the United States Armed Forces who have been and will be dispatched to Somalia to assist in that work."[71]

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60 Hugo Grotius, On the Law of War and Peace (Stephen C. Neff. ed., Cambridge Univ. Press 2012/1625).

61 James MacGregor Burns, Roosevelt: The Soldier of Freedom 141 (1970).

62 Mike Gravel, Pentagon Papers 179-214 (1971).

63 U.S. Dept. of State, Office of the Historian, The Cuban Missile Crisis 1961-1963, Vol. XI (1962).available at https://history.state.gov/historicaldocuments/frus1961-63v11.

64 Edward S. Miller, Bankrupting the Enemy: The U.S. Financial Siege of Japan before Pearl Harbor (2007).

65 Matthew C. Waxman, *Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4),* 36 Yale J. Int'l. L. 421 (2011).

66 Christopher Schaller, *Using Force against Terrorists "Outside Areas of Active Hostilities" — The Obama Approach and the Bin Laden Raid Revisited*, 20 J. Confl. & Sec. 195 (2015).

67 North Atlantic Treaty art.5, Apr. 4, 1949, 63 Stat.2241, 34 U.N.T.S. 243.

68 President Trump wondered aloud whether the United States should adhere to article 5 of the North Atlantic Treaty and intervene if Montenegro were attacked. Eileen Sullivan, *Trump Questions the Core of NATO: Mutual Defense, Including Montenegro*, N.Y. Times, July 18, 2018, at A8.

69 Prosecutor v. Tadić, *Case No. IT-04-84-A 193,* ICTY (2010).

70 *Stephen F. Burgess, Operation Restore Hope: Somalia and the Frontier of the New World Order*, in From Cold War to the New World Order: The Foreign Policy of George H. W. Bush 259 (Meena Bose & Rosanna Perotti eds. 2002).

71 William P. Barr, Authority to Use United States Military Forces in Somalia, 16 Op. O.L.C 6, 7 (1992).

In this bizarre circularity, sending the military can be justified as safeguarding the military already sent. Nowhere in the legal rationale was war or Congress so much as mentioned.

In 1994, the Clinton administration claimed that sending 20,000 troops to Haiti to secure regime change did not constitute war.[72] The following year, Clinton presided over nearly three months of bombing of Kosovo,[73] likening it to maintaining troops in Europe and Korea and justifying the action as "in support of an agreement the warring parties have reached and is at the invitation of those parties,"[74] as if at least one of the parties had asked to be bombed. The Obama administration oversaw armed drone attacks that killed almost 2,600 persons, *excluding* persons in Afghanistan, Iraq, and Syria — were these acts of war?[75] The President's position was that "determining whether a particular planned engagement constitutes a 'war' for constitutional purposes . . . requires a fact-specific assessment of the 'anticipated nature, scope, and duration' of the planned military operations [involving] prolonged and substantial military engagements."[76] By this "fact-specific assessment," neither deploying troops to achieve regime change in Haiti nor flying over 2,300 sorties over Bosnia qualified as wars.[77]

President Obama bombed Libya's air defenses and provided logistical support for NATO airstrikes in 2011, in an effort to secure regime change. The Libyan campaign consumed over a billion dollars, continued for six months, and contributed to overthrowing a government and murdering its leader, but the administration maintained, "We're not engaged in sustained fighting. There's been no exchange of fire with hostile forces. We don't have troops on the ground. We don't risk casualties to these troops."[78] Two years later, Obama threatened to intervene in Syria over the regime's use of poison gas against civilians. Though he later said that he would seek congressional authorization before acting, he continued to claim that

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72 Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173, 174 n.1, 178-79. President George H. W. Bush in 1989 had invaded Panama also to secure regime change. He spoke with congressional leaders, but did not seek congressional authorization. 2 Pub. Papers of George Bush 1722-23 (1990).

73 Richard B. Bilder, *Kosovo and the "New interventionism" Promise or Peril?* 9 J. Transnat'l L. & Pol'y 153 (1999); Michael Hahn, *The Conflict in Kosovo: Almost War?* 89 Geo. L.J. 251 (2001).

74 Walter Dellinger, Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C 327, 330-32 (1995).

75 Off. Dir. Nat'l. Intel., *Summary of Information Regarding U.S. Counterterrorism Strikes Outside Areas of Active Hostilities* (Jan. 19, 2017), https://www.dni.gov/index.php/newsroom/reports-publications/reports-publications-2017/item/1741-summary-of-information-regarding-u-s-counterterrorism-strikes-outside-areas-of-active-hostilities.

76 Caroline D. Krass, Authority to Use Military Force in Libya, 35 Op. O.L.C 1, 8 (2011).

77 Regarding Bosnia, each house of Congress adopted resolutions supporting the troops, but expressing reservations about the mission. S.J. Res. 44, 104th Cong. (1995) and H.R.J. Res. 302, 104th Cong. (1995).

78 Scott Wilson, *Obama Administration: Libya Action Does Not Require Congressional Approval*, Wash. Post, June 15, 2011. Candidate Obama had told an interviewer, "The President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation... It is always preferable to have the informed consent of Congress prior to any military action." Charlie Savage, *Barack Obama's Q&A*, Boston Globe, Dec. 20, 2007.

he had "the authority to carry out this military action without specific congressional authorization."[79]

If brief attacks like these should lead to further armed conflict, would the initial attack count as an act of war? As it is impossible to predict with certainty all the consequences of such initial attacks, should they *all* be termed acts of war? Certainly, George W. Bush could not have anticipated that the wars begun in Iraq and Afghanistan would continue over a decade past his leaving office. As one former Pentagon official put it, "war and peace are not binary opposites, but rather the outer limits of a continuum."[80] The traditional image of uniformed soldiers fighting on a battlefield has been revised by technology and experience. None of these administrations conceded that it was waging war and, therefore, required congressional assent. Yet a consequence was that it "deprived the country of . . . national debates about the nature of the threat and the proper response,"[81] debates that might have improved decisions, educated the public, enhanced accountability, and encouraged all actors to give serious consideration to the very serious issue at hand.

On the other hand, if each of this wide range of actions required a formal declaration of war, the government would in the first instance often find it difficult to start acting, and in the second instance difficult to stop. Flexibility, commonly advantageous in security matters, would be severely limited. Is it possible, then, that a formal declaration would be required for an all-out war, like World War II, but not for much more limited engagements, like the President Reagan's 1983 invasion of Grenada?[82] The Correlates of War Project has proposed that wars be defined as armed conflicts with at least a thousand combat deaths, but plainly the number (which may be uncertain and open to manipulation) is arbitrary.[83] The Falklands War with 907 deaths would not make the cut nor would America's Barbary War during the Jefferson and Madison administrations, where 818 were killed. But if these were not wars, what were they?

Which raises the question as to the relation of declarations of war to war. Obviously, there can be war without a declaration, for the point of surprise attacks would be lost if the attacker first declared an intention to fight. Similarly, there can be a declaration without war, at least for a time, as the seven month "phony war" preceding the German attack on France and Britain in World War II illustrates. In the Middle East, a number of Arab states remain in a state of war with Israel over

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79 White House Office of the Press Secretary, *Statement by the President on Syria*, (Aug. 31, 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/08/31/statement-president-syria. The threat never culminated in action. Obama was criticized for deferring to Congress, both contemporaneously (e.g., Matthew Pinsker, *Obama Fails Lincoln Lesson on Syria*, USA Today, Sept. 11, 2013) and later (e.g., Leon Panetta & Jim Newton, Worthy Fight: A Memoir of War and Peace 450 (2014).

80 Rosa Brooks, How Everything Became War and the Military Became Everything 352 (2016).

81 Jack L. Goldsmith, The Terror Presidency: Law and Judgment Inside the Bush Administration 207 (2007).

82 Michael Rubner, *The Reagan Administration, the 1973 War Powers Resolution, and the Invasion of Grenada*, 100 Pol. Sci. Q. 627 (1985).

83 Lewis F. Richardson, Statistics of Deadly Quarrels (1960) and J. David Singer & Melvin Small, The Wages of War, 1816-1965: A Statistical Handbook (1972) also agree on a thousand.

seventy years after the initial declaration, though actual fighting has taken place only intermittently. The connection of war and declarations of war is not always obvious.

Which highlights a minor irony: as "war" has become commonplace metaphorically — war on drugs, war on crime — it has been displaced in international law by such terms as "armed attack" or "use of force."[84] Thus, a pair of authorities concluded that "declarations of war serve little purpose under international law."[85]

II. The War Powers Resolution

Congress has been reluctant to seize major responsibility for initiating armed conflict by formally declaring war. Though the public is invariably enthusiastic at the outset, the longer range prospects are uncertain and a formal declaration would etch congressional support in granite, perhaps leaving members vulnerable at the polls. Yet in order to retain its status and power, Congress can hardly renounce its role in the nation's most important and visible political decisions. Enter the War Powers Resolution of 1973,[86] enacted as a rebuke to President Nixon's unilateral actions in Southeast Asia at a time when he was reeling from Watergate. The purpose of the resolution, according to a Senate report, was "to prevent secret, unauthorized military support activities and to prevent a repetition of the most controversial and regrettable actions in Indochina."[87] The resolution begins by stating that the President may exercise his commander in chief powers only if Congress has declared war or authorized participation by statute or if the nation has been attacked, but then undermines this principle by announcing that it will be enough for the President merely to "consult" with Congress before sending troops into hostilities. If he orders military engagement, he must report his action to Congress within forty-eight hours. Unless Congress acts, the troops must be withdrawn after sixty days, though Congress may have him order them out of hostilities at any time. Thus was the declaration of war redefined and the congressional role downsized to merely speaking with leaders.

President Nixon vetoed the resolution,[88] but weakened by scandal, was unable to block it. Later commentators have often echoed his fear, for example, calling it "dangerous to the country's safety because it denies flexibility to the President . . . and conveys a message of potential disunity."[89] However, the next two Presidents, Ford and Carter, both vulnerable and about to be defeated at the polls, virtually ignored the law and suffered no bad consequences. Ford, unelected and facing a Democratic Congress, met the reporting requirement in evacuations from

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84 U.N. Charter, art. 2.

85 Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terror*, 118 Harv. L. Rev. 2048, 2061 (2005).

86 War Powers Resolution Nov. 7, 1973, Pub. L. 93-148, 87 Stat. 555.

87 S. Rep. No. 93-220, at 24 (1973).

88 9 Weekly Comp. Pres. Docs. 1285-86 (Oct. 24, 1973).

89 J. Terry Emerson, *Making War without a Declaration*, 17 J. Legis. 23, 51 (1991).

Vietnam and Cambodia[90] and the retaking of a freighter, the Mayaguez,[91] seized by Cambodia, but failed to consult with Congress.[92] Carter, weakened by economic stagflation and the humiliation of Iran's holding diplomats hostage, refused to consult with Congress prior to his failed hostage raid; the War Powers Resolution provides for consultation "in every possible instance," he argued, but a fear that it might compromise the secrecy of the mission and its element of surprise meant that this was not a "possible instance."[93] He was pilloried after the raid, not because he failed to consult with Congress but because the raid was a fiasco.[94]

When President Reagan dispatched 1,900 Marines and Army Rangers to Grenada to protect American civilians in the aftermath of a bloody coup, he consulted with congressional leaders only after the invasion order was given.[95] House Speaker Thomas P. "Tip" O'Neil reported that "we weren't asked for advice," but were only "informed what was taking place,"[96] but far from complaining, he said to Reagan, "God bless you, Mr. President. And good luck."[97] Nor did George H.W. Bush consult before sending troops to capture the president of Panama.[98]

In 2017, President Trump authorized "bloodying the nose" of Syria, which had used poison gas against civilians, by sending fifty-nine cruise missiles to strike Syrian military targets, solely on his own authority.[99] A year later, rejecting

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90 War Powers Act: Test of Compliance, Hearing before H. Comm. on International Relations, at 9, 30, 41, 94th Cong., (1st sess. 1975). However, the ultimate collapse of South Vietnam was precipitated by congressional action, namely, the refusal to fund the war.

91 Roy Rowan, The Four Days of Mayaguez 179-80 (1975). Ford also deployed troops on rescue missions to Cyprus and Lebanon and did not report to Congress.

92 Ford wrote that he "did not concede that the resolution itself was legally binding on the President on constitutional grounds." W. Taylor Reveley III, War Powers of the President and Congress: Who Holds the Arrows and Olive Branch? 254 (1981).

93 Lloyd Cutler, Legal Opinion on War Powers Consultation Relative to the Iran Rescue Mission, May 9, 1980.

94 Initially, a few Senators, including Frank Church (D-ID) and Charles Mathias (R-MD), criticized Carter for ignoring the War Powers Resolution, but this was very short lived, as Congress focused attention on why the helicopters used malfunctioned. Steve Delaney, *Congress Reacts to President Carter's Rescue Mission to Iran* (NBC Nightly News Apr. 11, 1980). In his televised address to the nation after the raid, Carter offered no legal justification for the mission. *Address to the Nation on the Rescue Attempt for American Hostages in Iran* (NBC Nightly News Apr. 25, 1980.) On the mission, *see* Mark Bowden, *The Desert One Debacle*, The Atlantic, May, 2006.

95 Michael Rubner, *The Reagan Administration, the 1973 War Powers Resolution, and the Invasion of Grenada*, 100 Pol. Sci. Q. 627, 630-36 (1985).

96 Hedrick Smith, *1,900 U.S. Troops, with Caribbean Allies, Invade Grenada and Fight Leftist Units; Moscow Protests; British Are Critical,* N.Y. Times, Oct. 26, 1983, at 1.

97 Ed Magnuson, *D-Day in Grenada*, Time, Nov. 7, 1983, at 28.

98 Eytan Gilboa*, The Panama Invasion: Lessons for the Use of Force in the Post-Cold War Era*, 110 Pol. Sci. Q. 539, 558-59 (1995); Eileen Burgin, *Congress, the War Powers Resolution, and the Invasion of Panama*, 25 Polity 217 (1992).

99 Charlie Savage, *Was Trump's Syria Strike Illegal? Explaining Presidential War Powers*, N.Y. Times, Apr. 8, 2017. A few months later, a National Security Council official announced, "The administration is not seeking a new AUMF, as the U.S. has sufficient authority to prosecute the campaign against the Taliban, al-Qaida, and associated forces, including ISIS." John T. Bennett & Lindsey McPherson, *White House Brushes off Calls for Updated Authorization of Military Force*, Rollcall (Sep 7, 2017 1:12 PM.), https://www.rollcall.com/news/politics/92700-2 One scholar, however, took the position that "even

his defense secretary's call for congressional approval[100] and facing innumerable scandals, he found that his bombing of chemical warfare sites in Syria provoked little dissent. Though House Speaker Paul Ryan (R-WI) defended the action as justified under the 2001 Authorization for Use of Military Force,[101] it was so obvious that the statute aimed at 9/11 perpetrators was irrelevant that the President himself spoke only of his generalized "constitutional authority to conduct foreign relations and as commander in chief and chief executive [acting] in the vital national security and foreign policy interests of the United States."[102] Later, he added that he was "keep[ing] the Congress fully informed, consistent with the War Powers Resolution,"[103] but did not indicate that he had consulted with congressional leaders before acting. Nor was there authorization from the UN Security Council. Nor was the United States under attack or an imminent threat of attack from Syria. The administration has declined to make publicly available the legal justification for the attack, though it later conceded that the attorney general was briefed only on the day following the attack, so that he could advise the President in "future attacks."[104]

President Trump, like President Obama justifying his 2011 airstrikes against Libya, rooted the strikes in the President's reasonably determining that they "serv[ed] important national interests."[105] The only limitation on his power was the requirement that the actions not be "prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period."[106] As Presidents will nearly always be able to point to a national interest — why else would they be concerned? — this hurdle does not amount to much of an obstacle.

The ongoing civil war in Yemen illustrates the ongoing nature of the problem. In the civil war, which has produced appalling and widespread civilian suffering and deaths, the United States is not a belligerent, but its secondary role supporting a Saudi coalition by training combatants, providing intelligence, weapon sales, commando raids, and air strikes is of considerable importance. The target is Houthi

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low-level uses of force" against another country implicates the declare war clause. Michael Ramsey, *The Constitution and Syria (Again)*, Originalism Blog (Apr. 7, 2017), https://originalismblog.typepad.com/the-originalism-blog/2017/04/the-constitution-and-syria-againmichael-ramsey.html.. President Clinton had earlier bloodied the nose of Saddam Hussein, who had tried to assassinate former President Bush. Letter to Congressional Leaders on the Strike on Iraqi Intelligence Headquarters 29 Weekly Comp. Pres. Docs. 1183 (June 28, 1993).

