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**Foreword**

*Tyler Anderson and Melanie Rosin*

Over ten years ago, the John Goodwin Tower Center for Political Studies began at Southern Methodist University (SMU) to commemorate the late U.S. senator and to promote his commitment to education and public service. As the Tower Center has grown over the past decade, operating to spark interest in the study of politics and international affairs as well as public service, the Center simultaneously found a need to involve students more in its endeavors.

In order to fill this void, the Tower Center branched out in the spring of 2010 with the creation of the Tower Center Student Forum. Despite its short time in existence, the Student Forum has already greatly increased in size to include hundreds of students who participate in the activities of the Tower Center through various events, speakers, research opportunities, and publications.

We are proud to showcase one aspect of the Student Forum’s publication branch—dialogue: Undergraduate Journal for Political Studies—as well as to celebrate ten years of academic success in the SMU community through the Tower Center. The pieces you will find in the second issue of dialogue reflect only some of the aptitude, intellect, and variety of political interests that can be found in SMU’s undergraduate community.

We would like to thank our contributors for their hard work and dedication to political studies as well as the Tower Center and SMU for supporting the Student Forum. We hope that the Student Forum continues to grow in the upcoming years and to display the talents, and more importantly, the expansive enthusiasm for political studies that we encounter at SMU.

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Political Studies
The Incorporation of the Bill of Rights: After 1947

Amanda Koons

Introduction

The issue of the incorporation of the Bill of Rights to the states has been a contested issue since the drafting of the Bill of Rights itself. At its ratification, the Fourteenth Amendment, beginning “no state shall,” became a potential vehicle for incorporation and has since invited heated debate. At the core of the debate are issues of fundamental rights and the relationship of the federal government to the states. If there are rights that are so fundamental to our freedom that we’ve protected them from action by the federal government, should we protect them from state governments as well? The question of fundamental rights has a broad reach, extending to the contentious issues of privacy, civil rights, and criminal process. In many ways, these debates were rekindled when the first eight amendments came to be considered for incorporation. The decision to incorporate most of the provisions of the Bill of Rights to the states, “transformed the basic structure of constitutional safeguards for individual political and civil liberties in the nation and profoundly altered the character of our federal system”1 by extending the protection of rights to the courts with which citizens most frequently interact.

One of James Madison’s original amendments submitted for inclusion in the constitution stated “‘No State shall infringe the right of trial by Jury in criminal cases, nor the rights of conscience, nor the freedom of speech, or of the press.’”2 From the outset, such an amendment would incorporate the protection of several specific rights to the states. However, the motion did not pass through the Senate, and the issue was left open for future legislation. The events of the Civil War “exposed a serious flaw in the notion that states could be trusted to nurture individual rights”3 and led to the ratification of the Fourteenth Amendment which was clearly intended to limit state action and defend individual rights to “life liberty and property.” However, as the debate over incorporation arose, the court dealt with questions of what constituted “liberty,” or
was included in “privileges or immunities” and “due process of law.”

In considering these issues, the court found it relatively easy to incorporate most of the rights contained in the First Amendment but refused to allow the incorporation of Fifth Amendment rights to the protection against double jeopardy and self incrimination. In 1942, an opinion in Betts v Brady which denied the incorporation of the right to government provided counsel for indigent defendants stated that “the application of the due process clause to State criminal proceedings [was] not governed by hard and fast rule.” Five years later, the opinions in Adamson v California sought to establish such a rule. In a 5-4 decision, the majority of the court declared that Fifth Amendment rights were not incorporated to the states. Concurring with the majority, Justice Felix Frankfurter expressed his view of “fundamental fairness” which allowed certain fundamental rights to be incorporated through the due process clause, though not in the way that they were protected by the federal government and not by simply by virtue of being included in the Bill of Rights. In an impassioned dissent, Justice Hugo Black argued for total incorporation based on the fact that the history of the Bill of Rights and the Fourteenth Amendment indicated that the rights in the first eight amendments were, in fact, fundamental and were intended to apply to the states. Justice Frank Murphy’s dissent argued that the first eight amendments, because they are fundamental, should be fully incorporated through the due process clause along with many other equally fundamental rights.

It is well known that Black’s doctrine of total incorporation never gained a majority of the court, and a handful of provisions in the Bill of Rights still remain unincorporated. However, after the Adamson case, the court began a rapid process of incorporating the majority of the provisions in the first eight amendments, resulting in near-total incorporation. At first it would “seem extraordinary that a theory going to the very nature of our Constitution and having such profound effects for all of us should be carrying the day without ever having been explicated in a majority opinion of the Court.” This paper seeks to explain how and why the Court pursued selective incorporation after the Adamson case in 1947.

There are several hypotheses that offer potential explanations of the phenomenon. The first of these is that changes in the court’s composition led to a shift away from the majority that previously opposed incorporation. The second is that changes in the types of rights being incorporated invited new motivations and justifications for incorporation.
Thirdly, it is possible that strategic behavior and compromise on the part of Justice Black and other incorporationists on the Court allowed incorporation to continue despite internal disagreements. The fourth claims that respect for stare decisis influenced the court’s formation of incorporation doctrine, and after the first provisions were incorporated, respect for the doctrine of stare decisis and a desire for consistency led the court to solidify its doctrine, and continue incorporation of other provisions. The final hypothesis offers a state-based explanation, claiming that the court only incorporated provisions of the Bill of Rights when it was clear that the states had already done so in practice. This paper will apply data from votes, opinions and especially memoranda between justices in order to examine these hypotheses and conclude that while other factors contributed to incorporation, the second hypothesis attributing incorporation to changes in the “types of rights” being incorporated, and the third hypothesis following the strategic model of judicial behavior are the most explanatory of the court’s behavior overall. According to these findings, the court built up to near-complete incorporation by 1969 using selective incorporation due to the court’s response to a changing concept of fundamental rights and utilizing a process of negotiation and compromise.

Changes on the Court

The hypothesis that personnel changes on the court could have caused the shift towards selective incorporation would be a simple explanation for such a dramatic shift the court’s position in such a short period of time. This hypothesis stems from a simple conception of justices as ideological actors. That is to say, if all justices were either pro- or anti- incorporation and voted consistently according to their ideological preference on the question of incorporation alone, then pro-incorporation justices replacing anti-incorporation justices on the court would be sufficient to explain the change. At first glance, this hypothesis is plausible. Between 1947 and 1961 when incorporation accelerated, Justices Reed, Vinson, Jackson and Burton, all members of the “anti-incorporation” majority, had left the court. Their places were eventually filled by Justices Brennan, Stewart, and Warren who were typically “pro-incorporation” justices. However, this simple analysis is flawed for many reasons.

Firstly, it cannot be assumed that justices vote simply based on ideology. Other factors including the positions of other justices can
influence any Justice’s vote. Secondly, in all of the cases concerning incorporation, the incorporation of the right itself was always a subtext to the primary consideration of the specific right in application to the facts of the case. Because of this, justices’ votes were not always for or against incorporation, but rather depended on other issues at question in the case. For example, in Wolf v Colorado, Justices Black and Douglas each argued the incorporation issue based on the logic of Black’s Adamson opinion. However, due to other factors of the case, Black submitted his opinion as a concurrence, and Douglas as a dissent. Cases like these demonstrate that an incorporation coalition can be split in votes because of other compelling issues at hand. As a result, the debate over incorporation was often played out in concurrences and dissents except for in a few major cases. These factors together contribute to the fact that votes are unreliable both for determining ideology and for measuring positions specifically on the issue of incorporation. Furthermore, there were divisions even among pro-incorporationists of the method and extend of incorporation, which will be explained later. Because of this, an analysis of the balance of the court must be much more complex than a binary, pro- or anti- assessment. Such a nuanced analysis eliminates the possibility of determining a “balance” on the court and demands a deeper observation of the boundaries between views and how they may have shifted from concurrence to dissent in any particular case. This perspective is characteristic of the strategic view of behavior.

