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Innocence is Not Enough: The Public Life of Death Row Exonerations[#]

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ABSTRACT

Miscarriages of justice and wrongful convictions are a pervasive reality in America's criminal justice system. In this paper we examine news coverage of miscarriages of justice in the death penalty system and the release of death row inmates to understand what we call the public life of exonerations. We examine the way newspapers tell the story of exonerations and the various tilts and tendencies that characterize their presentations. We focus on the five states which, from 1972-2019, had ten or more exonerations. During that period, they were Florida, Illinois, Texas, Louisiana, and Oklahoma. We conclude that the public discourse surrounding exoneration, while providing evidence of the death penalty system's most consequential flaws, serves as much to preserve that system as to challenge it.

KEYWORDS

Miscarriages of Justice, Exonerations, Death Penalty, News Coverage

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"The only statement I want to make is that I am an innocent man convicted of a crime I did not commit. I have been persecuted for twelve years for something I did not do. From God's dust I came and to dust I will return, so the Earth shall become my throne."

Cameron Todd Willingham, minutes before his execution
February 17, 2004

I. Introduction

Miscarriages of justice and wrongful convictions are a pervasive reality in America's criminal justice system.[1] They undermine a fundamental premise of life in a free society, namely that "every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of his guilt with utmost certainty."[2] Not only are they unjust, wrongful convictions dilute the deterrent effect of criminal punishment.[3]

In this paper we examine news coverage of miscarriages of justice in the death penalty system and the release of death row inmates to try to understand the public life of exonerations. In so doing we contribute to a line of research on the problem of wrongful conviction that extends back to the early twentieth century when Yale Law School professor Edwin Borchard published one of the first books on wrongful conviction, *Convicting the Innocent.*[4] While Borchard documented sixty-five cases in which innocent people were convicted,[5] it is difficult to know with any precision the totality of the issue.[6] However, we do know that many factors contribute to miscarriages of justice, including eyewitness misidentification, police and prosecutorial overzealousness or bad faith, community pressure for conviction, errors in criminal record keeping and false confessions.[7] In all of this, race plays a significant role with racial/ethnic minorities being overrepresented among the wrongfully convicted.[8]

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1 Richard A. Leo, *Rethinking the Study of Miscarriages of Justice: Developing a Criminology of Wrongful Conviction*, 21 J. Contemp. Crim. Just. 201 (2005).

2 *In re* Winship*,* 397 U.S. 358, 364 (1970).

3 Henrik Lando, *Does Wrongful Conviction Lower Deterrence?*, 35 J. Legal Stud. 327 (2006); Nuno Garoupa & Matteo Rizzolli, *Wrongful Convictions Do Lower Deterrence*, 168 J. Institutional & Theoretical Econ. 224 (2012).

4 Edwin M. Borchard & E. Russell Lutz, Convicting the Innocent: Errors of Criminal Justice (1932).

5 D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. Crim. L. & Criminology 761 (2007).

6 Kimberley A. Clow et al., *Public Perception of Wrongful Conviction: Support for Compensation and Apologies*, 75 Alb. L. Rev. 1415 (2012).

7 C. Ronald Huff et al., Convicted but Innocent: Wrongful Conviction and Public Policy (1996); Arye Rattner, *Wrongful Conviction and the Criminal Justice System*, 12 Law & Hum. Behav. 283 (1988).

8 Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523 (2005); Karen F. Parker et al., *Racial Bias and the Conviction of the Innocent*, *in* Wrongly Convicted: When Justice Fails 114 (Saundra Davis Westervelt & John A. Humphrey eds., 2001); Angela Yvonne Davis, Women, Race & Class (1983);

What is true for the entire criminal justice system in general is also true in death cases.[9] The problem of erroneous convictions in such cases has become central to the contemporary abolition movement,[10] and error reduction has been an important, though not uncontested, part of the jurisprudence of capital punishment for almost 50 years.[11] In 1972, the United States Supreme Court held that the arbitrariness and capriciousness of death sentencing rendered it unconstitutional.[12] Four years later, in *Gregg* v. *Georgia,* the Court decided that the death penalty was not *per se* cruel and unusual punishment according to the Eighth Amendment.[13] The Court believed that the reduction in the number of death-eligible crimes would reduce the errors endemic to the capital punishment system.[14] Because the Court found that "death is different,"[15] it mandated what some have called "super due process" to ensure the reliability of death penalty determinations.[16] As Justice Sandra Day O'Connor once noted, "This Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded a process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake."[17]

Scholars estimate that of the 2,600 people currently on death row, approximately 1 in 25, or 104 people, are actually innocent.[18] Incompetent defense

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Campbell Robertson, *A Lynching Memorial Is Opening. The Country Has Never Seen Anything Like It.,* N.Y. Times (Apr. 25, 2018), https://www.nytimes.com/2018/04/25/us/lynching-memorial-alabama.html; *The National Memorial for Peace and Justice*, Equal Justice Initiative, https://museumandmemorial.eji.org/memorial (last visited Jan. 7, 2020).

9 *See* When Law Fails: Making Sense of Miscarriages of Justice (Charles J. Ogletree, Jr. & Austin Sarat eds., 2009).

10 Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. Crim. L. & Criminology 587, 594 (2005).

11 *See* Jordan M. Steiker, *The American Death Penalty: Constitutional Regulation as the Distinctive Feature of American Exceptionalism*, 67 U. Miami L. Rev. 329 (2013); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 Harv. L. Rev. 355 (1995); Jordan S. Rubin, *Justices Weigh Finality, Windfalls in Complex Capital Case (1)*, Bloomberg Law (Dec. 11, 2019, 5:43 PM), https://news.bloomberglaw.com/us-law-week/justices-weigh-whether-new-law-applies-to-old-capital-cases; Daniel Medwed, *Grand Finality*, *in* Final Judgments: The Death Penalty in American Law and Culture 90 (Austin Sarat ed., 2017); Anna Arceneaux, *In America, People on Death Row Can Be Executed While the Supreme Court Reviews Their Cases*, American Civil Liberties Union (Mar. 8, 2019, 12:45 PM), https://www.aclu.org/blog/capital-punishment/america-people-death-row-can-be-executed-while-supreme-court-reviews-their.

12 Furman v. Georgia, 408 U.S. 238 (1972).

13 Gregg v. Georgia, 428 U.S. 153, 188 (1976).

14 Medwed, *supra* note 11.

15 "The penalty of death is different in kind from any other punishment imposed under our system of criminal justice.", Gregg v. Georgia, 428 U.S. 153, 188 (1976) (Stewart, J.).

16 Ronald J. Tabak, *The Egregiously Unfair Implementation of Capital Punishment in the United States: 'Super Due Process' or Super Lack of Due Process?*, 147 Proc. Am. Phil. Soc'y 13 (2003).

17 Eddings v. Oklahoma, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring).

18 *See* Gross et al., *supra* note 8; Andrew Cohen, *Yes, America, We Have Executed an Innocent Man,* The Atlantic (May 14, 2012), https://www.theatlantic.com/national/archive/2012/05/yes-america-we-have-executed-an-innocent-man/257106/.

attorneys, police and prosecutorial misconduct, faulty jury instructions, and faulty forensic science all contribute to the problem of miscarriages of justice in death cases. Craig Haney additionally suggests that the media, which sometimes spreads false information about a particular death case, is also a significant contributor to miscarriages of justice.[19]

Since 1973, 167 people from 28 different states have been exonerated from death row.[20] In other words, for every nine people executed in the United States, one has been freed following discovery of error. Some were freed by DNA testing and others were not.[21] Some received compensation for the time they lost, but most did not. These cases and experiences are both unique and shockingly similar.

Even the discovery of the many factors that can lead to wrongful conviction is often insufficient to provide the legal basis for releasing someone from death row.[22] Jon B. Gould notes that "wrongful convictions are only overturned when there [is] 'hard,' irrefutable evidence that the defendant did not commit a crime."[23] Exoneration requires a reversal of something that was previously thought to be true. Often the same officials who were involved in the original erroneous conviction must come to recognize and accept their error and the convict's innocence.[24]

Increased use of DNA testing has played a key role in uncovering error in murder and other kinds of cases. Such testing was first admitted as evidence in the New York case, *People v. Wesley.*[25] When errors are uncovered and convictions are overturned, with or without the use of DNA, those freed from death row seldom receive any compensation for the injustice done or their time served on death row.[26] Of the 167 death row exoneration cases, only 50 received compensation.[27] This is

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19 Craig Haney, *Exoneration and Wrongful Condemnations: Expanding the Zone of Perceived Injustice in Death Penalty Cases*, 37 Golden Gate U. L. Rev. 131 (2006).

20 *Innocence Database,* Death Penalty Information Center, https://deathpenaltyinfo.org/policy-issues/innocence-database (last visited Jan. 20, 2020).

21 Just over 50% of death row exonerations result from the use of DNA or from some other means of establishing that the exonerees were "factually innocent." In other cases, the evidence obtained after trial showed that the state had not met its burden of proving legal guilt. *Description of Innocence Cases,* Death Penalty Information Center, https://deathpenaltyinfo.org/policy-issues/innocence/description-of-innocence-cases (last visited Mar. 30, 2020).

22 Herrera v. Collins*,* 506 U.S. 390 (1993).

23 Jon B. Gould & Richard A. Leo, *The Path to Exoneration*, 79 Alb. L. Rev. 325 (2016).

24 Carpitcher v. Commonwealth, 641 S.E.2d 486, 492 (Va. 2007).

25 George Bundy Smith & Janet A. Gordon, *The Admission of DNA Evidence in State and Federal Courts*, 65 Fordham L. Rev. 2456 (1997).

26 In the past 10 years, only 6 of 27 exonerees have received compensation. This number comes from our review of available information. *See also* Jean Coleman Blackerby, *Life After Death Row: Preventing Wrongful Capital Convictions and Restoring Innocence After Exoneration*, 56 Vand. L. Rev. 1179 (2003).

27 Exonerees can attempt to receive compensation for their wrongful convictions by one of three methods. The first is via the *Civil Rights Act of* 1987. However, these claims are complicated because they require demonstrating prosecutorial, defense, lab, or police misconduct. *See* Tiffany Charity Merritt, Legal and Extra-Legal Factors That Influence Redress Received by Death Row Exonerees (May 1, 2017) (unpublished M.A. thesis, University of North Carolina at Greensboro (on file with the Walter Clinton Jackson Library, University of North Carolina at Greensboro). The second method exonerees may

in part due to the complexity of the processes for petitioning for compensation and the disparities among state compensation statutes.[28] Of the 50 death row exonerees who have received compensation, the amount they received varied from $29 million after 33 years of wrongful imprisonment[29] to $100, a pair of pants, and a shirt after 18 years of wrongful imprisonment.[30] Those fortunate enough to be exonerated and compensated after a wrongful conviction still must deal with the lasting consequences of that experience.[31]

Exoneration, by definition, is a kind of absolution. The word has Latin origins. "The 'ex' means 'away' or 'from.' And the 'onerate' comes from the Latin word, 'onus'…. In Latin, [onus] literally meant weight … So exonerate means to lift the weight from or to remove the weight of.'"[32] Exoneration is vindication. It is clear, specific, and undeniably good. Exoneration is a statement about truth, about an objective fact.

Nonetheless, according to Marc Bookman, the United States Supreme Court has

> repeatedly declined to hold that the federal Constitution allows for so-called freestanding claims of innocence, that is, the right to be let out of prison simply because you didn't do it, without any other procedural or 'technical' violation of the law. In the United States, the inmate who raises a compelling case of innocence after a constitutionally proper trial may well be doomed.[33]

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use is lobbying their state legislatures for private compensation bills. Here compensation comes directly from the state treasury to the exoneree and the legal obstacles are not as high. The third method of obtaining compensation is through a preexisting state statute that determines what exonerees are awarded after they have been released. For example, Virginia law provides that after a conviction is vacated the maximum compensation award be "90% of the VA per capita personal income—for each year of incarceration." *See* Va. Code Ann. §§ 8.01-195.10-195.13 (West).

28 Only 33 states have such statutes. The remaining 17 do not have established plans for handling providing compensation for people wrongfully convicted of committing a crime.

29 *Peter Limone*, National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3383 (last visited Mar. 30, 2020).

30 *Juan Roberto Melendez*, National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3465 (last visited Mar. 30, 2020).

31 Ronald Keine, *When Justice Fails: Collateral Damage*, 75 Alb. L. Rev. 1501 (2012); Leo, *supra* note 1.

32 Edgar B. Herwick III, *Does 'Exonerate' Mean What We Think It Means?*, WGBH News (Apr. 3, 2019), https://www.wgbh.org/news/national-news/2019/04/03/does-exonerate-mean-what-we-think-it-means. *See also Glossary*, The National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx (last visited Mar. 30, 2020).

33 Marc Bookman, *Does an Innocent Man Have the Right to Be Exonerated?*, The Atlantic (Dec. 6, 2014), https://www.theatlantic.com/national/archive/2014/12/does-an-innocent-man-have-the-right-to-be-exonerated/383343/. *See also* Lara Bazelon, *Scalia's Embarrassing Question*, Slate (Mar. 11, 2015, 9:37 AM), https://slate.com/news-and-politics/2015/03/innocence-is-not-cause-for-exoneration-scalias-embarrassing-question-is-a-scandal-of-injustice.html.

As Justice Scalia once reminded his colleagues, the Court has

> never held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually innocent.' Quite to the contrary, we have repeatedly left that question unresolved, while expressing considerable doubt that any claim based on alleged 'actual innocence is constitutionally cognizable.[34]

Exoneration touches on a central fear regarding the death penalty, namely that the United States has, at some point in history, executed an innocent person. Statistically, the execution of an innocent person seems very likely,[35] but no state has ever admitted to putting an innocent person to death. It is seemingly impossible to actually prove innocence after an execution so instead we are left with those whose narrow escapes we can document.[36]

Exoneration is a story about a past wrong made right, about a death sentence no longer on the table and freedom granted. Because death has been successfully and rightfully avoided, there is a note of safety in the story of an exoneration and the promise of something close to a happy ending. The documentary film *Time Simply Passes,* which focuses on James Richardson, who was convicted of murdering his own children in Florida, offers one example of this pattern.[37]

The opening scenes include sun-soaked, shaky footage, seemingly taken by a family member so overcome with joy that he cannot hold the camera steady. Richardson looks towards the sky, squinting into the light and proclaims "Thank God, I'm free. I don't have to worry about that trouble no more. It's all over," and is then embraced by an unknown man.[38] A news program reports that Richardson, after one day of freedom, has "never looked better" while he strolls barefoot on the beach with the lawyer who freed him.[39]

This is the reassuring picture of the exonerated, a person who has known great suffering but whose innocence now is his greatest possession. The joy of exoneration is so sharply separated from the actual process of his conviction, confinement, and appeals that it feels like a resurrection and the start of a completely different life, a different story, making the earlier suffering feel far away, boxed in, and, most

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34 Corey Adwar, *Justice Scalia Says Executing the Innocent Doesn't Violate the Constitution*, Business Insider (Sept. 4, 2014, 10:00 PM), https://www.businessinsider.com/antonin-scalia-says-executing-the-innocent-is-constitutional-2014-9?r=US&IR=T.

35 *National Academy of Sciences Reports Four Percent of Death Row Inmates Are Innocent*, Innocence Project (Apr. 28, 2014), https://www.innocenceproject.org/national-academy-of-sciences-reports-four-percent-of-death-row-inmates-are-innocent/. *See also* Cohen, *supra* note 18; Tom Jackman, *Essay: The Problem of Innocence in Death Penalty Cases*, Wash. Post (Aug. 28, 2017, 5:16 PM), https://www.washingtonpost.com/news/true-crime/wp/2017/08/28/essay-the-problem-of-innocence-in-death-penalty-cases/.

36 Associated Press, *Judge Denies DNA Testing That Could Exonerate Tennessee Man Executed 13 Years Ago*, WBIR (Nov. 18, 2019, 8:55 AM), http://www.wbir.com/article/news/crime/lawyers-dna-tests-could-exonerate-man-executed-13-years-ago/51-326b056b-2297-461c-a19b-a18bafa5ada0.

37 *Time Simply Passes* (Tanman Films 2015).

38 *Id.*

39 *Id.*

importantly, over. That is how exoneration is meant to feel for the exonerated and be communicated to the public. Richardson is part of the exoneration canon, the value of his life and the potential for its loss now realized in full.

Yet life after exoneration is seldom easy.[40] *Time Simply Passes* complicates the picture of post-exoneration life, showing people discussing Richardson's financial struggles after his release from death row and his fight for compensation from the state which put him on death row. Richardson is taken care of by a white family while he seeks redress from Florida through the Victims of Wrongful Incarceration Act of 2008.[41] Initially, he was denied compensation because he was unable to satisfy the Act's requirement that he provide DNA evidence or some other affirmative proof of innocence.

In 2014, the Florida legislature authorized compensation for Richardson. After final passage of that legislation, as he watched from the gallery, legislators gave him a standing ovation. The documentary offers its viewers reassurance that rebirth is possible after exoneration. But, as Cathy Caruth's writings on traumatic experience and its denial of narrative finality would predict, something still doesn't feel quite right.[42]

Exoneration stories generally cover neither suffering, nor acknowledge the lasting harm done. Instead, they highlight the value of the lives at stake and the grace they earned. This is the story people expect from an exoneration: conviction is horrible and shocking; death row is deeply traumatic; life on the outside is complicated and still painful but unquestionably better. Exonerees are grateful to be alive, and they are alive because the truth that once was obscured is now known.

Nonetheless, there is a lively debate about the significance of false convictions and subsequent exonerations for the legal system. Some seize on the fact that "mistakes were caught before these prisoners were put to death" as "proof that the system works."[43] No matter that many of the exonerated were freed solely because of the hard work of defense attorneys and non-profit groups dedicated to identifying instances of wrongful conviction or the chance discovery of some new evidence. No matter that some of the convictions resulted from police misconduct or false witness testimony. The system is working because, in the end, the state did not kill an innocent person.

Others argue that false convictions and exonerations show that "Our death penalty system has been—by any measure—a failure."[44] As an editorial in the *New York Times* put it, "[E]xonerations are not a sign that the system works."[45]

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40 Saundra D. Westervelt & Kimberly J. Cook, Life After Death Row: Exonerees' Search for Community and Identity (2012)**.** *See also*, Scott Pelley, *Life After Death Row*, CBS News (July 31, 2016), https://www.cbsnews.com/news/60-minutes-life-after-death-row-exoneration-2/.

41 *See* Victims of Wrongful Incarceration Compensation Act, Fla. Stat. §§ 961.01-961.07.

42 Cathy Caruth, Unclaimed Experience: Trauma, Narrative, and History (20th ed. 2016).

43 *Bush Blind to Execution's Dangers*, St. Petersburg Times, Feb. 18, 2000, at A14.

44 Liliana Segura & Jordan Smith, "*There Are Innocent People on Death Row" - Citing Wrongful Convictions, California Governor Halts Executions*, The Intercept (Mar. 13, 2019), https://theintercept.com/2019/03/13/california-death-penalty-moratorium/.

45 *Innocents on Death Row*, N.Y. Times (May 23, 1999), https://www.nytimes.com/1999/05/23/opinion/innocents-on-death-row.html.

> For those who have been wrongfully convicted and sentenced to death, the system is broken. It is not a matter of the 'rotten apples' in the system who have fallen short of their ethical obligations. Rather their cases point to the 'contaminated orchard' where the entire system—from prosecution to incarceration and ultimately to post-exoneration—inflicts trauma, and irreversible damage to them, where the final insult is an inability by anyone to 'own' the state's role in the tragedy.[46]

In what follows we show how the release of innocent people from death row plays out in what we call the public life of exoneration. We examine the way newspapers tell their stories and the various tilts and tendencies that characterize their presentations. While publicized instances of wrongful conviction and exonerations in America date back to 1819,[47] scholarly attention to the way they have been publicized is relatively recent. Available research differs in the approaches used and in the conclusions reached about the impact of news coverage on the public's support for, or belief in the legitimacy of, the death penalty.[48]

In one of the first and most important examples of such attention, Frank Baumgartner and his collaborators conducted a content analysis of coverage of the death penalty in the *New York Times* from 1960 to 2005.[49] That analysis demonstrates substantial changes in the "framing" of the debate about capital punishment. Baumgartner et. al. found that over a period of more than 40 years, the emphasis of the death penalty coverage has shifted from moral and/or constitutional issues to the administration of capital punishment, and since 1993, "attention has increasingly focused on questions relating to the defendants in criminal trials rather than to victims."[50] News coverage has recently been dominated by stories about the fairness of the death penalty, and as the authors document, there has been an increase in "anti-death penalty tone over the last decade."[51] They note that, "the average number of stories an individual exonerated from death row today is likely to get is more than 13 times the number that someone exonerated [before the

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46 @ Saundra D. Westervelt & Kimberly J. Cook, *Framing Innocents: The Wrongly Convicted as Victims of State Harm*, 53 Crime, L. & Soc. Change 259, 274 (2010). *See also* Don Terry, *Survivors Make the Case Against Death Row*, N.Y. Times (Nov. 16, 1998), https://www.nytimes.com/1998/11/16/us/survivors-make-the-case-against-death-row.html; Herbert H. Haines, *Flawed Executions, the Anti-Death Penalty Movement, and the Politics of Capital Punishment*, 39 Soc. Probs. 125 (1992).

47 *See* Stuart Banner, The Death Penalty: An American History 212 (2002).

48 Other scholars have studied the impact of public awareness of miscarriages of justice on public support for capital punishment without examining the news coverage that produced such awareness. *See, e.g.*, James D. Unnever & Francis T. Cullen, *Executing the innocent and support for capital punishment: Implications for public policy,* 4 Criminology & Pub. Pol'y. 3 (2005); Amy L. Anderson et al., *Age, Period, and Cohort Effects on Death Penalty Attitudes in the United States, 1974-2014,* 55 Criminology 833 (2017).

49 Frank R. Baumgartner et al., The Decline of the Death Penalty and the Discovery of Innocence (2008).

50 *Id.* at 127.

51 *Id.* at 121.

1990s] could expect"[52] They conclude that this fact helps explain changes in public attitudes toward capital punishment as well as in the number of death sentences.

Another more limited study, by Laura Rozier, focused on 30 news clips from the Vanderbilt Television News Archives between 1981 and 2014.[53] Like Baumgartner, Rozier found substantial changes in news coverage of capital punishment. DNA was not discussed at all in the 1980s but by the year 2000 it was mentioned in 29% of clips about the death penalty.[54] However, unlike Baumgartner, Rozier observes that the impact of such new coverage depended on *the substance* not just *the fact* of coverage. As she argues, "Individuals are more likely to believe that a person who is exonerated using DNA evidence is innocent than one who is not, even if the criminal justice system was confident enough in both to set them free."[55]

A third study, by University of Cincinnati professor David Niven, examined the way newspapers in the American South covered death row exonerations.[56] He too focused on the substance, not just the fact of coverage. Niven argues that "if the media gloss over the facts of the exoneration story and the larger trend, then the effects of exonerations may be blunted, with the media, in effect, acting to protect the death penalty from popular scrutiny."[57] Niven found that "by a wide margin [media] coverage gives voice to supportive words which portray the exoneration as an isolated mistake, or, perversely, as evidence the system is working."[58] In contrast to Baumgartner, he concludes that newspaper coverage "helped to bolster support for death sentences in the South.[59]

Following Rozier and Niven, we studied the substance of newspapers' coverage of exonerations. Like them we analyzed what news stories said about the exonerations they described. We focused on the five states which, from 1972-2019, had ten or more exonerations. During that period, they were Florida, Illinois, Texas, Louisiana, and Oklahoma.[60] We examined the two largest circulation newspapers in each state.[61] We relied on the Death Penalty Information Center's list of exonerations.[62]

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52 *Id.* at 26.

53 Laura Rozier, *The Media, the Innocent, and the Public: A Nuanced Look at Exonerations and Public Opinion of Capital Punishment* (Apr. 27, 2015) (unpublished B.A. thesis, Weinberg College of Arts and Sciences, Northwestern University) (on file with the Department of Political Science, Weinberg College of Arts and Sciences, Northwestern University).

54 *Id.* at 39.

55 *Id.* at 44.

56 David Niven, *Southern Newspaper Coverage of Exonerations from Death Row*, 11 J. Crim. Just. & Popular Culture 20 (2004).

57 *Id.* at 27.

58 *Id.*

59 *Id.*

60 Since we completed the research for this article, a tenth man has been exonerated in North Carolina.

61 There is no definitive information regarding a ranking of newspaper distribution because such information is made public only for the purposes of advertising, and newspapers must pay to be included. However, we used the SRDS Media Advertising Source and the Gale Directory Of Publications to choose the newspapers with the largest listed distribution numbers in those texts. We did not take into account Sunday distribution numbers or online circulation.

62 *Innocence Database*, Death Penalty Information Center (Mar. 30, 2020), https://deathpenaltyinfo.org/policy-issues/innocence-database.

News coverage of exonerations is, of course, governed by the journalistic conventions of the newspapers which cover them. Those conventions emphasize both the need for independence and balance.[63] Contemporary journalism foregrounds principles of fairness and balance in the service of "objectivity."[64]

Michigan State University professor Frederick Fico observes that "all the codes of ethics of major news organizations and professional associations command fairness," and that "courts in at least 10 states have adopted a 'neutral reportage' privilege in libel actions which protects journalists when they have presented balanced assertions from competing sources in stories about controversy."[65] According to journalistic convention, balance means presenting all sides of an issue, and giving them equal weight.[66] In this effort, journalists mimic the third person voice by effectively becoming a distant observer to the matter being reported.[67]

Our inquiry focuses on the aftermath of capital cases—once they have already been classified as wrongful convictions and the ex-defendant has been exonerated. As we will see, journalistic conventions are very consequential in reporting on such cases.[68] Our database contains 1717 articles which mention a death row exoneration. One thousand and thirty-six of those articles contain some explanation of, or argument about, why someone was released from death row. In the latter group, we analyzed whether the explanations offered referred to DNA or police misconduct, whether they included a substantial case history, whether they mentioned the granting of, or ongoing fight for, compensation, whether they included any sort of follow-up with the exoneree, whether they contained any mention of a state apology, whether a pardon was mentioned, and mentions of blame or fault, systemic failure, reasons for compensation or lack thereof, the necessity for apology, questioning of innocence, and of the word justice/injustice or luck and misfortune, as well as their use (or lack thereof) of the word exoneration.

In what follows, we ask whether coverage of exoneration explains how a miscarriage of justice occurred. Why? Has it happened to other people, past or present? Is the death of an innocent person an acceptable risk? We conclude that the public discourse surrounding exoneration, while providing evidence of the death

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63 Christopher B. Daly, Covering America: A Narrative History of a Nation's Journalism 154 (2012). *See also* David T. Z. Mindich, Just the Facts: How "Objectivity" Came to Define American Journalism (1998).

64 Joel Kaplan, *Objectivity and Balance: Today's Best Practices in American Journalism*, https://publicmediaintegrity.org/wp-content/uploads/cpb_BestPractices_Kaplan.pdf (last visited Mar. 30, 2020).

65 Frederick Fico et al., Fairness and Defamation in the Reporting of Local Issues (AEJMC 1997 Conference Papers) (on file with Michigan State University).

66 Michael Schudson, *The Objectivity Norm in American Journalism*, 2 Journalism 149 (2001).

67 Robert M. Entman, Democracy Without Citizens: Media and the Decay of American Politics (1989); Declan Fahy, *Objectivity, False Balance, and Advocacy in News Coverage of Climate Change*, Oxford Research Encyclopedia of Climate Science (Mar. 29, 2017), https://oxfordre.com/climatescience/view/10.1093/acrefore/9780190228620.001.0001/acrefore-9780190228620-e-345; D. J. Koehler, *Can Journalistic 'False Balance' Distort Public Perception of Consensus in Expert Opinion?*, 22 J. Experimental Psychol.: Applied 24 (2016).

68 Rob Warden, *The Revolutionary Role of Journalism in Identifying and Rectifying Wrongful Convictions*, 70 UMKC L. Rev. 803 (2002).

penalty system's most consequential flaws, serves as much to preserve that system as to challenge it.[69]

II. The Language of Exoneration

Table 1. Use of the word "Exoneration".

	Use of word "Exoneration"
Yes	426 (24.8%)
No	1,291 (75.2%)
Total	1,717

Exoneration is the word used by every organization working on the problem of wrongful convictions and by the DPIC in its list of people released from death row. This word, as we noted above, suggests that those people no longer carry the burden of guilt, whether factual or legal. Yet one of the most striking facts of newspaper coverage of cases in which death row inmates are freed after the discovery of a miscarriage of justice is the infrequency with which it uses the word exoneration. Only 24.8% of newspaper articles that we examined mention that word or a derivative thereof.[70]

One example of the avoidance of the language of exoneration occurs in news coverage of the Florida case of Joseph Green Brown. He was convicted of the 1973 rape and murder of Earlene Treva Barksdale, the wife of a prominent Tampa attorney. Green, also known by his Swahili name "Shabaka," was born in Charleston, South Carolina, but moved to Florida in search of work in the early 1970s. There he met Robert Floyd, and the two ultimately carried out a string of crimes, including robbing a Holiday Inn. The same day as that robbery, Barksdale was murdered in the back of her clothing store, from which $100 was also found to be missing. The similarities between the two crimes, committed within hours of each other, and statements made by Floyd implicating Brown after his arrest for the Holiday Inn robbery led police to arrest the twenty-four-year-old.

Brown's 1974 trial, in front of an all-white jury, took just five days. He was convicted of first-degree murder, rape, and robbery and sentenced to death. The prosecution's star witness was Floyd, who had accepted a plea deal in exchange for his testimony. Yet the prosecution denied that such a deal had been made in closing statements during the trial. Moreover, the prosecution also falsified ballistics evidence, claiming that Brown's .38 caliber handgun was the murder weapon, despite an FBI analysis that had eliminated that possibility.

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69 Richard Nobles & David Schiff, Understanding Miscarriages of Justice: Law, the Media, and the Inevitability of Crisis (2000).

70 Newspapers sometimes use the word, without applying it to a specific case, when they name an organization (National Registry of Exonerations etc.) or refer to a list of the states' "exonerees." In addition, there are other words and phrases which can have the same effect as exoneration, "innocence" or variants thereof being the obvious example. Exoneration is not a principally legal term (some states have introduced exoneration into the legal lexicon of compensation, but it remains largely outside of that world).

At one point during his long imprisonment, Brown came within 24 hours of execution.[71] His conviction ultimately was overturned on appeal after the court found that the prosecution knowingly allowed (and encouraged) Floyd to provide false testimony regarding his plea deal. After Brown's conviction was overturned, the prosecution decided they did not have enough evidence to retry Brown and he was released from prison. Brown maintained his innocence the entire time.

Yet the *Tampa Bay Times* coverage of Brown's release describes him as "a convicted murderer imprisoned on death row since 1974." The paper said that Brown was "freed because Hillsborough County prosecutors, ordered to retry the case, decided they lacked the evidence to prove the original murder charge."[72] In fact, Brown at this point in his life was not a convict at all. He was an innocent man in the eyes of the law, but the coverage seems to tell the story of guilt, "a convicted murderer" just walking away from punishment, free and easy. The newspaper avoids the use of the term exonerated to refer to Brown while suggesting instead that he escaped punishment on a legal technicality.[73]

The *Florida Sun-Sentinel's* coverage of Brown's release from death row also avoids referring to him as exonerated. Its headline–"*Man Free After Death Row Stay*"–with its reference to a "stay" makes death row seem like a bed and breakfast where many choose to spend some years.[74] The article that follows the headline is remarkably cavalier regarding Brown's near-death: "A death-row inmate who came within a day of being electrocuted is a free man today. Joseph Green Brown had spent 13 years under the death sentence for the 1973 robbery, rape and murder of Earlene Evans Barksdale."[75] Here again, the newspaper makes no mention of actual innocence, or exoneration. Brown remains an ex-inmate, permanently marked by his overturned conviction.

Michael Toney was convicted for the 1985 bombing-murder of three people at a trailer park in Lake Worth, Texas.[76] At first, the police could not identify a motive for the murder, and they eventually became convinced that the bomb was intended for a neighbor who was selling weapons illegally. The case went cold for ten years until the federal government's Bureau of Alcohol, Tobacco, and Firearms reopened investigations into all unsolved domestic bombings. During that investigation an inmate then informed police that he had heard Michael Toney confess to the bombing. He recanted this statement before Toney's trial.

However, police convinced Toney's ex-wife to say that she remembered being near the site of the bombing on the night of the murders, along with Toney's then-best-friend, Christopher Meeks. She also claimed that Toney had carried a briefcase similar to the one used in the bombing. Meeks corroborated her testimony, and Toney was convicted and sentenced to death, despite the complete lack of a motive or any physical

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71 The reported number of hours varies. In some cases it is as low as fifteen.

72 Bob C. Port, *Charges Dropped for Death Row Prisoner,* St. Petersburg Times, Mar. 7, 1987, at 7B.

73 John Davison Lawson, *Technicalities in Procedure Civil and Criminal*, 1 J. Crim. L. & Criminology 63 (1910).

74 The Associated Press, *Man Free after Death Row Stay*, Fla. Sun-Sentinel, Mar. 7, 1987, at 23A.

75 *Id.*

76 Alexandra Gross, *Michael Toney*, National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3692 (last visited Feb. 13, 2020).

evidence. His initial appeals were denied, but ultimately his lawyers discovered that police had fed information to Meeks and the former Mrs. Toney and withheld documents contradicting their testimony. They were able to persuade a judge to throw out his conviction, after which the prosecutor's office decided not to retry the case.

In Toney's case, no one discovered new evidence of innocence. There was simply never any real evidence of guilt. Testimony materialized and disappeared quickly, but, in the meantime, a man was sentenced to death. This is not the kind of case which typically generates much news coverage. There was no DNA evidence, no tortured false confession, and the man in question had already served time for other crimes. In this case many people, specifically the police, behaved badly, and news coverage of Toney's case struggled to come to terms with this reality.

Throughout his time on death row, the *Houston Chronicle* portrayed Toney as desperate to draw attention to his case and as eventually getting his way. One article's opening passage is followed by the revelation of the release of "14 documents…that cast doubt on the testimony of two key witnesses against him."[77] In addition, the article never mentions either exoneration or innocence (beyond noting Toney's own claim). It concludes by saying that the prosecutor's office intends to retry the case "but has not made a final decision."[78] In fact, the case was never retried, because there was no evidence of Toney's guilt.

The *Dallas Morning News'* sole article on Toney also does not mention actual innocence.[79] Following the conventions of balanced reporting, the article quotes the defense and then the prosecution. The prosecutor admits that he should have turned over the exonerating evidence, but still believes that Toney is guilty.[80] The newspaper reported that Toney's ex-wife stood by her testimony but also now admits to also memory-loss caused by toxic exposure during her military service in the Persian Gulf War. [81]

Newspaper coverage of other cases uses the language of exoneration, but in a way that casts doubt on it. It does so by using qualifiers, like "could have,"[82] "might have"[83] or "potentially"[84] to describe exonerations. And some articles were more direct in calling attention to expressions of doubt about innocence. Thus coverage of Curtis McCarty's release from Oklahoma's death row refers to him only as a "man formerly on death row." It mentions that in McCarty's case "authorities don't consider him to be exonerated, despite District Judge Twyla Mason Gray's decision to dismiss the murder charge against him."[85]

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77 *Id.*

78 *Id.*

79 *Id.*

80 *Id.*

81 Doug J. Swanson, *1985 Murder Case Tarrant Withheld Evidence, DA Says Documents Favorable to Death Row Inmate; Retrial Expected in Bomb Slayings*, Dall. Morning News, Oct. 3, 2008, at 1B.

82 Ted Gregory, *Dupage 7 Hearing Fuels War of Lawyers*, Chi. Trib. (Nov. 10, 1997), https://www.chicagotribune.com/news/ct-xpm-1997-11-10-9711100213-story.html.

83 Ray Robinson, *Judges Differ on Evidence in Bowen Case,* Oklahoman (Jan. 28, 1986), https://oklahoman.com/article/2135814/judges-differ-on-evidence-in-bowen-case.

84 Griff Palmer, *Stay Denied, But Bowen Still in Prison*, Oklahoman (Jan. 24, 1986), https://oklahoman.com/article/2135320/stay-denied-but-bowen-still-in-prison?.

85 Jay F. Marks, *Ex-Inmate Suing City, Chemist*, Oklahoman (Dec. 27, 2007), https://oklahoman.com/article/3185641/ex-inmate-suing-city-chemist.

III. Innocence: An Unsettled Question

Table 2. Questioning the Exoneree's Innocence[86]

	Innocence Questioned
Yes	235 (22.7%)
No	801 (77.3%)
Total	1,036

If refusing to actually use the word exoneration, or softening its effect with various qualifiers, expresses ambivalence about the innocence of those released from death row, then the outright questioning of innocence is the next step towards undermining the impact of such exonerations.[87] While legally those released from death row are innocent of the crime for which they had been convicted,[88] as Table 2 shows, 22.7% of the articles we examined contain some statement or statements questioning the exoneree's innocence. While clearly a minority of the news stories, that nearly a quarter do so represents a significant fact of the public life of exoneration.

In the instances when news stories question a death row exoneree's innocence, most of the time (68.3%) they do so by quoting a state official, namely a policeman, a prosecutor, a politician, or some other state actor (see Table 3). As a result, state actors play a key role in sowing public doubt about the innocence of those released from death row. Officials who were principally involved in securing convictions in death cases become central narrators when those convictions come undone.

In what follows we offer some examples of the ways news stories question innocence. For example, take the 1963 case of Freddie Pitts and Wilbert Lee.[89] Their court-appointed attorney advised both men to plead guilty to the murders of two white gas station attendants, Grover Floyd Jr. and Jessie L. Burkett. Although there was no plea agreement with the prosecution, they hoped to avoid the death penalty. Nonetheless, an all-white jury sentenced both men to death.

The racial dimensions of the case were heightened by witness reports that Lee, who was indeed at the gas station earlier in the day, and some female acquaintances had argued with its owner after the women were denied use of a whites-only bathroom. The police and polygraph examiner, who had been forced out of the Air Force for eliciting a false confession in another case, questioned a witness,

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86 In this and subsequent tables we focus on the subset of articles which contain some explanation or argument about why someone was released from death row.

87 *See* Michael Leo Owens & Elizabeth Griffiths, *Uneven Reparations for Wrongful Convictions: Examining the State Policies of Statutory Compensation Legislation*, 75 Alb. L. Rev. 1283, 1317 (2011).

88 Just over 50% of death row exonerations result from the use of DNA or from some other means of establishing that the exonerees were "factually innocent." In other cases, the evidence obtained after trial showed that the state had not met its burden of proving legal guilt. *See Description of Innocence Cases,* Death Penalty Information Center, https://deathpenaltyinfo.org/policy-issues/innocence/description-of-innocence-cases (last visited Mar. 30, 2020).

89 *Freddie Pitts*, National Registry of Exonerations\: Exonerations Before 1989, https://www.law.umich.edu/special/exoneration/Pages/casedetailpre1989.aspx?caseid=255 (last visited Jan. 26, 2020).

Table 3. Who Questions Innocence?[90]

Speaker	Percentage of Times Innocence is Questioned
State	177 (68.3%)
Advocate for Victim	45 (17.5%)
Juror	7 (2.7%)
Citizen	26 (10%)
Newspaper	4 (1.5%)
Total of Speakers who Questioned Innocence	259

nineteen-year-old Willie Mae Lee (no relation), for four days during which she denied any knowledge of the crime. However, after the discovery of Burkett and Floyd's bodies, she admitted to being an accomplice to the crime and implicated Lee and another man—Lambson Smith. When Smith's alibi proved unshakeable, she changed her story and implicated Freddie Pitts. The change in Lee's story was not revealed by the prosecution until well after the conviction of Pitts and Lee.

Both Pitts and Lee confessed under pressure, but soon recanted their confessions. Three years after their convictions, Curtis Adams Jr. confessed to the Burkett and Floyd murders. In 1968 Willie Mae Lee recanted her testimony. However, Pitts and Lee were not released until 1975.

Twenty-three years later they received $500,000 each as compensation for their erroneous convictions.[91] At that time, newspapers quoted Florida Rep. Jamey Westbrook who declared, "I think Mr. Pitts and Mr. Lee are guilty - there is no doubt about it."[92] This is a concrete example of the directness with which news accounts sow doubt about an exoneree's innocence

In 2011, the state of Texas refused to compensate Clarence Brandley[93] for his wrongful conviction and death sentence.[94] Thirty-one years earlier, Brandley, while working as a janitor at a high school in Conroe, Texas, discovered the body of Cheryl Dee Ferguson in a loft above the school's auditorium. She had been raped and strangled. Brandley was with another janitor, Henry Peace, at the time. During his investigation of the crime, Texas Ranger Wesley Styles is reported to have said to the two men: "One of you is going to have to hang for this" and, turning to Brandley, added, "Since you're the n....r, you're elected."[95]

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90 The total here is larger than the 235 articles in which innocence is questioned because those articles may contain more than one instance in which that occurs.

91 John Kennedy, *Pardoned Pair Lobby State for Their Cause: They Meet Legislators, Seeking Compensation*, Fla. Sun-Sentinel, Apr. 15, 1998, at 10B. *See also*, *Judge Okays $1-Million Award to Men,* St. Petersburg Times, May 23, 1998, at 1B.

92 Lucy Morgan, *After 22 Years, Bill Passes on Claim of Ex-Death Row Inmates*, St. Petersburg Times, May 1, 1998, at 1B, 4B.

93 Alexandra Gross, *Clarence Brandley*, National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3044 (last visited Jan. 26, 2020).

94 Keri Blakinger, *Wrongfully Convicted Ex-Death Row Inmate Clarence Brandley Dies, Months After DA Reopens Case*, Hous. Chron. (Sept. 12, 2018), https://www.chron.com/news/houston-texas/article/Death-row-exoneree-Clarnece-Brandley-dies-months-13220646.php.

95 *Id.*

The other, all white, janitors at the school said that they had seen Brandley follow Ferguson to the loft. Semen recovered from her body was destroyed under suspicious circumstances, and no physical evidence was introduced at trial. Brandley's first trial resulted in a hung jury and a mistrial. During his retrial, in front of a second all-white jury, the prosecutor accused Brandley of being a necrophiliac. This time he was convicted and sentenced to death.

Less than a year after Brandley's conviction, his lawyers found out that the state had destroyed multiple pieces of potentially exculpatory evidence. It included the semen, Caucasian pubic hairs which matched neither the victim nor Brandley, and photographs which showed that Brandley was not wearing a belt on the day of the crime, which the prosecution had claimed was the murder weapon. Brandley came within six days of execution but was granted a stay because someone else confessed to Ferguson's murder. In addition, another janitor, John Sessum, recanted his statement implicating Brandley and instead said that another janitor, Gary Acreman, had committed the crime. Two other people claimed they had heard Acreman confess that he murdered Ferguson. In 1987 Brandley was granted a new trial, after which the prosecution dropped all charges against him.

News reports highlighted continuing doubts about Brandley's innocence. A story in the *Dallas Morning News* quoted one of the prosecutors in his case:

> In the motion, Mr. Speers [a district attorney tasked with the Brandley case] argued that 'neither the facts, in any version, nor the law support the conclusion that Clarence Brandley was denied a fair trial. Clarence Brandley is guilty of this heinous crime, and nothing in this court's opinion even suggests that it believes otherwise.'[96]

The article reports that the prosecution "conceded that it would be virtually impossible to retry Mr. Brandley because most of the physical evidence is missing and because key witnesses have recanted testimony."[97] It concludes that Brandley's release will mean that a "vicious killer will walk free."[98] Through this lens, Brandley has been released, but he is not exonerated.[99]

In the public life of exoneration, victims' families also play a role in questioning the innocence of those released from death row. For those families, exoneration takes away whatever comfort is provided by the conviction and sentencing of someone they believe to be responsible for their loved one's death. It is not surprising that some of them resist this conclusion, even as the evidence of the miscarriage of justice piles up in front of them.

The role of victim families is highlighted in news coverage of Rolando Cruz's case, one of the best-known exoneration cases.[100] Cruz was convicted of the Jeanine Nicarico's murder in 1983 and was exonerated in 1995. Yet the victim's parents of

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96 The Associated Press, *DA Files Appeal in Brandley Case: Motion Seeks to Block Inmate's Release,* Dall. Morning News, Dec. 29, 1989, at 14A.

97 *Id.*

98 *Id.*

99 *Id.*

100 Center on Wrongful Convictions, *Rolando Cruz*, National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3140 (last visited Jan. 26, 2020).

the victim remained so convinced of Cruz's guilt that they helped defend police officers and prosecutors who were indicted for "conspiring to deny justice" to Cruz in a lawsuit following his exoneration.[101]

The Nicaricos continued to believe in Cruz's guilt even after another man, Brian Dugan, confessed to the crime, and after recanted testimony and DNA evidence in the Cruz case became widely known. As the *Chicago Sun-Times* noted, "[The Nicaricos] also say they now accept that another man, Brian Dugan, was involved – as Dugan has reportedly confessed. But the Nicarico's say they believe Dugan acted with other defendants, even though a state police probe could find no link between them."[102]

The inclusion of these kinds of statements in press coverage of exonerations means that instead of a celebration of innocence, that coverage feels like an unending tragedy for a suffering family. It gestures to the idea that there is a real victim, a real innocent, who it is not the exonerated. In this sense, the rhetorical patterns of the criminal justice system are reaffirmed and the harm done to exonerees by the state is minimized. When news stories question their innocence, exonerees are treated as if they were not a victim at all or as being less important than some other, more legitimate, victim.

IV. What Difference Does DNA Make?

Table 4. Questioning Innocence in DNA Exonerations

Innocence Questioned	
DNA Case	41 (17.5%)
Non-DNA Case	194 (82.5%)
Total Number of Articles in Which Innocence is Questioned	235

Table 5. Who Questions Innocence?

Speakers Questioning Innocence	**DNA Cases**	**Non-DNA Cases**
State	37 (90.4%)	129 (66.5%)
Advocate of Victim	2 (4.8%)	32 (16.5%)
Juror	1 (2.4%)	6 (3.1%)
Citizen	1 (2.4%)	23 (11.8%)
Newspaper	0 (0.0%)	4 (2.1%)
Total Number of Speakers Questioning Innocence	41	194

DNA is commonly thought to have been a difference maker in the national debate about capital punishment and in propelling the so called "new abolitionism," [103] which focuses on the imperfections of the death penalty system rather than on

[101] Thomas Frisbie, *Nicaricos Keep up Courtroom Vigil. Couple Defends Indicted Cops, Ex-Prosecutors*. Chi. Sun-Times, Jan. 26, 1997, at 24.

[102] *Id.*

[103] *See* Gould, *supra* note 23.

its moral deficiencies.[104] DNA is supposed to be able to tell us who was where, and who did what, and has revealed that many of the people on death row did not do what the state said they did.[105] The very character of exoneration has been shaped by DNA. Some compensation statutes require that in order to qualify for compensation, the exoneration must have involved DNA evidence of some kind.

As Table 4 and 5 reveal, in a number of cases involving DNA, state actors continue to question innocence. They play a more prominent role in doing so in DNA cases than in exonerations where DNA played no role.

This questioning of innocence in DNA cases which result in exonerations is highlighted in the case of Robert Lee Miller who spent almost eleven years on death row in Oklahoma, convicted of the rape and murder of two elderly women. His conviction rested largely on forensic analysis showing that semen found at the scene matched Miller's blood type. However, DNA testing of that same sample later proved the semen belonged to an already-convicted rapist, Ronnie C. Lott, and not to Miller. As a result, Miller's conviction was overturned, and he was freed from death row.

However, as an article in the *Daily Oklahoman* reveals, prosecutors continued to insist that Miller was somehow involved in the crimes— "'The DNA in the body fluids found on the bed ruled out that he (Miller) was the rapist,' District Attorney Robert Macy said. 'Yet we believe he was there.'"[106] Statements reported by the *Tulsa World* are even more jarring: "'It doesn't prove any innocent man was convicted,' Macy argued. 'All the evidence on which we convicted with is still valid.'"[107]

At the time these statements were made, Lott had already been sentenced to twenty-five years for rapes of other elderly women which took place twenty blocks away from the scenes of Miller's supposed crimes. He had confessed and made no mention of a partner. Miller was an unquestionably innocent man, and yet his innocence was questioned repeatedly.

Another example of how little impact DNA can have on the trajectory of news coverage of exonerations is provided by Rudolph Holton's release from death row. Holton had an extensive criminal record, including convictions for armed robbery before he was sentenced to death in 1986 for murdering a seventeen-year-old prostitute in Tampa, Florida. He spent 16 years on death row for the crime before DNA proved that a hair found in the victim's mouth did not in fact match Holton's DNA.

A *Tampa Bay Times* article about Holton case quotes a member of the parole board who referred to DNA evidence as "a technicality," which "doesn't change what happened."[108] In a sense, he was correct. It did not change what had happened. Rudolph Holton was not, and never had been, actually guilty of the crime for which he was sent to death row.[109]

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104 *Id.*

105 *Id.*

106 Diana Baldwin, *Macy Investigating Man Freed in Murder*, Oklahoman (Nov. 10, 1999), https://oklahoman.com/article/2674426/macy-investigating-man-freed-in-murder.

107 The Associated Press, *DNA Evidence Clears Client, Lawyer Says*, Tulsa World, Jan. 24, 1995, at N10.

108 Shannon Colavecchio-Van Sickler, *Complicated Story Cuts an Early Release Short*, Tampa Bay Times (Jan. 20, 2006), https://www.tampabay.com/archive/2006/01/20/complicated-story-cuts-an-early-release-short/.

109 Wire Reports, *Digest*, South Fla. Sun-Sentinel, Nov. 15, 2006 at 7B.

Damon Thibodeaux[110] was convicted of murdering fourteen-year-old Crystal (or Chrystal) Champagne, his step-cousin, in 1997, well-after DNA technology was widely available. After Champagne's partially-nude body was discovered, police interrogated Thibodeaux for nine hours during which he confessed. Yet there was no physical evidence tying him to the crime and the defendant recanted his confession as soon as he was allowed to eat and rest. Eventually, another man's DNA was discovered on the wire used to strangle Champagne and Thibodeaux was released. However, news coverage highlighted the District Attorney's continuing contention that, "Damon Thibodeaux cannot be excluded as a suspect."[111] Even where DNA evidence leads to exonerations such statements most often go unchallenged in press coverage.

V. Continuing Adversariness

Given the conventions of modern journalism, it is not surprising that news coverage of exoneration is characterized by the continuing of an adversarial structure between the state and the exonerated. In this structure, the defense and the prosecution have very different relationships to time. Exoneration is a past tense designation. The defense focuses on a truth it claims to have always known, that the convicted person was truly innocent. The state sees exoneration as, at best, about discovery of things that could not have been known in the past, circumstances that changed, facts that are now known but could not have been known before.

The adversarial structure of exoneration's news coverage is exemplified in the coverage of the Gabriel Solache case.[112] Solache was convicted of murdering of Mariano and Jacinta Soto and kidnapping their two young children in Illinois. At the time, Solache, and nine others, lived with Adriana Meija, who left home on the day of the murder and returned with two children who were later identified as the kidnapped Sotos. After seeing a photo of the older boy on the news, her family pressured her to go to the police. Solache and Meija's husband accompanied Adriana to the police station. After a grueling interrogation, all of them confessed to the murders. However, suspicion ultimately focused on Adriana. Her husband was released, but Solache and another man were tried, convicted and sentenced.

In news coverage of Solache's and Reyes' release from death row, "First Assistant State's Attorney Eric Sussman said prosecutors still strongly believe Gabriel Solache and Arturo Reyes are guilty of the 1998 fatal stabbing of a couple in their Bucktown neighborhood home."[113] In contrast, the defense insisted: "Now

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110 Alexandra Gross, *Damon Thibodeaux*, National Registry of Exonerations (Sept. 28, 2012), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4004.

111 John Simerman, *Paying the Price: Former Convicts Facing Pushback From State Over Innocence Compensation*, New Orleans Advoc., May 29, 2016, at 1A.

112 Maurice Possley, *Gabriel Solache*, National Registry of Exonerations (Jan. 3, 2018), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5252.

113 Megan Crepeau, *2 Jailed in '98 Murders See Charges Dropped: State Cites Tainted Ex-Cop's Role in Confessions*, Chi. Trib. (Dec. 22, 2017), http://digitaledition.chicagotribune.com/tribune/article_popover.aspx?guid=5f6d1b27-0867-475c-95cd-ed0553f436da.

we have a judicial pronouncement of what we knew all along: Detective Guevara is a liar, he should not be believed and any case that rests upon his testimony should be thrown out."[114] In the news reports, the statements of prosecution and defense run in parallel. News coverage of exoneration conveys the continuing life of an adversarial understanding of facts and events and a continuing re-litigation of the story.

VI. Attributing Blame for Miscarriages of Justice

Table 6. Attributing Blame for the Wrongful Convictions

	Attribute Blame
Yes	334 (32.2%)
No	702 (67.8%)

As Table 6 reveals, in only one third of news stories about exoneration is blame attributed for the erroneous conviction. It often is difficult to point to a singular person, or department, more difficult perhaps to point to a rule or policy, and perhaps even more difficult to identify something that is fundamentally structurally wrong. In the absence of such attributions of blame, news coverage suggests that false convictions are, to borrow an idea from Judith Shklar, "misfortunes," accidents for which no one can or should be held accountable, rather than "injustices."[115]

Table 7. Who Is Blamed for the Wrongful Conviction?[116]

	Blamed
Individual Actor	221 (59.4%)
The State	137 (36.8%)
The Exoneree	1 (3.8%)
Total	372

When someone or something is blamed, blame is more often placed on an individual official within the criminal justice system than on the system itself. (See Table 7) Blaming "the state" in the general sense is as much a cry into the void, an expression of exasperation, as it is a genuine placement of blame.

Not surprisingly, exonerees or their advocates are most likely to point an accusing finger. (See Table 8) While police, prosecutors and other state officials are quoted more often than any other speakers in articles about exoneration, they were much less likely than those who have suffered a miscarriage of justice to find fault.

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114 *Id.*

115 *See* Judith N. Shklar, The Faces of Injustice (1990).

116 The total number of people blamed is 372. The number of articles in which someone is blamed is 334 because within a single article there may be multiple instances of blame.

Table 8. Who Attributes Blame?

Speakers doing the Blaming	
State	51 (13.7%)
Advocate of Victim	4 (1.1%)
Juror	1 (0.3%)
Citizen	37 (9.9%)
Newspaper Reporter	134 (36%)
Exoneree or His/Her Advocate	145 (39%)
Total Number of Speakers Attributing Blame	372

Anthony Graves represents a typical case in which blame appears in news coverage of exonerations. Graves, the 138th person exonerated from death row,[117] was arrested when he was twenty-six years old for murdering a family of six people in Somerville, Texas. The district attorney's office offered no physical evidence or even a motive for the crime. Graves was convicted solely on the testimony of Robert Carter, who would himself later confess to the crime. Graves was on death row for 12 years until his conviction was overturned in 2006. However, the state continued to question his innocence and his release did not occur until 2010.[118]

In news coverage, Charles Sebesta, the prosecutor in the case, bears the brunt of the blame for Graves' conviction. Stories refer to him to as "obsessed with death,"[119] "scheming,"[120] "the man who almost single-handedly forced the Graves case through the courts,"[121] and "rogue."[122] Sebesta did ultimately pay a price for his behavior in the Graves case (among others). He was disbarred but not prosecuted for his crime.[123] However, Sebesta was a creature of a system, not an aberrational, exceptional evil.[124] Nevertheless, news stories make no statements about the systemic issues that allowed or perhaps encouraged his behavior.[125]

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117 Anthony Charles Graves, Infinite Hope: How Wrongful Conviction, Solitary Confinement, and 12 Years on Death Row Failed to Kill My Soul (2018).

118 Jon Schuppe, *How Anthony Graves Went from Death Row to Overseeing the Houston Crime Lab*, NBC News (June 27, 2015), https://www.nbcnews.com/news/us-news/how-anthony-graves-went-death-row-overseeing-his-local-crime-n381891.

119 The Editorial Board, *Obsessed with Death*, Dall. Morning News, Jan. 30, 2011, at P02.

120 The Editorial Board, *Life vs. Death*, Dall. Morning News, Oct. 10, 2011, at A12.

121 The Editorial Board, *An IOU on Justice*, Dall. Morning News, May 3, 2011, at A18.

122 White Mckinney, *State Bar Investigation into Death Penalty Case Is a Conflict of Interest*, Dall. Morning News, July 14, 2014.

123 Amanda Holpuch, *Texas Prosecutor Officially Disbarred for Sending Innocent Man to Death Row,* Guardian (Feb. 9, 2016), https://www.theguardian.com/us-news/2016/feb/09/texas-prosecutor-charles-sebesta-disbarred-anthony-graves-innocent-death-row.

124 For an analysis of the systemic nature of prosecutorial misconduct in Texas death cases, *see* Guy Goldberg & Gena Bunn, *Balancing Fairness & Finality: A Comprehensive Review of the Texas Death Penalty*, 5 Tex. Rev. L & Pol. 49, 109 (2000).

125 Brian Rogers, *Freed Death Row Inmate Goes After His Prosecutor Wrongfully Convicted Texan, Lawmakers Urge State Bar to Take Action Against Ex-DA*, Hous. Chron. (Jan. 21, 2014), https://www.houstonchronicle.com/news/houston-texas/houston/article/Freed-death-row-inmate-takes-action-against-5160551.php.

Frank Lee Smith died of cancer while on Florida's Death Row, but, on December 15, 2000, he was posthumously exonerated by DNA which conclusively excluded him from guilt.[126] Smith had been convicted of a 1985 home invasion, rape and murder of an eight-year-old girl in Broward County, Florida.[127] Witnesses, a neighbor and the victim's mother, said they saw an unidentified black man, approximately six feet tall, around thirty years old, near the scene of the crime. Smith was arrested based on a composite sketch from the description that they provided.

During the appeals process, one witness recanted her identification of Smith, and Smith's defense team requested DNA testing of semen found on the victim. However, Smith died before those requests were granted. However, his case prompted Governor Jeb Bush to appoint a special prosecutor specifically to look into what went wrong. Newspapers blamed Captain Richard Scheff who was accused of lying to convict Smith.[128] However, the special prosecutor who investigated Scheff decided that there was insufficient evidence to show he lied.[129]

In its coverage the *Tampa Bay Times* characterized the Smith case as an example of systemic failure rather than individual fault. Pulitzer Prize winning journalist Sydney P. Freedberg flatly notes that, "they got it all wrong. Florida locked up the wrong man for 14 years and left the real killer free - to commit other grievous crimes."[130] An editorial in the *Tampa Bay Times* remarks, "It's bad enough when the system sends an innocent man to prison by accident. It's intolerable if it does so by design."[131] It goes on to say that, "the advent of DNA testing has shown how fallible the system can be. Now the challenge is to make it better."[132] The *Sun-Sentinel* reported that "Smith's case, opponents of the death penalty say, underscores the flaws in the system that may lead to the execution of the innocent."[133] Such an attribution offers no insight into what about the "system" needs change. In Smith's case blame is placed on no one and nothing in particular.

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126 *Glossary*, National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx (last visited Mar. 30, 2020).

127 *Frankie Lee Smith*, National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3644 (last visited Jan. 18, 2020).

128 *See, e.g.*, Ardy Friedberg, *Sheriff Supports Inquiry - Captain Is Accused of Lying in Testimony*, Fla. Sun Sentinel, Mar. 2, 2001, at 1B; John Holland & Shannon O'Boye, *Sheriff's Captain Accused of Lying - Officer Who Helped Send an Innocent Man to Death Row is Target of Inquiry by Special Prosecutor*, Fla. Sun Sentinel, Mar. 1, 2001, at 1A.

129 Paula McMahon, *BSO Settles Lawsuit with Family of an Exonerated by DNA*, Fla. Sun-Sentinel (July 21, 2013), http://articles.sun-sentinel.com/2013-07-21/news/fl-frank-lee-smith-dna-settled-20130721_1_virginia-smith-civil-lawsuit-scheff-and-amabile.

130 Sydney P. Freedberg, *He Didn't Do It*, Tampa Bay Times, Jan. 7, 2001, at 1A.

131 The Editorial Board, *Following Trail of Injustice*, Tampa Bay Times, Mar. 6, 2001, at 17A. *See also* The Editorial Board, *Policing Prosecutors*. Tampa Bay Times, July 12, 2003, at 16A; *Frank Lee Smith*, Innocence Project, https://www.innocenceproject.org/cases/frank-lee-smith/ (last visited (Mar. 30, 2020).

132 The Editorial Board, *Following Trail of Injustice*, Tampa Bay Times, Mar. 6, 2001, at 17A.

133 Damian P. Gregory, *Activists Urge End to Death Penalty*, Sun-Sentinel, Dec. 19, 2000, at 4B.

VII. Conclusion

To say that someone has been exonerated is to name a singular truth, but newspapers conventionally present only different interpretations of that reality. Newspapers regularly communicate doubt about the connection between exoneration and actual innocence. They do so by avoiding the language of exoneration entirely and/or by conveying continuing adversarial perspectives on the meaning of miscarriages of justice in death cases.

It is rare that newspapers help their readers understand what forces produce such miscarriages of justice. Moreover, they generally do not focus on the traumatic experience of life on death row, the fear of imminent death, the isolation, the loss of relationships, the health battles, the psychological damage, and on the difficulty of adjusting to life on the outside. And, as we have shown above, they often avoid calling the exonerated person what they are: innocent.

In the end, our research suggests that the traction the recognition of miscarriages of justice has had in changing the national conversation around the death penalty has been gained in spite of, not because of, the way newspapers cover such events.

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Oceans Apart?: The Rule of Lenity in Australia and the United States

Julian R Murphy*

ABSTRACT

Occasionally traced back to Byzantine times, the rule that penal statutes are to be interpreted strictly in favor of the subject, also known as the rule of lenity, now finds expression in common law countries across the world. This Article compares the origins and evolution of the rule in Australia and the United States. The comparison is timely because of the current uncertainty in both jurisdictions about the rule's rationale and scope and because of an emerging global trend towards the "constitutionalization" of common law rules of interpretation. In the course of the analysis, various facets of the rule are discussed, including its common law origins; jurisprudential development; purported constitutional foundations; and modifications by state and federal statutes. Tracing the rule's development in each country reveals significant commonalities, but also important differences, in the respective approaches to the interpretation of criminal statutes. Most importantly, despite similarities in the two countries' constitutional structures, the rule has assumed constitutional significance in the United States but not in Australia. Identification of this marked difference provides an opportunity to reflect on the separation of powers, and the federal structure, of each country.

KEYWORDS

Legislation, Statutory Interpretation, Strict Interpretation, Lenity, Penal Laws

CONTENTS

* PhD student, University of Melbourne, School of Law. Part of this Article was written during the course of a Human Rights Fellowship at Columbia Law School. I would like to thank Akhil Amar, Kent Greenawalt, Walter Loughlin and Judge Jed Rakoff for discussions about federalism, criminal law and lenity. All opinions and errors are my own.

I. Introduction

The rule that penal statutes are to be interpreted strictly, also known as the rule of lenity ("the rule"), has been said to be as old as the task of statutory interpretation itself.[1] It has also been labelled "the subject of more constant controversy than perhaps of any in the whole circle of the Law."[2] All agree[3] that the rule found early expression in the practice of 17th century English courts strictly construing statutes that purported to displace the "benefit of clergy" (a common law doctrine that provided exceptions to the death penalty for certain eligible defendants and crimes).[4] Some even seek to trace the origins of the rule to Byzantine

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1 United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself.").

2 Jeremy Bentham, A Comment on the Commentaries: A Criticism of William Blackstone's Commentaries on the Laws of England 141 (Charles W. Everett ed., Oxford Univ. Press 1928) (1776).

3 Modern historians of the rule include: Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 Harv. L. Rev. 748, 749–51 (1934); Jerome Hall, Theft, Law and Society 356–63 (2nd ed. 1952); George W. Dalzell, Benefit of Clergy in America & Related Matters (John F. Blair ed., 1955); J. M. Beattie, Crime and the Courts in England, 1660-1800 141–48 (Princeton Univ. Press 1986); William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 Colum. L. Rev. 990, 1057 (2001); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 129–30 (2010).

4 For early English scholarship describing the rule see: Samuel E. Thorne, A Discourse upon the Exposicion and Understandinge of Statutes, 154–55 (Lawbook Exchange 2003, first pub. approx. 1567) ("for the lawe always favoureth hym that goeth to wracke, nor it will pulle him on the nose that is on his knees."); Thomas Coventry, Thomas Littleton & Edward Coke, A Readable Edition of Coke upon Littleton §§ 54b, 153b, 238b (London, Saunders & Benning 1830) (expressing the general rule that penal laws were not to be extended by equity); 1 William Blackstone, Commentaries *88 (recounting two cases: one in which an English court strictly construed a statute prohibiting the stealing of "horses" such that it was inapplicable to the stealing of a single horse; and a second case in which a statute punishing theft of "sheep, or other cattle" was read only to apply to sheep); 1 Matthew Hale, The History of the Pleas of the Crown 469–70 (R.H. Small, 1st American ed. 1847) (recounting a 1639 case in which the court narrowly interpreted a statute making certain acts of manslaughter punishable by death); *Id.* at vol. 2, 335, 371 ("That where any statute…ousted clergy in any of those felonies, it is only so far ousted, and only in such cases and as to such persons as are expressly comprised within such statutes, for *in favorem vitae & privilegii clericalis* such statutes are construed literally and strictly."); William Hawkins, A Treatise of the Pleas of the Crown 343 (1716-1721); Michael Foster, A Report of Some Proceedings on the Commission of Oyer and Terminer and Goal Delivery for the Trial of the Rebels in the Year 1746 in the County of Surry, and of Other Crown Cases. To Which Are Added Discourses upon a Few Branches of the Crown Law 126–27 (Oxford, Clarendon Press, 1762) ("The Principle is true, that in Prosecutions on Penal Statutes the Words of the Statute are to be pursued. But it is equally true, that We are not to be governed by the Sound, but by the Well-known, True, Legal Import of the Words"); Michael Foster, A Report of Some Proceedings on the Commission of Oyer and Terminer and Goal Delivery for the Trial of the Rebels in the Year 1746 in the County of Surry, and of Other Crown Cases. To Which Are Added Discourses upon a Few Branches of the Crown Law 357–59 (Dublin, Sarah Coi 1763); 4 Matthew Bacon, A New Abridgment of the Law 651

times.[5] Despite its shared ancestry, the rule has evolved in different ways in most common law jurisdictions. This article will explore some of these differences by tracing the origins and evolution of the rule in two illustrative contexts – Australia and the United States.