100 Helene Cooper, *Mattis Wanted Congressional Approval Before Strikes*, N.Y. Times, Apr. 18, 2018.

101 Joe Gould, *Key Democrats Want Trump to Hit the Brakes on Syria Strike*, Defense News, Apr. 13, 2018 https://www.defensenews.com/congress/2018/04/13/key-democrats-want-trump-to-hit-the-brakes-on-syria-strike/.

102 White House Letter of Notice to the Speaker of the House and the President Pro Tempore of the Senate (Apr. 13, 2018) . The President's televised speech to the nation offered no legal justification. White House Office of the Press Secretary, *Statement by President Trump on Syria* (Apr. 13, 2018) . The Constitution is silent as to the President's powers to act unilaterally in support of vital national security and foreign policy interests.

103 *Id.*

104 Second Declaration of Paul P. Colborn at 3, The Protect Democracy Project v. U.S. Dept. Defense, No.17-cv-00842-CRC (D.D.C. Jan. 9, 2018).

105 Steven A. Engel, 42 Op. O.L.C. 9 (2018).

106 *Id*., citing Authority to Use Military Force, 35 Op. O.L.C. 8 (2011).

rebels, supported by Iran but not officially designated as a terrorist group and operating entirely within Yemen. American involvement began under President Obama in 2011 and continues under President Trump. In 2018, it became known that American Special Forces were involved, although such action was denied by the Defense Department and was not authorized by Congress. Senator Tim Kaine (D-VA) called for congressional authorization, but nothing came of it.[107] The government, for its part, has maintained that the events in Yemen do not constitute hostilities[108] and that, in any case, they are covered by the 2001 AUMF.

Careful scholars have concluded that "U.S. military forces have not crossed the threshold of direct, imminent involvement in hostilities, under traditional interpretations of the War Powers Resolution,"[109] but it is difficult to see how the Saudi-led coalition could have functioned at its current level without American help. Further, the resolution expressly includes under "introduction' of armed forces, "the assignment of . . . armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that will become engaged, in hostilities."[110] The application to Yemen is obvious, and served as the basis for a Senate joint resolution, claiming that the War Powers Resolution compelled Trump to withdraw military forces from the Yemeni war. Never before had the Senate passed a resolution that could expedite action under the War Powers Resolution.[111] However, as the House refused to take up the issue, no legislation was enacted, and the resolution was exposed as a mere gesture. Democratic victories in the 2018 elections gave them a majority in the House, however, and they responded by voting 243 to 177 to invoke the War Powers Resolution's provision that permits Congress to force the withdrawal of troops, when no formal declaration of war had taken place.[112] The Senate declined to repass its similar 2018 resolution.

Where, then, did the legal justification for unilateral presidential action come from? The answer is dicta, first in a World War II opinion concerning America training British flying students,[113] next in an opinion concerning Truman's entry in

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107 Helene Cooper, *Thomas Gibbons-Neff & Eric Schmitt, Green Berets Quietly Aid War on Yemen Rebels*, N.Y. Times, May 4, 2018.

108 Letter from William S. Castle, Acting General Counsel, Dep't of Defense to Senator Mitchell McConnell (Feb. 27, 2018).

109 *Oona A. Hathaway et al., Yemen*: *Is the U.S. Breaking the Law?* Harv. Nat'l Security J. (2018).

110 50 U.S.C. §1547 (c).

111 S.J. Res. 54,115th Cong. (2d Sess. 2018). Another resolution, S.J. Res. 69,115th Cong. (2d. Sess. 2018), called for a diplomatic solution to the Yemen crisis, countering the President's support of the Saudis' military effort.

112 The rebuke to the Saudis reflected not only a growing horror at the civilian cost of the war, but also outrage at the murder and dismemberment of Jamal Khashoggi, a Saudi activist living in the United States, which inflamed American public opinion.

113 Robert Jackson, Training of British Flying Students in the United States, 40 Op. Att'y Gen. 58 (1949).

the Korean War,[114] and then in *United States v. Verdugo-Urquidez*.[115] From these dicta, the Office of Legal Counsel, in a 1992 opinion on intervention in Somalia, concluded "that the President has the power to commit United States troops abroad for the purpose of protecting important national interests."[116] Two years later, this finding buttressed an OLC opinion on intervention in Bosnia and Herzegovina.[117] Thus did dicta, unmoored to constitutional text, generate doctrine, leaving Presidents free to act militarily whenever they thought it useful.[118] The subsequent "legitimacy" of Trump's Syrian bombing[119] was tethered only very weakly to the law; the main anchor was moral outrage and disgust over the use of poison gas.[120]

What is interesting is what did *not* happen: there was no great congressional or public outcry. Of forty-nine Senate Democrats and Independents, only four opposed the strikes and nine raised the issue of congressional authorization but supported the strike; no less than twenty others voiced their support. In the House, opposition was greater but no more effective. Ninety members of both parties called on the President to "consult and receive authorization from Congress before ordering additional use of U.S. military force in Syria,"[121] and the Progressive Caucus predicted that "U.S. military interventions will likely add to the mass suffering in Syria."[122] A new AUMF proposed by Senators Corker (R-TN) and Kaine , which claimed to expedite congressional action but actually left presidential discretion intact,[123] excited very little interest. The congressional and media noise level was

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114 Authority of the President to Repel the Attack in Korea, 23 Dep't. St. Bull. 173 (1950). Truman asserted that he could "send troops anywhere in the world," without congressional authorization. Harry S Truman, 7 Pub. Papers, 9 (Jan. 11, 1951). Congress acquiesced.

115 494 U.S. 259, 273 (1990).

116 Timothy E. Flanagan, Memorandum Opinion for the Att'y Gen. 16 Op. O.L.C. 1 (Dec 4 1992).

117 Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 327, 333 (Nov. 30, 1995).

118 A retired Air Force major general defended Trump's second Syria strike as consistent with a developing norm to protect helpless civilians and as anticipatory self-defense, given the 2,000 American soldiers then in Syria. Charlie Dunlap, *Yes, There Are Plausible Legal Rationales for the Syria Strikes*, Lawfare (Apr. 19, 2018), https://www.lawfareblog.com/yes-there-are-plausible-legal-rationales-syria-strikes. As the norm has not yet been recognized and the American soldiers had never been targeted, the argument is a bit of a stretch.

119 Nikki Haley, *U.S. Mission to the UN, Remarks at an Emergency UN Security Council Meeting on Syria*, United States Mission to the United Nations (Apr. 14, 2018), https://usun.state.gov/highlights/8372.

120 For example, Sen. Rubio (R- FL) spoke of Assad's "war crimes" and Rep. Thornberry (R-TX) talked of "future atrocities." *Where Top Lawmakers Stand on Syria*, N.Y. Times, Apr. 7, 2018.

121 Letter from Rep. Zoe Lofgren to President Trump (D-CA) et al., (Apr. 13, 2018), available at https://lofgren.house.gov/media/press-releases/88-bipartisan-members-urge-congressional-authorization-military-action-against.

122 Sarah Lazare, *Senate Democrats Offer Little-to-No Opposition to Trump's Expansion of Syrian Bombing*, In These Times, Apr. 16, 2018.

123 S.J. Res. II, 115 Cong. (2d sess. 2018) While replacing the 2001 and 2002 AUMFs, it would have guaranteed uninterrupted authority for the 2001 AUMF (thereby approving ongoing operations) and would have granted the President authority to identify associated groups, provided only that he informs Congress within forty-eight hours. In place of a sunset clause, it would have merely required that he report to Congress activities undertaken pursuant to the law every four years. Transparency would have marginally improved.

muted, and in a few days, like news coverage of a train accident, debate over the bombing was over. Was this because the Syrian government was so reviled that the complaints might strike voters as little more than a turf battle? But turf battles, sometimes called "checks and balances," are foundational constitutionally. Or was it because the President was under attack from so many fronts that his bombing decision simply got lost? But bombing presumably is too important to overlook. Or was it that presidential dominance in the Yoo mode was so well established that the affair seemed far more familiar than aberrant?

The lesson was plain: presented as a means of strengthening Congress and opposed by Presidents as intruding into their prerogatives, the War Powers Resolution has worked to free the President from constitutional strictures, granting him unilateral powers in excess of those expressed in the Constitution and compounding the confusion by leaving the meaning of key terms like "hostilities" and "consultation" unclear. However, even if "consultation" were construed as "seeking advice or opinions," how to ensure that the advice or opinions are taken seriously? In sum, the most obvious factor explaining the weakness of the resolution is simply that Congress has declined to enforce it.[124] Any worry that the resolution would seriously weaken presidential discretion is misplaced.

Three years after the War Powers Resolution was passed, Congress adopted the National Emergencies Act,[125] which brings together other emergency law statutes and mimics the declare war clause, in requiring that the President officially announce a national emergency in order to access the power. Congress may override the declaration, but the override in turn would be subject to a presidential veto. Still, it is not the emergency that justifies presidential action, but rather Congress' acquiescence.

Of course, Congress may question whether an actual emergency exists, but this will not be easy because the statute never defines the term and because past practice would seem to grant the President virtually unlimited discretion.[126] Congress has formally and informally delegated so much discretion to the President for so many years that a strong act of will would be required to halt the momentum. Congress' checking power under the statute has never been exercised.

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[124] Relevant international agreements do not appear to have had much impact. The Kellogg-Briand Peace Pact (1928), for example, "condemn[ed] recourse to war for the solution of international controversies and renounce[d] it as an instrument of national policy in their relations with one another." Art. I, Treaty Providing for the Renunciation of War as an Instrument of National Policy, 46 Stat. 2343 (1929). Most authorities regard it as ineffective. *See, e.g.*, Stephen M. Walt, *There's Still No Reason to Think the Kellogg-Briand Pact Accomplished Anything*, Foreign Policy (Sept. 29, 2017, 7:00 AM), https://foreignpolicy.com/2017/09/29/theres-still-no-reason-to-think-the-kellogg-briand-pact-accomplished-anything/. *But cf.*, Oona A. Hathaway & Scott J. Shapiro, The Internationalists: How a Radical Plan to Outlaw War Remade the World (2017), where it is argued that the pact upset the "classical international law" assumptions that nations possessed the right to wage wars to rectify wrongs and if successful, could seize territory or funds from the losers.

[125] 50 U.S.C. §1601-1651, Pub. L. 94-412, 90 Stat. 1255 (1976).

[126] For example, President Clinton announced an emergency, prohibiting new investment in Burma (E.O. 13047, 1997); President George W. Bush, blocking property of Balkan terrorists (E.O. 13219, 2001); and President Obama, blocking property of Central African Republic fighters (E.O. 13536, 2010).

III. The Gulf of Tonkin Resolution

The President has always had options other than a formal declaration of war, and two episodes, one before the enactment of the War Powers Resolution, the Gulf of Tonkin crisis, and one after, the war on terror's Authorization for Use of Military Force, illustrate what forms this may take.

Consider the Gulf of Tonkin crisis during the Vietnam War. In 1964, the position of the South Vietnamese government was deteriorating to the point that July "was the bloodiest [month] of the war up to that time."[127] In response, the government increased its commando raids against the North, and by the end of the month the North had complained to the International Control Commission about an attack on a fishing boat in the Gulf of Tonkin, where an American destroyer, the *Maddox,* was alleged to have provided protection for South Vietnamese patrol boats. But though an air of high tension was enveloping the South, American public opinion was paying little attention to these developments.

On August 2, according to Secretary of Defense Robert McNamara, three North Vietnamese torpedo boats attacked the *Maddox* in the Gulf. "The *Maddox* was operating in international waters," he said, on a "routine patrol," and had been engaged in no provocative actions.[128] Hanoi admitted that its boats had attacked, claiming that the Maddox had violated its coastal waters and had shelled its islands. American planes, dispatched from a nearby aircraft carrier, sunk one of the North Vietnamese boats and damaged three others. President Johnson warned North Vietnam that "grave consequences" would follow if the attacks were repeated,[129] and sent a second destroyer, the *C. Turner Joy*, to join the *Maddox* in a patrol near two North Vietnam islands that had been attacked a few days earlier. On August 4, the administration reported, the two destroyers had been fired on by torpedoes, which they evaded. They responded by sinking two patrol boats. This time, North Vietnam denied that any attack had taken place.

President Johnson convened the National Security Council for one of its rare meetings, and at his instigation it recommended retaliation. The President then sent sixty-four bombing missions against the North and made a series of long range military moves to increase America's presence in the area. With his top Pentagon and State Department officials, he also met with leaders of Congress, seeking a resolution "making it clear that our government is united in its determination to take all necessary measures in support of freedom and in defense of peace in Southeast Asia."[130] None of the congressional leaders objected. That evening, in a televised address to the nation, the President defended the air strikes and the

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127 Kenneth Sams, *Air Power — the Decisive Element*, 49 Air Force Space Digest 49 (Mar. 1966).

128 South East Asia Resolution, Joint Hearing before S.Committees on Foreign Relations and on Armed Forces, on Joint Resolution to Promote Maintenance of International Peace and Security in Southeast Asia, 88 Cong. (2d sess. Aug. 6, 1964) Copies of the transcript were not released until Thanksgiving Day 1966, and testimony on whether raids had provoked the attacks were censored.

129 Lyndon B. Johnson, U.S. Protest to North Vietnam, (Aug. 3, 1964), 51 Dept. State Bull. 258 (Aug. 24, 1964).

130 Lyndon B. Johnson, Address of the President, Syracuse University (Aug. 5 1964), 51 Dept. State Bull. 260 (Aug. 24, 1964).

resolution. The next day, he repeated this position in a widely reported speech, and was supported in appearances by the Secretary of State and the United Nations Ambassador. Newspapers were nearly all laudatory.[131] Public opinion favored the resolution,[132] and became sharply optimistic following the Gulf events. A tepid July 21 poll revealed that thirty-nine percent of the public thought the war was going as well as could be expected and forty-one percent thought it was going badly; by August 4, the percentages had changed to seventy-two and sixteen, respectively.[133]

On August 6, the President formally asked Congress for a joint resolution, requesting its full support "for all necessary action to protect our armed forces and to assist nations covered by the SEATO treaty."[134] After brief closed door hearings and little floor debate, the resolution was approved on August 7, 416-0 in the House and 88-2 in the Senate.[135] By the winter, bombing of the North was well underway, and by the end of 1965, troop strength had increased from 23,000 to 184,000. The resolution would before long, in the words of the Under Secretary of State, "fully fulfill the obligation of the Executive in a situation of this kind to give the Congress a full and effective voice, the functional equivalent of the constitutional obligation expressed in the provision of the Constitution with respect to declaring war."[136] As the functional equivalent of a declaration of war against the North, the resolution in the short term was used to rebut charges by Senator Barry Goldwater (R-AZ), Johnson's rival for the presidency, to the effect that he was insufficiently tough in defense matters. In the longer term, it provided congressional authorization for escalating the war.

As time passed, several members of Congress who had backed the resolution began to have serious qualms about the war. In 1967, the Senate Foreign Relations Committee undertook an investigation of the events in the Gulf, and concluded that there had been mass confusion at the Pentagon on the day of the second incident to the extent that it could not even be sure that a second attack had taken place.[137]

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131 Support, for example came from the New York Times, the Washington Post, the Philadelphia Inquirer, the Los Angeles Times, the Miami Herald, the Charlotte Observer, and the Richmond Times-Dispatch.

132 For example, a 1964 Survey Research Center poll found that forty-six percent favored escalation and only thirteen percent withdrawal. William L. Lynch & Peter W. Sperlich, *American Public Opinion and the War in Vietnam*, 3 West. Pol. Q. 21, 27 (1979).

133 Brian S. Anthony, On Public Opinion in Time of War 11 (Sept. 2009) (unpublished thesis, Naval Postgraduate School), https://apps.dtic.mil/dtic/tr/fulltext/u2/a514232.pdf.

134 Lyndon B. Johnson*, President's Message to Congress*, 51 Dept. State Bull. 262 (Aug. 24, 1964).

135 78 Stat. 384 (1964).

136 Nicholas deB. Katzenbach, *quoted* in William Conrad Gibbons, The U.S. Constitution and the Vietnam War: Executive and Legislative Relations, Part IV, 813 (1995). In 1967, Katzenbach angrily asked a prominent Senate critic of the war, "didn't that resolution authorize the President to use the armed forces of the United States in whatever was necessary? Didn't it? What could a declaration of war have done that would have given the President more authority and a clear voice of the Congress than this?" United States Commitments to Foreign Powers, Hearing before S. Comm. on Foreign Relations 90th Cong. 81 (1st sess. 1967). By 1970, Katzenbach was backing an effort to repeal the resolution. John W. Finney, *Katzenbach*, *Who Termed Tonkin Gulf Resolution "Equivalent" of Declaration of War, Now Backs Repeal*, N.Y. Times, July 29, 1970.