However, none of this is to say that the composition of the court had no influence on the course of incorporation. It simply determines that as a single element, change in the membership of the court cannot be the controlling explanatory factor. In fact, it is plain to see that the shift to an overall incorporationist stance began with the first years of the Warren court. This court continued incorporation to the last day of Warren’s tenure on the court in which it handed down the last incorporation case, Benton v Maryland. In general, the Warren court is characterized by a greater focus on individual and civil rights as well as a reinterpretation of criminal process rights. The incorporation of these rights to the states was a large part of the expansion of their defense overall.

One characteristic of the Warren court is that it was not deferential to precedent insofar as rights are limited by historically-bound ideals. Two quotes from members of the court epitomize this dichotomy. Frankfurter, in Wolf v Colorado, referred to precedent and declared of incorporation: “The issue is closed.” In contrast, Justice
Douglas, after highlighting the inability of previous interpretation of doctrine to account for fundamental rights remarked in Gideon v Wainwright, states, “happily, all constitutional questions are always open.” This view allowed the court to reassess issues of segregation, criminal procedure and privacy, overturning a significant amount of court precedent in the process. In terms of incorporation, the court appealed to a “change in facts” or the “light of contemporary human knowledge” in order to reinterpret the concept of fundamental rights within the Palko doctrine. Because of their willingness to reassess past doctrine in the light of expanding individual and civil rights, the portion of the court in favor of selective incorporation was about to appropriate elements of the fundamental fairness doctrine to support its position. In doing so, the court shifted the issue from whether fundamental rights should be incorporated, which became settled doctrine, to a debate over which rights are considered to be fundamental.

Change in Types of Rights Being Incorporated

Another possible explanation for selective incorporation is that there was a change in the types of rights being incorporated before and after the Adamson case. This means that the rights considered for incorporation fall into different categories which require different treatment over the course of the court’s treatment of incorporation. The hypothesis is drawn from a general discrepancy in the amount of discussion in incorporation cases which dealt with First Amendment rights, criminal process rights, and especially the overturning of precedent. First Amendment rights seem to be incorporated with little debate, even in mere dicta, as in Gitlow v New York incorporating freedom of speech. Many more pages of opinions and a much greater volume of memoranda circulated in cases regarding the incorporation of the other types of rights.

Furthermore, the mere wording with which we refer to rights in the bill of rights show a marked distinction between different types of rights along the lines established by the court’s treatment in opinions. First Amendment rights are referred to in substantive terms, for example, as the “freedom of speech” or “freedom of association.” Fifth Amendment rights, on the other hand, are phrased as the “right to protection against double jeopardy” or the “right to protection against self-incrimination.” This difference reveals itself as a contrast between positive and negative rights. First Amendment provisions restrain government action in
order not to infringe on rights whereas other rights contained in the Bill of Rights require a greater commitment of government energy and resources to upholding the right or privilege. This is even more apparent in the cases concerning rules like the “Miranda rules” and the “exclusionary rule” which, when incorporated, place a great burden on the states.

It is certainly true that the types of rights being considered for incorporation cause changes in the court’s approach in selective incorporation, and this hypothesis serves to frame how the court followed selective incorporation by establishing categories in which it was required to reinterpret or extend existing doctrine to include different types of rights. Before Adamson, only First Amendment rights had been incorporated to the states. After Adamson the court began to incorporate criminal process rights, followed by rights that had previously been ruled not to be incorporated, and finally attendant provisions like the exclusionary rule that had been recognized as fundamental to the function of other incorporated rights at the federal level. The ease with which First Amendment rights were incorporated is remarkable in contrast with the debate over the incorporation of rights in the latter categories, but is explained by the differences in the view of the court on which rights were considered fundamental or “implicit in the concept of ordered liberty.” In fact, the opinions which denied the incorporation of 4th and 5th amendment rights in 1908 and 1937 left “open doors” through which rights considered to be fundamental could be “incorporated,” “absorbed,” or at least “applied” to the states. It was through these doors that the First Amendment rights were incorporated early on, and a changing concept of fundamental rights allowed for the latter rights to be incorporated later on.

“Open Doors” in Early Precedent

These “open doors,” have their origins in Twining v New Jersey and Palko v Connecticut which both originally denied the incorporation of specific criminal process rights. The first, less important open door, found in Twining, was a lack of express prohibition of incorporation. The Twining opinion states that “the first eight amendments are restrictive only of National action, and while the Fourteenth Amendment restrained and limited state action, it did not take up and protect citizens of the states from action by the states as to all matters in the first eight amendments.” This open door implies that some of the rights contained within the Bill
of Rights are still applicable to the restriction of the states. Although this is not incorporation per se it does not expressly prohibit the possibility that certain rights can be incorporated to the states. Twining became a major part of Justice Frankfurter’s Adamson concurrence and one of the bases for his conception of fundamental fairness and due process as the means by which fundamental rights are protected from the states. As will be explained later, this concept of the role of due process was combined with definitions of fundamentality beyond the Twining or Frankfurter conceptions in order to constitute part of the court’s justification for selective incorporation.

The second “open door” came as a part of Palko v Connecticut which clarified which rights could be considered fundamental by saying that those rights which have been incorporated and are eligible for incorporation are such because “neither liberty nor justice would exist if they were sacrificed,” and because they are “implicit in the concept of ordered liberty and as such, enforceable to the states.” Through this open door came certain tests for fundamentality. The first of these is establishing a historical context for the fundamental nature of the law. Because the court had previously decided that the rights contained in the first amendment were fundamental to the function of the federal government, these justifications were the basis of the pre-1947 cases which incorporated the rights of the first amendment. In post-1947 First Amendment cases, this allowed the court simply to confirm the incorporation of those rights, at times in a single line of the opinion.

A second test was to consider whether the American system of government could function properly without the protection of the right in state courts. This creates a narrow conception of “liberty” by attempting to distinguish between essential and nonessential rights. For this reason, provisions in the bill of rights that are more procedural in nature were less likely to be incorporated than substantive rights thought to guide existing procedure. Although this conception of fundamental rights did not initially reach out to criminal process rights, these issues were the ones that appeared before the Warren court in the years after Adamson. The court utilized justifications from Palko in order to recognize rights in the latter categories through a changing conception of fundamentality. Once the court recognized the “fundamental nature” of the elements of fair trial rules and criminal procedure, they were less able to conceive of a system that could function without the protection of those rights.
Conceptual Changes to Fundamentality
in Criminal Law Amendments

It is clear, then, that in order to incorporate criminal process rights, overturn precedent, or incorporate attendant procedural safeguards, it was necessary for the court to establish a new definition of “fundamental” under Palko. Palko, the source of the fundamentality tests, applied them to the protection against double jeopardy and found that it was not a fundamental right. Thereafter, the court was dealing with a different, more challenging type of rights. When the court faced questions over the subsequent amendments, starting with Betts v Brady in 1942, it began to recognize that the “application of the due process clause to State criminal proceedings is not governed by hard and fast rule” and could only be determined fundamental if its denial was “shocking to the universal sense of justice” based on the facts of each individual case. In Justice Black’s dissent in Adamson, whose majority had rejected the incorporation of 5th amendment protection against self-incrimination, he argued that “nothing in the Palko opinion recommends that the Court apply part of an amendment’s established meaning, and discard that part which does not suit the current style of fundamentals.”

Contained within his assertion of total incorporation was Black’s broad view of fundamental rights as any of the rights contained within the Bill of Rights simply by virtue of their inclusion in the Constitution.