A comparison between Australian and the United States has at least three reasons to recommend it. First, both the Australian and United States' rules share the same source, namely, the common law of England. Secondly, apart from both being common law systems, Australia and the United States share a number of relevant constitutional features, notably: a written constitution; a separation of legislative, judicial and executive power; and a federal structure. The third reason to believe that a comparison between the two jurisdictions might prove informative is that that Australian judges discussing the rule regularly draw upon decisions of the United States Supreme Court.[6]

This article will proceed in four parts. First, some terminological clarifications and a statement of the scope of the rule for the purposes of this article. Secondly, a discussion of the rule's origin and development in Australia. Thirdly, a discussion of the United States context. Finally, an effort to explain the similarities and divergences in the evolution of the rule in Australia and the United States.

II. Some Terminological Ground-Clearing

Before launching into the discussion proper it is necessary to clarify some of the terms used in this article. The first point of clarification pertains to the rule's title, or shorthand label. In Australia, the rule is rarely referred to as the rule of lenity,[7] and is more commonly described as the rule that "where there is doubt about the

(Dublin, Luke White, 6th ed. 1793) ("[P]enal laws are to be construed strictly; yet even in the Construction of these, the Intention of the Legislators ought to be regarded.").

5 Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 Wis. L. Rev. 1179, 1189–90 (1990) nn.47–8 (seeking to draw a parallel between the rule and one of the maxims contained in the Digest of Justinian). *See also* Jerome Hall, General Principles of Criminal Law 20–27 (1947) (tracing the related principle of *nulla poena sine lege* to ancient Roman times).

6 Scott v. Cawsey (1907) 5 CLR 132, 156–57 (Austl.); Brown v. Tasmania (2017) 261 CLR 328, 497 (Austl.).

7 Exceptional uses of the "lenity" label in Australia include six judicial decisions, two transcripts of oral argument in the High Court, and one book chapter: Alcan (NT) Alumina Pty Ltd v. Commissioner of Territory Revenue (Northern Territory) (2009) 239 CLR 27, 49 (Austl.); City of Swan v. Gurney (2011) 186 LGERA 19, 30 (Austl.); Walker Corporation Pty Limited v. Director-General Department of Environment, Climate Change and Water (2012) 82 NSWLR 12, 21 (Austl.); Tabcorp Holdings Limited & Tatts Group Limited v. The Treasurer of Victoria [2013] VSC 324, [27] (Austl.) n.16 (referring to *Alcan (NT) Alumina* (2009) 239 CLR 27 (Austl.)); James McDonald v. Racing New South Wales [2017] NSWSC 1511, [19], [35] (Austl.); Ultra Tune Australia Pty Ltd v. Australian Competition and Consumer Commission [2019] FCAFC 164, [41], [46] (Austl.); Kuru v. State of New South Wales [2008] HCATrans 152 (17 April 2008) (Austl.); Commissioner of Territory Revenue v. Alcan (NT) Alumina Pty Ltd [2009] HCATrans 150 (23 June 2009) (Austl.); Jeremy Gans, *Legality and Lenity, in* The Principle of Legality in Australia and New Zealand (Dan Meagher & Matthew Groves eds., 2017).

meaning of a penal statute it should be resolved in favour of the subject".[8] In the United States, the rule is now most commonly referred to as "the rule of lenity".[9] The American phraseology remains a modern phenomenon, dating back only to 1958.[10] Prior to that time, the rule was generally called the rule of strict construction or, in the fuller sense, "[t]he rule that penal laws are to be construed strictly".[11] The modern move away from the language of "strict construction" is a welcome development, as that label was apt to confuse. This is because, according to a holistic conception of the rule, while ambiguous provisions creating criminal liability will be construed strictly (against the State), ambiguous provisions *excusing* a defendant from liability – for example, statutory defences or excuses – will be interpreted liberally (in favor of the subject).[12] In any event, the Supreme Court has described the rule of lenity and the rule of strict construction as "identical twins" [13] and most of the academic literature treats them as such.[14] Accordingly, for the remainder of this article, no distinction is drawn between them.[15]

Unfortunately, titular matters are not the only aspects of the rule requiring clarification; courts in Australia and the United States tend to be somewhat undecided on two further questions:

i. what is meant by "penal" laws – i.e. what type of statutes engage the rule?; and
ii. what is meant by "ambiguity" – i.e. what degree of statutory ambiguity is required before the rule is engaged?

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8 *See* Aubrey v. The Queen (2017) 260 CLR 305, 325–26 (Austl.).

9 *See* Shaw v. United States, 137 S. Ct. 462, 469 (2016) (finding insufficient ambiguity to call for application of "the rule of lenity").

10 Gore v. United States, 357 U.S. 386, 391 (1958) (Frankfurter, J.). Earlier uses of the term "lenity" to similar effect can be seen in Ex parte Davis, (No. 3,613) 7 F. Cas. 45, 49 (1851) (quoting from scholarly work: "it was ... one of the laws of the twelve tables of Rome that whenever there was a question between liberty and slavery, the presumption should be on the side of liberty. This excellent principle our law has adopted, in the construction of penal statutes; for whenever any ambiguity arises in a statute, introducing a new penalty or punishment, the decision shall be on the side of lenity and mercy"); Bell v. United States, 349 U.S. 81, 83 (1955) (Frankfurter, J.) ("When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. . . . It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment."); United States v. Turley, 352 U.S. 407, 418 (1957) (Frankfurter, J.) (referring to "the principle of lenity").

11 United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820).

12 Hall, *supra* note 3, at 749 ("Under the rule, an ambiguous statutory determinable imposing or enlarging criminal liability will be construed narrowly, while such a determinable relieving from or diminishing liability will be construed broadly, so that the particular determinate will be placed with reference to the statutory determinable where it is of most advantage to the accused.").

13 Sedima v. Imrex Co., Inc., 473 U.S. 479, 491 n.10 (1985). See also the equation of the two concepts in United States v. Lanier, 520 U.S. 259, 266 (1997).

14 *See, e.g.*, Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 Sup. Ct. Rev. 345, 346 n.1 (1994).

15 Contrast a Senate Report proposing a statue to eliminate the doctrine of strict construction, which claimed to leave intact the rule of lenity. *See* Sen. Rep. No. 95-605 23-24 (1977).

In Australia, there does not appear to be consensus as to the sort of statute that will engage the rule.[16] In general, invocations of the rule refer simply to "penal" statutes.[17] More specific articulations of the rule sometimes refer to "statutes creating offences",[18] or statutes that have "enlarged" an offence or that might be read as "extending any penal category".[19] Nevertheless, the rule has also been applied to non-criminal statutes, for example, legislation pertaining to government powers of property confiscation[20] and deportation.[21] Further difficulties arise when a statute contains an amalgam of penal and remedial provisions.[22]

In the United States, the position appears to be no clearer. Although the courts agree that the rule is engaged by all "criminal statutes",[23] there is uncertainty as to the application of the rule to hybrid statutes incorporating both criminal and civil provisions.[24] This uncertainty has been compounded by the ill-defined interaction of *Chevron*[25] deference and the rule.[26] To resolve these debates is beyond the scope of

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16 For an illustration of this uncertainty see the exchange in oral argument between David Jackson QC and Justice Crennan in Commissioner of Territory Revenue v. Alcan (NT) Alumina Pty Ltd [2009] HCATrans 150 (23 June 2009) (Austl.). Then see the decision, which deliberately skirts the issue: Alcan (NT) Alumina Pty Ltd v. Commissioner of Territory Revenue (Northern Territory) (2009) 239 CLR 27, 49 (Austl.).

17 *See, e.g.*, Aubrey v. The Queen (2017) 260 CLR 305, 325–26 (Austl.).

18 Beckwith v. The Queen (1976) 135 CLR 569, 576 (Austl.).

19 R v. Adams (1935) 53 CLR 563, 567–68 (Austl.).

20 Murphy v. Farmer (1988) 165 CLR 19, 28–29 (Austl.).

21 Minister for Immigration & Multicultural Affairs v. Dhingra (2000) 98 FCR 1, 25. See, generally, D. C. Pearce & R. S. Geddes, Statutory Interpretation in Australia 382–83 (8th ed. 2014); Perry Herzfeld & Thomas Prince, Statutory Interpretation Principles 261–62 (2014).

22 Pearce & Geddes, *supra* note 21, at 357.

23 McNally v. United States, 483 U.S. 350, 359–60 (1986); *see also* United States v. Canal Barge Co., 631 F.3d 347, 353 (6th Cir. 2011) ("the rule of lenity is typically invoked only when interpreting the substantive scope of a criminal statue or the severity of penalties that attach to a conviction - not the venue for prosecuting the offense.").

24 *See, e.g.*, United States v. Thompson/Centre Arms Co., 504 U.S. 505, 518 (1992); Crandon v. United States, 494 U.S. 152, 158, 168 (1990). *See generally* Bruce A. Markell, *Bankruptcy, Lenity, and the Statutory Interpretation of Cognate Civil and Criminal Statutes*, 69 Ind. L.J. 335 (1994).

25 Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984) (holding that, when a statute is "silent or ambiguous", and an administrative agency has resolved that silence in a "reasonable" way, courts should defer to the agency's interpretation of the statute).

26 The Supreme Court has not definitively resolved the question of whether Chevron applies to criminal statutes. *See, generally*, Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 704 n.18 (1995) ("We have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement. Even if there exist regulations whose interpretations of statutory criminal penalties provide such inadequate notice of potential liability as to offend the rule of lenity, the [present] regulation ... cannot be one of them."); Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., dissenting) ("a criminal statute is not administered by any agency but by the courts ... The Justice Department, of course, has a very specific responsibility to determine for itself what this statute means, in order to decide when to prosecute; but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference."); United States v. Thompson/Center Arms Co., 504

this article. As such, it is convenient to proceed by reference to the uncontroversial core of the rule, namely, its application to legislative provisions that create or extend criminal liability.

The final terminological issue warranting mention is the "ambiguity" precondition to the rule's application.[27] How much ambiguity is required before a statute will be deemed ambiguous for the purposes of the rule?[28] In Australia, the threshold requirement for ambiguity has found varied expression. For instance, the High Court has suggested that all that is needed to engage the rule is "doubt about the meaning of a penal statute".[29] Earlier case law required "a fair and reasonable doubt" about the meaning of statutory language before the rule would be engaged.[30] The most recent pronouncement of the High Court on the topic suggests that what is needed is "real" ambiguity.[31] In America, Justice Scalia, writing extra-judicially with Bryan Garner, called for a similar threshold test: "The criterion we favour is this: whether, after all the legitimate tools of interpretation have been applied, 'a reasonable doubt persists'."[32] Others in the United States have said that "grievous

U.S. 505, 518 (1992) (applying lenity and declining to defer to agency interpretation of a tax statute); Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004) (giving no weight, in deportation proceedings, to the Immigration and Naturalization Service's view that petitioner's two convictions for DUI causing serious bodily injury were "crime[s] of violence" within the meaning of 18 U.S.C. § 16, a criminal statute); Abramski v. United States, 134 S. Ct. 2259, 2274 (2014) ("Whether the Government interprets a criminal statute too broadly [as it sometimes does] or too narrowly . . . a court has an obligation to correct its error."); Whitman v. United States, 135 S. Ct. 352, 352–53 (2014) (Scalia, J., joined by Thomas, J., concurring in the denial of certiorari) ("A court owes no deference to the prosecution's interpretation of a criminal statute. . . . legislatures, not executive officers, define crimes.").

27 For a survey of interpretative approaches requiring "ambiguity" as a trigger to their application see Brett Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2134–44, and the cases cited at 2143 n.131 (2016). For further commentary on the problematic ambiguity threshold for many interpretative inquiries see Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U. Chi. L. Rev. 81, 90 (2017); Ward Farnsworth, Dustin F. Guzior & Anup Malani, *Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. Legal Analysis 257 (2010); Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 Md. L. Rev. 791 (2010); Lawrence M. Solan, *Pernicious Ambiguity in Contracts and Statutes*, 79 Chi.-Kent L. Rev. 859 (2004); Meredith A. Holland, Note, *The Ambiguous Ambiguity Inquiry: Seeking to Clarify Judicial Determinations of Clarity Versus Ambiguity in Statutory Interpretation*, 93 Notre Dame L. Rev. 1371 (2018).

28 *See* Antonin Scalia, A Matter of Interpretation 28 (1997) ("Every statute that comes into litigation is to some degree 'ambiguous'; how ambiguous does ambiguity have to be before the rule of lenity ... applies?"); *see also* United States v. Hansen, 772 F.2d 940, 948 (D.C. Cir. 1985) (Scalia, J.) (observing that the rule provides "little more than atmospherics, since it leaves open the crucial question – almost invariably present – of how much ambiguousness constitutes an ambiguity.").

29 *See* Aubrey v. The Queen (2017) 260 CLR 305, 325–26 (Austl.).

30 Chandler and Co v. Collector of Customs (1907) 4 CLR 1719, 1734 (Austl.) (quoting Nicholson v. Fields (1862) 31 L.J. Ex. 233, 235 (UK)).

31 R v. A2 [2019] HCA 35, [52] (Austl.).

32 Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 299 (2012) (quoting Moskal v. United States, 498 U.S. 103, 108 (1990)).

ambiguity" is required before the rule can be engaged.[33] Yet others have said that the rule is engaged "only when the equipoise of competing reasons cannot otherwise be resolved."[34] For present purposes, it is sufficient to acknowledge the controversy over the meaning of "ambiguity" rather than attempt to resolve it.

III. The Australian Story[35]

A. Early Case Law from the High Court

A number of early decisions of the High Court make reference to the rule. An illuminating example is the case of *Scott v Cawsey*,[36] which is commonly cited as the earliest authoritative Australian statement of the rule.[37] In that case, the Court had to determine whether Mr Cawsey had been properly penalized as "keeper of a disorderly house" within the meaning of an offence provision in the *Sunday Observance Act* 1780.[38] Of the five Justices on the bench, four[39] explicitly discussed the rule. While the remaining Justice only engaged with the topic implicitly,[40] his views on the rule can be gleaned from a decision delivered later in the same year, in which he outlined his interpretative approach to penal statues.[41]

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33 Chapman v. United States, 500 U.S. 453, 463 (1991) (quoting Huddleston v. United States, 415 U.S. 814, 831 (1974)).

34 Johnson v. United States, 529 U.S. 694, 713 n.13 (2000) (Souter, J.); *cf.* Scalia & A. Garner, *supra* note 32, at 298 (arguing that if Justice Souter's "equipoise" threshold was required then "the rule would either never apply . . . or would be superfluous").

35 This analysis, like the analysis of the United States' rule, begins with the formation of the federal system. This article therefore does nothing to ameliorate the dearth of scholarship on pre-Federation statutory interpretation in the Australian colonies.

36 Scott v. Cawsey (1907) 5 CLR 132 (Austl.).

37 For scholars citing Scott v. Cawsey (1907) 5 CLR 132 (Austl.) as an early authoritative statement of the rule see Pearce and Geddes, *supra* note 21, at 367; Gans, *supra* note 7, at 189–208, 199–201. The case is not in fact the earliest High Court consideration of the rule, but it is perhaps the earliest comprehensive discussion of it. For earlier decisions touching on the rule see: Master Retailers' Association of New South Wales v. Shop Assistants Union of New South Wales (1904) 2 CLR 94, 106 (Austl.) ("the old distinction between remedial and penal Acts has of late years been much discredited. What has been laid down in modern cases is that the duty of the Court is to interpret Acts according to the intent of the Parliament which passed them."); Prior v. Sherwood (1906) 3 CLR 1054, 1072 (Austl.) ("This Act is a penal one, and without troubling our heads very much with the strength or effect of the statement that a penal Act should be construed strictly . . . a short and clear way of putting the matter [is] 'that the Court in construing such a Statute must see that the thing charged is an offence within the plain meaning of the words used, so as to carry out the true intention of the legislature" citations omitted); Hamilton v. Warne (1907) 4 CLR 1293, 1297, 1302 (Austl.) ("the provisions of the law as to acts of insolvency have always been construed strictly. An analogy . . . may be found in the rule for the construction of provisions creating a forfeiture." And "The proceedings are quasi-penal; and his conduct must come strictly within the words of the Act in order to justify the Court making the order absolute.").

38 Scott v. Cawsey (1907) 5 CLR 132, 142 (Barton, J.) (Austl.).

39 *Id.* at 141 (Griffiths, C.J.), 144–45 (Barton, J.), 154–55 (Isaacs, J.), 173 (Higgins, J.).

40 *Id.* at 151 (O'Connor, J.).

41 Chander and Co. v. Collector of Customs (1907) 4 CLR 1719, 1734–35 (Austl.).

Of the majority, Chief Justice Griffith did not find the statute to be ambiguous and, accordingly, held that the rule was not engaged. Nevertheless, in obiter dicta, his Honour noted that in "a case of ambiguity … the construction in favour of liberty should be adopted."[42] Justice Barton engaged more substantively with the rule, referring to Blackstone[43] and three separate English authorities.[44] The burden of Justice Barton's observations was that the rule required that the court not "strain" the words of a penal statute to extend it beyond those acts "distinctly" or "strictly" within the "plain meaning of the words used".[45] Importantly, for Justice Barton, where statutory words permit of two equally plausible interpretations, the courts must prefer that which favors the defendant.[46] Justice O'Connor reached the same conclusion as the majority without explicitly referring to the rule. Instead, his Honour invoked the separation of powers concerns animating the rule:

> "where a Statute constitutes the committing of certain acts a criminal offence … [it is not] the duty of a Court to so add to the language of a Statute as to make it include the committing of acts of the same kind which lead to the same result, but which the legislature has not constituted an offence. To do so would be to make laws, not to interpret them."[47]

Of the minority, Justice Higgins only engaged with the rule in passing, expressing agreement with the idea that a person ought only be found to have violated a penal statue where their acts fall within "the letter *and* spirit of the law".[48] Justice Isaacs, the other dissenting Justice, engaged extensively with English case law and commentary on the rule. Departing from the statements of Chief Justice Griffiths and Justice Barton, Justice Isaacs expressed the view that, where two constructions are left open by the words of the statute, courts ought to prefer that which best gives effect to the intent of the legislature— even where that intent may disfavor the defendant.[49] His Honour was prepared to go even further, holding that a court would be permitted to employ the full flexibility of the statutory words to effectuate the intention of the legislature, even where doing so would involve the court departing

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42 Scott v. Cawsey (1907) 5 CLR 132, 141 (Griffiths, C.J.) (Austl.). It is interesting to contrast this utterance with his Honour's remarks just a few years earlier in Master Retailers' Association of New South Wales v. Shop Assistants Union of New South Wales (1904) 2 CLR 94, 106 (Austl.) ("the old distinction between remedial and penal Acts has of late years been much discredited. What has been laid down in modern cases is that the duty of the Court is to interpret Acts according to the intent of the Parliament which passed them.")

43 1 William Blackstone, Commentaries *88 ("The law of England does not allow of offences by construction.") quoted in Scott v. Cawsey (1907) 5 CLR 132, 145 (Barton, J.) (Austl.).

44 Reid v. Wilson (1895) 1 WB 315, 320, 322 (UK); Dyke v. Elliot; The Gauntlet (1872) LR 4 PC 184, 191 (UK); Dickenson v. Fletcher (1873) LR 9 CP 1, 7 (UK) all quoted in Scott v. Cawsey (1907) 5 CLR 132, 144–45 (Barton, J.) (Austl.).

45 Scott v. Cawsey (1907) 5 CLR 132, 144–45 (Barton, J.) (Austl.).

46 *Id.* at 145 (Barton, J.).

47 *Id.* at 151 (O'Connor, J.).

48 *Id.* at 173 (Higgins, J.) (emphasis added).

49 *Id.* at 155–56 (Isaacs, J.) (referring to Llewellyn v. Vale of Glamorgan Railway Co (1898) 1 WB 473, 478 (UK)).

from an alternative, plausible, literal interpretation.[50] Importantly for present purposes, Justice Isaacs went on to refer to three decisions of the Supreme Court of the United States,[51] which he considered to mirror his own views. (It is perhaps possible to read these cases as standing for a narrower proposition than that which Justice Isaacs advances, but there is no doubt that they do emphasize the statutory purpose in a way that the traditional rule does not.)

What the various opinions in *Cawsey* helpfully illustrate is that, even in the High Court's early days, the scope of the rule was hotly contested. The issue that separated the Justices in *Cawsey*, at least with respect to the rule, was the degree to which legislative intent could be relied upon to save a penal statute from ambiguity (and the application of the rule). On the one hand, most of the Justices conceived of the rule as coming into play whenever the legislature fails to bring conduct within the "plain meaning"[52] or "distinct[words]"[53] of the statute. One might label this strong version of the rule a "textualist" approach to strict construction, because of the primacy it affords the statutory language. Such an approach can be seen in other early High Court authorities. For example, a year after *Cawsey*, Justice Barton referred back to that case before restating the Court's "duty … not to give greater force to the *language* of the legislature than it will *clearly* bear".[54]

On the other side of the conceptual divide, Justice Isaacs conceived of a less powerful rule, which would only come into play if legislative intent could not be relied upon to clarify ambiguous words. This view found support in the extended treatment of the rule by Justice O'Connor in *Chandler & Co v Collector of Customs*, a judgment handed down just two weeks after *Cawsey*. O'Connor wrote that the rule was engaged in cases where there was "a fair and reasonable doubt" about the meaning of statutory language.[55] His Honour then went on to make clear that such a doubt would not arise merely from *textual* ambiguity:

> "The existence of an ambiguity in the words to be construed does not necessarily create a doubt. It is a reason for an examination of the context, the scope and object of the enactment. But that examination may

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50 Scott v. Cawsey (1907) 5 CLR 132, 155–56 (Isaacs, J.) (Austl.) (referring to Caledonian Railway Co v. North British Railway Co (1881) 6 App. Cas. 114, 122 (UK)). It important to note the error of Justice Isaacs' reference to *Caledonian Railway Co*. That case did not concern the interpretation of a penal statute and, for that reason, cannot be read to support the broad proposition for which Justice Isaacs sought to deploy it.

51 Johnson v. Southern Pacific Co 196 U.S. 1, 17, 18 (1904); United States v. Lacher 134 U.S. 624 (1890); United States v. Winn 3 Sumn. 209 (1838) all quoted in Scott v. Cawsey (1907) 5 CLR 132, 156–57 (Isaacs, J.) (Austl.).

52 Scott v. Cawsey (1907) 5 CLR 132, 145 (Barton, J.) (Austl.) (quoting Dyke v. Elliott; The Gauntlet (1872) LR 4 PC 184, 191 (UK)). See also Prior v. Sherwood (1906) 3 CLR 1054, 1072 (Austl.) (quoting Powell v. Kempton Park Racecourse Co. (1897) 2 QB 242, 298 (UK)) ("the Court in construing such a Statute must see that the thing charged is an offence within the plain meaning of the words used, so as to carry out the true intention of the legislature.")

53 Scott v. Cawsey (1907) 5 CLR 132, 145 (Barton, J.) (Austl.) (quoting Dickenson v. Fletcher (1873) LR 9 CP 1, 7 (UK)).

54 Lyons v. Smart (No 1) (1908) 6 CLR 143, 158 (Barton, J.) (Austl.) (emphasis added).

55 Chandler and Co v. Collector of Customs (1907) 4 CLR 1719, 1734 (O'Connor, J.) (Austl.) (quoting Nicholson v Fields (1862) 31 L.J. Ex. 233, 235 (UK)).

> satisfy the Court beyond all doubt as to the meaning to be placed on an expression which is on its face ambiguous. I take it, therefore, that in the interpretation of a penal or taxing Statute *mere ambiguity of expression or loose or inaccurate language will not prevent a Court from giving effect to the meaning of the legislature* if, by the application of the ordinary rules of construction applicable to all other Statutes, that meaning can be ascertained. If, notwithstanding a careful examination … a doubt still remains … the Court is not at liberty to resolve the doubt against the accused"[56] (emphasis added)

The tension between the strong, textualist version of the rule championed by Justice Barton and the more qualified version of the rule expressed by Justice Isaacs, makes *Cawsey* an important early consideration of the rule. Unsurprisingly, that case has been cited by the High Court on a number of subsequent occasions, both in reliance on the words of the majority Justices and for the remarks of Justice Isaacs in dissent.[57] This article will now turn to the manner in which this early tension has finally been resolved in modern and contemporary High Court case law.

B. Modern and Contemporary Case Law: The "Last Resort" Rule

In the years since *Cawsey*, Justice Isaacs' qualified version of the rule has ultimately prevailed.[58] The slow dilution of the rule's originally potent concentrate is exemplified in the case of *Beckwith v The Queen*,[59] which one scholar has described as marking the "low ebb" of the rule in modern Australian jurisprudence.[60] In *Beckwith*, Justice Gibbs did much to entrench the qualified version of the rule, asserting:

> "The rule formerly accepted, that statutes creating offences are to be strictly construed, has lost much of its importance in modern times. In determining the meaning of a penal statute the ordinary rules of construction must be applied, but if the language of the statute remains ambiguous or doubtful the ambiguity or doubt may be resolved in favour of the subject by refusing to extend the category of criminal offences … The rule is perhaps one of last resort."[61]

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56 Chandler and Co v. Collector of Customs (1907) 4 CLR 1719, 1735 (O'Connor, J.) (Austl.).

57 *See, e.g.*, Lyons v. Smart (No 1) (1908) 6 CLR 143, 157 (Austl.); Brott v. The Queen (1992) 173 CLR 426, 438 n.43 (Austl.); R v. Lavender (2005) 222 CLR 67, 95 n.94 (Austl.); R v. Holliday (2017) 260 CLR 650, 674 n.75 (Austl.); Brown v. Tasmania (2017) 261 CLR 328, 497 (Austl.).

58 Pearce and Geddes, *supra* note 21, at 367–68 ("The approach more frequently used nowadays by the courts was enunciated by Isaacs J in *Scott v Cawsey* . . . The mere discovery of an ambiguity in a penal statute should not automatically mean that a defendant must be acquitted. . . . the court must endeavour to resolve that ambiguity by the application of the various aids to construction that are applicable to all statutes. Then, and only then, if a doubt still remains as to the meaning of the penal provision should the issue be resolved in favour of the defendant.").

59 Beckwith v. The Queen (1976) 135 CLR 569 (Austl.).

60 Gans, *supra* note 7, at 199.

61 Beckwith v. The Queen (1976) 135 CLR 569, 576 (Austl.) (citations omitted).

After Gibbs assumed the Chief Justice's chair, the above passage was subsequently quoted with approval by a majority of the High Court in *Waugh v Kippen*, where it was said to reflect "the modern approach in construing penal statutes".[62] In addition to *Waugh*, *Beckwith* has been cited in over twenty High Court decisions for its statement of the rule.[63] In light of this tidal wave of High Court authority, there can be little doubt that the rule is now confined to its limited version. On this version, the rule is only engaged if ambiguity remains after all of "the ordinary rules of construction [have been] applied".[64] This means that a court will only apply the rule of lenity after it has had regard to text, context (including legislative history), purpose and any applicable provisions of an interpretation statute.

Nevertheless, before leaving these cases it is worth noting that, in the final result in *Beckwith*, Justice Gibbs in fact applied the rule in favor of the defendant, writing: "The effect of the [statutory] provisions at least remains doubtful and that doubt should be resolved in favour of the liberty of the subject."[65] Furthermore, while there is no room left to doubt the reasoning in *Waugh*, it should be remembered that the statute in that case contained both penal and remedial provisions and, as such, does not provide a perfect analog for cases raising the application of the rule to purely penal statutes.

C. A Constitutional Dimension?

Unlike the United States – to be discussed below – Australian courts very rarely suggest that the rule might have a constitutional dimension. It will be recalled, however, that in the earliest High Court case to authoritatively apply the rule, *Cawsey*, Justice O'Connor invoked the separation of powers to rationalize the strict construction of the penal provision under consideration. Similarly, in the early case of *Lyons v Smart (No 1)*, Justice Barton quoted from American

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62 Waugh v. Kippen (1986) 160 CLR 156, 164 (Austl.).

63 *See* Gallagher v. Attorney-General (Cth) (1983) 152 CLR 238 (Austl.); Barker v. The Queen (1983) 153 CLR 338 (Austl.); He Kaw The v. The Queen (1985) 157 CLR 523 (Austl.); Kingswell v. The Queen (1985) 159 CLR 264 (Austl.); O'Sullivan v. Lunnon (1986) 163 CLR 545 (Austl.); Brott v. The Queen (1992) 173 CLR 426 (Austl.); Telstra Corporation Ltd v. Australasian Performing Right Association Ltd (1997) 191 CLR 140 (Austl.); Lee Vanit v. The Queen (1997) 190 CLR 378 (Austl.); Re Colina; Ex parte Torney (1999) 200 CLR 386 (Austl.); Cheng v. The Queen (2000) 203 CLR 248 (Austl.); Chief Executive Officer of Customs v. El Hajje (2005) 224 CLR 159 (Austl.); R v. Lavender (2005) 222 CLR 67 (Austl.); Stevens v. Kabushiki Kaisha Sony Computer Entertainment (2005) 224 CLR 193 (Austl.); White v. Director of Military Prosecutions (2007) 231 CLR 570 (Austl.); CTM v. The Queen (2008) 236 CLR 440 (Austl.); Australian Competition and Consumer Commission v. Channel Seven Brisbane Pty Ltd (2009) 239 CLR 305 (Austl.); Alcan (NT) Alumina Pty Ltd v. Commissioner of Territory Revenue (Northern Territory) (2009) 239 CLR 27 (Austl.); Public Trustee (Qld) v. Fortress Credit Corporation (Aust) 11 Pty Ltd (2010) 241 CLR 286 (Austl.); Agius v. The Queen (2013) 248 CLR 601 (Austl.); Alqudsi v. The Queen (2016) 258 CLR 203 (Austl.); Re Day (No 2) (2017) 263 CLR 201 (Austl.); Aubrey v. The Queen (2017) 260 CLR 305 (Austl.); R v. Holliday (2017) 260 CLR 650 (Austl.); Brown v. Tasmania (2017) 261 CLR 328 (Austl.); R v. A2 [2019] HCA 35 (Austl.).

64 Beckwith v. The Queen (1976) 135 CLR 569, 576 (Austl.).

65 *Id.* at 578.

authority[66] to describe the different institutional functions of the legislative and the judicial branches of government, concluding that: "[the] duty [of the judiciary is] … not to give greater force to the language of the legislature than it will clearly bear".[67] Nevertheless, Justices Barton and O'Connor's attempts to ground the rule in Australia's constitutional structure remains an exception and, accordingly, it is unlikely that the rule will be found to have a constitutional basis in Australia any time soon.

D. Statutory Modification

An important aspect of Australian statutory interpretation is the role played by what this article will call "interpretation statutes", which statutes contain legislative directives as to how courts should engage in the task of statutory interpretation. Each jurisdiction in Australia has enacted such a statute,[68] and each includes a purposive interpretation provision.[69] Broadly speaking, there are two varieties of purposive interpretation provisions.[70] For present purposes, the more prescriptive variety of provision needs to be considered, because if the rule can be squared with such a provision then it will certainly be reconcilable with the less prescriptive provision.

An example of the more prescriptive provision can be seen in §15AA of the federal *Acts Interpretation Act* 1901:

> "In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation."[71]

At first blush, this might appear to create a potential for inconsistency with the rule.[72] The courts, however, have held that there is no contradiction between

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66 United States v. Lacher, 134 U.S. 624, 628 (1890).

67 Lyons v. Smart (No 1) (1908) 6 CLR 143, 158 (Austl.).

68 Legislation Act, 2001 (A.C.T.); Interpretation Act, 1987 (N.S.W.); Interpretation Act, 1987 (N.T.); Acts Interpretation Act, 1954 (Qld.); Acts Interpretation Act, 1931 (Tas.); Interpretation of Legislation Act, 1984 (Vic.); Interpretation Act, 1984 (W. Austl.).

69 Pearce & Geddes, *supra* note 21, at 42 (listing purposive interpretation provisions within each Australian jurisdiction's interpretation statute).

70 Pearce & Geddes, *supra* note 21, at 42.

71 An earlier version read: "In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object." The change to the current wording occurred in 2011 and was effected by the Acts Interpretation Amendment Act, 2011 (Austl.), sched 1. Note the change from "a construction that would promote the purpose" to "the interpretation that would best achieve the purpose". The new wording is thought to be more prescriptive because, in the event "of a choice between two or more interpretations each of which would promote the Act's purpose or object, … the interpretation that would best achieve that purpose or object must be chosen." *Id.* at 42.

72 *See, e.g.*, Minister for Immigration & Multicultural Affairs v. Dhingra (2000) 98 FCR 1, 27–28 (Hill, J.) (Austl.) ("If there were to be a conflict between the application of the common law rule [of strict construction] . . . and the statutory rule [in s 15AA of the

purposive interpretation provisions like s 15AA and the rule.[73] Commentators have agreed.[74] To avoid any doubt, two states – Queensland[75] and South Australia[76] – have explicitly qualified their liberal construction provisions to avoid any interference with the rule of strict construction.[77] The South Australia provision, for instance, provides:

> "**Construction that would promote purpose or object of an Act to be preferred**
> (1) Subject to subsection (2), where a provision of an Act is reasonably open to more than one construction, a construction that would promote the purposes or object of the Act (whether or not that purpose or object is expressly stated in the Act) must be preferred to a construction that would not promote that purpose or object.
> *(2) This section does not operate to create or extend any criminal liability.*"

E. Summary of the Current Australian Approach

In summary, the Australian rule of lenity is a common law creature (albeit with ill-defined constitutional roots) that has been largely unaffected by the legislative enactment of purposive interpretation provisions. Nevertheless, the Australian rule is one of "last resort", only applied after other interpretative methods have been exhausted and "ambiguity or doubt" remains.[78] The rule has been understood and applied in this way in recent years.[79]

Acts Interpretation Act, 1901 (Austl.)], then it is obvious that the statutory rule would prevail.").

73 *See, e.g.*, Minister for Immigration & Multicultural Affairs v Dhingra (2000) 98 FCR 1, 26 (Burchett, J. and Branson, J.) (Austl.) ("it would be rarely, if ever, that the general provision made by s 15AA with respect to the interpretation of all statutes would be found to render nugatory the special rules which have always applied to particular types of statute, such as penal statutes."); Director-General Department of Land and Water Conservation v. Bailey (2003) 136 LGERA 242, 249 (Austl.) ("there would be no contradiction between [the traditional approach to penal statutes] and s 33 of the Interpretation Act, 1987 (N.S.W.) because to prefer the construction promoting the object and purpose of a statute is to apply it according to its terms.").

74 *See, e.g.*, Pearce and Geddes, *supra* note 21, at 368–69.

75 Acts Interpretation Act § 14 1954 (Qld.).

76 Acts Interpretation Act § 22 1915 (S. Austl.).

77 For a discussion of these provisions and their operation see Gans, *supra* note 7, at 201–03.

78 Beckwith v. The Queen (1976) 135 CLR 569, 576 (Austl.) (citations omitted).

79 Brown v. Tasmania (2017) 261 CLR 328, 497 (Austl.).

IV. The American Story[80]

A. Early Case Law from the Supreme Court

The rule first entered the federal law reports of the Supreme Court of the United States in 1820 via Chief Justice John Marshall's judgment in *Wiltberger v United States*.[81] In that case the Court was called upon to interpret a suite of provisions in the Crimes Act of 1790, the first criminal statute passed by the United States Congress. More specifically, the Court had to determine whether the manslaughter prohibition contained in §12, which prohibited homicides occurring "on the high seas", ought to be read to encompass a homicide on a river. Notwithstanding strong textual indications from other provisions suggesting that Congress *had* intended §12 to be read to encompass acts done on rivers, the Court viewed the rule as commanding a strict construction of the penal provision to exclude coverage of rivers. Importantly, the Court reached this conclusion while acknowledging that it might have been contrary to "the obvious intent of the legislature"[82] and conceding that Mr Wiltberger's case was probably "within the reason or mischief of [the] statute".[83] In this reasoning one can see that the early statement of the rule in the American context was close to the strong textualist version that found early support in Australia.

The strong, textualist version of the rule articulated in *Wiltberger* was justified on two bases: the rule's august common law heritage and the constitutional values underpinning it. In relation to the first rationale, Chief Justice Marshall wrote: "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself."[84] The Chief Justice's rhetorical strategy is unmistakeable, the authority of the Court's decision is being bolstered by reference to a higher order rule. This was an approach that the Marshall Court adopted not just in respect of the rule of lenity, but in respect of statutory interpretation more generally, to which Chief Justice Marshall sought to bring systems and certainty.[85] Since

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80 This analysis, like the analysis of the Australian rule, begins with the establishment of the federal judiciary. There is very little scholarship on the rule's existence (or non-existence) in the case law of the American colonies and then the States prior to 1788. *But see* Dalzell, *supra* note 3.

81 United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820); *but see* Lawrence M. Solan, *Law, Language, and Lenity*, 40 Wm. & Mary L. Rev. 57, 89–91 (1998) (arguing that the rule of lenity in fact entered Supreme Court jurisprudence 15 years earlier, in the case of United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805) ("where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed.")); *see also* Barrett, *supra* note 3, at 129 n.91 (suggesting that the earliest reported federal case to invoke the rule was Bray v. The Atalanta, 4 F. Cas. 37, 37 (D.S.C. 1794) (No. 1819) where it was said: "it is a penal law and must be construed strictly.").

82 United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 94 (1820).

83 *Id.* at 96.

84 *Id.* at 95. Here Marshall proves the truth of Alexis de Tocqueville's diagnosis of American (and English) lawyers: "Americans have retained the law of precedents . . . [and] a taste and a reverence for what is old". Alexis de Tocqueville, Democracy in America 139 (1831).

85 *See* John Choon Yoo, Note, *Marshall's Plan: The Early Supreme Court and Statutory Interpretation*, 101 Yale L. J. 1607, 1628 (1992). *See also* The Federalist No. 78

Wiltberger, courts applying the rule have followed suit, invoking the rule's deep historical roots, presumably to provide additional justification for results that are often advantageous to a defendant and thus less palatable to the general public.[86] For example, the Court has described the rule as "venerable"[87], "time-honored"[88], "long-established",[89] "well-recognized"[90], "traditional"[91], "familiar"[92], an "ancient requirement"[93], and a "long-standing principle[]"[94].

Notwithstanding the fact that, prior to *Wiltberger*, the rule was already being applied by federal courts,[95] it is *Wiltberger* that is now the authoritative early American statement of the rule.[96] Nevertheless, as will be seen in the following discussion, the strong, textualist version of the rule expressed in *Wiltberger* has not survived.

B. Modern and Contemporary Case Law: The "Tiebreaker" Rule

Historians of the rule in America have described how the *Wiltberger* version of the rule was gradually eroded in the 20th Century. Lawrence Solan has conducted

(Alexander Hamilton) ("To avoid an arbitrary discretion in the courts, it is indispensable that they shall be bound by strict rules and precedents.").

86 *See* Ross E. Davies, *A Public Trust Exception to the Rule of Lenity*, 63 U. Chi. L. Rev. 1175, 1182–83 (1996) ("History matters to the modern application of the Rule because the judges and justices who apply it say so. They do so in at least two ways: (1) history is frequently a factor in debates over canons of construction and terms of art developed at common law; and (2) historical support is a significant element of judicial rhetoric justifying the existence and importance of the Rule. History also matters from a practical standpoint, to the extent that historical acceptance of the Rule bolsters the credibility of the judicial actors who invoke it …"). Note, however, that on at least two occasions the Supreme Court has announced the rule without any citation and on another occasion has doubted that the rule requires any citation. *See* Bell v. United States, 349 U.S. 81, 83–84 (1955); United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221–22 (1952). *See also* United States v. Bramblett, 348 U.S. 503, 509 (1954) ("That criminal statutes are to be construed strictly is a proposition which calls for the citation of no authority.").

87 United States v. R.L.C., 503 U.S. 291, 305 (1992).

88 United States v. Kozminski, 487 U.S. 931, 952 (1988). *See also* Rewis v. United States, 401 U.S. 808, 812 (1971); Dowling v. United States, 473 U.S. 207, 229 (1985).

89 Dunn v. United States, 442 U.S. 100, 112 (1979).

90 United States v. Rodgers, 466 U.S. 475, 484 (1984).

91 Whalen v. United States, 445 U.S. 684, 703 (1980) (Rehnquist, J., dissenting).

92 Adamo Wrecking Co v. United States, 434 U.S. 275, 275 (1978).

93 United States v. R.L.C., 503 U.S. 291, 310 (1992) (Scalia, J., concurring) (citation omitted).

94 *Id.* at 310 (Scalia, J., concurring). (Quoting Hughey v. United States, 495 U.S. 411, 422 (1990)).

95 *See* Barrett, *supra* note 3, at 128–34 (describing the rule's development in the early Republic and concluding: "a review of early federal cases leaves one with the distinct impression that lenity was the most commonly applied substantive canon of construction. My searches yielded far more cases applying the rule of lenity than any other canon."); *cf.* Eskridge Jr., *supra* note 3, at 1069 ("Federal judges in the 1790s were not as willing [as their state counterparts] to supplement criminal statutes, but I was surprised by their reluctance to ameliorate their harsh operation either. Decisions showing criminal defendants lenity in the 1790s typically involved procedural rather than substantive rights." citations omitted).

96 United States v. Santos, 553 U.S. 507, 515 (2008) (referring to United States v. Wiltberger, 18 U.S. (5 Wheat.) 76 (1820) as "our seminal rule-of-lenity decision").

the most comprehensive review of the rule's application during this period.[97] He convincingly divides the rule's 20th Century development into two chapters, both involving a progressive narrowing of the rule. First, one must consider the era of legal interpretation ushered in by the landmark decision in *Church of the Holy Trinity*.[98] That case, decided in 1892, is generally understood to mark the beginning of a more expansive approach to statutory interpretation at the Supreme Court. From that time onwards, the Court began to more readily consider legislative history and other extra-textual material in its attempts to divine the meaning of statutory text. Solan explains how this approach resulted in a de-prioritization of the rule. Instead of being applied in any case of textual ambiguity–even to override apparent statutory purpose (as appears to have occurred in *Wiltberger*)—the rule was only applied if the statute remained ambiguous after consideration of legislative history, context and other interpretative aids.

The second chapter in Solan's 20th Century history of the rule is set in the Rehnquist Supreme Court (1986—2005). This period saw the rule have something of a renaissance, largely as a result of the championship of Justice Scalia.[99] Yet the relative frequency of the rule's invocation did not translate into a stronger statement of its place in the interpretative process. In fact, for most members of the Court the rule came "dead last in the interpretative hierarchy."[100] So, for example, in *Moskal v United States* the Court explained: "we have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute."[101] Others on the Supreme Court during this period, notably Justice Scalia, took a different approach, whereby the rule was applied to resolve any ambiguity that might arise between a purely textualist approach and an approach based on extra-textual indicators.[102] Nevertheless, Justice Scalia's approach did not

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97 Solan, *supra* note 81, at 89–122 (tracking the progressive narrowing of the rule from the its early days, through Justice Frankfurter's influence, to the Rehnquist Court's lenity jurisprudence); *see also* Mila Sohoni, *Notice and the New Deal*, 62 Duke L.J. 1169, 1203–07 (2012) (largely adopting Solan's analysis that the arrival of Justice Frankfurter to the Supreme Court and the beginning of a new interpretative culture all contributed to the deprioritization of the rule).

98 Church of the Holy Trinity v. United States, 143 U.S. 457 (1892).

99 *See, generally*, Sarah Newland, Note, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 Harv. C.R.-C.L. L. Rev. 197–230 (1994).

100 Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 Fordham L. Rev. 885, 891 (2004); *see also* Kahan, *supra* note 14, at 425. ("Ranking lenity 'last' among interpretative conventions all but guarantees its irrelevance.").

101 Moskal v. United States, 498 U.S. 103, 108 (1990) (quoting Bifulco v. United States, 447 U.S. 381, 387 (1980)) (emphasis added). *See also* Abramski v. United States, 134 S. Ct. 2259, 2272 n.10 (2014) (where the majority did not reach the application of the rule of lenity because no statutory ambiguity remained after reference was had to "context, structure, history and purpose").

102 *Moskal*, 498 U.S. at 132 (Scalia, J., dissenting). See also *Abramski*, 134 S. Ct. at 2280–82 (Scalia, J.) (criticizing "the majority's miserly approach" whereby lenity ranked last in the interpretative hierarchy). Scalia has advocated for an even more ambitious, textualist rule of lenity in his extra-judicial writing, a rule that would apply to any textual ambiguity at all. See Scalia & Garner, *supra* note 32, at 298 (noting the ideal rule would be that which "were automatically applied at the outset of textual inquiry, before any other rules of interpretation were invoked to resolve ambiguity. Treating it as a clear-

find favor with other members of the Court and the rule is now generally understood to operate only as a "tiebreaker"[103] after all other interpretative methods have been exhausted.[104]

C. Constitutional Foundations[105]

As was foreshadowed above, the Court in *Wiltberger* did not rely solely on the rule's common law roots for its authority. Chief Justice Marshall also grounded the rule in constitutional values, writing:

> "The rule that penal laws are to be construed strictly … is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment."[106]

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statement rule would comport with the original basis for the canon and would provide considerable certainty. But that is not the approach the cases have taken.").

103 United States v. Rodriquez, 553 U.S. 377, 404 (2007) (Souter, J., dissenting) (describing the rule as "a ready tiebreaker . . . which applies where [as here] we have seiz[ed] everything from which aid can be derived, but are left with an ambiguous statute" internal quotation marks omitted, citation omitted); United States v. Canal Barge Co., 631 F.3d 347, 353 (6th Cir. 2011) ("the rule of lenity is only a tiebreaker of last resort"); Markell, *supra* note 24, at 346 ("In short, the Court seems to use lenity not for its embodiment of due process and structural concerns, but as a tie-breaker for tough issues."); *see also* John G. Malcolm, *Hook, Line & Sinker: Supreme Court Holds (Barely) That Sarbanes-Oxley's Anti-Shredding Statute Doesn't Apply to Fish*, 2014–2015 Cato Sup. Ct. Rev. 227, 237 (2014) (describing the rule as a "tie-breaker and a rule of constitutional avoidance"); Orin S. Kerr, *A Rule of Lenity for National Security Surveillance Law*, 100 Va. L. Rev. 1513, 1533, 1535 (2014) ("the rule of lenity breaks the tie in favor of the individual instead of the State." and "The tiebreaker should go to the individual, not the State.").

104 As stated in the text, it is now conventional wisdom in the Supreme Court that lenity ranks after other interpretative methods, as a sort of "tiebreaker". *See* Callanan v. United States, 364 U.S. 587, 596 (1961) ("The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning"); Moskal v. United States, 498 U.S. 103, 108 (1990) ("we have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even after resort to 'the language and structure, legislative history, and motivating policies' of the statute." emphasis and citation omitted); compare the position of Justice Scalia and Chief Justice Roberts, who would rank lenity higher in the interpretative hierarchy. *See id.* at 132 (Scalia, J., dissenting) ("If the rule of lenity means anything, it means that the Court ought not . . . use an ill-defined general purpose to override an unquestionably clear term of art"); United States v. Hayes, 555 U.S. 415, 436–37 (2009) (Roberts, C.J., dissenting) (asserting that the rule should be applied prior to resort to legislative history: "If the rule of lenity means anything, it is that an individual should not go to jail for failing to conduct a 50-state survey or comb through obscure legislative history. Ten years in jail is too much to hinge on the will-o'-wisp of statutory meaning pursued by the majority.").

105 A more in depth discussion of the potential constitutional foundations for the American rule can be found in Julian R. Murphy, *Lenity and the Constitution: Could Congress Abrogate the Rule of Lenity?*, 56 Harv. J. on Legis. 423 (2019).

106 United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820).

(i) Separation of powers

With the words "vested in the legislative", one sees a clear reliance on the separation of powers doctrine and an unwillingness on the part of the federal judiciary to venture into Congress' sovereign domain of criminal lawmaking.[107] Astute scholars[108] have noted the *sub silentio* harmonies between *Wiltberger* and the Court's seminal decision of eight years earlier, *United States v Hudson & Goodwin*.[109] In *Hudson & Goodwin*, it was held that federal courts had no power to develop a body of federal criminal common law. The Court in *Hudson & Goodwin* recognized that "[t]he legislative authority of the Union must first make an act a crime … [and] affix a punishment to it" before a federal court could enforce that punishment.[110] Dan Kahan has suggested that, in *Wiltberger*, Chief Justice Marshall's proclamation that "the power of punishment is vested in the legislative … department"[111] was a direct reference to the earlier words used in *Hudson & Goodwin*.[112] Kahan draws a further link between *Wiltberger* and *Hudson & Goodwin*. In *Wiltberger*, the Court rejected the idea that crimes not clearly caught by the text of a criminal statute can nevertheless be brought within its ambit if they are "of equal atrocity, or *of kindred character*, with those which are enumerated".[113] Kahan plausibly sees in this statement a rejection of the "mainstay of common law adjudication", analogical reasoning.[114]

Even without accepting Kahan's claims about the specific connections between *Wiltberger* and *Hudson & Goodwin*, it is undeniable that the Court in *Wiltberger* saw the rule to be giving effect to the constitutional separation of powers. Unsurprisingly, subsequent decisions of the Supreme Court have similarly

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107 *See, generally*, John Calvin Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189, 202 (1985) ("As the branch most directly accountable to the people, only the legislature could validate the surrender of individual freedom necessary to the formation of the social contract. The legislature, therefore, was the only legitimate institution for enforcing societal judgments through the penal law." citation omitted); Akhil Reed Amar, America's Unwritten Constitution: The Precedents and Principles We Live By 427 (2012) ("Structurally, this rule has guaranteed that no person may be sent to the gallows or to prison unless both houses of Congress - and especially members of the lower house, the one most directly accountable to the people - have specifically authorized this grave intrusion upon bodily liberty.").

108 *See, e.g.*, Kahan, *supra* note 14, at 359–61; Markell, *supra* note 24, at 339 n.27; Price, *supra* note 100, at 898, 909.

109 United States v. Hudson & Goodwin, 111 U.S. (7 Cranch) 32 (1812).

110 *Id.* at 34.

111 United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 94 (1820). *See also* at 105 ("We can conceive no reason why other crimes, which are not comprehended by this act should not be punished. But congress has not made them punishable, and this court cannot enlarge the statute.")

112 Kahan, *supra* note 14, at 359.

113 *Wiltberger*, 18 U.S. (5 Wheat.) at 96 (emphasis added).

114 Kahan, *supra* note 14, at 361 (referring to Cass R. Sunstein, *On Analogical Reasoning*, 106 Harv. L. Rev. 741, 754 (1993)). *See also* Guido Calabresi, A Common Law for the Age of Statutes (1985) (accepting that a statutory interpretation method that "updates" statutory text is, at its root, a common law method); Roscoe Pound, *Common Law and Legislation*, 21 Harv. L. Rev. 383, 388, 388 n.6 (1908) (describing analogical statutory reasoning as being a common law method as old as Roman law).

claimed to be effectuating the separation of powers by application of the rule.[115] For example, in *United States v. Bass*, the Court wrote:

> "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity … Thus, where there is ambiguity in a criminal statute, doubts are resolved in favour of the defendant."[116]

(ii) Due process

Today, the rule is commonly understood to be grounded in a second constitutional imperative—Due Process.[117] More specifically, the rule is said to arise from the idea inherent in Due Process that a person ought to have sufficient notice, or fair warning, of the acts that a government would criminalize.[118] At least two scholars[119] have suggested that the Due Process foundation of the rule was present in *Wiltberger* in Chief Justice Marshall's gesture to "the tenderness of the law for the rights of individuals". Others have pointed to other early decisions, many of them by federal judges riding circuit.[120] It is more convenient, for present purposes,

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115 *See, e.g.*, Whalen v. United States, 455 U.S. 684, 689 (1980) ("the power to define criminal offenses ... resides wholly with Congress"); Dowling v. United States, 473 U.S. 207, 213 (1985) ("Federal crimes, of course, 'are solely creatures of statute.' ... Due respect for the prerogatives of Congress in defining federal crimes prompts restraint in this area, where we typically find a 'narrow interpretation' appropriate." citations omitted); United States v. Aguilar, 515 U.S. 593, 600 (1995) ("We have traditionally exercised restraint in assessing the reach of a federal criminal statute ... out of deference to the prerogatives of Congress"); United States v. Lanier, 520 U.S. 259, 265 n.5, 267 n.6 (1997) ("The fair warning requirement also reflects the deference due to the legislature, which possesses the power to define crimes and their punishment." and "Federal crimes are defined by Congress, not the courts").

116 United States v. Bass, 404 U.S. 336, 348 (1971).

117 *See, e.g.*, Cass Sunstein, *Interpreting Statutes in the Regulatory States*, 103 Harv. L. Rev. 405, 471 (1989); William Eskridge, *Public Values in Statutory Interpretation*, 137 U. Pa. L. Rev. 1007, 1029–30 (1989); David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. Rev. 921, 935-36 (1992); Jeffrey A. Love, *Fair Notice About Fair Notice*, 121 Yale L.J. 2395, 2400 (2011); John F. Manning, *Clear Statement Rules and the Constitution*, 110 Colum. L. Rev. 399, 406 n.26 (2010); Trevor Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 S. Cal. L. Rev. 455, 455 (2001); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085, 2094 (2002); Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case W. Res. L. Rev. 581, 582 (1989).

118 *See* Connally v. General Construction Co., 269 U.S. 385, 391 (1926) (describing notice as "the first essential of due process of law").

119 Markell, *supra* note 24, at 339; Davies, *supra* note 86, at 1179.

120 For early invocations of a Due Process type justification for the rule see United States v. Wilson, 28 F. Cas. 699, 709 (C.C.E.D. Pa. 1830) (No. 16,730) (opinion of Baldwin, J.) ("[The rule] is founded on the tenderness of the law for the rights of individual . . . ."); United States v. Mann, 26 F. Cas. 1153, 1157 (C.C.D.N.H. 1812) (No. 15,718) (opinion of Story, J.); The Enterprise, 8 F. Cas. 732, 734 (C.C.D.N.Y. 1810) (No. 4499) (opinion of Livingston, J.) ("It should be a principle of every criminal code, and certainly belongs to ours, that no person be adjudged guilty of an offence unless it be created

to look one hundred years later to the 1931 decision of *McBoyle v United States*[121] for an *explicit* invocation of the notice/fair warning language.

In *McBoyle*, the Supreme Court had to determine whether the National Motor Vehicle Theft Act[122] applied to airplanes. The text of the Act limited its application to "motor vehicles", which it defined as "any … self-propelled vehicle not designed for running on rails."[123] While conceding that it was "etymologically … possible" to read the definition inclusive of airplanes, Justice Holmes felt that the penal nature of the law required a narrower reading. Writing for the Court, Justice Holmes based this conclusion on the notice rationale:

> "it is reasonable that fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."[124]

Since *McBoyle*, the Supreme Court has become increasingly explicit in espousing the due process basis of the rule. So, for example, in *Dunn v United States* the Court explained that the rule "reflects not merely a convenient maxim of statutory construction," but rather "is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited".[125] Similarly, in *United States v Lanier*, it was said that the rule "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered."[126]

(iii) Federalism

The final constitutional dimension to the rule of lenity is, arguably, the effect it gives to values of federalism. On this account, federal criminal laws ought to be interpreted strictly so as to limit the scope of federal legislative incursion into regulatory realms traditionally left to the states. Kahan articulates the values underlying this reasoning in the following terms:

> "What conduct a state chooses to criminalize and how severely it chooses to punish it are matters critical to the experience of deliberative democracy within that state. Because federal criminal law dictates uniform, national answers to such questions, expansive readings of federal criminal law threaten to extinguish the opportunity that states have to use criminal law to express and shape local ideals."[127]

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and promulgated in terms which leave no reasonable doubt of their meaning.") *See, generally*, Barrett, *supra* note 3, at 129–30.

121 McBoyle v. United States, 283 U.S. 25 (1931).

122 41 Stat 324 (1919).

123 41 Stat 324 (1919) § 2(a).

124 McBoyle v. United States, 283 U.S. 25, 27 (1931).

125 Dunn v. United States, 442 U.S. 100, 112 (1979).

126 United States v. Lanier, 520 U.S. 259, 266 (1997).

127 Kahan, *supra* note 14, at 421.

This idea only rarely finds expression in the case law[128] and, accordingly, has not garnered much academic attention.[129] One reason that the federalism rationale for the rule is rarely relied upon independently of its other constitutional bases is that there is little to distinguish a federalism-focused application of the rule of lenity from the distinct interpretative canon of deference to states' rights.[130] When applied to federal Congress' criminal lawmaking power the two rules are coextensive – both requiring a narrow reading of federal criminal laws.

D. Statutory Modification

Just as the rule has arguably been impacted by statutory innovations in Australia so too have legislative enactments in the United States proved troubling for courts applying the rule and scholars theorizing it. At least two states have legislated to codify the rule: Florida and Ohio.[131] The vast majority, however, have done the opposite – attempting to displace the rule by statute. This started in the early 1800s, when Tennessee and Virginia gaming laws required courts to interpret them "remedially", despite their penal character.[132] The first generally applicable statutory provision purporting to displace the rule came into effect in Arkansas in 1838.[133] In Livingston Hall's invaluable survey of the rule's early legislative modification he describes how other states soon followed suit at the recommendation of "commissioners appointed to revise the penal codes of the older states, or draft new ones for territories on their admission to statehood".[134] In 1864 such a rule was proposed in New York where Field, Noyes and Bradford's *Draft of a Penal Code for the State of New York* (1864) included the following at § 10:

> "The rule of the common law that penal statutes are to be strictly construed according to the fair import of their terms, has no application to this Code.

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128 See the survey of Rehnquist-court era cases in Note, *The New Rule of Lenity*, 119 Harv. L. Rev. 2420, 2430–31 (2005).

129 Exceptions include John J. O'Connor, *McNally v. United States: Intangible Rights Mail Fraud Declared a Dead Letter*, 37 Cath. U. L. Rev. 851, 869 n.180 (1988); *Id.* at 230–31; Julian R. Murphy, *A Tale of Two Canons: Can a Federalism Canon Succeed where Lenity has Failed to Limit Federal Criminal Laws?* Va. J. Crim. L. (forthcoming).

130 There is some variance in the literature as to whether the methods of statutory interpretation that take account of federalism ought to be described as one canon or a set of canons. Compare Scalia & Garner, *supra* note 32, at 290–94 (describing the "presumption against federal preemption canon") with William N. Eskridge Jr., Philip P. Frickey & Elizabeth Garrett, Legislation and Statutory Interpretation 367–75 (2006). (describing a number of related "substantive canons designed to protect state authority from federal encroachment").

131 Fla. Stat. §775.021 (West 2000) ("The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused."); Ohio Rev. Code Ann. § 2901.04(a) (Anderson 2002) ("sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.")

132 *See* Hall, *supra* note 3, at 752–53 n.22 (listing relevant Tennessee and Virginia gaming law provisions and subsequent case law interpreting them).

133 Ark. Rev. Stat. (1837) c. 129, §§ 22-23 (approved March 5, 1838).

134 Hall, *supra* note 3, at 753.

> All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice."

Despite legislative prescriptions, the general trend amongst courts in the 19th and early 20th century was to summarily ignore these statutory stipulations. Writing in 1935, Hall claims that in New York "[t]he liberal construction statute has been more honoured in the breach than in the observance".[135] The position does not appear to be much different today. Jeffrey Love has conducted the most recent review—building on the work of Zachary Price.[136] Love concludes "most state supreme courts seem to be invoking lenity when it suits their fancy."[137]

In the federal context, there is no analog to the state purposive interpretation provisions. That is not to say that such a thing has not been contemplated. The American Law Institute's Model Penal Code excludes the Rule, providing: "when the language [of a Code provision] is susceptible of differing constructions it shall be interpreted to further the general purposes [of the Code] and the special purposes of the particular provision involved."[138] Whether such a wide-reaching prescription could garner sufficient congressional support to pass into law remains to be seen. Furthermore, there would likely be a challenge to the constitutional validity of such a law, given the Due Process and separation of powers concerns that the rule is said to embody.[139]

Although there has not yet been a federal effort to comprehensively displace the rule, there have been attempts at more targeted modification of the rule in particular contexts, such as racketeering and securities fraud.[140] The most notable of these attempts is contained in the *Racketeer-Influenced and Corrupt Organizations Act* ("RICO"), which provides: "The provisions of this [statute] shall be *liberally construed* to effectuate its remedial purposes."[141] Although RICO contains both criminal and civil provisions the liberal construction clause does not, at least on its face, limit its application to the civil provisions of the statute. Nevertheless, some courts have been reluctant to explicitly apply the directive to RICO's penal provisions in a way that would completely override the rule of lenity[142] (although

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135 *Id.* at 755 n.39.

136 Price, *supra* note 100, at 901–06.

137 Love, *supra* note 117, at 2396.

138 Modern Penal Code, § 1.02(3). The drafters of the Model Penal Code decided to displace "[t]he ancient rule that penal law must be strictly construed, . . . because it unduly emphasized only one aspect of the problem".

139 *See also* Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 Colum. L. Rev. 2162, 2205 (2002) ("Where a legislature does clearly enact an interpretative statute that aims to undermine the preference-eliciting function of a statutory canon like the rule of lenity, however, that type of opt-out arguable violates whatever constitutional clauses in the particular jurisdiction vests legislative authority in each generation's legislature and interpretative authority in the courts.")

140 *See also* Section 853(a) of the Continuing Criminal Enterprises Act 21 U.S.C. § 853(a) (1994) ("The provisions of this section shall be liberally construed to effectuate its remedial purposes.")

141 Pub L No 91-452, § 904(a), 84 Stat 947 (1970) (emphasis added).

142 *See, e.g.*, United States v. Anderson, 626 F.2d 1358, 1369–70 (8th Cir. 1980) (choosing to apply the rule over the liberal construction clause); United States v. Grzywacz, 603 F.2d 682, 692 (7th Cir. 1979) (Swygert, J., dissenting) (doubting whether RICO's liberal construction provision was intended to apply to the provisions establishing criminal

the courts are arguably applying the provision *sub silentio*, given the expansive interpretations adopted in some RICO decisions).[143] For example, in *United States v McClendon* a Federal District Court expressed the view that: "Congress' call for a liberal interpretation in order to effectuate the Act's 'remedial purposes' does not outweigh the Court's duty under the 'rule of lenity' to construe criminal statues strictly."[144] Less forcefully, but no less tellingly, the Supreme Court has explicitly disclaimed reliance on the liberal construction clause when interpreting RICO's penal provisions[145] and has suggested that the rule can be accommodated in the statutory scheme.[146] At least one scholar has suggested that for courts to apply RICO's liberal construction clause to its penal provisions would violate constitutional Due Process guarantees.[147]

E. Summary of the Current American Approach

Notwithstanding general agreement about the common law and constitutional foundations of the rule there is rarely agreement on the Supreme Court as to its application. One scholar has written that "The rule of lenity today has very little practical effect in decisions interpreting criminal statutes"[148], another claims "Today, strict construction survives more as a makeweight for results that seem right on other grounds than as a consistent policy of statutory interpretation."[149] Before he was elevated to the Supreme Court, Justice Kavanaugh admitted "I do not have a firm idea about how to handle the rule of lenity. Of course, the Supreme

liability). For courts willing to apply the liberal construction provision to RICO's penal provisions, see United States v. Noriega, 746 F. Supp. 1506, 1516–17 (S.D. Fla. 1990) (applying the liberal construction clause in interpreting certain of RICO's penal provisions to cover certain conduct engaged in abroad); United States v. Huber, 603 F.2d 387, 394 (2d Cir. 1979) (relying on the liberal construction clause to interpret the meaning of "enterprise" in § 1961(4)).

143 David Kurzweil, Note, *Criminal and Civil RICO: Traditional Canons of Statutory Interpretation and the Liberal Construction Clause*, 30 Colum. J. & Soc. Probs. 41, 42 (1996) ("Courts have willingly accepted Congress' mandate to apply RICO broadly").

144 United States v. McClendon, 712 F. Supp. 723, 729 (E.D. Ark. 1988).

145 United States v. Turkette, 452 U.S. 576, 587 (1981).

146 Sedima, S.P.R.L. v. Imrex Company, Inc., 473 U.S. 479, 491 n.10 (1985); Reves v. Ernst & Young, 507 U.S. 170, 184 n.8 (1993).

147 Barry Tarlow, *RICO Revisited*, 17 Ga. L. Rev. 291, 309 (1983) ("If the liberal construction clause is applicable to determine the scope of criminal liability under [RICO], the provisions is therefore unconstitutional."); Ellsworth A. Van Graafeiland, *RICO and the Rule of Lenity*, 9 N. Ill. U.L. Rev. 331, 331 (1989) ("[the liberal construction] clause cannot be applied constitutionally to RICO's criminal provisions."). *See also* Alan R. Romero, *Interpretative Directions in Statutes*, 31 Harv. J. on Legis. 211, 229–30 (1994) (suggesting that constitutionally-grounded canons must take precedence over liberal construction provisions). *Compare* Donald Lee, *The Availability of Equitable Relief in Civil Causes of Action in RICO*, 59 Notre Dame L. Rev. 945, 951 (1984) ("due process does not require the strict construction of penal statutes.") *with* Craig W. Palm, *RICO and the Liberal Construction Clause*, 66 Cornell L. Rev. 167, 182, 182 n.54 (1980) ("The Supreme Court has never held that strict construction of penal statutes is constitutionally compelled." And "[decisions of the Supreme Court suggest] that the strict construction rule is prudential rather than mandatory.")