137 According to a communique from the Naval Communications Center sent about four hours after the supposed attack, "Review of action makes many recorded contacts and torpedoes

Subsequent testimony cast added doubt on the second attack and portrayed the destroyers as invading the North's territorial waters in provocative ways. Secretary McNamara admitted that, at the time, he had met for about four and a half hours with top military officials, "reviewing the information that bore on whether an attack had taken place."[138]

The revelations induced a number of members of Congress to charge angrily that they had been misled. Foremost was J. William Fulbright (D-AR), chair of the Foreign Relations Committee and an old friend of Johnson, who had shepherded the resolution through the Senate. Now, he bitterly turned against Johnson, arguing that the resolution could not be considered the functional equivalent of a declaration of war, "especially having been made under conditions of emergency."[139] The events described to Congress on August 5 were very different from the events as depicted months later. The members felt deceived.

What members of Congress refused to concede was their own complicity in the affair, for what is most striking is that even had the original description been accurate in all particulars, it hardly constituted a crisis calling for an immediate, far reaching response. It was known at the time that no American was killed or wounded. Even property damage was minimal.[140] But if the Tonkin Gulf incidents did not constitute a crisis, it was clear to the administration that without major American intervention, the war itself might in the coming months pose a crisis – a crisis to the administration's policy, if not to the nation. The *faux* crisis, in this sense, was a proxy for a true crisis that seemed just beyond the horizon. The administration's response was not a wholesale falsification of facts, but instead an approach more subtle and effective: the creation of an ambience of crisis by appealing to national pride and marketing a narrative full of urgency and outrage. Of course, there is no way to be certain that formal hearings on a declaration of war, then or later, would have produced a different result. But the episode does suggest that available work-arounds like the Tonkin Gulf Resolution, because they are seen as smaller affairs, may be easier for administrations to manipulate than outright declarations.[141]

The Gulf of Tonkin Resolution met the commonly heard goal of the nation's speaking with one voice. But it also suggests how this may lead to folly. With dissent stigmatized as obstructionist, if not unpatriotic, other options were not explored. As vigorous discussion is the heart of democracy and good public policy, its absence may be risky, indeed. The episode also points to the public's belief that war requires a war declaration. President Johnson, the consummate politician of

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fired appear doubtful. Freak weather effects and overeager sonar may have accounted for many reports. No actual visual sightings by Maddox. Suggest complete evaluation before any further action." Hearing, *supra* note 81, at 57. By December the Pentagon had concluded that the second attack was "probably imaginary." Joseph C. Goulden, Truth Is the First Casualty 208 (1969).

138 South East Asia Resolution, Joint Hearing before S. Committees on Foreign Relations and on Armed Forces, *supra* note 128, at 58.

139 *Id*. at 82.

140 It was later said to consist of one bullet hole. Eric Sevareid, *Why Our Foreign Policy Is Failing: An Interview with Senator Fulbright*, Look, 26, May 3, 1966.

141 The Gulf of Tonkin Resolution was repealed in lopsided votes in 1971, under pressure from the Nixon administration determined to deny anti-war Democrats a legislative victory. 84 Stat. 2053, 2055 (1971).

his day, fully understood this. Had he pushed Congress for a formal declaration, he would have increased the prominence of the war enormously and redefined his campaign against a Senator Goldwater he had tarred as a warmonger, enraging many of his supporters. But the Tonkin Gulf Resolution was soon hidden in the campaign fog – only to reemerge after the fog, post-election, blew away.

IV. The AUMF

Since the time of John Adams and the French crimes at sea,[142] President Jefferson and the Barbary pirates,[143] and President Madison and the Dey of Algiers,[144] Presidents have gone to Congress seeking authorization for use of military force (AUMF). These early AUMFs suggest that the Framers accepted them in lieu of formal war declarations. The AUMF is not precisely the equivalent of a war declaration, which automatically activates a series of statutes that grant the President the authority to seize control of transportation systems,[145] extend military enlistments,[146] and so on. But the President can issue a proclamation asserting a national emergency, and this, together with the AUMF, may be used to greatly expand his powers. The increasing weight of legal obligations attached to formal declarations of war has made AUMFs correspondingly attractive, to the point that they now constitute "the new default."[147]

The first important modern AUMF occurred in 1955 and was directed against China. President Eisenhower, fearing that China might attack Taiwan (then called Formosa), an American ally, asked Congress to authorize the use of force "for the specific purpose of securing and protecting Formosa."[148] This made tangible the President's commitment to defend Formosa, while avoiding an inflammatory declaration of war; by seeking congressional approval, he insulated himself against the criticism that had been directed at President Truman over his involvement in the Korean War to the effect that it had been a unilateral decision. Congress backed Eisenhower, a popular President and a highly respected former general, with only three dissenting votes in the House and Senate. Though China later resumed shelling of Formosan forces, no broad scale attack took place; perhaps the deterrent value of the AUMF deserves credit.

Unquestionably, the most famous AUMFs arose out of the 9/11 attacks. President George W. Bush described the attacks as "acts of war," and, after consulting with congressional leaders, submitted an AUMF to Congress that provided "That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that took place on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international

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142 2 Stat. 561 (1798).
143 1 Stat. 129 (1802).
144 3 Stat. 230 (1815).
145 10 U.S.C. §2644 (2012).
146 10 U.S.C. §519 (2012).
147 Tanisha M. Fazal, Wars of Law: Unintended Consequences in the Regulation of Armed Conflict (2018).
148 Pub. L. 84-4, 69 Stat. 7 (1955).

terrorism against the United States by such nations, organizations, or persons."[149] The resolution passed the Senate 98-0 and the House 420-1. Floor debates as well as the text made it clear that the resolution was directed solely at those involved with 9/11, and not at terrorism generally. Bush used the AUMF not only to justify war efforts, but also to provide the foundation for military detention[150] and warrantless surveillance.[151]

In 2002, with the 9/11 trauma still fresh, President Bush sought a second AUMF to be used against Iraq, which he said had acquired weapons of mass destruction. The resolution authorized the President to use the armed forces "as he determines to be necessary and appropriate in order to (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq."[152] This resolution, not tied to 9/11, passed the more skeptical Senate 77-23 and House 296-133, the numerous negative votes reflecting the greater distance from 9/11. Neither resolution contained an expiration date.

Years later, the two AUMFs remain the chief legal foundation for the nation's military anti-terrorist efforts, and they are likely to continue to do so. Initially, the targets were Al Qaeda, the organization that carried out the 9/11 attacks, and the Taliban, which controlled Afghanistan and gave Al Qaeda sanctuary and support. But the AUMFs' scope has since been broadened, as Presidents have widened the application of the statutes. The Tonkin Gulf Resolution, whatever its flaws and however tenuous its basis, at least was invoked against its target. AUMFs have proved to be a weapon that can be directed (and have been directed) at a wide range of targets unnamed at the time of their adoption. Congress, ever eager to avoid controversy, has quietly acquiesced. The courts have said almost nothing, with their leading cases instead concerning the relatively narrow issue of detention.[153]

The Obama administration, facing new terror threats in new places, further stretched the law.[154] In his September 23, 2014 War Powers Resolution letter, the President outlined a series of military and humanitarian deployments in Iraq, including sending 475 armed forces personnel to Iraq, and noted, "It is not possible to know the duration of these deployments and operations."[155] The international terror picture, organizationally and geographically, had changed considerably in the interval since 9/11. Obama did not mention Al Qaeda or the Taliban, who

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149 Pub. L. 107-40, 115 Stat. 224 (2001). The AUMF departed from past practice in targeting organizations and persons in addition to nations. The rationale was that terrorists like Al Qaeda and the Taliban were not nations.

150 Military Order of November 12, 2001*:* Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, 66 Fed. Reg. 57833 (Nov. 16, 2001).

151 Legal Authorities Supporting the Activities of the National Security Agency Described by the President*,* (Dep't of Justice Jan. 19, 2006).

152 Pub. L. 107-243, 116 Stat 1498 (2002).

153 Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952) *supra* note 41.

154 More than other recent Presidents, Obama "practically abandon[ed] the article II treaty process," in favor of executive agreements, partly as a result of intense partisan opposition. Jeffrey S. Peake, *The Decline of Treaties? Obama, Trump, and the Politics of International Agreements*, Clem. U. Dept' of Poli. Sci, (Apr. 6, 2018).

155 Letter from the President, *War Powers Resolution Regarding Iraq,* White House Office of the Press Secretary (Sept. 23, 2014).

had been the targets of the 2001 AUMF, but he did mention Syria, which had not been a target of either AUMF. Nonetheless, the two AUMFs were cited as offering statutory authority.

The following year, Obama proposed an AUMF that would repeal the 2002 AUMF and replace it with one directed against the Islamic State and "associated persons or forces." He announced that passage of the new AUMF "would show the world we are united in our resolve to counter the threat posed by ISIL,"[156] which had not existed when the earlier AUMFs were adopted. The new AUMF was unusual in setting a three year time limit and in not covering long term, large scale "enduring" ground combat operations. The President may have considered the 2002 AUMF outdated and his proposal moderate with broad appeal, sharing responsibility for the war with Congress and reinforcing his electoral base with a more narrowly targeted and legally based approach. In this he was mistaken. Progressives in his own party thought the vague reference to associated persons could justify a "forever war,"[157] suspecting that the sunset clause could be abrogated by extensions and noting that no geographical limits were included in the resolution. On the right, critics were troubled by the sunset clause and the absence of authority to intervene in Syria. "You have a Republican Congress that wants to grant the President more power than he wants for himself," complained Representative Duncan Hunter (D-CA).[158] In either case, conservatives regarded the proposal as too restrictive on presidential discretion and liberals as too generous, though simple partisanship was also involved. The bill never came up for a vote. This was the only occasion in recent years, when a presidential AUMF request was not adopted.

However, because President Obama continued to insist that he had constitutional and 2001/2002 AUMF authority to act against terrorists, whoever they were and wherever he found them, the defeat had no practical impact. The rationale, entitled "associated forces," was that the AUMF also implicitly targeted organizations linked to Al Qaeda or the Taliban plus attacking nations linked to the United States or its coalition partners.[159] This expansive reading, which granted the President wide discretion, rendered the authorization he had sought from a new AUMF superfluous. Thus, notwithstanding that the 2001 and 2002 AUMFs failed to target them, Obama used the AUMFs to justify military engagements against Al Shabab in Somalia, the Khorosan in Syria, and Al Qaeda in the Arabian Peninsula in Yemen,[160] as well the Islamic State, even if the groups had become rivals and not partners.[161] Despite the 2015 AUMF failure, Obama oversaw an impressive expansion of presidential authority.

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156 Letter from the President, *Authorization for the Use of United States Armed Forces in Connection with the Islamic State of Iraq and the Levant*, White House Office of the Press Secretary (Feb. 11, 2015).

157 Ryan Goodman, *Obama's Forever War Starts Now*, Foreign Policy, Feb. 12, 2015.

158 Austin Wright & Bryan Bender, *Authorization for Military Force Stalls*, Politico, Mar. 18, 2015.

159 Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 2, *In re* Guantanamo Bay Litigation, Misc. No. 08-442 (TFH) (D.D.C. Mar. 13, 2009).

160 Charlie Savage, Power Wars: Inside Obama's Post-9/11 Presidency 224-27, 274-79 (2015); Charlie Savage, *Is the U.S. Now at War with Shabab? Not Exactly*, N.Y. Times, Mar. 15, 2016.

161 Savage, Power Wars, *supra* note 160 at 688-89.

Even AUMFs with the explicit goal of "mak[ing] Congress do its job"[162] in practice enhance the presidency. The proposed Corker-Kaine AUMF of 2018,[163] for instance, would have replaced the 2001 and 2002 AUMFs, authorizing the President to designate groups and individuals as "associated forces" to be militarily targeted, provided only that he inform Congress. The resolution failed, but that it was offered by two of President Trump's most prominent national security critics illustrates how reluctant to exercise power Congress really is.

V. The Threats of President Trump

So, could President Trump unilaterally order an attack on, say, North Korea? The first thing to say is that it was simply talk, bellicose talk, to be sure, personally insulting talk as well, but simply talk. In more talk a year later, the President announced that "we fell in love, OK? No, really. He wrote me beautiful letters, and they're great letters. We fell in love."[164] But even if his earlier talk pointed to a club in the closet, there is no constitutional prohibition of presidential threats (though article 2 (4) of the United Nations Charter bans states from threatening the use of force). Indeed, the deterrence model,[165] which dominated the Cold War and continues in force to this day, is built on threat; the chief American nuclear strategic controversies were whether the United States should have first or second strike capabilities[166] or whether weapons should be aimed at military targets[167] or population centers, too.[168] Apart from those favoring nuclear disarmament, everyone took the legitimacy of threat for granted. Certainly, today when the United States joins with South Korea for annual war games, North Korea does not fail to see the element of threat. In a 1950 press conference during the Korean War, President Truman repeatedly said that use of atomic bombs was "under active consideration,"[169] an obvious threat. In short, the use of military threats by Presidents is a major theme in recent history. Much of what diplomats and generals do involves signaling to adversaries their willingness to take certain steps, and President Trump may well believe that his threats will incentivize North Korea to agree to a deal that he can live with. In this regard, he may have conceived his warnings as constituting a conditional declaration of war: If these nations fail to meet certain conditions, he may order attacks.[170] Of course, credible threats will be more effective than those with weak

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162 Sen. Tim Kaine (D-VA), *quoted in* Karoun Demirjun, *Senators Release Bipartisan Proposal to Reauthorize Use of Force*, Wash. Post, Apr. 16, 2018.

163 *Supra* note 123.

164 Fred Kaplan, *Trump Said What About Kim-Jung-Un?* Slate, (Sept. 30, 2018, 3.06PM), https://slate.com/news-and-politics/2018/09/trump-loves-kim-really.html.

165 Richard Sisk, *"First Strike" Nuclear Doctrine Won't Change: Carter*, Military.com (Sept. 27, 2016) https://www.military.com/daily-news/2016/09/27/first-strike-nuclear-doctrine-wont-change-carter.html.

166 *See* Albert Wohlstetter, *The Balance of Terror*, 37 For. Aff. 211 (1958); Thomas C. Schelling, Surprise Attack and Disarmament, (P-1574) (Rand Corp. 1958).

167 *See* Walter Slocombe, *The Countervailing Strategy*, 5 Int'l Security 18 (1981).

168 *See e.g.,* McGeorge Bundy, *To Cap the Volcano*, 48 For. Aff. 1 (1969).

169 The President's News Conference, *supra* note 111 (Nov. 30, 1950).

170 President George W. Bush issued an explicit conditional declaration of war to Saddam Hussein in 2002.

credibility, and if a threat is constitutional, this may add to its credibility, though probably only very modestly.

But if threats helped to prevent warfare between Cold War superpowers,[171] obviously threats have not always had such benign results. In World War I, for example, Austria-Hungary's threats to Serbia seem to have helped bring on the war, with consequences no one foresaw. [172] There are threats and there are threats. Some are serious; some are not. Some concern vital interests; some do not. Some are deliberately disrespectful; some observe the usual diplomatic courtesies.

Imagine, then, that President Trump's threats fail to achieve their goal, and he decides on his own and without input from Congress to launch an attack on North Korea.[173] The Framers certainly agreed that in an emergency, a President could act on his own to respond to an invasion or rebellion, Madison and Elbridge Gerry, for instance, saying that they would leave "to the executive the power to repel sudden attacks."[174] With time pressures vastly greater today—a North Korean missile could hit America in an hour and a half, while in the Framers' time, it would take a ship from Europe at least three weeks to reach American shores — no one doubts that this exception remains viable. In the Caroline incident of 1842, Secretary of State Daniel Webster argued that a pre-emptive attack would be justified only when the need to respond is "instant, overwhelming, and leaves no choice of means, and no moment of deliberation."[175] This remains the classic justification for pre-emptive attacks.[176] Webster also emphasized the importance of proportionality, maintaining that any attack must be "justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it." The UN Charter acknowledges "the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures to maintain international peace and security."[177] One reading would ban any pre-emptive attack; another would claim that the customary right of self-defense remains unimpaired. But insisting that the President must wait until the last moment to respond to a threat will strike many as reckless and unworkable, for by waiting this long, preferable options might well have been foreclosed.