While, again, Black’s total incorporation was never accepted, the court was willing to go as far as saying that several rights contained in the Bill of Rights could be incorporated to the states, especially in the realm of criminal process rights. As in the words of Harry Friendly in 1965, “the present Justices feel that if their predecessors could arrange for the absorption of some such provisions in the due process clause, they ought to possess similar absorptive capacity as to other provisions equally important [fundamental] in their eyes.” For example, In Wolf v Colorado, the court incorporated the Fourth Amendment protection against unreasonable searches and seizures (although it rejected incorporation of the procedural safeguard of the exclusionary rule for the time being) by establishing that such a right was considered to be “implicit in the concept of ordered liberty,” and thus, was fundamental. Robinson v California incorporated the Eighth Amendment prohibition of cruel and unusual punishment on similar grounds, citing “contemporary human knowledge” as the basis on which its fundamentality was recognized. These cases combined the justifications...
set out in Palko with an evolving conception of fundamental rights in order to incorporate previously unconsidered criminal process rights. “Mirror Cases:” Overturning Precedent for non-First Amendment Rights

When it came to overturning precedent in incorporation cases, the court faced a greater burden to justify its departure from prior rulings. These cases generated copious amounts of memoranda and long opinions focused on the issue of incorporation almost exclusively. In the “mirror cases” which reversed prior decisions, the court found its forum in which to clearly express divergent theories of incorporation. The first clear statement of these theories was in Adamson v California, which threatened to overturn the precedent of Twining v New Jersey. Although Adamson did not overturn Twining, it garnered a 5-4 decision and four separate opinions. Frankfurter expressed his theory of fundamental fairness as the recognition of fundamental rights separate from, but at times parallel to those in the Bill of Rights. This view was in keeping with the precedent of Twining and a strict interpretation of the doctrine in Palko. Black’s and Murphy’s dissents, however, were expressions of a reinterpretation of fundamental rights applied to the Palko doctrine according to a detailed historical analysis of the original intent of the Bill of Rights and the Fourteenth Amendments.

The next “mirror” case was Mapp v Ohio28 which overturned the recent Wolf decision by incorporating the use of the exclusionary rule in Fourth Amendment cases to the states. The Mapp justification for departing with precedent was that there had been a change in the facts since Wolf and most states had put the exclusionary rule into practice, thus confirming its status as “implicit in the concept of ordered liberty” in that it is necessary to the application of the Fourth Amendment rights. Malloy v Hogan, which overturned Twining and Adamson, relied heavily on the logic of Mapp, arguing that a shift in state cases, and the Fifth Amendment’s close relation to the Fourth allowed the right to protection against self-incrimination to be incorporated to the states when it had not been in the past. The majority opinion in Gideon v Wainwright stated that Betts, which it overturned to incorporate the right to government provided counsel, was simply wrong. Gideon argued that historical data, including especially the decision in Powell v Alabama29, thoroughly established the right to government-provided counsel as a fundamental right, applicable to the states by the Palko doctrine. Justice Harlan’s dissent adheres closely to Frankfurter’s interpretation of parallel, but not incorporated rights. As such, he argues that the right is not fundamental because of the lack of “special circumstances” similar to the illiteracy
and low intelligence involved in the specific facts of Powell in all cases. According to this logic, government-provided counsel is a privilege incorporated to the states in its substantive form, which is restricted to the specific facts of the case which declared it to be “fundamental” in the circumstances.

Finally, in Benton v Maryland\textsuperscript{30}, the court reversed the ruling of Palko in order to incorporate the right to protection against double jeopardy. The majority opinion declared that the right was “fundamental to the American scheme of justice,” and based reinforced this argument with historical legal examples, the constitutional text of Article III and existing state laws. The dissent again relied on fundamental fairness to refuse that this right was fundamental or applicable to the states.

While these cases generated explicit arguments for and against selective incorporation, they also illustrated the court’s response to the extra demands placed on cases which overturn precedent. The court drew on historical facts, alternative precedents, and state behavior in order to establish the fundamental nature of the rights which were to be incorporated through the due process clause of the Fourteenth Amendment.

**Applying Provisions to the States with “Full Force”**

The final category of rights in the course of incorporation was constituted by those that were not rights at all, but rather procedural safeguards established by the court in support of rights enumerated in the Bill of Rights, sometimes referred to as ““The “fundamental liberty interest” or “unenumerated right” branch of substantive due process.”\textsuperscript{31} It would seem that these would be the most difficult to defend under any theory of selective incorporation since they are not rights and are not found anywhere in the text of the Constitution. However, the court relied on precedent in federal cases\textsuperscript{32} in order to establish that these rules and procedures were fundamental to the protection of the fundamental rights already incorporated to the states. Miranda v Arizona, Ker v California, and Aguilar v Texas established, as stated in Miranda, that “the substantive standards underlying the privilege applied with full force to state court proceedings.”\textsuperscript{33} By doing so, the court established that selective incorporated translated the provisions of the bill of rights with full force and in the same way that they had been applied to the federal government. Furthermore, by incorporating these provisions, selective incorporation theory was clearly asserted over fundamental
fairness. Because fundamental fairness did not incorporate rights as they appeared in the Bill of Rights, proponents of fundamental fairness like Harlan and Frankfurter certainly would not have applied procedural safeguards to the states as well.

**Strategic Behavior**

The third hypothesis which seeks to explain why the court was able to pursue selective incorporation is that of selective behavior on the part of the justices, particularly Justice Black. This hypothesis is drawn directly from Lee Epstein and Jack Knight’s book The Choices Justices Make. The argument that this book presents is that justices are motivated to engage in strategic behavior during case selection, conference discussion, opinion circulation and voting. These activities can include bargaining, forward thinking, manipulating the agenda, and strategic opinion writing. Based on data drawn from voting patterns, opinions (especially concurring and dissenting), and memoranda it is clear that strategic behavior played a major role in the formation of opinions that advanced selective incorporation after Adamson.

This compromised is characterized in a line from Black’s Adamson dissent in which he states, “If the choice must be between the selective process of the Palko decision, applying some of the Bill of Rights to the States, or the Twining rule, applying none of them, I would choose the Palko selective process.” Several correspondents praised this dissent and commented that his opinion “must eventually become the Law of the Court” whether “Whether this evolutionary process be slow or fast.” Although Black’s primary preference would be total incorporation exactly as stated in his Adamson opinion, he recognizes that such a position will never gain a majority in the court, and settles for supporting selective incorporation instead, since it is a position that can feasibly be executed in court decisions.

While Black’s consistent compromise in recognizing selective incorporation is one example of strategic behavior at the opinion circulating and voting stages, it is not clear from the data that he or any other justices engaged in strategic behavior in the case selection stage, or using the method of manipulating the agenda. This mainly can be attributed to the fact that many incorporation cases were not heard merely because of the incorporation question. In fact, many cases, especially those incorporating previously unincorporated rights, devoted a very small amount of attention to the issue of whether or not
the right was incorporated. In fact, in many of these cases there is no mention of incorporation at all in the memoranda circulated among the justices. Nevertheless, strategic behavior did in fact shape the opinions in the cases which centered on the incorporation debate. Considered individually, these cases were focused on constructing a wide majority through bargaining and strategic opinion writing. As a whole, it is clear that Black and other justices including Douglas were forward-thinking in their consideration of the overall arc of selective incorporation as a gradual process that would eventually achieve the basic goals of total incorporation, but using a different justification.