148 Price, *supra* note 100, at 899.

149 Jeffries, *supra* note 107, at 198–99.

Court seems to be very uncertain about the rule of lenity, too."[150] Yet the Court continues to refer to the rule and purport to apply it.[151] If application of the rule appears "random"[152] that is likely because of the diversification of interpretative tools and methodologies now in use.[153] This is not a problem unique to the rule. In a thorough survey of the Supreme Court's approach to statutory interpretation, one scholar summarized the approach as "eclectic".[154] While the rule has been subjected to sustained academic criticism – including some prominent voices calling for its abolishment[155] – there has never been serious doubt in the Supreme Court that the tiebreaker version of the rule is sound. Recent cases suggest as much, with the rule dictating the result for a closely split Court in *Yates*.[156]

V. Similarities, Differences and Attempts at Explanation

A. Early Case Law

As has been seen, early statements of the rule in Australia and the United States both gave it real force as a tool engaged in the face of any textual ambiguity in penal statutes. On both of these accounts, textual ambiguity could not easily be resolved by reference to the overarching purpose of the statute. Instead, both accounts stressed the need for clarity in the words of criminal statutes and thought it proper to apply the rule in the absence of such textual clarity. In Australia, that initial position was complicated by the persuasive reasoning of Justice Isaacs' dissent in *Cawsey* (whereas there was no dissent in the American *Wiltberger* decision). The chronological distinction between *Cawsey* and *Wiltberger* is also relevant. *Cawsey* was decided one hundred years after *Wiltberger*, by which time the more expansive approach to statutory interpretation that was heralded in America by the *Church of the Holy Trinity* decision was also starting to make its way into Australian courts. Indeed, it is instructive to note that Justice Isaacs relied on American authority in his dissent in *Cawsey* – thus demonstrating the influence that the enlightenment in American statutory interpretation eventually came to have on Australia's approach to penal statutes.

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150 Kavanaugh, *supra* note 27, at 2145 n.136.

151 Note, *The New Rule of Lenity*, 119 Harv. L. Rev. 2420, 2421 (2005) (conducting a comprehensive review of the Rehnquist Court's application of the rule of lenity and concluding: "lenity is not defunct. In a small but significant number of cases, the Court applied the rule to reach results that cannot plausibly be explained on other grounds.")

152 Eskridge, *supra* note 117, at 1083.

153 *See* Solan, *supra* note 81, at 102–08 (documenting the diversification of statutory interpretation methods at the Supreme Court).

154 Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation*, 70 Tex. L. Rev. 1073, 1120 (1992). *See also* Easterbrook, *supra* note 27, at 81–82 ("A conference about 'best practices' for legal inquiry supposes that there *are* practices. In the field of legal interpretation, that assumption is doubtful").

155 *See, e.g.*, Hall, *supra* note 3, at 768–70; John Barker Waite, The Criminal Law in Action 320 (1934); Jeffries, *supra* note 107, at 219–20; Kahan, *supra* note 14, at 396.

156 Yates v. United States, 135 S. Ct. 1074 (2015).

B. Constitutional Foundations

Perhaps the starkest difference in the rule's development in Australia and the United States is that only in the latter country has the rule gained a constitutional foothold. The first, and most obvious, reason for this difference is that Australia's Constitution contains no provision comparable to the Due Process clauses contained in the Fifth and Fourteenth Amendments to the United States Constitution.[157] Less easy to explain is the failure of Australian courts to conceive of the rule as an expression of the separation of powers. It is true that Justice O'Connor in *Cawsey* did use separation of powers language to justify a strict interpretation of the penal provision at issue, but the other Justices of the Court (and most courts since) have seen the rule as a common law interpretative canon rather than a constitutional requirement. Similarly, to this author's knowledge, no Australian court has applied the rule to protect State sovereignty in the Australian federal structure. This is likely due to the attenuated species of federalism that now prevails in Australia's constitutional system; a system characterized by "the High Court's reluctance to develop a constitutional jurisprudence of federalism that might seriously temper" the post-1920 phenomenon of "the steady expansion of the powers of the national government to the diminishment of those of the states".[158]

In contrast, the rule has been expressed in constitutional terms in the United States for close to two centuries—primarily in furtherance of separation of powers and Due Process values, but also, occasionally, for federalism-orientated reasons. Nevertheless, there is no agreement amongst the academy as to whether the rule is merely constitutionally inspired or whether it is in fact a constitutional requirement. So, for example, Ross Davies calls the rule a "quasi-constitutional norm" as distinct from a "truly constitutional standard".[159] Einer Elhauge describes the constitutional foundations of the rule as "dubious".[160] This analysis would seem to be borne out by the fact that the rule has been subject to legislative displacement in many of the states.[161]

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157 It should be noted, however, that the lack of an explicit due process clause in the Australian constitution has not precluded the Courts from protecting certain due process rights. *See, generally*, Anthony Gray, Criminal Due Process and Chapter III of the Australian Constitution (2016); Will Bateman, *Procedural Due Process under the Australian Constitution*, 31 Syd. L. Rev. 32 (2009).

158 Shipra Chordia & Andrew Lynch, *Federalism in Australian Constitutional Interpretation: Signs of Reinvigoration?*, 33 Univ. of Queensl. L. J. 83, 83 (2014). *See, generally*, Stephen Gageler, *Beyond the Text: A Vision of the Structure and Function of the Constitution*, 14 J. of the N.S.W. B. Ass'n. 30 (2009). For an informative comparison of federalism in the United States and Australia (as well as other countries), see Michael Burgess, Comparative Federalism: Theory and Practice (2006).

159 Davies, *supra* note 86, at 1175, 1195–96 n.92.

160 Elhauge, *supra* note 139, at 2196.

161 Although one could argue that due process and separation of powers principles might afford more law-making latitude to state courts than federal courts given that state courts are charged with the development of common law crimes whereas federal courts are precluded from doing so (United States v. Hudson & Goodwin, 111 U.S. (7 Cranch) 32 (1812)).

C. Statutory Modification

There is significant diversity of approach to the rule amongst Australia's state and federal legislatures, just as there is in the United States. Two Australian states have legislated to preserve the rule,[162] while at least two American states have enshrined the rule in their own statutory provisions.[163] At the federal level, Australia has an overarching liberal construction clause while the United States Congress has preferred to enact targeted liberal construction clauses within specific pieces of penal legislation, like *RICO.* It is possible to make two general observations about legislative modification of the rule in Australia and the United States. First, notwithstanding the constitutional foundations of the rule in the United States, the rule appears to be vulnerable to legislative displacement in both countries. Secondly, where legislative enactments purport to erode the rule of lenity, courts will only reluctantly give them that effect. In summary, then, the diversity of approaches as amongst Australian and American courts and legislatures to the legislative displacement of the rule of lenity is an example of what Abbe Gluck has called state "laboratories of statutory interpretation".[164]

D. Contemporary Iterations of the Rule

Finally, it is surprising to note that the current versions of the rule in Australia and the United States share very much in common despite their distinct routes of historical development. Both countries have grappled with the application of the rule to hybrid civil-criminal statutes; both countries have struggled to identify the precise degree of "ambiguity" or "doubt" required to engage the rule; and both countries have placed the rule last in the interpretative hierarchy – as a "last resort"[165] in Australia and a "tiebreaker" in the United States.

VI. Conclusion

This article has sought to survey the genesis and development of the rule of lenity (or the rule that ambiguous penal laws be interpreted in favor of the subject) in Australia and the United States. This descriptive analysis has revealed some significant doctrinal differences in each country's development of the rule, primarily deriving from local constitutional differences. In the knowledge of these differences, it is surprising to see how closely the two countries' contemporary versions of the rule align—the United States using the language of "tie-breaker" and Australia using the language of "last resort." These linguistically similar formulations have been arrived at despite very little modern reference to decisions

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[162] Queensland and South Australia, see Acts Interpretation Act § 14 1954 (Qld.); Acts Interpretation Act § 22 1915 (S. Austl.).

[163] Price, *supra* note 100, at 902 n.110.

[164] Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation*, 119 Yale L. J. 1750, 1790 (2010).

[165] The American rule of lenity has also been described as "a canon of last resort". *See* Mark S Popofsky, *The Section 2 Debate: Should Lenity Play a Role?*, 7 Rutgers Bus. L.J. 1, 5 (2010).

of the other country's case law. The question left unanswered by this analysis is, of course, the most interesting. Why is it that the rule has achieved such a similar state in both countries despite the local differences? The answer to this question is best left for future research.

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Declared War and American Victory: A Search for Effective Commitment

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ABSTRACT

This Article argues that the act of formally declaring war entails a measure of explicit commitment on the part of American political actors that raises the cost of failure and motivates politicians to see engagements through to a decisive end, fulfilling the role of a contract or institutional commitment device. It argues that undeclared conflicts, lacking such a device, are more likely to end on less decisive and less favorable terms to the United States. On this basis, it explains the emergence of a decades-long trend of protracted, unsuccessful, and indecisive military engagements by the United States as having emerged from the erosion of a constitutionally established separation of powers with respect to the initiation and administration of foreign military conflicts. In defense of this theory, it uses case studies to assess the relevance of its predictions and to weigh potential objections involving selection bias and imperfect information.

KEYWORDS

Declare War Clause, War Powers, Congressional Oversight, Public Choice, Constitutional Economics

CONTENTS

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I. Introduction

In the two-hundred-and-forty years since the Declaration of Independence, the United States Congress or its antecedent, the Second Continental Congress, have formally declared war eleven times against ten countries in six separate wars: the American Revolution (1776), War of 1812 (1812), Mexican-American War (1846), Spanish-American War (1898), World War I (1917), and World War II (1941). The United States (or the colonies that would soon comprise it) decisively won five of them and concluded the other (War of 1812) in a favorable draw. In fourteen instances, the U.S. engaged in a significant military conflict with congressional approval but without a formal declaration. In seven other cases, the U.S. Congress funded military engagements led by the United Nations without either formally declaring war or engaging its own military. The record for these undeclared or U.N.-led conflicts has been more mixed, occasionally resulting in clear victories but often leading to costly and prolonged engagements without a decisive or favorable result. Despite the "Powell Doctrine" having instilled in modern American military leadership the values of overwhelming force, well defined goals, and clear exit strategies,[1] American conflicts in recent decades have shown anything but.

The contrasting outcomes across these two categories invite this article's hypothesis: that the act of formally declaring war raises the cost of failure and mission creep such that legislators are more likely to press for a swifter resolution of conflict and a more decisive victory. This article views a congressionally approved, formal declaration of war as carrying certain costs and commitments for legislators. In committing the United States to war, they not only ask for certain contributions of both lives and wealth from American citizens; they put their own reputations at stake in the process, making themselves vulnerable to public backlash should the war become too costly and unpopular.

Viewing institutional commitment devices as arrangements that enhance performance by aligning costs and benefits, this article applies theoretical understandings of such arrangements in the context of wartime politics, arguing that with declarations as commitment devices attaching them to the outcome of a war, legislators will be less capable of treating war as a strictly executive affair and less prone to shifting blame for unsuccessful endeavors onto the executive. Legislators will thus apply greater pressure to bureaucrats, the executive, and the military to satisfy popular tastes for security and victory relative to that which would be exerted in the absence of a declaration. Formal declarations thus function much like written contracts in improving the fulfillment of commitments and in serving as reference points for parties' senses of entitlement.[2]Even in the presence of sovereign immunity and the inability of the public to seek formal redress for the government's failure to meet its commitments, it is argued here that the act of making an explicit,

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1 *See generally*, Colin L. Powell, *U.S. Forces: Challenges Ahead*, 71 Foreign Aff. 32 (1992).

2 For a summary and update of the classical conception of contracts, see Patrick Bolton & Mathias Dewatripont, Contract Theory (2005). For an argument on the effect of moral obligations motivating contract fulfillment, see Charles Fried, Contract as Promise: A Theory of Contractual Obligation (1981). For the theory of contracts as reference points, see Oliver Hart & John Moore, *Contracts as Reference Points*, 123 Q. J. Econ. 1 (2008).

written commitment in conjunction with the threat of electoral punishment proves sufficient to motivate politicians to see wars through to more decisive and favorable ends. The effect of that written commitment, however, depends upon loyal, continued adherence to the constitution's requirements for making war. As Daryl Levinson has written, "Formal constitutional entrenchment is not sufficient to create functional entrenchment because formal, legal barriers may be ignored, opportunistically revised or overriden" and "[a]n effective system of constitutional law–one that can serve as a mechanism of political commitment–thus depends on the success of an underlying sociopolitical commitment to play by the constitutional rules."[3] In making this argument, I adopt a public choice approach grounded in rational choice, politics-as-exchange, and methodological individualism.[4] In short, partisanship and the notion of Congress acting *qua institutum* may be superficially descriptive, but, in the limit, only individuals choose.

For students and practitioners of constitutional law and constitutional economics, this perspective on the problem of political commitment in the context of war invites us to consider a potential contractual incompleteness in our constitutional separation of powers and how that incompleteness can result in poorly defined political property rights, precipitating *ex post* reallocations of powers between branches that, though optimal from the standpoint of politicians, may impose considerable costs on the population at large. This does not mean that political actors bargaining away from constitutional entitlements is never, on net, socially optimal; experience may reveal Pareto efficient departures from the Founders' initial constitutional allocations. Nor, however, does it mean, as Aziz Huq comes close to saying, that such departures generally pass the costbenefit test or are presumably born of the wisdom of experience;[5] many are very arguable as rent-seeking made intransigent by the logic of concentrated benefits and dispersed costs. Which has transpired in a particular case rent-seeking or Pareto improvement is an empirical question. On occasion, the Supreme Court has strictly limited institutional bargains on hyper-formalist grounds,[6] but the general tendency is to allow them subject to certain limitations, giving rise to the delegation doctrine in its various statutory permutations[7], the "clear statement rule" for Spending Clause

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3 Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 Harv. L. Rev. 657, 698 (2011).

4 *See generally,* James M. Buchanan & Gordon Tullock, The Calculus of Consent: Logical Foundations of Constitutional Democracy, Chs. 2-4 (Liberty Fund 1999) (1962). For elaborations on its theoretical framework, *see* Geoffrey Brennan, *Politics-as-Exchange and the Calculus of Consent*, 152 Pub. Choice 351 (2012). *See also* Viktor J. Vanberg, *Methodological and Normative Individualism in "The Calculus"*, 152 Pub. Choice 381 (2012).

5 Aziz Huq, *The Negotiated Structural Constitution*, 114 Colum. L. Rev. 1595 (2014).

6 *E.g.*, INS v. Chadha, 462 U.S. 919 (1983); Clinton v. City of New York, 524 U.S. 417 (1998).

7 *See*, *e.g.*, Mistretta v. United States, 488 U.S. 361 (1989); American Power & Light Co.v. SEC, 329 U.S. 90, 105 (1946); Opp Cotton Mills, Inc. v. Administrator, Wage and Hour Div. of Dept. of Labor, 312 U.S. 126, 145 (1941); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928). *But see* A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935).

statutes[8], the functionalist reasoning of *Noel Canning,*[9] etc. It seems incontrovertible to say that outright inter-branch conspiracies that benefit politicians at the public's expense should be blocked. On the other hand, we wish to preserve textually permissible and institutionally sensible bargains, net of the cost of lost transparency and accountability.

Perhaps most importantly, this analysis also breaks new ground by pushing legal scholarship on declarations of war beyond historical debates (reviewed below) over what was *intended* by the Founders in the writing of Article I, Section 8 of the U.S. Constitution and toward an arguably more important question for contemporary purposes: what the *substantive effect* of formal declarations might be on relevant actors' incentives and behavior. If, as scholars of constitutional economics have long held[10], the terms and structure of constitutional relationships have a meaningful effect on actors' behavior, then it would seem both plausible and highly significant that changes which radically alter the nature of such relationships even temporarily, in a time of crisis should affect individuals' choices on the margin. On that premise, it is reasonable to expect that a systematic change of constitutional practice from using formal declarations and the expansion of powers that they entail to abandoning declarations altogether should bear upon the incentives of policy makers. The framers of the Constitution, it is argued here, understood the implications that separation of powers would have for war policy and crafted the uniquely American system of legislative declaration and executive prosecution of war accordingly. Recent generations' abandonment of formal declarations has been more tacitly accepted than rationally advocated, and perhaps irreversibly so, but before an explicit constitutional grant of power to one branch is permanently traded to another and the constitutional model of war declaration is relegated to history books, it is worth asking whether the purported public benefits of the trade exceed its costs.

The following section presents a brief review of the relevant literatures in law, political science, political theory, and public choice. Section Three offers a very brief intellectual history of the origins of the Declare War Clause. Section Four describes the institution of declaring war, presents the theory of formal declarations of war as commitment devices, and models the institutional conditions that prevail with and without explicit declarations, arguing that the issue at the root of common modern complaints about prolonged and indecisive military conflicts is an inadequate stricture in the constitutional assignment of political property rights and prohibitions of *ex post* renegotiations between branches of government. Section Five offers a series of case studies, comparing declared and undeclared wars to illustrate the theory and determine whether ready objections to this view sustain the weight of the evidence. Section Six concludes.

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8 *E.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 255 n. 7 (1985) (Brennan, J., dissenting).

9 N.L.R.B. v. Noel Canning, 573 U.S. 513__ (2014).

10 *See generally,* James M. Buchanan & Gordon Tullock, The Calculus of Consent: Logical Foundations of Constitutional Democracy (Liberty Fund 1999) (1962); James M. Buchanan, Logical Foundations of Constitutional Liberty (1999); James M. Buchanan, Federalism, Liberty, and the Law (2001); Robert D. Cooter, The Strategic Constitution (Princeton U. Press 2002) (2000).

II. Related Literature

In the argument of this article, we go against the trajectory of thought on the subject since the signing of the Constitution. In that time, the prevailing view has shifted from declarations of war being considered too obviously necessary to merit debate to being considered too obviously superfluous. James Madison asserted in Federalist No. 41[11] that the power of declaring war was so selfevidently necessary that it was superfluous to argue the point. Professor Clyde Eagleton, observing emerging practices and opinions in 1938, expressed doubt that war would ever be declared again and that "the declaration of war seems to be regarded by some as an anachronism to be discarded."[12] The radical change in American intellectuals' views on the subject over that 150 year period can be traced by periodic publications. Noted jurist Henry Wheaton asserts clearly that declarations of war to one's enemy are superfluous as a matter of international law.[13] Rather, he makes a pragmatic argument for declarations to one's own people based not in Madison's intention of restraining the executive but a pragmatic case for giving fair warning to merchants, "the instruction and direction of the subjects of the belligerent State," and the simplification of subsequent peace conferences.[14] Eagleton asks the purpose of a formal declaration of war and, prioritizing the resolution of related legal issues, answers that it satisfies the demand for a specific "date upon which the metamorphosis from peace to war takes place."[15]

Modern literature on formal declarations of war continues to be predominated by the legal scholarship, with political science and theory playing secondary roles. The most thorough legal analysis of the subject has been conducted by Fisher[16], who argues that modern American politicians' approaches to entering war have been contrary to those of America's Founding Fathers both in theory and practice. He conducts a comparative analysis of American conflicts from the founding through the presidency of Barack Obama, with particular focus on the executive branch's aggregation of war powers over that period and Congress's willingness to surrender those war powers guaranteed to it by the language of the Constitution. Contrary to the stated intention of the War Powers Resolution of 1973, he sees it and other modern legislative actions on war powers as attempts by Congress to *appear* concerned with the loss of its war powers rather than as genuine efforts to reassert those powers. Prakash details three approaches to understanding the war clause of the Constitution—categorical, pragmatic, and formalist—and analyzes the merits of each interpretation, landing ultimately in favor of the categorical interpretation, which gives Congress "power to control all decisions to enter war."[17]Delahunty and Yoo, in response to Prakash, argue that the war clause was designed only to

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11 The Federalist No. 41 (James Madison) (Gideon ed., Liberty Fund, 2001) (1788).

12 Clyde Eagleton, *The Form and Function of the Declaration of War*, 32 Am. J. Int'l. L. 19 (1938). To date, Professor Eagleton has been correct, with the sole exception of World War II.

13 Henry Wheaton, Elements of International Law 214 (1836).

14 *Id.* at 213.

15 Eagleton, *supra* note 14, at 229.

16 Louis Fisher, Presidential War Powers (3d. ed., 2013).

17 Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by 'Declare War,'* 93 Cornell L. Rev. 45 (2007).

"regulate the relations between the United States and other states" rather than to in any way regulate the division of power between the branches of the federal government.[18] Campanelli et al. note that no one among the Founders denied that the president might respond militarily to imminent attack requiring a defensive response, but they find it unambiguous in the record of late eighteenth and early nineteenth century debates, communications, ratifying conventions, and Supreme Court opinions that Congress alone held "the power to make war."[19]And Paulsen, arguing more broadly that the executive power over warmaking is at a historical high with Congress' grants of unprecedented power to the president in the War on Terror, nonetheless notes that the power to declare war is not the power to manage it and that the two should not be confused.[20] We do not dispute this but rather argue that the two powers *are* functionally linked by declarations giving legislators a greater personal stake in military conflict and forestalling their attempts to shift all accountability for war onto the executive.

In political science and theory, the most extensive recent treatments have been by Hallett, who defends the practice on the basis of preferences for peace and limited government[21] but whose subsequent writing is pessimistic on the prospects of ever reestablishing the incentives to revive the formal declaration process.[22]

The assertion that declarations have a positive effect on the outcomes of wars is either absent from or in contradiction to all existing literature on the subject. Most writers on the subject have been silent on declarations' effect on the outcomes of wars. Hallett, a defender of formal declarations, denies that declarations affect the contest of war: "from the legal perspective, declarations of war affect primarily the condition of war, not the contest, the declaration's specific juridical functioning being to establish the legal condition of war by voiding contracts and treaties, triggering the rights of neutrals, and activating the other provisions of the law of war."[23] Accordingly, most defenders of the custom have focused their attention on normative arguments grounded in preferences for limited government,[23] chivalrous "fair warning" to an enemy,[24] clarifying *ex post* legal questions,[25] religious beliefs,[26]

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18 Robert J. Delahunty & John Yoo, *Making War*, 93 Cornell L. Rev. 123 (2007). A surprising interpretation, given that the overriding purpose of the Constitution itself was to regulate the division of power between branches of the federal government and not between the United States and other states.

19 M. Andrew Campanelli et. al., *The Original Understanding of the Declare War Clause*, 24 J.L. & Pol. 49 (2008).

20 Michael Stokes Paulsen, *The War Power*, 33 Harv. J.L. & Pub. Pol'y 113 (2010).

21 Brien Hallett, The Lost Art of Declaring War(1998).

22 *Id.* at 87; Brien Hallett, Declaring War: Congress, the President, and What the Constitution Does Not Say (2012).

23 Hallett *supra* note 23; Hallett *supra* note 24*;* Louis Fisher, Presidential War Powers (3d. ed., 2013).

24 Thucydides, History of the Peloponnesian War, (Richard Crawley trans., Longmans, Green, and Co. 1874); Sir John Frederick Maurice, Hostilities Without Declaration Of War: An Historical Abstract of the Cases in Which Hostilities Have Occured Between Civilized Powers Prior to Declaration or Warning (Nabu Press 2012) (1871).

25 Clyde Eagleton, *The Form and Function of the Declaration of War*, 32 Am. J. Int'l. L. 19 (1938).

26 *Deut*. 20:10-12 (King James); *Judges* 11:1-32 (King James).

diplomatic clarity of intentions[27], courtesy to merchants, instruction of the domestic population[28], and general preferences for peace over war.[29]

Critics of the formal declaration process, having predominated the last century of scholarship on the subject, follow primarily in the tradition of Cornelius van Bynkershoek,[30] who described the act of formal declaration as a largely hollow process designed "to render victory more honourable and glorious." William Edward Hall echoed this view, writing that "any sort of previous declaration... is an empty formality unless the enemy must be given time and opportunity to put himself in a state of defence, and it is needless to say that no one asserts such a quixotism to be obligatory."[31] Along these lines, it can be generally asserted that, far from seeing a positive strategic value to declarations, critics of the process tend to view them as dispensing with a valuable element of surprise at the onset of war.

A rare attempt to integrate the insights of law and economics to the issue of declaring war is by Sidak, who, adapting the insights of the Coase Theorem, cites reduced monitoring costs and enhanced political accountability in formally declared versus undeclared wars.[32] His extensive analysis and application to the Persian Gulf War offers a normative interpretation of the War Clause structured upon a positive analysis of the separation of powers. In contradistinction to the Coase Theorem's assertion that the establishment of legal rules and property rights reduces transaction costs and facilitates bargaining, Sidak argues for an "Inverse Coase Theorem" in which "monitoring costs are reduced, and political accountability enhanced, by prohibiting bargains that alter the Constitution's formal allocation of rights of decision among political actors."[33] Given that the executive and legislative branches make bargains over that which belongs to a third party (the public), Sidak argues, the failure to explicitly allocate those powers between the two branches in greater detail allows them to lay considerable costs on the public while preventing the public from effectively discerning which branch is accountable for the increasing burden of the war. Sidak's characterization of the problem presented by undeclared conflicts is accepted here and extended through the application of choice theory and the literature on contracts and commitment devices.

An extensive literature in institutional economics views the nature and implications of institutional commitment devices as arrangements that enhance

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27 Hugo Grotius, The Rights of War and Peace 321 (A. C. Campbell trans., M. Walter Dunne 1901) (1625); Convention (III) relative to the Opening of Hostilities. The Hague, 18 October 1907; Maurice *supra* note 26 at 3; *see* Henry Wheaton, Elements of International Law 213 (1836).

28 *See* Henry Wheaton, Elements of International Law 229 (1836).

29 Hallett, Declaring War, *supra* note 24; Hallett, The Lost Art , *supra* note 23; Cicero, *De Officiis* i. II. 36, iii. 23-35; *cf. De Republica* ii. 17; G. A. Harrer, *Cicero on Peace and War*, 14 Classical J. 26, 38 (1918).

30 Cornelius van Bynkershoek, Quaestionum Juris Publici Liber Duo, 14 (Frank Tenney trans., 1930).

31 William Edward Hall, A Treatise on International Law (A. Pearce Higgins, 8th ed., Oxford Univ. Press 1924) (1880).

32 J. Gregory Sidak, *To Declare War*, 41 Duke L.J. 27 (1991); J. Gregory Sidak, *The Inverse Coase Theorem and Declarations of War*, 41 Duke L.J. 325 (1991).

33 Sidak*, supra* note 34 at 326.

performance by establishing shared goals, costs, and benefits.[34] The fundamental importance of institutions in establishing credible commitment is addressed by North.[35] Noting that commitment is not the sole function of institutions and should not be the only standard by which they are measured, he nonetheless cites it as "overwhelmingly the most pressing issue." Shepsle specifies this further by arguing that commitment can be credible in one of two ways: the motivational or the imperative.[36] Motivational credibility reinforces commitment by making actors want to fulfill their terms at the point of transaction. Imperative credibility does so through coercion or the removal of actors' discretion. The role of declarations as argued here can be thought of as having the same motivational/imperative characteristics of legislation more generally in the public choice literature: voters prefer legislators who are intrinsically motivated to fulfill the commitments at a minimum of costly punishment but are willing to vote politicians out if they fail to deliver.

A theory of legislative and executive commitment playing instrumental roles in foreign policy has already been detailed by Martin, who argues that for democracies, legislative integration into cooperative diplomatic arrangements is instrumental to determining the level of commitment to those arrangements.[37] She presents two mechanisms by which this is made true: (i.) legislatures' power to reclaim authority from the executive or to refuse to implement international arrangements and (ii.) indirect means of control through funding and the obstruction or delay of necessary ratifications. In this theory, she upholds a conception of legislative-executive relations as an exchange relationship and highlights the need for "institutions that allow both branches to benefit from international cooperation."[38] Leeds likewise argues that domestic institutional arrangements create incentives that have significant consequences for the success of international cooperation.[39] These views are extended here with one modification: the contention that the same principles apply in instances of international conflict as in international cooperation. Seeing formally declared war as a political condition as well as a contest, it assumes the legislature to be no less relevant in determining the degree of political commitment to the prosecution of war than it would be in determining the commitment to peace.

A formal declaration of war is presented as a commitment device that better ensures the successful resolution of international conflict.

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34 Douglass C. North, *Institutions and Credible Commitment*, 149 J. Institutional & Theoretical Econ. 11 (1993); Lisa L. Martin, *Theoretical Framework: Legislatures, Executives, and Commitment*, in Democratic Commitments: Legislatures and International Cooperation 21 (2000); Jeffrey K. Staton & Christopher Reenock, *Substitutable Protections: Credible Commitment Devices and Socioeconomic Insulation*, 63 Pol. Res. Q. 115 (2010).

35 North, *supra* note 36.

36 Kenneth Shepsle, *Discretion, Institutions, and the Problem of Government Commitment*, *in* Social Theory for a Changing Society 245 (Pierre Boureau & James S. Coleman eds., 1991).

37 Lisa L. Martin, *Theoretical Framework: Legislatures, Executives, and Commitment*, *in* Democratic Commitments: Legislatures and International Cooperation, 21 (2000).

38 *Id.* at 23.

39 Brett Ashley Leeds, *Domestic Political Institutions, Credible Commitments, and International Cooperation*, 43 Am. J. Pol. Sci., 979 (1999).

This theory also puts forward a new application of the literature on elected officials' responsiveness to voters' preferences. An existing literature argues that elected officials face pecuniary and non-pecuniary costs if they fail to deliver what they promise and will thus strive to avoid those costs by conforming to voters' values and expectations.[40] Downs argues that politicians "act solely in order to attain the income, prestige, and power which come from being in office... their only goal is to reap the rewards of being in office per se" and contends that this goal is equivalent to maximizing voter support.[41] Maskin and Tirole view this as sufficient to eliminate the moral hazard concerns that come with permanently appointed officials and to shape officials' behavior in accordance with voters' values. Weighing the costs and benefits of direct democracy, representative democracy, and permanent appointments, they conclude that the welfare-maximizing option for the public is, *ceteris paribus*, for decisions resulting in large legacy payoffs to be handled by elected representatives who face the prospect of reelection. They specifically cite the choice of whether to enter war as an instance of such a decision. Though this does not, of itself, imply anything as to the superiority of a legislatively declared and managed war versus one spearheaded by the executive (since both are elected officials), it does justify the assumption of a significant interrelationship between, on the one hand, voters' welfare and, on the other, elected representatives playing a greater role in the decision of whether or not to engage in war. It is no great logical leap to assume, based on this, that the greater the share of elected officials who play a role in the decision to enter war, the greater the share to whom these incentives apply.

Also pertinent is the copious literature on civilian control of military policy and operations. Naturally, the arguments made here take much for granted in assuming that civilian leadership matters and has a substantive effect on the conduct of war. Huntington traces the evolution of civilian control of the American military, arguing that its modern form is more a product of extra-constitutional political practice than of the framers' design.[42] The assignment of an executive office of "Commander in Chief" rather than a specific set of tasks, he argues, has led to complicated historical questions and inter-branch contests for power over military affairs.[43] Later writings by Huntington, however, still portray a viable effect of civilian control, arguing that it is fostered by interbranch competition within the military[44]and that sharp distinctions between the military and civilian spheres were crucial to the military "internalizing" civilian control and maintaining favorable relations with civilian functions of the state.[45] Quite contrary to the perspective of my arguments,

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40 Anthony Downs, An Economic Theory of Democracy (1957); Eric Maskin & Jean Tirole, *The Politician and the Judge: Accountability in Government*, 94 Am. Econ. Rev. 1034 (2004); Claire S. H. Lim, *Preferences and Incentives of Appointed and Elected Public Officials: Evidence from State Trial Court Judges*, 103 Am. Econ. Rev. 1360 (2013).

41 Downs, *supra* note 42, at 28-31.

42 Samuel P. Huntington, *Civilian Control and the Constitution*, 50 Am. Pol. Sci. Rev. 676 (1956).

43 *Id.* at 693-99.

44 Samuel P. Huntington, *Interservice Competition and the Political Roles of the Armed Services in* Total War and Cold War:Problems in Civilian Control of the Military (Harry L. Coles ed., 1962).

45 Samuel P. Huntington, The Soldier and the State: The Theory and Politics of Civil Military Relations (1964).

Damrosch has argued that there is a general trend in constitutional democracies toward parliamentary control over war and peace decisions and that Congress has asserted more power in this arena over time.[46] Her argument, however, is hard to reconcile with the facts as described here. To the matter of how congressional resignation from this area might have substantive effects, Sechser demonstrates through quantitative analysis that states with strong civilian control over the military are, on average, less prone to initiate military action than states without it, suggesting that, consistent with my argument, reduced civilian involvement might lead to more frequent engagements.[47] Last but not least, Yoo encourages further examination of civilian-military relations within the framework of administrative law and principle-agent theory, citing the president's removal authority as vesting him with considerable control over military conduct.[48] And Powell's account, as a former chairman of the Joint Chiefs of Staff, commends such a perspective, noting generals' cognizance of Secretary of Defense Dick Cheney's willingness to fire generals during the administration of George H.W. Bush.[49] Though debates persist as to the proper policy approach and the right balance of civilian and military control, there is a broad, if tacit, acceptance of the premise that civilian policy matters and can have a substantive effect on military outcomes.

Finally, in accordance with the view that declarations do not affect the contest of war, a contrary explanation for the United States' greater success in declared wars is selection bias. This view contends that American politicians choose to formally declare war only where and when they believe that they face a high probability of success. This hypothesis thus invites us, as we review the historical record of declared versus undeclared conflicts, to consider whether cases in which military engagements are undeclared would have appeared to politicians at the onset of conflict as more daunting, their outcomes less certain. If success can be said to have been generally viewed as less probable at the onset of undeclared wars than in declared ones, then this critique may carry considerable weight. If not, then the *ex post* effects of declarations on political incentives and commitment must be viewed with interest, suggesting a worthwhile research agenda into the constraints and incentives that formal declarations provide.

III. Origins of the War Powers Clause

The Founders' embrace of separations-of-powers was as radical a departure from common practice in war declaration as it was in so many other aspects of governance. They were not, however, working against a blank slate. As noted above, many revered political and legal theorists through the ages had addressed the question of war declaration, from Thucydides to Grotius, van Bynkershoek, and

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46 Lori F. Damrosch, *Is There a General Trend in Constitutional Democracies Toward Parliamentary Control Over War-and-Peace Decisions?,* 90 Proc. Ann. Meeting Am. Soc. Int'l L. 36 (1996).

47 Todd S. Sechser, *Are Soldiers Less War-Prone Than Statesmen?*, 48 J. Conflict Res. 746 (2004).

48 John Yoo, *Administration of War*, 58 Duke L.J. 2277 (2009).

49 Colin Powell, *An Exchange on Civil-Military Relations*, 36 Nat'l Int. 23, 23 (1994).

others with whom the Founders were surely familiar.[50] Locke, in his *Two Treatises*, distinguished three categories of governmental powers legislative, executive, and federative and placed the "power of war and peace" and other matters of foreign relations among the federative.[51] Locke, however, noted that the federative and executive powers were "almost always united," stressing that they "are hardly to be separated and placed... in the hands of distinct persons," as both require the "force of society."[52] And a generation later, in Montesquieu, the distinction was erased entirely, leaving only the legislative power and a dual executive power over civil and international laws.[53] Going still further, Blackstone, in his *Commentaries*, warned that subjecting foreign affairs to the many wills of democracy would lead to indecisiveness and considerable danger.[54] The Founders' great regard for these theorists notwithstanding, they clearly elected not to follow their trajectory when it came to assigning the power to declare war.

The Founders' division of war powers across branches of government harkened more to their admiration for the republics of Antiquity than for the Englightenment theorists. Both Greece and Rome, in their experiences with representative government, divided war powers across separate bodies. In Ancient Athens, the Assembly (*ecclesia*) was reponsible for declaring war on behalf of the city, overseeing military strategy, and electing generals and other military officials.[55] And Sparta, though initially having granted war declaration powers to its dual kings, stripped them of that right from the time of the Persian wars, asserting greater legislative control.[56] The Founders, however, to the extent that they were influenced by the ideal of Greek politics, looked to the more mixed democracy of Solonian Athens than the unlimited majoritarianism of other eras of Athens or to the statism of Sparta, and they seemed to favor the example of Rome most of all.[57] In Rome, war declaration was a ritualistic endeavor carried out by "fetials," independent priests of Jupiter who served variously as diplomats, international law judges, and expert witnesses to the Roman Senate on the laws of war.[58] Their primary charge, according to Plutarch, was to ensure that Rome did not enter an unjust war, and they had the power to prevent war's initiation where they saw it to be unmerited.[59]

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50 *See id.* For a more general summary of intellectual influences on the framers' approach to foreign relations, see Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 Yale L.J. 231 (2001).

51 *See* John Locke, Two Treatises on Government, Ch. XII (1690).

52 *Id.* at *327*.

53 Baron de Montesquieu, The Spirit of Laws (1751).

54 William Blackstone, Commentaries on the Laws of England (1765).

55 Mogens Herman Hansen, *How Many Athenians Attended the Ecclesia?*, 17 Greek, Roman, & Byzantine Stud. 115, 121 (1976).

56 Paul Halsall, *Sparta*, Fordham Univ., https://sourcebooks.fordham.edu/ancient/eb11-sparta.asp, (last visited May 24, 2019).

57 Mogens Herman Hansen, *The Tradition of the Athenian Democracy A.D. 1750-1990*, 39 Greece & Rome, 14, 18 (1992).

58 John Rich, *The Fetiales and Roman International Relations*, *in* Priests and State in the Roman World (James H. Richardson & Federico Santangelo eds., Franz Steiner Verlag 2011). For a fuller discussion of the fetials and a deeper exploration of their role, see Alan Watson, International Law in Archaic Rome: War and Religion (1993).

59 *Id.* at 190.

The Constitution was not the first time that the Founders had vested powers over war and peace in the legislature. The Articles of Confederation established no executive branch and therefore vested the war power, by default, in the legislature, stating that "The United States, in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war,"[60]allowing exceptions only for states' power to defend themselves against invasion by Indian tribes.[61] Thus, when it came time to allocate war powers under the Constitution, institutional inertia would have been on the side of keeping that power in the legislature. Inertia, however, proved no safeguard against so many fundamental changes in the American system of government, so this alone was no guarantee. Rather, the framers' shared concerns about perverse incentives that might accompany executive war powers made legislative supremacy in war declaration uncontroversial.

Though the framers diverged over the desired strength of the new executive branch, they were in broad agreement as to what powers he should have with regard to war. George Mason, in characteristic distrust of executive power, opposed giving the executive war power, "because not safely to be trusted with it;... He was for clogging rather than facilitating war."[62] By contrast, Founding Fathers such as Charles Pinckney, John Rutledge, and James Wilson all advocated for a singular executive but nonetheless shared Mason's apprehensions about vesting in that executive unilateral powers over warmaking decisions.[63] Alexander Hamilton proposed that the Senate have the "sole power of declaring war," leaving the president authority over "the direction of war when authorized or begun."[64]

Broadly speaking, the Founders saw executive power over war as leading to the aggrandisement of that office and feared the perverse, glory-seeking incentives that it created,[65] with Madison writing some years after the ratification that "the Ex. is the branch of power most interested in war, & most prone to it. [The Constitution] has accordingly with studied care, vested the question of war in the Legisl."[66] Hamilton, writing as Pacificus, took the contrary view that Congress was the more belligerent branch and that the executive would place a check upon such impulses, but he argued no less forcefully for the importance of separating powers on the issue and for the functional importance of requiring Congress to formally declare.[67] Striking in this as in so many of the Founders' comments is that, contrary to the scholarly perspectives on war declaration both before and after them, the Founders did not see the question as being merely one of formality, tradition, fair warning to merchants or the enemy, or religious imperative but rather as a functionalist, political economy question about institutional incentives and the externalities

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60 Articles of Confederation of 1781, art. IX.

61 Articles of Confederation of 1781, art. VI.

62 Louis Fisher, Presidential War Powers 9 (3d. ed., 2013). Fisher's broader discussion of the history of war powers is invaluable, and this summary owes a great debt to his labors.

63 *Id.* at 4-5.

64 *Id.* at 5.

65 William Michael Traenor, *Fame, the Founding, and the Power to Declare War*, 82 Cornell L. Rev 695 (1997).

66 *Id.* at 10.

67 *See* Alexander Hamilton*, Letters of Pacificus No. 1* (1793) *in* The Pacificus-Helvidius Debates of 1793-1794: Toward the Completion of the American Founding at 8, 11-16 (Morton J. Frisch, ed. Liberty Fund, 2007).

to the public of unchecked executive power to initiate war (albeit not in those anachronistic terms).

Overall, the Declare War Clause prompted no significant debate at the Constitutional Convention. The most notable exchange over it at the Convention was prompted by James Madison's and Elbridge Gerry's motion to substitute the word "declare" for what had thus far been called the power "to make war."[68] The ensuing debate evinces some confusion among delegates as to the significance of the change, but Madison's and Gerry's stated reason was to avoid any interpretation that might prevent the president from acting quickly to repel attacks before receiving a Congressional declaration of war.[69] No real dispute emerged from these discussions, though, and the measure passed with ease.

In the end, war powers, broadly defined, extended well beyond the simple statement of Congress' power to declare war. The Commander-in-Chief Clause, in Article II, § 2, declared that "[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States," but the precise demarcation of what that role entails was left undefined, doing little to resolve these interbranch contests. Counterbalancing this role, seven clauses of the Constitution allocate war powers to Congress, including Clause 10 (defining and punishing piracies and felonies on the high seas, offenses against the Law of Nations), Clause 11 (declare war, grant letters of marque and reprisal, make rules concerning captures on land and water), Clause 12 and 13 (raise and support armies, maintain navy), and Clauses 14 through 16 (regulation of forces, call forth militia, discipline militia).

All of these Congressional powers read as preparatory or rule-making powers, constraining military action either by legal or fiscal means, fitting well with the idea of Congress setting the parameters for military action and leaving much of the prosecution of war to a more agile and decisive executive. This is not to say, however, that the framers took the commander-in-chief function to be any more immune from legislative oversight nor more likely to function well in the absence of such oversight than any other executive power; to the contrary, the aforementioned clauses together indicate a strong desire for legislative participation and oversight. And as the ensuing analysis and case studies will attest, the assumption that legislative oversight has a substantive effect on the satisfactory execution of policy is as reasonable in warmaking as in civilian matters. More controversially, I argue that Congress' proper exercise of the war powers granted to it has a substantive effect on legislators' attachment to war and their willingness to assert their oversight prerogatives beyond the initial declaration.

IV. Theory

A. The Institution of Declared War

In the American political system, a declaration of war is a vote by elected representatives to commit publicly owned resources to the prosecution of a military

[68] Michael S, Paulsen, *The War Power*, 33 Harv. J.L. & Pub. Pol'y 113 (2010).
[69] The Federalist No. 41, at 117 (James Madison) (Gideon ed., 2001).

undertaking and to alter the existing constitutional and legal relationship between the people and government for the duration of the war in order to achieve a favorable outcome.[70] As with any ordinary bill that is made into law by the federal government, it consists of a simple majority vote by both houses of Congress and the signature of the president. Should the president veto, the declaration is subject to the possibility of a legislative override of his veto by a two-thirds majority of both houses. By this process, a conditional exchange of powers and privileges is conducted between the state and the public that includes the provision for the suspension of habeas corpus under Article I, Section 8 of the U.S. Constitution and for the establishment of martial law.[71] Economically, the expansion of government's power is total. In a time of war, the government may expand its claims to private industry's output through seizures, rationing, and/or price controls.[72] In a passage shared by 20th century declarations, they assert that "all the resources of the country are hereby pledged by the Congress of the United States."[73] In return for this expansion of its power, politicians commit, under threat of political punishment, to achieve a decisive and favorable outcome—be it defense of the homeland, conquest, or the elimination of threats abroad.

Unlike other acts of legislation, in which Congress makes law within the established constraints of the Constitution and delegates their enforcement to the executive, in declaring war, Congress arrogates to the federal government powers in excess of those normally granted by the Constitution in order to meet the needs of the country at that moment. Legislators conditionally grant the president, as commander-in-chief, managerial discretion over the conduct of the war subject to congressional oversight. The resulting arrangement can be thought of as a contract in which a mediator oversees a transfer of rights from one party in exchange for a guarantee of victory (however defined) from the other. The mediator (Congress) acts as trustee of those rights and monitors the recipient (the executive branch) to ensure that the terms are fulfilled to the best of its ability. The defining institutional trait of a declared war is the way in which it publicly and explicitly distributes political responsibility for the war between the executive and legislative branches. By accepting the responsibility of having authorized the war, legislators share with the executive in the costs and risks of failure (whether outright defeat or the failure to achieve certain stated goals) but also in a claim to credit should the United States prevail. The result is an alignment of costs and rewards that establishes a cooperative relationship between Congress and the executive with the fulfillment of commitments expressed in the declaration as their shared goal.

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70 The commitment of publicly owned resources is invariably stated explicitly in American declarations of war, granting to the president the "entire naval and military forces of the United States and the resources of the Government"— that exact wording having been shared by all 20th century declarations but expressed in some variation in all American declarations. *Official Declarations of War by Congress*, United States Senate, , https://www.senate.gov/artandhistory/history/common/generic/Origins_WarPowers.htm.

71 Provisions for martial law are likewise included in Art. I, § 9 but have been further limited by subsequent pieces of legislation including the Posse Comitatus Act of 1878, 18 U.S.C. § 1385 and the Insurrection Act of 1807, 10 U.S.C. §§ 331-335.

72 Robert Higgs, Crisis and Leviathan: Critical Episodes in the Growth of American Government (2007).

73 *Official Declarations of War by Congress*, United States Senate, https://www.senate.gov/artandhistory/history/common/generic/Origins_WarPowers.htm.

Though it is true that these powers are asserted and agreed upon by a simple majority, it is fair to say that the trustee role, as described, applies to a sufficient percentage of legislators to achieve substantial institutional commitment. Based on the fact that a majority of legislators in both houses are required to vote in favor of a declaration for it to pass and the assumption that voters' evaluation of legislators is dependent upon the legislators' individual voting records[74], it seems safe to assume that a majority of legislators in both houses have, in the eyes of the electorate, some reputational attachment to the war being declared. The high margins by which declarations of war have historically passed indicates that the reputational connection to declared wars should be very strong. Thirteen out of seventeen votes to declare war in the House and Senate have done so with more than ninety percent of the vote, and in only one war (the War of 1812) has the United States declared with less than seventy percent support in both houses. Even if we reason that legislators who did not vote for a given declaration of war feel no obligation to involve themselves in the conduct of that war (a dubious proposition, given the rally-round-the-flag effect[75] and historical efforts by dissenters, *infra*, to signal that despite their vote against a war they intend to be involved in its conduct), the passage of a declaration by majority vote assumes that unless and until a sufficient number of those legislators who supported the declaration are voted out, the reputational effect on legislators' attentiveness will prevail over a majority of both houses of Congress. It is arguable that this relationship could weaken if a declared war lasted so long that a considerable portion of congressional seats turned over before it was resolved, but as no declared war has reached the near-generational lengths of Vietnam and Afghanistan, such an eventuality is untested and arguably prevented by the very qualities that declarations are herein argued to possess. Thus, while it is reasonable to argue that the assumptions of responsibility described in this article do not apply equally to all legislators, it is likewise reasonable to presume that they apply to a sufficient portion of them to make these relationships function as described. All of this is to say that to the extent that voters derive utility and disutility from war, individual legislators' votes count.

Another worthwhile potential objection to this claim is that the declaration of war, which necessarily occurs at the outset of war, matters less than subsequent developments of the conflict and policy makers' positions on those developments—budgeting, adjustments of troop levels, revised depletion reports, diplomatic negotiations, etc. This objection is consistent with common observations as to voters' short memories.[76] However, votes on whether or not to go to war are particularly conspicuous votes on a legislator's record and, anecdotally, have proven

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74 Brandice Canes-Wrone et al., *Out of Step, Out of Office: Electoral Accountability and House Members' Voting*, 96 Am. Pol. Sci. Rev. 127 (2002); Stephen Ansolabehere et al., *The Effects of Party and Preferences on Congressional Roll-Call Voting*, 26 Legis. Stud. Q. 533 (2001).

75 John E. Mueller, *Presidential Popularity from Truman to Johnson*, 64 Am. J. Pol. Sci. 18 (1970).

76 S*ee generally*, Beth Miller, *Failing to Recall: Examining the Effects of Trace Decay and Interference on Memory for Campaign Information*, 34 Pol. Psychol. 289 (2013). Some evidence suggests, however, that voter memory can be influenced by favorable circumstances and effective politicking, see Michael M. Bechtel & Jens Hainmueller, *How Lasting Is Voter Gratitude? An Analysis of the Short- and Long-Term Electoral Returns to Beneficial Policy,* 55 Am. J. Pol. Sci. 852 (2011).

to "follow" politicians throughout their careers in a way that individual votes on troop levels or budgets do not appear to do. It seems fair to say that, given voter ignorance of day-to-day, "managerial" sorts of votes, a politician's vote on whether or not to go to war attaches him to the outcome of that war more than his votes on tedious technical matters of administration that quickly lose voters' interest. In war, voters derive utility from their country being victorious and secure with a minimum of casualties, economic costs, or infringement upon their rights and freedoms. Pro-war and anti-war movements are popular fixtures in American history, whereas narrower pro-war-spending, anti-war-spending, pro-troop-increase, and anti-troop-increase activism is less common and, where present, generally a subset of pro-war or anti-war activism more generally.

The conceptualization of the declaration process as a model of contractual exchange allows us to apply a rational choice framework to the problem of war's initiation. Broadly speaking, we can describe the median voter's utility with respect to war as consisting of preferences for victory, variously defined, based on standards for success applied by voters; national security; personal political rights and freedoms that might be infringed upon by policy governing the conflict; casualties; and a variable capturing the aggregate, strictly defined economic costs of the war. This last can be thought to include both public and private spending on the war, the cost of wartime regulations, additional taxes, quotas, rationing, and, in rare cases such as the War of 1812, physical damage to property and infrastructure on the homeland.[77] Utility from each of these is assumed to consist of both tangible as well as psychological benefits or costs, and each argument is assumed to affect both forms of utility in the same direction. Setting aside cases of voters who benefit or lose from war to a unique extent, we assume the effects of the war to be entirely public goods or bads.

A formal declaration of war provides for the maximization of voters' gains from military victory and, consequently perhaps, any resultant improvement in national security. A declared war will diminish voters' enjoyment of personal political rights though, as the following sections will address, perhaps no more than an undeclared conflict would. Casualties and material economic costs of war are ambiguously affected by the act of declaring. The history of American military engagements does not readily provide us with two conflicts, one declared and one undeclared, within a sufficiently narrow window of time and of comparable scale for us to adequately judge the effects of a declaration on political actors' tolerance for casualties and economic costs of war. There are logical arguments for seeing declarations as either increasing or decreasing said tolerance. On the one hand, it could be argued that once a declaration is approved, the enhanced incentive to achieve victory would lead elected officials, *ceteris paribus*, to be more willing to spend lives and wealth to achieve victory. On the other, in the absence of a declaration, legislators are not as vulnerable to voter dissatisfaction with a conflict's adverse effects and may be less responsive to a protracted war with severe economic costs and heavy casualties.

This ambiguity requires me to limit my argument to the claim that declarations increase the probability of victory in war without claiming a clear positive or

[77] Each of these variables will be subject to public perception and interpretation, and no assumption is made here that public opinion is perfectly reflective of objective realities nor that public opinion on a given war is or is not affected by biases— random or systematic.

negative effect on the costs to the voter. The argument for declarations thus cannot be based on a claim of pure cost-reduction but rather of benefit-maximization. In terms of the model, declarations are seen to maximize politicians' incentives to provide victory and national security, though not necessarily to reduce casualties or economic costs. Formally declaring thus in no way supplants or affects the need for diligence in fiscal management of the conflict nor strategic leadership to achieve objectives with a minimum of casualties, though the following analysis of elected officials' utility with respect to war certainly allows for the possibility that greater political accountability could affect fiscal cost-reduction and the lessening of casualties. Geys finds the fiscal costs of war to have had a significant effect on presidential approval ratings in Korea, Vietnam, and Afghanistan/Iraq, though his results for the effect of casualties on said approval are insignificant once fiscal costs and casualties are both included in his regression.[78] A significant literature, however, does find significant adverse effects of war casualties or the logarithm of war casualties on presidential approval.[79] Feaver and Gelpi, though not controlling for non-military political or economic events, contrastingly find a positive relationship between war casualties and presidential approval when the military intervention in question is considered successful.[80] Whatever the direction of the effects, the wealth of the evidence suggests that both economic costs and casualties influence political opinion with regard to war.

The utility of politicians is similarly ripe to be dissected, though key to my analysis here is the assumption that the costs and benefits of war to politicians in the legislative and executive branch are not one in the same. Politicians are assumed to seek re-election by maximizing the median voter's satisfaction.[81] With respect to war politics, we contend they do so by either maximizing voters' utility from war or, as war is a venture shared between the executive and legislative branches, by altering perceptions of accountability for the status of the war—claiming credit for themselves in increasing war's benefits and minimizing its costs while blaming the other branch for any reductions in benefits and increases in costs. Thus, politicians' utility from the war is a function of both voters' utility from war and the ability to reallocate credit and blame in voters' eyes.

Certain assumptions apply. Politicians in both branches are assumed to be risk averse. For politicians in each branch, blame leveled against them reduces their utility from war, whereas the alternate branch's blame is assumed to enter positively, offsetting it.[82] Politicians of each branch are assumed to be jealously

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78 Benny Geys, *Wars, Presidents, and Popularity: The Political Cost(s) of War Re-Examined*, 74 Pub. Opinion. Q. 357 (2010).

79 John E. Mueller, War, Presidents, and Public Opinion (1973); Samuel Kernell, *Explaining Presidential Popularity. How Ad Hoc Theorizing, Misplaced Emphasis, and Insufficient Care in Measuring One's Variables Refuted Common Sense and Led Conventional Wisdom Down the Path of Anomalies*, 72 Am. Pol. Sci. Rev. 506 (1978); Robert S. Erickson et al., The Macro Polity 57-60 (2000).

80 Anthony Downs, An Economic Theory of Democracy (1957); Duncan Black,*On the Rationale of Group Decision-Making*, 56 J. Pol. Econ. 23 (1948).

81 A nascent but intriguing literature has emerged in recent years on the economics of blame. Mehmet Y. Gurdal et al., *Why Blame?*, 121 J. Pol. Econ. 1205 (2013).

82 Christian R. Grose & Keesha M. Middlemass, *Listen to What I Say, Not How I Vote: Congressional Support for the President in Washington and at Home*, 91 Soc. Sci. Q. 143 (2010).

protective of their own measure of accountability and it is assumed that the selfinterested motives of politicians dominate any effects of partisan loyalty shared by the executive and members of the president's party in the legislature.[83] This examines blame in an experimental setting, concluding that "Blame may not be justified on the basis of what can be observed or inferred, but the common knowledge that it exists makes it a powerful incentive—a contract—and assures that, more generally, it will be justifiable: agents will have incentive to employ effort toward the mental and physical activities needed to benefit the principal, whether or not the principal understands or observes these activities. By doing so, blame implements a characteristic and counterintuitive property of the optimal contract in the principal-agent model: that the payment is dependent on events that are outside the control of the agent and, in some cases, events that do not influence the principal's payoffs."[84] Charles Tilly, in *The Blame Game* (2010),[85] writes of the economic and sociological use of blame in political debate, with particular reference to its use in the War on Terror:

> Credit and blame are no mere game. In American public life and across life in general, who gets credit and blame matters. It matters retroactively and prospectively. It matters retroactively because it becomes part of the stories we tell about good and bad people... It matters prospectively because it indicates whom we can trust, and whom we should mistrust. Day after day, people spend plenty of effort assigning credit and blame. They take it seriously. So should we. This is not to argue that no such camaraderie exists; merely that, on the margin, politicians choose their own well being over that of fellow party members in the other branch. Where credit is concerned, politicians of each branch are assumed to only be directly concerned with their own credit (blame) for positive (negative) developments or their own share of overall credit (blame) but, partisan considerations aside, are not assumed to begrudge the other branch any positive surplus in public opinion.[86]

This similarly raises the question of why credit and blame are traded primarily between branches rather than primarily between individual politicians. This is, in large part, a historical, empirical observation. The case studies that follow display numerous instances of—even in declared wars—attempts by one branch to ascribe ownership of the war to the other branch. Given the managerial role of the executive in military conflicts, this almost always manifests as the legislature attempting to shift full responsibility for a war's initiation and outcome to the president via such monikers as "Mr. Madison's War," "Mr. Polk's War," etc. We theorize that the struggle over credit and blame between branches is cost-minimizing from the standpoint of legislators trying to gain the favor of rationally ignorant voters. Feuding words and debates between legislators or between a president and senator

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83 Glenn R. Parker, *Some Themes in Congressional Unpopularity*, 21 Am. J. Pol. Sci. 93 (1977).

84 *Id.*

85 Charles Tilly, *The Blame Game*, 41 Am. Sociologist 382 (2010).

86 *Id.*

are likely to be more tiresome to voters than, say, Democrats' invocation of slogans such as "Bush Lied, People Died" during the Iraq war. Inter-branch blame is a less costly way for incumbents to secure their own reputations than attempting to relay the who-said-what of legislative debate to low-to-moderate-information voters.

Furthermore, neither credit nor blame in the public eye are perfectly traded between politicians of the two branches at a 1:1 ratio. That they can be shared in some proportion by politicians of both branches establishes a loose relationship in the inter-branch exchange of accountability. Positive developments in the war can theoretically lead to any distribution of credit between executive and legislative branch politicians, just as negative developments can theoretically lead to any distribution of blame between them. This is supported empirically by Parker,[85] who finds that "presidential popularity seems to have no noticeable effect on Congressional unpopularity" once relevant controls have been applied. In response to a fall in the median voter's net benefits from war, the legislature is thus capable of stoking blame against the executive to such an extent that it can perfectly shirk, with all blame falling on the executive but no positive benefits to legislators. Perfect shirking, however, is not an upper bound. It is entirely conceivable that in response to a fall in voters' net benefits from war, an increased flurry of blame leveled against the executive could be great enough as to yield legislators political *gains* in response to voter dissatisfaction. The argument for declarations is not that they ensure a perfectly equitable 50-50 distribution of credit or blame between politicians of the two branches. It is that in the determination of legislators' utility from war, the propensity for blame to be shifted to the executive is at least constrained such that legislators are not immune from all accountability for the war and cannot use negative developments in the war advantageously for their own electoral benefits. Legislators are less able to maintain immunity from voter dissatisfaction with the war or to opportunistically achieve political gains by stoking dissatisfaction with the executive.

Also worth addressing is the reverse of our concern here: that a declaration which involves Congress more deeply in the prosecution of a war risks legislative meddling that might complicate its management with the usual vicissitudes of micromanagement and demagoguery, leading to less favorable outcomes. The text of the Constitution suggests that the Founders feared this. Waging war is one of the executive's inherent powers and was vested in the monarch in every state that the Founders would have known in their lifetimes and in nearly every historical case of which they were students (with the noted exceptions in periods of Ancient Greece and Rome). The power to declare it is a partial divestment. The reason why the Commander-in-Chief Clause appears is to clarify that whereas Congress has the power to declare war, the president has the power to manage it. It is worth asking, then, whether there is a means of credible legislative commitment not to meddle. As the foregoing analysis might suggest, though, the risks here are rather single-tailed. The natural inclination of many legislators from the early years of the republic has been to try to shift full responsibility for war-making onto the executive and enjoy the quieter life of peacetime domestic policy. From a public interest standpoint, then, the required institutional solution is not a "corridor" system that would limit deviations in legislative behavior in either direction but a "floor" system that simply limits the downside risk of shirking. In other words: a commitment device.

Lastly, the effectiveness of declarations of war in altering voter perceptions of credit and blame for politicians of either branch hinge upon public awareness of the declaration. It is reasonable to assume that even a poorly-to-moderately informed voter will know whether the United States is engaged in any major armed conflict at

a given time, but if a notable percentage of the general public is unaware of whether Congress has formally declared war or whether a given conflict is an executive-led undertaking, then the role of the declaration in allocating credit and blame—and therefore in enhancing commitment—would be significantly diminished. As we turn to case studies in the next section, it will be necessary to establish whether the general public was reasonably aware of Congress's participation in the act of declaring war for us to say confidently that the declaration played a role in enhancing legislative commitment. In general, however, two claims can be made in favor of my argument. First, declarations are open acts of Congress that are as susceptible to public scrutiny and analysis as any other legislation and are very widely publicized when they do occur, such that there is no strong basis for believing that any voter with an interest in knowing whether war has been declared should face considerable costs in obtaining that information. Second, until the Korean War began in 1950, the United States had never engaged in a large-scale military conflict against a foreign power without a formal declaration.[87] Thus, unlike the current era, to American voters of the past there were not multiple ways in which major wars were fought; they were formally and very publicly declared, as will be discussed in the coming sections. Given the clear language of the Constitution empowering Congress alone to declare war, until that practice was abandoned it was simply *the* way of going to war. Nonetheless, we will address the issue of voter ignorance in the case studies.

This analysis leaves us with some important assertions and limitations. The assertions are that declarations of war enlist legislators as monitors over the political conduct of war and that the desire to take credit for a war's positive developments and avoid blame for negative developments lead those legislators to effectively improve the outcome of a war through better oversight. The legislators' ability to shift blame for unfavorable developments in the war is bounded by their having given written approval for the war, delegated extraordinary powers to the executive, committed all of the resources of the country to themselves, and assumed the roles of monitors over the war's prosecution. Though it could be argued that even in the presence of a declaration, legislators could still blame the executive's management of the war, history indicates that, having passed a declaration, legislators are seemingly more active participants in that management through their oversight powers and that they treat the war more as they do Congressionally passed law or Congressionally administered regulation than like the workings of executive bureaucracy. The result is an improvement of the median voter's welfare with respect to war by making victory more probable and, where observed, more complete.

The limitations of this theory are (i.) that a case cannot be made that declarations unambiguously reduce the costs of war, only that they improve the probability of a successful outcome and whatever spoils may result; and (ii.) that the declaration

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[87] I admittedly make some exceptions in saying "against a foreign power," but I believe it to be justified. The American Civil War was obviously a notable instance of internal conflict that did not receive a formal declaration but in which the U.S. was victorious. However, with internal conflicts the choice to formally declare confers a measure of diplomatic formality to an internal rebel group that would contradict the federal government's claim that such groups are illegitimate. Thus, the logic changes. I also do not see intranational conflicts as suffering from the sort of political commitment problems that international ones can, since loss in a civil conflict usually spells much greater personal and political risks, so I make no claims one way or the other as to declarations in such instances.

carries no promise of a perfectly equitable distribution of credit and blame between the two branches, only one in which blame cannot be so drastically shifted onto the executive that legislators are unaffected or positively affected by the costs of war placed on voters. Thus, from the standpoint of maximizing the median voter's utility from war, the case for declarations is that legislators, having explicitly signed on to a role in the war's initiation, are thereby more directly accountable for its prosecution and restricted in their ability to shift credit and blame at their convenience. The relationship between voter utility and support for incumbent legislators is thereby strengthened insofar as voters base their votes on utility from the war, and legislators, in order to maintain support, must expend greater effort towards increasing voter utility and less towards manipulating public perceptions.

B. Undeclared Conflicts as Institutional Failure

An undeclared conflict under the American model of government is a decidedly executive undertaking. In some cases it has entailed an authorization by Congress that grants approval for military engagement under unspecified Congressional oversight to be conducted (or not) at legislators' discretion. More often, it has consisted of unilateral executive discretion over the choice to engage, the scale of forces to be employed in the task, the objectives to be achieved, and the time and manner of withdrawal. In some cases this practice may be the result of divergent views by the executive and legislators as to whether to engage in war, with the executive proceeding against the will of Congress. More often, it is the result of a shared preference by politicians in both branches for less restrained executive action. In any case, it is a failure of monitoring such that the institutional structure designed by the framers breaks down and costs and benefits become misaligned, diminishing political commitment to those guarantees given by government to the public.

In an undeclared conflict, there is no change in the fundamental legal and constitutional relationships between the people and their government. No explicit grants are given to Congress committing the nation's resources to the prosecution of the conflict and no legislative procedure is mandated. Prior to the 1973 War Powers Resolution[88], the accumulated war powers of the executive had grown such that no vote was required that would involve Congress in the decision of whether to engage in a foreign conflict. Since 1973, the president has only been required to report upon the hostilities and consult with Congress on an *ex post* basis within sixty to ninety days of engagement. Even this provision, despite being included in Congressional authorizations, has gone largely unenforced. As one monograph on the subject observes, "Every president since Nixon, Democrat and Republican, has refused to recognize [the Resolution's] constitutionality... Only once, for Lebanon in 1983, has the War Powers clock even been started, and then the president was granted an eighteen-month grace period. And when launching smaller-scale military operations, presidents frequently have dodged the resolution's reporting requirements. Rather than correcting for gross imbalances in the nation's system of separated powers, the War Powers Resolution, astonishingly, turned bad to worse."[89]

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88 War Powers Resolution, 50 U.S.C. §§ 1541-48 (2019).