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171 *See* John E. Mueller, Atomic Obsession: Nuclear Alarmism from Hiroshima to Al-Qaeda (2009).

172 Samuel R. Williamson Jr., Austria-Hungary and the Origins of the First World War (1991); Ruth Henig, The Origins of the First World War, ch. 1 (3d ed. 1989).

173 A unique complicating factor is that, technically, a state of war with North Korea still exists, providing the President with an opportunity to claim that an attack would not initiate a new war, but merely resume an old one. It is not clear that this argument would succeed: there has been no fighting since 1953, and in 1950 President Truman was careful to call it a "police action" not requiring prior congressional authorization and not a war.

174 2 The Records of the Federal Convention, *supra* note 14, at 318.

175 Letter from Secretary of State Daniel Webster to British Minister to the United States, Lord Alexander Baring Ashburton (Aug 6, 1842); *see also* John Bassett Moore, A Digest of International Law 412 (1906).

176 R.Y. Jennings, *The Caroline and McLeod Cases*, 32 Am. J. Int'l. L 82, 92 (1938). *See also* Oscar Schacter, *The Right of States to Use Armed Force*, 82 Mich. L. Rev. 1620, 1635 (1984); Michael Byers, *Terrorism, the Use of Force and International Law after 11 September*, 51 Int'l & Comp. L. Q. 401 (2002). *But cf.* Maria Benvenuta Occelli, *Sinking the Caroline: Why the Caroline Doctrine's Restrictions on Self-Defense Should Not Be Regarded as Customary International Law*, 4 San Diego Int'l L.J. 467, 475-79 (2003).

177 U.N. Charter, art. 51.

The War Powers Resolution, however, permits the President to circumvent the issue of declaring war. All he would need do is to meet with congressional leaders and file a report, and he would receive a sixty day bye, which he could renew for an additional thirty days.

Conceptually, the time element will be central. If the President acts when there is still the opportunity for diplomatic and political means to succeed and avoid war, he may have denied Congress the deliberative opportunity it needs; an avoidable war will not be avoided. Yet if he waits too long, he may court disaster. And only in hindsight (and not always then) do we know how long is too long. In 1981, Israel destroyed Iraq's Osirak nuclear reactor. It was not yet operational, but Israel was afraid that if it waited until it was producing weapon grade material that might be used in bombs potentially directed at Israel, it would have waited too long. Perhaps some material might already have been created, unbeknownst to the Israelis, that could be weaponized; in any case, waiting and then destroying an operational reactor would risk mass nuclear contamination.[178] Or, more famously, consider the Soviet effort to install missiles in Cuba. While the installation may have made the American homeland more vulnerable to a nuclear attack, no one suggested that such an attack was imminent. In fact, the imminent danger was brought about not by the Soviet action, but by President Kennedy's response to it.[179] Similarly, when President George W. Bush invaded Iraq in 2003, it was not threatening the United States, but the invasion itself raised the possibility that it might use weapons of mass destruction (which it later turned out it did not possess). Presidential action addressing an ostensible crisis may bring about an actual or potential one. By this point in 2003, consideration of the time element, supposedly central, had simply vanished.

More fundamentally, what is to be the locus of the decision to go to war? It may well be that Presidents cannot be trusted, that they cannot be counted on to disentangle personal and national interests, that they may cynically seek to create a sense of emergency when they know quite well that no emergency exists. Democracy teaches us to mistrust our rulers, so that we are always ready to throw them out of office. But if not the President, who? Certainly not Congress, with its 535 members.

VI. Crises

Who has not experienced terror and the fear of death, only to awaken safely in bed? Or, on the contrary, who has not heard of someone driving routinely, perhaps day dreaming or listening to music, only to be struck suddenly by an unseen speeding vehicle? Crises are not announced in sonorous tones by a celestial butler, but instead are labels officials (and others) impose on events. We may accept an abstract definition, like a serious threat to a high priority goal that requires an urgent response, but its application dissolves consensus. Serious, but how serious? As terrible as 9/11 was, it did not threaten the survival of the nation. But if 9/11 could not qualify as "serious," what could? Who now

[178] The UN Security Council unanimously condemned the attack, though plainly several members were quietly relieved at its success.

[179] Thomas Halper, Foreign Policy Crises: Appearance and Reality in Decision Making, ch. 6 (1971).

regards preventing North Vietnam from conquering South Vietnam as serious enough to constitute a crisis? More generally, is preserving credibility a high priority goal? The importance of appearances and expectations should not be underestimated. Yet proclaiming a credibility issue embodies a certain circularity: by pronouncing that our credibility is at stake, we make our credibility at stake. It also runs the risk of elevating a passing slight to a cosmic level, where face saving compromises may be hard to accept. An urgent response? Delay may suggest indecision and embolden adversaries, but stepping back and weighing consequences and alternatives may prove a wise investment. He who hesitates is lost, but sometimes it makes sense to look before you leap.

In the world of international politics, leaders may mistake something else for a crisis or mistake a crisis for something else. Events move swiftly, information is radically incomplete and imperfect, psychological factors like confirmation bias, loss aversion, or reference dependence may warp perceptions, personal careers and national goals may be on the line, personalities and temperaments will generate conflict. Intelligent, experienced, reasonable persons doing their best will make mistakes. And, of course, leaders will not always be intelligent, experienced, reasonable persons doing their best. Recall Cicero's maxim that the safety of the people is the highest law.[180] Can we take the President's word that the safety of the people is truly in peril?

Civil law systems that trace their lineage to the Roman Republic generally say Yes. For the most part, they explicitly incorporate war and emergency powers in their constitutions, following the Roman example, where consuls with the approval of the Senate could appoint dictators for a six month term, with the dictators dependent upon the Senate for funding.[181] Article 48 of the Weimar constitution permitted the president in time of emergency to rule by decree, without the approval of the Reichstag,[182] and article 16 of the constitution of the French Fifth Republic permits the President to declare a state of siege "[w]hen the institutions of the Republic, the independence of the Nation, the integrity of the territory or the compliance with its international commitments are threatened in a serious and immediate manner and regular operation of the constitutional public authorities is interrupted."[183] The constitution does not, however, address the President's powers, except to provide that he "shall take the measures required by these circumstances." In this, the French followed the path of the ancient Roman Republic.

The United States Constitution, like most common law systems, includes no comparable provision, perhaps implying more skepticism as to the virtues of leadership. Indeed, we can imagine a casual reader echoing the view of a modern theorist that "bringing emergencies into the law contaminates the law itself by making it accommodate practices that will of necessity spoil the law."[184] It is certainly true that the Constitution's war declaration requirement is intended to serve, as a great

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180 Cicero, De Legibus, 3.8. (James E.G. Zetzel ed. & trans. 1990)

181 Clinton W. Keyes, *The Constitutional Position of the Roman Dictatorship*, 14 Stud. in Philology 298 (1917).

182 This article provided Hitler with a legal rationale for his seizure of power and the constitutional dictatorship that followed. Clinton Rossiter*, Article 48 in Law and Theory,* in Constitutional Dictatorship: Crisis Government in Modern Democracies ch. 5 (Clinton Rossiter ed. 2002).

183 Article 36 limits the state of siege to twelve days, unless approved by Parliament.

184 Giorgio Agamben, State of Exception, 32-33 (Kevin Attell trans. 2005).

scholar remarked in a slightly different context, as "an invitation to struggle,"[185] that is, one of the numerous checks and balances built into the system. And the ambiguities of the clause (and the much later War Powers Act), by promoting turf battles, might seem to ensure that no single branch would establish dominance, preventing spoilage of the law. Shifting exigencies generate patterns of conduct that modify or even reverse the text. In foreign affairs, the key rhetorical gambit is often the evocation of crisis. Apart from a mention regarding the suspension of habeas corpus,[186] the Constitution is silent on the subject of crises. But if the safety of the people is the highest law,[187] then the power to designate situations as crises is central. For crises enormously expand presidential discretion and, relatedly, are seen as essential to the presidential greatness that egos may crave.

VII. Conclusions

For the declare war clause to work, the actors, Congress and the President, must be willing to struggle. The evidence is overwhelming, however, that Congress, invariably opportunistic, is ordinarily unwilling to enter the fray. When the President is popular, struggle is the last thing on its mind. As a consequence, the Framers' insistence that Congress be key in initiating American involvement in war has been repealed by events—and by Congress' own persistent reluctance. When war or, indeed, any military action, is imminent, there is normally an enormous public demand for leadership, which can come only from the President, and in the exhilarating early stage, he typically becomes very popular. Tied to this is the widespread conviction that the end of victory justifies nearly any means (as Hughes put it, "the power to wage war implies the power to wage war successfully")[188] which quickly translates into an unspoken license to expand presidential powers within limits that are broad, indefinite, and shifting.[189] In such circumstances, Presidents will likely find irresistible pressures and incentives urging them on to ever more vigorous leadership. Congress, shoved to the background by events, will be aware that leadership is not its role and, in fact, with hundreds of members, is

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185 Edward S. Corwin, the President: Office and Powers, 201 (2d ed. 1941). He was referring to foreign affairs, but the observation applies equally to war powers.

186 U.S. Const. art. 1, §9.

187 *Supra* note 180. This principle was also applied by the Court in the domestic crisis of the Great Depression. A Minnesota statute permitted persons unable to make their mortgage payments to petition a court to be granted a moratorium on payments; the mortgage holder challenged the statute as violating the Constitution's ban on impairing the obligation of contracts (art. I, sec. 10); the Court, though proclaiming that "Emergency does not create power," held that '[a]n emergency existed . . . which furnished a proper occasion for the exercise of the reserved power of the State to protect the vital interests of the community." Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426, 444 (1934).

188 Charles E. Hughes, *War Powers Under the Constitution*, 40 Ann. Rep. A.B.A. 232, 238 (1917).

189 Lincoln provided a classic rationale. "[O]ften a limb must be amputated to save a life, but a life is never wisely given to save a limb. I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the union." Letter to Albert G. Hodges Apr. 4, 1864, 7 The Collected Works of Abraham Lincoln *supra* note 7, at 282.

simply not possible. It is literally a supporting player, and by supporting the war, it is seen as supporting the country, though it is simultaneously also supporting the President.

We are used to assuming that politicians reflexively seek to extend their power, but in the question of whether to go to war, members of Congress understand that there will be plenty of time later to revise their views, maybe qualifying or even, like Senator Fulbright, withdrawing their support. If the war turns out to be popular, they can claim they supported it; if unpopular, they can call it the President's war and distance themselves from it, in an extreme case even ending it, as they did with Vietnam. But during that very early stage, it is the President's show. Credit and blame, rather than policy or constitutional concerns, tend to drive congressional rhetoric. So powerful are the incentives that even when the facts presented clearly fail to constitute a crisis (Gulf of Tonkin resolution) or the enemy poses no imminent threat (the Houthis in Yemen), the President prevails with ease. Congress may declare war explicitly or implicitly, but in either case, tends to be supine before the President. The view that "Congress' reluctance to issue a formal declaration of war since World War II reflects a domestic concern over the aggregation of power in the executive branch"[190] gets things precisely backwards. The political trumps the constitutional.

Of course, Congress would not abrogate its responsibility if the voters demanded it to act. But though over three-quarters of Americans report thinking it "too risky" to give Presidents more power,[191] the public has acquiesced quietly to this development, perhaps regarding it as natural, unavoidable or desirable. Congressional refusal to fund the Vietnam War is frequently raised as an illustration of legislative power. But when one recalls that it followed after nearly 60,000 American deaths, over 150,000 wounded, hundreds of billions of dollars spent, and countless protests and demonstrations, it seems like a very tardy arrival at the fair. Indeed, had the presidency not been so weakened by a scandal quite unrelated to the war powers, it is doubtful funding would have been cut off at all. The public wants leadership, often irrespective of its direction, and two legislative chambers with 535 talkative, egotistical members cannot provide it. Congress' role has tended, especially at the beginning, to be cheerleading.

A formal declaration of war, whether following a fabricated crisis (like the Gulf of Tonkin incident) or a national trauma (like 9/11), seems to strike both the President and Congress as ill advised. For it may add pressure to achieve victory when only compromise turns out to be realistic, raising hopes and expectations that cannot be fulfilled; it may make it more difficult to de-escalate or withdraw because the initial commitment was so great; and it may have legal consequences, domestic and international, that may not be helpful. Probably the biggest impact flowing from a declaration would result simply from its not having been invoked for three-quarters of a century. This would set it apart from the far more common

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190 Sidak, *supra* note 15, 94.

191 Carroll Doherty, *Key Findings on Americans' Views of the U.S. Political System and Democracy,* Pew Research Center (Apr. 26, 2018). At the same time, a Lawfare poll indicated slightly more confidence in the President's ability to protect national security than Congress'. Mieke Eoyang et al., *Confidence in Government on National Security Matters: April 2018*, Lawfare (Tuesday, May 8, 2018, 2:31 PM), https://www.lawfareblog.com/confidence-government-national-security-matters-april-2018.

AUMFs, identify the crisis as greater than and different from more recent crises, and generate immense visibility. But it would be the rarity of the declaration rather than the declaration itself that likely would be responsible for the elevated impact. Put differently, the distinctive consequences flowing from the declaration would mainly be a function of its past disuse, as if it were an inconvenient legal technicality of trifling practical value.

Disuse, in other words, is taken as evidence that the war declaration clause is merely a tired anachronism, a kind of legal vermiform appendix. But this view is hard to sustain. It is true, of course, that international events move much faster today than in 1787. However, it was always understood that the President could respond unilaterally to an attack, when time was of the essence; this has not changed. And a glance at the occasions where Presidents have acted on their own reveals no urgency that would render a congressional role impossible or impractical. In fact, speedier technology would make it much easier today to gather Congress and present it with information than was true centuries ago. One change that might argue for a more aggressive role is the atrophying of the Electoral College—the Framers believed it would guard against demagogues—and the recent weakening of political party organizations—party bosses tended to prefer candidates more moderate than party activists. But by themselves, these changes would not seem sufficiently potent to cast Congress aside.

Yet a key attribute of sovereignty is precisely the right and ability to make war. On the list of powers that "free and independent states" possess, for example, the Declaration of Independence lists first the right "to levy war [and] conclude peace." The international community, such as it is, is unconcerned with the intra-state maneuverings that preceded these decisions; its level of analysis is confined to the nation. But constitutionally, the internal events are of supreme importance. Can Congress re-delegate the power granted to it by the Constitution to the President? The growth of the administrative state has left the courts exceedingly reluctant to invoke the rule against re-delegation, for it seems so clearly impractical. But it is one thing to re-delegate to the executive the power to regulate, say, highway construction or small business loans, and quite another to do so on matters of war and peace.

When practice consistently departs from constitutional text, what to do? Courts have replied that practice illuminates the text, and with this hocus-pocus have eliminated the stark fact of contradiction. Put differently, the practical demise of the declare war clause and the acknowledged triumph of the presidency may be viewed as another example of the power of the Living Constitution approach to constitutional law. The originalist view centering on Congress has seemed impractical, outdated, and thus in need of reformulation. Both Congress and the Presidents have been willing, in fact often eager, to collude to bring about presidential dominance, never even hinting at its problematical constitutional status.

Is there any reason to suppose that requiring formal war declarations would change the current pattern of presidential initiation and congressional subservience? Perhaps, the war declaration's highlighting the issue in stark terms might alter the national debate, inducing caution in some and xenophobia in others. But it is hard to see how declarations could make a substantial difference. By definition, the declaration would occur at the beginning of the war, in other words, at the moment of public euphoria, when few elected officials would dare say no.

The President and Congress appear content with their present roles. Thus, declarations of war—in, say, an AUMF form, if not as formal declarations—are

hardly dead letters. Presidents see the AUMFs' importance in mobilizing public support and dominating Congress. Some academics[192] and pundits[193] may press for formal declarations to strengthen Congress' hand, but Congress does not want its hand strengthened. With power comes responsibility, and Congress, for the most part, does not want responsibility. The presidential-congressional struggle that was supposed to ensue is nowhere to be seen. "The life of the law," as Holmes famously announced, "has not been logic. It has been experience,"[194] and if the Constitution points to a congressionally centered reading of the war declaration clause, the two branches have long since settled into a presidentially centered mode. "The American people are not easily persuaded to embrace war," concluded one authority,[195] but recent evidence strongly suggests otherwise. The Framers did not want war making to be easy, but in this their plans have failed.

Is the clause a dead letter or an invitation to struggle? The answer, it seems, is neither.