Bargaining and Strategic Opinion Writing

In individual cases, it was important for supporters of incorporation to gain as large of a majority as possible and build coalitions so that pro-incorporation arguments could be included in the majority opinion. In order to make this happen, the justices most often circulated draft opinions and requested advice or suggestions from other justices whose votes might be tenuous. Justices who did not feel that their opinions were being considered would also file separate concurrences or even dissents, indicating that the majority opinion did not do enough to incorporate their views. Because Black’s opinion in Adamson v California was a dissent, he did not exhibit any obvious strategic behavior to get others to join. In fact, Douglas was the only Justice who did, and Murphy and Rutledge dissented separately. The first case in which this strategic behavior was clearly manifested was Mapp v Ohio. In memos circulated with drafts of Clark’s majority opinion, Black remarked that he thought the opinion actually incorporated the Fifth Amendment in addition to the Fourth’s attendant exclusionary rule. When Clark replied that it was not his intention to also include the Fifth Amendment in addition to the Fourth’s attendant exclusionary rule. When Clark replied that it was not his intention to also include the Fifth Amendment in addition to the Fourth’s

my agreement to your opinion depends upon my understanding that you read Wolf as having held, and that we are holding here, that the Fourth Amendment as a whole is applicable to the States... If I am wrong in this and your opinion means that the Fourth Amendment does not apply to the States as a whole, I am unwilling to agree to decide this crucial question in this case and prefer to wait for a case that directly and immediately involves application of the Fourth Amendment...41

Clark replied immediately that it was his intention so that Black would stay with his majority. Black concurred in the result but did not
agree that the exclusionary rule should also be incorporated since it was not part of the text of the Fourth Amendment. Clark’s reassurance allowed Black to stay in the majority. As Douglas usually follows Black, and indeed both of their concurrences cited the Wolf precedent as controlling, there was a chance that both could have changed their votes, which would have reversed the majority to a 5-4 decision against the incorporation of the exclusionary rule. Aware of this, Clark was quick to accommodate Black’s concerns. Thus, Black and Clark were able to serve their own interests through bargaining and compromise.

Gideon v Wainwright is another classic example of strategic behavior through negotiations between justices. Brennan, in agreement with Black’s opinion incorporating the right to government counsel and overruling Betts, expresses that he has “doubts whether Potter shares the view” but feels that “Byron [White] and Arthur [Goldberg] will find it entirely acceptable.” However, Stewart only made one slight suggestion (which Black accommodated) then praised the opinion saying, “you have done an admirably skillful and fair job in accommodating a variety of views.” Brennan also made extensive suggestions which were all included in the final opinion. By responding to Brennan and Stewart’s suggestions, Black was able to write an opinion that included a wide range of justifications for the incorporation of the right to government provided counsel. Evidently, Douglas’s view on incorporation had also begun to diverge from the one Black expressed, but the moderate opinion kept him in agreement. Although the vote in the case was unanimous, Clark and Harlan concurred in the result and opposed incorporation in their concurrences. Nevertheless, Black’s bargaining and willingness to compromise allowed him to build a coalition of 6-2 in favor of the incorporation of the right.

This coalition building continued in the same manner throughout the 1960s cases. In Malloy v Hogan, Douglas wrote to Brennan with concern that his opinion was too weak and failed to overturn Twining. In his memo he used subtle bargaining language to indicate that he was not certain to agree with the opinion without the extensive changes he suggested:

I had trouble enough with Gideon, although Hugo steered close enough to the line to make it possible for me to go along… Each of us travels his own path of necessity, and I really see no great urgency in getting a Court opinion. Perhaps the suggestions I have made reach beyond your ability to accommodate.
Brennan responded the next day explaining his intent and noted “I’d be very hopeful that we could arrive at some kind of agreement in Malloy because otherwise I’ll not have a court for the opinion.”

Following Black’s example in Gideon, Brennan included all of Douglas’s suggestions; in fact, the “copy which was marked-up became the copy he sent to the printer.”

Malloy was one of the mirror cases which overturned a significant precedent in both Twining and Adamson. Because of this, the case was decided mainly on the incorporation question and since it was ultimately a 5-4 decision, Douglas’s agreement was crucially important to maintaining a majority.

Two-way strategic behavior like in Malloy became the norm in subsequent cases. With the exception of Harlan’s constant dissents, no opinion contained a “pure” expression of incorporation doctrine. When Black attempted to include, “by the mere fact that this right appears in our Bill of Rights…” in the opinion for Pointer v Texas, Justice Goldberg suggested that he could remove such a pure, absolute statement “without affecting the force of [his] opinion.” Instead, every opinion was a mash-up of several distinct but non-conflicting justifications contributed by each particular Justice as the means by which incorporation could be executed. This behavior resulted in opinions like that of Earl Warren, who was especially concerned with building large majorities, in Klopfer v North Carolina.

In this opinion, Warren cites the logic of Malloy, Pointer and Gideon, but also looks to such diverse sources as the Magna Carta, Sir Edward Coke, the Virginia Declaration of Rights of 1776 and contemporary state statutes to establish the fundamentality of the right to a speedy trial. Furthermore, Warren refers to both the due process clause and “life liberty or property” from the Fourteenth Amendment. In writing his opinion in such a way that other justices’ opinions were already included, Warren was able to craft an opinion that drew very little discussion in memoranda, excepting statements of “I agree.” This opinion stood as a single statement for the court except for Harlan’s (expected) dissent.

Forward-looking Strategic Behavior

Over the course of selective incorporation, it is clear that Black was willing to sacrifice his first preference of total incorporation in favor of selective incorporation via the due process clause. After Adamson, at first Black continued to assert his dissenting position in concurrences, repeating that, “For reasons stated in my dissenting opinion in Adamson
v. California …I agree with the conclusion” in each case. Douglas joined these concurrences and continued to use the Adamson reasons in separate concurrences from the more moderate opinions in which Black wrote or agreed with the majority opinion. However, Black abandoned explicit expression of this position from 1962-1967 both when he wrote the majority opinion, and joined in opinions that incorporated provisions of the Bill of Rights.

Based on this information, it would seem that Black had abandoned his Adamson total incorporation position in favor of selective incorporation. Even in Duncan v Louisiana, Black’s first draft of his concurrence only mentioned “the concept of ordered liberty,” citing reasoning from Palko and Gideon in a one-paragraph opinion. However, when Harlan circulated his lengthy dissenting opinion which Frankfurter’s Adamson majority, Black took the opportunity to restate his Adamson total incorporation argument in full. He had hinted that he still adhered to full incorporation “by the mere fact that [a] right appears in our Bill of Rights,” in Pointer, and his concurrence in Duncan is proof that his silence was strategic rather than indicative of a shift in his position. Duncan came to be the definitive statement of the court’s position on selective incorporation twenty-one years after the process began. The majority opinion exhibits the same type of mixed-justification reasoning as used in Klopfer, and Black’s concurrence (joined by Douglas) repeated the Adamson defense, adapted to the facts of 1968. Black’s return to the Adamson reasoning proves that his compromises were made with the expectation that, by choosing more moderate justifications and supporting selective incorporation, the court’s behavior would eventually approximate his first preference.

The presence of strategic behavior in the crafting of incorporation doctrine further proves that incorporation is not a purely ideological issue. Nor is it one that demands an all-or-nothing approach. Ultimately, Black did not so strongly adhere to his total incorporation doctrine that he shunned due process and selective incorporation. Nor were any of the justices committed to any particular doctrine to the point that they could not accept the suggestions of the other justices. In Black’s opinion, it did not necessarily matter how incorporation was carried out as long as it was carried out. It is also revealing to note that no right has ever been un-incorporated after being incorporated, and it is reasonable to assume that neither Black nor any of the selective incorporationists anticipated this ever happening. Because of this, incorporation doctrine was more malleable than other doctrines like privacy and the content
of the exclusionary rule, which could be, and were, gradually chipped away by subsequent exceptions and weakening decisions.

**Stare Decisis**

The idea that respect for the doctrine of stare decisis allowed the court to reach near-total incorporation by 1969 serves as the fourth hypothesis for explaining this phenomenon. The hypothesis is drawn from Epstein and Knight’s argument that “norms of legitimacy…affect the ability of justices to influence the substantive content of the law.” According to this argument, one should expect that the norm of stare decisis either limits or encourages change justices are able to make. Evidence for this hypothesis would be found either in the content of opinions, which could either explicitly reference stare decisis, or rely heavily on precedent to come to a decision. It could also be found in memoranda discussing the court’s legitimacy or use of stare decisis. In the incorporation cases, while evidence does exist in opinions, it does not appear in the memoranda circulated among the justices.