89 William G. Howell & Jon C. Pevehouse, While Dangers Gather: Congressional Checks on Presidential War Powers 4 (2007).

Larger engagements conducted within the framework established by the Resolution have received Congressional approval via Authorizations for the Use of Military Force (AUMF's), whether before the president orders military action or after the fact. Though issued by a majority vote of Congress, AUMF's do not constitute the same transformation of legal and constitutional relationships as a formal declaration. As a Congressional Research Service analysis of the differences notes,

> With respect to domestic law, a declaration of war automatically triggers many standby statutory authorities conferring special powers on the President with respect to the military, foreign trade, transportation, communications, manufacturing, alien enemies, etc. In contrast, no standby authorities appear to be triggered automatically by an authorization for the use of force, although the executive branch has argued, with varying success, that the authorization to use force in response to the terrorist attacks of 2001 provided a statutory exception to certain statutory prohibitions.[90]

These standby authorities allowed for by a declaration number at approximately 250.[91]

In issuing AUMFs, however, Congress has frequently refused to explicitly name a country or entity against which the executive shall use military force, instead providing a general cause such as responding to the September 11, 2001, attacks and leaving it to the president's discretion how far the war should be carried and across which political boundaries. Thus, under an AUMF, Congress is giving the president considerably greater diplomatic leeway and unilateral discretion over decisions to militarily engage the governments or inhabitants of other countries so long as the executive justifies those engagements as being in the service of a broad public purpose or agenda stated by the AUMF.[92] As Paulsen has written,

> Congress, in enacting the AUMF, sweepingly and in separation of powers terms somewhat surprisingly declared its acceptance

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[90] Jennifer K. Elsea & Matthew C. Weed, Cong. Research Serv., RL31133, Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications (2014).

[91] *Id.*

[92] An arguably parallel process occurs when the president uses political commitments such as the 2015 Joint Comprehensive Plan of Action as a substitute for treaties when he cannot get the support of a majority of the Senate. Softer promises stand as substitutes for the sanctity of law. It is not clear whether or how a set of incentive effects arises comparable to what is described here, but it is an interesting question to be explored. In principle, it seems logical to assume that the same diminished legislative attachment to the terms of the commitment should result, but unlike the legislative consent afforded when Congress grants an AUMF, resort to a political commitment, as in the 2015 JCPOA case, seems more of an executive last resort that is limited by Congress' refusal to give it statutory force. The president is then left to act within his constitutional parameters as chief diplomat. In any case, Congress has not shown itself willing to fully abandon its rights in treaty-making as it has in war-making, so the question remains hypothetical.

> of unilateral presidential military action... and the claim of unilateral presidential constitutional authority to do so... All of this is extraordinary. The AUMF marks a stunning, landmark paradigm shift in the constitutional practice of war powers, light years distant in tone and attitude from the War Powers Resolution of 1973,[93]

which, as noted, was a departure from the traditional, constitutional model in itself. In short, in an undeclared conflict, if legislators have participated at all, it has been to authorize the executive to undertake military action without mandating a relationship of accountability or an oversight role for themselves.

The framework that this establishes is best described by Sidak, who distinguishes between a "Coasean trespass" between branches of government, in which one branch assumes powers constitutionally granted to another without the other's consent, and "Coasean bargains" in which two parties implicitly agree to transfer constitutional powers between them, thereby pursuing their own preferences at the expense of the electorate.[94] In the Coasean bargain, both branches rely upon the other's consent not to bring unwanted attention to this exchange, and with no party seeking judicial review of the practice it is left to private parties to enforce compliance with the Constitution.[95] With sovereign immunity in effect, monitoring costs of government high, and the costs of such constitutional indiscretions dispersed, the incentive to force adherence to the Constitution's allocation of powers is low for any given actor. This invites the proposal of a sort of "Inverse Coase Theorem" in which, from the electorate's standpoint, "monitoring costs [would be] reduced, and political accountability enhanced, by prohibiting bargains that alter the Constitution's formal allocation of rights of decision among political actors" but in which the political will or ability to do so is lacking.[96]

Given the paucity of efforts by Congress to reassert its own constitutional authority in warmaking, the current arrangement appears to be a clear-cut Coasean bargain in which legislators have exchanged their constitutional powers for electoral stability and the executive has accepted this transfer in exchange for a greater share of credit for American victory and security. As a result of this bargain, from the standpoint of the electorate, an executive military action is troubled by an implicit collusion between its would-be agents in Congress and the executive branch.

The value of the declaration to the public, as asserted in the previous section, was that it bound legislators to a formally established role in the war-making process. With legislators unbound from their roles as mediators and trustees, the executive branch is permitted to proceed, less constrained, in the engagement of military forces. Risk-averse legislators are better able to avoid oversight of or involvement in the conflict and continue to govern as they previously had with minimal added political risks and responsibilities of wartime. Meanwhile, in the absence of Congressional oversight, the expenditures of lives and wealth on a conflict are choice variables for the executive branch politicians that they can increase without checks on their

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93 Michael S. Paulsen, *The War Power*, 33 Harv. J.L. & Pub. Pol'y 113 (2010).
94 J. Gregory Sidak, *To Declare War*, 41 Duke L.J. 27, 64-65 (1991).
95 *Id.* at 65.
96 J. Gregory Sidak, *The Inverse Coase Theorem and Declarations of War,* J. 41 Duke L.J. 325, 326 (1991).

discretion in order to achieve victory and a greater degree of national security for which they can take credit. As Gene Healy has written,

> Individual presidents have every reason to protect and expand their power but individual senators and representatives lack similar incentive to defend Congress's constitutional prerogatives. 'Congress' is an abstraction. Congressmen are not, and their most basic interest is getting reelected. Ceding power can be a means toward that end: it allows members to have their cake and eat it too. They can let the president launch a war, reserving the right to criticize him if things go badly.[97]

Empirically, there is evidence of this decline in monitoring. Fowler, in an extensive study of Congressional oversight of U.S. foreign policy, "concluded that key Senate committees with responsibility for oversight of the executive showed an unprecedented lack of monitoring *during* a major conflict and a failure to establish accountability *after* hostilities ceased" in conflicts since the end of World War Two.[98] There is likewise evidence in historical approval ratings for the claim of Congress's immunity from the effects of war. Parker, looking at the period of 1939 to 1974, finds no statistically significant relationship between Congressional approval ratings and war: "The lack of a substantial relationship between the existence of war and the unpopularity of Congress would seem to suggest that Congress, unlike the presidents in Mueller's analysis, is not held responsible for our involvement in foreign wars. The president's position as Commander-in-Chief, his preeminence in the area of international affairs, and the historic participation of presidents in the conduct of wars may overshadow Congress' constitutionally prescribed power to declare war."[99] Granted, the sample years that Parker uses include the years of World War II, and the data are unfortunately not cleanly severable, so a counter-argument could be made that the relationship between Congressional approval and wartime was not significant there either, but as he notes, Mueller's analysis of the effects of casualties on presidential approval ratings in particular suggests some differential effect in the cases of Korea and Vietnam.[100] Reinforcing this, Parker finds that the existence of international crises is *positively* correlated with Congressional approval ratings, making it doubtful, were we able to measure the effects of individual wars, that they would be a net cost to legislators in this period.[101] Berinsky, looking at World War II and the Iraq War, translates Zaller's well known elites theory[102] into wartime politics, finding that when political elites are in agreement on the merits of military action, voters give them considerable leeway in the war's political conduct and administration; when elites are divided, voters follow their respective party

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97 Gene Healy, *Congress: The Least Dangerous Branch*, Cato At Liberty (Apr. 12, 8:59 AM) https://www.cato.org/blog/congress-least-dangerous-branch.

98 Linda L. Fowler, Watchdogs on the Hill: The Decline of Congressional Oversight of U.S. Foreign Policy xiii (2015).

99 Glenn R. Parker, *Some Themes in Congressional Unpopularity*, 21 Am. J. Pol. Sci. 93, 104 (1977).

100 John E. Mueller, War, Presidents, and Public Opinion 226-31 (1973).

101 Parker, *supra* note 99, at 108.

102 John R. Zaller, The Nature and Origins of Mass Opinion (1992).

leaders.[103] It does not appear to be a great logical leap to infer from these findings that if legislators are not adversely affected by war in the post-World-War-Two era and might stand to gain from it (*a la* Parker) but presidents remain susceptible to the war's developments (*a la* Mueller), then an institutional commitment device that better attaches a wider swath of American politicians to the initiation of the war might prevent the polarization effect from dominating to such an extent that legislators could gain from voters experiencing diminished utility from war.

In the terminology of my earlier analysis, the effect of foregoing the commitment device can be conceived of as diminishing both the credit and blame allotted to legislators, neither improving nor diminishing legislators' reputation with voters but rather satisfying legislators' risk aversion by insulating them from changes in the median voters' utility from the conflict. If the casualties and economic costs of war grow such that voters' net returns from war turn negative, legislators, having assumed either no monitoring role for themselves or a notably diminished one, are free to place greater blame on the executive until their own well being is fully restored or even increased beyond its previous level. The possibility for legislators to achieve political gains by placing greater blame on executive branch politicians suggests that in addition to insulating themselves from the political risks of war, legislators may well benefit from the median voter's loss of utility from the conflict. In practice, whether legislators shift blame onto the executive merely insofar as to insulate themselves from voter dissatisfaction or choose to opportunistically gain from the voter's loss is a function of broader political considerations such as whether the president's party has a legislative majority, the strength of the president's party in cultivating consensus and limiting defection, the vulnerability of legislators' states and districts, etc.

In a representative government, the proposition that a collusive bargain could transpire between politicians of these two branches in which elected politicians are able to reallocate power between them per their own preferences, irrespective of an established constitution, suggests a lack of completeness in the assignment of powers. That politicians might, as a result of that incompleteness, transform a loss of voter utility into a gain for themselves suggests an institutional failure and an inversion of the principal-agent model on which the United States Constitution was explicitly based. The resulting costs that have been incurred by the United States throughout a long series of undeclared conflicts thus signal not only the risks of military engagement without declarations but, more fundamentally, the potential for perverse incentives and the reallocation of constitutional powers wherever negotiation between branches is not prohibited and is costly to monitor.

The ultimate consequence of such institutional failure in the context of military policy is a significantly diminished legislative commitment to achieving decisive and favorable resolutions to foreign conflicts. Legislators, having never attached their reputations to an engagement, are insulated from its political costs and, in the extreme, stand to potentially *gain* from a fall in the median voter's utility from war. This diminishes legislators' incentive to apply the weight of their collective offices to oversight of the executive's conduct and nullifies the benefit of divided government and the system of checks and balances that was designed as the

[103] Adam J. Berinsky, *Assuming the Costs of War: Events, Elites, and American Support for Military Conflict*, 69 J. Pol. 975 (2007).

linchpin of the American system of government. From the executive's standpoint, the political cost of engagement is lower and the potential for undivided credit is increased, thereby increasing the propensity for more frequent military activities that are more costly to the electorate relative to the benefits that they are meant to attain. The more costly and politically unpopular the conflict, the less legislative participation can be expected, leaving the longest, most challenging military ventures to see diminishing political pressure for the achievement of stated U.S. objectives. Based on this view of undeclared conflicts, the predicted result is a pattern of frequent and inconclusive engagements in which legislative involvement in and oversight of military policy is significantly reduced relative to declared wars.

V. Case Studies

A theory of declared and undeclared wars at our disposal, the remaining challenge is thus to look at those cases in which the United States has formally declared war as well as those in which it has militarily engaged without a declaration in order to determine whether its behavior is consistent with this theory's predictions. The predictions are (i.) that instances in which a war is formally declared will see greater legislative oversight over its prosecution than instances in which it is undeclared and (ii.) that declared wars will be pursued to more decisive and favorable ends than undeclared conflicts. I will make a general argument in each case for both points and will substantiate the second point with other parties' interpretations of victory, such as Feaver and Gelpi[104] and the Correlates of War Project[105], which covers conflicts from 1816 to 2007.

One criticism that the foregoing theory readily invites is that of selection bias: might legislators be more likely to declare war in those instances in which they believe beforehand that the United States is likely to succeed? According to this line of reasoning, legislators consent to formally declare war because they recognize from the outset that the United States is highly likely to emerge successful, thereby minimizing the political risk of their decision. Conversely, they avoid formal declarations when they perceive the United States to be in a more tenuous position and prefer not to attach themselves to what they foresee to be a riskier venture. This criticism offers clear-cut predictions: when it can reasonably be said that the United States is in a more advantageous position relative to an adversary at the outset of a conflict, Congress will be more likely to declare war; among that pool of conflicts in which the United States and its opponent are more evenly matched or in which the United States is seen as being at a disadvantage, however, undeclared wars will be more common. Another worthwhile critique is that of rational ignorance. It can be argued that declarations are an inadequate explanatory variable because voters are unaware that war has been formally declared. Historical evidence on this is difficult to find, making the critique hard to conclusively refute, but I will present arguments as to why it is unlikely to be an undermining factor.

Thus, for the theory to be seen as descriptive, both predictions must be borne out, the selection bias critique must be refuted, and it must be shown that voters are

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[104] Peter D. Feaver & Christopher Gelpi, Choosing Your Battles: American Civil-Military Relations and the Use of Force (2004).

[105] Meredith Reid Sarkees & Frank Wayman, Resort to War: 1816-2007 (2010).

sufficiently aware of the declaration of war for the accountability relationships to function as described by the model. That is what the following case studies will examine.

A. Declared Wars

i. The American Revolution

The United States began, in a sense, with a declaration of war. The Declaration of Independence was surely more than that—a statement of diplomatic intent, an assertion of rights, and an impassioned statement on moral and political philosophy—but among its core political functions was to formally declare the American colonies' willingness to defend their intentions to separate by the use of military force, or what they could muster of it. The Declaration is frequently treated as a mere statement of grievances or a spirited profession of intent by the Second Continental Congress, but as Sandefur[106] notes, no other issuance by the Congress is held in such a token manner. All other acts by that body have been retrospectively viewed as carrying the full legal weight of the colonial governments, and the exception made in the case of the Declaration is not so much logically argued as arbitrarily assumed. Thus, attributing to it the same legal status as the Congress's other issuances, the Declaration of Independence can be viewed as, among other things, a declaration of war, complete with an even greater position of accountability for the legislature, as there was at that time no executive to oversee its prosecution. The Continental Army and Navy thus reported and received direction from the legislature itself.

Of the innumerable historical accounts since written of the Founders and the American Revolution, no notable claim or debate has emerged to the effect that the Second Continental Congress was not attentive and involved in its leadership of the war. This is understandable given the circumstances. Aside from being America's first war as an independent country, the Revolution was unique in the stakes that it imposed on political actors, with every signer of the Declaration reasonably sure that he would personally face execution and his family be divested of their property should the effort fail. Thus, the Revolution can be viewed as an extreme case of the greatest personal stakes faced by political actors who elected to declare war. Their level of involvement in the war's prosecution both as a body and individually bears out the predictions of this model. Two and a half weeks after the Declaration's signing, they had established a Board of War to oversee the administration of the war, and though none of the signers would be killed in battle, one third of them served as militia officers during the war, four were taken captive, and many lost considerable personal wealth in the process.

Historian Gordon Wood writes:

> In 1763, Great Britain straddled the world with the greatest and richest empire since the fall of Rome. From India to the Mississippi River its armies and navies had been victorious. The Peace of Paris that concluded the Seven Years' War... gave Britain undisputed dominance over the eastern half of North America.[107]

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[106] Timothy Sandefur, The Conscience of the Constitution 14-15 (2014).
[107] Gordon Wood, The American Revolution 4-5 (2003).

Its resources beyond North America were likewise impressive and mobile, capable of being directed to a different corner of the empire should dissent turn to insurrection, as it gradually did in the 1770's. Britain quickly responded to unrest in the American colonies with an escalation of troop levels and punitive political measures. At the time of the signing of the Declaration of Independence in 1776, as Wood writes, "a military struggle seemed to promise all the advantage to Great Britain. Britain was the most powerful nation in the world... the British navy was the largest in the world, with initially half its ships committed to the American struggle." The Americans, by contrast, "had to start from scratch. The Continental Army they created numbered usually less than 5,000 troops, supplemented by state militia units of varying sizes. In most cases inexperienced amateur officers served as the American military leaders."[108]

Granted: Wood is quick to note that in some senses this great discrepancy was misleading, with significant disadvantages for the British including three thousand miles of ocean separating them from the front lines of the war, complete with the communications, logistical, and supply problems that it imposed. He likewise cites the size of the American territory, the wild terrain, and the colonies' cultural and political fragmentation as obstacles for the British Army. Wood, however, may be in some ways giving the British too much of a handicap. The obstacle of the Atlantic was not small, but oceans had not prevented Britain from establishing lucrative trade lines around the globe, holding colonies in America for over a century, establishing by force other powerful footholds to its empire in India and the Far East, nor making war when necessary to protect them. As for the size of the American territory, the terrain, and social fragmentation, these can be seen as being equally an obstacle to both combatants. It is arguable that such features, especially the social characteristics, were often as troublesome for the revolutionaries as for the British.

Whatever the developments that would come throughout the war— the escalation of British forces in North America to over 50,000, with 30,000 German mercenaries supporting them; the foundation and development of the Continental Army and Navy; and a long series of bloody battles—it seems reasonable to say that the Continental Congress could not confidently have perceived war with Great Britain to be easily undertaken or decidedly winnable. Thus, the selection bias critique is weak in this case. As much can be deduced from Founders' writings in that era. George Washington wrote in his general orders in January of 1871, "We began a Contest for Liberty and Independence ill provided with the means for war—relying on our own Patriotism to supply the deficiency."[109] And Benjamin Rush would write in later years to John Adams on the dim mood of the Declaration's signing, "Do you recollect the pensive and awful silence which pervaded the house when we were called up, one after another, to the table of the President of Congress to subscribe what was believed by many at that time to be our own death warrants?"[110]

As to the public's knowledge of a formal declaration, I grant that the Declaration of Independence was presented as a conditional ultimatum, but it did make clear that if King George III did not peaceably accept the secession of the colonies from

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[108] *Id.* at 76.

[109] Senagan P. Sculley, Contest for Liberty: Military Leadership in the Continental Army, 1775-1783 397 (2019).

[110] Benjamin Rush*, To John Adams from Benjamin Rush*, National Archives, (July 20, 1811), http://founders.archives.gov/documents/Adams/99-02-02-5659.

the British Empire then the Americans were willing to resort to force. Given that anti-British sentiments had been manifesting in armed skirmishes for over a year, there was little expectation that the British would allow the colonies' departure without a fight. As for awareness of the Declaration itself, news spread rapidly, with descriptions of the Declaration or, just as often, its full text printed on the front page of major newspapers in the colonies' larger cities. Public readings were common, and whether in print or public profession the Declaration was widely publicized across the English-speaking world and Western Europe by the summer's end.[111]

The American Revolution, on these observations, appears to vindicate this model. Though the governing structure was different than in our other case studies, lacking an executive branch, it is entirely possible that members of the Second Continental Congress, or some portion of them, could have shirked, distanced themselves from the war's administration, or individually abandoned the effort had they not literally signed their names to it from the outset. Histories of revolutions often demonstrate the ability of elites to lessen their involvement when the costs of participation rise. If we wish to understand why not one of the fifty-six signers defected nor abdicated his role in the Revolution, in addition to their own moral convictions we can read the effective commitment achieved by a formal document to which each man signed his name and attached his reputation. The American Revolution enjoyed an overwhelming support from its political leaders, was seen through to a decisive and favorable end, cannot be said to suffer from selection bias in the sense of legislators declaring because they felt exceedingly confident in their success from the outset, and, given its public readings and rapid publication at home and abroad in multiple languages, it is difficult to imagine that any notable percentage of the population was not quickly aware of the Declaration's signing and the new state of war. America's first experience with war, despite the institutional differences with its post-Constitutional governing structure, thus serves as one of the best examples of the effectiveness of a signed declaration fostering unified political stewardship over the prosecution of war.

ii. The War of 1812

The vote to declare war against Great Britain again in 1812 is, to date, the narrowest vote for war in the history of the United States. It proceeded with only fifty-nine percent support from the House of Representatives and sixty-two percent from the Senate.[112] Reticence to engage in the war stemmed primarily from the belief that the United States was grossly unprepared for the scale of conflict that would be required and secondarily from belief that the escalating problems with Great Britain could be reconciled by peaceable, diplomatic means. Among the examples provided by American history, it thus offers the best opportunity to examine whether the argued effect of a formal declaration is weakened or fails when the margins by which it is passed are small and when confidence in achieving a favorable outcome is lacking.

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[111] Jared Keller, *How the Declaration of Independence Went Viral: a Brief Media Chronology of America's First Big Story*, *in* Pac. Standard, (June 28, 2016), https://psmag.com/how-the- declaration-of-independence-went-viral954127bb6e31#.ofmeousry; Pauline Maier, American Scripture 156 (1998).

[112] Leland R. Johnson, "*The Suspense Was Hell: The Senate Vote for War in 1812*," 65 Indiana Magazine of History 247 (1969).

The Continental Army's and Navy's rapid buildup during the American Revolution did not carry over into the beginning of the nineteenth century. The Founders' opposition to maintaining a standing military left it vulnerable and unprepared when conflict with Britain again escalated thirty years after the Revolution. Yet again, at the onset of war, the now-United-States found themselves dramatically outmanned and out-gunned by Great Britain in a conflict that was to be decided primarily on the seas, where Britain's advantage was strongest. The British Royal Navy, centuries old, had over 500 active warships, 140,000 seamen and, among them, 31,000 trained marines. The U.S. Navy, just eighteen years old, lacked a single battle fleet, had sixteen ships, approximately 5,000 seamen, and 1,000 marines.[113] It sported only fifteen warships, three of which were ready for action at the war's onset, and no man-of-war class "ships of the line"—the largest and most formidable naval vessels of the time.[114] It had sold its last warship in 1785, part of a trend away from naval power towards a stronger merchant marine, and only somewhat revived its naval forces in the mid-1790s to protect its merchants against piracy by the Barbary State of Algeria.[115] The state of its land forces inspired similar unconfidence, as did its foreseeable means of raising funds to augment either within the window of time necessary to be successful.[116]

The U.S. had other perceived advantages that emboldened it: Britain's distraction with the Napoleonic Wars, its distance from friendly dockyards where it could make repairs and resupply, and memories of American victory in the Revolution still clear in the minds of many who were young soldiers at the time of the Revolution but had since risen to the ranks of veteran statesmen. Nonetheless, the Congressional debate over whether to go to war with Britain was bereft of concrete arguments for the United States' military preparedness. Voices of caution such as Rep. Harmanus Bleecker (F-NY) pointed directly to the inadequacy of its resources and viewed them as so insufficient as to make a vote for war treasonous:

> "Sir, we cannot go to war within sixty days. I mean not to offend gentlemen, or to rouse their feelings, but it is impossible that we can go to war at the expiration of the embargo... What is the state of your fortifications? Where are your armies, your navy? Have you money? No, sir, rely upon it there will be, there can be, no war, active offensive war, within sixty days... the people know we cannot go to war, at the expiration of the embargo...They think... that for the Government to go to war in our present unprepared state, would be little short of an act of treason."[117]

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113 *Naval Battleships in the War of 1812*, PBS, http://www.pbs.org/wned/war-of-1812/essays/naval-battleships/ (last visited Mar. 1, 2019).

114 *Id.*

115 Michael J. Crawford & Christine F. Hughes, The Reestablishment of the Navy, 1787-1801: Historical Overview and Select Biography, Naval Hist. Heritage Command (Jan. 28, 2019, 02:58 PM), https://www.history.navy.mil/research/library/bibliographies/reestablishment-navy1787-1801.html.

116 Eugene Van Sickle, *Financing the War of 1812*, Bandy Heritage Ctr., (2014) http://www.bandyheritagecenter.org/Content/Uploads/Bandy%20Heritage%20Center/files/1812/Financing%20the%20War%20of%201812.pdf.

117 24 Annals of Cong. 1380 (1812).

John Randolph (DR-VA) joined him in saying,

> It would appear astonishing, with the general apathy prevailing in this House, and out of it, that a slumbering Legislature, and a people stupefied under the effects of this powerful political narcotic, the embargo, should have their dreams disturbed by the thought of war. War! when, as a gentleman has justly asked, where are the means to carry it on?[118]

Advocates of war, though equally impassioned, do not seem to have offered any strong contrary interpretation of the U.S.'s abilities to effectively wage war, merely moral assertions that it must do so and mentions that certain measures were already on paper that would make the U.S. more able to supply itself, secure loans, and build its forces over the course of the war once it was begun. As John Rhea (DR-TN1) contended on the House floor,

> It is urged that they do not believe the United States can go to war. Well, if they do not believe, and will act accordingly, with themselves be it, on themselves be the consequence. Several laws have been enacted, during the present session, bearing strong evidence in themselves that they are preparatory to war, carrying with them also evidence that the United States can go to war at a time when the unprovoked injuries inflicted by a foreign nation renders war necessary.[119]

Rhea and his fellow War Hawks, under the leadership of Speaker Henry Clay (DR-KY) and Rep. John C. Calhoun (DR-SC), prevailed in the final vote. Thus, the war commenced with narrow legislative support and mere optimistic assurances that the manpower and resources needed to conduct the war could be acquired over the course of the war. Political opposition to the war would last until its conclusion, with Federalists in New England acting as the most vocal anti-war protesters. Though opposition to the war was not universal in New England, the spirit of dissent that prevailed there would grow so powerful and create such rifts between Washington and New England that President James Madison ultimately decided to remove federal funding for the militias of Massachusetts, Rhode Island, and Connecticut.[120] Historian Donald R. Hickey writes, "The War of 1812 was America's most unpopular war. It generated more intense opposition than any other war in the nation's history, including the war in Vietnam."[121] That division was fully at work in the legislature. Hickey again: "Federalists everywhere opposed the war, and in Congress they presented a united front against war legislation. The only exceptions were bills to expand the navy and build coastal fortifications, which they considered sound longterm investments in national defense."[122] The tenacity of

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118 *Id.* at 1385.
119 *Id.* at 1384.
120 Donald R. Hickey, The War of 1812: A Forgotten Conflict, 591 (Bicentennial ed., Univ. of Illinois Press, 2012) (1989).
121 *Id.* at 255.
122 *Id.* at xxvi.

antiwar Federalists was such that historians have since viewed it as a major reason for the party's rapid decline after the war.[123]

Despite its tenuous political support, however, the War of 1812 was throughly overseen by both the executive and legislative branches of government. Opposition was fierce, and opposition towards efforts to expand the war may have persisted, but as Hickey's statement suggests, not to the point of neglecting nor obstructing sufficient political oversight of the war nor allowing the U.S. Army and Navy to go unsupplied or unsupported. It is important here to reiterate this model's prediction: that a formal declaration of war enhances legislators' commitment to the outcome of the war by maintaining legislative involvement in its conduct. It is not to say that a considerable number of legislators will not continue to oppose the war; merely that those who voted to enter into war in the first place, having issued an explicit commitment to it, will show a greater propensity to see the conflict through to a favorable end. The War of 1812 demonstrates the resilience of that effect in the midst of a very divisive war.

If anything, the thrust of Federalists' protests was to make the legislature all the more involved in the war's conduct. The Annals of Congress during the war years show regular and attentive involvement by Congress on conduct of the war[124], war taxes and borrowing[125], appropriations of supplies and munitions[126], provisions for the Navy[127], as well as measures necessary to ensure adequate supplies of new recruits[128] and the appropriation of compensation and bounties to those aiding in the war effort[129]. Indeed, from debates over Treasury policy to relations with France to the annexation of new territories, scarcely any debate occurs in Congress over this period which is not cast in the light of the war and considered in relation to its success.

In its first military undertaking since the signing of the Constitution, the United States already demonstrated the political rifts that would characterize many conflicts to come, in which Congress strives to shift accountability for the war onto the executive. Even when formally declared, history shows a strong propensity for wars to become popularly identified with the president, if not at congressmen's initiation then certainly with their tacit approval. The War of 1812 quickly became known by critics and Federalist opponents as "Mr. Madison's War," despite the far more open and vociferous pursuit of its initiation by various members of Congress.[130] However, in contrast to the undeclared conflicts of the twentieth and twenty-first centuries, the effort to shift blame onto the executive was limited to the extent that legislators were either unable or unwilling to distance themselves from the political leadership of America's second war.

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123 David Heidler & Jeanne T. Heidler, The War of 1812 378 (Greenwood 2002).

124 *E.g.*, 27 Annals of Cong. 2030-2031 (1814). *See, generally,* 26 Annals of Cong. (1813-14).

125 *E.g.,* 26 Annals of Cong. 127-31 (1813); 26 Annals of Cong. 1436-40 (1814); 27 Annals of Cong. 1441-1577, 1590-1768 (1814).

126 *E.g.,* 26 Annals of Cong. 157-63 (1813).

127 *E.g.,* 26 Annals of Cong. 166-67, 318-19 (1813); 27 Annals of Cong. 1800-04, 1808-32, (1814).

128 *E.g.*, 28 Annals of Cong. 482-91 (1814).

129 *E.g.*, 28 Annals of Cong. 517-18 (1814).

130 Donald R. Hickey, The War of 1812: Writings from America's Second War of Independence 709 (2013).

Where the American Revolution provided a kind of pure case of entirely legislative oversight of a war with widespread approval, the War of 1812 served as both the United States' first military experience with multiple branches of government and the most divisive declared war in its history. Measured against the predictions of our model, however, it appears to hold up. Despite its considerable unpopularity in certain regions of the country, the war enjoyed thorough legislative oversight and was seen through to a favorable draw in which the British embargo was ended and U.S. territorial integrity was maintained; based on Congressional transcripts, the case cannot reasonably be made that Congress was confident enough in the war's outcome as to feel assured of victory ex ante, thus dispelling the selection bias critique; and the heated debate over the war's declaration, giving birth to a much-contested and highly publicized Congressional faction known as the "War Hawks," makes it unlikely that interested voters would not have known whether the United States had ever declared war or not. Newspapers in the North and mid-Atlantic such as the *NationalIntelligencer*, *Niles Register*, Baltimore *Whig*, and *BostonGazette* made the prolonged debate over whether to declare war a regular focus of their news coverage and their editorial pages, with the *Intelligencer* predicting that historians would rank the Twelfth Congress alongside "the immortal Congress" of 1776 for its debates and decision to declare.[131] In the Republican-dominated South, pro-declaration and subsequently pro-war papers such as the Augusta

Chronicle, Savannah *Republican*, and Athens *Georgia Express* dueled with the Federalist Savannah *Columbian Museum* until wars of words in the newspaper turned to physical violence.[132] Though estimates of public knowledge of the details of public events are difficult when looking to this period in history, the undisputed predominance of the war debates in headlines throughout the states makes it likely that any citizen with a passable knowledge of the day's top news would likely have been aware of Congress's action to declare. Thus, in summation, the War of 1812 serves as a stress test of the model's predictions as to declared war but a successful one.

iii. The Mexican-American War

At noon on May 11, 1846, the United States Congress received a message unique in American history up to that time. It was a notification from President James K. Polk that the United States was actively engaged in a military conflict with Mexico, an assessment of the egregious injustices that Polk claimed Mexico had perpetrated against the United States, and a request not that Congress declare war anew but that it vote to authorize a war that was already ongoing.[133] Time and a fuller revelation of the facts would thoroughly contradict Polk's account of the preceding events, but Congress, limited to the information available to it on that day and unwilling to leave the United States Army without adequate support, found itself cornered into a decision.

Polk's approach was not without careful design. In the preceding weeks and months, he had directed U.S. troops to move beyond the Nueces river into

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131 *Id.* at 47.

132 John E. Talmadge, *Georgia's Federalist Press and the War of 1812*, 19 J. Southern Hist. 488 (1953).

133 Amy S. Greenberg, A Wicked War: Polk, Clay, Lincoln, and the 1846 U.S. Invasion of Mexico 104 (2012).

now-western-Texas, intruding into what was at that time recognized as Mexican territory. His claim that "after reiterated menaces, Mexico has passed the boundary of the United States, has invaded our territory and shed American blood upon American soil" was, on every point, an inversion of actual events.[134] Despite this, when Democratic lawmakers bundled a preamble authorizing funding for the troops with a declaration of war penned by the president himself, Whig opponents hurried unsuccessfully to amend it, finding themselves cornered into either supporting the declaration or opposing the provision of adequate supplies and reinforcement to soldiers on the front line. Much of Congress decried Polk's approach as an act of subterfuge. Garrett Davis (W-KY), declared it to be "our own President who began this war," accusing that "He ha[d] been carrying it on for months."[135]

There was little to no concern as to whether the United States could be victorious in a war against Mexico. Having learned the lessons of unpreparedness twice, the U.S. Navy would have been well prepared for another war against Great Britain, to say nothing of smaller, poorer, less formidable Mexico.[136] The *Milwaukee Daily Sentinel and Gazette*, no advocate of war, referred to Mexico on April 29, 1846, as "a weaker nation on the South," and the description fit. Despite its comparable population to the United States at the time of their respective revolutions, the United States had grown in numbers, wealth, and strength while Mexico had declined, its per capita income falling by half from 1800 to 1845.[137] Jingoist sentiments aside, there was no uniting ideology or identity in Mexico analogous to the United States, and what began as a short-lived kingdom saw so many coups that the Mexican presidency would change hands more than fifty times from 1821 to 1857. Stable government was essentially non-existent in its history. More to the point, its instability was roundly acknowledged and understood in America.[138] President Polk certainly perceived Mexico as a pushover country. Motivated by objective recognition of Mexico's inferior strength, racial beliefs about Mexican inferiority, and ideological commitment to Manifest Destiny, Polk "didn't really believe allout combat would be necessary."[139] Writing to his brother, the president intimated "my impression and hope is, that it will be of short duration... It is probable that the war will be over very soon."[140]

Despite great political unrest, the president's approach worked, and the vote to declare "Mr. Polk's War" passed with ninety-two percent support in the House and ninety-five percent in the Senate. Moral doubts as to the war's legitimacy remained strong, and its aggressive character, driven by ideals of Manifest Destiny, was clear.[141] It would soon be answered with both derision and approbation in an American press that had grown rapidly in the 1800's and made national politicians

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134 William Henry Harrison et al., A Compilation of the Messages and Papers of the Presidents 422 (James D. Richardson ed., 1902).

135 Greenberg, *supra* note 133 at 104.

136 *Id*. at 16.

137 *Id*. at 56.

138 *Id*. at 57.

139 *Id*. at 76.

140 James K. Polk to William H. Polk, July 14, 1846, *in* 11 James K. Polk, Correspondence of James K. Polk 246 (Herbert Weaver et al. eds. Univ. of Tennessee Press 2009) (1846).

141 Amy S. Greenberg, A Wicked War: Polk, Clay, Lincoln, and the 1846 U.S. Invasion of Mexico 109-110 (2012).

and war news more accessible to the public than ever before.[142] Many who voted to declare, however, felt that they could play a greater role in mitigating its costs were they to remain involved and a vote to declare as the best means of securing themselves in that role. As Robert Winthrop (W-MA) stated, "[I]f I can do anything to moderate the War spirit... it must be by exhibiting myself wil[l]ing, when War comes, to vote men & money for defense."[143]

The declaration of war against Mexico was thus perceived by many who voted for it not as an endorsement of the war itself but a profession of their own commitment to support the Army, thereby making perhaps the clearest expression of our model's predictions in action. This commitment was not universal. John Quincy Adams (W-MA8) declared it a "most outrageous war" and noted to a fellow congressman that he "hoped the officers would all resign, & the men all desert, & he would not help them, if they did not."[144] However, for legislators in more tenuous political standing than a former U.S. president who had returned to Congress, the act seems to have been effective. Popular awareness of both the conduct and the politics of the war was brought to new heights by the burgeoning of American journalism. Historian Frank Luther Mott writes that "the news coverage of the Mexican War was far more copious than that of any previous war in any part of the world."[145] Another describes it as "the first war to be adequately and comprehensively reported in the daily press."[146] And public debate over the war ultimately proved consequential in the 1846 elections, signaling the public's attribution of the war to legislators who had voted for it. The struggle to rein in the war's expansionist ambitions and prevent it from becoming a means of expanding slavery westward divided the Democratic Party and gave Whigs control of the House of Representatives in December of 1847. Legislative opposition by the new Whig majority ultimately proved sufficient to pressure Polk into recalling the U.S. Army from Mexico with the same reluctance that Whigs had shown in declaring the war over a year and a half earlier. The Treaty of Guadalupe Hidalgo was signed on February 2, 1848, ending the war. Polk, damaged by his role in the war, would choose not to seek reelection. Nonetheless, the Mexican-American War is considered to be a decisive victory for the United States.[147]

If the War of 1812 tested the viability of our predictions when the legislature is fiercely and almost evenly divided over a war, the Mexican-American War tests them under conditions of rising and, ultimately, majority legislative opposition to an executive who has clearly and overtly extended himself as the war's unquestionable instigator. In such conditions, it should be even easier for legislators who oppose the war to declare it a case of unmitigated executive overreach and to distance themselves from it as the Federalists did in 1812. However, in the war against Mexico, Whig legislators proclaimed themselves opposed to the war before signing on to the declaration as an act of explicit commitment, consigning to the effort their patriotic support. With Winthrop and others clearly stating their motivation, they implicitly acknowledged the declaration as an expressive device

142 *Id.* at xvii, 17.
143 *Id.* at 107.
144 *Id.* at 106.
145 Frank Luther Mott, American Journalism 248 (3d ed., Macmillan 1962) (1914).
146 Joseph J. Mathews, Reporting the Wars 53 (1957).
147 Meredith Reid Sarkees & Frank Wayman, Resort to War: 1816-2007 (2010).

that assigned to them a role in the war's prosecution. In the twenty-one months of war that followed, Congress remained thoroughly involved in the war, to the point of ensuring that it was quickly ended when its course diverged from the agenda supported by a majority of the American people and assumed an unwanted air of imperialism.

This case is the most susceptible yet to the selection bias critique. Democrats can be argued to have been more willing to formally declare war because they knew that the probability of victory was exceedingly high. One might even argue that those Whigs who went along with the vote would have been less willing had Mexico been a more formidable adversary, a la Britain. However, the option of going to war without a declaration appears to have been absent from the debates in this period. America's few experiences with it in the early nineteenth century (discussed below) were highly contentious, and as of the 1840's, the executive branch still behaved as if successfully entering a war depended upon Congress's passage of a formal declaration. Polk may have been willing to send troops into battle before securing legislative approval, but his effort to pen the declaration himself and push it through Congress points to a sense that it was still indispensable, even for such a *fait accompli*. *Going* to war and *declaring* war were still being treated as equivalent, with legitimacy and success in the first dependent upon the latter. Thus, whether to enter into war declared or undeclared does not emerge as a debate in this case, and it would be an anachronous insertion of perspectives from a century later to assume that legislators' choice in 1846 to formally declare war was a function of their exceeding confidence in the outcome rather than a function of consistency and adherence to practices dating to the founding of the country.

iv. The Spanish-American War

By 1898, Cuba had seen three decades of struggle for autonomy from Spain, ranging from outright war (the Ten Years' War, 1868-1878) to insurgency and organizing by exiled activists for Cuban economic independence. Since 1895, it had been caught in a guerrilla war between the Spanish military and revolutionaries led by José Martí. In consideration for American-owned property in Cuba and the risks posed to American business interests by the war, President William McKinley sent American naval forces to the Havana harbor as a security measure against further instability.[148] Trade with Cuba had decreased by more than two-thirds as a result of the war, and further externalities to American parties was a leading concern (*Ibid*. 51). On the night of February 15, 1989, the *U.S.S. Maine*, at rest in the harbor, exploded and sank, killing two American naval officers and 266 enlisted sailors.

Debate as to the cause of the explosion persists to this day, though the evidence is now seen to weigh against foul play. Louis Fisher, summarizing the findings, writes, "A naval board of inquiry concluded that the blast was caused by a mine placed outside the ship. Release of the board's report led many to accuse Spain of sabotage, helping to build public support for the war. Subsequent studies, including one published in 1976 and later reissued in 1995, determined that the ship was destroyed from the inside, when burning coal in a bunker triggered an explosion in

[148] John L. Offner, An Unwanted War: The Diplomacy of the United States and Spain Over Cuba 56 (1992).

an adjacent space that contained ammunition."[149]Whatever the cause of the disaster, belief in Spain's responsibility created such an outcry in the United States that, in stark contrast to the Mexican-American War, the United States went to war against the protests and objections of both the speaker of the House of Representatives and the president, who urged caution and restraint.[150] McKinley, whose experiences in the American Civil War made him wary of rushing into conflict, was outdone by a powerful pro-war sentiment.[151] Historian Evan Thomas writes that

> In the 1890s, not just [Secretary of the Navy Theodore] Roosevelt but a good slice of his countrymen were possessed by a hunger for war" and that McKinley "was swept aside by hawks like Roosevelt and [newspaper publisher] William Randolph Hearst.[152]

On April 11, McKinley succumbed and asked Congress for authorization for an armed intervention in Cuba but stopped short of asking for a declaration of war against Spain. Congress would exceed the president's request, however, proclaiming Cuba's independence from Spain and issuing authorization for the use of whatever military forces the president deemed necessary to support that cause. McKinley signed the joint resolution on April 20th, Spain declared war against the U.S. on April 23rd, and a declaration from Congress was requested by McKinley and granted on April 25th. In the largest divide between the two houses of Congress over a vote to declare war, the Senate passed the declaration with fifty-five percent support against the House's ninety-eight percent. The lower house, designed by the Founders to be more responsive to current sentiments, proved to be exactly that. Thus, the Spanish-American War can be viewed as unique in two respects: (i.) the striking difference in the level of support for it between the two houses of Congress and (ii.) the fact that it is the first American war in which war was declared by the opposing party first and only secondarily by the United States.

Neither of these factors, however, appear to have manifested in insufficient commitment. The official record of Congressional meetings during this era of American history is sparse, making a detailed account of the frequency of meetings on the topic of the war hard to establish. However, what we know of legislative involvement in the war points to it being a central focus of legislators' efforts at the time. Senator John Sherman of Ohio (R), chairman of the Senate Foreign Relations Committee, established a subcommittee on Cuban affairs and sent Senator Henry Cabot Lodge to Cuba to liaise with and advise the Cuba Libre movement. Meanwhile, Democrats and Republicans literally fistfought one another on the House floor over rules disputes determining who would be the first to pass a resolution recognizing an independent Cuba.[153] By all appearances, the public and at least a majority of their representatives in Congress were unified in their commitment to the new war.

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149 Louis Fisher, *Destruction of the Maine (1898)*, Law Library of Congress (2009), http://loc.gov/law/help/usconlaw/pdf/Maine.1898.pdf.

150 Offner, *supra* note 148 at 131-135.

151 Evan Thomas, The War Lovers: Roosevelt, Lodge, Hearst, and the Rush to Empire (2010).

152 *Id.* at 474.

153 *Id.* at 238.

As a result, the already powerful pro-war sentiment that pervaded the country even before the point of declaration complicates the view of a declaration enhancing commitment in the case of the Spanish-American War. In addition to animosity over the explosion of the *Maine* and the escalating tensions with Spain was what historian Richard Hofstadter has called "the psychic crisis of the 1890s": an eagerness for war and an expansionist fervor widely recognized by historians writing on the period.[151][154] It was an undirected "war fever" that had been building over the preceding years, at first threatening a third war with Great Britain before tensions with Spain arose. The *NewY orkTimes* headline on December 18, 1895, read "Preparations for War: Country Is Aroused, Want to Fight England: Army, Navy Men Profess Great Eagerness to Go to War, Talk of Invasion of Canada." Contemporary historian Richard Titherington writes of the light-heartedness with which politicians and journalists spoke of war in the lead-up to declaration in 1898[155] . And it would be difficult to understand the culture of the Spanish-American War without noting the pro-war journalism surrounding it. Though the role of "yellow journalism" in creating the war has been downgraded by historians over the decades, Hearst, Joseph Pulitzer, and newspapers across the country are viewed as having contributed in some measure to the agitation for war, at least in certain major eastern cities.[156]

That spirit was born out in Congress after the explosion in Havana, as politicians scarcely waited for the results of the investigation into its causes before increasing funding and armaments. On March 2, the Senate rushed through a vote for $50 million in defense spending to prepare itself for a war that seemed inevitable.[157] For his caution towards war and increased military funding, Speaker Thomas Reed (R-ME1) was branded in the press as being "Anti-National Defense."[158] And romanticization of the experience would not soon end with the coming of peace. Once the Spanish were defeated, diplomat John Hay reflected on the experience in a letter to Roosevelt as a "splendid little war."[159] Surely, as in all American wars since 1812, there was an antiwar movement.[160] It was, however, a minority view drowned out by calls for conflict and dismissed as, to borrow Theodore Roosevelt's term, a "cult of non-virility."[161]

The selection bias critique also carries more weight in this case than in the preceding cases, as a high probability of success undoubtedly made the pro-war spirit easier to indulge. As in the war with Mexico, expectations of victory entering the Spanish-American War were strong. Given the military and, specifically, naval advancement of the United States over the 19th century and Spain's decline relative

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154 *Id.* at 190.

155 Richard H. Titherington, The History of the Spanish-American War of 1898 72 (1900).

156 Ted Curtis Smythe, The Gilded Age Press, 1865-1900 (2003); George W. Auxier, *Middle Western Newspapers and the Spanish American War, 1895-1898*, 26 Miss. Valley Hist. Rev. 523 (1940).

157 Evan Thomas, The War Lovers: Roosevelt, Lodge, Hearst, and the Rush to Empire 74 (2010).

158 *Id.* at 232.

159 *Id.* at 12.

160 Piero Gleijeses, *1898: The Opposition to the Spanish-American War*, 35 J. Latin. Am. Stud. 681 (2003).

161 Thomas, *supra* note 157, at 73.

to its former military preeminence, politicians could reasonably expect swift victory at the time of declaration. Cuba, ninety miles from the Florida Keys, was far more accessible to the United States than to Spain, whose forces, already possessing a foothold in its contested territories (Cuba, Puerto Rico, Guam), would have to rely heavily on them for resupply or else wait for reinforcements from across the Atlantic. The United States, both militarily superior and logistically advantaged, could enter the conflict confidently and securely—likely explaining much of the pro-war fervor that preceded the declaration's passage. And public support would manifest far beyond poll numbers. At the outset of the war, the U.S. Army numbered 28,000 soldiers. President McKinley asked for 125,000 volunteers. He wound up with more than one million over a matter of weeks.[162]

The case of the Spanish-American War is relatively ambiguous by comparison to its predecessors. Officially lasting just over six months from the declaration of war against Spain until the signing of the Treaty of Paris on December 10, 1898, it saw only three months of intensive fighting against Spain, resulting in Spain's cessation of Puerto Rico, Guam, and the Philippines to the United States and the independence of Cuba. In that brief span, it is viewed as having effectively ended the Spanish Empire. A summary of events up until the Treaty of Paris would seem to present a clear-cut victory in a formally declared war with thorough legislative involvement, and indeed it is listed by Correlates of War as a decisive victory for the United States.[163] However, the three year campaign that followed, devoted to securing American control over both the Philippines and Hawaii, comes to look much less like our model of a declared war and much more like the undeclared conflicts of the twentieth and early twenty-first centuries: prolonged occupations with high American casualties and little demonstrable reward. From 1898 to 1903, what became known as the Philippine-American War would see a decline in public support for the war as 4,000 Americans lost their lives battling an insurgency and reports of American atrocities trickled back across the Pacific until Roosevelt, then president, declared an end to all military operations in the Philippines. This stalemated adventure into the Pacific might be cited as evidence contradicting the predictions of our theory of declared wars, but such objections would be misplaced. After the Treaty of Paris, America ceased to be in any formally declared war against Spain, and any excursions pursued beyond December 1898 constitute an undeclared conflict that adheres well to the predictions of that model. That American politicians and military leaders still pursued their objectives in the South Pacific under the auspices of the Spanish-American War does not nullify the fact that in the eyes of the American public war was over, the United States won, and politicians had fulfilled their obligations to the voters. That fact, however, did not prevent politicians from continuing, on an undeclared basis, in a prolonged conflict that looks much more in retrospect like American wars in Vietnam, Afghanistan, and Iraq than like 1812, the Mexican-American War, or the World Wars.

Other unique traits emerge from the Spanish-American War. Given the overwhelming, unprecedented American eagerness for war in the preceding years, the commitment-device-effect of a declaration for legislators appears to be made redundant by strong preferences for war and conquest among both politicians

[162] *Id*. at 243.
[163] Meredith Reid Sarkees & Frank Wayman, Resort to War: 1816-2007 (2010).

and the general public. Commitment devices are rendered rather useless where principals and agents share the same goals with similar fervor, which appears to be the case here. This also provides our first case of an overtly reluctant president being committed to war by legislators eager for conflict. In that sense, it is the reverse of what was observed with President Polk in the Mexican-American War. Though it is our only case study to follow such a pattern, it demonstrates the reciprocality of declarations in committing both branches to the conflict, no matter which is more eager for the fight. It likewise illustrates the commitment of one house of Congress—the Senate—to prosecuting the war even when it passed the declaration by only a very narrow margin.

v. World War I

By April of 1917, World War I had been underway in Europe for nearly three years. The assassination of Archduke Franz Ferdinand by Bosnian nationalists in 1914 had spurred the issuance of the July Ultimatum, a set of deliberately unacceptable demands, by Austria-Hungary to Serbia. Russia had mobilized against Austria-Hungary in defense of Serbia; Germany had declared war against Russia; tensions boiled over into conflict between Germany and neighboring France and Belgium; and Great Britain had entered to defend the neutrality of Belgium, bringing every major power in Europe into the fray. President Woodrow Wilson had won reelection in 1916 on the basis of his having kept the United States out of the war, in a state of "armed neutrality," but the sinking of the passenger ship *Lusitania* by a German U-boat in 1915 and Germany's violation of commitments to not engage in unrestricted submarine warfare made America's abstinence increasingly difficult to maintain. The revelation of the Zimmerman Telegram, in which Germany solicited Mexico's entry into war against the United States, proved to be the final straw. Wilson would present the telegram to the American public and secure Congress's support to enter the war on the side of the Allied Powers. Congress declared war on April 6, 1917.

The declaration of war against Germany passed with strong support: ninetythree percent of the Senate, eighty-eight percent of the House. Coincident with the Zimmerman Telegram and resumed U-boat activities were economic considerations that favored supporting the Allies, whom American financiers had already kept afloat with sizable lines of credit. Should they default, politicians feared that overexposed American banks might be destabilized. When Wilson consulted his cabinet on the question of declaring, he found unanimous support for entry.[164] Gompert et al. note the lack of clarity in the historical record as to whether popular opinion followed or preceded Wilson's decision.[165] There had been, since the outbreak of war in Europe, strong antiwar activism counterbalanced by others who agitated for American involvement, but whether Wilson sensed support for entry increasing and followed public opinion or chose to take the initiative is not readily clear. Whatever the order of events, once war was declared, Wilson found a largely committed public who were, at least at the outset, convinced of the war's probable necessity.

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[164] David C. Gompert et al., *Woodrow Wilson's Decision to Enter World War I, 1917*, *in* Blinders, Blunders, and Wars: What America and China Can Learn 75 (2014).

[165] *Id.* at 76.

The European powers had entered into World War I in 1914 confident that it would be a brief endeavor without devastating costs. Wilson, despite his acting three years later, believed the same of American entry. To his credit, he was right, though not for all of the reasons he presented. In arguing for entry before Congress, Wilson expressed the arbitrary view that though particular leaders agitated for war, all the peoples of Europe truly wanted peace and found themselves caught beneath the machinations of their rulers. In arguing this, Wilson's estimation of human nature was more assumed than thoroughly defended. His second reasoning, however, was decidedly more practical. From Gompert et al, "Wilson did not expect that large-scale U.S. forces would actually be needed to fight on the Western Front; rather, he figured that political, financial, and material support would tip the balance decidedly in favor of the Allies."[166] Given the grinding stalemate of the war at the time of American entry and its mere nineteen months duration afterwards, Wilson was correct to believe that the U.S. would tip the scales in favor of a quicker resolution. What he either underestimated or downplayed was the considerable cost of lives and resources that ending it would require.

In the years leading up to American entry, a number of prominent American leaders in government and business, including Theodore Roosevelt and former Secretaries of War Elihu Root and Henry Stimson, had led what was known as the Preparedness Movement, an effort to fund and organize American readiness should it ultimately need to enter the war in Europe.[167] Their training camps for potential wartime officers, however, were small relative to what America would soon require. American military preparedness had dwindled since the beginning of the 20th century, leaving the United States with the lowest troop and supply levels since the Civil War. The U.S. Navy was widely viewed as unprepared for conflict on the scale that would be demanded. The U.S. Army numbered roughly 200,000 men, with 80,000 of those in the National Guard—compared to Germany's 11 million troops, Austria's 7.8 million, and Britain and France with roughly 8 million each.[168] Regardless, the National Defense Act of 1916 expanded the governments manpower and resources, allowing it to begin organizing for the fight, and Wilson would rely heavily on conscription to fulfill the numbers required to defeat the Central Powers. A greater obstacle would be filling the ranks of officers able to provide the skilled battlefield leadership needed to win.[169]

Congress was, for their initial reluctance, actively involved in policies supporting military preparedness and supply even before the declaration of war. Rep. James Hay (D-VA7), an ardent promoter of peace and an opponent of conscription, was ultimately persuaded to support some of the Wilson administration's preparedness plans. Rep. David H. Kincheloe (D-KY2) opposed increasing the Army's ranks prior to war but, anticipating the plans of President Dwight Eisenhower decades later, advocated for the construction of a national highway system as a matter of national defense (Herring, 1964). Congress voted to give the federal government the

166 *Id.*

167 George C. Herring, *James Hay and the Preparedness Controversy, 1915-1916*, 30 J. Southern Hist. 383 (1988).

168 Michael Clodfelter, Warfare and Armed Conflicts: A Statistical Reference to Casualty and Other Figures, 1618-1991 (1992).

169 Mitchell Yockelson, *They Answered the Call: Military Service in the United States Army During World War I, 1917-1919*, 30 Prologue Magazine 228 (1998).

authority to call up the National Guard in times of crisis. Once war began, Congress would be actively engaged in military and domestic policy—sometimes for better and sometimes for worse. Benjamin Kleinerman writes that "The World War I Congress, under the prodding of Woodrow Wilson, authorized all those powers Wilson thought might be necessary to fight the war." Wilson repeatedly sought, and in some cases received, legislative approval for expansions of his executive powers in ways justified by but not limited to wartime necessity. Through the Espionage Act of 1917 and the Sedition Act of 1918, Wilson sought to suppress dissent and criticism of the war, asking Congress for "authority to exercise censorship over press" in order to silence "persons in a position to do mischief."[170] Congress, though at times permissive of Wilson's requests, would counter him on others, maintaining its role as a foil to executive discretion in wartime policy.

Means aside, the war was successfully brought to an end, at least for the moment. Correlates of War lists it as a victory for the United States.[171] The Paris Peace Conference and the Treaty of Versailles allowed Germany to conditionally surrender, subject to its acceptance of guilt for the war and its payment of reparations. Placing the seeds of World War II in the Treaty and its provisions is probably the most well-trodden exercise in process tracing in all of international relations and political history, but for that moment in history, the resolution it achieved meets the standard put forth by this model, being both favorable and—for a generation—decisive. The continued development of the American print media by this time and the element of the draft makes it difficult to imagine that a majority of the electorate would be unaware that war had been declared. Thus, World War I appears to pass our model's four-part test: a highly involved legislature, a decisive and favorable resolution, no prevalent ex ante view that victory was relatively certain, and widespread public awareness that Congress had declared war.

vi. World War II

The 1930s were, economically, a lost decade for the United States, the Great Depression having left the country thoroughly depleted. By 1941, for the first time since the stock market crash of 1929, U.S. GNP was returning to its precrash levels and had begun to show signs of stability and growth.[172] Meanwhile, as in 1917, the United States struggled to remain uninvolved in another world war that had spread across Europe, Russia, North Africa, and Asia. However, when Axis Powers' animosity reached a boiling point over the United States' Lend-Lease Program, the American renunciation of its trade deal with Japan, and its refusal to continue selling Japan airplane fuel, the United States could avoid war no longer. On December 7, 1941, the Empire of Japan bombed the American base at Pearl Harbor in Hawaii. Unlike at the onset of World War I, the United States had been deliberately and unambiguously attacked. It wasted no time in responding. President Franklin Delano Roosevelt issued the most widely heard radio broadcast in history on December 8 before a joint session of Congress, making his appeal

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[170] Benjamin A. Kleinerman, *In the Name of National Security*, *in* The Limits of Constitutional Democracy (Jeffrey K. Tulis & Stephen Macedo eds., 2010).

[171] Meredith Reid Sarkees & Frank Wayman, Resort to War: 1816-2007 (2010).

[172] *Gross National Product, 1929-1941, Not Seasonally Adjusted*, FRED St. Louis Fed. https://fred.stlouisfed.org/series/GNPA.

to legislators for a formal declaration of war against Japan. Over 81 percent of Americans listened live to his speech.[173]Congress passed the resolution within an hour of Roosevelt's address. Germany, in solidarity with its ally, declared war against the United States on December 11, and the United States responded in kind the same day with a declaration against both Germany and Italy.

The decision to enter war with Japan was, in this case, thrust upon American politicians. An attack of such scale and deliberation would be impossible to ignore. The option by Roosevelt's administration to declare war against Germany was initially undecided, as his advisors deliberated over whether to wage a singular war in the Pacific against Japan or to divide America's efforts and aid ally Britain on the European front. That the decision was effectively made for them by Germany's choice was momentous. Roosevelt advisor John Kenneth Galbraith remembered:

> We could have been forced to concentrate all our efforts on the Pacific, unable from then on to give more than purely peripheral help to Britain. It was truly astonishing when Hitler declared war on us three days later. I cannot tell you our feelings of triumph. It was a totally irrational thing for him to do, and I think it saved Europe.[174]

With war on two fronts, the United States needed to mobilize rapidly if it was to be successful. Its politicians wasted no time.

Whether it is creditable to budgetary prioritization or to the Founding Fathers' establishment of a culture averse to a large standing military, in every war in American history yet discussed, the United States has found itself significantly diminished from its previous military standing by the time of the next war. World War II is somewhat of an exception. Military strength stood at roughly 250,000 in 1940—almost unchanged since 1920. After the fall of France, it began to accrue forces and supplies in case Europe's war should become its own. When the war ended, three-and-a-half years after Pearl Harbor, 16.1 million Americans had been drafted or volunteered to serve in the Armed forces.[175] In the interim, the United States Congress played an active role with the president in setting troop levels, directing foreign and military policies, providing adequate funding and supply, and in all respects enhancing the United States' capacity to make war.

Historian David L. Porter, in his analysis of the seventy-sixth congress, which presided from 1939 to 1940, looks to the congressional records and finds a more active role played by Congress in the lead-up to World War II than that played by the president. Citing Congress's revision of neutrality legislation, its provision of a loan to Finland, its support of a peacetime draft, and a shift from isolationism to internationalism to interventionism, he gives a leading role to Congress in readying American forces for war.[176] The creation of the Senate Special Committee

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[173] Robert J. Brown, Manipulating the Ether: The Power of Broadcast Radio in Thirties America 117-20 (1998).

[174] Gitta Sereny, *Interview with John Kenneth Galbraith*, in Albert Speer: His Battle with Truth 267-268 (Knopf 1995).

[175] Bernard Rostker, *World War II*, *in* Providing for the Casualties of War: The American Experience Through World War II 175 (2013).

[176] David L. Porter, The Seventy-Sixth Congress and World War II, 1939-1940 (1979).

to Investigate Gasoline and Fuel Oil Shortages and the Special Committee to Investigate the National Defense Program as well as the joint Conference Committee on S. 2208 and the joint Reduction of Nonessential Federal Expenditures indicate structural changes designed to provide special attention to the war effort, and the strong war orientation of even committees not typically related to national defense such as committees on Public Buildings and Grounds, Judiciary, Interstate Commerce, and Education and Labor reveal the salience of the war to all legislative bodies. Indeed, official records of roll call votes reveal thirty-three "outstanding" war-related Senate votes by the 77th Congress prior to Pearl Harbor.[177]

However the credit is to be apportioned, both branches played a role in ensuring that the war was conducted with adequate supply. Harrison writes that, "[b]y mid-1942 war contracts had been issued to a sum exceeding the value of the 1941 gross national product," and the United States would be the only major war economy to never rely heavily upon external supply, demonstrating a level of productivity unmatched by the other major powers, all while using a lesser percentage of its population in the military and war economy.[178] Beyond funding and the apportionment of manpower and supplies, legislators played an active role in ensuring that war policy was effectively conducted. The 77th Congress passed the Lend Lease Act and established the Senate Special Committee to Investigate the National Defense Program, alternatively known as the "Truman Committee," to oversee war production and ensure efficient use of wartime resources. Indeed, contemporary reports suggest that there was at least as much criticism of Congress for being too involved in the administration of the war effort as there was for it being too lax.[179]Its level of involvement shows no sign of having waned; in March of 1944, Congress established a special House committee of 23 members to formulate a postwar military policy and determine the method of consolidation of the armed services.[180]To the end, legislators expressed concern for executive overreach. A Senate resolution of February 7, 1944, called for a general investigation by the Senate Judiciary Committee into the Roosevelt administration's use of executive orders, regulations, and directives[181], and the Smith committee, which was established in 1943 to investigate "activities of the executive agencies beyond the scope of their authority" recommended in November of 1944 that broad changes be enacted within the legislature to expand its control of bureaucracies relative to the Executive Branch. "The framers... of the Constitution," it wrote, "never contemplated that the Legislative Branch... would become a mere ratifying body of a supreme Executive will."[182]

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177 *Record Votes in the 77th Congress (First Session)*, *in* Editorial Research Reports 1941 453 (1941), http://library.cqpress.com/cqresearcher/cqresrre1941121600.

178 Mark Harrison, *Resource Mobilization for World War II: The U.S.A., U.K., U.S.S.R., and Germany, 1938-1945*, 41 Econ. Hist. Rev. 171 (1988).

179 *Congress and the Conduct of War*, CQ Researcher, (1942), http://library.cqpress.com/cqresearcher/document.php?id=cqresrre1942082400, (last visited Sept. 24, 2017).

180 *Record of the 78th Congress (Second Session)*, *in* Editorial Research Reports 1944, at 363-416 (1944), http://library.cqpress.com/cqresearcher/cqresrre1944122000 [hereinafter *78th Congress*].

181 S. Res. 252, 78th Cong. (Feb. 7, 1944).

182 *78th Congress*, *supra* note 180.

The result of the United States' military and political efforts was the most decisive victory in its history. The Allies won the war on all fronts, and the U.S. not only turned the course of the war by its entry but ultimately secured the unconditional surrender of the European Axis powers and Japan.[183] In the process, as a result of its own buildup, Britain's loss of numerous territories, and the role that its diplomats played in framing the subsequent peace, the United States emerged as the most powerful nation in the world. Here again, it seems, the predictions of the model are largely borne out in terms of legislative involvement and a decisive, successful outcome. Its weakest points as a demonstration of the model's predictions are (i.) that, as in World War I, the measures taken prior to the time of declaration to prepare the U.S. cannot be seen as arising from the declaration itself but rather as part of an already existent spirit of support for the effort and (ii.) that, while U.S. forces and supplies may have been scant at the outset of the conflict, leaning on this fact too heavily disguises the immense productive potential available to be realized from its then-immobile resources. The first point does not negate the model so much as obscure the effect of declarations when support and morale are already high, and the second is well taken, though a war that is declared within twenty-four hours of a devastating surprise attack can hardly be said to have been declared in a spirit of exceeding confidence. In the end, it seems we have yet another case of an open and formal declaration, a high degree of legislative commitment, and a decisive victory.

B. Undeclared Wars

Those cases in which the United States has formalized a military engagement with a declaration of war constitute a small minority. Relative to these six cases of formally declared war, in thirteen instances the U.S. Congress has authorized military operations against foreign governments or in defense of American trade, and in seven instances it has authorized the engagement of American troops under United Nations Security Council resolutions with provisions for funding made by Congress. In at least 125 other cases, an American president has led a military venture without congressional approval or appropriations.[184] The instances are far too numerous to discuss the vast majority of them, so for the sake of thorough analysis I will focus on the more notable undeclared conflicts since World War II. They are of interest not simply because of their recency but because of the trend that they establish: a sixty year pattern of large, costly, deadly ventures in which the United States Congress gives its authorization on either an *ex ante* or *ex post* basis, large numbers of troops are committed to the conflict, but the final result is generally either ambiguous or unfavorable.

The 5-0-1 record of the United States in declared wars finds a stark contrast in the 1-4 record of moderate-to-large-scale undeclared engagements over this period. In exchange for that poor record, by this author's calculations using official

[183] Meredith Reid Sarkees & Frank Wayman, Resort to War: 1816-2007 (2010).

[184] John C. Yoo, *Memorandum Opinion for the Deputy Counsel to the President*: *The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sept. 25, 2001), available at https://www.justice.gov/sites/default/files/olc/opinions/2001/09/31/op-olc-v025-p0188_0.pdf.

data, the United States has suffered 97,311 casualties.[185] In fiscal outlays, it spent over $1.18 trillion (2011$) on the Korean War, Vietnam War, and Gulf War, not including the years of medical benefits and government services that are still accruing as a result of those wars.[186] And the twenty-first century conflicts in Iraq and Afghanistan are projected to be the most expensive in its history, costing $4-6 trillion once all resultant future military benefits are included.[187] In addressing these very costly cases throughout this section, we will find that the predictions of this theory of undeclared wars are not perfectly born out in all instances. The Persian Gulf War stands out as a notable success despite never having been formally declared. However, the claim that declared wars are *more likely* to be seen through to decisive ends is summarily validated.

We will also see that the selection bias critique is undermined by a litany of instances contradicting its predictions. If, as that critique proposes, legislators are more inclined to formally declare war when they know that victory is highly probable, then we should have observed many more formal declarations than we have over the period in question. Whatever the degree of confidence felt by American politicians in the wars analyzed in the previous section, the selection bias critique requires us to believe that they were more confident going to war against Great Britain (twice), Mexico, Spain, Germany (twice), Italy, and Japan than against the opponents it has faced in the last six decades. Whereas debate can be entertained as to the relative military strengths of the Allied and Axis Powers in 1941, it is inconceivable to argue that the United States should have seen itself as militarily inferior to or equalled by North Korea, the North Vietnamese, the Hussein regime in Iraq, the Taliban in Afghanistan, or other adversaries not discussed here such as Libyan Arab Jamahiriya or Shia and Druze militias in Lebanon. Yet no formal declarations were passed or proposed. Thus, that argument appears to be further weakened by a lack of ambition on the part of legislators to seek easy credit for wars that were viewed, *ex ante*, as easily winnable.