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192 *See, e.g.*,Sidak & Glennon, *supra* note 15.

193 *See* e.g., George Friedman, *What Happened to the American Declaration of War?,* Forbes (Mar. 30, 2011, 05:10pm), https://www.forbes.com/sites/beltway/2011/03/30/what-happened-to-the-american-declaration-of-war/.

194 Oliver W. Holmes Jr. The Common Law, 1 (1881).

195 Andrew J. Polsky, The Presidency at War: The Window of Agency in Wartime Presidential Leadership, in The Presidency and the Political System, 525, 529 (Michael Nelson ed. 2014).

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Normative and Institutional Dimensions of Rights' Adjudication Around the World

Pedro Caro de Sousa*

ABSTRACT

The implications of incommensurability for rights' adjudication tend to be overlooked in much of contemporary constitutional theory. This paper criticizes the dominant "one right-answer" approach to conflicts of rights, and develops an alternative approach that is better suited to constitutional rights' adjudication in contemporary pluralistic legal orders. It is submitted that the normative reasons for having courts undertake the value-choices implicit in constitutional rights' adjudication, and for preferring certain legal methodologies over others, must reflect the role of courts in resolving social disputes in the light of specific aspects of the economic, social, and legal life of the polities in which those courts operate. It is further argued that any theory that builds from this approach needs to answer two inter-related questions: when is constitutional rights' adjudication by courts appropriate, and how rights' adjudication should be pursued.

KEYWORDS

Constitutional Law, Rights' Adjudication, Institutional Comparisons, Comparative Constitutional Law, Incommensurability.

CONTENTS

* D.Phil. Oxon (Lady Margaret Hall), formerly law lecturer at the University of Reading, currently at the Organisation for Economic Cooperation and Development. The opinions in this paper are personal. They in no way reflect the views of the OECD, its staff, committees or delegates.

I. Introduction

Since the Second World War, the "institutionalisation" of constitutional rights[1], the adoption of procedural paradigms such as those of "the priority of rights over the good"[2], and the idea that to each legal question there is a single right answer have led to a judicialization of the political sphere and to the development of a technocratic culture that leaves limited room for the articulation or realization of competing conceptions of the good.[3] This article criticizes these developments on the basis of concerns related to the incommensurability of rights.[4] It is submitted that the implications of this are significant, particularly when coupled with critiques of the supposed objectivity of judicial adjudication. If taken to their last consequences, accepting these premises leads to the conclusion that constitutional rights do not have an objective meaning that can be identified and applied everywhere and at all times—i.e. the incommensurability of rights and the absence of objective adjudication are fatal to claims of absolute universality and objectivity of constitutional rights.

The article is structured as follows. A first section provides an overview of the history behind the current rights' culture and of the intellectual underpinnings of the prevalent "one right-answer" approach to conflicts of rights. A second section will pursue a critique of this position and intellectual tradition. A third and last section advances an alternative approach, better suited to rights' adjudication in contemporary pluralistic legal orders. It is submitted that a humbler approach to constitutional rights' adjudication—one that is sensitive to the particular circumstances of the relevant jurisdiction—better reflects the realities of constitutional adjudication and is normatively preferable to the dominant approach. It is further argued that the normative reasons for having courts undertake the value-choices implicit in rights' adjudication, and for preferring certain legal methodologies over others, are to a large extent based on the added value that courts can bring to the resolution of social disputes in the light of specific aspects of the economic, social, and legal life of the polities in which those courts operate. Constitutional rights must fit the society in which they are applied — where they may "drip" into political discourse and "crush" unconstitutional actions. Such an institutionally-sensitive approach allows for the development of a high-level framework regarding constitutional rights' adjudication that can be applied everywhere, but that must be adapted in each jurisdiction to reflect local realities.

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1 I will use the term "constitutional rights" to refer to justiciable rights that are held to be hierarchically superior to legislatively issued rules. Even though not all constitutional rights are human rights, their legitimacy as supra-legal values derives from similar sources, and as such constitutional rights will serve as shorthand for judicially enforceable human rights.

2 John Rawls, *The Priority of Right and Ideas of the Good*, 17 Philos. & Pub. Affairs. 251, 251 (1988).

3 Martin Koskenniemi, *The Effect of Rights on Political Culture* in The E.U. and Human Rights, 99 (Philip Alston ed., 1999).

4 Issues of conceptual indeterminacy of these rights, in their adjudication will not be addressed here. On this *see* Gunnar Beck, *The Mythology of Human Rights* 21 Ratio. Juris. 312 (2008).

II . The Origins of the Rights Culture

A. Natural Law

Since the Second World War, rights discourse has established itself as a common currency of both politics and law.[5] Contemporary public discourse, especially when appealing to such core values as liberty, equality, and justice, is invariably cast in the language of rights.[6] But even though the rights revolution is a recent phenomenon, its intellectual origins go far back, to the dawn of Western civilization.[7]

From very early on, law has been associated with justice. Natural law has always based its claim to superior normative status on the existence of something—a divinely ordained order, moral rights, reason, etc.—which "naturally" prevails over whatever particular rules may be in place at any given time and space. Already in Hesiod we find an implicit adumbration of natural law or, rather, an application of the term *nomos* to domains for which we would nowadays use "natural law":

> The son of Kronos [Zeus] has appointed the following nomos for humans: that fish and beasts and winged birds should devour one another, because they have no share in justice. But to human beings he gave justice, which is far the best.[8]

The co-existence of natural law and positive rules imposed by force was nonetheless perceived as a source of conflicts, and potentially tragedy. The most famous example of such a conflict can be found in Aristotle's analysis of Sophocles' "Antigone" in his "*Rhetoric*" and, in particular, in its discussion of the conflict between Antigone and Creon, king of Thebes. The conflict was, in mundane terms, between Creon's edict requiring that Antigone's brother's body remain unburied on the battlefield, prey for carrion-eaters, and Antigone's claim to a right to bury her brother. Aristotle describes Antigone's claim as being based on natural law,[9] and that:

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5 For a good discussion of these developments, *see* Akira Iriye & Petra Goedde, *Human Rights as History*, *in* The Human Rights Revolution – An International History (Akira Iriye et al. eds., 2012).

6 Jürgen Habermas, *Human Rights and Popular Sovereignty: The Liberal and Republican Versions*, 7 Ratio Juris. 1, 8 (1994).

7 Martin Loughlin, The Idea Of Public Law 114 (2004); John Tasioulas, *Towards a Philosophy of Human Rights*, 65 Curr. Leg. Probs. 1, 26 (2012); However, some see the idea of human rights developed in the 20th century as being fundamentally innovative – Samuel Moyn, The Last Utopia: Human Rights in History (2010).

8 Anthony A. Long, *Law and Nature in Greek Thought*, in The Cambridge Companion to Ancient Greek Law, 416 (Michael Gagarin and David Cohen eds., 2005); quoting Hesiod's *Works and Days,* in The Cambridge Companion to Ancient Greek Law, 276-80 (Michael Gagarin & David Cohen eds., 2005). Greek thought saw natural law not in terms of content, but as originating from a divine source. For example, in Sophocles' *Oedipus Tyrannus* the chorus draws a contrast between legitimate law – in this case, divine law – and the tyrant's imposed rules precisely in terms of authorship. *See* Danielle Allen, *Greek Tragedy and Law* in The Cambridge Companion to Ancient Greek Law, 388 (Michael Gagarin & David Cohen eds., 2005).

9 *Id*. at 390.

> *"Universal law is the law of nature. For there really is, as everyone to some extent divines, a natural justice and injustice that is binding on all men, even on those who have no association or covenant with each other."*[10]

Greek theorists of natural law, such as Plato and Aristotle, thought right conduct and right law were both equivalent and objective facts. This identity between objective morality and natural law was shared by the Stoics. Stoicism equated nature with God, the perfectly rational and all-pervasive cause of the Universe, and took the world as a whole to be divinely and rationally administered. They argued that, by properly reflecting on the natural order, one would recognize that goodness and authentic lawfulness consist in conformity to correct reason.[11]

This Stoic idea of natural law gained widespread currency through Cicero's works on political theory. In "*The Republic"*, Cicero writes down what is for many the classic definition of natural law:[12]

> True law is right reason, in agreement with nature, diffused over everyone, consistent, everlasting, whose nature is to advocate duty by prescription and to deter wrongdoing by prohibition . . . It is wrong to alter this law, nor is it permissible to repeal any part of it, and it is impossible to abolish it completely. We cannot be absolved from this law by Senate or people, nor need we look for any outside interpreter of it or commentator. There will not be a different law at Rome and at Athens, or a different law now and in the future, but one law, everlasting and immutable, will hold good for all peoples and at all times. And there will be one master and ruler for us all in common, God, who is the founder of this law, its promulgator and its judge.[13]

This line of thought was coupled with Christianity – with its emphasis on the universality of Revelation – by Saint Paul.[14] The role of natural law in Christian doctrine and medieval thought was given its most complete expression by St. Thomas Aquinas who, together with the scholastics, identified an inaccessible first cause (i.e., God) that instituted second causes accessible to men by reason (e.g. physical laws regulating both physical phenomena and men).[15] Amongst these

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10 Aristotle, Rhetoric 1.13.1373b5: "koinon de ton kata phusin. esti gar ti ho manteuontai pantes, phusei koinon dikaion kai adikon, kan mēdemia koinōnia pros allēlous ē mēde sunthēkē." The translation is taken from William Rhys Roberts, The Works of Aristotle 11 (William David Ross ed., 1924).

11 Long, *supra* note 8, at 421-26.

12 *Id*. at 429.

13 Marcus Tullius Cicero, De Res Publica, De Legibus [On the Republic, On the Laws], 211 (Clinton W. Keyes trans., 1928).

14 *See* for example, EPISTLE TO THE ROMANS ch. 2:14–15.

15 Klaus Gunther, *The Legacies of Injustice and Fear*, *in* The E.U. and Human Rights 99, 117-8 (Philip Alston ed., 1999); Josiah Ober, *Law and Political Theory*, *in* The Cambridge Companion to Ancient Greek Law, 395 (Michael Gagarin and David Cohen eds., 2005); David Oderberg, *The Metaphysical Foundations of Natural Law*, *in* Natural Moral Law in Contemporary Society 48 (Holger Zaborowski ed., 2010).

second causes was natural law, which accorded with both to Scripture and reason, but also needed to be promulgated by those with political power.[16]

In time, this "second causes" doctrine became the seed for the move from a divine to a purely rational foundation for natural law.[17] Hugo de Grotius' statement that natural law exists: "*even if we were to suppose (what we cannot suppose without the greatest wickedness) that there is no God, or that human affairs are of no concern to Him*", implicitly allows for a complete decoupling of natural law from any theological underpinnings.[18] Despite this decoupling, early-modern secular jusnaturalism shared an assumption with religious jusnaturalism born of their common intellectual origins:

> that there exists some single principle which not only regulates the course of the sun and the stars, but prescribes their proper behavior to all animate creatures. […] At its center is the vision of an impersonal Nature or Reason or cosmic purpose, or of a divine Creator whose power has endowed all things and creatures each with a specific function; these functions are elements in a single harmonious whole, and are intelligible in terms of it alone.[19]

The parents of jusnaturalism, both of religious and secular bents, are thus Greek ethical objectivism and Christian epistemic universalism.[20] As we will see below, these are the origins of the objectivism and naturalism that underpin much of contemporary rights' theory.

B. Individual Rights

The concept of natural law reviewed thus far did not require subjective rights vested in individuals and enforceable against the community.[21] Instead, the idea of individual, subjective natural rights was originally developed by the school

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16 St. Thomas Aquinas, Summa Theologica I-II q. 90 a. 4: law is "*quaedam rationis ordinatio ad bonum commune, ab eo qui curam communitatis habet, promulgata* " [law is nothing but a rational regulation for the good of the community, made by the person(s) having powers of government, and promulgated] James E. Penner & Emmanuel Milissaris, Jurisprudence, 24 (5th ed., 2008).

17 Antonio M. Hespanha, Panorama Historico Da Cultura Juridica Europeia, 143-44 (1998).

18 Hugo de Grotius, De Jure Belli Ac Pacis [On the Law of War and Peace] (Francis W. Kelsey trans., Clarendon ed. 1925); *See* also Richard Tuck, Natural Rights Theories: Their Origin and Development, 66 (Cambridge University Press eds., 1979); Knud Haakonssen, *Hugo Grotius and the History of Political Thought*, 13 Pol. Theory 239, 240 (1985); Hespanha, *supra note* 17, at 145-47.

19 Isaiah Berlin, Against the Current: Essays on the History of Ideas, 84 (2013).

20 Gunther, *supra note* 18, at 119, 138. *Cf.* David Oderberg, Real Essentialism (2007).

21 Loughlin, *supra note* 7, at 116; more generally, John Millbank, *Against Human Rights: Liberty in the Western Tradition*, 1 Oxford J.L. & Religion, 203 (2012).

of Salamanca[22]—particularly by Luis de Molina and Francisco Suarez[23]—in its attempt to deal with Lutheran and Calvinist theories on the godliness of civil rulers and the absence of free will. Developing in particular nominalist ideas by Ockham and Mair, the school of Salamanca came to embrace the conception of the individual as a bearer of natural rights within a state of nature. As a result of these natural rights, individuals were thought to possess a right of rebellion when the (Protestant) sovereign did not keep his side of the bargain or infringed upon the precepts of natural law.[24]

The idea of grounding the rights of individuals in a state of nature previous to the creation of the state was strikingly original. Taking on a life of their own, subjective rights would eventually become a crucial conceptual toolbox in the development of modern natural law conceptions of the sovereign State.[25] It led to the development of contractualist approaches that attempted to explain how the exercise of absolute sovereignty—as developed in Bodin[26]—was compatible with natural law.[27] The contractualists, by:

> Treating right as a personal possession rather than an objective state of affairs, […] transformed the concept of jus as it had appeared in Roman law and Thomist thought. Reconfiguring the relationship between authority and right, they promoted individualist and contractualist theories of sovereignty that acknowledged the absolute authority of the sovereign.[28]

C. Towards Modern Constitutional Rights

At the dawn of the modern age, the basic subjective and objective elements required for the placement of some individual rights above general law were in place.[29] As societies secularized, intellectual debates abandoned the objective-religious foundations of the ideal political order to focus on how individuals constitute polities via a social contract in the light of their pre-political natural rights.[30] Yet,

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22 Even though a conception of individual rights derived from human rational capacity could be said to be at least incipient in 12th century glossators – *id*. at 22-25; Brian Tierney, The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 234-5 (1997); James Griffin, On Human Rights 30-1 (2008).

23 Quentin Skinner, 2 The Foundations of Modern Political Thought 155-58, 174-75 (1978).

24 Francisco Suarez, De Defensio Fidei III: Principatus Politicus O la Soberania Popular (Eleuterio Elorduy & Lucian Pereñao trans., Madrid Consejo Superior de Investigaciones Cientificas ed. 1965); On the influence of nominalist thought in this development, *see* Hespanha, *supra note* 17, at 151.

25 Skinner, *supra note* 23, at 176-78, 184.

26 Jean Bodin, Six Books of the Commonwealth (Blackwell Publishers ed. 1955).

27 Skinner, *supra note* 23, at 158-64. For a thorough analysis of these developments, *see* Martin Loughlin, The Foundations of Public Law 73-83 (2010).

28 *Id*. at 73-74.

29 It should be emphasized that the concept of political sovereign was developed alongside that of individual rights, even if only at the pre-political stage.

30 The most prominent works on the social contract as a pre-political arrangement are by Thomas Hobbes, Leviathan (2004); and Jean-Jacques Rousseau, Du Contrat Social, ou, Principes du Droit Politique [On the Social Contract, or Principles

this transition from religious to secular underpinnings of the social order left the foundations of natural law unaffected. It was typical of this epoch to consider that both the rules governing nature and society were absolute and, as such, that natural law was both objective and universal.