It was mentioned before that the Warren court did not show a significant amount of deference to precedent when it believed that the facts had changed, especially regarding the protection of individual rights. Furthermore, the important “mirror cases” were important due to the fact that they overturned precedents. This is not to say that the court ignored its own norms of legitimacy. However, it did find a compelling reason to abandon some precedents and reappropriate elements of others to support incorporation. In each case, this reason was that the court found each right to be fundamental, and thus applicable to the states under the formula in the Palko precedent.

The concept of stare decisis also influenced the court’s vision of how its incorporation doctrine would be respected. As mentioned before, the court could reasonably expect that incorporation would not be overturned. Therefore, it constantly referred to recent precedent from opinion to opinion in order to solidify the court’s commitment to selective incorporation. For example, the opinion in Pointer v Texas claims, “in the light of Gideon, Malloy, and other cases…the statements made in [earlier precedents]…can no longer be regarded as law. In doing so, the court simultaneously rejects old precedent and establishes respect for a new set of “correct” precedents.

While stare decisis is not necessarily explanatory of why selective incorporation was pursued after Adamson, it does inform the
methods in which it did so. Furthermore, stare decisis explains why total incorporation was never accepted as the rule of the court. Because an acceptance of Black’sAdamson dissenter would overturn several precedents at once, even his thorough evidence of original intent and the fundamental nature of the Bill of Rights as a whole would not be enough to establish a compelling interest to do so.

**Imitating State Practice**

The final hypothesis seeking to explain selective incorporation is that the court merely incorporated provisions in the Bill of Rights as a response to what states were already doing in practice. This hypothesis is drawn from the expectation that federalism concerns might influence the court to tread lightly when interfering with state practices. In order for this hypothesis to be true, state practice would have to play a major role in the court’s opinions and the court would not incorporate rights that were not already applied in a wide majority of the states. According to the data, this cannot be proven to be true. When opinions do indeed refer to state practice, they do so briefly, and it is treated with equal or lesser attention than other justifications for incorporation. Furthermore, state practice is cited to defend both selective incorporation and fundamental fairness. Because of this, state practice cannot be the only factor, or even the central factor, explain the court’s use of selective incorporation.

This is not to say that state practice serves no purpose in selective incorporation. It is helpful to observe the differences between how state practice is treated under selective incorporation and fundamental fairness views. Such an observation reveals that state practice was used in defense of selective incorporation as a test of fundamentality. One way to prove that a right was fundamental would be to illustrate that a wide majority of states had chosen to defend it in their state conventions. Chief Justice Warren did exactly that in his detailed citation of state practices in his Klopfer opinion. To Frankfurter and Harlan, the main proponents of the fundamental fairness position, state practice was simply proof that incorporation was unnecessary since state governments could be expected to protect these rights without excessive control of the federal government.

Perhaps the greatest challenge to this justification is the notion, expressed emphatically in both Malloy and Miranda that “the substantive standards underlying the privilege applied with full force to state court proceedings.” Without incorporation of fundamental rights, whether
states already respected them or not, incorporation vests the federal courts with the ability to apply federal standards to the protection of these fundamental rights. The states cannot be expected to independently regulate these standards in the same way the court has determined to be fundamental to their protection.

Conclusions

The process of selective incorporation of the provisions of the Bill of Rights resulted from the court’s evolving concept of fundamental rights and was executed through strategic compromises between total incorporationists and selective incorporationists in order to ultimately achieve near-total incorporation. As the second amendment was incorporated in McDonald v Chicago (2010) the only provisions which remain unincorporated are the Third Amendment freedom from quartering soldiers, the Fifth Amendment right to grand jury indictment, the right to a jury trial in civil cases for amounts greater than $20, and Eighth Amendment protection from excessive bail or fines. However, unless the court decides that these rights are indeed fundamental, it is unlikely that they will be incorporated in the foreseeable future.

The incorporation of the provisions of the Bill of Rights paralleled the Warren court’s expansion or the recognition and protection of civil rights. Previous to the Warren court’s elaboration of civil rights as we know them today, the understanding was that “civil rights were not the rights to free speech, free press, and free exercise of religion; nor were they the procedural rights of criminal defendants. Rather, civil rights were” considered in terms of “economic rights that had their foundation in the common law,” and therefore were the kinds of rights regulated by state governments. When the Warren court began to assert the fundamentality of protecting the “civil rights” as rights to “life, liberty and property” in the terms of the Fifth Amendment, the concept of civil rights became inextricably linked to the criminal law amendments and due process. When the court was faced with the tests for fundamentality from Palko v Connecticut, it was inevitable that they would have to reconcile the federal conception of these rights with the due process clause of the Fourteenth Amendment in order to settle the incorporation question. In other words, as the “due process” clause of the Fifth Amendment came to include more individual and civil rights, so too did the “due process” clause of the Fourteenth through a conception of substantive due process. Ultimately the court decided to incorporate
the amendments that had been deemed “fundamental” in their federal application as well as those that it deemed to be fundamental using the Palko tests. In this way, the expansion of civil rights both provoked and perpetuated selective incorporation. This expansion of civil rights in other issues on the court’s agenda influenced the way in which the court conceptualized an evolution of fundamental rights.

The nationalization of the Bill of Rights also had the same effect as many of the civil rights and criminal process cases had on state governments. There was a greater burden placed on states to adhere to federal standards. Selective incorporation fundamentally altered the way the states related with the federal government. In the same way that federal courts had been burdened with the provisions that protected individual and civil rights, so too were state courts. While some argue that this restricts the states’ abilities to “experiment” with effective laws⁵⁹, others claim that they should not experiment at all with fundamental rights, which through incorporation, were shielded from the discretion of state legislatures and state courts.

A large part of Black’s objection to both selective incorporation and fundamental fairness was that he did not believe it was the court’s place to determine which rights were fundamental and which were not. Furthermore, denying that particular provisions of the Bill of Rights were fundamental, thus allowing the “Court [to] determine what, if any, provisions of the Bill of Rights will be enforced, and, if so, to what degree, is to frustrate the great design of a written Constitution.”⁶⁰ Justice Souter would reply that the provisions of the Bill of Rights, especially those of the criminal law amendments cannot be so easily applied that incorporation of only the rights would be sufficient to protect civil rights. For this reason, the court’s ability to uphold those fundamental rights included in the Bill of Rights, those rights must be incorporated in combination with “more elaborate reasoning to show why very general language applies in some specific cases but not in others.”⁶¹ This role of the court is the precise reason why the types of rights incorporated by the due process clause was expanded to include even attendant provisions that allowed for the proper protection of rights contained in the first eight amendments. The complex role of interpreting the meaning and application of constitutional provisions also allows Justices the discretion to determine which rights are fundamental based on the complex justifications which, in the case of incorporation, include the interpretations of the Fourteenth Amendment, the specific provisions in the Bill of Rights and the definition of what is “fundamental” in judicial
This evolving concept of fundamental rights and the necessities of applying them reflect the court’s development in civil rights and criminal process cases which were applied to its position on incorporation. The change in the types of rights the court decided to incorporate which followed allowed the concept of selective incorporation to develop from a minority position in an issue that was supposedly “closed” to a powerful doctrine which incorporated nearly all of the Bill of Rights. Future investigations of the issue of incorporation could delve deeper into the past of incorporation theories in order to explain what formed the Twining and Palko precedents. Such an investigation would shine a brighter light on the distinction between First Amendment rights and other provisions of the Bill of Rights and provide a clearer vision of the court’s evolution in its concept of fundamental rights and how it influenced issues of federalism and individual rights.
END NOTES