In an attempt to validate the theory of undeclared conflicts, I will examine the following cases with an eye towards signs of deficient legislative oversight, unchecked executive discretion in the conflict's management, more successful efforts by legislators to shift blame onto the executive branch, and largely indecisive or unfavorable resolutions.

i. Korean War

In August of 1945, in an agreement with the United States designed to end World War II in the Pacific, the USSR declared war against Japan and pushed Japanese forces out of the northern half of the Korean peninsula as far as the 38th parallel. Following the American defeat of Japan that same month, the Soviets would hold the conquered territory in the North as the South emerged under a new, American-

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185 U.S. Dep't of Veterans Aff., America's Wars (2017), https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf.

186 Stephen Daggett, Cong. Research Serv., RS22926, Costs of Major U.S. Wars 2 (2010).

187 Linda J. Bilmes, *The Financial Legacy of Iraq and Afghanistan: How Wartime Spending Decisions Constrain Future National Security Budgets*, Hks Faculty Research Working Paper Series Rwp13-006 (2013).

led government. By 1948, Korea was operating under two separate governing systems—one communist, one free. On June 25, 1950, in an attempt to unify the peninsula under communist leadership, Northern forces supported by the Soviet Union and China commenced an invasion of the South, immediately provoking a response by the recently established United Nations Security Council. UNSC Resolution 82, issued that same day, demanded an immediate end to hostilities by North Korea and called upon member states to "render every assistance to the United Nations in the execution of this resolution and to refrain from giving assistance to the North Korean authorities."[188] UNSC Resolution 83, adopted June 27, formally declared the attack to be a breach of the peace and recommended that "Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area."[189]

In response to these developments, the administration of U.S. President Harry S. Truman exercised an unprecedented degree of unilateral activism, quickly committing the United States to leadership of the U.N.'s mission via naval and air strikes and soon engaging over 326,000 American troops to the Korean peninsula in the name of containing communist aggression.[190] Perhaps more surprising was Truman's success in amassing such troop levels in a matter of months and without significant Congressional challenge. Political scientist Stefan M. Brooks describes this as the result of a growing culture of legislative deference in the wake of World-War-II and Franklin Roosevelt's dramatic accruance of executive powers:

> "Throughout most of American history, Congress was the predominant power in the U.S. government. In the 1930s, however, owing first to the Great Depression and then to World War II, the power and responsibility of the president increased dramatically and eclipsed that of Congress, particularly in foreign affairs. This trend became even more pronounced with the coming of the Cold War in the late 1940s. Congress increasingly seemed to defer to the actions of the president with little, if any, critical debate or oversight. President Harry S. Truman broke new ground by committing U.S. troops to the Korean War in 1950 with no prior congressional approval or debate and no formal declaration of war."[191]

Undoubtedly, the environment of fear and suspicion towards communism that prevailed in the immediate aftermath of World War II played a role in the ease of attaining domestic acquiescence to U.S. action. Also instrumental was Truman's unequivocal insistence during the onset of the conflict that "[w]e are not at war."[192]

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188 S.C. Res. 82 (June 25, 1950).

189 S.C. Res. 83 (June 27, 1950).

190 David Rees, Korea: The Limited War 23 (1964).

191 Stefan M. Brooks, *Imperial Presidency*, *in* The Encyclopedia of the Vietnam War: A Political and Military History (Spencer C. Tucker ed., 2d ed., ABC-CLIO 2011) (1998).

192 Harry S. Truman, *The President's News Conference of June 29, 1950*, Teaching American History, https://teachingamericanhistory.org/library/document/the-presidents-news-conference-of-june-29-1950/.

In rhetoric that foreshadowed the later Bush administration's downplaying of unrecognized actors in the War on Terror, Truman dismissed the U.N. intervention as a "police action" that was "going to the relief of the Korean Republic [sic] to suppress a bandit raid."[193] Whatever the merits of the debate over whether American voters were acutely aware of the role of Congress in the United States' declared wars, it can be said confidently that an American president actively engaging a significant number of U.S. forces abroad while emphatically insisting to the public that the U.S. was not at war is a distinctive move away from its earlier approach. Truman's motives are, in retrospect, clear. The United States having been a late entrant to the conflict in both world wars, the Truman administration felt the need to ensure that the conflict on the Korean peninsula, with the USSR and China as North Korea's backers, did not turn into either World War III or a wholesale destruction of newly established South Korea. Also at issue was the possibility that South Korea, if conquered, could become a base for launching expansionary measures against newly reconstructed Japan.[194]

As a product of these concerns and America's newfound status as global superpower, the Truman administration ensured that the U.S. would provide the vast majority of the U.N.'s peacekeeping forces. As noted, it did so unilaterally at first, with little to no participation by members of Congress. Records show that on June 27, 1950, two days after North Korean invasion, President Truman invited a small number of congressional leaders (the exact number not being preserved in the record) to the White House not to ask for permission but to inform them of his chosen course of action with respect to Korea, with every member of that delegation submitting to the president's plan after only a few clarifying questions.[195] The newly established framework of the United Nations appears in the record to have sufficed for these legislative leaders in replacing any need for congressional debate or authorization, no mention having been made of bringing the issue before their committees nor the floors of their chambers before military measures were taken. In response to legislators' passivity, with troops already mobilizing, on June 30 Truman considered seeking congressional approval on an ex post basis but apparently felt no need for it. With public support for the engagement at that time very high and Truman not wanting to invite criticism from Republicans, he merely dispensed with the process of securing Congress's support. In his own words, "I just had to act as Commander in Chief and I did."[196]

In a scene that would repeat in the Vietnam and Iraq Wars, a legislature that passively accepted entry into a conflict, never exerted any notable effort to avoid entry, nor challenged the constitutional authority of the president to initiate a conflict would go on to challenge the sitting president on the merits of entering it after the fact (if not always wanting to deeply involve themselves in improving its administration). In each case, entry into the conflict is passively accepted without

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193 *Id.*

194 Yông-jin Kim, Major Powers and Korea 46 (1973).

195 Harry S. Truman, *Notes Regarding Meeting with Congressional Leaders, June 27, 1950*, Harry S. Truman Presidential Library & Museum (June 27, 1950), https://www.trumanlibrary.gov/library/research-files/notes-regarding-meeting-congressional-leaders.

196 Barton J. Bernstein, *The Truman Administration and the Korean War*, *in* The Truman Presidency 426 (Michael J. Lacey ed., 1989).

issue only to be made contentious later in response to public dissatisfaction. In each case, however, with Korea establishing the model, legislators seem, at the onset of conflict, wholly willing to engage in the sort of implicit Coasean bargain described by Sidak.

Consistent with later cases, legislators of the 80th and 81st Congresses would abandon their former passivity when the war turned unpopular, shifting blame onto the executive while downplaying their own early acceptance of it. Following Chinese entry into the war on October 19th, public support dissipated, falling from favorability ratings in the high seventies to below fifty percent and fluctuating well below fifty percent for the duration of the war. By October of the following year, fifty-six percent of Gallup respondents agreed with the position that Korea was a "useless war," and fifty-one percent in March of 1952 called it a mistake.[197] Congress responded to the fall in approval ratings, demanding answers to questions it had not asked at the start of the conflict and displaying a sudden anger that it had not been granted a greater role in the decision to enter. Buchanan writes that "Republicans, who had initially offered only token resistance, began to complain that Congress had not been consulted."[198] They soon proposed the Bricker Amendment, designed to constrain the president's military discretion, but only *after* hostilities in Korea had been concluded, not during. Despite having never insisted upon national security committee hearings and oversight in June of 1950, after public support soured in the fall both the SFRC and SASC increased the number of their hearings dramatically in 1951 (from about 65 to roughly 110 for the SASC and about 50 to around 75 for SFRC).[199] However, that support was not lasting, and though the war waged on, the change in oversight appears to have returned to its previous levels in 1952.[200] Legislators' interest in oversight thus appears to be more susceptible to the rise and fall of popular opinion when Congress has not given its imprimatur from the outset and the president has assumed full ownership of the conflict's initiation.

In keeping with our model's predictions, Congress strove to shift all blame for the war's negative developments onto the president. Republican Senator Robert Taft (OH), a presidential aspirant, strove to carve out an executive image for himself by frequently criticizing both Truman and General Douglas MacArthur for the progress of the war. The criticism of Taft and others proved effective as Truman's approval ratings fell precipitously, vacillating in the high twenties to low thirties from January 1951 onward, giving him an average approval rating of 36.5% in his second term and a low of twenty-two percent in February of 1952, leading him to decide not to seek reelection in November of that year. [201]Truman's fellow Democrats would not be immune from the war's political costs, losing both the House and Senate in 1952 but regaining both in 1954. In an unintended homage to their nineteenth century predecessors, legislators soon dubbed the conflict "Mr.

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197 John E. Mueller, War, Presidents, and Public Opinion 51 (1973).

198 Bruce Buchanan, *Presidential Accountability for Wars of Choice*, 22 Issues Governance Stud. 1, 4 (2008).

199 Linda L. Fowler, Watchdogs on the Hill: The Decline of Congressional Oversight of U.S. Foreign Policy 51 (2015).

200 *Id.*

201 *Presidential Approval Ratings—Gallup Historical Statistics and Trends*, Gallup, http://www.gallup.com/poll/116677/presidential-approval-ratings-gallup-historicalstatistics-trends.aspx, (last visited Sept. 23, 2017).

Truman's War."[202] Unlike those predecessors, however, they had been complicit facilitators in the war's initiation and found their distaste for the conflict only after a series of negative developments and an upwelling of public dissatisfaction.

America's first instance of conflict without declaration in the post-WorldWar-Two era appears, by all accounts, to validate our theory of undeclared conflicts. It was a costly war at $341 billion in 2011 dollars and 54,246 American deaths.[203] It was initially met with legislative passivity only to later see congressmen and senators vehemently—and successfully—shift accountability to the executive branch. Finally, and troublingly, it was an indecisive conflict, listed as a "Stalemate" by Correlates of War[204]and "Not Successful" by Feaver and Gelpi.[205] A stark contrast to the total defeats of Germany and Japan less than eight years prior, it ended in a stalemate at the 38th Parallel, with half of Korea remaining subsumed under communist dictatorship. To this date, the Korean War never officially ended at all but has remained at a tenuous ceasefire for over sixty years. Despite its considerable costs, fatalities, political confusion, and unsatisfying resolution, however, the Korean War would not prove to be a learning experience for the United States. Rather, its troubles were already being replicated just a few years hence.

ii. Vietnam War

If Korea established the model of costly, indecisive, and feverishly debated military engagements that have characterized the post-World-War-Two era, the Vietnam War epitomized it. Officially lasting nine years, from the 1964 Gulf of Tonkin Resolution to the withdrawal of U.S. forces from Vietnam under the 1973 Paris Peace Accords, it began inauspiciously as part of a gradual escalation of U.S. involvement in Southeast Asia. In 1955, President Dwight Eisenhower sent 700 soldiers to Vietnam in 1955 as "military advisors" in support of the South Vietnamese, who were struggling to resist a rising communist regime in the North. In 1961, the incoming Kennedy administration increased the number of Special Forces troops and advisors from 794 to 959. In 1962, their numbers were increased dramatically to 8,498, with 53 having been killed. By the end of 1963, the number of American military personnel in Vietnam rose to 15,620, and a clear trend of rapid escalation had begun.[206] Whatever the preferred terminology for American forces in country, the United States was becoming deeply involved in an intranational conflict on the other side of the globe.

As American troop levels in Vietnam rose throughout the early 1960's, public records do not reveal a corresponding increase in Senate national security committee hearings. Significant upticks in the frequency of oversight hearings didn't begin until 1964, when the Gulf of Tonkin Resolution was passed, authorizing U.S. military action against the North Vietnamese in response to alleged firings against

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202 Donald R. McCoy, The Presidency of Harry S. Truman 222 (1984).

203 Stephen Daggett, Cong. Research Serv., RS22926, Costs of Major U.S. Wars 2 (2010).

204 Meredith Reid Sarkees & Frank Wayman, Resort to War: 1816-2007 (2010).

205 Peter D. Feaver & Christopher Gelpi, Choosing Your Battles: American Civil-Military Relations and the Use of Force 140 (2004).

206 Tim Kane, *Global U.S. Troop Deployment, 1950--2003*, Heritage Foundation (Oct. 27, 2004) , http://www.heritage.org/defense/reportglobal-us-troop-deployment-1950-2003.

U.S. Navy ships off the coast of Vietnam. To be sure, after the Resolution both the SFRC and SASC increased oversight subtly, relying on closed-door executive hearings rather than the sort of public hearings likely to attract press and public awareness. Neither committee held a public hearing on Vietnam until 1966, even as Operation Rolling Thunder commenced bombing North Vietnam.[207]

As in the Korean War, the frequency of legislative hearings tracked poll numbers, rising as public approval of the war plummeted and it assumed a central role in American national politics. Fowler notes that from 1964 to 1975, the point of final withdrawal from Vietnam, the SASC and SFRC conducted 345 days of hearings on national security, 137 of which were public and 208 of which were closed-door executive hearings. Ninety percent of Armed Services' 147 meeting days were about crises and scandals related to Southeast Asia, as were sixty-three percent of Foreign Relations' 198 meeting days. As of the spring of 1966, though, the vast majority of Senate oversight hearings had been conducted behind closed doors.[208] Politicians' approach seems to have been one of getting involved without drawing attention to their involvement. Whatever the frequency of hearings, however, legislative involvement does not appear to have been at any point an effective brake or a meaningful challenge to the executive branch's escalation. Troop levels grew every year from 1959 to 1968, with over half a million troops committed to the conflict in that time. As Brooks remarks, "Expansion of the war was achieved largely without much congressional involvement. Certainly there was virtually no congressional oversight leading up to the war in 1965."[209] As for the legislature outside of SASC and SFRC, after the Gulf of Tonkin Resolution passed in 1964 neither house of Congress would cast roll call votes on the war in Southeast Asia until 1970, when the Cooper-Church Amendment, which blocked funding for military personnel and air operations in Cambodia, passed the Senate only to be defeated in the House.[210]

By the spring of 1966, the weight of the war's growing unpopularity fell considerably on the executive. SFRC Chairman J. William Fulbright (D-AR) publicly and repeatedly invoked the term "credibility gap" to describe his committee's lack of trust in executive branch officials and commenced a series of "educational" public, televised hearings in order to call out the administration for its alleged secrecy, with the irony of that committee's disinterest in the conflict two years earlier going seemingly unmentioned. Correspondingly, President Johnson's approval ratings regarding handling of the war fell from 63 percent to 49 percent in response to the scrutiny.[211] The president was indeed "owning" the war, and it would continue to be reflected in such ratings. Whereas Johnson's average overall approval rating during his first term, November 1963 to January 1965, was 70.1% with a high of 79% in February 1964, it fell precipitously to 50.3% in his second term, January 1965 to

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207 Linda L. Fowler, Watchdogs on the Hill: The Decline of Congressional Oversight of U.S. Foreign Policy (2015).

208 *Id.* at 65.

209 Stefan M. Brooks, *Imperial Presidency*, *in* The Encyclopedia of the Vietnam War: A Political and Military History 529 (Spencer C. Tucker ed., 2d ed., ABC-CLIO 2011) (1998).

210 Fowler, *supra* note 207, at xv.

211 *Vietnam Hearings,: 1964-Present*, United States Senate, https://www.senate.gov/artandhistory/history/minute/Vietnam_Hearings.htm, (last visited Sept. 23, 2017).

January 1969, with a low of 35% in August 1968. Despite periodic variations, its trajectory throughout both terms was one of steady decline.[212] Likewise, in November of 1964, one year after Kennedy's assassination and Johnson being sworn in, overall public trust in government reached a high that has never been achieved again, with seventy-seven percent of Americans surveyed by Pew Research Center reporting that they have confidence in the federal government "just about always" or "most of the time." Over the course of the war, that figure would fall every year. When the last American troops were withdrawn from Vietnam, it was less than half of its original value at thirty-six percent. Distrust rose symmetrically over the period, increasing from twenty-two percent in 1964 to sixty-two percent in 1974, with Vietnam cited as a leading cause alongside the Watergate scandal.[213]

Due to the powerful effect of public outrage, the Vietnam War would not go completely unattended to by legislators, but it nonetheless bears out the theory of a legislature that, having never formally participated in the decision to wage war in the first place, is able to secure itself against the political risks of doing so and lay the costs of the war at the feet of the executive. Fowler notes that "After the long nightmare of Vietnam"—but not during— "Congress reasserted its institutional prerogatives in international affairs. Lawmakers passed the War Powers Act in 1973, publicized a long list of CIA abuses, terminated funding for military operations in Southeast Asia, formed intelligence committees in both chambers to oversee clandestine activities, asserted greater control over the president's distribution of military aid, and trimmed defense spending."[214]As was noted by Fisher[215] and can be inferred from Howell and Pevehouse[216], however, the War Powers Resolution can largely be seen as an effort to appear involved without actually imposing constraints upon the executive. Given the timing of all of the other provisions mentioned by Fowler, coming as they do, like the Bricker Amendment, *after* hostilities have ceased, the spirit of assertiveness in these measures is highly questionable.

For failings in a task of government—war making—which was specified in the Constitution to be the province of Congress, Lyndon Johnson so lost popularity that he chose not to seek reelection in 1968.[217] Marking a further shift toward full

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212 *Presidential Approval Ratings—Gallup Historical Statistics and Trends*, Gallup, http://www.gallup.com/poll/116677/presidential-approval-ratings-gallup-historicalstatistics-trends.aspx, (last visited Sept. 23, 2017).

213 *Public Trust in Government: 1958-2014*, Pew Res. Ctr., (Nov. 13, 2004) PewResearch.org, http://www.people-press.org/2014/11/13/public-trust-in-government/.

214 Louis Fisher, Presidential War Powers 71 (3d. ed., 2013).

215 *Id.*

216 *See generally,* William G. Howell & Jon C. Pevehouse, While Dangers Gather: Congressional Checks on Presidential War Powers, (2007).

217 The role of Vietnam in Johnson's choice not to run has long been the subject of some controversy, with former officials in his administration denying that poll numbers on Vietnam played any role in the president's choice*, e.g.,* James R. Jones, *Behind L.B.J.'s Decision Not to Run in '68*, N.Y. Times, Apr. 16, 1988. However, the popular consensus is that his unpopularity in 1968 played a significant role. I defer to the most common understanding here, with reference to Jeff Shesol, Mutual Contempt: Lyndon Johnson, Robert Kennedy, and the Feud that Defined a Decade 545 (1998); Lewis L. Gould, 1968: The Election that Changed America 16 (2d ed., 2010), and Anthony J. Bennett, The Race for the White House from Reagan to Clinton: Reforming Old Systems, Building New Coalitions 160 (2013).

executive accountability, unlike Democrats' brief loss of both houses due to the unpopularity of the Korean War, this time costs were not allotted along party lines but concentrated thoroughly on the executive. Johnson's party held a majority of the House and Senate throughout the Vietnam era by never less than fifty and fourteen seats, respectively. Adapting to the new institutional arrangement (military conflict as an executive venture), voters seem to have attached less responsibility for the war to the legislature than they did in 1950 and 1952. Vietnam also fits the description of undeclared conflicts as frequently long, costly endeavors that produce high numbers of American casualties and conclude in indecisive or unfavorable results. Despite an official casualty count of 58,220 U.S. soldiers and a financial cost of $738 billion (2011$), it achieved no lasting effect and failed to resist the establishment of a communist state[218] The North Vietnamese and their allies in South Vietnam, the Vietcong, would repeatedly violate the terms of the peace, free from American reprisal or condemnation, and Saigon, capital of the South, would fall to North Vietnamese forces in 1975. In summary, the Vietnam War was a costly undeclared conflict with high fatalities conducted over a prolonged period and led to an unfavorable end, the blame for which fell squarely on the executive at little cost to legislators. Correlates of War[219] lists it as a decisive loss for the United States, and Feaver and Gelpi[220] code it as "Not Successful." It thus fits our model of undeclared conflicts quite well. While it would be unfair to say that legislators were not involved in the administration and conduct of the war on an ex post basis, their involvement again seems to track public opinion rather than start strong, bound by an ex ante sense of commitment to a conflict that they had authorized. Their neglect of the circumstance until after the conflict was fully underway discarded the possibility of debate over its merits and meant that responsibility for its initiation was not evenly borne by the two branches of government in the eyes of the public.

iii. Persian Gulf War

On August 2, 1990, under the leadership of Baathist dictator Saddam Hussein, Iraq invaded the neighboring gulf state of Kuwait. Iraq, heavily indebted and economically depressed after a deadly, protracted war against Iran had long perceived Kuwait as rightfully belonging to it and saw Kuwaiti oil reserves as a potentially valuable source of revenue. The Hussein regime cited Kuwaiti defection from OPEC oil production quotas as "economic warfare" and used it as a pretext for invasion. Decrying the act as unprovoked aggression, the United Nations Security Council imposed economic sanctions against Iraq. Under the leadership of President George H.W. Bush, U.S. forces were deployed to Saudi Arabia in preparation for repelling Iraqi troops from Kuwait. On January 17, 1991, the U.S. and a broad international alliance of 38 countries began a naval and aerial bombardment, followed by a ground invasion on February 24. By March 10, the Iraqi invasion had been effectively thwarted, Iraqi troops had been repelled back

[218] U.S Dep't of Veterans Aff., America's Wars, (2017), https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf.; Stephen Daggett, Cong. Research Serv., RS22926, Costs of Major U.S. Wars 2 (2010).

[219] Meredith Reid Sarkees & Frank Wayman, Resort to War: 1816-2007 (2010).

[220] Peter D. Feaver & Christopher Gelpi, Choosing Your Battles: American Civil-Military Relations and the Use of Force 140 (2004).

across the border, and the more than half a million U.S. troops in the Gulf began to withdraw. Total U.S. casualties numbered 382, a comparatively very small figure among post-World-War-Two undeclared conflicts.[221]

The clear cut victory of U.S.-led Coalition forces in the Persian Gulf War is one outstanding exception to the pattern of protracted, indecisive, and largely unsuccessful undeclared conflicts that characterize American military history in the post-World-War-Two era.[222] Executed pursuant to the 1991 Authorization of the Use of Military Force Against Iraq Resolution[223], it authorized the president to use armed forces to impose the terms of the relevant U.N. Security Council resolutions conditional upon his provision to House and Senate leaders adequate proof that all diplomatic measures at his disposal had been exhausted and his reportage on the progress of the conflict to those bodies at least once every sixty days. It conferred upon him no extraordinary powers nor any explicit limitations beyond explicitly stating the causes and justifications for its issuance. Nonetheless, it was an indisputable victory that invites us to consider what so differentiates this case from those preceding and following it.

The scale of the conflict and the relative strength of the combatants are the most readily available explanations. Certainly, were it a larger world power that had invaded, the conflict would likely have been longer and more difficult. However, if scale and relative strength were deterministic, U.S. intervention in Vietnam, Lebanon in 1983, the Libyan Civil War in 2011, and a litany of other minor interventions should presumably have been more decisive. That the Gulf War was a collaborative multilateral intervention conducted with broad international support should enhance commitment to a successful resolution. There again, by the same logic, the War in Afghanistan, with full NATO support, should have been similarly swift and decisive. And it cannot be discounted that, unlike Korea, Vietnam, Lebanon, Afghanistan, Iraq in 2002, and Libya in 2011, the Persian Gulf War was a clear case of a small, sovereign nation invaded by a foreign army with no recognized claims to any part of its territory. Lacking the ambiguities of intrastate conflicts, rebellions, and insurgencies, it presented clear delimitations and a well defined geographical boundary beyond which the invaders must be repelled, making the standard for victory apparent.

As to the role of the legislature, an argument could be made that Congress's moderate support for intervention (fifty-two percent in the Senate, fifty-seven percent in the House)[224] was counterbalanced by the support of the United Nations and America's assumed responsibilities to that body. Furthermore, the AUMF issued by Congress, citing U.N.S.C. resolutions,[225] explicitly noted the indiscretions and violations of international law by Iraq that were used to justify military force against it. More than some formal declarations of war (against Great Britain in 1812, Mexico in 1846, Spain in 1898, or Germany in 1917), the AUMF specifically

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221 U.S. Dep't of Veterans Aff., America's Wars (2017), https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf.

222 Sarkees & Wayman, *supra* note 219; Feaver & Gelpi, *supra* note 220, at 140.

223 H.R.J. Res. 77, 102d Cong., 105 Stat. 3 (1991).

224 S.J. Res. 23, 107th Cong., 115 Stat. 224 (2001).

225 U.N.S.C. Res. 660 (1990);, S.C. Res. 661 (1990);, S.C. Res. 662 (1990); S.C. Res. 664 (1990); S.C. Res. 665 (1990); S.C. Res. 666 (1990); S.C. Res. 667 (1990); S.C. Res. 669 (1990); S.C. Res. 670 (1990); S.C. Res. 674 (1990); S.C. Res. 677 (1990).

cited those actions taken by the targeted country, and it couched its actions more broadly within the authority of the United Nations. Even with a simple majority of support for the AUMF in both houses, Congressional involvement during the period was considerable. From the commencement of the one hundred and second Congress on January 3, 1991, to the withdrawal of U.S. troops on March 10, at least 68 bills and resolutions related to the conflict were introduced, including official condemnations of the Hussein regime and its actions against Kuwait,[226] appropriations bills,[227] provisions for returning veterans,[228] measures regarding relations with Saudi Arabia and other allies,[229] resolutions attempting to restrict the scope of the conflict to narrowly stated purposes,[230] resolutions calling for an international criminal trial of Hussein,[231] and one attempt at a formal declaration of war,[232] among others.

In sum, the Persian Gulf War enjoyed a beneficial combination of features that made it relatively easy to see through, and its success relative to other undeclared conflicts in the post-World-War-II era is probably best understood as a combination of these: an overwhelming military advantage against a small, underfunded and ill-equipped enemy; broad international support; a well defined standard of victory; and a very short duration, which left little room for the kind of political fatigue that has plagued more prolonged conflicts such as Vietnam and the War on Terror. Those who view formal declarations as incidental to the conduct of war may well argue that the Persian Gulf War is a textbook case of an AUMF sufficing for the achievement of a decisive and favorable resolution. Looked at very narrowly, with our focus restricted to the domestic political environment, that perspective would seem to bear the weight of the evidence. However, viewed in the broader context of these favorable circumstances, we see what good fortune is required before an undeclared conflict proves successful. To say that an undeclared conflict can succeed when all of the relevant forces align perfectly in leaders' favor is hardly indicative of the sort of robust political institution that we should want when undertaking a venture so costly and tenuous as war. Thus, while the Gulf War may be evidence that an undeclared conflict can be successful, it also arguably indicates the ideal and seldom observed conspiracy of circumstances that appear necessary to secure that success. Nonetheless, fair analysis dictates that I must acknowledge it as the most credible countersuit to our model of undeclared conflicts.

iv. War in Afghanistan and Iraq War

The War in Afghanistan that began in the fall of 2001 was the first instance since World War II in which the United States engaged in a significant armed conflict on its own behalf rather than as an intervention into the internecine conflicts of another region. After the attacks of September 11th, the United States, under the leadership of President George W. Bush and with the joint collaboration of the

226 H.R.J. Res. 48, 102d Cong. (1991).
227 S. 332, 102d Cong. (1991).
228 H.R. 3, 102d Cong. (1991).
229 *E.g.* H.R. Con. Res. 15, 102d Cong. (1991).
230 S.J. Res. 10, 102d Cong. (1991).
231 H.R.J. Res. 88, 102d Cong. (1991); S. Res. 69, 102d U.S. Cong. (1991).
232 H.R.J. Res. 63, 102d Cong. (1991).

United Kingdom, invaded Afghanistan for the stated purpose of seeking out all of those responsible for those atrocities and unseating the Taliban regime which had protected and fostered them. Consensus held at the time and further developments substantiated the deep interconnectedness between Al-Qaeda, led by September 11th architect Osama bin Laden, and the Taliban under the leadership of Mullah Omar. Though Afghanistan was largely held to have been rendered a failed state through protracted civil war, the unrecognized Taliban government was seen as the predominant power within Afghanistan and was the closest it had to a functioning system of government.

Nonetheless, when President Bush sought authorization from Congress for military action, he neither requested nor received a formal declaration of war or an AUMF limiting the executive to action against certain individuals, organizations, or nations. The AUMF that was granted was entirely open-ended, delegating to the president unilateral discretion to take the pursuit of justice across any national borders and against any parties he deemed responsible for the attacks. In its own words, "[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determined planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001."[233] Thus, America's first experience using an AUMF for a large-scale and protracted conflict provided little scope for congressional oversight and legislative accountability. It would follow that authorization with another in 2002 for the use of military force against Iraq, which, in a war of broadening scope against any and all actors deemed to support terrorism, was seen by the Bush administration as the next logical choice for invasion.

Contrary to all formal declarations by the United States, the motivating clause of the 2001 AUMF makes no mention of Congress except to detail what Congress authorizes the executive to do. It does not explicitly commit any of the nation's resources to its control. By the very nature of the AUMF it is asserting the position not of the ultimate authority with respect to war, with the executive as manager thereof, but a far more delegative role. It has not established and has, in fact, resisted attempts to establish rigorous reporting by the executive. In the deliberations over the 2001 AUMF, Rep. John Tierney (D-MA6) moved to require a report from the president on executive actions under the resolution every sixty days. The movement was quickly dispelled by a majority of the House.[234] That proposal does not seem to have been entirely in vain: it would make it into the 2002 AUMF against Iraq.[235] Its ineffectiveness at inspiring congressional involvement in and oversight of the war, however, is indicated by a dearth of legislative oversight hearings in the ensuing years.

Thomas E. Mann and Norman J. Ornstein, writing in late 2006, note the collapse of legislative monitoring in foreign policy even in the first five years of the War on Terror: "In the past six years... congressional oversight of the executive across a range of policies, but especially on foreign and national security policy, has virtually collapsed. The few exceptions, such as the tension-packed Senate hearings

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233 S.J. Res. 23, 107th Cong., 115 Stat. 224 (2001).

234 Jennifer K. Elsea & Matthew C. Weed, Cong. Research Serv., RL31133, Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications (2014).

235 H.J. Res. 114, 107th Cong., 116 Stat. 1498 (2002).

on the prison scandal at Abu Ghraib in 2004, only prove the rule. With little or no midcourse corrections in decision-making and implementation, policy has been largely adrift."[236] Describing the legislative disposition: "oversight of foreign policy has taken the form of 'fire alarm' hearings, responding to scandals or crises, rather than of 'police patrols,' designed to prevent problems before they occur." More broadly, they note that throughout the post-World-War-Two period (the precise range within which undeclared military engagements rose in frequency), there was a collapse in the institution of congressional oversight of foreign affairs (military operations in particular) that once saw legislators frequently challenging even presidents of their own party in the name of checks and balances. A longtime Senate staffer is quoted as saying that "the Senate Armed Services Committee held no hearings specifically on operations in Afghanistan in 2003 and 2004, and only nine on Iraq [excluding the prisoner abuse matter] in that period—less than 10 percent of its total hearings. The House Armed Services Committee held only one hearing on Afghanistan in 2003 and 18 on Iraq during 2003-2004—less than 14 percent of its total number of hearings. The Senate Foreign Relations Committee spent 19 percent of its time on those two countries." Kriner and Shen note the greater propensity of legislators to make floor speeches when military casualties from their state or district are high, but this effect on speeches has not observably translated into committee actions, legislative checks on executive military discretion, nor legislative demands for more control over military and defense policy.[237] *The New York Times* and *Washington Post* would later apologize to their readers for failing to pursue an understanding of the rationale behind the Iraq War's AUMF, but according to Fowler "[t]he papers' failure to a large extent reflected the lack of authoritative sources on Capitol Hill that publicly reviewed the war and offered alternative views to the Bush administration's version of events."[238]

Even in the 2006 midterm elections, when voters listed the Iraq War as one of the two most important issues, their opposition to the war manifested as largely anti-Bush in nature, voting out Republicans as a statement against the Republican president. CNN exit polls showed fifty-seven percent opposition to the Iraq War and fifty-eight percent disapproval of George W. Bush.[239] Thirtyfive percent of voters listed the Iraq war as "Extremely Important" to their vote, thirty-two percent as "Very Important," and twenty-one percent as "Somewhat Important." In the same poll, thirty-six percent of voters reported voting to "Oppose Bush" with twenty-two percent voting to "Support Bush" and thirtynine percent reporting that Bush was not a factor in their vote.[240] In a January 2007 Gallup poll, fifty-three percent of those who said that Iraq had gone worse than expected said they blamed Bush

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[236] Thomas E. Mann & Norman J. Ornstein, *When Congress Checks Out*, Foreign Aff., (Nov./Dec. 2006), https://www.foreignaffairs.com/articles/united-states/2006-11-01/when-congress.

[237] Douglas Kriner & Francis Shen, *Responding to War on Capitol Hill: Battlefield Casualties, Congressional Response, and Public Support for the War in Iraq*, 58 Am. J. Pol. Sci. 157 (2014).

[238] Linda L. Fowler, Watchdogs on the Hill: The Decline of Congressional Oversight of U.S. Foreign Policy 61 (2015).

[239] *Exit polls: Bush, Iraq key to outcome*, CNN, (Nov. 8, 2006), http://www.cnn.com/2006/POLITICS/11/08/election.why/.

[240] *America Votes 2006: Exit Polls*, CNN, https://edition.cnn.com/ELECTION/2006/pages/results/states/US/H/00/epolls.0.html, (last visited Sept. 23, 2017).

a "Great Deal," compared with forty-one percent saying the same of Iraqi political leaders and Secretary of Defense Donald Rumsfeld followed by Vice President Dick Cheney at thirty-three percent, U.S. intelligence agencies at twenty-six percent, the U.S. news media at twentyfour percent, and U.S. military leaders in Iraq at thirteen percent.[241] Congress was Congressional Republicans' approval rating, at roughly fifty percent, could not overcome that of President Bush, which hovered in the thirties.[242] With Bush no longer on the ballot in 2008, however, the new Democratic majority did not seem to be similarly punished in the next election for presiding over the 2007 Iraq "surge" nor for the decade since of continued military presence in Afghanistan and Iraq. The war was, again, a largely executive venture in public opinion.

Consistent with a pattern, both of these conflicts proved to be long, ambling projects carried out at immense cost and without a clear or decisive resolution. The War in Afghanistan has been the single longest military engagement in the history of the United States, officially dating over thirteen years from the time of U.S. invasion until NATO officially handed power over to the Afghan government in December 2014. Correlates of War lists it initially as an interstate war but codes it as having "transformed into another type of war." From there, it was reclassified as an "Extra-State War" (one conducted between a state and non-state actor) and is listed as ongoing as of December 31, 2007.[243] Since then, a residual force of U.S. troops has remained in-country and continues to conduct airstrikes and special operations; both NATO and the CIA have proceeded to establish an indefinite presence there; and the withdrawal of U.S. troops has been repeatedly pushed back in the face of instability.[244] The same descriptors are applied to Iraq, in sequence. There, the vacuum created by the fall of Saddam Hussein's regime led to the rise of the Islamic State and spread into neighboring, war-torn Syria. Despite the formal end of the Iraq War in December of 2011, U.S. Special Forces were again called upon to conduct special operations and train Kurdish resistance forces.[245] In a speech before NATO at Warsaw, Poland, in July of 2016, President Obama described the state of a quasi-war that he said would last beyond his time in office, was not definitively successful, and offered no clearly foreseeable resolution what the *Washington Post* called "a

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241 *Presidential Approval Ratings—George W. Bush*, Gallup, http://www.gallup.com/poll/116500/presidential-approval-ratings-george-bush.aspx, (last visited Sept. 27, 2017).

242 Lydia Saad, *Congress' Approval Rating Ties Lowest in Gallup Records,* Gallup, May 14, 2008, http://www.gallup.com/poll/107242/congress-approval-rating-ties-lowest-galluprecords.aspx.

243 Meredith Reid Sarkees & Frank Wayman, Resort to War: 1816-2007 (2010).

244 Tim Craig, *Nato Hopes to Keep a Base in Afghanistan, U.S. General Says*, Wash. Post, May 23, 2015, https://www.washingtonpost.com/world/nato-hopes- tokeep-a-long-term-base-in-afghanistan-us-general-says/2015/05/23/d4f6a25c-0157-11e5-8c77bf274685e1df_story.html; Matthew Rosenberg & Michael D. Shear, *In Reversal, Obama Says U.S. Soldiers Will Stay in Afghanistan to 2017*, N.Y. Times, Oct. 15, 2015, http://www.nytimes.com/2015/10/16/world/asia/obama-troopwithdrawal-afghanistan.html?_r=0.

245 Spencer Ackerman, *U.S. Military Special Forces Pictured Aiding Kurdish Fighters in Syria*, Guardian, May 26, 2016, https://www.theguardian.com/world/2016/may/26/usmilitary-photos-syria-soldiers-fighting-isis.

new kind of endless war."[246] When the Obama administration sought congressional approval for actions against the Islamic State in 2014, *The New York Times* reported that "congressional leaders, who met with Mr.Obama about Iraq in June, have explicitly told them that Mr. Obama need not go to Congress to authorize military action,"[247] prompting Senator and later Vice-Presidential nominee Tim Kaine (D-VA) to pen an opinion article in *The Washington Post*, commenting that "This is not about an imperial presidency. It's about a Congress that's reluctant to cast tough votes on U.S. military action."[248]

VI. Conclusion

The history of American military engagements can be read as a story of two very different kinds of endeavors: one, formally declared wars, which have been thoroughly prosecuted and invariably successful; the other, undeclared wars, the record of which has been considerably mixed. The paradox of the postWorld-War-Two era, in which the United States has has simultaneously been recognized as the world's preeminent superpower but at the same time suffered a long series of prolonged, indecisive, and unsuccessful conflicts, suggests that the source of its troubles is not a matter of sheer military strength. Politicians and pundits have resorted to calling America's modern military actions "a new kind of war" in which the old rules do not apply, in which clear victory can never be expected, and which may well last decades or a generation. The cryptic nature of these characterizations, however, invites us to look for underlying changes in the institutional structure of American warfare, both military and political. The most politically relevant of these is America's abandonment of formal declarations of war.

Formal declarations, this theory has argued, are much more than the outmoded technicalities that they are often dismissed as being. By requiring the explicit, formal endorsement of two branches of government, they have the effect of committing politicians in both branches to the outcome of the war, enhancing legislative involvement and improving the political will to achieve a favorable and decisive outcome. By limiting politicians' capacity to shift credit and blame at will, declarations better ensure that politicians have a reputational stake in the outcome, inducing them to exert more effort in the conflict's political administration. In this sense, they carry commitment value analogous to a formal pledge or written contract.

The result is a stark contrast in the two models' records of success, with all six of America's formally declared wars having ended on clearly favorable terms,

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246 Greg Jaffe & Michael Birnbaum, *With a Hint of Regret, Obama Describes New Kind of Endless War*, Wash. Post, July 9, 2016, https://www.washingtonpost.com/politics/with-a-hint-of-regret-obama-describes-new-kind-of-endless-quasi-war/2016/07/09/b9fdacb2-4624-11e6-bc99-7d269f8719b1_story.html.

247 Julie Hirschfield Davis, *Neither Obama Nor Congress Seems Eager for a Vote on Military Action in Iraq*," N.Y. Times, Aug. 19, 2014, at A15.

248 Tim Kaine, *Congress Has a Role in U.S. Military Action in Iraq*, Wash. Post, (June 24, 2014), https://www.washingtonpost.com/opinions/tim-kaine-congress-has-a-role-in-us-military-action-in-iraq/2014/06/24/77ec1776-fbc8-11e3-b1f4-8e77c632c07b_story.html.

a distinction enjoyed by only one out of five major undeclared conflicts in the post-World-War-Two era. The Persian Gulf War aside, the trend appears to be in the direction of progressively less legislative involvement and accountability over time. The Korean War saw initial legislative deference that was quickly, if briefly, punished by voters. The Vietnam War saw no such punishment, with the majority party—Democrats—retaining considerable control of the legislature at all times throughout a strikingly unpopular and widely protested war. In both cases, we saw an executive—Truman, then Johnson—bear such undivided responsibility for the war in the public eye that despite starting with eighty-seven percent and seventy-nine percent approval, respectively, neither was able to seek reelection. Only in the 2006 midterm elections does the unpopularity of a war seem to have played heavily into voter preferences in a way that lasted more than one congressional term, but the argument for legislators' partisan association with President Bush being the dominant influence there is strong. Thus, with presidents being punished for wars in more dramatic ways than legislators, we must consider the possibility that the view of war as a primarily executive undertaking is being cemented in public opinion, contrary to the dictates of the Constitution. With a small and dwindling percentage of the electorate having been alive the last time the United States formally declared war, it is reasonable to assume that voter expectations for legislative involvement in the political tasks of warmaking will continue to be significantly diminished relative to previous eras.

A lingering question that these case studies invite is what motivates the executive branch's repeated willingness to pursue such endeavors. The legislature's desire to distance itself from wars of choice is in keeping with our understanding of politicians as risk-averse. Why presidents choose to get involved in such conflicts of their own accord despite the great costs it has imposed on their predecessors is less clear, though the assumption of risk aversion for the executive should not necessarily be abandoned. It is possible that the executive faces such different incentives and expectations in voters' eyes that the safe bet for presidents is to err on the side of engaging in conflict, particularly since the passage of the War Powers Resolution gave presidents an explicit window within which they could act, free from accountability to Congress. Such provisions may make executives more likely to receive blame for inaction on an *ex post* basis, making military engagement the risk-averse option. This consideration is speculative, however, and is sufficiently intricate to deserve fuller analysis of its own.

The debate over formal declarations of war has historically been divided between, on the one hand, those who view them as archaic, hyper-formalist obstacles to swift, executive-led military action and, on the other, those who view them as proper checks on executive power that are necessary to ensure proper political representation in decisions over war and obediance of constitutional strictures. Opponents of declarations prioritize efficiency in military action; proponents cite ideological values, diplomatic propriety, and careful restraint. This article has put forth a unique institutional viewpoint on the subject, arguing that declarations, through the incentives they establish, have a significant effect on the political conduct of the war that makes expedient victory more likely. From a survey of historical arguments for declarations, this appears to be the first to propone them on the grounds of enhancing the likelihood of military victory. Marrying a respect for the value of constitutionally limited government with a focus on broader strategic considerations, it is arguably the most efficiency-oriented perspective on either side of the debate, if efficiency is broadened to include the achievement of victory in war

rather than simply the lowest cost means of entering a war. Whether and how the implicit Coasean bargain between the two branches can be overcome in a manner that restores the intent of the Constitution's framers is a narrower but more daunting subject of future inquiry troubled by perverse political incentives, coordination problems, and voters' own rational ignorance.

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Persuasive or Pipe Dream? The Potential Influence of the Feminist Judgments Project on Future Judical Decision Making

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ABSTRACT

The Feminist Judgments Project ("FJP" or the "Project") rewrites existing judicial opinions from a feminist perspective. This article explores whether and how the FJP's alternative jurisprudence can influence future legal decisions. The FJP seeks to change the law by revealing unconscious bias and opening judicial minds to previously unknown perspectives - a method that draws on psychological theories of decision making such as cultural cognition. This article takes a different approach and evaluates the FJP using theories from political science. In light of the increasingly conservative judiciary and the Republican administration, the attitudinal and strategic theories of decision making would give the FJP little prospect of actually influencing the law. Thus, this article focuses on historical institutionalism to present a theoretical explanation for why and how the FJP's re-envisioned law could possibly persuade the judiciary. Specifically, the article examines the degree to which the FJP draws on social facts highlighted by the #MeToo and LGBTQ rights movements and whether the Project thereby creates the conditions for social construction and resultant legal change. It also uses theories on displacement to present a critique of the FJP's more radical re-writes and points to the more moderate approach of ideational salience amplification as effective. Ultimately, it concludes that the FJP's path of persuasion is somewhat narrow and limited, but possible.

KEYWORDS

Feminist Judgments Project, Feminism and Political Science, Historical Institutionalism, Judicial Decision Making

CONTENTS

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The purpose of the Feminist Judgments Project is to rewrite existing opinions from a feminist perspective.[1] The project is an international effort that originated in Canada and the United Kingdom and has spread to the United States, Australia, New Zealand, and India.[2] The United States' Feminist Judgment Project ("FJP" or the "Project")[3] has issued two collections of opinions to date, *Feminist Judgments: Rewritten Opinions of the Supreme Court*[4] and *Feminist Judgments: Rewritten Tax Opinions*,[5] with many more collections planned and in progress.[6] The FJP correctly claims value in its own right regardless of its impact on the judiciary. For example, one goal of the Project is simply to explore what feminist judging is, substantively and rhetorically.[7] The FJP tests which feminist theories have practical application and which feminist methods are most workable within the limitations of judging.[8] Another goal of the FJP is to reveal how seemingly neutral decision making is not neutral.[9] Ultimately, however, the FJP is more than theoretical; it also seeks to create change, to affect the future development of the law in order "to achieve gender justice in the outcomes of cases as well as in the process of judging."[10]

The FJP asserts that it can achieve this change by opening minds, revealing points or perspectives that the judiciary's implicit biases shield from view.[11] This approach reflects theories of cultural cognition which posit that judicial decision

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1 *E.g.*, Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford, *Introduction to the U.S. Feminist Judgments Project*, *in* Feminist Judgments: Rewritten Opinions of the United States Supreme Court 5 (Kathryn M. Stanchi et al. eds., 2016) [hereinafter "Stanchi Introduction"].

2 *Id.*at 6-7; Bridget J. Crawford & Anthony C. Infanti, *Introduction to the Feminist Judgments: Rewritten Tax Opinions Project*, *in* Feminist Judgments: Rewritten Tax Opinions 3 (Bridget J. Crawford & Anthony C. Infanti eds., 2017) [hereinafter "Crawford Introduction"]. *See also* Melinda Buckley, *Women's Court of Canada Act and Rules*, 8 Oñati Socio-Legal Series 1259, 1261 (2018); Feminist Judgments: From Theory to Practice (Rosemary Hunter et al. eds., 2010); Australian Feminist Judgments: Righting and Rewriting Law 1 (Heather Douglas et al. eds., 2014); Feminist Judgments of Aotearoa New Zealand: Te Rino: A Two-Stranded Rope (Elisabeth McDonald et al. eds., 2017); The Feminist Judgments Project: India, https://fjpindia.wixsite.com/fjpi (last visited July 25, 2019).

3 U.S. Feminist Judgments Project, https://sites.temple.edu/usfeministjudgments/ (last visited July 25, 2019).

4 Feminist Judgments: Rewritten Opinions of the United States Supreme Court (Kathryn M. Stanchi et al. eds., 2016) [hereinafter "Feminist Judgments"].

5 Feminist Judgments: Rewritten Tax Opinions (Bridget J. Crawford & Anthony C. Infanti eds., 2017).

6 *Series Projects*, U.S. Feminist Judgments Project, https://sites.temple.edu/usfeministjudgments/projects/ (last visited July 25, 2019) [hereinafter "Series Projects"].

7 Stanchi Introduction, *supra* note 1, at 5.

8 *Id.* at 5-6.

9 *Id.* at 4 ("Although the project has a number of goals, one priority is to uncover that what passes for neutral law making and objective legal reasoning is often bound up in traditional assumptions and power hierarchies.").

10 Linda L. Berger et al., *Rewriting Judicial Opinions and the Feminist Scholarly Project*, 94 Notre Dame L. Rev. Online 1, 2 (2018). *See also* Stanchi Introduction, *supra* note 1, at 5 ("If we can broaden the perspectives of the decision makers, change in the law is possible.").

11 Stanchi Introduction, *supra* note 1, at 4-5.

making is driven by psychological factors.[12] According to this perspective, a judge's viewpoint is shaped by background and can be changed when the blinders of experience are removed.[13] This article, however, analyzes and critiques the FJP from a different perspective. Instead of psychological theories, this article uses political science models of judicial decision making to evaluate the potential persuasiveness of the FJP's alternative opinions and arguments. Political science scholarship is of particular relevance because certain prominent political theories would find the FJP to have no potential to influence the judiciary.[14] These theorists present extensive empirical evidence that judges are ideological decision makers.[15] They assert that the legal arguments, such as those offered by the FJP, do not persuade, but merely act as cover for jurists' pursuit of policy preference.[16] In light of the challenge of these ideological theories, and an increasingly conservative judiciary, this article explores whether the field of political science universally condemns the FJP to a purely intellectual exercise. As the following sections explain, one alternative branch of political science, historical institutionalism, does offer a theoretical argument for why and how the types of arguments made within the FJP opinions could potentially persuade courts, regardless of ideology.[17] This Article explores the potential of this theory, and any supporting empirical evidence, to justify the utility of the FJP for future persuasion. Ultimately, it concludes that the path of persuasion is somewhat narrow and limited, but possible.

Part I of this Article details the history and substance of the FJP, identifying the Project's goals and methods and providing examples of the types of arguments in the rewritten opinions. Part II explores the basics of the political science theories that view judicial decision making as ideological and the contrasting theories of historical institutionalism that find judges sometimes follow institutional norms even when contrary to policy preference. Part III more specifically discusses historical institutionalism theories on legal change and what type of arguments are persuasive. Part IV applies historical institutionalism to the FJP and explores which FJP arguments and cases most closely match historical institutionalism's theories of persuasion. Part V analyzes and critiques the application, exploring the degree to which historical institutionalism offers a convincing argument for the persuasiveness of the FJP. In this analysis, Part V identifies different categories of argument within the FJP and their varied likelihoods of success.

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12 Kate Webber, *Families Are More Popular Than Feminism: Exploring the Greater Judicial Success of Family and Medical Leave Laws*, 32 Colum. J. Gender & L. 145, 167 (2016).

13 *Id.* at 167-68; *see also* Ann C. McGinley, *Cognitive Illiberalism, Summary Judgment, and Title VII*: *An Examination of Ricci v. DeStefano*, 57 N.Y.L. Sch. L. Rev. 865, 874 (2013); *See, e.g.*, Paul Secunda, *Cognitive Illiberalism and Institutional Debiasing Strategies*, 49 San Diego L. Rev. 373, 387-394 (2012).

14 *See infra* Part II.

15 *See id.*

16 *See id.*

17 *See infra* Parts II & III.

I. The Feminist Judgments Project: Critical Opinion Writing and the Hope to Persuade

The FJP takes existing judicial opinions and re-writes them from a feminist perspective.[18] The Project is spearheaded by editors Kathy Stanchi, Linda Berger and Bridget Crawford,[19] and has issued two collections: one consisting of twenty-seven rewritten Supreme Court opinions[20] and a second consisting of eleven rewritten tax opinions from various courts and administrative bodies.[21] In both collections, each rewritten decision is paired with a separately authored commentary.[22] The FJP plans to issue at least six additional collections with rewritten opinions in the following subject areas: reproductive justice, torts, corporations, trusts and estates, employment discrimination, and family law.[23]

The inspiration for the FJP came from similar efforts to rewrite legal decisions, first in Canada, and then the United Kingdom.[24] A number of other common law countries have either issued, begun, or are considering similar projects, including: Australia, Ireland, New Zealand, and India.[25] A feminist rewriting of international law is also planned.[26]

A. Methods and Outcomes

Both the Supreme Court collection and tax decision collection of the FJP, as with all of their sister projects, were limited in their ability to rewrite the law.[27] Specifically, authors of the feminist opinions had to write as if bound by the law and facts as they

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18 Stanchi Introduction, *supra* note 1, at 3; Crawford Introduction, *supra* note 2, at 3; U.S. Feminist Judgments Project, *supra* note 3 ("The United States Feminist Judgments Project is a collaborative effort of more than 100 feminist law professors to rewrite U.S. legal decisions from a feminist perspective.") .

19 U.S. Feminist Judgments Project, *supra* note 3.

20 Feminist Judgments: Rewritten Opinions of the U.S. Supreme Court, *supra* note 4.

21 Feminist Judgments: Rewritten Tax Opinions, *supra* note 5.

22 *See generally*, Feminist Judgments, *supra* note 4; Feminist Judgments: Rewritten Tax Opinions, *supra* note 5.

23 Series Projects, *supra* note 6.

24 Crawford Introduction, *supra* note 2, at 3. *See* Buckley, *supra* note 2, at 1261; Feminist Judgments: From Theory to Practice, *supra* note 2.

25 Crawford Introduction, *supra* note 2, at 3. *See* Australian Feminist Judgments: Righting and Rewriting Law 1, *supra* note 2; Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity (Mairead Enright et al. eds., 2016); Feminist Judgments of Aotearoa New Zealand: Te Rino: A Two-Stranded Rope, *supra* note 2; The Feminist Judgments Project: India, *supra* note 2.

26 *Feminist International Judgments Project: Women's Voices in International Law*, U. Leicester, https://www2.le.ac.uk/departments/doctoralcollege/researchimages/2016-competition/feminist-international-judgments-project-women2019s-voices-in-international-law (last visited July 25, 2019).

27 Crawford Introduction, *supra* note 2, at 10 ("Authors were free to draw on their own understandings and interpretations of feminist theories and methods, but they were limited to rewriting their opinions based on the law and facts in existence at the time of the original decision. This is a key feature of all the books in the Feminist Judgments Series.").

existed at the time.[28] Authors could expand on the facts presented in the opinion, but only if those additional details were available in the record before the Court or subject to judicial notice.[29] The opinion authors were free to write reimagined majority, concurring, or dissenting opinions.[30] In the Supreme Court collection, the opinion authors created fifteen new majority decisions, of which eight changed the outcome and seven changed only the reasoning.[31] This collection contained four feminist concurrences, one partial concurrence/dissent, and five dissenting opinions.[32] The tax law collection contains seven rewritten majority opinions, two dissents, one dissent in part and concurrence in part, and one concurrence.[33]

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28 Stanchi Introduction, *supra* note 1, at 10; Crawford Introduction, *supra* note 2, at 3.

29 *E.g.*, Stanchi Introduction, *supra* note 1, at 11.

30 *Id.* at 9; Crawford Introduction, *supra* note 2, at 10.

31 Stanchi Introduction, *supra* note 1, at 13. The following opinions change the outcome of the case. Laura Rosenbury, *Griswold v. Connecticut*, *in* Feminist Judgments, *supra* note 4, at 103-113); Lucinda M. Finely, *Geduldig v. Aiello*, *in* Feminist Judgments, *supra* note 4, at 190-207; Tracy A. Thomas, *City of Los Angeles Department of Water & Power v. Manhart*, *in* Feminist Judgments, *supra* note 4, at 223-41; Leslie C. Griffin, *Harris v. McRae*, *in* Feminist Judgments, *supra* note 4, at 247-56; David S. Cohen, *Rostker v. Goldberg*, *in* Feminist Judgments, *supra* note 4, at 277-96; Lisa R. Pruitt, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, *in* Feminist Judgments, *supra* note 4, at 365-83; Ilene Durst, *Nguyen v. INS*, *in* Feminist Judgments, *supra* note 4, at 473-84; Maria Isabel Medina, *Town of Castle Rock v. Gonzalez*, *in* Feminist Judgments, *supra* note 4, at 508-526. The following cases change the reasoning. Teri McMurtry-Chubb, *Loving v. Virginia*, *in* Feminist Judgments, *supra* note 4, at 119-136; Dara E. Purvis, *Frontiero v. Richardson*, *in* Feminist Judgments, *supra* note 4, at 173-84; Angela Onwuachi-Willig, *Meritor Savings Bank v. Vinson*, *in* Feminist Judgments, *supra* note 4, at 303-21; Deborah L. Rhode, *Johnson v. Transportation Agency*, *in* Feminist Judgments, *supra* note 4, at 327-40; Ann C. McGinley, *Oncale v. Sundowner Offshore Services Inc.*, *in* Feminist Judgments, *supra* note 4, at 414-25; Ruthann Robson, *Lawrence v. Texas*, *in* Feminist Judgments, *supra* note 4, at 488-503; Carlos A. Ball, *Obergefell v. Hodges*, *in* Feminist Judgments, *supra* note 4, at 532-546.

32 Stanchi Introduction, *supra* note 1, at 13. The following decisions are concurrences. Karen Syma Czapanskiy, *Stanley v. Illinois*, *in* Feminist Judgments, *supra* note 4, at 142-45; Kimberly M. Mutcherson, *Roe v. Wade*, *in* Feminist Judgments, *supra* note 4, at 151-67 ; Martha Chamallas, *Price Waterhouse v. Hopkins*, *in* Feminist Judgments, *supra* note 4, at 345-60; Valorie K. Vojdik, *United States v. Virginia*, *in* Feminist Judgments, *supra* note 4, at 389-407. The following opinions are dissents. Phyllis Goldfarb, *Bradwell v. Illinois*, *in* Feminist Judgments, *supra* note 4, at 60-77; Pamela Lauder-Ukeles, *Muller v. Oregon*, *in* Feminist Judgments, *supra* note 4, at 83-97; Cynthia Godsoe, *Michel M. v. Superior Court*, *in* Feminist Judgments, *supra* note 4, at 262-71; Ann Bartow, *Gebser v. Lago Vista Independent School District*, *in* Feminist Judgments, *supra* note 4, at 430-46; Aníbal Rosario Lebrón, *United States v. Morrison*, *in* Feminist Judgments, *supra* note 4, at 452-67. *See also* Maria L. Ontiveros, *Dothard v. Rawlinson*, *in* Feminist Judgments, *supra* note 4, at 213-27 (partial concurrence/dissent).

33 The following are majority opinions. Grant Christensen, *United States v. Rickert*, *in* Feminist Judgments: Rewritten Tax Opinions, *supra* note 5, at 54-79; Mary Louise Fellows, *Welch v. Helvering*, *in* Feminist Judgments: Rewritten Tax Opinions, *supra* note 5, at 103-20; Mary L. Heen, *Manufacturers Hanover Trust Co. v. United States*, *in* Feminist Judgments: Rewritten Tax Opinions, *supra* note 5, at 172-85; Danshera Cords, *Cheshire v. Commissioner*, *in* Feminist Judgments: Rewritten Tax Opinions, *supra* note 5, at 225-42; Jennifer Bird-Pollan, *Magdalin v. Commissioner*, *in* Feminist Judgments: Rewritten Tax Opinions, *supra* note 5, at 253-65; David B. Cruz,

The FJP calls on authors to rewrite the opinions from a feminist perspective,[34] but allows each author to choose from the "multiplicity of theories, methods, and approaches" within feminist legal theory.[35] For example, in the FJP published to date, some opinions reflect theories of formal equality, while others take an anti-subordination or intersectionality approach.[36] Opinion authors also use recognized feminist methods, such as feminist practical reasoning and narrative feminist method.[37] As a result, the rewritten opinions have a wide variety of outcomes and reasoning.

In some cases, the majority decision was re-envisioned to such a degree that the new, imagined opinion had the opposite outcome to the original.[38] For example, in the rewritten majority opinion of *Town of Castle Rock v. Gonzales*, Professor Maria Isabel Medina found that "the Colorado statute restricting law enforcement's discretion to refuse to enforce mandatory arrest restraining orders created a property interest that entitles its holder to meaningful process under the Due Process Clause."[39] This is directly contrary to the Supreme Court's majority opinion in the original decision.[40] Despite the difference, Professor Medina based her opinion on existing precedent and facts, relying on a broad interpretation of *Board of Regents v. Roth*[41] as well as reasoned consideration of the plain language

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O'Donnabhaim v. Commissioner, *in* Feminist Judgments: Rewritten Tax Opinions, *supra* note 5, at 274-96; Ruthann Robson, *United States v. Windsor*, *in* Feminist Judgments: Rewritten Tax Opinions, *supra* note 5, at 306-16. The concurring opinion rewrites the *Bob Jones* decision. David A. Brennen, *Bob Jones University v. United States*, *in* Feminist Judgments: Rewritten Tax Opinions, *supra* note 5, at 150-63. The dissents are as follows. Ann M. Murphy, *Lucas v. Earl*, *in* Feminist Judgments: Rewritten Tax Opinions, *supra* note 5, at 89-94; Wendy C. Gerzog, *Estate of Clack v. Commissioner in* Feminist Judgments: Rewritten Tax Opinions, *supra* note 5, at 195-214. *See also* Patricia A. Cain, *United States v. Davis*, *in in* Feminist Judgments: Rewritten Tax Opinions, *supra* note 5, at 129-39 (dissenting in part concurring in part). "Of the eleven rewritten cases in the [Tax FJP] book, six are Supreme Court decisions, one is a federal circuit court opinion and four are Tax Court opinions." Crawford Introduction, *supra* note 2, at 10.

34 Stanchi Introduction, *supra* note 1, at 9-11; Crawford Introduction, *supra* note 2, at 10.

35 Berger, *supra* note 10, at 2-3; *see also* Crawford Introduction, *supra* note 2, at 3 ("there are no unitary feminist methods or reasoning processes").

36 *See* Stanchi Introduction, *supra* note 1, at 18-22.

37 *See id.* at 15-17.

38 *E.g.*, Finely, *supra* note 31, at 199-200 (in rewritten *Geduldig v. Aiello* holding that a pregnancy exclusion in the California Unemployment Insurance Code discriminates on the basis of sex violating the Equal Protection Clause); Thomas, *supra* note 31, at 233 (in rewritten *City of Los Angeles Department of Water & Power v. Manhart* awarding retroactive damages after finding the retirement contribution plan violates Title VII of the Civil Rights Act of 1964); Griffin, *supra* note 31, at 254 (in rewritten *Harris v. McRae*, finding the Hyde Amendment, allowing federal defunding of abortion services through Medicaid, violates equal protection under the Fifth Amendment); Cohen, *supra* note 31, at 277 (in rewritten *Rostker v. Goldberg* holding that a male-only registration violates equal protection under the Fifth Amendment); Durst, *supra* note 31, at 473 (in rewritten *Nguyen v. INS*, finding section 1409(a) of the Immigration and Nationality Act violates equal protection).

39 Medina, *supra* note 31, at 509.

40 Town of Castle Rock v. Gonzales, 545 U.S. 748, 768 (2005).

41 408 U.S. 564 (1972).

and legislative history of the underlying Colorado statute.[42] Professor Medina's traditional legal arguments were bolstered by a detailed factual immersion into the reality of domestic violence. Using the feminist jurisprudential method of narrative and contextualization,[43] Professor Medina detailed the long history of women's legal subordination, the stereotypes beneath it, and how this led to a lack of enforcement of protective orders against domestic abusers.[44] She explained the nationwide effort to combat these biases through mandated enforcement and provided explicit description of the violence these laws were intended to mitigate.[45]

In other FJP cases, the identical outcome was bolstered by a reinvigorated legal theory reflecting the insight of time and a critical analysis of the original decision.[46] As just one example, in the rewritten *Roe v. Wade*, Professor Kimberly Mutcherson based the right to abortion not just on a right to privacy, the basis of the original opinion,[47] but also on due process and equal protection.[48] Professor

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42 Medina, *supra* note 31, at 518-523.

43 Stanchi Introduction, *supra* note 1, at 15-16. This could also be considered a use of the method of feminist practical reasoning. *Id*. at 15.

44 Patricia A. Broussard, *Commentary on* Town of Castle Rock v. Gonzales, *in* Feminist Judgments: Supreme Court, *supra* note 4, at 507-508; Medina, *supra* note 31, at 509-10.

45 Medina, *supra* note 31, at 510-12. The rewritten opinion of *Manufacturers Hanover Trust Co. v. United States*, is an example of this type of opposite outcome in the Tax Law collection of the FJP. *See* Heen, *supra* note 33, at 181. In the feminist judgment, Professor Heen rejected the original opinion's conclusion that use of gender-based tables to value reversionary interests was related to the important governmental objective of promoting fairness and accurately valuing these interests. *Id*.

46 *See* Purvis, *supra* note 31, at 175 (applying strict scrutiny, instead of intermediate scrutiny, to gender based classifications; Vojdik, *supra* note 32, at 390 (same); McMurty-Chubb, *supra* note 31, at 122-23 (in rewritten *United States v. Virginia*, analyzing Virginia's statute barring interracial marriage beyond racial discrimination by looking at Virginia's history of white patriarchal influence on marriage to maintain "racialized gender roles"); Onwuachi-Willig, *supra* note 31, at 315, 319 (in rewritten *Meritor Savings Bank v. Vinson*, extending the reasonable person standard to that of a reasonable person in the victim's shoes in analyzing hostile environment harassment and applying strict liability, no longer requiring notice of the alleged misconduct to the employer, when supervisory personnel engage in sexual harassment); McGinley, *supra* note 31, at 418, 420-21 (in rewritten *Oncale v. Sundowner Offshore Services Inc.*, redefining the "because of sex" standard of harassment to include situations where victims do not conform gender roles or stereotypes and by shifting the burden on the defendant to prove if the behavior occurred because of sex); Czapanskiy, *supra* note 32, at 142-43 (in rewritten *Stanley v. Illinois* restricting the level of due process owed to a parent to reflect the relationship between the parent and child thereby not extending due process rights to parents only because they are mothers or married). An example of this approach in the Tax FJP is the rewritten *O'Donnabhain v. Commissioner*. Cruz, *supra* note 33. In the feminist judgment of this case, the result is nearly identical but the reasoning moves away from characterizing the transgender taxpayer has having a 'disorder,' offering a less "pathologized" interpretation of the Treasury Regulations to allow a medical deduction for the taxpayer's gender conforming surgery. Nancy J. Knauer, *Commentary on* O'Donnabhain v. Commissioner, Feminist Judgments: Tax Opinions, *supra* note 5, at 272-73; Cruz, *supra* note 33, at 286-88.

47 Roe v. Wade, 410 U.S. 113, 153 (1973).

48 Rachel Rebouché, *Commentary on* Roe v. Wade, *in* Feminist Judgments: Supreme Court, *supra* note 4, at 147; Mutcherson, *supra* note 32, at 153-54.