It was at this point that a crucial step in the conceptualization of individual rights against the state was taken: secular natural rights were moved from the pre-political to the political realm by John Locke.[31] Locke argued that the preservation of property is the main reason people contract with one another to place themselves under a governing authority; accordingly, when a system of government is established, natural rights are not alienated but merely exchanged for state-sanctioned civil rights. If government fails to discharge its responsibilities properly, power devolves back to the people, who retain a right of rebellion for the purpose of preserving their natural rights.[32]

The heirs to Locke's philosophy were the British of the Glorious Revolution and their fellow countrymen, the American colonists. For our purposes, however, the impact of this philosophy was greater in America, where the concepts of a written constitution and of individual rights that are judicially enforceable against the State were first implemented. Before independence, company charters granted by the British Crown had established—in writing—a governing framework for the colonies that neither the chartered companies nor the colonists could alter.[33] The originality of the colonists was to adopt this model for their newly independent country in the form of a formal written Constitution which included the basic rights of citizens as expressed, first, in the Virginia Bill of Rights of 1776, and, then, in the Bill of Rights of 1791.[34] The greatest innovation of this system was, arguably, to accord judges the duty to apply the Constitution in the same way as they applied "*any particular act proceeding from the legislative body",* and to set out that *"if there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute"*.[35] The result was that:

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of Political Law] (1985); On the role of the Protestant Reformation in the demise of the Catholic Church as the main source of political legitimacy, and the concurrent need to find other sources of legitimacy; *see* Jerome B. Schneewind, The Invention of Autonomy: A History of Modern Moral Philosophy (1998); *See* Charles Taylor, *The Diversity of Goods*, in Utilitarianism and Beyond, 140 (Amartya Sen & Bernard Williams eds., 1982; James Griffin, *supra* note 22, at 10.

31 It could be argued that individual rights of divine origin were already "political" under the original formulation of the right of rebellion by the School of Salamanca.

32 John Locke, *Two Treatises on Government*, in 2 The Works of John Locke 200 (3d ed. 1728): " yet the legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them". *See* also Loughlin, *supra* note 7, at 116-7.

33 For an elaboration of this, and for examples, *see* Loughlin, *supra* note 27, at 279.

34 Both of these could, in turn, find precedent in the British Bill of Rights 1689.

35 The Federalist No. 23 (Alexander Hamilton); It should be noted, however, that in practice this line of thought was only fully realized later on, following *Marbury v. Madison* 5 U.S. 137 (1803); and developments in the 20th century, particularly after World War II – *see* Charles R. Epp,The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective (2d ed. 1998); and Richard A. Primus, The American Language of Rights (1999).

> in furtherance of their natural rights, the state was reconstituted and the functions of government delimited. By establishing a modern constitution that laid down this formal framework of government […] citizens could now expect an independent judiciary to protect their basic rights.[36]

The intellectual underpinnings of these developments were naturalistic theories of rights understood to provide universally accepted objective principles that posed "natural" limits to those in power. The result was a mechanism for constraining public power by delimiting a sphere of individual freedom as against the State—constitutional rights[37]—which eventually became widespread. Later on, the diffusion of judicial review beyond American shores in the wake of World War II created fertile grounds for constitutional rights to spread, starting a "rights revolution".[38]

Building as they do on these blocks, constitutional rights have a number of perceived characteristics around the world. First, they are said to reflect objective values. Second, given that they are grounded in a rational order, they can be subject to "reasoning" through "logic". Accordingly, rights' reasoning based on objective readings of natural law allows one to be right about her value judgments.[39] This absoluteness is not accidental: the very purpose of constitutional rights is to create a set of non-political imperative considerations, and to limit "political" state action by implicit reference to an apolitical good society. Through their aprioristic and universal characterization, rights embody objective reason, which gives them great rhetorical power. Political disagreements in areas falling within the scope of constitutional rights are thus no longer framed as legitimate differences, but as fundamental errors.[40]

This is a tradition that to this day remains intellectually fertile, as evidenced by the number of theories of "correct" interpretation of constitutional rights that were developed and found a receptive audience over the last decades.[41] Rights'

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36 Loughlin, *supra note* 7, at 122; *See* also Richard Tuck, *The 'Modern' Theory of Natural Law*, *in* The Language of Political Theory in Early Modern Europe *(*Anthony Pagden ed., 1987). This can be contrasted to the *Déclaration des Droits de l'Homme et du Citoyen* (Declaration of the Rights of Man and Citizens) adopted in 1789 in France, which, even though famously stating in its Art. 16 that: "*Toute société dans laquelle la garantie des droits n'est pas assurée ni la séparation des pouvoirs déterminée, n'a point de Constitution*" [Any society in which rights are not assured and the separation of powers is not established does not have a Constitution], did not require those rights to be judicially enforced, but merely to serve as guidance in the exercise of political power.

37 *Supra* note 1.

38 On the debates regarding how the relationship between natural law and natural rights was understood during this period, *see* Kenneth Cmiel, *The Recent History of Human Rights*, 109 Am. Hist. Rev. 117 (2004); Epp, *supra* note 35; and Kai Möller, The Global Model of Constitutional Rights (2012). On the reasons why the importance of human rights was recognized only after the II World War, *see* Lynn Hunt, Inventing Human Rights: A History 177-208 (W.W. Norton & Company ed. 2007).

39 Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, *in* Left Legalism/ Left Critique 184-5 (Wendy Brown & Janet Halley ed., 2002).

40 Koskenniemi, *supra* note 3, at 101-2.

41 *See*, for example Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (2d ed. 1986); Ronald Dworkin, Taking Rights Seriously (Harv. Univ Press ed. 1977); Ronald Dworkin *Objectivity and Truth: You'd*

discourse has now established itself as a common currency of both politics and law. Contemporary public discourse in Western countries, particularly when appealing to such core values as liberty, equality, and justice, is invariably cast in the language of rights.

III. A Critique of Rights Culture

The imposition of absolute aprioristic standards binding upon a political community—i.e. constitutional rights—coexists in tension with the principle of popular sovereignty.[42] This tension sometimes comes to the fore but is, in the main, submerged by rhetorical devices that distinguish between value-charged law-making and value-neutral judicial adjudication. The judicial adjudication of constitutional rights is premised not only on the objectivity and universality of constitutional rights, but also on its own neutrality and objectivity, which makes: *"the apparent objectivity of rights theory dovetail perfectly with the apparent objectivity of judicial method."*[43] In other words, questions about constitutional right are objective – —i.e., pre-determined and knowable, —and should be entrusted to a *cadre* of independent professionals trained in "fidelity" to the law.[44]

This view implicitly takes for granted the objectivity and neutrality of constitutional rights, and the aptness of judges to enforce them objectively and neutrally. Both premises, however, do not withstand scrutiny.

A. Against "Objective" Natural Law

There are myriad constitutional rights' theories that seek to develop principles for identifying "one right solution" to legal problems. Some theories openly ignore existing law and focus on what the law should be on the basis of some select normative factor. Normative basis for such theories include welfare maximization[45], rational principles of justice,[46] or metaphysical theories of human flourishing[47]. Other theories are more openly based on legal precepts, as is the case of Dworkin's theory of constitutional rights as trumps, Ely's reading of constitutional rights as being representation-reinforcing, Bickel's reading of constitutional rights as expressions

Better Believe, in 25 Phil. & Pub. Aff 87 (1996); John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980); John Rawls, Political Liberalism (Colum. Univ. Press ed. 1996). While this seems to be a mainly American endeavor, it has recently been spreading globally along with the influence of the rights' revolution: *see*, for example, Aharon Barak, *Proportionality and Principled Balancing*, 4 L. & Ethics of Hum. Rights 1 (2010).

42 Both the notions of individual rights and popular sovereignty were arguably developed in tandem as modern justifications for the legitimacy of law: *see* Habermas, *supra* note 6, at 2-6.

43 Kennedy, *supra* note 39, at 187.

44 This view is common to both classic positivistic and jusnaturalistic perspectives – *see* Duncan Kennedy, A Critique of Adjudication (Fin De Siècle), 27 (1997).

45 This underpins the "law and economics" movement.

46 John Rawls, A Theory Of Justice (Revised ed. Harv. Univ. Press 1999).

47 John Finnis, *Commensuration and Public Reason: Reason in Action*, in 1 Collected Essays (2011).

of the fundamental principles of a nation's political morality, and Möller's reading of global constitutional rights as being concerned with the protection of interests related to personal autonomy.[48] All these theories are openly normative, and seek to influence the decision of constitutional cases.

These approaches are also all monist—they assert the priority of one value over all others and elaborate theories based on that foundational value's primacy[49]—and rely on strong concepts of rationality.[50] They thereby strive to present public law (and particularly constitutional rights) as a monist version of rationalist metaphysics, according to which moral and legal answers are all both knowable and compatible with one another.[51]

It is submitted that this "monism", and its dependence on "strong" forms of rationality, are not sustainable given the impossibility of gaining access to the contents of a detailed, objective moral order. This critique is not new. It is based on value pluralism, an idea that was at the heart of Isaiah Berlin's work[52], and has since been adopted in moral philosophy. To put it very broadly, value pluralism argues that upholding an (objective) value often cannot be achieved without the sacrifice of another (also objective, and equally important) value. Central to value pluralism is the acknowledgement that that there is no clear hierarchy of moral ends. Instead, there are thought to be a multiplicity of equally fundamental values that may not only be incompatible but also incommensurable.[53] Raz has summarized its propositions as follows:[54]

(a) there is a multiplicity of values that are not merely different manifestations of one supreme value;

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48 *Supra* note 41.

49 Richard Posner, *Against Constitutional Theory*, 73 N.Y.U. L. Rev. 1, 2 (1998); Richard Posner, The Problematics of Moral and Legal Theory, 5 (1999); Robert H. Bork, *Styles in Constitutional Theory*, 26 S. Tex. L. J. 26 383, 384(1985). This paper does not take any position on the ideal method of interpreting the U.S. Constitution, nor do these criticisms (of what are mainly liberal constitutional theorists) amount to an endorsement of originalism in any of its forms.

50 According to which an action is rational if it is rationally required, and omitting it would be irrational. A prominent example of the limitations of stronger usage of "rationality" and democratic decision-making is Arrow's impossibility theorem — Kenneth Arrow, Social Choice and Individual Values (1951) — but it should be noted that the stringent implications of this theorem can be relaxed by making the decision-making process more information sensitive — *see* in particular Amartya Sen, *The Possibility of Social Choice*, 89 American Econ. Rev. 349 (1999). There is also a weaker use of rationality — adopted, for example, by Joseph Raz, The Morality of Freedom (1986) — according to which an action is rational if it has not been ruled out by reason. We will look into this in more detail in section 3 below.

51 Trevor Allan, Constitutional Justice: A Liberal Theory of the Rule of Law 290–2 (2001); Beck, *supra note* 4, at 323.

52 *Loughlin, supra* note 7, at 40; Alasdair Macintyre, After Virtue 143 (3d rev. ed. 2007). This is not to say that the intellectual tradition sustaining this approach is not long-lived: it can be traced back to the Greek Sophists, and particularly to Vico, Herder, and the Counter-Enlightenment and Romantic movements in general: *see* Isaiah Berlin, The Proper Study Of Mankind: An Anthology of Essays 243, 553 (Penguin Books ed., 2013) (1997).

53 Beck, *supra* note 4, at 317.

54 *See*, for a similar definition of value monism, Berlin, *supra* note 52, at 555.

(b) there are incompatible values, meaning values cannot all be realized in the life of a single individual, nor, when we consider values that can be instantiated by societies, can they be realized by a single society.

As a result, the difference between values is not merely quantitative but qualitative – and different values may be incommensurable.[55]

This is not to say that all questions about goods and values must always shipwreck on the rock of incommensurability—commensuration of goods and evils will usually be available as regards alternative courses of action, insofar as the deliberation about the alternatives remains in the technical domain, as in certain types of cost-benefits analysis.[56] Further, it is possible to arrive at valid reasons for choosing even when dealing with incommensurable alternatives. It is a normal part of life to grapple with competing priorities: the differences in nature and qualities of apples and oranges do not prevent us from choosing between them every time we decide to eat.[57] This can be extrapolated to judicial-making: "*Legal systems justifiably—and in fact, necessarily—authorize judges to resolve many issues that can only be justly resolved by reconciling incommensurable considerations*".[58] For example, courts are often required to calculate the amount of damages corresponding to pain, or the length of imprisonment due for committing a crime—requiring a balance between matters that do not share a common metric, or lead themselves to an obvious answer.

Despite this, if it is accepted that incommensurability exists, this has significant consequences for constitutional adjudication. Value pluralism can translate into legal uncertainty when legal norms reflect different values and: (i) there is no express hierarchy of norms or order of value which prioritizes some values over others; and (ii) there is no other accepted legal method or criteria for balancing and prioritizing conflicting values. These conditions tend to be met by constitutional law. Constitutional instruments often express incomplete agreements regarding competing legal values. Most legal orders pursue a number of different constitutional objectives without a clear hierarchical relationship, and without providing a formula on how to resolve conflicts that may arise between those objectives.[59]

Value pluralism poses a threat to the modern rights culture at a basic level, by challenging its very premise that a monist prioritization of individual and societal values is possible.[60] Disagreements on how to balance different rights, or about the specific content of individual rights, will often express rival normative conceptions of the good life or the good society. As such, when choices need to be made

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55 Taylor, *supra* note 30, at 138.

56 Finnis, *supra* note 47, at 238.

57 Amartya Sen, The Idea of Justice 242, 395 (2009).

58 Timothy Endicott, *Proportionality and Incommensurability*, *in* Proportionality And The Rule Of Law, 325-6 (Grant Huscroft et al. eds. 2014).

59 Gunnar Beck, The Legal Reasoning of the Court of Justice of the E.U. 83-84 (2012). This is particularly the case with national and international bills of rights, which will unavoidably contain values that are incompatible, incommensurable, or both. For a thorough discussion of legal uncertainty regarding rights' adjudication resulting from value pluralism, with examples drawn from the ECHR, the Human Rights Act, and the U.S. Bill of Rights, *see id*. at 86-90.

60 Beck, *supra* note 4, at 317.

between rights, some "value" will have to be sacrificed.[61] From a value pluralistic perspective:

> When rational inquiry leaves our views of the good deeply at odds, it is vain to appeal to rights. Basic human rights can be justified as giving protection against universal human evils; but even such rights clash with one another, and incompatible settlements of their conflicts can be equally legitimate. When universal evils clash, no theory of rights can tell us what to do.[62]

This limitation of monist approaches to constitutional rights can be demonstrated by reference to the monist theories reviewed above. While monists agree that there is one "correct" articulation of the "good"—i.e., they agree that objectivity is possible,—they differ as to what that "correct" normative framework should be. As noted by Sen, all these theories agree that universally applicable constitutional rights extend to everyone, and hence are said to promote some dimension of equality and non-discrimination. Discussions about whether equality is being observed are seemingly technical—after all, they require an empirical assessment of whether disparate treatment is taking place. Nonetheless, these theories invariably fall into a pattern of arguing against approaches ensuring equality in some dimension, on the grounds that they violate the more important requirement of equality in some other sphere. In other words, these theories disagree about the content of values and about their prioritization.[63] Ultimately, each of these theories advances a different conception of what is good and valuable, and thus they differ regarding the identification of the overarching good by reference to which discrimination must not be allowed.[64] In these approaches, as in all theories of rights and justice, differing views on rights ultimately spring from different views on what is "good".[65]

It should be noted that the argument thus far has been framed in ontological terms, so one might legitimately ask: "how do you know monism is not correct?" This is a valid question, but unless there is a method to access objective moral reality, value pluralism has the same bite from an epistemological as from an ontological perspective. In the absence of some demonstration of the validity and contents of naturalism—i.e. a method allowing for the discovery of the absolute, universal foundation of the "good"—monist approaches must be considered arbitrary, with their adoption merely a function of their persuasiveness.[66] This, in effect, entails recognizing, at least from a practical standpoint:

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61 John Griffith, *The Political Constitution*, 42 Mod. L. Rev. 1, 12-13 (1979). This may, to a certain extent, be the result of the "emotional", instead of rational, basis of fundamental rights — *see* John Alder, *The Sublime and the Beautiful: Incommensurability and Human Rights*, 4 Pub. L, 697, 707 (2006), building on work by Finnis and Rorty.

62 John Gray, Gray's Anatomy — Selected Writings, 34 (2015).

63 Compare, for example, the communitarian theories of Dworkin and Rawls with the libertarian theories of Nozick and Hayek.

64 Sen, *supra* note 57, at 295.

65 Gray, *supra* note 62, at 36.

66 Taylor, *supra* note 30, at 142.

> that ends equally ultimate, equally sacred, may contradict each other, that entire systems of value may come into collision without possibility of rational arbitration, and that not merely in exceptional circumstances, as a result of abnormality or accident or error—the clash of Antigone and Creon […]—but as part of the normal human situation."[67] […] "[When Creon and Antigone disagree] there is not something wrong or incomplete about the arguments they present […]. There are breakdowns and failures in ethical life of a sort that reveal the limitations and inconsistencies in a value claim itself, in its claim to be able to serve as a reason for action.[68]

B. Against Objective Adjudication

Those who reject purely monist approaches, or at the very least acknowledge that a legal problem can sometimes have more than one single solution, tend to drop grand substantive claims in favor of more limited procedural approaches. This usually leads to a defense of rights' adjudication on grounds of procedural neutrality and rationality.