2. Brennan 535
3. Brennan 537
5. 316 U.S. 455
6. 332 U.S. 46
9. Epstein and Knight
10. These cases are the “mirror cases” which I will discuss later in which precedents were overturned and incorporation became the central issue. These include Mapp v Ohio, Gideon v Wainwright, Malloy v Hogan, Duncan v Louisiana, and Benton v Maryland.
11. Brennan, 545
12. In Twining, Palko, Betts and Adamson
14. Gideon v Wainwright
15. Robinson v California
16. Palko
17. 211 U.S. 78
18. Self incrimination in Twining; double jeopardy in Palko
19. Emphasis added
20. 302 U.S. 319
21. Palko v Connecticut
22. These cases are as follows: 1925 Gitlow v New York- incorporates freedom of speech; 1931 Near v Minnesota- incorporates freedom of press; 1937 DeJonge v Oregon – incorporates freedom of assembly; 1940 Cantwell v Connecticut- incorporates free exercise.
23. These cases include Everson v Board of Education , Engel v Vitale, Sherbert v Verner ,and Edwards v South Carolina,
25. Adamson, p. 86
27. 370 U.S. 660 (1962)
28. 367 U.S. 643
29. 287 U.S. 45 (1961)
30. 395 U.S 784 (1969)
32. i.e. Miranda v Arizona
33. Miranda v Arizona
34. See 8.
35. Epstein and Knight, pp 22-36
36. Epstein, pp 56-99
40. The two exceptions to this which was present in the papers were that Stewart, Harlan and Clark (all eventually in dissent from the majority) voted to deny certiorari in *Malloy,* and Clark voted to deny in *Gideon.*
44. Douglas Memo in *Malloy v Hogan* (see below)
48. *Malloy v Hogan*
50. 386 US 213 (1967)
51. This may be an implicit reference to the privileges or immunities clause which, paired with “life, liberty or property” was never explicitly revived from Black’s Adamson dissent until Justice Clarence Thomas’s dissent in *McDonald v Chicago* (2010)
52. *Klopfer v North Carolina* pp. 221-226
53. *Wolf v Colorado* p 40
55. All others [see above]
56. Epstein and Knight, 157.
57. *Miranda v Arizona*
59. Friendly 940
60. *Adamson v California*
Autarchy and Autonomy: A Criticism of Stanley Benn’s Socialization Processes

Michael Dearman

Introduction

Autonomy is often equated with the notion of positive liberty, as acting on one’s desires, but there is a prerequisite to autonomy that is often overlooked. Stanley I. Benn names this prerequisite “autarchy” in his book A Theory of Freedom and differentiates it from the notion of autonomy.1 He explains the conditions under which an individual is considered both autarchic and autonomous, leaning heavily on the notion of socialization, where the development of autonomy is contingent upon non-interference of a certain kind.

Herein, I seek to describe Benn’s theory of both autonomy and autarchy and point out the problems I find with his formulation of autonomy. While I mostly agree with Benn’s distinction between autarchy and autonomy, it is the process by which one becomes autonomous that I find trouble with because Benn simply places too much emphasis on the strength of social forces. While others may not agree with me – in fact some may think Benn does not go far enough with his explanation of socialization – I ultimately believe there is a significant amount of individual free direction of the will that is necessary to qualify as autonomous, which Benn disregards.

While Benn does not make an explicit connection between his principle of non-interference and autarchy and autonomy, there is one segment of his principle that influences the notion of autarchy that is worth describing before delving into autarchy and autonomy explicitly. When an agent is making choices, she is generally operating within a “standard choice situation,” which is defined in four components.2 (1) The agent has a range of powers, capacities, and resources. (2) The agent has opportunity costs (if the agent does x then the agent must forgo y). (3) The agent has beliefs about (1) and (2). (4) The agent has an ordered set of preferences for certain activities. The first two are objective conditions concerned with the actual state of the agent in the world while the last two are subjective conditions, contingent upon the
agents own inner feelings and cognition. These four characteristics, while Benn primarily uses them to describe the way in which interference occurs, help elucidate his more ambiguous descriptions of autarchy.

**Rationality**

Benn believes that there is a fundamental distinction that most philosophers have misunderstood in describing autonomy. Autarchy, as Benn describes it, is a condition separate from and necessary for autonomy. It is the condition of being self-directing, which is normally a way in which philosophers formulate autonomy, but Benn separates the two terms. In addition to being self-directing, an agent must also be minimally rational to be autarchic. The standard choice situation, with components (1) - (4), is what I believe Benn means to describe minimal rationality in addition to what I have described in the endnote, though he claims that the standard choice situation is not limited to autarchic or autonomous individuals, but to all individuals. However, having the kind of self-knowledge about one’s abilities and opportunity costs demands a level of rationality that some individuals simply do not have. Importantly, Benn asserts that autarchy is the normal condition of humanity. As long as an individual is not mentally handicapped, for example, or lacking in minimal rationality, then the individual would be considered autarchic.

I simply think that in order for an agent to be in a standard choice situation, she must be more than just “minimally” rational, but quite rational to knowingly discern conditions (3) and (4). Rationality is an active function of the mind, not some desire-based subconscious process. Conditions (3) and (4) imply that the agent must have accurate self-knowledge, something that is not always an easy thing to come by these days. However, it seems plausible that an agent could be in a standard choice situation (fulfilling criteria (1)-(4)), yet be delusional about her abilities, environment, resources, etc. while still retaining a modicum of rationality. If Benn means that to be in a standard choice situation, then one must have accurate beliefs about (1) and (2), thus pointing to the fact that even if one is autarchic, then one may not necessarily be capable of being in a standard choice situation.

Regardless, autonomy is a step beyond autarchy because there are further conditions added to the possession of autarchy that are necessary to attain a state of autonomy. Benn’s autonomy is “an excel-
lence of character for which an autarchic person may strive...[and can] generate reasons for action.” Benn cites Rousseau in claiming that to be autonomous is to live “according to a law that one prescribes to oneself.” The additional condition that Benn adds on to his definition of autonomy is called the nomos, which is a consistency and coher- ence of the beliefs that motivate an agent’s actions. Autonomy requires nomos, but not all nomic agents are autonomous. There are conditions that can prevent a nomic agent from becoming autonomous.

Primarily, the source of the principles that govern an autarchic agent’s life determines whether an agent is heteronymous or autono- mous. A heteronymous agent is someone who receives their principles ready-made from the culture. The acceptance is made uncritically and without examination. A heteronymous agent is like a soldier that has been indoctrinated to think, act, and function in a certain fashion de- vised by individuals outside of itself. While a heteronymous agent may live with a set of coherent beliefs much like an autonomous person, it is in the fact that those beliefs do not stem from critical thinking that prevents the agent from being considered autonomous.

I generally agree with Benn up to this point about his theory, though his notion of minimal rationality and standard choice situa- tions lack clarity, but this is where Benn and I diverge. The nature of what it is to be an autonomous individual, to become an autonomous individual is at stake. He makes a claim about culture and socialization that undermines his own notion of autonomy and inaccurately repre- sents the nature of the autonomous being. Benn states that “the basic presuppositions of the culture which has furnished the very conceptual structure of his world...[even] the very canons of rationality that he employs ...have been learned as part of his cultural heritage.” Benn does not think that enculturation undermines his own formulation of autonomy at all, but I think that it does. What Benn fails to realize is that if the tools by which one thinks critically about certain beliefs are enculturated then there is a certain area of beliefs which must be blindly accepted in order to critically understand other beliefs essential to one’s autonomy.

**Benn’s Weaknesses**

In a sense, ways of thinking, formal or otherwise, must be ac- cepted in order to critically assess other beliefs. Short of formal logic, just the simple act of thinking could be said to be enculturated in the
way that Benn describes the socialization processes. How could one hope to be autonomous at all if some determinist process of enculturation dictates how one’s beliefs will be assessed, effectively determining the individual? Benn anticipates this critique and responds to it by claiming that even if an agent cannot question certain beliefs because his system of logic deems it logically impossible, then this does not violate the agent’s autonomy. Benn is allowing for a certain amount of relativism in his formulation of autonomy. However, if the socialization process simply instills “guilty feelings,” and the agent is inhibited by them, then the agent’s autonomy is certainly unattainable.