Mutcherson further rejected the trimester framework and established a strict scrutiny test for any state effort to restrict access to abortion.[49] Mutcherson adopted the argument of a number of scholars that limitations on abortion depend on gender stereotypes about women's "inherent" nature as mothers.[50] Thus, Mutcherson used the classic feminist legal method of "asking the woman question,"[51] delving into the effect of abortion restriction laws that reinforce gender inequality.[52] By doing so, Mutcherson explored the equal protection implications of abortion rights.[53]

Finally, in a number of important decisions, the feminist perspective led to a ringing dissent, looking to future legal change for the adoption of the author's viewpoint.[54] For example, in the feminist judgment of *United States v. Morrison*, Professor Aníbal Rosario Lebrón wrote a dissenting opinion challenging the original opinion's holding that the Violence Against Women Act (VAWA) exceeded congressional authority under the Commerce Clause.[55] Applying narrative feminist method—and in sharp contrast to the brief and euphemistic references in the original case—Professor Rosario Lebrón's dissent provided explicit detail of the underlying case, including the rapist's "debasing remarks about what he liked to do with women."[56] Rosario Lebrón drew on earlier Commence Clause precedents to focus on the burden and effect upon interstate commerce, rather than recent trends that analyze the source of the commerce, and used congressional findings to detail the ways gender violence acted as "a form of economic domination."[57] Rosario Lebrón also made the novel argument that the VAWA was a means to comply with the United States' obligations under international law, specifically the International

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49 Rebouché, *supra* note 48, at 147; Mutcherson, *supra* note 32, at 157.

50 Rebouché, *supra* note 48, at 148; Mutcherson, *supra* note 32, at 163.

51 Katharine T. Bartlett, *Feminist Legal Methods*, 103 Harv. L. Rev. 829, 837 (1990).

52 Rebouché, *supra* note 48, at 148; Mutcherson, *supra* note 32, at 162-66.

53 Mutcherson, *supra* note 32, at 162-63.

54 Goldfarb, *supra* note 32, at 60 (rewritten *Bradwell v. Illinois*); Lauder-Okeles, *supra* note 32, at 83 (rewritten *Muller v. Oregon*); Godsoe, *supra* note 32, at 262 (rewritten *Michael M. v. Superior Court*); Bartow, *supra* note 32, at 430 (rewritten *Gebser v. Lago Vista Independent Scholl District*); and Lebrón, *supra* note 32, at 452 (rewritten *United States v. Morrison*). The feminist judgment in the *Estate of Clack v. Commissioner*, is an example of a dissenting opinion in the Tax FJP. Gerzog, *supra* note 33. In the feminist dissent, Professor Wendy Gerzog challenges the original opinion's holding that an executor has the discretion "to elect QTIP treatment, and possibly divest the surviving spouse of a property interest, qualified for the marital deduction pursuant to [Internal Revenue] Code § 2056(b)(7)." Goldburn P. Maynard Jr., *Commentary on* Estate of Clack v. Commissioner, *in* Feminist Judgments: Tax Opinions, *supra* note 5, at 188; Gerzog, *supra* note 33, at 207-14. Professor Gerzog uncovers the stereotypes underlying to original opinion and focuses on the disparate harmful effect of the decision on widows. Maynard, *supra* at 188; Gerzog, *supra* note 33, at 209-10. Professor Gerzog further critiques the original opinion for an unduly narrow interpretation of the underlying law and disregard for established understandings of the Internal Revenue Code. Maynard, *supra* at 188; Gerzog, *supra* note 33, at 201-203.

55 Shaakirrah R. Sanders, *Commentary on* United States v. Morrison, *in* Feminist Judgments: Supreme Court, *supra* note 4, at 447; Lebrón, *supra* note 32, at 452-53 (rewritten *United States v. Morrison*).

56 Sanders, *supra* note 55 at 447; Lebrón, *supra* note 32, at 453-56 (rewritten *United States v. Morrison*).

57 Sanders, *supra* note 55, at 448-49; Lebrón, *supra* note 32, at 458-62 (rewritten *United States v. Morrison*)..

Covenant on Civil and Political Rights (ICCPR) which calls on signatories to combat gender-motivated violence.[58]

B. Goals and Assumptions

One goal of the FJP is "[t]o make the point that law may be driven by perspective as much as *stare decisis*."[59] The FJP seeks to demonstrate that a "more complex and contextualized vantage" would lead to a different decision making process.[60] The FJP is based on the premise that decision makers are profoundly influenced by "subjective (and often unconscious) beliefs and assumptions," that "reinforce traditional or familiar approaches," and that these underlying influences generate the systemic inequalities within the law.[61] Indeed, according to the FJP, "all decision making involves a situated perspective … affected by assumptions and expectations of norms relating to gender, race, class, sexuality, and other characteristics."[62] The FJP's goal then, is to shed light on these underlying biases, and challenge the myth that judges are neutral actors who merely apply the law.[63] The FJP asserts that by highlighting these subjective, situated influences, the Project creates the conditions for avoiding that influence, and thus, for changing the law.[64]

This stated premise of the FJP draws on the concepts of cultural cognition, a psychology- based theory of judicial decision making which asserts that unconscious cultural and cognitive forces subconsciously affect judges.[65] Cultural cognition recognizes that people process information in a manner that supports their existing

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58 Sanders, *supra* note 55, at 451; Lebrón, *supra* note 32, at 465-66 (rewritten *United States v. Morrison*).

59 Stanchi Introduction, *supra* note 1, at 10.

60 *Id.* at 9. *See also* Linda L. Berger et al., *Method, Impact, and Reach of the Global Feminist Judgments Projects*, 8 Oñati Socio-Legal Series 1215, 1218 (2018) ("The signature achievement of the FJPs has been to demonstrate that judicial decision making is rarely detached from personal background and experience and that judicial interpretation is never purely neutral and objective.").

61 Stanchi Introduction, *supra* note 1, at 5.

62 *Id.*at 4-5.

63 *Id.* at 4-5.

64 *Id.* at 5; Berger, *supra* note 10, at 2. The FJP looks to have an influence beyond judicial decision makers. It also speaks to lawyers, to show feminist advocates how to 'use law to persuade and produce social change." *Id. See also* Gillian Thomas, *Feminist Judgments and Women's Rights at Work*, 94 Notre Dame L. Rev. Online 12 (2018) (the FJP "overarching thought experiment also offers invaluable lessons to today's practitioners… whom must tell clients' stories"). Students are also beneficiaries of the various feminist judgment projects. Stanchi Introduction, *supra* note 1, at 4-6 (noting the important "educational function" of the Supreme Court FJP); *see also* Berger et al., *supra* note 60, at 1218 (noting how the projects have proved their value as teaching tools and have inspired students).

65 Webber, *supra* note 12, at 167 (*citing* Paul Secunda, *Cognitive Illiberalism and Institutional Debiasing Strategies*, 49 San Diego L. Rev. 373, 374 (2012); Sidney A. Shapiro & Richard Murphy, *Politicized Judicial Review in Administrative Law: Three Improbable Responses*, 19 Geo. Mason L. Rev. 319, 337 (2012); Paul Secunda, *Cultural Cognition at Work*, 38 Fla. St. U. L. Rev. 107, 108-109 (2010)). *See also* Ann C. McGinley, *Cognitive Illiberalism, Summary Judgment, and Title VII*: *An Examination of* Ricci v. Destefano, 57 N.Y.L. Sch. L. Rev. 865, 874 (2013).

viewpoint; overlooking information that is inconsistent with their values and overvaluing facts that support it.[66] When judges bring their own cultural perspective to a case, this type of processing results in biased decision making, a result termed "cognitive illiberalism."[67] According to cultural cognition theory, this is unconscious, and judges sincerely believe they are applying the law neutrally, without deliberate reference to their ideological beliefs.[68] Consequently, those who adopt cultural cognition theory, and its related concepts of implicit bias, look to solutions via exposure, education, and conscious de-biasing techniques such as deliberately considering other points of view.[69] According to theories of cultural cognition, by training decision makers on the influence of these biases and teaching them to use their conscious mind to counteract them, biases in decisions can be reduced or eliminated.[70]

As noted above, the FJP appears to adopt this approach to understanding the origin of biased decision making and what are the potential solutions. In particular, many[71] of the rewritten opinions in the FJP seek to create legal change by offering new factual details omitted from or incompletely considered in the original opinions.[72] This is consistent with the premise of cultural cognition that biases causes decision makers to unconsciously disregard facts that are inconsistent with their viewpoint, and the proposed solution of consciously examining the previously unconsidered perspective.[73] For example, in her rewritten opinion of *Meritor Savings Bank v. Vinson*, Professor Onwauchi-Willig revised the legal standard for sexual harassment to analyze the work environment, not from a reasonable person standard, but from the perspective of a "reasonable victim in the complainant's shoes."[74] In crafting this standard, Onwauchi-Willig emphasized the

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66 Webber, *supra* note 12, at 167 (citing Secunda, *Cognitive*, *supra* note 65, at 380-81; Shapiro & Murphy, *supra* note 65, at 337).

67 *Id.* at 168.

68 *Id.* at 167-68; *See also* McGinley, *supra* note 65, at 874.

69 *See, e.g.*, Secunda, *supra* note 65, at 387-94.

70 *Id.* at 387-88.

71 *See* Goldfarb, *supra* note 32 (written *Bradwell v. Illinois*); Doneff & Lauder-Ukeles, *supra* note 32 (rewritten *Muller v. Oregon*); McMurty-Chubb, *supra* note 31 (rewritten *Loving v. Virginia*); Finely, *supra* note 31 (rewritten *Geduldig v. Aiello*); Cohen, *supra* note 31 (rewritten *Rostker v. Goldberg*); Onwuachi-Willig, *supra* note 31 (rewritten *Meritor Savings Bank v. Vinson*); Rhode, *supra* note 31 (rewritten *Johnson v. Transportation Agency*); Pruitt, *supra* note 31 (rewritten *Planned Parenthood of Southeastern Pennsylvania v. Casey*); Vojdik, *supra* note 32 (rewritten *United States v. Virginia*); McGinley, *supra* note 31 (rewritten *Oncale v. Sundowner Offshore Services, Inc.*); Bartow, *supra* note 32 (rewritten *Gebser v. Lago Vista Independent School District*); Lebrón, *supra* note 32 (rewritten *United States v. Morrison*); Durst, *supra* note 31 (rewritten *Nguyen v. INS*); Medina, *supra* note 31 (rewritten *Town of Castle Rock v. Gonzales*). *See also* Murphy, *supra* note 33, at 89-94 (rewritten *Lucas v. Earl*); Cain, *supra* note 33, at 129-29 (rewritten *United States v. Davis*); Brennen, *supra* note 33, at 150-63 (rewritten *Bob Jones University*); Heen, *supra* note 33, at 172-85 (rewritten *Manufacturers Hanover Trust Co.*); Cruz, *supra* note 33, at 274-96 (rewritten *O'Donnabhaim v. Commissioner*); Robson, *supra* note 33, at 306-16 (rewritten *United States v. Windsor*).

72 *See* Stanchi Introduction, *supra* note 1, at 15-16 (describing narrative feminist method).

73 *See supra* notes 66-70 and accompanying text.

74 Kristen Konrad Tiscione, *Commentary on* Meritor Savings Bank v. Vinson, *in* Feminist Judgments: Supreme Court, *supra* note 4, at 301; Onwuachi-Willig, *supra* note 31, at 309-12.

factual circumstances of the plaintiff, a single woman with limited education who is dependent on her job to support her family, noting women are more likely than men to view conduct as harassment and some are less likely to resist or complain given vulnerable economic circumstances.[75] Onwauchi-Willig went on to change the legal standard and hold employers strictly liable for sexual harassment by supervisors; again emphasizing the facts of worker vulnerability and the need to earn a living in contrast to the employer's superior ability to control a supervisor harasser.[76]

II. Political Science and the FJP: Can the Project Persuade?

Although the FJP's approach is consistent with theories of cultural cognition, other theories of judicial decision making pose a direct challenge to the Project's goal of influencing future decisions.[77] Specifically, political science has a long standing, empirically supported, body of research and theory asserting that judges, particularly the justices of the Supreme Court, make decisions based on ideological preferences.[78] Under these theories of decision making, the FJP's offer of new persuasive arguments is for naught unless feminist-minded judges are deciding the matter. The sections below explore this challenge and ask whether political science theories universally condemn the FJP to existence as an intellectual exercise in light of the number of conservative jurists currently on the bench.[79] Ultimately, although certain theories undermine the utility of the FJP, one line of thought, the theory of historical institutionalism, does find a role for legal persuasion and offers support for the Project's goal of inspiring change through novel reconstructions of the law.

A. The Problem of the Ideological Models

It is a common belief that judges, particularly the justices of the Supreme Court, are political, meaning they decide cases based on ideological preferences, not based on neutral application of the law.[80] A number of political science scholars

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75 Tiscione, *supra* note 74, at 301, Onwuachi-Willig, *supra* note 31, at 312.

76 Tiscione, *supra* note 74, at 302; Onwuachi-Willig, *supra* note 31, at 319-21.

77 Stanchi Introduction, *supra* note 1, at 5 ("[i]f we can broaden the perspectives of the decision makers, change in the law is possible"); Berger, *supra* note 10, at 2 ("In the form of rewritten opinions based on the facts and precedent in effect at the time of the original decisions, these projects demonstrate that judges who apply feminist perspectives would make a profound difference, not only in the outcomes and processes in individual cases, but also in the development of the law").

78 Webber, *supra* note 12, at 158; *See also* Julie Novkov, *Understanding Law As A Democratic Institution Through Us Constitutional Development*, 40 Law & Soc. Inquiry 811, 814 (2015).

79 *See, e.g.*, Thomas Kaplan, *Trump is Putting Indelible Conservative Stamp on Judiciary*, N.Y. Times, Aug. 1, 2018, at A15.

80 *E.g.*, Adam Liptak, *Supreme Court Bars Challenges to Partisan Gerrymandering*, N.Y. Times (June 27, 2019) https://www.nytimes.com/2019/06/27/us/politics/supreme-court-gerrymandering.html (describing the addition of conservative Brett Kavanaugh to the court as contributing to the outcome); Lucia Manzi & Matthew E.K. Hall, *Friends You Can Trust: A Signaling Theory of Interest Group Litigation Before the U.S. Supreme*

have empirically tested this general view and find that ideology does determine judicial outcomes.[81] The notion that ideology drives decisions is usually termed the attitudinal model of judicial decision making.[82] The attitudinal model can be paired with the strategic model, which also asserts that judges engage in ideological decision making, but adds a constraint.[83] Specifically, the strategic model claims that judges want to make ideology based decisions but are confined in their ability to do so by other political forces, such as the potential for reversal, or in the case of the Supreme Court, legislative override or even impeachment.[84] Consequently, the strategic model states that judges will only vote as ideologically as possible, modifying their preferred position to stay below the partisan level of voting that could result in that type of backlash.[85]

These political science theories pose a challenge to the FJP. If judges are ideological decision makers, no amount of creative or persuasive arguments will alter the legal outcomes. The only real recourse would be political action, the election of a president who would appoint feminist minded judges and justices and the election of feminist minded legislators who might provide strategic incentive for the courts to be less hostile to feminist legal goals. If these theories are the correct understanding of how the courts work, the FJP is merely academic, and the time invested in the Project is perhaps better spent in the political arena.

The field of political science, however, does not monolithically limit the FJP to a thought exercise. A number of political science scholars counter the ideological theories and offer alternative theories on how and why the law does matter to, and constrain, judges.[86] These alternative theories create the possibility that legal arguments, such as those offered by the FJP, can influence judges. In particular, the principles of "historical institutionalism" explain how judges, including Supreme Court justices, are limited by the institutional norms of the judiciary, including, for example, an obligation to apply precedents and consider certain legal values.[87]

Court, 51 Law & Soc'y Rev. 704, 729-30 (2017) (describing how amicus briefs influence justices of similar ideology); Neal Devins, Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 Sup. Ct. Rev. 301, 302 (2016) (describing ideological divide in the Supreme Court tied to party affiliation of appointing president).

81 Webber, *supra* note 12 at 158; *See also* Novkov, *supra* note 78, at 814.

82 Webber, *supra* note 12, at 158. *See also* Lee Epstein et al., The Behavior of Federal Judges 69 (2013); Richard L. Pacelle, Jr. et al., Decision Making by the Modern Supreme Court 34-36 (2011); Jeffrey A. Segal & Harold Spaeth, The Attitudinal Model Revisited 86 (2002).

83 *E.g.*, Mario Bergara et al., *Modeling Supreme Court Strategic Decision Making: The Congressional Constraint*, 28 Legis. Stud. Q. 247, 267 (2003).

84 Webber, *supra* note 12, at 158; Michael A. Bailey & Forrest Maltzman, The Constrained Court 97-101 (2011). Pacelle, Jr. et al, *supra* note 82, at 39-45. Novkov, *supra* note 78, at 814-15.

85 Webber, *supra* note 12, at 158; Bailey & Maltzman, *supra* note 84, at 97-101; Pacelle, Jr. et al, *supra* note 82, at 39-45.

86 Webber, *supra* note 12, at 158-59 (describing the integrated model of judicial decision making that asserts judges "are ideological in part, but also modify their decisions based on … a respect for legal principles such as precedent") (citing Bailey & Maltzman , *supra* note 84, at 73,78; Pacelle, Jr. et al, *supra* note 82, at 51-52).

87 *E.g.*, Ronald Kahn, *Institutional Norms and Supreme Court Decision-Making: The Rehnquist Court on Privacy and Religion*, *in* Supreme Court Decision-Making: New

As described in Section B below, according to this theory, institutional constraints prevent courts from acting as solely partisan decision makers.[88]

B. Historical Institutionalism: Theory

Historical institutionalism is a model for the behavior of political actors, including the judiciary.[89] The basic premise of this model is that institutions, their norms, expectations and historical practices, confine and restrain decision makers.[90] In the judicial context, historical institutionalism contends that judges act within a set of internalized constraints such as "a sense of duty or obligation about their responsibilities to the law and the Constitution and by a commitment to act as judges rather than as legislators or executives."[91] Thus, courts, and the Supreme Court in particular, are unique among the three political branches, in that they are bound by certain legal practices and are not free to solely pursue their preferred ideological outcomes.[92] To maintain their legitimacy, the courts must at least appear to be bound by the law; this limits the ability of judges to act in a wholly partisan

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Institutionalist Approaches 175, 175-76 (Cornell W. Clayton & Howard Gillman eds., 1999).

88 *E.g.,* Kahn, Institutional Norms*, supra* note 87*,* at 175-76 .

89 *E.g*. *id*. at 3 ; Marcella Marlowe, Jurisprudential Regimes: The Supreme Court, Civil Rights, and the Life Cycle of Judicial Doctrine 11 (2011). Historical institutionalism is sometimes termed new institutionalism. See e.g. Marlowe, *supra* at 11; Rogers M. Smith, *Historical Institutionalism and the Study of Law, in* The Oxford Handbook Of Law And Politics 48 (Gregory A. Caldeira et al. eds. 2008) (describing how public law scholars critical of behavioralism identified themselves first as new institutionalist and then as historical institutionalists). Regardless of terminology, this institutionalist theory falls within the broader umbrella of American Political Development. Marlowe, *supra* at 27-31; Ronald Kahn & Ken I. Kersch, *Introduction, in* The Supreme Court And American Political Development13-16 (2006). Historical institutionalism can be distinguished from "rational choice institutionalism." Kahn & Kersch, *supra* at 5; Smith, *supra* at 47-48. Rational choice institutionalism maintains the premise that judges seek to implement their policy views into the law but sometimes cannot do so due to institutional forces such as Congress overturning a court's statutory interpretation. Kahn & Kersch, *supra* at 5. Thus, the strategic model does accept some institutional premises. Id. Historical institutionalism, in contrast, views institutional forces not just as obstacles to ideological decision making, but rather, shaping decision making itself. Smith, *supra* at 47-48.

90 *E.g.*, Kahn, Institutional Norms, *supra* note 89, at 4-5. Novkov, *supra* note 78, at 820 (noting the "fundamental historical institutional insight that legal decision making, even when it is responsive to political concerns, takes place within the available legal discursive frameworks of the jurisprudential moment in which it occurs") (citing Pamela Brandwein, Rethinking the Judicial Settlement of Reconstruction (2011); Kenneth Kersch, Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law (2004)).

91 Howard Gillman & Cornell W. Clayton, *Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making*, *in* Supreme Court Decision-Making: New Institutionalist Approaches 1, 5 (Cornell W. Clayton & Howard Gillman eds., 1999). *See also* Marlowe, *supra* note 89, at 11-12; Kahn & Kersch, *supra* note 89, at 17-18.

92 Marlowe, *supra* note 89, at 12.

manner.[93] Historical institutionalism does not completely reject the attitudinal premise that political preferences affect judicial decisions, acknowledging that such preferences play a role.[94] Rather, this model provides an explanation of the circumstances under which judges must subordinate their ideological preferences in order to serve institutional norms, including respect for the law.[95]

For example, historical institutionalist scholar Professor Ronald Kahn examined landmark religion cases during the Rehnquist Court and concluded that its justices did not "follow election returns, the policies of the presidents who appointed them, or even personal policy wants … institutional norms, including the following of precedent, or *stare decisis*; respect for the difference between law and politics; and concerns for institutional legitimacy inform[ed] Court decision-making in important ways."[96] As Kahn explained, if the Supreme Court of that era had followed personal policy preferences, it would have rejected precedents regarding state establishment and free exercise of religion.[97] At the time, conservative scholars and politicians sought to replace the Establishment Clause test established in *Lemon v. Kurtzman* with what is called a coercion test, and which would allow greater state support of religion.[98] The Rehnquist Court, however, rejected the coercion test and kept "the central premise of the *Lemon* test."[99] As Kahn explains, these decisions, which were contrary to conservative ideology, reflected the constraining effect of institutional principles, specifically, the duty to follow established precedents and the normative value of a Court's "autonomy from politics."[100]

The evidence in support of historical institutionalism is often qualitative, consisting of deep analysis of the context and content of Supreme Court decisions and locating institutional influences at work.[101] Yet the proponents of this approach offer it as an alternative to the ideological models of analysis,[102] which are based on empirical studies.[103] Given the challenge that these theories pose to the utility of the FJP, explained above, it is important to examine what empirical evidence exists in support of the historical institutionalist claim that law matters. Fortunately, statistical analysis supporting the institutionalist position is available, including recent studies confirming the role of law in decisions.

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93 *Id.* at 11-13; Kahn & Kersch, *supra* note 89, at 17-18.

94 Howard Gillman, *The Court as an Idea, Not a Building (or a Game)*, *in* New Institutionalist Approaches 65, 86 (Cornell W. Clayton & Howard Gillman eds., 1999), 180; Kahn & Kersch, *supra* note 89, at 14; Novkov, *supra* note 78, at 815-16.

95 Kahn, *supra* note 87, at 180; Kahn & Kersch, *supra* note 89, at 14.

96 Kahn, *supra* note 87, at 177.

97 *Id.* at 185.

98 *Id.* at 186.

99 *Id.* (citing *Lee v. Weisman*, 505 U.S. 577, 587 (1992)).

100 *Id.*

101 Marlowe, *supra* note 89, at 23; Ronald Kahn, *The Commerce Clause and Executive Power: Exploring Nascent Individual Rights in National Federation of Independent Business v. Sebelius*, 73 Md. L. Rev. 133, 143 (2013).

102 Kahn, *supra* note 87, at 175-77.

103 *E.g.*, Kate Webber, *It Is Political: Using the Models of Judicial Decision Making to Explain the Ideological History of Title VII*, 89 St. John's L. Rev. 841, 860-61 (2015). Kahn critiques this reliance as being based on the assumption that the Court's decision making is based on external factors such as ideology and ignores internal institutional and precedential factors. Kahn, *supra* note 101, at 143.

C. Empirical Support for the Relevance of the Law

Mark Richards and Herbert Kritzer provided one of the seminal statistical studies establishing the law's influence on the Supreme Court.[104] Their study examined the influence of "jurisprudential regimes" which "structure Supreme Court decision making by establishing which case factors are relevant for decision making and/or by setting the level of scrutiny or balancing the justices are to employ … ."[105] Richards and Kritzer applied statistical tests using logistic regression to examine "all cases from 1953 to 1998 that presented a free press, free expression, or free speech issue."[106] Although acknowledging that policy goals influence Supreme Court decision making, their study concludes that the Court "is not simply a small legislature - [l]aw matters in Supreme Court decision making" as well.[107] Specifically, they found that jurisprudential regimes did structure the justices' decisions, regardless of ideology.[108]

This study is consistent with Kahn's historical institutional analysis of the survival of the *Lemon* test in the Rehnquist Court described above. In fact, in a subsequent study, Richards and Kritzer performed a statistical analysis of the impact of *Lemon v. Kurtzman* on a series of subsequent Establishment Clause decisions.[109] Their analysis concluded that although *Lemon* did not directly dictate specific outcomes, and justices did not always follow the decision, the *Lemon* test "acted as a framework for the decisions in Establishment Clause cases decided over the last 30 years."[110] Thus, Richards and Kritzer explain, "law does matter" to the Supreme Court by setting the parameters for deciding cases.[111]

In another example, to test the hypotheses "that justices' voting behavior is influenced by their desire to reach legally sound decisions," Stefanie Lindquist and David Klein studied 338 cases in which the Supreme Court granted certiorari to resolve a circuit split.[112] Their statistical analysis revealed "strong evidence that jurisprudential influences matter for justices' decisions in [circuit] conflicts cases."[113] Specifically, they found that the greater the number of circuits in favor of a position, the more likely justices were to adopt that position.[114] As Lindquist and Klein explained, this indicated a number of possible jurisprudential influences: for example, that with more circuit court opinions there were more chances that at least one court hit upon

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104 Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 Am. Pol. Sci. Rev. 305 (2002).

105 *Id.* at 305.

106 *Id.* at 312.

107 *Id.* at 315.

108 *Id. Contra* Marlowe, *supra* note 89, at 22 (describing evidence that "undercuts the efficacy" of the Kritzer and Richards results).

109 Herbert M. Kritzer & Mark J. Richards, *Jurisprudential Regimes and Supreme Court Decisionmaking: The Lemon Regime and Establishment Clause Cases*, 37 Law & Soc'y Rev. 827, 828-31 (2003).

110 *Id.* at 831, 839.

111 *Id.* at 839.

112 Stefanie A. Lindquist & David E. Klein, *The Influence of Jurisprudential Considerations on Supreme Court Decisionmaking: A Study of Conflict Cases*, 40 Law & Soc'y Rev. 135, 144 (2006).

113 *Id.* at 151.

114 *Id.* at 142, 151-52.

a persuasive legal argument or the winning position gained more supporting circuit court positions because it had "greater legal plausibility and justices tend to choose the more plausible position."[115] The study also found that justices were less likely to side with an argument that generated more dissenting and concurring opinions in the circuit court decisions.[116] Again this indicated jurisprudential influences on the Supreme Court: "[d]issenting opinions typically identify faults in the majority's legal analysis, thus undermining its persuasiveness."[117]

This study also established that the more prestigious the circuit court, the more likely the Supreme Court would adopt its position, likely due to the fact that circuit courts are prestigious for their superior legal reasoning.[118] Finally, Lindquist and Klein found that the position taken by the Solicitor General was, under certain circumstances, more likely to be adopted by the Supreme Court, and that this could indeed be due to the expertise in that office of crafting persuasive legal arguments.[119] Thus, overall, based on their empirical study and statistical analysis, Lindquist and Klein conclude that although justices' personal values affect their decisions, the "results strongly support the view that judges and justices [also] engage in sincere efforts to find solutions that are persuasive according to a commonly held set of criteria."[120]

More recent empirical studies bolster the evidence of legal influences on decisions making. For example, Michael Bailey and Forrest Maltzman tested the effects of three legal factors: precedent, deference to Congress, and "the sanctity of the First Amendment's free speech clause,"[121] in Supreme Court cases from 1951 through 2008.[122] They found "strong evidence that legal principles are influential for the decisions made by most justices."[123] In a different study, Richard Pacelle, Jr., Brett Curry, and Bryan Marshall performed a statistical analysis of the Supreme Court's economic and civil liberties cases from the 1953-2000 terms to examine the influences of ideology and existing precedents.[124] Although the study found that justices' policy preferences play a significant role, it also found that the "Court pays attention to precedent and seeks to establish consistency in the law…."[125] They specifically note the consistency of their findings with Richards and Kritzter's 2002 study on the influence of jurisprudential regimes.[126] Thus, empirical studies support the assertion by historical institutionalists that the law acts as a constraining force on judicial decision making.

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115 *Id.* at 151-52.
116 *Id.* at 143, 153-54.
117 Lindquist & Klein, *supra* note 112, at 153.
118 *Id.* at 154-55. According to Lindquist and Klein, this explanation is the most likely given prior studies that show prestige of circuit courts is unrelated to ideology. *Id.* at 154.
119 *Id.* at 144, 155-56. Lindquist and Klein note that on this factor, their tests were not conclusive, but still concluded, "we think it highly likely that jurisprudential and/or institutional considerations account for some of the SG's success in conflict cases." *Id.* at 156.
120 *Id.* at 156.
121 Bailey & Maltzman, *supra* note 84, at 70.
122 *Id.* at 70
123 *Id.* at 78.
124 Pacelle, Jr. et al, *supra* note 82, at 61.
125 *Id.* at 203.
126 *Id.* at 203.

D. Implications for the FJP

The first impact of historical institutionalism on the FJP is to offer some validation to the Project's goals. By rejecting the premise that judges only engage in ideological decision making, and giving law at least some role, historical institutionalism justifies the effort to craft legal arguments to persuade the courts, as the FJP does. Indeed, in many ways, the FJP works within the bounds of institutional theory. Specifically, the FJP only works with existing law.[127] The Project does not assume a constitution with an Equal Rights Amendment; it does not rely on imaginary statutes; and it does not create new facts that did not exist at the time of the various decisions.[128] Instead, all rewritten opinions in the FJP must use the law as it existed at the time and the facts available either in the record or through judicial notice.[129] In this manner, the FJP implicitly accepts and works with the historical institutionalist premise that the judiciary as an institution is bound by certain norms such as precedent.

The FJP, however, also has a seemingly contradictory premise. Although each opinion is bound by the law at the time, each opinion is new, changing the precedent it is based on and offering a different type of argument in that case. By rewriting existing precedents, the FJP attempts to show that even within confines of existing law and fact, a different outcome or legal reasoning was, and is, possible.[130] These changes in prior cases, create a model for deciding future cases in a similarly reinvented manner. Thus, the FJP ultimately seeks to *change* the law.[131] Historical institutionalism's basic premise, that institutional norms such as precedent confine judges,[132] seems to suggest more continuity rather than change. Indeed, the Richards and Kritzer results suggest the stability of the law via jurisprudential regimes.[133] Historical institutionalist works have addressed this issue, however. As described below, historical institutionalism theory offers detailed explanations on how change is possible even within institutional confines.[134]

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127 *E.g.*, Stanchi Introduction, *supra* note 1, at 10.

128 *Id.* at 10-11; Crawford Introduction, *supra* note 2, at 3. Nor does the FJP assume a different bench of justices; many opinions were written as dissents in acknowledgment of that their arguments would not have been adopted by a majority at the time of the decision. Stanchi Introduction, *supra* note 1, at 9-11; Crawford Introduction, *supra* note 2, at 10.

129 *E.g.*, Stanchi Introduction, *supra* note 1, at 10.

130 *Id.* at 13.

131 *Id.* at 5. "Through this project, we hope to show that systemic inequalities are not intrinsic to law, but rather may be rooted in the subjective (and often unconscious) beliefs and assumptions of the decision makers. These inequalities may derive from processes and influences that tend to reinforce traditional or familiar approaches, decisions, or values. In other words, if we can broaden the perspectives of the decision makers, change in the law is possible." *Id.*

132 *E.g.*, Kahn, *supra* note 87, at 177.

133 *E.g.*, Kritzer, *supra* note 109, at 831, 839 (noting that "the *Lemon* regime acted as a framework for the decisions in Establishment Clause cases decided over the last 30 years.").

134 *See* Novkov, *supra* note 78, at 820-22 (explaining how institutionalism enables scholars to theorize above change in law over time).

III. Changing the Law: Historical Institutionalist Theories

As explained above, the institutional theory of decision making asserts that to achieve legitimacy, courts cannot decide cases based solely on politics or personal policy preferences, but must comply with precedent and other institutional norms."[135] The meaning or application of those institutional principles, however, can change in light of social, economic, and political changes in the outside world.[136] Thus, according to some institutionalists, a necessary additional premise of institutionalism is that to *sustain* the legitimacy of the judiciary, the law cannot remain stagnant; courts, particularly the Supreme Court, must "interpret principles and precedents in light of what they mean as applied in a changing society." [137] As a result, as Kahn explains, the Supreme Court's decision making process is both internal, governed by institutional concerns such as that law itself or judicial norms and procedures, and external, influenced by a changing social reality.[138] Professor

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135 Kahn, *supra* note 87, at 178. *See also* Ronald Kahn, *Why Does a Moderate/Conservative Supreme Court in a Conservative Age Expand Gay Rights?*, *in* Constitutional Politics in a Conservative Era 173, 189-90 (Austin Sarat ed., 2008)("The presence of constituting institutional norms and practices means that Supreme Court rulings have objectivity and are independent of individual subjective policy opinions held by each participant in a majority opinion."); Marlowe, *supra* note 89, at 12 ("Most new institutionalists believe that legal constraints are a legitimate part of the constitutive effect on judges, making an analysis of legal factors essential to a nuanced understanding of judicial behavior."); Novkov, *supra* note 78, at 814-18 (describing the new institutionalist's view of the law's influence on the courts and critique of the attitudinal model).

136 Kahn, *supra* note 135, at 195-96 . *See also* Marlowe, *supra* note 89, at 39-40 (explaining how a jurisprudential regime will begin to end when the doctrine at issue becomes outdated); Novkov, *supra* note 78, at 817-18 (describing new institutionalist scholar Howard Gillman's analysis of the *Lochner* era and how his work illustrated "the courts' construction of a new constitutional order around old principles but also how and why that order was ultimately unsustainable as struggles between capital and labor intensified in the political sphere.").

137 Kahn, *supra* note 101, at 188; *see also* Kahn & Kersch, *supra* note 89, at 72-73 (The Court emphasizes that its legitimacy is based on the quality of its decision making, which includes its ability to recognize when the social constructions prior rights were based on are no longer valid."). As institutionalist scholar Howard Gillman explains, "as with any institution, those who are affiliated with the Court should be expected to deliberate about protecting their institution's legitimacy and (relatedly) adapting their institution's mission to changing contexts and the actions of other institutions; in other words, in addition to performing a mission, institutional actors must consider issues of institutional maintenance in the context of a dynamic social setting." Gillman, *supra* note 94, at 81. *See also* Novkov, *supra* note 78, at 824-25 (describing institutionalists positions on legal change, noting that legal doctrine is "critically important … and its meaning changes in response to the legal and political forces that act upon it"); Marlowe, *supra* note 89, at 39-42 (describing the post-governance phase of a jurisprudential regime, where legal doctrine loses its relevance and force due to societal changes). Kahn notes, however, that for originalists, the Court's legitimacy is undermined by this evolving rights approach. *See infra* Part V(A).

138 Kahn, *supra* note 135, at 185-86. *See also* Kahn, *supra* note 101, at 143 (describing the bi-directionality approach and its view that there is a "mutual construction process involving internal institutional and precedential factors, as well as external factors").

Kahn terms this mutually constructive process, "principled bi-directional decision making," and it can lead to dramatic change in the law, including overturning precedent.[139]

A. Principled Bi-Directional Decision Making

According to Kahn, principled bi-directional decision making (PBD) "is the means through which the Court applies polity (political institutional) and rights principles, in light of the lives of citizens as they have lived them … as the complexity and the diversity of the nation's society, economy, and politics increase."[140] PBD is principled because it is based on legal doctrines and underlying institutional values; but it is also bi-directional because the Court's internal decision making norms interact with the external social and political world.[141] To put it another way, the legal and institutional principles which the Court is constrained to follow, can only gain meaning through their application to the outside world.[142]

PBD is a theoretical model that can explain Supreme Court decisions in certain areas such as individual rights; specifically, Kahn asserts that PBD can explain why "implied fundamental rights have been sustained and expanded in a conservative political era."[143] He points to a number of key examples, including *Planned Parenthood v. Casey*,[144] *Lawrence v. Texas*,[145] *National Federation of Independent Business v. Sebelius*,[146] *United States v. Windsor*,[147] and *Obergefell v.*

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139 Kahn, *supra* note 135, at 175. PBD is the most recent term Kahn uses for this model; his previous work details similar concepts with different nomenclature. *E.g.* Kahn & Kersch, *supra* note 89, at 85.

140 Kahn, *supra* note 5, at 177.

141 *Id.* at 175, 184-85.

142 Kahn & Kersch, *supra* note 89, at 68.

143 *See* Kahn, *supra* note 135, at 184-85. Ronald Kahn, *The Right to Same-Sex Marriage: Formalism, Realism, and Social Change in Lawrence (2003), Windsor (2013), & Obergefell (2015)*, 75 Md. L. Rev. 271, 273 (2015) ("[T]he Supreme Court has reaffirmed and expanded implied fundamental rights and equal protection under the law for gay men and lesbians during a period of political dominance by social conservatives and evangelical Christians, and other groups who view the protection of their definition of family values as a central mission of government.").

144 505 U.S. 833 (1992). In the *Casey* decision, the Supreme Court upheld the central holding of *Roe v. Wade*, that the constitutional protected the right to abortion choice, but also upheld a series of restrictions to accessing abortion, including express consent, a 24-hour waiting period, parental consent, and reporting requirements. 505 U.S. at 860, 876-901.

145 539 U.S. 558 (2003). In the 2003 *Lawrence* decision, the Court overturned *Bowers v. Hardwick*, 478 U.S. 186 (1986) which had permitted anti-sodomy laws as applied solely to gays and lesbians. 539 U.S. at 564-67. *Lawrence* recognized that the protection of liberty within the Fourteenth Amendment, including the implied right to privacy, rendered such laws unconstitutional. *Id.*

146 567 U.S. 519 (2012). In the *Sebelius* decision, the Court upheld the constitutionality of the individual mandate under the Affordable Care Act. *Sebelius*, 567 U.S. at 563.

147 570 U.S. 744 (2013). In *United States v. Windsor*, the Court found that the Defense of Marriage Act ("DOMA") which had denied recognition of same sex marriage, was unconstitutional. *Windsor*, 570 U.S. at 775.

Hodges.[148] [149] These decisions disappointed conservative activists who had hoped for different outcomes in light of the number of Republican appointments to the Supreme Court.[150]

A number of commentators and scholars explain these liberal outcomes by pointing to the ideology of the justices joining the majority opinions, which in all but *Sebelius*, consisted of liberal justices plus, in some cases, the long-acknowledged "swing" votes of Justices O'Connor and/or Kennedy.[151] Kahn, however, offers a different, non-ideologically based explanation, a "contextual analysis" that explores the relationship between the Court's decision making process and society.[152] Kahn claims the theory of PBD offers superior explanatory utility, asserting that "most social scientists and other legal scholars and experts in constitutional law have failed to explain or predict the expansion of privacy rights and other individual liberties," in these important decisions.[153]

For example, according to Kahn, in *Casey*, PBD forced the Court to look at the external society and acknowledge that the factual underpinnings of *Roe*, and the general understanding of those facts, had not changed.[154] In fact, since the *Roe* decision, women's place in society continued to expand significantly, and "women and their families had grown to rely on the existence of rights of abortion choice."[155] In the process of engaging in PBD, the Court considered these external realities in light of internal norms such as the importance of precedent and an apolitical judiciary.[156] Specifically, had the Court ignored the fact that societal facts still supported the central holding of *Roe* and overturned that case in whole, the Court would be seen as deciding the issue on "raw policy grounds, or in response to

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148 135 S. Ct. 2584 (2015). In *Obergefell v. Hodges*, the court held that the fundamental right to marry applies to same sex couples. 135 S. Ct. at 2604-2605.

149 Kahn, *supra* note 143, at 273. (discussing *Lawrence, Windsor*, and *Obergefell*; Kahn, *supra* note 101 (discussing *Sebelius*); Kahn, *supra* note 136, at 178-184 (discussing the *Lawrence* and *Casey* decisions); Kahn & Kersch, *supra* note 89, at 68 (same).

150 Kahn, *supra* note 101, at 139. Conservatives were particularly critical of Justice Roberts' decision to uphold the individual mandate under the ACA. "Since 1969, when President Nixon named Warren Burger as Chief Justice, through 2005, when President George W. Bush appointed Chief Justice John Roberts to and nominated Samuel Alito for the Supreme Court, Republican presidents had made twelve of fourteen appointments to the Supreme Court, thus constituting a clear majority of appointees in any given year." *Id.* at 135-36.

151 *E.g.*, Robert H. Smith, *Uncoupling the "Centrist Bloc"-an Empirical Analysis of the Thesis of A Dominant, Moderate Bloc on the United States Supreme Court*, 62 Tenn. L. Rev. 1, 38, 70-71 (1994) (*Casey*); Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 Nw. U. L. Rev. 1483, 1537-39 (2007) (*Lawrence*); Tonja Jacobi, *Obamacare As A Window on Judicial Strategy*, 80 Tenn. L. Rev. 763, 777 (2013) (*Sebelius*); Bertrall L. Ross II, *The State As Witness: Windsor, Shelby County, and Judicial Distrust of the Legislative Record*, 89 N.Y.U. L. Rev. 2027, 2029 (2014) (*Windsor*); Jane S. Schacter, *Putting the Politics of "Judicial Activism" in Historical Perspective*, 2017 Sup. Ct. Rev. 209, 265-68 (2017) (*Obergefell*).

152 Kahn, *supra* note 101, at 140; Kahn, *supra* note 143, at 273-74.

153 Kahn, *supra* note 101, at 140; Kahn, *supra* note 143, at 273-74.

154 Kahn & Kersch, *supra* note 89, at 70-71 (quoting 505 U.S. at 833, 864).

155 *Id.* at 72.

156 *Id.* Kahn, *supra* note 135, at 178.

politics."[157] This would have undermined the Court's legitimacy as an institution.[158] In fact, as a result of these institutional forces, the Court not only upheld the central holding of *Roe v. Wade*, it expanded beyond privacy rights as basis for doing so, recognizing abortion choice as important to women's rights of personhood as well.[159] Thus, according to Kahn, in the *Casey* example, PBD acted as a force of both stability and change.[160] The process of PBD led to continuity in the central holding of *Roe* with new, reinvigorated legal principles for doing so, namely, a new emphasis on relevance of abortion choice to women's right of personhood, not just privacy.[161]

According to Kahn, in *Lawrence v. Texas*, PBD led to significant legal change expanding gay rights.[162] Kahn asserts that, as in *Casey*, in *Lawrence*, the Court considered the social factual background, but in this case found the facts, or understanding of those facts, had changed.[163] These new social constructions now recognized gay citizens as possessing rights of privacy and personhood that were often threatened by animus.[164] In the mutual construction process of PBD, these social constructions implicated key internal judicial norms that affected the Court's legitimacy.[165] For example, Supreme Court decisions since *Bowers v. Hardwick* offered expanded understanding of the connection between intimate choices and the personal dignity and autonomy central to the liberty protected by the Fourteenth Amendment.[166] Had the Court refused to apply this legal precedent on liberty to a disfavored minority, it would be contrary to the Court's norms of being apolitical and its institutional role of protector of rights, even in the face of majority animosity.[167]

Kahn summarizes PBD in these two example cases as follows:

The Supreme Court sustains and expands individual rights, even gay rights, because … majority and concurring Justices in *Casey* and *Lawrence* strongly reject political contestation and majoritarian opinion as reasons on which to decide implied fundamental rights cases. When the *Casey* and *Lawrence* Courts engaged in PBD, they considered whether the rights at issue in these cases, privacy and personhood, are still important and expanding and whether citizens have accepted these rights in their lives.[168]

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157 Kahn & Kersch, *supra* note 89, at 72.

158 Kahn, *supra* note 135, at 178; Kahn & Kersch, *supra* note 89, at 71-72. Indeed, as Kahn notes, the *Casey* decision explicitly acknowledges this concern for legitimacy. *Id.* at 71 (quoting 505 U.S. at 833, 864).

159 Kahn, *supra* note 135, at 178; Kahn & Kersch, *supra* note 89, at 71-72.

160 Kahn, *supra* note 135, at 178; Kahn & Kersch, *supra* note 89, at 71-72.

161 Kahn, *supra* note 135, at 178; Kahn & Kersch, *supra* note 89, at 71-72.

162 Kahn, *supra* note 135, at 178-81.

163 *Id.* at 178-79.

164 *Id. See also* Kahn, *supra* note 143, at 289 (noting Kennedy's reasoning in *Lawrence* that "state prohibitions on sodomy caused prejudice against gays, even if states were prohibiting all citizens from engaging in sodomy") (citing *Lawrence*, 539 U.S. at 575).

165 Kahn, *supra* note 135, at 180.

166 Kahn & Kersch, *supra* note 89, (quoting *Lawrence* at 574).

167 Kahn, *supra* note 135, at 180.

168 *Id.* at 183.

B. Social Construction

As the above examples show, PBD leads to changes in the law because PBD considers changes in society and how the law must evolve to address them.[169] Kahn makes clear, however, that new social facts alone do not cause legal change; rather, advocates must use "legal grammar" to tie new social facts to existing institutional norms such as precedent or legal values of equal protection or liberty.[170] Kahn defines this conversion of raw fact into legally significant fact, "social construction,"[171] and it is a central aspect of PBD described above. Kahn's definition of social construction is "both empirical and normative"—empirical because it draws on the real lives of citizens and normative because it entails application of principles of justice, liberty, and equality to these social facts.[172] As described above, the process of social construction played a role in the evolution of the law of abortion rights in *Casey* and the law of gay rights in *Lawrence*.

Social constructions are woven within lines of Supreme Court cases and can influence future decisions as much as legal principles.[173] For example, after *Reed v. Reed* and progressing through such cases as *Frontiero v. Richardson*, new social facts on women's expanding role in society became a social construction relevant to the principle of equal protection.[174] As Kahn described it, "[w]ith each new case, social constructions would further illuminate what gender discrimination means, and thus what constituted an equal protection violation."[175] Kahn identifies other examples of social construction, such as the effect of psychological coercion on children in *Lee v. Weisman* or the reality of domestic abuse and power disparity between women and their spouses recognized in *Casey*.[176] Kahn's recent work, however, cautions that the social construction must be robust in order to have precedential effect.[177] Social construction will not create effective legal principles where social facts are not well connected to precedent, or the construction creates an unworkable rule.[178]

C. Modern Decisions

Kahn continues to rely on PBD to explain the monumental decisions in *Sebelius*, *Windsor*, and *Obergefell*, again rejecting a purely ideological explanation for the

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169 Kahn & Kersch, *supra* note 89, at 72 ("When changes in society are symbiotic with the Court's evaluation of the application of rights principles, landmark cases will not be overruled; when social constructions in past landmark cases are no longer tenable, landmark cases are ripe for serious modification, if not outright overturning.").

170 Kahn, *supra* note 135, at 185, 193; Kahn & Kersch, *supra* note 89, at 86-87.

171 *E.g.*, Kahn, *supra* note 135, at 193; Kahn & Kersch, *supra* note 89, at 86.

172 Kahn & Kersch, *supra* note 89, at 86.

173 *Id.* at 87.

174 Kahn, *supra* note 135, at 193; Kahn & Kersch, *supra* note 89, at 87-88.

175 Kahn & Kersch, *supra* note 89, at 88.

176 Kahn, *supra* note 135, at 193.

177 Kahn, *supra* note 101, at 175-76.

178 *Id.* (discussing Roberts' interpretation of the Commerce Clause in *National Federation of Independent Business v. Sebelius*, finding it unlikely to be applied and sustained in the long term because it is impossible to clarify his interpretations key distinction between action/inaction and this construction's conflict with prior precedent).

Justices' individual decisions on the case.[179] For example, Kahn describes Chief Justice Roberts' decision in *Sebelius* as bringing external economic realities into an analysis of principles of federalism and separation of powers and of prior cases on the Commerce and Taxing Clauses.[180] According to Kahn, Justice Roberts' refusal to find authority for the ACA under the Commerce Clause stems from "his comparison of the failure of citizens to purchase health insurance with the failure of farmers to purchase wheat in *Wickard* and the failure of persons to grow and use marijuana in *Raich*."[181] This connection between external facts and internal norms (precedent) matches Kahn's definition of PBD, *principled* based decision making, not ideology based. Kahn similarly describes Justice Ginsberg's dissent, not as a justification for her preferred ideological outcome, but rather as bi-directional decision making, specifically, a critique of the Roberts' opinion's economic construction.[182] According to Kahn, this dispute among the justices over how to incorporate economic realities into law reflects the centrality of the construction process to decision making, a key premise of his PBD theory in contrast to ideological explanations.[183]

Kahn also offers this alternative explanation for the outcome in subsequent gay rights cases. In *Windsor*, instead of turning solely on the political viewpoints of the justices with Kennedy as the key swing vote, Kahn sees principled (precedent and rights based) bi-directional (external world affecting those precedents) decision making.[184] Kahn describes how the majority opinion brought in the outside world, the lived lives of same sex families,[185] to existing precedent on marriage and gay rights.[186] According to Khan, Kennedy looked outside of the bounds of the Constitution to consider the burdens DOMA placed on the family life of same sex couples and families, and that this reality demonstrated why DOMA was a denial of equal protection and liberty.[187] With respect to *Obergefell*, again, Kahn finds that ideology-based theories of judicial decision making do not fully explain this case's dramatic outcome.[188] Kahn notes that *Obergefell* is the logical next step in the social construction process started by *Lawrence* and continuing through other cases such as *Windsor*.[189] In all of these cases, the lived lives of gay families are connected

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179 *E.g.*, Kahn, *supra* note 101, at 162 (asserting that in *Sebelius*, "[c]onservative and liberal Justices … engage in a bidirectional Supreme Court decision-making process that incorporates the outside economic, social, and political world.").

180 *Id.* at 159 (Roberts engaged in "an economic construction process … drawing analogies between the construction processes of the individual mandate as compared to the economic constructions of prior Commerce and Taxing Clause jurisprudence.").

181 *Id.* at 187.

182 *Id.* at 176.

183 *Id.* at 176-77.

184 Kahn, *supra* note 143, at 299.

185 *Id.* at 301.

186 *Id.* at 299 ("The majority opinion in *Windsor* is a classic example of … bidirectional decision-making. The principles and social constructions that produced a liberty of sexual relations in *Lawrence* led to the principles and social constructions behind the *Windsor* decision.").

187 *Id.* at 292.

188 *Id.* at 302. (*Obergefell* "cannot be explained by external factors that are emphasized by political scientists employing the attitudinal and regime approach to explain Court decision-making…").

189 Kahn, *supra* note 143, at 301-303. "In *Obergefell*, as in *Windsor* and *Lawrence*, the Court emphasizes the importance of marriage in fostering deep, enduring personal relations

to legal principles of liberty and equal protection; a process of social construction which leads to the liberal outcome.[190]

Thus, the historical institutionalist theory of PBD offers a method for persuading justices. Through social construction, advocates can tie changes in the lives of citizens to existing legal principles to show how the law must evolve and change as well. This theory offers an explanation for a number of cases with progressive outcomes. The FJP would like to do the same thing: convince judges to change the law towards a more feminist legal reasoning and case decisions.[191] If the FJP uses the institutional change mechanism of PBD, perhaps the Project can succeed in its goals and influence even the current, conservative judiciary. The following section explores this question.

IV. The FJP's Use of Historical Institutionalist Change Techniques

A number of decisions in the FJP use social construction, which, according to Kahn's theories of historical institutionalism, is a method of persuasion that can lead to legal change. Although the FJP limited the opinion writers to the facts available in the record or that were suitable to judicial notice,[192] in many cases the FJP authors pointed to previously unconsidered, or improperly discounted facts.[193] As described below, in the FJP opinions, these social understandings are tied directly to legal principles to inform their interpretation. This process mirrors Professor Kahn's description of principled based decision making where the law can change when social realities are specifically tied to existing legal values.[194] The following sections describe two major social themes that appear in a number of FJP decisions: a broader understanding of sexual violence and harassment and expanded recognition of the experiences of gay, and transgender, people.

A. Social Construction in the FJP: #MeToo and the Law

Although the FJP precedes the popularization of #MeToo, many FJP authors draw on the broader understanding of sexual violence and harassment that has since been more widely recognized as a result of the #MeToo movement[195] and the related

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deserving of protection; the hurt and loss of dignity to children and parents in same-sex families caused by the prejudice of the wider society towards them; and the rejection of simple, moral disapproval against gays as a basis for legislation." *Id.* at 303.

190 *Id.* at 303.

191 Stanchi Introduction, *supra* note 1, at 5.

192 *Id.* at 10; Crawford, *supra* note 2, at 3.

193 *See infra* Parts IV(A) & (B). *See also* Stanchi Introduction, *supra* note 1, at 15-16 (describing feminist method of using facts the law "often shies away from").

194 *See supra* Part III.

195 Although originally founded by Tarana Burke over ten years ago, the #MeToo became a national phenomenon in 2017 after a number of famous actresses came forward with their stories of abuse and harassment. Melissa Murray, *Consequential Sex: #Metoo, Masterpiece Cakeshop, and Private Sexual Regulation*, 113 Nw. U. L. Rev. 825, 831 at n. 24, 866-867 (2019). "Initially intended as a means of cultivating empathy among young women for other victims of sexual harassment and sexual assault, the movement

organization TimesUp.[196] The #MeToo movement has received significant media coverage and started a new national conversation about the sexual abuse of women by men with power over their careers.[197] Women under the #MeToo umbrella have come forward to report real life instances of mistreatment and crime, with many high profile perpetrators being held to account.[198] A number of the opinions in the FJP are fortuitously drawing on themes that the #MeToo movement has been broadcasting widely.[199] Moreover, the authors not only identify these new social facts, they specifically tie them to legal precedents and values using the "legal grammar" a judicial opinion requires.[200] This full, social construction, provides the dual force of new fact and legal argument that Kahn describes as persuasive.[201]

The rewritten opinion of *Dothard v. Rawlinson*,[202] is an example of this social construction. The original Supreme Court opinion held that the height and weight requirements imposed by Alabama's correctional department violated the prohibition of sex discrimination in employment because it disparately excluded women and the state failed to show the requirements were necessary for the position.[203] At the same time, the Court also held that sex was a bona fide occupational qualification ("BFOQ") for guarding a men's prison due to the risk of sexual assault, and, as a result, women could be completely excluded from that job.[204] In the rewritten

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and its representative hashtag have come to represent the ubiquity of the offenses--and a society and legal culture that seem to condone the conduct." *Id*. at 866. *See also* Jamie R. Abrams, *The #Metoo Movement: An Invitation for Feminist Critique of Rape Crisis Framing*, 52 U. Rich. L. Rev. 749, 750 (2018) ("After decades of a relatively stagnant and opaque framing of rape and sexual assault through the lens of crisis, the #MeToo Movement "unleashed one of the highest-velocity shifts in our culture since the 1960s" with social media as its "powerful accelerant." With the click of a "MeToo" hashtag, virtually overnight, a modern anti-sexual assault and -sexual harassment movement was born.").

196 "#MeToo has spawned similar social justice-oriented organizations, including Time's Up, a 'solution-based, action-oriented next step in the [# MeToo] movement' that focuses on passing legislation and changing policies to address the systemic sources of inequality--lack of representation, gendered pay disparities, and the unequal distribution of power--that cultivate the conditions in which sexual harassment and violence may occur.

Murray, *supra* note 195, at 866-67.

197 *E.g.*, Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #MeToo?*, 54 Harv. C.R.-C.L. L. Rev. 156, 193-196 (2019); L. Camille Herbert, *Is 'MeToo' Only a Social Movement or a Legal Movement Too?*, 22 Empl. Rts. & Employ. Pol'y J. 321, 322-23 (2018).

198 "Using social media and the press, the # MeToo movement has identified recidivist harassers and workplaces where sexual harassment and sexual assault are rife, advocated for increased workplace harassment training, and, ultimately, called for the expulsion from the workplace of several high-profile men who, for years, engaged in objectionable conduct with impunity." Murray, *supra* note 195, at 833. *See also*, Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 Minn. L. Rev. 230, 230-32 (2018) (describing the MeToo movement and listing the prominent men accused and later fired).

199 *See* Herbert, *supra* note 197, at 322-23.

200 *See infra*.

201 *See supra* Part III.

202 Ontiveros, *supra* note 32, at 213.

203 Dothard v. Rawlinson, 433 U.S. 321, 328-32 (1977).

204 *Id.* at 334-37.

feminist judgment, concurring and dissenting in part, Professor Maria Ontiveros critiques this BFOQ argument for its stereotyping of women as the cause of sexual assault,[205] echoing a theme of #MeToo.[206] As Ontiveros explains in her dissenting part, the majority accepted the assertion by the state that sexual assaults against female guards are inevitable; ignoring evidence that the prison system made a series of choices in the structure of the prison that created this hazard and failed to take available steps, used in other systems, to eliminate it.[207] As Ontiveros explains, "the majority's line of reasoning reinforces the stereotypes that women are, first and foremost, sexual objects whose very presence cause sexual assault [relying] on the unstated premise that the stereotype is fixed, normal and natural, and nothing can be done to change it."[208] Ontiveros then takes the next step in social construction by tying this social understanding of assault to the law. Specifically, she notes how all of these assumptions are stereotypes about the nature and roles of women, and that precedent explicitly prohibits basing a BFOQ defense on stereotypes.[209] She also draws the logical corollary that BFOQ is not available when the employer itself creates the conditions that make a position inhospitable to a particular gender.[210]

The rewritten opinion in *Meritor Saving Bank* also emphasizes a #MeToo principle, that there are many reasons why victims of harassment cannot immediately report the misconduct or find help,[211] and adds another feature of new social facts, the intersectional impact of race and gender.[212] The original *Meritor* opinion established the first definitive definition of sexual harassment as a form of sex discrimination under Title VII, requiring plaintiffs to show severe or pervasive misconduct based on sex that was both objectively and subjectively offensive.[213] In rewriting *Meritor*, Onwuachi-Willig took the opportunity to offer a new foundational definition that removed the problematic aspects of subjective offense (unwelcomeness), objective offense assessed by a "neutral" standard, and the severe and pervasive language which has proven to be a significant roadblock to plaintiffs' recovery.[214] This rejection of the current legal standard for sexual harassment resonates with the #MeToo and TimesUp efforts to address harassment, including the unduly demanding legal standards as well as other barriers.[215] In the

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205 Brenda V. Smith, *Commentary on* Dothard v. Rawlingson, *in* Feminist Judgments: Supreme Court, *supra* note 4, at 209; Ontiveros, *supra* note 32, at 223-25.

206 Catharine A. MacKinnon, *Where #MeToo Came From, and Where It's Going*, The Atlantic, Mar. 24, 2019, https://www.theatlantic.com/ideas/archive/2019/03/catharine-mackinnon-what-metoo-has-changed/585313/.

207 Ontiveros, *supra* note 32, at 217, 225-26.

208 *Id.* at 223-24.

209 *Id.* at 218, 223-27.

210 *Id.* at 223-27.

211 Abrams, *supra* note 195, at 771 ("The #MeToo Movement powerfully revealed the harsh reality that many women are not able to reveal their victimization for decades or years for myriad of reasons."). *See also* Herbert, *supra* note 199, at 331-32 (noting the #MeToo movements potential to inform courts about "the complexity of reasons women fail to promptly report harassing conduct").

212 Onwuachi-Willig, *supra* note 31, at 303; Abrams, *supra* note 195, at 779-81.

213 Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 63-67 (1986).

214 Tiscione, *supra* note 74, at 300, Onwuachi-Willig, *supra* note 31, at 315-17.

215 *See*, *e.g.*, Jessica Clarke, *The Rules of #MeToo*, *forthcoming* 2019 at 7-10; Herbert, *supra* note 197, at 325-26, 329-31; Tippett, *supra* note 198, at 241-49.

rewritten opinion, "the gravamen" of a sexual harassment claim is now "whether the challenged conduct unreasonably interfered with the plaintiff's work environment or performance, create a hostile or intimidating environment, or worked to preserve patterns of sex segregation in employment."[216] Professor Onwuachi-Willig, removes the unwelcome requirement altogether, because focusing on whether the harassment was welcome ignores the power differentials that make it less likely that some women, given their economic or career vulnerabilities, are able to resist or complain, the accepted evidence of unwelcomeness.[217]

In her discussion, Onwuachi-Willig also emphasized the particular vulnerability of black women, citing studies that showed their claims of sexual harm were less likely to believed and the stereotypes of black women as sexually immoral that contribute to this.[218] To legally capture this social reality, she created a different standard for assessing whether there is a hostile work environment, asking how the reasonable person with the complainant's identity characteristics, here a reasonable black woman, would perceive events instead of the original reasonable person standard.[219] Onwuachi-Willig moves beyond the hashtag MeToo movement in this intersectional analysis, echoing perhaps more of the original #MeToo creator's message.[220] Overall, she ties a broader understanding of the real life experiences of women, and black women in particular, into the legal definitions of harassment.

Other rewritten opinions reflect the increased social recognition of the nature, extent, and implications of sexual violence and harassment. In the rewritten *Gebser v. Lago Vista*,[221] for example, Professor Ann Bartow crafted a dissent rejecting the original opinion's characterization of sex between a thirteen (to fifteen) year old and her teacher as a "relationship," correctly identifying this as rape due to the student's age and lack of capacity to consent.[222] Bartow further explores the social facts of how difficult it is for a minor to report sexual misconduct by a teacher with authority over their grades and courses.[223] Bartow's contextualization for a minor victim resonates with Tarana Burke's original MeToo and its empathetic focus on younger victims of sexual violence; although Bartow's case lacks the intersectional perspective Burke also emphasizes.[224] Bartow then ties this reality to the legal

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216 Onwuachi-Willig, *supra* note 31, at 317.

217 Tiscione, *supra* note 74, at 301; Onwuachi-Willig, *supra* note 31, at 316-17.

218 Onwuachi-Willig, *supra* note 31, at 315.

219 *Id.*

220 The Founder of #MeToo Doesn't Want Us to Forget Victims of Color, PBS NewsHour (Nov. 15, 2017, 6:35 PM), https://www.pbs.org/newshour/show/the-founder-of-metoo-doesnt-want-us-to-forget-victims-of-color (MeToo creator Tarana Burke discussing how black women and girls are viewed as inherently sexual and therefore less likely to be believed when asserting claims of assault or harassment) Although Ms. Burke expressed this intersectional reality, others have critiqued MeToo for failing to address the specific experience of black women. Angela Onwuachi-Willig, *What About #ustoo?: The Invisibility of Race in the #Metoo Movement*, 128 Yale L.J. Forum 105, 107-108 (2018).

221 Bartow, *supra* note 32, at 430.

222 Michelle S. Simon, *Commentary on* Gebser v. Lago Vista Independent School District, *in* Feminist Judgments: Supreme Court, *supra* note 4, at 428; Bartow, *supra* note 32, at 431, 436.

223 Bartow, *supra* note 32, at 437-38, 443.

224 *History & Vision*, metoo, https://metoomvmt.org/about/#history (last visited July 26, 2019) ("Tarana Burke began 'me too' with young Black women and girls from low

standard, again rejecting the original majority opinion and its requirement that a school have actual notice and fail to act before it is liable for a teacher's harassment of a student.[225] Instead, Bartow offers a standard of liability based on agency law, that "a school district is liable under Title IX if a teacher's sexual harassment was 'facilitated either expressly or implicitly, by the teacher's actual or apparent authority as an employee of the school.'"[226] This rewritten opinion also echoes some of the messages of the #MeToo and TimesUp movements more generally—namely the role of power disparity in facilitating sexual abuse,[227] and the need for more effective, systemic solutions.[228]

Other examples include the rewritten opinions of *Town of Castle Rock v. Gonzales*[229] and *Oncale v. Sundowner Offshore Services, Inc.*[230] In *Town of Castle Rock*, the Supreme Court originally held that a victim of domestic violence had no federal constitutional right to the enforcement of a civil restraining order against her husband, despite a Colorado statute mandating such enforcement.[231] In the rewritten majority opinion, Professor Maria Isabel Medina comes to the opposite conclusion, finding a property interest in such enforcement that is protected by the Due Process Clause.[232] Medina's opinion provided detailed social facts highlighting the pervasiveness of domestic violence and the history of police under-enforcement of protective orders based on long standing stereotypes about "primacy of male spouses as heads of households" and "views of women as naturally submissive, indecisive, and prone to complaint, but likely to retract allegations of domestic violence."[233] Medina reasoned that the Colorado legislature sought specifically to counteract those problems by requiring enforcement of domestic violence protective orders.[234] She engaged in social construction by tying these concepts to existing precedent on property rights.[235] She reasoned that the Colorado statute

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wealth communities. She developed culturally-informed curriculum to discuss sexual violence within the Black community and in society at large. Similarly, the 'me too' movement seeks to support folks working within their communities to attend to the specific needs of their community/communities, i.e. supporting disabled trans survivors of color working to lead and craft events/toolkits/etc. with other disabled trans survivors. Together, we can uplift and support each other to strengthen a global movement to interrupt sexual violence.").

225 Bartow, *supra* note 32, at 443-44.

226 *Id.* at 444.

227 *See, e.g.*, Open Letter from Time's Up*, News Documents,* N.Y. Times, https://www.nytimes.com/interactive/2018/01/01/arts/02women-letter.html?_r=0 (last visited July 26, 2019).

228 Jennifer Smola*, Founder of 'Me Too' Movement Fears Narrative Being Hijacked from Helping Survivors Heal*, Columbus Dispatch (Apr. 23, 2018), https://www.dispatch.com/news/20180423/founder-of-me-too-movement-fears-narrative-being-hijacked-from-helping-survivors-heal ("This is about systems. There were systems in place that allowed [perpetrators of sexual violence] to behave the way they behaved … . It has to be a movement about how we dismantle the systems, not the individuals.").