A good example of this are defenses of balancing, a technique which plays an important role in the case law of many constitutional courts.[69] Balancing purports to be a tool for solving conflicts between individual rights. In the European—and, increasingly, global—context, balancing is traditionally associated with the principle of proportionality.[70] The best known treatment of proportionality is probably by Alexy, who draws and builds on Dworkin's conceptual distinction between rules and principles.[71] Given the global preponderance of proportionality as a test for ascertaining whether constitutional rights are infringed, we will use Alexy's approach as a basis of analysis.[72]

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67 Berlin, *supra* note 19, at 94-.

68 Robert Pippin, *The Conditions of Value*, in The Practice of Value—The Tanner Lectures on Human Values, 103 (Joseph Raz ed., 2003).

69 Donald H Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev 1091, 1101-8 (1986), describes a number of different balancing tests in the American context; Miguel Maduro, We the Court: The European Court of Justice and the European Economic Constitution 54-8 (1998) does the same in the European context. *See* also Möller, *supra* note 38, at 134-177.

70 Analyzing the potential differences between balancing and proportionality, *see* Moshe Cohen-Eliya & Iddo Porat, *American Balancing and German Proportionality: The Historical Origins*, 8 Int'l. J. Const. L. 263, 268-70 (2010). Mapping the adoption of proportionality throughout the world, *see* Alec Stone Sweet & Jud Mathews, *Proportionality, Balancing and Global Constitutionalism*, 47 Colum. J. Transnat'l. L. 72 (2008).

71 Robert Alexy, A Theory of Constitutional Rights (Julian Rivers trans., 2001).

72 A number of common law countries, including the UK and the USA, are outliers internationally in their lack of reliance on proportionality, even though balancing also occurs in US constitutional law — *see* Dworkin, *supra note* 41, at 23-6; Alex Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L. J. 943, 943 (1986-1987); Jacco Bomhoff , Balancing Constitutional Rights 188-89 (2013).

For Alexy, constitutional rights are principles—i.e. standards of relatively high generality providing non-conclusive reasons for deontic decisions that may be displaced by other principles, including other constitutional rights. However, Alexy also sees constitutional rights as optimization requirements demanding to be realized to the greatest extent possible.[73] This implies that constitutional rights are value-claims with mere *prima facie* force, to which balancing is inherent. When constitutional rights and principles collide, the conflict cannot be solved by declaring that one of the principles is invalid or by building exceptions into it.[74] Instead, one must create a conditional relation of precedence for the balancing of constitutional rights in the light of the specific facts of the case. To achieve this, Alexy proposes a "Law of Balancing", which can be divided into three stages: first, establishing the degree of non-satisfaction of a first principle or right; second, establishing the importance of the competing principle or right; and third, establishing the relationship between the first two elements. This technique, if yielded properly, should create the appearance that legal adjudication leads to purely objective results.[75]

However, Alexy himself refused the existence of an objective order of values that could determine *a priori* the content of adjudication, and expressly admitted that balancing does not lead to a single correct solution in each case. Nonetheless, while it is not possible to find a single substantive answer to all moral and legal questions, he argued that it is possible to develop procedural rules or conditions for rational practical argument.[76] Balancing is thus defended as operating at a purely formal level, with its correctness a matter of discourse and of relative coherence rather than of any external, substantive standards.[77]

From an objectivist perspective, the problem is that this neutral, rational "procedural" test injects value-based considerations at two moments: when determining the relative "weight" of the principles involved,[78] and when carrying out the final balancing exercise between the "costs" and "benefits" of each principle.[79] In the absence of sensible standards for comparing and grading values, this means that this test – and every test that seeks to balance between truly different values –

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73 Alexy, *supra* note, 71 at 44.

74 *Id*., at 66; Joseph Raz, The Authority of Law, 228 (1979). Raz' position is distinct from Alexy's in that he considers that principles and rules are reasons for actions, while Alexy's view is more restricted and strictly jurisprudential.

75 Alexy, *supra* note 71, at 50-54.

76 *Id*. at 99, 365-370; Gustavo Zagrebelsky, Il Diritto Mite (The Mild Law) 170 (1992). A similar process-based theory has been advanced by Jurgen Habermas, *Law and Morality* in 8, The Tanner Lectures on Human Values (S. M. McMurrin ed., 1988).

77 Thomas McCarthy, *Practical Discourse: On the Relation of Morality to Politics* in Habermas and the Public Sphere (Craig Calhoun ed., 1992).

78 Which, as has been noted, are usually assumed to be of equal weight, which is not appropriate for situations of incommensurability — see Alder, *supra* note 61, at 717.

79 An additional problem here is that there may well be epistemic issues – e.g. regarding the effective risk of something (say, terror attacks) that may be advanced as a reason to limit constitutional rights. *See* Robert Alexy, *Formal Principles: Some Replies to Critics*, 12 Int'l J. Const. L. 511, 520-22 (2014).

contains elements of subjectivity.[80] Procedural tests fail to solve the problem created by the absence of a common metric to values – i.e. their incommensurability. Since conflicts of rights ultimately reflect competing values and different conceptions of the "good", the relevant rights' adjudication criteria will of necessity reflect an implicit (and subjective) normative preference for some conception of the good over another.[81]

In other words, "balancing" tests are neither purely procedural nor completely neutral. Instead, they require (substantive) value judgements. This means that balancing and proportionality exercises do not bring absolute transparency and objectivity to rights' adjudication.[82] When a judicial choice is made between equally ultimate, incompatible and incommensurable values, the choice will necessarily lack a purely rational justification regardless of how sophisticated the judicial analysis looks.[83] As Weber put it: "increasing intellectualization and rationalization do not […] indicate an increased and general knowledge of the conditions under which one lives".[84]

In short, rights' adjudication always requires the exercise of a certain amount of political discretion on the part of courts. This, in turn, raises the question of whether courts are competent and legitimate to pursue such a role.

IV. The Use of Rights—A Defense

At the heart of the contemporary rights culture lies a tension that has been latent since at least the Enlightenment between the search for one universal good—objectivism —and the toleration of different views of the good—pluralism.[85] Recent studies in psychology and anthropology seem to support pluralism. They have identified a cluster of different moral themes to which people subscribe, and found that different cultures seem to prioritize different clusters.[86] Of these clusters, only one —based

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80 Matthias Jestaedt, *The Doctrine of Balancing—Its Strengths and Weaknesses*, in Institutionalised Reason — The Jurisprudence of Robert Alexy 164-5 (Matthias Klatt ed., 2012). Alexy considers this problem to be inherent to any practical reason discourse: see Ruth Adler, Neil MacCormick & Robert Alexy, A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification 206-208, 288 (1989). Claiming that this requires 'external justification' in terms of legal reasoning by courts, Matthias Klatt & Moritz Meitser, *Proportionality—A Benefit to Human Rights? Remarks on the I·CON Controversy*, 10 Int'l J. Const. L. 687, 694 (2012).

81 Berlin, *supra* note 19, at 98.

82 Endicott, *supra* note 58, at 328. In the light of this, some authors have favored abandoning balancing and proportionality as a viable and rational form of judicial argumentation and decision-making: see Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, 7 Int'l J. Const. L. 468 (2009).

83 Beck, *supra* note 4, at 323-24.

84 Max Weber, *Science as a Vocation in* From Max Weber: Essays in Sociology 139 (H. H. Gecth & C. Wright Mills eds., 1948).

85 Gray distinguishes between the universalism of such distinct thinkers as Locke, Kant, Rawls and Hayek, and the emphasis on toleration and peaceful coexistence of Hobbes, Hume, Berlin and Oakeshott — see Gray, *supra* note 62, at 22.

86 R. A. Schweder, *In Defense of Moral Realism: Reply to Gabennesh*, 61 Child Development 2060 (1991); R.A. Schweder & Jonathan Haidt, *The Future of Moral*

on autonomy —is congruent with an individual rights' culture; and, currently, this cluster seems to prevail only among well-educated westerners.[87]

These studies have identified a number of human universals.[88] However, and to put the matter rather broadly, they also found that these universals are high-level modules which details need to be filled in, are too numerous to be adopted simultaneously, and have the potential to be mutually incompatible.[89] As a result, the specific moral principles that an individual holds are the result of her background, including how she was socialized.[90]

Given the failure of both objectivist substantive theories of rights and procedural theories of rights' adjudication, the application of constitutional rights—and their judicial imposition in particular—must find some other justification. If these studies in psychology and anthropology are correct—and it is accepted that not only societies, but even individuals within the same society can legitimately have different values—it follows that any theory of social morality should focus on how to manage conflicts between the values that different people legitimately and naturally hold. Even if these studies are not correct, a similar notion that different conceptions of the good life are legitimate underlies most politically liberal regimes, and a similar focus on the part of political and constitutional theory is justified.

In pluralistic societies, we need common institutions that allow many forms of life to co-exist. Constitutional rights—which often express specific values—are one such institution.[91] Constitutional rights and their judicial adjudication can thus be justified on practical grounds, and particularly on the basis of their suitability to facilitate pluralism and the co-existence of different but equally legitimate life choices.

This "institutional" perspective on constitutional rights has a number of implications. First, it means that the content of individual rights will vary from society to society, and may evolve—as is commonly observed in practice—because this content is the outcome of struggles between alternative views about what a good society should be like.[92] Secondly, and more importantly to our purposes, it implies that a defense of rights' adjudication must go beyond abstract claims of objectivity and neutrality. The defense must be about the specific discursive and

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Psychology: Truth, Intuition and the Pluralist Way, 4 Psychol. Sci. 360, 362-63 (1993); R.A Schweder, N.C. Much, M. Mahapatra & L. Park, *The "Big Three of Morality" (Autonomy, Community and Divinity) and the Big Three Explanations of Suffering*' in Morality and Health (A. Brandt & P. Rozin eds., 1997).

87 The literature has categorized this segment of the population as WEIRD – both in a descriptive (Western, Educated, Industrialized, Rich and Democratic) and comparative (as in a minority in the context of Human History, and even current world population) sense. See J. Henrich, S. Heine & A. Norenzayan, *The Weirdest People in the World?*, 33 Behav. & Brain Sci. 61 (2010).

88 Donald Brown, Human Universals (1991). For a full list of universals, see Steven Pinker, The Blank Slate: The Modern Denial of Human Nature (2002), Annex.

89 Jonathan Haidt & C. Joseph, *The Moral Mind: How 5 Sets of Innate Intuitions Guide the Development of Many Culture-Specific Virtues, and Perhaps Even Modules* in The Innate Mind, 367 (Peter Carruthers et al. eds., 2007).

90 Jonathan Haidt, The Righteous Mind 131-33 (2012); Schweder & Haidt, *supra* note 86, at 363-64.

91 Gray, *supra* note 62, at 38.

92 Koskenniemi, *supra* note 3, at 105.

political practices[93] underpinning rights' adjudication in individual polities—and it must explain why such practices should be preferable to other decision-making processes.[94]

At least in the Western world, constitutional rights are an integral part of contemporary legal and political discourse. Even if constitutional rights cannot, by themselves, solve political and social disputes, they frame these disputes and define their terms.[95] Constitutional rights operate as guiding principles around which some communal values and individual interests can be organized, and, in liberal systems, set the primary conditions for the pursuit of personal conceptions of the good.[96]

Constitutional rights are particularly useful in the resolution of social disputes because they *straddle*. On the one hand they are *"legal rights embedded and formed by legal argumentative practice (legal rules)"*. On the other, they constitute a normative framework said to "exist" prior to and outside the legal system, exerting its influence *"in the form of an assertion about how an outside right should be translated into law."*[97] In the way they straddle, constitutional rights point not only to the inter-relationship between politics and law, which are: "*two distinct ways of managing the inevitable social facts of agreement and disagreement"*. They also serve as mechanisms of institutional choice, since: "*to submit a political controversy to legal resolution is to remove it from the political domain"* and leave it to courts.[98]

Even if conflicts between constitutional rights merely reflected conflicts of political claims—*contra* their perceived pre- and a-political nature —courts could still legitimately resolve such conflicts. This would be a matter of institutional choice—and institutional choices ultimate depend on the relevant historical, social and institutional context in which they are made.

From an "institutional" perspective, two main questions need to be addressed in the context of rights' adjudication. The first question is a matter of institutional choice, which is usually disguised as an issue regarding jurisdiction—when should courts be competent to deal with issues under the *aegis* of constitutional adjudication? The second question is a matter of practice—how should constitutional adjudication proceed?[99] While each of these questions merits a level of attention that exceeds the

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93 Practice here means: "*a set of rules for the regulation of the behavior of a class of agents, a more-or-less widespread belief that these rules ought to be complied with, and some institutions, quasi-institutions, and informal processes for their propagation and implementation*." Practices provide reasons for adopting a specific mode of action (e.g. rights' adjudication), but do not necessarily serve to delineate the scope of specific actions (e.g. the precise content of a constitutional right). See Charles R. Beitz, The Idea of Human Rights 8-9, 42 (2009); and, more broadly MacIntyre, *supra* note 52, at 253.

94 Beitz, *supra* note 93, at 102.

95 Joseph Raz, *More on Explaining Values*, in The Practice Of Value—The Tanner Lectures on Human Values 154 (Joseph Raz ed., 2003).

96 Rawls, *supra* note 2, at 255-60.

97 Kennedy, *supra* note 39, at 187. See also H.L.A. Hart, *Are There Any Natural Rights?*, 64 Phil. Rev. 175 (1955).

98 Robert Post, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 Cal. L. Rev. 1319, 1343 (2010).

99 The relationship between these questions is not merely sequential. The way constitutional rights are construed is arguably relevant to normative assessments of whether courts are better options to arbitrate between different political values than legislative or administrative bodies.

scope of this article—and, under the terms of any institutional theory like the one sketched above, the answers to these questions must ultimately be identified at the relevant jurisdictional level—an attempt is below made to sketch their basic contours.

A. When Should Courts Decide?

Prima facie, courts face structural limitations that would seem to make them unsuitable to engage in the political role inherent to constitutional rights' adjudication. Courts often lack expertise and resources; have high administrative costs; are subject to information biases in favor of those sufficiently organized to participate in the judicial process; may decide issues without hearing some of the affected interests; do not have the advantage of determining when to adopt politically charged decisions; and lack democratic legitimacy.

However, institutional choices occur in a world of second-bests. The question is not whether courts are ideally suited for politically charged adjudication; it is how they compare to legislatures and governments. In particular, political processes can be subject to both majoritarian and minoritarian biases which may make the allocation of decision-making powers to courts appropriate. Majoritarian biases occur when the majority adopts decisions that ignore or disproportionately harm the interests of minorities. A particular concern is with acts where: "*prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities*."[100] On the other hand, minoritarian biases may occur when a minority group of some sort benefits from better access to the seats of power through personal influence, organization, information, or sophistication. Under these conditions, minorities may impose losses that are spread out across the majority of people in a way that makes political reaction unlikely or unfeasible.[101] The trade-off is thus between political processes that have better information and greater democratic legitimacy, but that are subject to both majoritarian and minoritarian biases; and an adjudicatory process with less information, resources and democratic legitimacy, but that suppresses some of those biases, particularly through the independence and specialization of judges.[102]

In a democratic context, there will normally be a presumption that politically controversial topics are best left to democratically legitimate bodies. And yet, from a comparative institutional perspective there may be situations where courts may be the preferable decision-making body, even if those situations will usually only arise extraordinarily—e.g. situations where the decision affects civil liberties and human rights (in particular situations concerning the prevention of outcomes which are morally intolerable for the relevant polity, or even for humanity as a whole), or where the protection of the integrity of the political process is at stake.

An important, yet subtle consideration which is relevant for any institutional comparative choice is the iterative relationship between the process through which the relevant bodies reach their decisions and the identification of the entity better

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100 United States v. Carolene Products Co., 304 U.S. 144,153 n.4 (1938).