For example, if an agent is a member of a cultural group that holds a certain action X to be deplorable, that cultural group will have some reasoning for why X is deplorable and should be held to be deplorable. Whether or not the cultural group’s reasoning is logically coherent is a moot point because guilty feelings are often attached to behavior deemed outside the social norm of a cultural group. Based on an internal view of the culture, the reasoning will seem sound and the guilty feelings justified, allowing for autonomous agents within the culture provided that they meet the other criteria. From an external view of the culture, the reasoning may appear illogical and disjoined, and the guilty feelings become the driving force behind the reasoning of the agent within the cultural group. From one’s perspective the agent is autonomous, but from another perspective, the agent is not.

Benn’s response is contradictory. If even the system of reason that one possesses is enculturated, and is in itself a belief, then it should also be subject to the same scrutiny of beliefs as certain feelings or religious beliefs. Benn fails to realize that by the strict standards of socialization that he sets in his book, he has undermined his whole notion of using critical reason to challenge and assess one’s own beliefs. Benn’s only hope is that a plural tradition will offer enough diverse resources to help criticize the resources that are handed to the agent. The tension between diverse beliefs that criticize each other is Benn’s only ground for the realization of autonomous individuals, but in a society that is not plural, the members of that society will have no hope of autonomy.

Benn’s hope does not solve the problem, since there is still some acceptance of certain facts in order to assess other beliefs, so a true definition of autonomy does not develop. The act of choosing, apart from critical reason and feelings, is in itself significant. There is a creation going on, a development of the self, that arises simply by choosing.
Personal experience and development is not accounted for in Benn’s theory. He does speak about learning and education, of a culture actively pouring into an agent, but he fails to mention the agent actively experiencing certain things in the agent’s immediate environment by choice and learning from those of one’s free will. As an individual, the choice to accept or rebel against one’s culture is an individual act directed by one’s will. It is a creative act, and I believe it could arise from oneself spontaneously apart from one’s culture.

It is not an easy thing to be autonomous, even Benn admits that, but by the time he defines autonomy, it becomes clear that being autonomous is much easier than he at first made it seem. If we applaud autonomy so much, then there must be something worth applauding, and Benn steals that away when he defines autonomy. Autonomy is a process, not a permanent state of being. We may never truly attain it, but by slowly severing ourselves from being dictated by a culture, we may be able to drive towards autonomy. If autonomy is necessarily derived from being self-directing in a coherent way, then it is derived from an agent as an individual. I cannot be directed by my culture; there is a level of control that I must have over the process of my formation. Benn ultimately fails to recognize this, and while highlighting some basic distinctions between autarchy and autonomy, the flaws in his formulation of autonomy are too fundamental to rework that segment of his theory.
END NOTES


2. Benn, 326.

3. Benn is exceedingly silent and ambiguous about the standard for minimal rationality. It seems that decision making on a cost-benefit basis and to understand at some level the consequences of one’s actions are two conditions that Benn would assign to the category of minimal rationality.

4. Benn, 328.

5. Benn, 330.

6. Benn, 331.
ONE MAN, TWO VOTES: HARRY BLACKMUN’S FEDERALISM SHIFT

Brandon Bub

Introduction

In an opinion filed with the clerk today, we reverse the judgment of the District Court. We hold that the protective provisions of the Fair Labor Standards Act cover the employees of the Authority, and that, in affording this protection to those employees, Congress contravened no affirmative limit under the Commerce Clause. To draw the boundaries of state regulatory immunity in terms of “traditional governmental functions,” we have concluded, is not only unworkable but is inconsistent with established principles of federalism. There is nothing in the regulations of the Act that is destructive of state sovereignty or violative of any constitutional provisions. The continued role of the States in the federal system is primarily guaranteed not by externally imposed limits on the commerce power, but by the structure of the Federal Government itself. We have concluded that National League of Cities is out of line with these principles. That case accordingly is overruled.¹

With this one paragraph from a case summary combined with the opinion that accompanied it, Justice Harry Blackmun effectively undid nine years of legal precedent on the Supreme Court. Indeed, Justice Blackmun’s federalism adventure between 1976 and 1985 is certainly a noteworthy one: in National League of Cities v. Usery² he provided the crucial fifth vote in a majority that effectively created an entirely new legal doctrine of state sovereignty, and a short few years later in Garcia v. San Antonio Metropolitan Transit Authority³ he wrote the majority opinion overruling it.

These two cases and the subsequent federalism cases in between them prove worthy of study, but not so much because of the precedents they helped create. After all, Garcia’s decision was handed down over 25 years ago, and the case really only represented a retreat
back to a standard that the Court followed before *National League of Cities* in the first place. Rather, what this set of cases can inform us the most about is the judicial decision-making process itself. Though it might be easy to postulate that the Court’s shift here is a purely political one caused by a Court that had formerly learned to the right now leaning further left, when we look at the voting breakdown between *National League of Cities* and *Garcia*, we see that all of the justices’ votes remained constant (except for Potter Stewart, who was replaced by Sandra Day O’Connor for *Garcia*’s decision. Even so, O’Connor still voted the same way as Stewart) save for Blackmun. It was his own shift and not any changes in the Court’s personnel that ultimately doomed the *National League of Cities* doctrine. Why exactly did Blackmun’s shift take place? And might this tell us something more about the wider concept of the “swing justice?”

That Blackmun changed his vote in such a short amount of time proves significant, and there is certainly no dearth of scholarship and literature about the subject that seeks to provide an answer to this question. However, much of the scholarly work surrounding this question was undertaken immediately after the decision in *Garcia* while Blackmun was still on the Court. Now that a significant amount of time has passed since *Garcia*, Blackmun’s own papers (as well as the papers of many of the other justices on the Court at the same time) are available to the public for research, and we can study this question through an entirely new lens.

There are several plausible answers to the question as to why Blackmun changed his vote. One is a more legal explanation: he was reluctant to go along with the *National League of Cities* majority in the first place as evidenced by his reluctant concurring opinion in the case, and that he later saw the standard created in that case to prove unworkable. Another explanation is more personnel-based: other members of the Court might have influenced him strategically, and his own clerks who helped him review these cases could have added their own sway. Finally, there’s the explanation of the Court itself and/or Blackmun shifting. While the Court’s personnel between 1976 and 1985 remained largely constant, Blackmun might have feared the direction that the Court was heading with the *National League of Cities* doctrine and switched his vote to prevent the Court from being able to extend it. While my research lends credence in some way to each of these explanations, after studying this question intently I’ve concluded the most likely explanation has to do with Blackmun being influenced by
his own brethren on the Court as well as his clerks. I plan to prove this thesis in the following manner: first, by reviewing secondary literature about the subject, and then diving into primary data from Blackmun’s papers, analyzing the evolution of his votes in these federalism cases that culminates in his vote in *Garcia*.

**Review of Secondary Literature**

Several scholars have written about Justice Blackmun’s jurisprudence as a whole. Harold Hongju Koh, for instance, discusses Blackmun’s views on federalism, separation of powers, and the death penalty. He contends that in each of these areas Blackmun changed, but “in each, his ‘second look’ was more probing and revealing. In none was his turnabout abrupt or capricious. In each, he changed only after studying the doctrine’s impact on society and realizing that he could no longer pretend ‘that the desired level of fairness has been achieved.’” Moreover, Dan Coenen highlights two developments between Blackmun’s votes in *National League of Cities* and *Garcia*: the “evidenced inability of lower courts to generate satisfactory results in applying the *National League of Cities* test” and “the revelation that four members of the Court were eager to take the principle of *National League of Cities* to lengths Justice Blackmun did not foresee at the time *National League of Cities* came down.” Indeed, Coenen postulates that Blackmun’s alternatives “were to facilitate a continued assault on congressional power or to pull the plug entirely on the *National League of Cities* principle.” Both of these articles seem to lend more credibility to the idea of the legal shift on Blackmun’s part: his change was the result of an effort to clarify and improve a legal doctrine.