229 Medina, *supra*, note 31, at 508-26.

230 McGinley, *supra* note 31, at 414-25.

231 Town of Castle Rock v. Gonzales, 545 U.S. 748, 766-67 (2005).

232 Medina, *supra*, note 31, at 518-26.

233 *Id.* at 512.

234 *Id.* at 511.

235 *Id.* at 518-19.

created a bundle of rights, and that the Court had found other analogous state benefits to be protected by Due Process.[236] Although not the main focus of the #MeToo movement, which in its current iteration most often concerns workplace abuse, some of the movement's themes have been extended to domestic violence.[237] Indeed, as Professor Jane Stoever explains, "[t]he recent #MeToo movement is relevant to societal and legal responses to gender-based violence … [and] reveals the persistent societal reluctance to believe abuse survivors and offer real remedies."[238] Thus, Medina's rewritten opinion is also engaged in social construction on issues of increasing social salience.

In the rewritten *Oncale* decision, Professor Ann McGinley continues the process of social construction identified by Kahn, and extends Title VII to prohibit discrimination on the basis of sexual orientation.[239] The original *Oncale* decision found that harassment between members of the same sex would also violate Title VII's prohibition of discrimination on the basis of sex; but did not address sexual orientation discrimination.[240] McGinley's rewritten *per curium* opinion has the same outcome, but extends the legal reasoning to specifically find that harassment and discrimination based on sexual orientation violates the statute as well.[241] McGinley reasons that the existing legal basis for finding that discrimination based on sex includes discrimination for failure to meet the social expectations for gender, women who are insufficiently feminine or men who are insufficiently masculine.[242] She then engages in social construction by extending this concept to animosity toward sexual orientation, explaining how this too is inextricably connected to stereotypes about the "proper" behavior of men and women.[243] Specifically, drawing on masculinities theory she cites research that it is virtually impossible to distinguish between animosity towards a man's failure to meet expectations of masculinity and animosity toward homosexuality.[244] She therefore concludes that

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236 *Id.* at 519.

237 Melissa L. Breger, *Reforming by Re-Norming: How the Legal System Has the Potential to Change A Toxic Culture of Domestic Violence*, 44 J. Legis. 170, 171 (2017)("[S] ome might argue that the #metoo movement is bringing to light "rape culture" and workplace sexual harassment through re-norming and changing social perceptions and norms in a way never seen before. We can apply some of these same re-norming lessons to try to curb intimate partner violence.); *See, e.g.*, Rachel Leah, *Is #MeToo Moving Into Domestic Violence?* Salon (Dec. 8, 2017), https://www.salon.com/2017/12/08/lucy-mcintosh-mark-houston-metoo-domestic-violence/.

238 Jane K. Stoever, *Access to Safety and Justice: Service of Process in Domestic Violence Cases*, 94 Wash. L. Rev. 333, 335 (2019). She also notes #MeToo is hindered by some of the same negative forces, such as infighting that appeared in the early battered women's movement. *Id.*

239 McGinley, *supra* note 31, at 424.

240 Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79-80 (1998).

241 McGinley, *supra* note 31, at 423-24. The Supreme Court will soon decide this issue. *See* Linda Greenhouse, *On LGBTQ Rights the Supreme Court Asks the Question*, N.Y. Times, Apr. 25, 2019, https://www.nytimes.com/2019/04/25/opinion/lgbt-rights-supreme-court.html?searchResultPosition=4.

242 McGinley, *supra* note 31, at 423.

243 *Id.* at 423-24.

244 *Id.* at 423 (citing Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame and Silence in the Construction of Gender Identity, in* Theorizing Masculinities 119-41 (Harry Brod & Michael Kaufman eds. 1994)).

a victim of same sex harassment may show the mistreatment was because of sex and thus actionable under Title VII by showing the harasser was motivated by the victim's failure to "adhere to masculine (or feminine) stereotypes including the real or perceived sexual orientation of the victim."[245] Although not as explicitly tied to the #MeToo movement, McGinley's analysis does tie into an increasing social understanding of the harm of toxic masculinity, which has been part of the #MeToo discussion, and is now so prevalent as to appear in razor commercials and medical recommendations.[246] Thus, in a number of the FJP's rewritten Supreme Court decisions, we see opinion authors tying increasingly salient social facts to legal principles, which is the type of argument Kahn identifies as potentially persuasive.

B. Tax Opinions and Continued Social Recognition of LGBTQ Rights

Kahn's description of social construction, the way evolving social norms can be incorporated into legal rules and thus change the law, is echoed in a number of rewritten tax opinions of the FJP as well. A number of authors offer alternative legal standards based on modern feminist theory and more complete and compassionate factual backgrounds. For example, as described below, three of these opinions offer a roadmap for courts to consider new understandings of LGBTQ rights, life, and dignity, again echoing a method of social construction Kahn found to be effective in creating progressive legal change, even in a conservative court.

In the rewritten opinion in *Magdalin v. Commissioner*, Professor Jennifer Bird-Pollan challenges the U.S. Tax Court's refusal to grant a medical deduction to a fertile gay man who used reproductive technology in order to have biologically related children.[247] The original opinion refused the deduction on the basis that the taxpayer did not suffer from a disease or defect requiring the fertility treatments.[248] At issue was the definition of medical care, which is deductible, under §213 of the Tax Code.[249] Unlike the original opinion which focused on §213's language defining medical care as treatment of disease,[250] Bird-Pollan emphasized the second part of §213's definition, whether the amounts paid "for the purpose of affecting any structure or function of the body."[251] The rewritten opinion found that reproduction is a type of human functioning and thus reproductive treatments are covered by §213's second part, regardless of the presence or lack of a medical disease or

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245 McGinley, *supra* note 31, at 424. She also changed the burden of proof. Margaret E. Johnson, *Commentary to* Oncale v. Sundower Offshore Services, Inc., in Feminist Judgments: Supreme Court, *supra* note 4, at 414.

246 Maya Salam, *What is Toxic Masculinity?* (N.Y. Times, Jan. 22, 2019). https://www.nytimes.com/2019/01/22/us/toxic-masculinity.html. *See also* A.P.A Guidelines for Psychological Practice with Boys and Men, Aug. 2018 Am. Psychol. Ass'n, https://www.apa.org/about/policy/boys-men-practice-guidelines.pdf (last visited Apr. 3, 2020).

247 Bird-Pollan, *supra* note 33, at 253-65.

248 Magdalin v. Comm'r, 96 T.C.M. (CCH) 491, 493 (2008), *aff'd*, 2010-1 U.S. Tax. Cas. (CCH) ¶ 50, 150 (1st Cir. 2009).

249 I.R.C. § 213(a).

250 *Magdalin*, 96 T.C.M at 492.

251 Bird-Pollan, *supra* note 33, at 257-59.

defect.[252] This legal argument is presented in the context of important social facts about the reality of gay life and families, echoing the process Kahn identified in the *Lawrence, Windsor*, and *Obergefell* decisions.[253] As Bird-Pollan explains, although some heterosexual couples require assisted reproductive technology due to medical conditions, "a large category of people … by the very nature of their identity, will also require IVF in order to facilitate reproduction."[254] The original opinion's conclusion that a fertile gay man could not deduct IVF expenses comes with the "unstated implication" that heterosexual intercourse was the proper way to have a child.[255] As Bird-Pollan's opinion explains, allowing a deduction ART for heterosexual couples but not fertile gay prospective parents "raise specters of discrimination on the part of the government" and injects non-determinative facts, namely, sexual orientation, into a tax deduction issue.[256]

The rewritten opinion in *O'Donnabhaim v. Commissioner* similarly uses a broader understanding of the dignity of transgender people to construct the law on tax deductibility of gender confirmation surgery.[257] In the original opinion, the Tax Court found that the taxpayer could deduct a significant portion, but not all, of the surgery and related treatment as a medical expense.[258] The court's conclusion, however, was based on a finding that the taxpayer suffered from a disease.[259] Professor David Cruz's rewritten opinion avoids the stigmatizing disease focus and incorporates a new social acceptance of the transgendered, by finding medical deductibility elsewhere.[260] Indeed, his opinion specifically explains the harms of treating transgenderism as a kind of illness.[261] The new opinion therefore establishes that gender difference affects the structure and function of the body and is therefore deductible under the second part of §213.[262] In this manner Cruz analogizes gender confirmation surgery to vasectomies or abortions that do not treat a disease but that are nonetheless deductible as medical expenses.[263] With the acknowledged cautions against stigmatizing the transgendered by undue emphasis on "disease", Cruz's opinion also presents the reasoning on why gender reassignment surgery and related expenses also meet the standard for treatment under the first portion of §213.[264] He does so as a Tax Court opinion author, recognizing that the IRS might appeal the decision and that in later analysis, disease may be the taxpayer's only winning argument.[265] He does so in light of the "benefits that the (Gender Identity Disorder) diagnosis has brought, especially to trans people of limited economic means" and '[i]n the interest of doing justice to the real human person before us."[266]

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252 *Id.*
253 *See supra Part* III.
254 Bird-Pollan, *supra* note 33, at 261.
255 *Id.* at 260.
256 *Id.* at 261.
257 Cruz, *supra* note 33, at 274-96.
258 O'Donnabhain v. Comm'r, 134 T.C. 34, 77 (2010).
259 *Id.* at 46.
260 Cruz, *supra* note 33, at 277.
261 Cruz, *supra* note 33, at 282-83.
262 *Id.* at 277.
263 *Id.* at 280.
264 *Id.* at 281-92.
265 *Id.* at 284.
266 Cruz, *supra* note 33, at 284.

This theme of dignity is similar to the dignity concerns raised in the *Lawrence*, *Windsor*, and *Obergefell* decisions, and Kahn identifies these themes as part of the PBD process which led to the progressive decisions.[267]

Finally, in the rewritten opinion in *United States v. Windsor*, Professor Ruthann Robson invigorates even this progressive decision with newer and different understandings of society.[268] Her rewritten opinion has the same outcome as the original, but offers a legal basis that more robustly prohibits discrimination on the basis of sexual orientation and recognizes the wide variety of family structures in current society.[269] The original opinion reasoned that in the Defense of Marriage Act (DOMA), the federal government was treating some state sanctioned marriages, same sex, differently from others, in a manner that violated due process rights and equal protection under the constitution.[270] The original opinion did not specifically call sexual orientation a suspect class nor designate a level scrutiny for it.[271] The rewritten opinion, in contrast, does not find any due process violation, and instead treats sexual orientation as a suspect classification subject to intermediate scrutiny under the equal protection clause.[272] Now six years after the original *Windsor*, it is possible that Robson's rewritten opinion taps a current social construction that supports protected class status for sexual orientation.[273]

The rewritten opinion also reflects a critique of the original *Windsor* opinion, that by basing the marriage rights on due process, it unduly glorified the status of marriage in a society of increasing variety of family structure.[274] Instead, the focus on equal protection turns the focus toward harm of sexual orientation discrimination.[275] Thus, the rewritten opinion avoids discussion of the harm to children which the original opinion mentioned frequently, despite the fact that the lesbian family which brought the suit had no children.[276] Recognizing the new social reality of increasing variety in family structure, Robson removes the emphasis on traditional marriage and procreative purpose, to avoid "elevating a biological component to parenting that denigrates every adoptive or nonbiological parent, whether male or female."[277] Although taking social construction beyond the issue of sexual orientation in the original *Windsor*, to include non-marital families in her rewrite, Robson is still using the PBD method to emphasize the legal importance of a broad social reality.

Overall, in each of these opinions, social facts infuse the analysis, guiding the rewritten opinion authors to new legal standards and alternative reasoning. Significantly, the reasoning in these opinions in not fictional; rather, it also draws

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267 *E.g.*, *Kahn*, *supra* note 143, at 290.

268 Robson, *supra* note 33, at 306-16.

269 *Id*.

270 570 U.S. 744, 775 (2013)

271 *See* 570 U.S. 744 (2013).

272 Robson, *supra* note 33, at 311-316

273 *See, e.g.*, Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018), cert. granted sub nom. Altitude Exp., Inc. v. Zarda, 139 S. Ct. 1599 (2019) (finding sexual orientation to be a protected category under Title VII).

articles and cases on recognizing Title VII protection for sexual orientation.

274 Allison Anna Tait, *Commentary on* United States v. Windsor, *in* Feminist Judgments: Rewritten Tax Opinions, *supra* note 5, at 297, 302-305.

275 *Id.* at 304.

276 *Id.* at 303.

277 *Id.* at 304 (quoting Robson, *supra* note 33, at 314).

on precedents, statutes, and regulations, the proper legal grammar for a court.[278] In this manner, the FJP opinions are engaging in social construction, the key aspect of PBD, a process that allows changes in social understandings to potentially change the law.[279] By explicitly tying broader social acceptance and understanding of citizens' lived lives to existing legal norms, the FJP follows the blueprint for legal change described by Professor Kahn.[280]

V. Critique and Analysis

The historical institutionalist theory of PBD can help explain certain court decisions that unexpectedly expanded or preserved individual rights. As explained in Part IV, a number of the FJP opinions use the tool of PBD, social construction, to offer persuasive arguments to change the law. Thus, a political science-based argument for the efficacy and utility of the FJP is available. This argument is not without critique or limitation, however. First, PBD theory comes with an acknowledged barrier - originalist[281] judges do not engage in PBD and, thus, are not moved to change the law by the presentation of new social facts.[282] Section A below explores the degree to which originalism blocks the PBD method of legal change pursued by the FJP. Second, a number of FJP opinions go further than PBD to engage in displacement, the wholesale substitution of existing rules.[283] Section B explores the challenges for these opinions which seek more fundamental change to existing precedent. Finally, in response to these critiques and to present a fuller picture, Section C explores alternative ways that the FJP can be effective, other than social construction and displacement.

A. The Problem of Originalists

A court will engage in PDB when it believes that adapting to social change is necessary to sustain legitimacy.[284] Originalists, however, believe the opposite, that judicial expansion of rights beyond those historically recognized is unprincipled and undermines respect for the courts.[285] As Kahn explains, originalists such as Scalia, "refus[e] to accept PBD and all rights based on that process, if that process moves beyond intentions derived from founding periods. Thus, *Roe*, *Casey*, *Romer*, and

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278 *See* Kahn & Kersch, *supra* note 89, at 86-87 (discussing the importance of tying new social facts to existing law using legal grammar).

279 Kahn, *supra* note 135, at 194; Kahn & Kersch, *supra* note 89, at 86-87.

280 *See supra* Part III.

281 Generally, originalism posits that legal texts mean what they meant at the time of their enactment." Hillel Y. Levin, *Justice Gorsuch's Views on Precedent in the Context of Statutory Interpretation*, 70 Ala. L. Rev. 687, 689 at n. 1 (2019) (citing, e.g., Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 78-82 (2012)).

282 Kahn, *supra* note 135, at 200.

283 James Mahoney & Kathleen Thelen, *A Theory of Gradual Institutional Change*, *in* Explaining Institutional Change: Ambiguity, Agency, and Power 1, 15-16 (James Mahoney & Kathleen Thelen eds. 2009).

284 Kahn, *supra* note 135, at 180, 199.

285 *Id.* at 200.

Lawrence are all illegitimate claims of "Constitutional" law."[286] According to Kahn, the real fissure on the Supreme Court, and to some degree politics more broadly, is not conservative versus liberal, but rather, originalist versus non-originalist.[287] This debate is not limited to the controversial decisions on gay rights or abortion, but extends to the nature of judicial decision-making and the role of the judiciary in government.[288]

A number of Supreme Court decisions reflect the limitations of PBD to create progressive outcomes when a significant portion of the Court is originalist.[289] As just one example, the Supreme Court's decision to allow President Trump's ban on transgendered people serving in the military[290] stands in direct contrast to the rewritten opinion in *O'Donnabhaim v. Commissioner*[291]. Moreover, the recent appointment of Justices Kavanaugh and Gorsuch seems to have solidified an originalist bloc on the Court.[292] Thus, the originalists' objection to PBD, combined with their status on the Supreme Court, does threaten to undermine the efficacy of social construction-based persuasion.

That said, perhaps Chief Justice Roberts' apparent new role as the swing vote leaves the door open to PDB and some version of social fact-based argument.[293] Indeed, his apparent concern for the Court's legitimacy[294] is, according to historical institutionalists, one of the foundational motivations that can drive judicial decision making away from ideology.[295] In addition to Roberts' potentially moderating path, as noted above, there are a number of empirical studies showing that law can still play at least some role in Supreme Court decision making even with ideological and strategic voting.[296] Indeed, historical examples provide some basis for optimism. In an in-depth, comparative case-study of death penalty and abortion cases before the Supreme Court from 1972 through 1989, which included the Reagan/Bush Court, political science scholars Lynn Epstein and Joseph Kobylka examined the cause of legal change.[297] Their study identified a myriad of factors influencing the Court's

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286 *Id.* at 200.

287 *Id.* at 200-201.

288 *Id.* at 201.

289 *E.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011); Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010); Trump v. Karnoski, 139 S. Ct. 950 (Mem) (2019) (granting stay of lower court injunction, consequently allowing President Trump's ban on transgender service in the military to take effect pending appeal).

290 Trump v. Karnoski, 139 S. Ct. 950 (Mem) (2019).

291 Cruz, *supra* note 33, at 274-96; Part IV(B), *supra*.

292 Levin, *supra* note 281, at 696 ("Broadly speaking, Justice Gorsuch does, like Justice Scalia, approach the law as a textualist-originalist. His early opinions on the Supreme Court suggest as much, he has said so himself, and observers seem to agree with the characterization."); Jeremy Kidd, *New Metrics and the Politics of Judicial Selection*, 70 Ala. L. Rev. 785, 804 (2019) ("As an originalist, Kavanaugh scored well on the percentage of opinions that used the language of originalism.").

293 *E.g.*, Julie Hirschfeld Davis, *With Kennedy Gone, Roberts Will Be the Supreme Court's Swing Vote*, N.Y. Times, June 28, 2018 at A19; Benjamin Pomerance, *Center of Order: Chief Justice John Roberts and the Coming Struggle for A Respected Supreme Court*, 82 Alb. L. Rev. 449, 524-32 (2019).

294 Pomerance, *supra* note 293, at 517-24.

295 *E.g.*, Kahn & Kersch, *supra* note 89, at 17-18.

296 *See supra* Part II(D).

297 Lee Epstein & Joseph F. Kobylka, The Supreme Court and Legal Change: Abortion and the Death Penalty 5-7 (1992).

decisions, including changes in Court personnel, interest group mobilization and political context.[298] Their study, however, also concluded that the legal arguments by the attorneys and within the *amicus* briefs had an influence as well, and that ultimately, "legal arguments grounded in law matter, and they matter dearly … arguments seem to influence most clearly the content and direction of the legal change that results."[299]

Thus, overall, the prospects for the FJP to be persuasive are mixed, particularly with respect to the FJP's rewritten Supreme Court opinions. The historical institutionalists present PBD, a compelling theory for the efficacy of persuasive arguments such as those offered by the FJP, and some empirical and case studies support this premise. Given the resistance of originalists, however, this branch of political science cannot offer a complete defense of the Project's utility.

B. Displacement

A number of opinions within the FJP are subject to an even stronger critique because they engage in displacement, a more radical method of legal change than PBD. In PBD, existing legal principles are considered and applied in light of new social facts, a mutually constructive process that gives current legal rules an important role.[300] In contrast, sometimes groups seek to completely substitute one set of rules for another, a process historical institutionalists term displacement.[301] Displacement is a more difficult type of change for out of power groups to achieve.[302] As described below, some of the rewritten FJP opinions concerning disparate impact are attempting this displacement, and in so doing, fail to offer strongly persuasive arguments for future use.

Disparate impact is a theory of discrimination that does not involve intentional conduct, but rather finds unintentional, or covert, acts create unequal results for protected groups.[303] As described below, in a number of FJP rewritten opinions, the authors pursue equality on disparate impact theories, challenging neutral laws that disproportionately harm women. At first glance, the FJP opinions discussing disparate impact could seem to be effective under the concept of PBD. Specifically, many disparate impact arguments offered by the FJP reference the phenomenon of implicit bias—a term for subconscious bias that results in unequal outcomes.[304] Implicit bias is gaining increased social recognition as a non-intentional, but nonetheless real,

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298 *Id.* at 302-10.

299 *Id.* at 302.

300 *See supra* Part III.

301 Mahoney & Thelen, *supra* note 283, at 15-16.

302 *See* Erik Bleich, *Historical Institutionalism and Judicial Decision-Making*, 70 World Pol. 53, 66 (2018) ("Ideational scholars have long demonstrated that when new actors enter the field they frequently struggle to enforce the supremacy of their distinct ideas through power or persuasion.") *See also* Mahoney, *supra* note 301, at 19 ("Where would-be agents of change face political contexts with myriad veto possibilities, it will be difficult for them to … displace the existing institutional rules. Hence, displacement is unlikely in the context of strong veto possibilities. Likewise, efforts at active conversion will be difficult in such a context, since veto powers also apply to the realm of rule enactment.).

303 *E.g.*, Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 Ala. L. Rev. 653, 656-59 (2015).

304 *Id.* at 657 (text and accompanying footnotes).

source of discrimination.[305] As Kahn makes clear, however, the mere presence of new social facts does not lead to change, but rather it is the ability to tie those facts to specific existing legal concepts that influences judges.[306] Thus, although there are advances in understanding implicit bias, there is strong legal precedent requiring intentional discrimination that makes the adoption of these disparate impact theories much more difficult.[307] Thus, according to historical institutionalists, the adoption of the FJP's disparate impact theories would not be the evolutionary social construction found in PDB, but rather, would require wholesale substitution of existing legal rules, a form of displacement which is not easily achieved.[308]

For example, in the rewritten *Griswold v. Connecticut* decision, Professor Laura Rosenbury came to the same outcome as the original opinion, finding Connecticut statutes criminalizing birth control to be unconstitutional, but offered a different legal basis.[309] Instead of a right to privacy, Rosenbury invalidates the statutes based on Due Process and Equal Protection.[310] Specifically, Rosenbury takes advantage of the historically situated posture of each rewrite. According to the premise of the FJP, opinion authors are bound by existing law at the time, but not future decisions.[311] Thus, Rosenbury's rewrite is before the *Washington v. Davis* case which held that only intentional discrimination creates a constitutional violation.[312] Rosenbury, therefore ignores *Washington v. Davis* and finds disparate

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305 Tryon P. Woods, *The Implicit Bias of Implicit Bias Theory*, 10 Drexel L. Rev. 631, 636 (2018) (The scientific research on implicit bias has proliferated in recent years, with empirical findings documenting the pervasive reality of unconscious racism.). *See also e.g.* Office of Public Affairs, *Department of Justice Announces New Department-Wide Implicit Bias Training for Personnel*, Department of Justice (June 27, 2016), https://www.justice.gov/opa/pr/department-justice-announces-new-department-wide-implicit-bias-training-personnel; Khiara M. Bridges, *Implicit Bias and Racial Disparities in Health Care*, 43 Hum. Rts. 19 (2018); Thomas C. Grella, *Implicit Bias: A Hidden Obstacle to Exemplary Firm Culture*, 45 Law Prac. 62 (May/June 2019).

306 *See supra* Part III(B).

307 *See* Washington v. Davis, 426 U.S. 229 (1976); Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1979); Dale Margolin Cecka, *Commentary to* Price Waterhouse v. Hopkins, *in* Feminist Judgments: Supreme Court, *supra* note 4, at 343 ("The U.S. Supreme Court has never recognized implicit bias against women"); Jonathan P. Feingold, *Equal Protection Design Defects,* 91 Temp. L. Rev. 513, 519 (2019) (A trio of cases in the 1970s solidified intent doctrine as the standard governing challenges to facially neutral state action) (*citing Feeney*, 442 U.S. at 278-79; *Arlington Heights*, 429 U.S. at 265; *Davis*, 426 U.S. at 240.); Kellen Funk, *The Present Crisis in American Bail*, 128 Yale L.J. Forum 1098, 1112 (2019) (noting the Supreme Court disfavors discrimination claims based on disparate impact without "ironclad proof of intentional animus") (citing Washington v. Davis); Kenji Yoshino, *The New Equal Protection*, 124 Harv. L. Rev. 747, 764 (2011) ("In the vast run of cases after *Feeney*, only facial discrimination has drawn heightened scrutiny under the equal protection guarantees.").

308 *See* Bleich, *supra* note 302, at 66. *See also* Mahoney & Thelen, *supra* note 283, at 19.

309 Rosenbury, *supra* note 31, at 103-113.

310 Cynthia Hawkins Debose, *Commentary to* Griswold v. Connecticut, *in* Feminist Judgments: Rewritten Opinions of the Supreme Court, *supra* note 4, at 98, 101; Rosenbury, *supra* note 31, at 106-111.

311 Stanchi Introduction, *supra* note 1, at 10; Crawford, *supra* note 2, at 3.

312 Debose, *supra* note 310, at 102 ("In recognizing this disparate impact, Rosenbury seeks to stave off the Court's subsequent holding in *Washington v. Davis*, which limited constitutional challenges to claims of intentional discrimination.").

impact violates the Equal Protection clause, as if to start an alternative timeline of the law.[313] This outcome might be historically possible at the time of the decision; however, arguments imagining the absence of a case that does, in fact, exist are less useful for the FJP's goal to affect future decisions. This feminist rewrite in *Griswold* offers the type of displacement that, according to political scientists, is hard for out of power groups to win.[314]

In the rewritten opinions that post-date *Washington v. Davis*, the authors do not try to reverse that precedent, as doing so would violate the premise of the FJP.[315] In one of the post- Washington cases, *Price Waterhouse v. Hopkins*, however, the opinion author worked with disparate impact in another context that was also contrary to existing precedent.[316] In the rewritten *Price Waterhouse v. Hopkins* opinion, Professor Martha Chamallas writes a concurring opinion to emphasize the role of implicit bias in employment decisions,[317] and urges courts to play close attention to expert testimony[318]. "Chamallas rejects the focus on conscious intent as the touchstone of 'real' discrimination … [and] requires courts to look at the totality of a corporate culture."[319] As with the *Griswold* rewrite as described above, the rewritten *Price Waterhouse* decision takes advantage of its historical posture. The Supreme Court generally rejected these ideas on implicit bias and reliance on expert testimony in the *Wal-Mart v. Dukes* decision.[320] Although there are certainly many intellectual uses for envisioning alternative lines of jurisprudence, by contradicting later firm precedent, this aspect of the *Price Waterhouse* rewrite is less useful for future persuasive arguments. Again, political science would characterize this as a displacement which is more difficult to instill.[321]

Some of the Tax FJP opinions also attempt to establish disparate impact as a viable legal theory in contravention of existing precedent. For example, in the rewritten *Bob Jones University v. United States*,[322] Dean David Brennan's concurring opinion comes to the same outcome as the original opinion,[323] specifically, that Bob Jones University is not entitled to §501(c)(3) status as a charitable organization because its admissions policies violate public policy,[324] but offers different reasoning. The original opinion based this outcome on the fact that the University's admissions policies were, intentionally, racially discriminatory.[325] Brennan finds the policies also violate public policy because they have a disparate impact on women.[326] To find that the admissions policy violated public policy, both

313 Rosenbury, *supra* note 31, at 111-112.
314 Bleich, *supra* note 302, at 66. *See also* Mahoney & Thelen, *supra* note 283, at 19.
315 *See generally* Feminist Judgments, *supra* note 4, at Chapters 11-27.
316 Chamallas, *supra* note 32, at 345-60.
317 Cecka, *supra* note 307, at 341, Chamallas, *supra* note 32, at 354.
318 Cecka, *supra* note 307, at 341, Chamallas, *supra* note 32, at 351-53.
319 Cecka, *supra* note 307, at 344.
320 *Id.* (noting that the "Supreme Court has never recognized implicit bias against women" and that in the *Wal-Mart* decision, the Court rejected expert testimony about stereotyping).
321 Bleich, *supra* note 302, at 66; *See also* Mahoney & Thelen, *supra* note 283, at 19.
322 Brennan, *supra* note 33, at 150-63.
323 Bob Jones Univ. v. U.S., 461 U.S. 574 (1983).
324 Brennan, *supra* note 33, at 155; Bob Jones, 461 U.S. at 592-596.
325 Bob Jones, 461 U.S. at 605.
326 Elaine Waterhouse Wilson, *Commentary on* Bob Jones University, *in* Feminist Judgments: Tax Opinions, *supra* note 5, at 146; Brennan, *supra* note 33, at 156-58.

the original opinion and the rewrite reviewed legislative, executive, and judicial actions concerning discrimination to find evidence of public policy.[327] Brennan's argument that gendered disparate impact as such a violation is contrary to *Washington v. Davis*, and indeed (as the commentary on his opinion acknowledges) to other cases indicating a mixed record on even intentional gender discrimination at that time.[328] Thus, while perhaps not requiring direct displacement of *Washington v. Davis*, the rewritten opinion bases its argument on disparate impact as "public policy," a difficult premise to support.

The rewritten opinion in *Estate of Clack v. Commissioner*, similarly offers a disparate impact theory as the basis for its opinion, acknowledging its likely lack of support by writing as a dissent.[329] In the original opinion, the Tax Court found that a marital deduction was still possible even where an executor could divest a surviving spouse of a property interest through qualified terminable interest property (QTIP) elections.[330] In the rewritten opinion, Professor Wendy Gerzog challenges this holding for its reliance on gender stereotypes and disparate impact on women.[331] As the commentary on the opinion acknowledges, it is embracing a disparate impact theory rejected by *Washington v. Davis*, and indeed a number of other tax related opinions.[332] Nonetheless, the commentary argues for "the expressive force of dissents," asserting that "[p]erhaps Gerzog's opinion could have set the stage for a series of dissents over time point out the structural sexism, racism, and heterosexism of the Code [which] could in turn have influenced public opinion."[333] Again, although useful for theoretical and intellectual pursuits, this alternative history of law offers less utility for crafting arguments to influence the current judiciary.

C. Alternative Methods of Persuasion

Overall, the above analysis identifies a category of FJP opinions engaged in displacement, which offer less useful arguments for persuasion, and a category of FJP decisions using PBD, which offers useful arguments for persuasion but only to non-originalists jurists. This section explores a third category of re-written FJP opinions that uses a perhaps more moderate approach, what has been termed "ideational salience amplification" (ISA).[334] ISA is a method of persuasion available to those without dominant power who wish to push judicial outcomes in a different direction.[335] ISA is available because, typically, those within power shape their decisions based on a wide range of ideas.[336] With ISA, "[r]ather than having to replace one set of established ideas with an alternative paradigm,

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Brennan's analysis is intersectional, finding both racial and gender discrimination within the policy. Brennan, *supra* note 33, at 155-60.

327 Wilson, *supra* note 326, at 142, 145-46; Brennan, *supra* note 33, at 156-58; Bob Jones, 461 U.S. at 592-96.

328 Wilson, *supra* note 326, at 146.

329 Gerzog, *supra* note 33, at 195-214.

330 Estate of Clack v. Comm'r, 106 T.C. 131, 140-42 (1996).

331 Maynard, *supra* note 54, at 190; Gerzog, *supra* note 33, at 207-14.

332 Maynard, supra note 54, at 194.

333 *Id.*

334 Bleich, *supra* note 302, at 66.

335 *Id.*

336 *Id.*

emergent actors may simply amplify the salience of certain ideas that already exist within the judicial field."[337] For example, conservative legal advocates used the norm of color blindness, first developed to aid the historically disadvantaged, to challenge affirmative action.[338] ISA takes a more legalistic approach than PBD. In PBD, existing precedent evolves to apply to new social facts; these facts play a crucial role in the argument.[339] With ISA, an existing legal principle receives greater emphasis, and this legal argument drives the outcome.[340]

A number of FJP opinions tap into the process of ISA. For example, in the Tax FJP, Professor Mary Louise Fellows re-wrote *Welch v. Halvering*[341] and revived the "necessary" prong of the existing ordinary and necessary business deduction test.[342] In the original opinion, the Supreme Court did not emphasize the necessary factor and deferred to the taxpayer's view on this aspect.[343] Professor Fellows removed this deference, and provided a more critical path for reviewing purportedly necessary deductions.[344] By amplifying the salience of this factor, Professor Fellows "avoid[ed] the original's reflexive abdication of power to the already powerful," and critiques the acceptance of public related expenses as necessary and business related while relegating others to "women's" private sphere.[345]

In the rewritten opinion of *Cheshire v. Commissioner*, Professor Danshera Cords, as a Tax Court judge, comes to the opposite conclusion as the original opinion on the crucial issue of what level of knowledge removes the innocent spouse defense to joint liability on a jointly filed married tax return.[346] The original opinion held that a married taxpayer was not entitled to innocent spouse relief if the spouse knew of the transactions giving rise to the income underlying the tax liability.[347] In contrast, Cords finds innocent spouse relief is only removed where the spouse has knowledge that the item is in fact taxable.[348] Cords' interpretation relies on extensive analysis of the legislative history of the relevant innocent spouse provision.[349] As a feminist opinion, Cords discusses the gendered context of this tax law, detailing the traditional gender roles women assume within marriage and how that places them at particular risk from joint liability.[350] Cords' reasoning however, is not dependent upon finding the law has a disparate impact on women, and instead rests on giving greater ideational salience to the legislative history supporting her legal test.[351]

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337 *Id.*
338 *Id.* at 79 (citing Desmond S. King & Rogers M. Smith, *Without Regard to Race: Critical Ideational Development in Modern American Politics*, 76 J. of Pol. 958-71 (2014)).
339 *See supra* Part III.
340 Bleich, *supra* note 302, at 66.
341 290 U.S. 111 (1933).
342 Nicole Appleberry, *Commentary on* Welch v. Helvering, *in* Feminist Judgments: Tax Opinions, *supra* note 5, at 100, Fellows, *supra* note 33, at 109-17.
343 290 U.S. at 113.
344 Fellows, *supra* note 33, at 109-17.
345 Appleberry, *supra* note 342, at 97, 101.
346 Cords, *supra* note 33, at 225-42.
347 Appleberry, *supra* note 342, at 197.
348 Cords, *supra* note 33, at 240-41.
349 *Id.* at 236-38.
350 *Id.* at 238-39.
351 *Id.* at 236-42.

In some FJP opinions, the authors use ISA on the concept of stereotyping as a form of gender discrimination.[352] Courts, including the Supreme Court, have long recognized a connection between stereotyping and discrimination.[353] This relatively non-controversial and accepted principle is therefore ripe for salience amplification. For example, in the rewritten opinion of *Rostker v. Goldberg*,[354] Professor David Cohen reverses the original opinion that had upheld the male only registration for the military draft.[355] Cohen's opinion concludes that the draft must apply to all, regardless of gender, refusing to adopt the original opinion's strong deference to the military.[356] Instead, Cohen details and emphasizes the extensive gender stereotypes behind the male-only rule and ties them into the anti-stereotyping principles the Court in *Reed v. Reed*,[357] *Frontiero v. Richardson*,[358] and *Craig v. Boren.*[359]

As these examples show, one of the techniques of the FJP is to persuade using existing legal concepts to different effect. This ideational salience amplification is quickly recognized by legal scholars as a classic form of argument; but it also has the support of political science scholars who have studied theories of idea-based change. This field recognizes that an out-of-power group that seeks to replace ideas altogether faces a more difficult path than one that takes the more indirect path of enhancing the prominence of existing norms and values.[360] Thus, to the likely extent that originalist judges will not be receptive to PBD and the displacement cases are contrary to existing precedent, ISA offers an alternative path of persuasion.

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352 Jamie R. Abrams, *Commentary on* Rostker v. Goldberg, in Feminist Judgments: Supreme Court, *supra* note 4,at 276-77; Cohen, *supra* note 31, at 281-83 *See also* Thomas, *supra* note 31, at 236-38 (citing economic stereotypes about women in finding higher pension deductions for female employees to be discriminatory); Godsoe, *supra* note 32, at 266-68 (discussing sex stereotyping behind law punishing men and boys who had sex with female minors more severely than women and girls who had sex with male minors).

353 *E.g.*, Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 722 (2003) ("The impact of the discrimination targeted by the FMLA, which is based on mutually reinforcing stereotypes that only women are responsible for family caregiving and that men lack domestic responsibilities, is significant."); Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 611, (1999) (Kennedy, concurring) ("Underlying much discrimination law is the notion that animus can lead to false and unjustified stereotypes, and vice versa."); J.E.B. v. Ala. ex rel. T.B., 511 U.S. 127, 130–31 (1994) ("Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women.").

354 Cohen, *supra* note 31, at 277-96.

355 Abrams, *supra* note 352, at 273-77; Cohen, *supra* note 31, at 277.

356 Abrams, *supra* note 352, at 273-77.

357 404 U.S. 71 (1971).

358 411 U.S. 677 (1973).

359 429 U.S. 190 (1976).

360 Bleich, *supra* note 302, at 66, 78.

VI. Conclusion

As the above discussion demonstrates, any critique or analysis of the FJP must be as multi-faced as the opinions themselves. Each FJP author seeks to infuse the law with a feminist perspective, and was bound by existing precedent and facts when doing so,[361] but the outcomes and reasoning vary widely. A number of FJP authors referenced underemphasized or altogether unrecognized facts and tied them to existing law to construct an alternative argument.[362] Historical institutionalism describes this process as principle-based decision making.[363] According to institutionalist scholars, in previous cases, this method caused legal rules to evolve in a progressive direction, even in a conservative court.[364] These type of arguments offered by the FJP offer some prospect of efficacy, except to the extent the deciding judges are originalists,[365] a perhaps daunting exception in the current climate. Some FJP opinions engage in displacement, offering arguments that directly contradict existing law, by imagining certain negative precedents would never come to be.[366] Political science studies find that for out-of-power groups, this direct approach is unlikely to succeed.[367] Thus, these alternative timeline scenarios might be intellectually stimulating, but offer less practical utility for constructing persuasive legal arguments. Finally, in a number of opinions, the authors delve into the law to construct arguments through ideational salience amplification.[368] These highlight existing legal principles to a greater degree or in slightly different ways than the original opinion.[369] Historical institutionalism finds this modest approach to have persuasive potential.[370] Overall, the mixed range of FJP opinions offer a mixed level of utility for future arguments.

Looking beyond the type of arguments, where the FJP might find its greatest utility is in its broader reach of jurisdictions and areas of law. Future FJP projects, including employment discrimination and health law, will be able to emphasize statutory and regulatory arguments rather than the constitutional arguments that were necessarily part of the Supreme Court collection.[371] Political science scholars have found that in less controversial areas[372] or those with clearer legal bases such as statutory language,[373] ideology will play less of a role in judicial decision-making. Moreover, the FJP plans to issue rewritten opinions in a number of fields governed by state law.[374] Although there are far fewer studies of state courts, their

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361 *E.g.*, Crawford Introduction, *supra* note 2, at 10.
362 *See supra* Part IV.
363 *See supra* Part III.
364 *E.g.*, Kahn, *supra* note 143, at 273.
365 *See supra* Part V (A).
366 *See supra* Part III.
367 *E.g.*, Bleich, *supra* note 302, at 66.
368 *See supra* Part V(C).
369 *Id.*
370 Bleich, *supra* note 302, at 66.
371 *Series Projects*, *supra* note 6.
372 *E.g.*, Isaac Unah & Ange-Marie Hancock, *U.S. Supreme Court Decision Making, Case Salience, and the Attitudinal Model*, 18 Law & Pol'y 295, 309-13 (2006).
373 *E.g.*, Jeb Barnes, Overruled?: Legislative Overrides, Pluralism and Contemporary Court-Congress Relations 80, 90-91 (2004).
374 *Series Projects*, *supra* note 6.

different political position suggests they might be less rigidly ideological.[375] Thus, the expansive reach of the FJP may hold the greatest promise for its ultimate effect on the law.

[375] *E.g.*, Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 Stan. L. Rev. 1629, 1656-58 (2010) (noting that state supreme courts are less politically isolated than the U.S. Supreme Court and are consequently less able to decide according to ideological preference and more likely to be affect by institutional concerns for legitimacy).

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Modernity, the Commons and Capitalism

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ABSTRACT

The modern way of life and reflected in modern political philosophy is directed by capitalist activity of both commodities and persons. Entities that do not have commodity value are worthless to the capitalist enterprise, regardless of any intrinsic value in themselves. Modernity is capitalist modernity. Modernity has given preference for objects/commodities over persons. This paper will argue for opening-up the landscape for alternative experiences to capitalism, as an attempt to move away from the capitalist enterprise. That is, be able to provide open space for people to use other than the buying and selling of commodities---where the commodification process breaks down and opens-up spaces for alternative experiences besides the capitalist experience. In other words, this work will attempt to serve as critique of Enlightenment philosophical discourse---that is, serve as a critique of the Age of Enlightenment serving as the foundational head of modernism---a plea for the rebellion against the quantification and mathematization of reality under modernist and industrial societies. It will use the modern landscape as the first effort to break free from the capitalist enterprise.

KEYWORDS

Modernity; Enlightenment Philosophical Discourse; Commons Revised and Revisited; Land Use Policy Management; Rationalization of Space-Time under the Corporatist/Capitalist World

CONTENTS

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I. Origins

One ancient mode, or should I say primitive mode of shelter, was to use the trees as the home space. Upon reaching the ground floor and starting to walk on twos, the human animal began to seek other modes of shelter such as caves and other natural barriers or enclaves that served as good sources for home-making and the protection from the elements or other natural dangers that the human animal faced in the primitive world.[1] With the dawn of modern civilization, with the coming of the Agricultural Age, agricultural communities started to put down more robust and artificial settlements, as opposed to the use of caves, in taking charge of the landscape. Agricultural society found it useful to erect long lasting fixed houses, and also serving as the anchoring the human animal down to a fixed landscape, as opposed to the previous phase of humanity, the Hunter-Gatherer stage, where the human animal roamed large and great distances in pursuit of the necessities of life.

Let us start from the beginning, beyond our primitivism stage of existence, the laying of the foundation of the modern age---the Enlightenment and the arrival of Industrialization---unanchored the human animal in the pursuit of capital and investments wherever they existed. In other words, the human animal was set free from its anchorage to the land. And, so, capital replaced land as the key ingredient in modernist times. This new age also brought in a new political and social world, just as steep as the primitive ages in jumping from a Hunter-Gatherer stage to the Agricultural Age. What has become clear, over the last few centuries, is the realization that the human animal is not tamable and in fact a very deadly animal. Liberalism, conservatism, socialism, existentialism, fascism and other major political philosophies miss one thing: that our species is a deadly animal---a blood-soaked animal, even among the most generous reading of history. We, as a species, were bred long before we fell off the trees, walked on twos, etc. upon the milk of violence and bloodshed. Why? We can blame "Nature." It layered on top of a lizard brain (a reptilian brain), an ape (mammalian) brain. Primates containing within their evolutionary history the amphibian and the reptilian structures of previous ions of biological and evolutionary development---'nature' not discarding previous structures completely but modifying them for further use. That is, previous ions of biological development, before the mammal makes an appearance on planet earth, nature was busy developing the process and modifications in the survival of biological entities on planet earth. Nature (the evolutionary process) used the patterns of previous species in layering on mammalian/primate brain on top of amphibian/reptilian brain. This mix of different species contained, in our species' brain structure, has bred our species, sort to speak, for violence and bloodshed.

An aggressive posture, with regard, to using other animals as food, even though our species evolved from pre-humanoid tree animals that took most of its supplies from leafy greens and fruit to becoming an omnivore. Even though the human animal is neither a pure vegetarian or carnivore animal, it can use either food supply to get its required calories per day---had our species been a pure carnivore, slaughter would probably would have been much more ingrained in our genes; the

[1] Cyril Aydon, A Brief History of Mankind: 150,000 Years of Human History (2009) (2007); Hannah Holmes, A Natural History of Our Lives (Atlantic Books, 2010) (2008).

contemplation, of the human animal as a pure carnivore, is too frightful to fathom--which, of course, would translate into greater bloodshed. Omnivore animals are less deadly and dangerous than carnivore animals.[2] Also, the human animal, like all mammals, is a territorial animal and prepared to defend its territory to the death from invaders.[3]

How does the modern human animal allocate space under industrial and post-industrial societies? We know the history of agricultural societies and the methods they used in the allocation of land. They worked the land and lived off the land. What is clear is that, with the rise of capital and technological development, land has become a second-class citizen to the rising tide of capital formation and capital accumulation. The Common Law began to accommodate the needs of industry and business during the early part of the 19th century. According to the eminent legal historian, Morton J. Horwitz: "[M]ill acts adopted in a large number of states and territories on the model of the Massachusetts law were, more than any legal measure, crucial in dethroning landed property from the supreme position it had occupied in the eighteenth century world view, and ultimately, in transforming real estate into just another cash-valued commodity."[4]

As the Common Law was being transformed, in the United States to accommodate business and industry, the Enclosure movement[5] in England was approaching its final solution in enclosing common land for private use. It was of some concern as to how those that depended on use of the Commons to graze their animals, collect wood to heat their homes, etc. as to how they can continue to exist on the land? The usual refrain was that they can be packed into cities with the hope of landing an industrial job. But at the same time people caught in the industrialization process, under capitalist conditions, also need alternatives to take back a dimension of control of-themselves and for-themselves from the ordering of the capitalist process, and make sure that the landscape is utilized for the benefit of the whole community rather than monopolized under a few privileged hands. Since people cannot return to the land, as before the capitalist/industrial transformation of the economy, it should not also mean that they are completely helpless and enslaved within the capitalist system of boom and bust cycles.[6]

II. The Commons Revised and Revisited

How is the word 'Commons' being used here? The idea of the Commons has a long history. The Commons harkens back to medieval English history. It refers to a manor and its commons as a way of life for the English for well over a thousand years before the rise of capitalism and the acceleration of the Enclosure movement and finally its extinction by the mid-19th century. We are defining a Commons, as a piece of property surrounding a manor or a point of centrality for any given

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2 Desmond Morris, The Naked Ape: A Zoologist's Study of the Human Animal (1967).

3 Holmes, *supra* note 1, at 126-56.

4 Morton J. Horowitz, The Transformation of American Law, 1780-1860 48 (1977).

5 J. A. Yelling, Common Field and Enclosure in England, 1450-1850 (1977).

6 Joseph E. Stiglitz, The Roaring Nineties 3-28 (2003); Naomi Klein, Shock Doctrine: The Rise of Disaster Capitalism (2007).

community, that can be used by the locals for their own purposes and ends. That is, in demarcating a modern Commons, or the bringing- back of a Commons model, based on medieval English traditions, would require certain modifications, in-light of the eclipsing of the Agricultural age, by the Industrial age. A modern definition of a Commons can simple be of any central point, in given communities, that leaves surrounding area open for use by the commoners, or put more modernly, the people of those communities. The Commons is a piece of property that is open to all in the community for their use. It is not public property, in the sense that it is open for the whole world to use but restricted for the use and benefit of the locals living in that community. However, the modern Commons, instead of the Commons surrounding the Manor House, as in ancient times, the modern Commons surrounds the City Hall or Town Hall or Central House, so designated as ideal for establishing the Commons, and such central entity will govern, support, and execute the will of the community to have and establish their particular type of Commons. A much broader definition of the Commons also includes what is referred to as Common-Pool[7] resources.

> The commons is the cultural and natural resources accessible to all members of a society, including natural materials such as air, water, and a habitable earth. These resources are held in common, not owned privately. Commons can also be understood as natural resources that groups of people (communities, user groups) manage for individual and collective benefit. Characteristically, this involves a variety of informal norms and values (social practice) employed for a governance mechanism. Commons can be also defined as a social practice of governing a resource not by state or market but by a community of users that self-governs the resource through institutions that it creates.[8]

Under modern scientific analysis for setting up a Commons, it would be illogical, unproductive, and inefficient to operate because fewer people controlling the land can yield better results and better profits for the few hands that control the land. So, why involve the many in the community to dabble on communal land when they can be used elsewhere in the system? Whether it is land-use management for best output per acre of land or the management of Common-Pool resources, the long knives are out, as to who sets the policy in such matters? Is it the democratically elected leaders of a given community or the elites and property owners? In the case of Common-Pool resource management, is it the responsibility of the Federal government and Global States to take leadership in the setting of use policy or the Large Corporations and other Industrial interests in an age of globalization? Much

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7 Modern Common-Pool resources encompasses a very wide range of issues beyond the scope of this article such as Environmental issues which deal with a much larger chunk of the modern economy than land-use issues. Nevertheless, learning to deal with Common-Pool resources becomes essential for cooperative efforts to reduce the impact of the human animal on planet earth and its natural resources.

8 Soutrik Basu, Joost Jongerden & Guido Ruivenkamp, *Development of the Drought Tolerant Variety Sahbhagi Dhan: Exploring the Concepts Commons and Community Building*, 11(1) Int'l. J. Commons 144 (2017); Elinor Ostrom, Governing the Commons; The Evolution of Institution for Collective Action (1990).

ink has been spilt as to the feasibility of establishing such Common-Pool entities.[9] That is, modern scholars and theorists have spent a great deal of time and energy debating and fighting over the feasibility, desirability, or efficiency of Common-Pool resources to accomplish ends best left to private hands and private markets. These theorists point to many problems and paradoxes that emerge once Common-Pool resources become available for distribution.[10] And suggest that efficiency principles do away with these feudal and unnecessary byways in the modern age. Modern economic theory suggests that the privatization process will yield the best result, much superior result over Common-Pool issues, than spreading out the process to communities controlling their environment. To some degree they may be right, but control of one's environment (air, water, land) are communal entities that cannot be privatized without leaving the many to suffer the contamination of their environment under the efficient control of the few for their interests.

In the case of Land-Use matters, involving the setting up a Commons, market economists would be horrified at such a messy prospect. According to capitalists, these communal paradoxes can disappear and be vanquished by introducing the principles of private property ownership of land. Private property can better accomplish a clean-up of environment and contamination issues by markets. The point of efficiency is one thing, the point of sharing communal property effectively is another. To prevent anarchy in dealing with Commons or Common Pool Resource problems requires a strong central authority, granted by the commoners, in the monitoring and enforcement of rules, for usage of common land. The centrality of the matter is ground zero, local centrality, rather than national centrality, since those closest to the ground are the most knowledgeable as to how best to deal with the Commons. By mathematization and strict scientific analysis is not the best way to deal with Commons issues but by those with hands-on-the-ground, in midst of the ebb and flow of communities, that rise and fall over time and require the workings and justice systems of the commons work and re-worked to make the necessary adjustments, as the flow of life is not stationary but dynamic and must be continuously adjust with proper and fair solutions as demanded on the ground. It is an issue of dynamic phenomenology.[11]

During the early history of the United States, the unbounded frontier[12] rendered the Commons as unnecessary due to the abundance of cheap land. In the United States, the idea of a Commons was not embraced as was the case with England. Hence, America never developed a legal system[13] that duly respected the rights to a Commons. Although the American Constitution does not give absolute rights to property owners, it gives them sufficient rights and minimal obligations with regard to property ownership.[14]

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9 Elinor Ostrom, The Drama of the Commons (Thomas Dietz et al. eds., 2002).

10 Garret Hardin, *The Tragedy of the Commons*, 162 Sci.1243 (1968).

11 Edmund Husserl, The Crisis of European Sciences and Transcendental Phenomenology: An Introduction of Phenomenological Philosophy (David Carr trans., 1970) (1936); Michael Ermarth, Wilhelm Dilthey: The Critique of Historical Reason (1981 paperback ed.)(1978).

12 Frederick Jackson Turner, The Frontier in American History (2006).

13 Horowitz, *supra* note 4, at 31-62.

14 U.S. Const. amend. V.

In the United States, land use was primarily left to the States and Local governmental entities to deal with, mostly local governments. And this is the proper process, that land use be dealt with primarily by the locals, but that does not absolve the Federal & State governments of not providing any resources or assistance to the local communities to better monitor, enforce, distribute, and resolve local land use matters. That is, local governments do not have adequate resources to properly and fairly deal with land use issues. Should Commons property start popping up around communities all over the United States, it will require all hands onboard—Federal, State, and Local—to make the new system work. Of course, this becomes essential, especially the role of the Federal government, in taking the lead in matters involving and dealing with wide scale Common-Pool issues such as the environment, oceans, and climate change.

The early days of America and up to the close of the 19th century, America had abundant land for the taking. The major issue was the development of that land. The unbounded frontier of America provided the space to make the obligations of property holders as minimal as possible, since any serious obligations could provoke them to pick up stakes and move elsewhere. But since the frontier has long been closed, there needs to be tighter regulations of land use and the need for national policies, giving lawmakers stronger tools to police the landscape and public domain space from the encroachment of private property.

Land use management has basically fallen to private hands, essentially the most powerful interests. Currently, the public property/public space has been rendered as second class property under capitalism via the growth of the corporation. With minimal restrains by the public sector over the corporate interests, due to the influence exerted by Big Business in the USA and under the political and philosophical dogma that free markets, individualism and private property ownership is the gold standard of life, public interests have become subservient to private interests. Although the use of anti-trust legislation exists, it is weak and not strong enough to curb or contain the corporate structure.[15] This has led to the disparagement of public property because the growth and size of corporations becomes unlimited as the growth and size of government becomes limited. "[T]he United States has long-standing and powerful institutions, but they have been subject to political decay. Government institutions that are supposed to serve public purposes have been captured by powerful private interests, such that democratic majorities have a difficult time asserting their control."[16] So, that all those people, who lack private property are cast as second-class citizens to those that own private property in the capitalist system.[17] The need of a Commons essentially becomes the life-blood of all those disposed by private interests. And Land Use becomes the tool for people to take control of their local political, economic, and social destiny unless they want to serve as the leftovers or final remains of the private interests and ebb and flow of market economics.

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15 George E. Garvey & Gerald J. Garvey, Law and Economic Growth: Antitrust, Regulation and the American Growth System (ann. ed. 1990); Edwin Mansfield, Monopoly Power and Economic Performance: Problems of the Modern Economy (4th ed. 1978); John E. Kwoka, Jr. & Laurence J. White, The Antitrust Revolution: The Role of Economics (2d ed. 1994).

16 Francis Fukuyama, Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy 7 (2014).

17 Howard Zinn, A People's History of the United States, 1492- Present (1995) (1980).

As indicated earlier, the problems and paradoxes of the Commons is not a science problem[18] but a social and humanitarian problem.[19] The ideology and philosophy of transforming social and humanistic issues into science issues has been to neutralize, sterilize, and de-vitalize the problems. The methodology of science is positivistic[20] and can work in many natural process and domains of inquiry. However, the procedures of science are not the appropriate tools in the study of human interactions---the dynamics of the everyday. The problem of the Commons cannot be studied in the laboratory, but by trial and error over countless situational moments that work for a given arrangement or timeframe but then become dynamic and liquid as interactions between people become fluid. It has more to do with a phenomenology of the moment in day to day fluid dynamics that renders the external observer nugatory as the parties or communities come to an understanding of their own situation and their own times. The rationalization process and scientific endeavor of the Enlightenment and positivistic enterprise is not the be all and end all marker of human understanding and knowledge.

The concept of the Commons and community have suffered under capitalism if not eliminated altogether. If the concept of public space is to be well regarded, from its low regard in American history, it is imperative that public institutions be respected and strengthened to serve as a "countervailing" force to privateers and profiteers such as the modern corporations. John Kenneth Galbraith has made the case, in his 1952 book, American Capitalism, that a capitalist system, left unchecked by countervailing forces, will tend towards the monopolization of resources.[21] However, Derber points out the countervailing power is not always generated by existing ruling power.

> Countervailing power, as Galbraith describes, is power exercised by unions, governments, consumers, suppliers, and competitors to keep corporations in check. Galbraith painted the Gilded Age as an era of tragically weak countervailing power, and his analysis offers the tools to recognize today's unnerving parallels. The flaw in his argument comes in his faith that great power inevitably creates great countervailing power---a tenant at odds with Lord Acton's famous view that absolute power creates absolute corruption, and one that blinded him and other great mid-century liberals to key parts of the American story.[22]

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18 Garrett Hardin, *The Tragedy of the Commons*, 162 Sci. 1243-48 (1968); Ronald Coase, *The Problem of Social Cost*, 3 J.L. Econ. 1-44 (1960); Russell Hardin, Collective Action (1982); Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups (1965); Ostrom, *supra* note 9.

19 Husserl, *supra* note 11; Ermarth, *supra* note 11

20 A. J. Ayer, Language, Truth, and Logic (Penguin Books 2001) (1936); Friedrich Stadler, The Vienna Circle: Studies in the Origins, Development,and Influence of Logical Empiricism (2015). Auguste Comte, Introduction to Positive Philosophy (Frederick Ferre trans., 1988).

21 John Kenneth Galbraith, American Capitalism: The Concept of Countervailing Power (2012) (1952); John Kenneth Galbraith, The New Industrial State (3d rev. ed., 1978); Immanuel Wallerstein, After Liberalism (1995); Alan Trachtenberg, The Incorporation of America (25th ann. ed. 2007).

22 Charles Derber, Corporation Nation 31 (1998).

Capitalist conditions under corporate rule help concentrate power in specific locations and points of leverage, such as banking, to control the distribution, not only of capital, but the labor power and community resources available to the locals. Land, that once served as a leverage point, has become secondary to the monopolization of the economy by giant corporations. So, local communities cannot take charge of their localities and metropolitan regions, if the local/state authorities are paired up with corporations that dictate what land uses are permissible and what will interfere with the function of modern business transactions and corporate rule. That is, the latitude and broadness granted to the locals to construct and run their Commons and communities depends on a strong government to keep Big Businesses at bay. Otherwise, the fusion of Big Business and the government cut the interests of the locals for self-determination and expression in having something as the dirt under their feet to stand on.

The modern Commons must be able to determine: Whatever is grown on the Commons/or taken off the Commons is for one's own benefit or the local community, but not for national or international sale. What is grown/or taken from the Commons is for local benefit only.

1) Commons property is not private nor public property. Should one want to make use of the Commons, then so be it. Since the Commons is not private property, one cannot reserve the property or keep the property upon leaving the community. In other words, Commons property does not travel with the user.
2) The Commons is open space for the community, and under governmental assistance and monitoring for fairness, in its distribution and uses becomes essential for preventing anarchy on the Commons. Liberal[23] theories of justice and fairness such as those modeled on the locality principles of Elster[24] working under conditions of scarcity or the rationality principles of Rawls[25] may be rich in theory but poor in practice. Communitarian principles are better suited for the cooperative control of the Commons than theories of liberty, individuality, and market power.
3) The addition, revision, re-positioning of the Commons, as was the case in traditional land use matters, also needs re-imagining under Industrial and Post-Industrial societies where land use is simple unavailable for the locals, but the locals are nevertheless free to designate other entities as Commons in the sense of providing them the traditional rewards of feeding their livestock or gathering fire wood to heat their homes off the Commons in the old days---sort of modern day equivalents to traditional Commons that can be used for the re-training and re-tooling of the community members to best cope with modernist conditions brought about by unfettered capitalism.

By overcoming the commodification process, in the turning over of commodities, in keeping labor employed and tied to its sustainability levels, there needs to be a

[23] Richard E. Flathman, Toward a Liberalism (1989).
[24] Jon Elster, Local Justice: How Institutions Allocate Scarce Goods and Necessary Burdens (1992).
[25] John Rawls, A Theory of Justice (rev. ed. 1999) (1971).

re-evaluation of values that reverses the current capitalist process of production. This reversal of values will produce commodities not simply to sustain life but to enhance life. That is, the human animal cannot afford to invest its time and space (conventionally measured) to the production of commodities while in the process devaluing that animal. The commodity in capitalist system is raised to a God while the human animal remains mortal. As indicated above, the commodity takes up space and time for its production, and consequently, is/exists in time and space---nothing is instantaneous in the production realm. The human animal also takes up space/time conventionally understood, but also lives an existence of its thrownness-in-the-world which is not the physicist's time but within a conceptual existence of its own making.[26]

Liberalism in the United States has come to mean the right to buy stuff, regardless of environmental damage because the whole economy depends on making and selling stuff.[27] The making and selling of stuff as the precondition and condition for capitalism leads to large swaths of the human animal engaged in these enterprises---that is, one's life depends on engaging in these activities. The re-establishment of a Commons becomes, in some small way, an alternative way of life free from this capitalist way of life and enterprise. The less stuff made, the less stuff circulates which means the more people become unemployed or remain unemployed.[28]

How has it come about that America is enslaved in the factory system of production psychology? And the factory system mentality pervades (even though manufacturing jobs have left the USA in droves); maybe, it is because such a system raised the United States from a reginal power to a world power; in that it first gave Americans domination over North America and later domination of the globe. [29] It nevertheless dominates the landscape and American psyche, as one looks all around the country seeing the dying, closed, or rotting square and rectangular building wasting away under the elements. What is it about this country, the USA, which believes order, efficiency, and money are the tickets to a better economy, more goods and services, better production and distribution that lead to a better society in general? It seemed during the 1990s that technology was going to be our savior, as manufacturing jobs disappeared. It was thought technology would step up, to take the unemployed off the streets, as the production line took the workers off the streets and turned them into efficient cogs in the production cycle at an earlier time

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[26] Martin Heidegger, Being and Time (John Macquarrie & Edward Robinson trans., 1962) (1927); Husserl, *supra* note 11; Existential and phenomenological philosophies that situate the human animal in-the-world with at-hand tools in the making and unmaking its environment---not only the current human made environmental-existential crisis with regard to climate change and planet contamination but an existential crisis of the human animal thrown-into-the-world (nature) and asked to live and become a commodity for use and disposal like a plastic bag; in other words a plastic world with plastic people at the ready for disposal.

[27] Olivier Zunz, Making America Corporate, 1870-920 (1990).

[28] Robert McChesney & John Nichols, People Get Ready: The Fight Against a Jobless Economy and a Citizenless Democracy (2016); Alec Ross, The Industries of the Future (2016).

[29] Joshua B. Freeman, American Empire: The Rise of a Global Power, the Democratic Revolution at Home, 1945-2000 (2012).

in America.[30] It has come to equate work with life itself. In other words, work is not a means to a good life but life itself. Of course, under conditions of scarcity it is easy to believe that a piece bread, fresh water, a piece of meat or other edible foodstuff can be equated with life itself. That is, one cannot have life itself unless people can have food, water, and shelter. But a minimal life is not a full life.

III. The Commons and Green Space

One such alternative to capitalist production is to nurture the Commons (and other green spaces) and to grant people rights to the land for their immediate use. An earlier generation of Americans, the Progressives and Populists, at the close of the 19th and early 20th centuries, attempted to wrest control from Big Business interests with some success.[31] That is, this early generation of workers and farmers were beginning to see the difference between themselves and the corporate interests and bravely fought back, although ultimately they were defeated by the capitalists. What eventually became clear is that whole communities could be wiped out, washed away, or erased away with every boom and bust of the capitalist cycle.[32] The drawing from the Commons the material and use of land as needed becomes an alternative way of being/existence to the capitalist universe, and also allow for the rise of communities that are not completely dependent on the business cycle. The hope being that the human animal can fall back to the land during bust cycles and does not need to roam large distances (as was the case in pre-civilized times), during the Hunter and Gatherer stage. The moving and dislocation of Americans, in search of work or due to the loss of work in the pursuit of jobs, has become a way of life under modernist conditions. And by focusing on localities attempt to feed workers from locally grown food supplies and thereby cut down the further contamination of the environment, with lessening the transportation of food from

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30 Joseph E. Stiglitz, The Roaring Nineties: A New History of the World's Most Prosperous Decade (2003); *See also,* John Milton Cooper, Pivotal Decades: The United States 1900-1920 132-45 (2003).

31 Charles Derber, Regime Change Begins at Home: Freeing America from Corporate Rule 29-30 (2004):

> Despite its awesome power, this first corporate regime forced a radical challenge by the Populists, fiery farmers and plain-spoken people from the heartland who created the People's Party in 1892, captured the Democratic Party in 1896, and launched one of the country's most politics of regime change. They proclaimed in 1892 that corporations were being used "enslave and impoverish the people. Corporate feudality has taken the place of chattel slavery." While the Populists melted away with the 1896 presidential defeat of their candidate, William Jennings Bryan, they helped give rise to the reform movement of the Progressive Era under the "trust-buster," President Theodore Roosevelt. In 1907, Roosevelt called for "the effective and thorough-going supervision by the National Government of all the operations of the big interstate business concerns," a direct challenge to the "free market" regime discourse of the robber barons.

32 Thomas Piketty, Capital in the Twenty-First Century (2013); Naomi Klein, Shock Doctrine: The Rise of Disaster Capitalism; Norman Birnbaum, The Crisis of Industrial Society (Oxford, UK: Oxford University Press, 1970) (1969).

long distances and save spoilage costs and the need to pump food with preservatives that are coming from far-away places.

To take the human animal into an artificial world is to remove that animal from its natural settings and primitivism that it has existed since the dawn of civilization. Once again, the animal becomes free to gather the resources it needs for survival from the land, in the location of its existence, rather than roaming the land as in Hunter-Gatherer times. It looks like capitalism has brought forth a new Hunter-Gatherer age by sending the worker to roam the globe to find, produce, and utilize capital in the most efficient manner possible. Although establishing a Commons, in and of itself, is insufficient to provide the human animal complete safety and control over the boom and bust cycles of capitalism, it at least takes the first step in the integration of that animal to its community. Most likely a modern Commons, in the utilization of land, will only go so far and no further in meeting all the needs of modern human in the Industrial Age. That is, whether a Commons is used as a garden, re-training centers, retooling and repurposing skills centers, such as job re-training centers, is a determination for the locals to decide how best to setup and run their Commons. During the medieval times sheep grazing and wood collection might make a good use of the Commons, but during modern times, skill and re-tooling one's skills, may make better sense. The capitalist cycle uproots the workers from their localities, so that their labor power can be used wherever the systems needs them. The urban and suburban geographical spaces along with demographic shifts ebb and flow with each capitalist boom and bust cycle.[33] Making and remaking population shifts in the pursuit of urban or suburban spaces that will best satisfy their needs in the modern metropolis centers. There is no anchorage to the American way of life outside the plasticity of the now or the nowness society. In short, the American community is a plastic community---just as disposable as a plastic bag after a single use.[34]

The return of the Commons (the attempt to bring back the Commons) is one small step towards returning the animal to the garden. Once again as a reminder of its biological connection with its primitive aspects and as a functional alternative to the mathematization and commodification of space and time.[35] Under capitalist conditions, the most important things are things of production. In the emerging Green-space world, the emphasis needs to be allowing the human animal back to an uncontaminated garden, that is environmentally fit for nurturing the community and thereby the individual and makes communion with the soil and earth alternative realities to the producing world for sale or the production and commodification of the world in the Industrial and Post-Industrial Age. The re-shifting of industrial policy towards workable communities rather than industrial pits of production could go a long way in beginning the process of creating living spaces.[36] Even though the

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33 Bruce Katz & Robert E. Long, Redefining Urban and Suburban America: Evidence from Census 2000, Vols. 1, 2 & 3 (2003, 2005, 2006).