101 Neil Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 Mich. L. Rev. 657, 671-75 (1988).

102 Neil Komesar, Imperfect Alternatives — Choosing Institutions in Law, Economics, and Public Policy (1994).

suited to decide certain matters. The way courts construe constitutional rights will be relevant to the desirability of having them decide constitutional rights' questions in the first place. This can be exemplified by reference to balancing and proportionality. While it may be considered a disadvantage that balancing and proportionality leave a wide margin for subjectivity, these legal techniques also acknowledge the existence of clashes of rights and recognize that there is no ready-made answer to them.[103] What is more, they provide discursive structures through which litigants can plead their cases and engage with their opponents' arguments, and create a measure of predictability regarding how courts frame their decisions.[104] Proportionality in particular can be perceived as providing a regulated argumentative framework that assists courts in accommodating conflicting values in individual cases in a way that is acceptable to all participants.[105] Proportionality and balancing may lead to uncertainty, but they also have the advantage of allowing for the control of arbitrary and purely subjective decisions—and thereby providing a mechanism to ensure the (bounded) rationality of judgements.[106] It also allows interested parties to participate in a process of legal alchemy through which controversial, politically charged decisions are transformed into natural, unproblematic developments of previous legal practice. As has been noted:

> (given a steady case load), fidelity on the part of the court to a particular framework will entrench that mode of argumentation as constitutional doctrine. To the extent that arguing outside of the framework is ineffective, skilled legal actors will use the framework, thereby reproducing and legitimizing it.[107]

This may well be deemed a comparative institutional advantage of courts over other institutions—including democratic representative bodies—as decision-making *loci.* In certain cases, it might be preferable that the subjective value assessment inherent to some political decisions occurs under conditions that are subject to rational control and criticism: legal reasoning aspires to objectivity[108], and submits subjective decisions to a discursive practice restricted by a series of conditions, such as respect for the law, consideration for precedent, and other rules.[109] What is more, courts will usually be able to decide on the basis of the particular facts of a case without needing to engage with the large-scale societal questions underlying it. Courts may adopt incompletely theorized decisions that reflect the limited

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103 Xavier Groussot, *Rock the KaZaA: Another Clash of Fundamental Rights*, 45 Common Mkt. L. Rev. 1745, 1762 (2008).

104 Similarly, Kai Möller, *Proportionality: Challenging the Critics*, 10 Int'l J. Const. L. 709, 726 (2012).

105 Another way to frame this is to say that proportionality provides as a mechanism that ensures a level of reasonableness in the resolution of legitimate disagreements: i.e. "*it is not necessary for everyone to actually agree with the results, [but] the result must be justifiable in terms that those who disagree with it might reasonably accept*" — Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review,* 4 Law & Ethics Hum. Rts. 142, 168 (2010).

106 Alexy, *supra* note 71, at 107, 387.

107 Stone Sweet & Mathews, *supra* note 70, at 89.

108 Neil Maccormick, Practical Reason in Law and Morality 192 (2008).

109 Alexy, *supra* note 71, at 370-387.

amount of societal consensus on the relevant topic. This mechanism is well suited to pluralist societies and an important source of social stability, allowing decisions to be reached on controversial topics without requiring the generalized imposition of certain value judgements with which the parties and segments of societies may strongly disagree.[110]

In other words, judicial practice, the issue to be decided, and the relevant social, institutional and political environment are all relevant to the comparative institutional choice of whether courts should make the value choices implicit in constitutional rights' adjudication. In particular, courts may be better placed to decide charged political questions if they do so within an operative and cognitive framework that recognizes such practice as legitimate—e.g. when courts are explicitly granted jurisdiction to decide such cases in the first place. Importantly, such operative and cognitive frameworks are usually time- and place-specific, which means that the relevant comparative institutional choice depends on the particular socio-legal context in which it occurs.

B. How Should Courts Decide?

While context is crucial to determine whether courts should adjudicate on constitutional rights' cases (and to identify which constitutional rights should be subject to judicial adjudication), it is also important to the way courts should decide cases.

Even if constitutional adjudication needs to decide between values that will often be incommensurate, this does not mean that there will be no sound reasons for courts' decisions on questions involving those values. A first step in the analysis of a constitutional right is to look at its normative foundation, and identify the "good" that it seeks to protect. This is crucial not only in order to take the right seriously, but also to determine the normative content of specific constitutional rights. While this content may not be precisely defined, it will be limited to a number of normatively acceptable possibilities.[111] This leads us to a second step: if—as it is often the case—there are multiple normative bases for a constitutional right and there is no definitive answer as to which is to be preferred, consideration should be given to all legitimate normative bases—i.e. normative pluralism should be embraced. Accepting the existence of a plurality of justificatory arguments underpinning constitutional rights has the potential to strengthen those rights—because they will benefit from added normative justification(s). At the same time, this plurality of normative bases creates some space for courts to take into account the individual, cultural and legal considerations which may be relevant to the adjudication of individual cases.[112]

A particularly relevant consideration regarding constitutional adjudication between multiple incommensurable values is that the absence of one right solution does not mean that one is unable to identify which solutions are wrong. Furthermore, while collisions between values cannot be avoided, deciding between

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[110] Cass Sunstein, Legal Reasoning and Political Conflict 5, 44 (1996); Alder, *supra* note 61, at 709.

[111] Jeremy Waldron, *Is Dignity the Foundation of Human Rights?*, in Philosophical Foundations of Human Rights 125-133 (Rowan Cruft et al. eds., 2013).

[112] *Id.* at 4-5; Kwame Anthony Appiah, The Ethics of Identity 73-83 (2005).

them need not be irrational.[113] Monist, "one-right-answer" approaches necessarily rely on strong rationality. However, there are other (weaker) forms of rationality according to which an action is rational if it has not been ruled out by reason.[114] Similarly, there are mechanisms that, through bounded rationality, seek to deal with indeterminate and incommensurable choices.[115] The basic idea being advanced here is that, through reliance on partial rankings, limited agreements and comparative judgements, reasonable public choices can be reached via practical reasoning.[116] The reasons adopted in this respect may well be pragmatic, consequentialist, and time- and agent-bound. These reasons may apply at a particular point in time but lapse fairly quickly, apply in certain societies but not others, or be reasons for courts to interpret rights in a particular way that do not extend to other cases. In other words, the particular application of specific values included in constitutional rights may depend on aspects of the economic, social, and legal life of a country, or even on the particularities of individual cases.[117]

Even if practical reason is unable to achieve a full commensuration of incommensurable things or to arrive at a single right solution, it can still hold the ring by disqualifying countless "solutions" as contrary to reason and wrong.[118] While issues of incommensurability remain, they can be circumvented—decisions can still be made, the same way one can choose between apples and oranges without much problem, even if the reasons for adopting these decisions will have to be pragmatic, and grounded on the institutional context and the nature of the decision-making process. Conflicts between values can thus be softened and managed in the light of specific contexts, particularly when a fragile balance that will avoid intolerable situations and choices can be reached.

In societies coherent enough to solve their problems peacefully, disagreements about incommensurable values will be contained within a framework of shared views: they will be instances of bounded disagreement that only make sense in a context of bounded pre-agreement according to which different people may legitimately stake opposing claims regarding certain matters. Importantly, in most contemporary Western societies, it is accepted that (some of) these disagreements can be addressed through rights' adjudication.[119] Naturally, not every conceivable

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113 Klatt & Moritz, *supra* note 80, at 697.

114 Raz, *supra* note 50, at 322-24. This builds on the distinction between "strong" and "weak" forms of rationality reviewed earlier in this note.

115 On bounded rationality, see Herbert Simon, *A Behavioral Model of Rational Choice*, 69 Q. J. Econ. 69 99 (1955); Herbert Simon, Models of Thought (1979). Relating the use of practical rationality to situations of weak rationality, see Möller, *supra* note 104, at 721-24.

116 Sen, *supra* note 57, at 241-43.

117 Isaiah Berlin, The Crooked Timber of Humanity 18-20 (2013); Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in Between Authority and Interpretation: On the Theory of Law and Practical Reason 367 (2009).

118 Finnis, *supra* note 47, at 252-53.

119 Raz, *supra* note 95, at 51. This is similar to, and builds on, the sharing of rules of language necessary for communication: disagreement must be preceded by agreement about the framework in which it occurs; *see* Joseph Raz, Between Authority and Interpretation: On the Theory of Law and Practical Reason 62-63 (2009), following Wittgenstein's rule-following argument in *Philosophical Investigations* (1958).

social disagreement can—let alone should—be solved this way.[120] In many cases (undoubtedly the greater part), rights' adjudication will not be the best option to address these disagreements. Judicial deference on the grounds of lack of democratic legitimacy will usually be appropriate.[121]

On the other hand, the alternative institutional options may be even less apt than courts; in extreme cases, there may be no way to arbitrate between different societal claims other than by a contest of force. Legal and political processes ultimately seek to stave off recourse to violence in the resolution of societal disputes. One way this has been pursued in Western political and legal culture is through the implementation of distancing devices for certain forms of decision-making—i.e. mechanisms for the settling of disputes in a way that is as independent as possible of the personal tastes of the relevant decision-makers.[122]

These distancing mechanisms include not only the creation of neutral courts comprising impartial judges—with all inherent institutional protections against external influence and interference—but also distinct modes of legal reasoning. Even when facing situations with different legitimate solutions, judges are expected to invoke only those reasons that are recognized by law.[123] This explains why judges go to great lengths to ensure that legal reasoning with law-making consequences is usually similar to, and continuous with, decisions interpreting and applying law.[124] Even in cases where the reasons for choosing between different possible interpretations are incommensurate, reliance on formal legal reasoning can serve as a distancing device that legitimates court decisions before the relevant community. [125]

It is a common understanding of a shared "story" about the contents and existence of a legal order that makes such a legal order authoritative within a community. Similarly, it is the obeisance to social practices and shared understandings by a legal community, which are in turn in accordance with a more general common understanding of what is legitimate law, that determines what judges can legitimately decide.[126] For courts to operate at all, every agent and organization participating in judicial processes must, in order for such participation to make sense, share in a common legal culture that provides the background for the participants' cognitive frameworks.

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120 Sen, *supra* note 57, at 396. Implicit in this observation is the fact that courts have been adjudicating on an increasing number of matters, as a result of what has been deemed "rights inflation" — *see* Möller, *supra* note 38, at 3-6.

121 Virgilio Afonso da Silva, *Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision*, 31 Oxford J. Legal Stud. 273, 292-93 (2011). It should be also remarked that issues of epistemic competence of the relevant decision-making bodies, amongst other factors, may also come into play.

122 Raz, *supra* note 117, at 368-69.

123 Raz, *supra* note 74, at 200 and 208; Jeremy Waldron, *Representative Lawmaking*, 89 B.U. L. Rev. 335, 336 (2009).

124 Karl Larenz, Methodenlehre Der Rechtswissenchaft [Methodology of Law] 519 (1991); Barry Friedman, *The Politics of Judicial Review*, 84 Tex. L. Rev. 257 (2005).

125 Raz, *supra* note 117, at 369. Concerning the use of various such devices as means to address concerns with the lack of judicial legitimacy and competence to pursue constitutional rights' adjudication, *see* Christopher McCrudden, *The Pluralism of Human Rights' Adjudication,* in Reasoning Rights: Comparative Judicial Engagement 18-27 (Liora Lazarus et al. eds., 2014).

126 Robert Cover, *Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 1 (1982); Gerald Postema, *Implicit Law*, 13 Law & Phil. 361, 369-371 (1994).

The existence of these shared cognitive frameworks usually goes unremarked because it is unremarkable; it is part of what has been called the "tacit dimension"—propositions and opinions shared by a group and deemed so obvious that they are never fully articulated or systematized.[127] In the cognitive setting common to Western legal traditions, decisions are arrived at through deliberation and analogical reasoning, and presented as relatively redundant, self-evident, incremental extensions of available legal materials. Control of whether the relevant parameters of legal reasoning have been complied with in a legal decision is ensured by the interactive nature of law practice: *ex-ante* because cases are brought and argued before courts by lawyers trained and imbued in the spirit and grammar of a specific legal community; and *ex post* through systems of appeal, and the criticism from an interpretative community that recognizes a number of commonly accepted parameters as authoritative for the correctness of interpretation.[128] In this context, extra-legal considerations are, like background principles and values, mediated through the existent institutional setting and a common culture of legal reasoning. Such culture imposes standards—for example, of consistency and coherence with the contents of the relevant statutes and legal precedents—by which the correctness of legal interpretation is to be judged. Judicial decisions are not valid only because they are issued by a judge, but because they are issued by a judge within a specific setting in a duly reasoned manner which is accepted in the context of a specific legal order.[129]

While recourse to certain modes of legal reasoning can be seen as an advantage for courts over other decision-makers when making the type of value choices inherent to rights' adjudication, such an advantage can come with a cost—an increased perception of judicial interference in political processes, and a focus on the lack of (democratic) legitimacy of courts.[130]

One way to address this is to abandon the pretense that legal reasoning about constitutional rights' can lead to a single right solution. Instead, courts should focus on why they have been chosen to deal with conflicts of constitutional rights, and on the powers that such a choice grants them. Prudential reasons—including local and situation specific reasons—should be brought to the fore and given greater prominence. This should create a sense of judicial humility for rights' adjudicators. Striving for reason but recognizing that subjectivity and discretion play their part, courts should reflect on their—and others'—limitations when adjudication constitutional rights' cases. As Isaiah Berlin noted:

> If there is only one solution to the puzzle, then the only problems are firstly how to find it, then how to realize it, and finally how to convert others to the solution by persuasion or by force. But if this is not so […], then the path is open to empiricism, pluralism, toleration, compromise.[131]

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127 Michael Polanyi & Amartya Sen, The Tacit Dimension (2009).

128 Gerald Postema, *"Protestant" Interpretation and Social Practices*, 72 Law & Phil. 283, 310-312 (1987); Loughlin, *supra* note 27, at 178-80.

129 In other words, judicial adjudication is a device giving formal and institutional expression to reasoned argument; *see* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353, 366 (1978).

130 Loughlin, *supra* note 7, at 130 (quoting Koskenniemi, *supra* note 3, at 100).

131 Berlin, *supra* note 19, at 98.

V. Conclusion

If one takes value pluralism seriously, one must acknowledge that an objective and universal order of values underpinning constitutional rights either does not exist or is not accessible. Those few values that are globally and consensually accepted as truly fundamental may still be justifiably called "human rights". Even in the context of universally acknowledged human rights, however, much will remain to be settled through appropriate collective decision-making procedures. While these procedures may not require a single necessary outcome to the balancing of constitutional rights, they are not procedures where values and reasons play no role—on the contrary, these are arenas where "weak" forms of reason prevail and where pluralism can flourish.[132]

Given the lack of access to an objective moral order and the absence of purely objective decision-making procedures, constitutional theory can focus on the institutional context in which decisions between incompatible constitutional rights—or, more precisely, between the values underpinning such rights—must be made. The resolution of social disputes through rights' adjudication, and the protection of certain fundamental values enshrined as judicially enforceable rights, is socially acceptable in the Western world because they build on a long intellectual and practical tradition of natural law and subjective rights. However, constitutional rights provide normative grounds that are too weak to ground a sense of community on their own, and are almost always insufficiently concrete to be fully policy-orienting. From a value pluralist perspective, while buying into the fiction of a single good society may seem to provide a way to avoid the tragedy of incompatible and contested goods, this is ultimately a myth. As none other than Rawls noted:

> there is no social world without loss — that is, no social world that does not exclude some ways of life that realize in special ways certain fundamental values. By virtue of its culture and institutions, any society will prove uncongenial to some ways of life.[133]

A further cost of embracing rights' adjudication without acknowledging value pluralism may well be the judicialization and bureaucratization of politics, and the politicization of law. Ignoring that the content of constitutional rights is ultimately socially constructed allows for their instrumentalization in struggles for power by different groups and bodies who claim to have "right" on their side—and who will usually also claim that those who do not share their conception of the "good" are ignorant, ill-informed or just plain evil. Poorly used, constitutional rights can be tools of social fragmentation.

The benefits and costs of rights' adjudication will ultimately need to be balanced on a case-by-case basis. Rights' adjudication is merely one among a plurality of conflict-solving procedures and institutions through which political and social disputes are addressed. Courts may have a role to play in rights' adjudication, but they also have a responsibility to understand the context in which they operate,

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[132] Raz, *supra* note 95, at 155.
[133] Rawls, *supra* note 2, at 265-66.

the humility to allow for the possibility that some questions are best left to other decision-making bodies, and the wisdom to take (most) rights as legal-political argumentative stepping-stones in the exercise of practical reason.

Constitutional rights are ultimately like water—they can adapt to the institutional context in which they are applied, but they can also erode and sculpt that context. Properly deployed, constitutional rights can be sources of vitality and rejuvenation for the institutional recipients into which they are poured. As such, constitutional theory should pay attention to the specific institutional conditions in which constitutional rights can be appropriately deployed—and try to better understand the local conditions under which recourse to constitutional rights can either enliven political life or risk drowning it instead.

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