34 Charles Derber, Corporation Nation (1998); Maurice R. Stein, The Eclipse of Community: An Interpretation of American Studies (1960 (exp. ed. 1972) (1960); Raymond Jackson Wilson, In Quest of Community: Social Philosophy in the United States 1860-920 (1968).

35 Alfred W. Crosby, The Measure of Reality: Quantification and Western Society, 1250-600 (1997).

36 Edward K. Spann, The New Metropolis: New York City, 1840-57 (1981); Chalmers Johnson, The Industrial Policy Debate (1984).

modernist industrial city, as directed by capitalism today, may be too centralized, concentrated, and disposable with every boom and bust cycle, the demanding of extracting natural resources from other weaker nations around the globe speaks of the selfishness of the powerful nations need to control the weaker countries via the exploitation of their natural resources, and hence the need to maintain formal or informal empires.[37]

It should not mean that cities of the future must be based on the factory model of production. And cities, like Detroit or other cities that have been depopulated due to the bust cycles of capitalism, are given a second chance of revival, by re-engineering themselves, by dedicating more open space/green space/environmentally friendly space for the greening of their cities and greater space availability for the Commons.[38] Of course, people re-tooling themselves to live a full life in communities that value them should be the goal rather than functioning as production tools for Big Business. But there should be no limit to the imagination, as to what type of Commons communities ask for, as long as the Commons principles are not violated.

IV. Modernity and Land Use Policy Modifications

The problem of property acquisition, distribution, rationalization, and use is directly connected with the modern age via its connection to the Age of Reason/Age of Science, Enlightenment, and Post-Enlightenment[39] of property being an extension of the human self as it has been rationalized into the cultural and civilizational mode of existence. In other words, a given civilizational development sets the horizons as to what to expect (expectations) and how to react to property/land. In the case of the Agricultural Age, land ownership, use, and control are critical to the survival of the individual, family, and community that worked the land and fed off the land. The Age of Reason is the starting point of Modernism---the mathematization/quantification of reality (key to modernity).[40] "For Platonism, the real had a more or less perfect methexis in the ideal. This afforded ancient geometry possibilities of a primitive application to reality. [But] through Galileo's *mathematization of nature, nature itself* is idealized under the guidance of the new mathematics; nature itself becomes---to express it in a modern way---a mathematical manifold [*Mannigfaltigkeit*]."[41]

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37 Eric J. Hobsbawn, Industry and Empire: From 1750 to the Present (1990) (1968).

38 Maurice Dobb, Studies in the Development of Capitalism (1947); Talcott Parsons, The Structure of Social Action, 1 (1968) (1937).

39 Karl Polanyi, The Great Transformation: The Political and Economic Origins of Our Time (1957); Sigmund Freud, Civilization and Its Discontents (reprint ed.1989) (1930); Andre Groz, Critique of Economic Reason (1989); Edward A. Purcell, Jr., The Crisis of Democratic Theory: Scientific Naturalism & the Problem of Value (1973).

40 Husserl, *supra* note 11; Reinhard Bendix, Work and Authority in Industry: Ideologies of Management in the Course of Industrialization (1963) (1956); David Beetham, Max Weber and the Theory of Modern Politics (2d ed., 1985) (1974).

41 Husserl, *supra* note 11, at 23.

In other words, the accountancy of everything of value and the discounting of the environmental aspects to life such as air, water and land that can be contaminated at will because they cannot be privatized and put into the accounting books. It is assumed under capitalist conditions that everything can be parceled, chopped up and distributed to the highest bidder. Natural entities like the oceans, rivers, lakes, mountains, air, etc., unappropriated property that are used by the public are there for the taking or contamination simply as externalities of doing business.

Because under modern conditions, it is assumed that the human animal can be individualized and marked off or cut off from nature from which it came and become an appendage of the machine---just as in previous ages it was an appendage of the plough. Capitalism has not freed the human animal from the modern plough, just substituted modern forms of ploughs that the animal can be yoked to. If we know anything about the Age of Reason, it was an effort to expel religion, superstition, and mysticism from the day to day world, and replace the medieval world with common sense, science, mathematics, and the questioning of one's presuppositions before leaping off the ground.

Modern societies have transformed the natural landscape in pursuit of beliefs of efficiency and productivity in the use of the landscape, under a capitalist ideology. The prioritization of the use of the landscape for the commodification process has eclipsed other modes of non-capitalist Being. Prior ages had their own transformative belief of the landscape to meet the needs of those living at the time. Under capitalist ideology, the solution to human problems being the-to-at-hand animal[42] making efficient use of space and natural resources in the transformation of these resources for commodity distribution within a market system. This transformation goes along with the mathematization of space-time to accommodate this new distribution of resources to the masses. The measurement of all aspects of living and existence becomes the calling card for modern being. In other words, the human animal is under the clock from the second he/she is thrown into the world, to be managed, trained, and conditioned for the tasks that will earn him/her a living. Whether the idea of work is a modern concept arriving with the Industrial Revolution or something human animals engage in from time immemorial has been reviewed and examined.[43] It nevertheless has been rationalized and adapted by the modern world as the marker of productivity and life itself for billions of people around the globe.

The bottom line being that work along with technological assistance can assist human power to bring nature under our control and dominion. These technological developments also tie the human animal and relate that animal to artificially created spaces and environments---through the efficient use of technology, that create the space or bubble for in-space living. That is, human animals create artificial spaces along a given landscape. The impact of that artificial space may be minimal or can be rather an extensive overhaul to meet the real or artificial needs of those making the change to the landscape---by way of extreme example, think of the artificial conditions that must be created to put the human animal into space once it leaves its natural environment, earth. No

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42 Heidegger, *supra* note 26.

43 Groz, *supra* note 39.

animal can live on the landscape of the moon without drastic reconstructions and reconfigurations to simulate earth conditions. During earlier times, the human animal lacking in how-to knowledge and technological tools was only able to make minimal modifications to the landscape. Aliens landing at the site thousands of years later would not be able to see the remains or the footprints left behind by the human animal in primitive spaces using primitive tools. But with greater technological prowess, it becomes real and very dangerous that a life-blood animal, like a human, with limited use and control of rational thinking and actions can devastate the natural landscape in an instant. Of course, the underlying presumption, under the Age of Reason/Enlightenment Age, that human reason can do away with its primitive belief structures and come up with efficient strategies to maximize the good for all. Of course today, with a more nuanced view of the rational capabilities of natural animals, with a mixture of amphibian, reptilian, and mammalian brain structures, sits uneasily besides the beliefs of the Enlightenment generation of intellectuals.

Our solution to capitalism and the rationalization of land use will be: we can start by attempting to create de-rationalized landscape/land-space--- decommodification and de-glorification of markets and the transformation of living, from one of acquiring products and commodities, to one that is one (in unity) with the land that sustains us.[44] Land is not a product for use, a tool-at-hand, but a resource constituting a landscape horizon for the emerging life there, both human life and/or other animal life. All animals have a right to the land. There is no inherent right to private ownership of the land or earth itself. The land cannot be made for sale unless it has been improved, Locke.[45]

Those that have land ownership have a privilege to use the land from the State, but not the right to the ownership of the land itself. That is, the ultimate control of the land always rests with the State, but the State grants the owner certain rights and privileges to the land that has been improved upon by its legal owner.

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[44] Polanyi, *supra* note 39.

[45] John Locke, The Second Treatise of Government 18-30 (1980) (1690); ("Whether we consider natural *reason*, which tells us, that man once born, have a right to their preservation, and consequently to meat and drink, and such other things as nature affords for their subsistence: or *revelation*, which gives us an account of those grants made of the world to Adam, and to *Noah*, and his sons, it is very clear, that God, as king *David* says, Psal. cxv. 16. *has given the earth to the children of men*; given it to mankind in common.") *Id*. at 18; ("Though the earth, and all inferior creatures, be common to all men, yet every man has a *property* in his own *person*: this nobody has a right to but himself. The *labour* of his body, and the *work* of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his *labour*, and joined to it that is his own, and thereby makes it his *property*. It being by him removed from the common state nature hath placed it in, it has by his *labour* something annexed to it, that excludes the common right of other men: for this *labour* being unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others. *Id*. at 19) ("It is true, in *land* that is *common* in *England*, or any other country, where there is plenty of people under government, who have money and commerce, no one can inclose or appropriate any part, without the consent of all his fellow-commoners; because this left common by compact, i.e., by the law of the land, which is not to be violated. And though it be common, in respect of some men, it is not so to all mankind; but is the joint property of this country or this parish.). *Id*. at 22

However, the title owner to the land only holds provisional or conditional control, until the State has a need either to take the land from the private owner for public use via the takings clause or via eminent domain processes, as per the specification of the 5th Amendment to the U.S. Constitution.[46]

If human animals do not have capital resources to sustain themselves, then they should have recourse to return to the land itself. Since the land is a natural resource, all creatures can claim a space on it, be it humanoid or not. Should that landscape become privatized or monopolized, as is the case under modernist/capitalist conditions, then life under that landscape becomes a privilege of the owners. Land cannot be bought or sold like any other commodity. However, during early in the 19th century, Morton Horwitz, in his major work, *The Transformation of American Law 1780-1860*, tells us how land was being transformed into capital. "As a result, the mill acts adopted in a large number of states and territories on the model of Massachusetts law were, more than any other legal measure, crucial in dethroning landed property from its supreme position it had occupied in the eighteenth century world view, and ultimately, in transforming real estate into just another cash-valued commodity."[47]

According to modern Western political philosophy, the land is tied up with the sovereign or the sovereign has the power to decide how land is to be used and divided amongst the populace. However, if the land is foundational to life, then the sovereign,[48] having the power to control the land, has also the power of life and death over the creatures and animals that exist on the land. This philosophy of land ownership by the sovereign is not universal but derived from common law[49] at different historical points different theories prevailed as to who has ultimate control of the land. The tumultuous nature of the 20th century, turned upside down, work space, land-use space, and intellectual space, for the working classes, industrial classes and managerial classes across the board.[50]

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46 George Skouras, Takings Law and the Supreme Court: Judicial Oversight of the Regulatory State's Acquisition, Use, and Control of Private Property (2000 paperback ed.) (1998)); George Skouras, *On the Formation of the American Corporate State: The Fuller Supreme Court, 1888-1910* J. Juris. 37 (2011).

47 Morton J. Horwitz, The Transformation of American Law, 1780-1860 47-48 (1979).

48 Thomas Hobbes, Leviathan (Penguin Books, 1968 paperback ed.) (1651); so, the two British philosophers, (Hobbes and Locke) serving as foundational heads of the Enlightenment, along with the coming of the French Revolution and French intellectuals, were important sources in shaping the American Republic; of course local American intellectuals/politicians such as John Adams and Thomas Jefferson were susceptible to the ideas of reason.

49 Edward S. Corwin, The "Higher Law" Background of American Constitutional Law 26 (1955) (1928)("common law embodied right reason furnished from the fourteenth century its chief claim to be regarded as higher law…the right reason to which the maxims of higher law on the Continent were addressed was always the right reason invoked by Cicero, it was the right reason of all men. The right reason which lies at the basis of the common law, on the other hand, was from the beginning *judicial* right reason.").

50 Michael Harrington, The Accidental Century (1966) (1965); John Dunn, Democracy: A History (2005).

So, what is to be done?[51] To break free human labor and human life from the commodification process, to break the bonds that give the commodity super-status and human animal supporting status, in its making and unmaking, requires a transformation of the link between labor and commodity. One way to regain a measure of freedom from the commodification process is through the allocation of Commons land to every metropolitan area and city. There should not be any city of any size that does not have a traditional Commons where possible or a Virtual Commons to meet modern needs.

V. The Capitalist Culture and Theory of Justice

Now, if life is beyond the materiality of existence, it is not to say the obverse is true; that it must be spirituality that is the necessary element to living life. No, materiality is the condition of life but to appreciate life requires reflection, self-reflection and otherness-reflection, to fit into nature properly. Those that find spirit or mystery in nature should not be pushed aside in the name of materialism. The proper natural fit can only be obtained when each individual is thrown into a particular civilizational mold but starts to build themselves as experiential and cognitive beings during the course of their lives---not according to the dicta of the given, but the dicta of the possible within the restraints of the civilizational mold they find themselves in---that is, the civilization one is thrown into becomes the horizon the possible because no one can escape their civilization they are thrown into, that is to say one does not get to pick the times one is born into.[52]

What is the American way to materialism? Produce it and they will buy it; build it and they will come. The American creed, as it has developed over the span of the Industrial Revolution, and only found in embryonic form prior to the Civil War, is that materialism is the be-all and end-all of the American system and the American way of life. This belief in materialism is in a sense a throwback to more primitive conditions of life, in that the acquisition of land, property, and objects were the very fabric of life itself. One would have assumed that machines and robots would have eased the burdens of humans, and in supporting a civilization that transcended the more barbarous activities forced upon human animals for their existence on planet earth in earlier times and would have progressed to non-materialist development of self. Yes, there have been many preachers over the centuries advocated for the development of the spirit rather than materialist concerns. In a sense, all religions preach such a message, but none of the previous civilizations could offer alternatives to the barbarous conditions the human animal faced on earth---so it was basically an empty message if humanity could do nothing about its daily barbarous activity.

Of course, modern day tele-preachers, with their tele-churches have eroded any semblance to the early Calvinist Protestantism. But there is something in the Protestant spirit that, unlike other religions, frees the individual to master the world

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51 Elinor Ostrom, James Walker& Roy. Gardner, *Covenants With and Without the Sword: Self-Governance Is Possible*, 40 Am.Pol.Sci.Rev. 309-17 (1992).

52 Freud, *supra* note 39; Polanyi, *supra* note 44; Madam Sarup, An Introductory Guide to Post-Structuralism and Post-Modernism, (2d ed. 1993); Max Weber, Economy and Society: An Outline of Interpretive Sociology (Guenther Roth & Claus Wittich trans., 1978) (1922).

in the glory of God or as a manifestation of God's will on earth. Of course, this phenomenon of Calvinistic Protestantism was noticed early on by Max Weber.[53] But there is something of this Calvinistic Protestantism that preaches production for its own sake is good and to hold back production is a sin. So the original Protestantism although praised production did not simply advocate that production must destroy what was produced to keep up with the boom and bust cycles of capitalism---what Schumpeter referred to creative destruction of goods,[54] so that a new cycle of production can begin and not have idle hands---that is, idle hands are the devil's tools for mischief and moral decay.

The necessity for the quick destruction of products is the key to modern society renewing itself by the employment of what otherwise would be idle hands---the unemployed being thrown off the line if the production line ceased to move forward. The assembly line, in the making of and assembly of cheap goods, that could be used once and discarded as quickly as possible to help continue to feed the workers on the line. That is, in order to sustain and maintain the capitalist system of production, nature itself must be destroyed in order to produce enough commodities to keep the workers at their tasks and hence curb any from revolting or revolution.

Life for production, not life for living. Globalization and free trade are good for the capitalists but bad for the workers. It has become unfortunate that the trend for re-locating work to the cheapest places on the globe, now more than 150 years in the making, has not been able to be reversed or contained, to give the masses a better chance at life because it is justified and sold under principles of rationality, efficiency, modernity, and progress. It might be progress for the top 1% but a nightmare for the remaining 99%.[55]

What does this mean? The support of industry at the expense of family and community. The idea of bringing back the Commons can serve to open-up space to alternative experiences outside the commodification experience.

Liberals, like John Rawls, have the belief that fairness and justice can be restored under a veil of ignorance in the distribution of talent and resources. He belongs to the social contract tradition.[56] Rawls derives his social contract from liberal philosophy. It is a hopeful philosophy that posits rationality in a favorable light and that the power of rationality can overcome the power of instinct in the human animal. From the start we have a 'non-starter', what makes him believe that the human species is a "rational" animal? Aristotelian logic in not dispositive of this subject matter. Has he not read Freud[57] or other modern psychologists? Has he not read history that suggests the that human animal is knee deep in blood? What if our species is a non-rational and violent animal, roaming the planet, as it has for ages looking for food and shelter as it has from the days in has fallen off the trees?

Rawls must have been aware that there is no period in human history that has been able to escape battle, war, killings, bloodshed, etc. for any extended

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53 Max Weber, The Protestant Ethic and the Spirit of Capitalism (Peter Baehr & Gordon C. Wells trans., 2002) (1905).

54 Joseph A. Schumpeter, Capitalism, Socialism and Democracy (15th ed. 2008); Ernest Mandel, Late Capitalism 377-407 (Joris De Bres trans., 1978) (1972).

55 Ray Ginger, Age of Excess: American Life from the End of Reconstruction to World War I (1965); Klein, *supra* note 32.

56 John Rawls, A Theory of Justice (rev. ed. 1999) (1971).

57 Freud, *supra* note 39.

period of time, and such a bipedal animal would use all available weapons in its toolbox, at any historical time, to carry forward killing on a small scale or in mass. As I indicated at the start of this paper, I suppose we can blame 'Nature' for this disposition; if we can ask 'Nature' why it has infused the human animal with such a deadly aspect/nature: 'Nature', in your infinite wisdom, why did you bring forth a species like the human being via a method of layering neo-cortex on top of more primitive and earlier brain, on top the brain stem rather than start afresh in the construction of the human animal? I fear 'Nature' will respond with silence. The way evolution operates is not by discarding previous patterns that survived but building on them; if a fish or a reptile could prove resilient and survive, why not add additional brain on top of existing brain? The vertebrate pattern did no start afresh but built up from the invertebrate pattern of previous ions of development.

Clearly, Rawls starts from a utopian proposition. Equality and freedom are metaphysical concepts. No two animals are identical. So, no two animals can biologically be compared as identical, but only similar. Similarity is not identity. The only equality that can exists is a metaphysical equality or mathematical equality. The liberty Rawls speaks of is only historically contingent liberty and hence has no universality. Currently, in America the corporation rules,[58] and individualism is a concept of a bygone era in America, but political philosophy theorists and other social science theorists cling on to it as the key to the good life. Yet America is corporate run, not individualistically run.

VI. Conclusion

The major conclusion derived here is that open space must remain open within city, suburban, and rural settings. The control of space for market use has displaced animal living for the accommodation of transactional living---living from moment to moment in the ledgers of the transactional books. We see this most clearly when the capitalist boom and bust cycles throws workers into the streets without any recourse for them to fall back on alternative opportunities, since the capitalist enterprise has cut off land-use except for capitalistic activity.

Let us summarize what this article has attempted to do: it has attempted to claim the Commons from the profiteers for the people. It has found a historical point of entry into the Anglo-American tradition before it was eclipsed by capitalism. It has put forth the normative claim that ALL members of a given community have a stake in the Commons; this is not a privilege offered by the profiteers or the government but a natural right based on a person's existence, and their existence cannot be taken away from them either by the government sector or the profiteers; and the Commons automatically attaches upon the formation of any community. The capitalist distributional model is unjust and unfair to all those that cannot command commodities under modern capitalism. That is to say that, modern capitalist conditions benefit a small section of society or community and excludes vast amounts of people from its benefits because it is exclusively based on the privileging of property ownership as an entrance point to the community. It generates a non-personal existence based on the non-personal commodity

[58] Alan Trachtenberg, The Incorporation of America, (25th ann. ed. 2007) (1982).

transaction. This yields a poor harvest as to the quality and nature of life for the human animal. It does not elevate the human animal but tries to extract its labor power and time on planet earth in exchange for wages. It is destructive of communities as it is the broader society in general. There is currently nothing on the horizon that will eliminate capitalism. However, by taking small steps to providing alternative means of existence to capitalism, we are hopefully firing the first shots towards its ultimate modification and demise. If it cannot be done in one swoop, then by taking small bites sizes out of it, until the day comes that other ways of Being can come into existence, that is not based on the cash-nexus and alternatives to the capitalist ways of Being can be seen on the horizon.

The article attempted to open-up the landscape to alternative use of space to the capitalist/utilitarian uses and to offer a way of life or revive ways of life that have been destroyed by markets and capitalism. It is an effort to give an equal opportunity to dispossessed people; by checking capitalism to only a portion of the life-cycle demands of the individual and not the totality-of-human existence and Being; that there be reserved to Being a portion of existence that is non-commercial, non-marketable, or on the selling block of capitalism---that some physical space remain open and available for the locals rather than gobbled up by the turbines of capitalist industrialization. That is, that some natural resources and spaces be off-the-market, not for sale.

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The Living Constitution and the (Almost) Dead Contracts Clause

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ABSTRACT

Under pressure to adapt to changing circumstances, the contract clause, though expressed in absolute terms, may now be violated for almost any reason at all. The living Constitution, in short, has virtually killed what was once a key constitutional provision.

KEYWORDS

Living Constitution; Contract Clause; Balancing Test; Home Building Association v. Blaisdell; Sveen v. Melin

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> "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ." -- United States Constitution, article I, section 10.

"We live by symbols," said Holmes,[1] and so it is with the Constitution,[2] which has been likened to a fetish.[3] As Aristotle observed, "it is from metaphors that we can best get hold of fresh ideas."[4] They engage our imagination, highlighting similarities and pushing dissimilarities into the shadows. It is not surprising, then, that during ratification, the proposed Constitution was compared by its defenders to "the tree of life,"[5] "the federal chariot,"[6] and "the dazzling splendor of the sun."[7] But for about a century, from the days of the early republic when a supporter described the Constitution as "the best national machine that is now in existence"[8] till the late 19th century, the prevailing constitutional metaphor compared it to a "machine that would go of itself,"[9] suggesting rational, impersonal efficiency.[10] By this time, however, the machine began to be supplanted by the Darwinian notion[11] of a living organism.[12] For the Progressives, a dominant political force during this period, this meant, as Woodrow Wilson put it:

The Constitution cannot be regarded as a mere legal document, to be read as a will or contract would be. It must . . . be a vehicle of life. As the life of the nation changes so must the interpretation of the document which contains its change . . . by the exigencies and new aspects of life itself.[13]

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1 Oliver Wendell Holmes, Jr., The Collected Legal Papers 270 (Courier Corporation, 2012) (1920).

2 Edward S. Corwin, *The Constitution as Instrument and as Symbol*, 30 Am. Pol. Sci. Rev. 1071 (1936).

3 Max Lerner, *Constitution and Court as Symbols*, 46 Yale L. J. 1290, 1294-1305 (1937). Henry Monaghan observed that Americans tend to believe that everything in the Constitution is good and that everything good is in the Constitution, notwithstanding widespread ignorance as to what it actually contains. Henry Paul Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. Rev. 353 (1981).

4 Aristotle, Rhetoric bk. III, at 1410b (Jonathan Barnes ed., W. Rhys Roberts trans., Princeton Univ. Press 1984) (c. 350 B.C.E.).

5 1 Ratification of the Constitution by the States: Virginia 19 (John P. Kaminski et al. eds., 1988) [hereinafter RCS: Virginia 1].

6 2 Ratification of the Constitution by the States: Massachusetts 803 (John P. Kaminski et al. eds., 1998).

7 RCS: Virginia 1, *supra* note 5, at 177. Opponents preferred different labels: "a political monster of absurdity," 3 Ratification of the Constitution by the States: Virginia 1310 (John P. Kaminski et al. eds., 1993); "a deadly serpent," 1 Ratification of the Constitution by the States: Massachusetts 47 (John P. Kaminski et al. eds., 1997); "a Pandora's box," 1 Ratification of the Constitution by the States: New York 134 (John P. Kaminski et al. eds., 2003).

8 Jack Nips [John Leland], *The Yankee Spy*, *in* 2 American Political Writings during the Founding Era, 1760-1805, 971, 977 (Charles Shang Hyneman & Donald S. Lutz eds., 1983) (1794).

9 6 James Russell Lowell, Writings 207 (1892).

10 Giuseppa Saccaro-Battisti, *Changing Metaphors of Political Structures*, 44 J. Hist. Ideas 31, 34 (1983).

11 Herman G. Stelzner, *Analysis by Metaphor*, 51 Q. J. Speech 52 (1965).

12 Michael Kammen, A Machine that Would Go of Itself: The Constitution in American Culture, 17-20, 140-41, 177 (1986).

13 Woodrow Wilson, Constitutional Government in the United States 192 (1911).

But it was not the Progressives who accounted for the triumph of the organic metaphor, but rather, as John Compton has demonstrated, Protestant Evangelicals. In his telling, the Constitution began as a secular document dedicated to restraining government interference with commerce and property rights, but was impelled toward flexibility by the rising Evangelicals' relentless opposition to alcohol and gambling, which courts could not ignore. Older doctrines limiting the states' police power were revised, and once it was established that these powers could be used to combat vice, the gate was open to other, more prosaic claims.[14] Among those who took advantage of this development were the Progressives. Enchanted by the potential of technical experts utilizing the authority of government, they saw that organic language with its aura of the warm and the natural, could counter the cold remoteness of their plans.

The Constitution, it must be said, welcomed the metaphor, for many of its wordings, like the commerce clause, the take care clause, and the guarantee clause, are so cryptic as only to hint at their meanings. Even the apparently clear cut requirement that Presidents be at least age thirty-five has not seemed clear cut to everyone.[15] Thus the very vagueness of many of the Constitution's provisions, including many important provisions, may mimic invitations to judicial improvisation. Absent this improvisation, how is the Constitution to remain *au courant*, for the amending process is so cumbersome that if left alone, the nearly 240 year old document might become a beautiful anachronism, what John Marshall called a "splendid bauble."[16]

The result is a proliferation of *living* Constitution clichés. Holmes called provisions of the Constitution "organic, living institutions."[17] Cardozo thought "A Constitution has an organic life."[18] "The Constitution, we cannot recall too often, is an organism," wrote Frankfurter.[19] "We are construing a living Constitution," said Powell.[20] Beard declared that the "Constitution as practice is a living thing . . . . How could it be otherwise?"[21] Perhaps, the living Constitution's chief judicial expositor was Justice William Brennan. In his concurring opinion in *Abington Township School District v. Schempp* (1963), involving a Pennsylvania law requiring Bible reading in public schools, he declared: "Whatever Jefferson or Madison would have thought of Bible reading . . . in what few public schools existed in their day,"[22] must give way to imperatives generated by the circumstances found in today's nation of compulsory education and a proliferation of religious denominations. "The genius of the Constitution," Brennan said elsewhere, "rests . . . in the adaptability of its great principles."[23]

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14 John W. Compton, The Evangelical Origins of the Living Constitution (2014).

15 Mark Tushnet, *Principles, Politics, and Constitutional Law*, 88 Mich. L. Rev. 49, 51 n.9 (1989).

16 McCulloch v. Maryland, 17 U.S. 316, 421 (1819).

17 Gompers v. United States, 233 U.S. 604, 610 (1914).

18 Browne v. City of New York, 241 N.Y. 96, 111 (1925).

19 Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 518 (1952).

20 Rummel v. Estelle, 445 U.S. 263, 307 (1980).

21 Charles A. Beard, *The Living Constitution*, 185 Annals Am. Acad. Pol. & Soc. Sci. 29, 31 (1936).

22 Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 241 (1963).

23 William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. Tex. L. Rev. 433, 438 (1986). Similar statements are legion, *see, e.g.*,

The living Constitution may seem like simple common sense. However, recalling that common sense tells us that the world is flat, perhaps its endorsement is insufficient. Metaphors may be highly useful in illustrating points or clarifying explanations. But they involve using familiar words to mean something unfamiliar, and if cleverly used, may highjack the imagination, so that we notice only the targeted similarities and pass over the differences. The Constitution is a document, and thus obviously not *literally* living. Yet when the term is applied, we know what it means: that the Constitution will adapt to changing circumstances in society. Who can be against adaptation? The problem is that the passive voice disguises *who* does the adapting. If it is done by constitutional amendment, that is one thing. If it is done by a court, say, assuming a few years after Reconstruction that racial problems have basically been solved[24] or that the then current economy required liberty of contract,[25] it is quite something else. It is not simply that we disapprove of the results. We may also harbor reservations about the process, specifically, where unelected judges find the authority to undertake the adaption, overruling decisions taken by elected law makers. As Justice Gorsuch put it, "Our Founders deliberately chose a written constitution . . . because they wanted to fix certain things." Living Constitution advocates, he went on, believe "judges [should] make it up."[26] Metaphors may be helpful, but like everything else, they have their limits. Consider the tale of the contract clause.

The indispensability of contracts derives from a pair of persistent facts. First, we can rarely achieve our purposes solely by our own efforts. We need the assistance of other people. Second, in an uncertain future, we cannot rely simply on informal agreements, but require the authority of the state to enforce them. Absent contracts enforced by the state, transaction costs would zoom, resulting in inefficiencies of such magnitude that it would be difficult to see how any significant commitment could succeed. Given these facts, the practical significance of contracts is hard to exaggerate.

In recognition of this, the contract clause was regarded by a prominent Framer as "the soul of the Constitution."[27] The War for Independence had left widespread economic dislocation in its wake, and the fears generated by Shays' Rebellion of angry Massachusetts farmers were by no means gone.[28] A particular problem was farm debt, which the law often treated harshly, which induced legislatures to pass laws to ease the farmers' pain, which led creditors at the Constitutional Convention to seek protection against state mandated repudiation of debts or alteration of payment methods. There was also the conviction that state abrogation of contracts

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Weems v. United States, 217 U.S. 349, 373 (1910) (McKenna, J.); Robert H. Jackson, The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics 174 (1941).

24 Civil Rights Cases, 109 U.S. 3, 24-25 (1883).

25 Lochner v. New York, 198 U.S. 45 (1905).

26 Kyle Peterson, *The High Court's Rocky Mountain Originalist*, Wall St. J., Sept. 8, 2019, at A11.

27 Charles Pinckney, Speech on the Section Ten of Article One of the Federal Constitution, *in* 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 333 (Jonathan Elliot ed., 2d ed.. 1901).

28 Michael J.G. Cain & Keith L. Dougherty, *Suppressing Shays' Rebellion: Collective Action and Constitutional Design under the Articles of Confederation*, 11 J. Theoretical Pol. 233 (1999).

had driven up the cost of borrowing, especially from a Europe already suspicious about investing in the new nation. Finally, there was the ethical rule: lenders are entitled to rely on the mortgagors' promise to repay.

The Framers' concern was not simply that individual, presumably wealthy creditors would be harmed by official indifference to contractual obligations, but that commercial growth and stability, generally, would be seriously undermined, with perhaps far reaching economic, social, and political implications. John Marshall, writing forty years later, recalled that state abuses "had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith."[29] Certainly, fears about impairing contracts was among the main reasons delegates decided to replace the ineffectual Articles of Confederation with a new Constitution.[30] Even an anti-Federalist, James Winthrop ("Agrippa"), agreed that "It shall be left to every state to make and execute its own laws, except laws impairing contracts, which shall not be made at all."[31] Yet the impairment of contracts attracted little debate in Philadelphia (perhaps because of "a consensus that required no voice"[32]), and may well have been included in the Constitution as a result of the efforts of Gouverneur Morris, head of the convention's Committee of Style, whose open wording seemed to apply both to private and public contracts.[33]

The contract clause was tossed in the grab bag of restraints on the states that is article I, section 10. That old standby, The Federalist, ignored the clause, except where Madison declared that violations would be "contrary to the first principles of the social compact and to every piece of sound legislation,"[34] and Hamilton

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29 Ogden v. Saunders, 25 U.S. 213, 355 (1827).

30 James W. Ely, Jr., The Contract Clause: A Constitutional History 7-12 (2016). The Northwest Ordinance, the Articles' most prominent achievement, included a similar provision. *See* Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 Colum. L. Rev. 929 (1995); Matthew J. Festa, *Property and Republicanism in the Northwest Ordinance*, 45 Ariz. St. L. Rev. 409, 448-52 (2013).

31 The Complete Anti-Federalist 112 (Herbert J. Storing & Murray Dry eds., 1981).

32 Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 Wis. L. Rev. 1135, 1142.

33 William Michael Treanor, *Framer's Intent: Gouverneur Morris, the Committee of Style, and the Creation of the Federalist Constitution* (Georgetown Law Faculty Pubs. & Other Works, Working Paper No. 2163, 2019), https://ssrn.com/abstract=3383183. Morris thought that "property [was] the main object of society." 1 The Records of the Federal Convention of 1787, at 533 (Max Farrand ed., 1911).

34 The Federalist No. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961). Yet apparently no such principles barred the central government from impairing the obligations of contracts. Indeed, article I, section 8 expressly grants Congress the power to "establish a uniform rule . . . on the subject of bankruptcies throughout the United States," and this "includes the power to discharge the debtor from his contracts and liabilities. . .", Hanover Nat. Bank v. Moyses, 186 U.S. 181, 188 (1902) (Fuller, C.J.). A national bankruptcy policy, it was thought, would minimize the deleterious effect upon interstate commerce and comity among states. Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship between Individual Liberties and Constitutional Structure*, 76 Cal. L. Rev. 267, 286 (1988). Madison believed that "there is more danger of those [contract] powers being abused by the state governments than by the government of the United States," due to competing factions checking each other in the extended republic. 1 Annals of Cong. 458 (1789) (Joseph Gales ed., 1834).

feared that "Laws in violation of private contracts" might disrupt peaceful relations among the states.[35] It was assumed, as James Wilson pointed out, that "retrospective interferences only are to be prohibited."[36] Perhaps because of its murky history, not even early court decisions delve much into its roots.

Notwithstanding its problematic birth, the language of the provision is noteworthy for its categorical, absolute finality. There is no weasely modifier, like "unreasonable' in the Fourth Amendment or "excessive' in the Eighth. Indeed, other items in section 10 itself contain modifiers, when it bans states from laying imposts except when "*absolutely necessary* for executing its inspection laws" and from entering into agreements "with another state or with a foreign power, or engage in war, *unless actually invaded or in such imminent danger as will not admit of delay*" (emphasis added).

When placed against these deliberately vague terms, the unwavering nature of the contract clause is stunning. Intellectually, the basis for this may have been belief in a Lockean "natural right to the acquisition and use of property."[37] Thus, it is not surprising that important early cases interpreted it rigidly. In the 1790s, *Champion and Dickason v. Casey* (1792) saw a federal circuit court in Rhode Island rely on the clause to invalidate a state law that granted a three year delay in repaying debts to a prominent merchant, who had fallen onto hard times.[38] Moreover, Marshall was a forceful advocate for the clause. In *Fletcher v. Peck* (1810), upholding a corrupt state land grant rescinded by a Georgia constitutional amendment, he declared, "When . . . a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of that law cannot divest those rights."[39] In *New Jersey v. Wilson* (1811), he ruled against a state repeal of a tax exemption for Indians.[40] In *Sturges v. Crowninshield* (1819), he struck down a state bankruptcy law that discharged debtors from all liability, observing, "Any law which releases a part of this obligation must, in the literal sense of the word, impair it."[41] In *Green v. Biddle* (1823), he found an effort to change a land title conveyed to the national government by a state in violation of the clause. [42] And in *Dartmouth College v. Woodward* (1819), he wrote to uphold a college charter granted prior to independence by the English Crown against a legislative effort to replace it.[43]

Elbridge Gerry of Massachusetts sought to apply the clause to the national government as well, but could not even receive a second to his motion. 2 The Records of the Federal Convention of 1787, at 619 (Max Farrand ed., 1911).

35 The Federalist No. 7, at 65 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

36 1 The Collected Works of James Wilson 158 (Kermit l. Hall & Mark David Hall eds., 2007).

37 G. Edward White & Gerald Gunther, The Marshall Court and Cultural Change, 1815-1835, at 597 (1988). On Locke, *see* John Locke, The Second Treatise of Government 3-30 (John Wiedhofft Gough ed., 6th ed., 1956) (1690).

38 Patrick T. Conley, Jr., *The First Judicial Review of State Legislation: An Analysis of the Rhode Island Case of Champion and Dickason v. Casey*, 36 R. I. B. J. 5 (1987).

39 Fletcher v. Peck, 10 U.S. 87, 135-38 (1810).

40 New Jersey v. Wilson, 11 U.S. 164 (1811).

41 Sturges v. Crowninshield, 17 U.S. 122, 197 (1819).

42 Green v. Biddle, 21 U.S. 1 (1823).

43 Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518 (1819).

Under Marshall's successor, Roger B. Taney, the clause was the most used provision for striking down state legislation.[44] In *Bronson v. Kinzie* (1843), for example, it invalidated a pair of state laws that altered mortgage contracts, leaving them worthless,[45] and in *Planters Bank v. Sharp* (1848), Justice Woodbury ruled that if "an act of the legislature . . . impaired the obligation of any contract . . . the clause in the Constitution . . . expressly prohibiting a state from passing any such law has been violated."[46] After the Civil War, Justice Strong announced that "[t]here is no more important provision in the federal Constitution,"[47] Justice Miller thought it "one of the most beneficial provisions of the federal Constitution,"[48] Justice Shiras found that "No provision of the Constitution . . . has received more frequent consideration by this Court,"[49]and the renowned British legal anthropologist, Henry Maine, proclaimed that "there is no more important provision in the whole Constitution."[50] The contract clause, worded as a stiff club, was stiffly interpreted: states were not free retroactively to interfere with the substance of contracts.

By the late 19th century, the nation was being transformed by industrialization, urbanization, and immigration, and in response to these tectonic shifts, the nature and scope of government was also changing. Also, the use of the corporation as a legal device to organize economic activity became much more prevalent, as its advantages became much more evident. As states and localities pushed the limits of their police powers, increasingly they encountered corporate contract clause obstacles, and increasingly, courts began siding with governments. In *Stone v. Mis*sissippi (1879), the Court approved a state's revocation of a charter to conduct lotteries, observing that "the legislature cannot bargain away the police power of a state."[51] In *Manigault v. Springs* (1905), too, the Supreme Court said that "the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected."[52] In other words, the police powers are "paramount to any rights under contracts between individuals,"[53] which "was perilously close to saying that states could impair contractual obligations whenever they had a good reason."[54] Can a state ban lotteries, making the tickets lawfully sold worthless?[55] Can a state ban the sale

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44 David P. Currie, The Constitution in the Supreme Court: The First Hundred Years, 1789-1888, at 210-11 (1985).

45 Bronson v. Kinzie, 42 U.S. 311 (1843).

46 Planters' Bank v. Sharp, 47 U.S. 301, 318 (1848).

47 Murray v. Charleston, 96 U.S. 432, 448 (1877).

48 Washington Univ. v. Rouse, 75 U.S. 439, 442 (1869).

49 Barnitz v. Beverly, 163 U.S. 118, 121 (1896).

50 Henry Sumner Maine, Popular Government 248 (1885).

51 Stone v. Mississippi, 101 U.S. 814, 817 (1879).

52 Manigault v. Springs, 199 U.S. 473, 480 (1905).

53 *Id.* at 480-81.

54 David P. Currie, *The Constitution in the Supreme Court: The Protection of Economic Interests, 1889-1910*, 52 U. Chi. L. Rev. 324, 334-35 (1985). Ironically, in the same year, the Court announced a constitutional right to liberty of contract in *Lochner v. New York*, 198 U.S. 45 (1905). It had earlier spoken of the liberty in *Allgeyer v. Louisiana*, 165 U.S. 578, 589-91 (1897).

55 *Stone*, 101 U.S. at 817.

of beer, making existing lawful contracts invalid?[56] Yes and yes. As time passed, exceptions to the rigid text of the clause were added to accommodate workers' compensation[57] and railway rates,[58] and World War I saw an emergency excuse involving rent control that cancelled housing leases.[59] The Court reasoned that police powers constituted the most basic argument for government itself, "the preservation of the public health and the public morals, and the protection of public and private rights,"[60] and thus had to take precedence over the contracts clause.

The Court, in short, balanced the benefits from protecting contracts against the benefits of safeguarding the police powers, and the police powers usually won.[61] Unless the competing claims are of incontestably obvious different worth, however, balancing is less a test than a means for avoiding a test. The balancing metaphor has a wonderful pictorial clarity: we place different weights on a scale and determine the heavier simply by literally observing which side goes down. Legal balancing, however, is an entirely different exercise. Instead of dealing with weights of given pounds, judges subjectively assign imaginary weights to the competing arguments; instead of an impersonal force like gravity objectively answering the question as to which is "heavier," there is only the judge's hunch. Furthermore, the very act of balancing begs two questions. First, are the two highlighted claims the only claims worth considering. The contract clause, for example, promises benefits not only for creditors, but for society at large. Should courts, then, balance these two claims plus the state's claim? The task quickly becomes exceedingly complex. Second, balancing begs the question as to whether enforcing the ban against impairing contracts should depend upon its consequences, for the plain wording of the clause says nothing about this. Nonetheless, impelled by balancing tests, the conquest of the contract clause by the police powers seemed all but complete.

All earlier emergencies, save the Civil War, were put in the shade by the Great Depression, and it is here, in *Home Building Association v. Blaisdell* (1934), that the emergency excuse reappeared with a vengeance. The Minnesota Mortgage Moratorium Act, passed the previous year, redrew mortgage contracts in that state. If a property had been foreclosed, the mortgagor was given an extended period to make good on the loan and in the meanwhile, could remain in possession of the property, provided only that he pay market rent. It was obvious, as *Blaisdell* conceded,[62] that the state had impaired the obligation of contracts on a massive scale. The question was whether the emergency excused it.

Chief Justice Hughes, writing for a narrow 5-4 majority, thought it did. A veteran of over a quarter century in public life as governor, secretary of state, and presidential candidate, Hughes approached the issue with an "instrumentalist perception that government is a tool for social betterment [and that] government

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56 Bos. Beer Co. v. Massachusetts, 97 U.S. 25 (1878).

57 New York Cent. R. Co. v. White, 243 U.S. 188 (1917).

58 Portland Ry., Light & Power Co. v. R.R. Comm'n of Oregon, 229 U.S. 397 (1913).

59 Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921). *See also*, Robert M. Fogelson, The Great Rent Wars: New York, 1917-1929, at 229-54 (2013).

60 Stone v. Mississippi, 101 U.S. 814, 820 (1879).

61 *See, e.g.*, Union Dry Goods Co. v. Georgia Pub. Serv. Corp., 248 U.S. 372 (1919), private contracts; St. Louis Poster Advert. Co. v. City of St. Louis, 249 U.S. 269 (1919), public contracts.

62 Blaisdell v. Home Bldg. & Loan Ass'n, 189 Minn. 422, 424 (1933).

and law were the agencies of progress."[63] Public rights, for him, superseded private rights,[64] and as an associate justice years before, he had supported the states in contract disputes with utilities, railroads, and a manufacturer.[65] "Contracts," he believed, "must be made subject to the law, and not vice versa."[66]

Hughes begins his *Blaisdell* opinion with "Emergency does not create state power. Emergency does not increase granted power . . ."[67] and then, comparing the Depression to a "great public calamity such as fire, flood, or earthquake,"[68] concludes: "An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the state to protect the vital interests of the community."[69] Without the extension, the mortgage market would collapse, and as many states had enacted similar legislation, the national mortgage market would also be affected. "The economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding the interference with contracts."[70] In other words, "The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worthwhile – a government which retains adequate authority to secure the peace and good order of society."[71]

As for the Framers, Hughes, now an advocate of the living Constitution, simply rejects the notion that "what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time."[72] His point, as one pundit put

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63 *Governor on the Bench: Charles Evans Hughes as Associate Justice*, 89 Harv. L. Rev. 961, 963 (1976).

64 Charles Evans Hughes, Conditions of Progress in Democratic Government, 13, 20 (1910).

65 *See, e.g.*, N.Y. Elec. Lines Co. v. Empire City Subway Sys., 235 U.S. 179 (1914); Louisville & N.R.R. v. Garrett, 231 U.S. 298 (1913); Cumberland Glass Mfg. Co. v. DeWitt & Co., 237 U.S. 447 (1915).

66 *Governor on the Bench: Charles Evans Hughes as Associate Justice*, *supra* note 63, at 988. In striking down the National Industrial Recovery Act the following year, he wrote, "Extraordinary conditions do not create or enlarge constitutional power." Schecter v. United States, 294 U.S. 495, 528 (1935). This time, he meant it.

67 Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425 (1934). He was also prone to interpreting regulations in ways conducive to government activism. For example, in Jones Nat'l Bank v. Yates, 240 U.S. 541 (1916), involving an insolvent bank and fraud allegations against its chief officers, Hughes upheld the convictions on the basis of an interpretation of a regulation that neither party anticipated.

68 *Blaisdell*, *supra* note 67, at 439.

69 *Id.* at 444.

70 *Id.* at 437.

71 *Id.* at 435. Hughes concedes in a footnote that the Court a century earlier refused to accept the emergency excuse in Bronson v. Kinzie, 42 U.S. 311 (1843) and McCracken v. Hayward, 43 U.S. 608 (1844), but concludes that neither case "is directly applicable to the question now before us" because "there was no provision, as in the instant case, to secure the mortgagee the rental value of the property during the extended period" of redemption. *Id.* at 432.

72 *Blaisdell*, *supra* note 67, at 443. At the same time, he declared that "we find no warrant for the conclusion that . . . the founders of our government would have interpreted the clause differently had they had occasion to assume that responsibility in the conditions of the later day." Yet the economic depression following the peace treaty with Britain in 1783 was perhaps the most serious the nation faced until 1929, and the Framers plainly took it into account.

it, was that "the Constitution was made for a changing society, and consequently to be adapted to the needs thereof; and social changes since 1789 make the type of emergency with which the Minnesota statute deals a matter of public concern."[73] On the other hand, many of the Framers, Hughes knew, were men of property and unsympathetic with debtors' pleas. How to reconcile the claims of the Depression with the intentions of the Framers? Ignore the intentions of the Framers.

Hughes also maintains that the contractual obligation to *Blaisdell* was not truly impaired because interest continued to run, rent was paid, and the mortgage would be serviced.[74] In that sense, he would argue, the extension, far from impairing the contract, actually preserved it. Of course, this argument would be more persuasive with minor contractual alterations than with major ones, for a substantially modified contract really constitutes a new contract, in that important terms of the agreement have been unilaterally changed. Is it reasonable to expect legislatures to foreswear such major interference for all time, irrespective of changed circumstances? Hughes thought not.

However, as Justice Sutherland pointed out in his dissent, the point of the contract clause was to prevent exactly Minnesota's kind of policy response to emergencies. Where Hughes disregarded the Framers, Sutherland was impressed with their opposition to easy debtor relief; indeed, he noted that the Constitution was created in a time of economic hardship, when calls for debtor relief were widespread and insistent.[75] "If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned,"[76] he said. *Blaisdell* might not have anticipated the Depression, but the Framers certainly did. Sutherland's gratuitous prescription will strike many as heartless: "individual distress . . . should be alleviated only by industry and frugality, not by relaxation of law." But for him, the overriding fact was that the clause "forbids state action under any circumstances, if it have the effect of impairing the obligation of contracts."[77] The text was the beginning and end of the story.

Yet for Hughes, the half-acknowledged role of emergency echoed the contract law's traditional notion of duress. Obligations of a contract may be voided if the "manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative."[78] Or as Holmes phrased it, if the promisor is forced "to choose the lesser of two evils."[79] Though initially duress was

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73 Edward S. Corwin, *Moratorium Over Minnesota*, 82 U. Penn. L. Rev. 311, 312 (1934).

74 Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425 (1934).

75 *Id.* at 454-57.

76 *Id.* at 448. A critic conceded that, "so far as historical investigation is to be relied upon in such a matter he is unquestionably right." Corwin, *supra* note 73, at 312.

77 *Blaisdell*, *supra* note 74, at 473. Luther Martin had opposed including the clause in the Constitution because he thought it banned debtor relief by legislatures. 1 The Records of the Federal Convention of 1787, at 533 (Max Farrand ed., 1911) at 172, 214-15. Madison in Federalist 44 defended the clause as inspiring "a general prudence and industry, and giv[ing] a regular course to the business of society," and Marshall thought it "manifested a determination to shield [the people] and their property from the effects of those sudden and strong passions to which men are exposed." Fletcher v. Peck, 10 U.S. 87, 137-38 (1810).

78 Restatement (Second) of Contracts, § 175(1) (1981).

79 Union Pac. R. v. Pub. Svc. Com'n., 248 U.S. 67, 70 (1918).

conceived in extreme terms "involving loss of life, mayhem or imprisonment,"[80] today matters are much looser, taking into account the circumstances of the parties, though the emergency excuse "remains largely unused."[81] Did enforcing the existing Minnesota mortgage contracts, then, amount to abusively taking advantage of changed circumstances? No one suggested that the mortgage was an unreasonable bargain when entered into. Nor was it alleged that the mortgage terms were misrepresented or that the mortgagor was ignorant of the terms or in some way incompetent. Nor were both parties mutually mistaken about some material fact or was a claim of impossibility of performance raised. Both sides were fully autonomous when the contract was struck; the arrangement was not an "unduly one sided,"[82] unconscionable affair, though the mortgagor evidently underestimated the risk involved. It was simply that the Depression, unforeseen by all parties, threatened the mortgagor, rendering him vulnerable. The issue was not whether the contract was unenforceable or void, but rather whether a state could retroactively and substantially alter the contract. For Sutherland, the Constitution "does not mean one thing at one time and an entirely different thing at another time."[83] For Hughes, however, the Depression altered the terms of the agreement. His focus, from first to last, was not on the individual mortgagor before him, but instead on the "use of reasonable means to safeguard the economic structure upon which the good of all depends."[84]

Hughes' reading reflects the Constitution's failure to address emergencies. Apart from a brief statement in Article I, section 9 on suspending habeas corpus, the Constitution is silent on the subject.[85] Emergencies demand action, which ordinarily translates into expanded government power. However, emergencies do not come cosmically announced, but instead are labels imposed on events by fallible and self interested persons. It is hard to deny that the Depression was an emergency or that the destruction of the mortgage market would not significantly have added to that emergency. For this reason, it was easy for Hughes to speak about the constitutional impact of emergencies without pausing to define the term. But the larger assumption, that emergencies somehow justify work-arounds of the Constitution, is much harder to defend. Indeed, in the famous Steel Seizure case, when President Truman plausibly argued that a wartime strike would constitute such an emergency, the Court refused to grant him that authority.[86]

Hughes' arguments would be more persuasive, had Blaisdell claimed that the statute deprived him of his property in violation of the Fourteenth Amendment's due process clause. Here, he would merely have had to show that Minnesota had

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80 Restatement (Second) of Contracts, *supra* note 78.

81 Grace M. Giesel, *A Realistic Proposal for the Contract Duress Doctrine*, 107 W. Va. L. Rev. 443, 444 (2005).

82 Russell B. Korobkin, *A "Traditional" and "Behavioral" Law-and-Economics Analysis of Williams v. Walker-Thomas Furniture Company*, 26 U. Haw. L. Rev. 444, 467 (2004).

83 Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 449 (1934).

84 *Id.* at 442.

85 To deal with war or serious internal dissension, the Roman Republic's senate appointed dictators "freed from all constitutional restraints" to serve for six month terms. By the second century B.C.E, the practice "was quietly abandoned but not abolished." Robert J. Bonner, *Emergency Government in Rome and Athens*, 18 Classical J. 144, 146, 147 (1922).

86 Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952).

a rational basis for its action. But presumably the contract clause cannot simply duplicate a dimension of the due process clause, for this would render it superfluous. The contract clause's absolute language suggests that it does, in fact, have a different and stronger meaning. But after *Blaisdell*, it is exceedingly difficult to say what it is. Hughes also declined to argue that since judicially ordered moratoriums were considered acceptable, legislative ordered moratoriums should also be permitted; indeed, as legislatures are democratically elected, their position might be even stronger than that of judges.

There is also the public policy defense, which has been traced to the English common law of the fourteenth century.[87] Simply put, a contract counter to an act of Parliament may not be enforced. This position makes sense, given the presumption of parliamentary supremacy, but in the United States no such presumption exists. Here, the claim that legislatures may retroactively cancel contracts would obviously leave the contract clause in tatters.

If we venture to ask *how* the Court decided as it did, instead of pursuing the usual *why*, another rationale suggests itself. While the notorious four Horsemen – Sutherland, Butler, Van Devanter, and McReynolds – evidently felt no pressure to bend to the exigencies of the Depression, the majority did. Was this from policy conviction? A fear that a stubbornly negative Court might undermine its crucial nonpolitical image? It is impossible to say. But *Blaisdell* is hardly the only instance involving the Court, where nonlegal considerations apparently carried the day. In *Bolling v. Sharpe* (1954), for example, the Court treated the Fifth Amendment's due process cause as equivalent to the Fourteenth Amendment's equal protection clause. But because the Fifth Amendment's due process clause repeats the Fourteenth Amendment's due process clause, the equal protection clause, on this reading, becomes completely unnecessary. The Court nonetheless embraced this rather bizarre result because "it would be unthinkable that the same Constitution would impose a lesser duty on the federal government."[88] It could hardly ban legally required racial segregation everywhere, except the nation's capital, where the Court itself sat.

It has been widely assumed that *Blaisdell*, a high profile case that seemed to treat the contract clause like a crasher at a wedding, signaled an end to its viability. But as David F. Forte has shown,[89] this bit of conventional wisdom was refuted by a unanimous decision handed down only a few months later, *Worthen v. Thomas.* Thomas owed Worthen rent, and a court ordered him to pay $1200. Thomas then died, leaving a $5000 insurance policy for his wife. Worthen sought to garnish the insurance money to satisfy the debt, but the state enacted a statute that exempted insurance proceeds from garnishment. Worthen sued, claiming that the law unconstitutionally impaired his contract with Thomas.

Hughes, in ruling for Worthen, struggled to distinguish the case from *Blaisdell*. The emergency excuse, he wrote, "must be limited by reasonable conditions appropriate to the emergency."[90] But the law in question made no distinctions. "There is no limitation of amount, however large. Nor is there any limitation as to

87 Percy H. Winfield, *Public Policy in the English Common Law*, 42 Harv. L. Rev. 76, 77-78 (1928).

88 Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

89 David F. Forte, *Forgotten Cases: Worthen v. Thomas*, 66 Clev. St. L. Rev. 705 (2018).

90 W. B. Worthen Co. v. Thomas, 292 U.S. 426, 433 (1934).

beneficiaries . . . There is no restriction with respect to particular circumstances or relations."[91] *Blaisdell* met this test; *Worthen* did not. Sutherland and the three other horsemen concurred, again insisting, "We were unable then [in Blaisdell], as we are now, to concur in the view that an emergency can ever justify . . . a nullification of a constitutional restriction upon state power in respect of the impairment of contractual obligations."[92] In *Worthen v. Kavanaugh*[93] and *Treiglee v. Acme Homestead Association,* decided over the next two years, the Court unanimously followed in the *Worthen v. Thomas* path.[94] Perhaps, the contract clause was not moribund after all.

This impression was reinforced in *Wood v. Lovett* (1941), where a state repealed a law passed two years earlier that guaranteed clear title to land, curing tax irregularities, with the purpose of increasing tax collections. The Supreme Court overturned the law. Justice Roberts conceded that the states and the federal government were facing a financial crisis, but thought that the "acts of the state in depriving the taxpayer of the right to set aside a sale for technical procedural defects"[95] qualified as impairing the obligation of contracts.

But it was a long dissent in *Wood* by Justice Black that before long was to become judicial orthodoxy. Black began by discussing the severe economic emergency that led to the legislation, declaring that it was the "imperative duty" of policymakers to act, and finding the law a "rational and understandable" response[96] that resembled Minnesota's in *Blaisdell*.[97] "The *Blaisdell* decision," he said, "represented a realistic appreciation of the fact that ours is an evolving society and that the general words of the contract clause were not intended to reduce the legislative branch of government to helpless impotency."[98] In *East New York Savings Bank v. Hahn* (1945), the Court adopted Black's views, expressly denying that an emergency excuse was required to rein in the contract clause.[99] The Black view prevailed for nearly thirty years, leaving the contract clause with "virtually no legal effect,"[100] "a pale shadow of its former self."[101]

In *United States Trust Co. of New York v. New Jersey* (1977), the Court surprisingly took a more aggressive view. The case involved bonds of the Port Authority of New York and New Jersey. Bond holders had been told that bond money would not go to subsidize passenger rail service; in the midst of a highly publicized oil crisis, the state repealed the provision, making bond money available for that purpose. A bond holder sued, and the Supreme Court, noting that other

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91 *Id.* at 431.
92 *Id.* at 434.
93 A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
94 Treigle v. Acme Homestead Assn., 297 U.S. 189 (1936).
95 Wood v. Lovett, 313 U.S. 362, 371 (1941).
96 *Id.* at 374.
97 *Id.* at 377.
98 *Id.* at 384. Black, famous for his textual literalness in free speech, here opted for a free-wheeling approach.
99 E. N.Y. Sav. Bank v. Hahn, 326 U.S. 230, 235 (1945).
100 Forte, *supra* note 89, at 722 ("all that re-mains of the Contract Clause's protective sweep is an asymmetric middle-tier test that has little analytic benefit and virtually no legal effect").
101 Thomas W. Merrill, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 Case W. Res. L. Rev. 596, 598 (1987).

alternatives could have been chosen, ruled that the repeal violated the contract clause. The Court distinguished between private and public contracts. Private contracts would receive cursory review, but because public contracts involved the "state's self-interest"—the state enacted the law that permitted it to escape an obligation—here the "Contract Clause would provide no protection at all."[102] As the Court said a few years later, "When a state itself enters into a contract, it cannot simply walk away from its financial obligations."[103] Of course, the idea that private contracts deserve less scrutiny is exactly the opposite of the view prevailing in the Framers' generation.[104]

In 1978 in *Allied Structural Steel Co. v. Spannaus*, the Court struck down a law that altered the terms of a pension benefit plan. In response to the denuding of the clause, Justice Stewart wrote, "If the contract Clause is to retain any meaning at all, . . . it must be understood to impose *some* limits upon the power of a state to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power."[105] Unlike *United States Trust* decided a year earlier, *Allied Steel* found private contracts to merit more scrutiny.[106] Justice Brennan, dissenting, declared, "To permit this level of scrutiny of laws that interfere with contract based expectations is an anomaly."[107] As these two cases with their generous readings of the clause were exceptions to decades of rejecting such claims, Brennan, indeed, had a point. Would they have any progeny?

This brings us to *Sveen v. Melin* (2018),[108] the Court's first contract clause case in over thirty years. Mark Sveen and his wife, Kaye Melin, were living in Minnesota, when he named her the primary beneficiary of his life insurance policy. His two adult children from his prior marriage were named contingent beneficiaries, and retained their status as primary beneficiaries of a second life insurance policy. Minnesota then in 2002 enacted a statute that would automatically revoke spousal beneficiary status after divorce and transfer it to the contingent beneficiaries, the couple divorced in 2007, and in 2011 Sveen died. Under the law, Sveen could have filed papers to retain Melin as his primary beneficiary, but he never acted nor did the divorce settlement address the question. Who gets the money? Did Minnesota impair the obligation of contracts?

Default rules were customary at common law to resolve intestate conflicts, and twenty-five other states had legislation similar to Minnesota's. The governing assumption was that the policy holder would prefer the revocation, but for some reason never acted to bring it about.

Justice Kagan, writing for an eight vote majority, began by observing that the "legal system has long used default rules to resolve estate litigation in a way that conforms to decedents' presumed intent,"[109] adding that "not all laws affecting

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102 U.S. Tr. Co. of New York v. New Jersey, 431 U.S. 1, 26 (1977).
103 Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 412-14 (1983).
104 Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 Hastings Const. L. Q. 525, 532-33 (1987).
105 Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 242 (1978).
106 *Id.* at 244-45.
107 *Id.* at 261.
108 Sveen v. Melin, 138 S. Ct. 1815 (2018).
109 *Id.* at 1819.

pre-existing contracts violate the [contract] clause."[110] Laws modifying remedial processes raise no constitutional issues, but laws that invade the substance of contracts do.[111] The test begins, she writes, by asking "whether the state law has operated as a substantial impairment of a contractual relationship."[112] The answer in *Sveen* is so obviously no that "we may stop after step one."[113] First, Kagan says, the law "furthers the policyholders' . . . typical" intent. Thus, instead of impairing the contract, it supports it. Second, the law likely does not disturb the policyholders' expectations because "an insured cannot reasonably rely on a beneficiary designation remaining in place after a divorce."[114] Third, policyholders retain the power to alter the default rule "with the stroke of a pen."[115] The minimal paperwork involved poses no constitutional problem.

Justice Gorsuch, dissenting, opens with some ridicule.

> The Court's argument proceeds this way. Because people are *inattentive* to their life insurance beneficiary designations when they divorce, the legislature needs to change these designations retroactively to ensure they aren't misdirected. But because these same people are simultaneously *attentive* to beneficiary designations (not to mention the legislature's activity), they will surely undo the change if they don't like it. And even if that weren't true, it would hardly matter. People know that *existing* divorce laws sometimes allow *courts* to reform insurance contracts. So people should know a *legislature* might enact new laws upending insurance contracts at divorce. For these reasons, a statute rewriting the most important term of a life insurance policy—who gets paid—somehow doesn't "substantially impair" the contract.[116]

With *Sveen*, Gorsuch concedes that the law is valid if applied to policies bought *after* the law was passed, when there are no past contracts to impair. But if applied retroactively, it runs up against a flat constitutional prohibition against "*any* . . . law impairing the obligation of contracts" (emphasis added).[117] The Framers could have offered loopholes, as they did elsewhere in section 10, but evidently chose not to.

Gorsuch then points to a loophole modern courts have devised allowing impairments in pursuit of "a significant and legitimate public purpose."[118] He disapproves of the loophole, but even laying the disapproval aside, he notes that it has no relevance here. Factually, Gorsuch pointed to Melin's claim that Sveen intended to keep her as beneficiary, that there might be a number of plausible reasons for policyholders to retain their ex as beneficiary, and that in recognition of

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110 *Id.* at 1821.
111 El Paso v. Simmons, 379 U.S. 497 (1965).
112 *Sveen*, *supra* note 108, at 1821-22.
113 *Id.* at 1822. The second step would have inquired as to whether the law was drawn in an appropriate and reasonable way to advance a significant and legitimate public purpose.
114 *Id.* at 1823.
115 *Id.*
116 *Id.* at 1826.
117 *Id.* at 1827.
118 *Id.*

this, nearly half the states plus the federal government have not adopted automatic revocation. None of this information may be conclusive, he admits, but it does suggest that the state's "substantial impairment" is unreasonable; for it could have been avoided simply by requiring "courts to confirm that divorcing couples have reviewed their life insurance designations." Or Minnesota "could have instructed insurance companies to notify policyholders [or] required attorneys . . . to address the question with affected parties." Nor were these options not on the table, for women's rights organizations had long advocated them. "Yet there's no evidence Minnesota investigated any of them, let alone found them wanting."[119] As Kagan thought it plain that there was no impairment, Gorsuch believes the reverse. "It substantially impairs contracts by displacing the term that is the 'whole point' of the contract."[120] As he said elsewhere, "The Constitution's original public meaning supplies the key."[121]

A few recent cases suggest that, though enfeebled, the contract clause is not yet dead. In *Elliott v. Board of Trustees of Madison Consolidated Schools* (2017),[122] the Seventh Circuit struck down a law that eliminated pre-existing layoff protection for tenured teachers, and in *Association of Equipment Manufacturers v. Bergum* (2019)[123], the Eighth Circuit upheld a preliminary injunction enjoining a state regulation that impaired a pre-existing farm machinery contract without justification from a significant and legitimate public purpose. But cases like this are becoming vanishingly rare.

Sveen, then, represents the logical conclusion of a process that has left the contract clause eviscerated, like chicken on a butcher's table. The provision contains no vague modifier, but instead is plainly absolute in its meaning. It makes no mention of state police power nor offers exceptions for emergencies. It contains no invitation, implicit or explicit, to balance contractual interests against public or other interests. Nor does the clause distinguish between private and public contracts or even mention them. Justice Brennan was surely right that "there is nothing sacrosanct about a contract,"[124] but did he mean there was nothing sacrosanct about the Constitution, either?

Of course, we are all familiar with the absolute that there are no absolutes. For example, we can quote Holmes' remark that "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[125] We can also make the banal observation that even a red light does not mean stop, if a police car's siren instructs us to go. And yet what these are, are exceptions that prove a rule. The presumption is in favor of the rule; exceptions have to be justified. As exceptions, they will be unusual. This is precisely the opposite of what has taken place with respect to the contract clause. Today, the exceptions *are* the rule. The question is not, as is typically the case in constitutional disputes, what the key words – "Impair," "obligation," or "contract" – mean. The Court makes no effort at the kind of Talmudic disquisition that Marshall famously

119 *Id.* at 1829.
120 *Id.* at 1830.
121 Oil States Energy Servs. v. Greene's Energy Grp., 138 S. Ct. 1365, 1381 (2018).
122 Elliott v. Bd. of Sch. Trustees of Madison Consol. Sch., 876 F.3d 926 (7th Cir. 2017).
123 Ass'n of Equip. Manufacturers v. Burgum, 932 F.3d 727 (8th Cir. 2019).
124 Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 261 (1978).
125 Schenck v. United States, 249 U.S. 47, 52 (1919).

inflicted on "necessary."[126] Instead, it simply dispenses with the word "any," the anchor of the clause, through a kind of linguistic brute force. Thus, the contract clause today may be violated for almost any reason at all. The living Constitution, in short, has virtually killed a constitutional provision.

[126] McCulloch v. Maryland, 17 U.S. 316, 413-15 (1819).

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