Joseph Kobylka treats the issue more in depth in a Creighton Law Review article released soon after *Garcia*. He emphasizes how “Blackmun’s *National League of Cities* opinion is brief and difficult to understand in light of the opinion in which he was concurring” because “nowhere in Rehnquist’s opinion did Rehnquist weight any interests” like Blackmun suggests in the concurrence. In his analysis of Blackmun’s role in *National League of Cities, Garcia*, and several relevant federalism cases in between, he offers a multitude of explanations for what caused Blackmun to abandon *National League of Cities*. His arguments, however, rely more so on court dynamics. First, “it is possible that in 1976 Blackmun was still feeling something of a “freshman effect”—still somewhat hesitant about charting an independent course
of his own.” His equivocation on *National League of Cities* may have been the product of a Justice torn between what seemed to be a comfortable bloc and what seemed to be clearly established legal principles.” In addition, O’Connor’s appointment to the Court following Stewart’s retirement may have made Blackmun “more aware of the possibilities of a rightward shift by the Court in its constitutional interpretation” since “her general orientation is clearly further to the right than was his.” Specifically, her joinder in Burger’s dissent in *EEOC v. Wyoming* (a case prior to *Garcia* where Blackmun was in the majority that found in the federal government’s favor as opposed to the states) that suggested that the *National League of Cities* doctrine “should extend beyond the commerce power to the enforcement sections of the Civil War amendments and other constitutional grants of power” might have “crystallized his fears in this area of constitutional law.” Finally, there’s the possibility that Brennan helped prod Blackmun over to his side since he would have assigned Blackmun the opinion in *FERC v. Mississippi* (another case that found in the federal government’s favor) and he “used something remarkably similar to the Blackmun balancing approach” in his opinion in *EEOC v. Wyoming*.

Biographies written about Blackmun also prove useful in identifying the elements behind his shift, especially in regards to the role that his clerks played in influencing his decisions. In her biography of Justice Blackmun, Linda Greenhouse cites how O’Connor and Blackmun’s “battle of footnotes” in the *FERC* case revealed Blackmun’s reluctance to keep the *National League of Cities* doctrine alive. Greenhouse also points out how Blackmun originally planned on voting with O’Connor, Rehnquist, and the rest of the *National League of Cities* majority in *Garcia* but his clerk Scott McIntosh convinced him he was on the wrong side because “basing state immunity on whether a particular service is a traditional governmental function was neither ‘sound in theory or workable in practice.’” McIntosh offered to produce a draft opinion that would have contravened the majority’s rationale but which did not outwardly overrule *National League of Cities*, which Blackmun proceeded to circulate to the conference. Since the majority was so surprised at Blackmun’s sudden shift, the justices decided to hold the case over for reargument for the following term.

Another biographer, Tinsley Yarbrough, further emphasizes the importance of Blackmun’s clerks in influencing his shift. He reiterates how McIntosh expressed his worry to Blackmun in originally deciding *Garcia* that “any rule of state immunity that looks to the ‘traditional,’
‘integral,’ or ‘necessary’ nature of governmental functions is an open invitation for the judiciary to make Lochner-era decisions about which state policies they favor and which they dislike.”

In addition though, Yarbrough underscores the importance of Blackmun’s clerk in the following term, Mark Schneider, in shaping the final form of the opinion. Schneider “recommended that the nondiscrimination restriction on congressional power that Scott McIntosh had proposed be discarded and that the Court commit the resolution of federal-state regulatory conflicts once again to the political arena.” This rationale was eventually implemented in Blackmun’s final draft of the opinion, and both of these biographies amply demonstrate that Blackmun’s clerks played a significant role in affecting his switch in *Garcia*.

**Review of Evidence**

Perhaps some of the most valuable evidence that can be found relating to Blackmun’s shift comes not from *National League of Cities* or *Garcia* but a federalism case that actually came before both of them. *Fry v. United States* was a case dealing with the application of the *Economic Stabilization Act of 1970* that “authorized the President to stabilize wages and salaries at certain levels.” The petitioners argued that “Congress did not intend to include state employees within the reach of the *Economic Stabilization Act* and that the Pay Board therefore did not have the authority to regulate the compensation due state employees.” The Court, however, disagreed, and in a 7-1 decision found in favor of the federal government.

Before the case was even decided, Blackmun himself wrote in his notes that “the case, for me [is] basically not a difficult one.” Because the act in question had expired the same year that the case finally reached the Court, Blackmun among other justices was inclined to dismiss the case as improperly granted, but since the case had already been briefed and argued he stated he was “somewhat hesitant to DIG the case.” When he began his discussion of the federalism issue, Blackmun noted that existing authority is flat and dead against the petitioners. *Maryland v. Wirtz* is surely significant precedent for the breadth of congressional power under the Commerce Clause. There the distinction between governmental and proprietary was rejected and the breadth of the commerce power was recognized. All
that was necessary is that the enactment have a rational basis. Surely that was so here.\textsuperscript{23}

Blackmunk went on to say that “unless the case is peremptorily decided, I am in favor strongly of an affirmance.”\textsuperscript{24} He would later go on to join the majority opinion on January 14, 1975 in a letter to Justice Marshall.\textsuperscript{25}

Most of the evidence suggests that Blackmun was particularly comfortable with finding in favor of the federal government and that he didn’t feel like federalism was a strong issue in this case. At first, he didn’t seem to have much problem with Marshall’s original opinion: a note from one of his clerks, David Becker, recommended that Blackmun join the opinion because it “hits the mark precisely...I am glad that he relies on the facts of this case to note that this particular law poses no problems of intrusion with state sovereignty.”\textsuperscript{26} However, an earlier outline of that case by the same clerk suggests a slight bit of discomfort: “Although I see some value in a signed opinion that cuts back a bit on the expansive language of Maryland v. Wirtz, it would not change the result in this case and is hardly one of the most pressing claimants to this Court’s time.”\textsuperscript{27} In a hand-written marginal annotation, Blackmun only wrote the word “agree” next to this paragraph. Blackmun’s reluctance becomes all the more visible after Justice Powell wrote a letter to Thurgood Marshall criticizing the original draft of the opinion.

Justice Powell in a January 14, 1975 letter told Justice Marshall that he “refrained from joining you in Fry because of concern as to its effect on National League of Cities v. Brennan and California v. Brennan.”\textsuperscript{28} These were actually the cases that would later become National League of Cities, which would come up in the Court’s following term. He believed that “Fry (as now written) will strengthen the force of Wirtz as a precedent and possibly be viewed as extending Wirtz,” something that Justice Powell was not inclined to do.\textsuperscript{29} Powell was uncomfortable joining Marshall’s opinion in its original form and was especially critical of the original penultimate paragraph:

Petitioners seek to distinguish Maryland v. Wirtz on the ground that the employees in that case performed primarily “proprietary” functions, while those subject to the wage regulations in this case performed both “proprietary” and “governmental” functions. But this Court rejected a similar attempted distinc-
tion as early as *United States v. California*, 297 U.S., at 183, where the Federal Safety Appliance Act was held applicable to an intrastate railroad owned by the State of California. Indeed, we reiterated the same view in *Wirtz* itself. See 392 U.S., at 195.\(^{30}\)

However, Powell suggested that if Marshall was “disposed to write *Fry* somewhat more narrowly, emphasizing the national emergency and its temporary nature, and eliminating or modifying the next to the last paragraph with respect to proprietary functions, I will happily join you now.” Marshall, however, was not inclined at first to change the opinion, stating in a letter to Powell his “regret that I cannot agree with [Powell]” and emphasizing how he felt the opinion was fine as it was.\(^{31}\) No doubt since Marshall already had a sizable majority he was relatively unafraid of losing one member of his coalition.

Blackmun, however, seemed to be growing more and more skeptical. He never outright criticized Marshall’s opinion like Powell, but after reading Powell’s note he did circulate a letter arguing that “there is much to be said...for Lewis’ point of view, set forth in his letter to you of January 14. This note is just to state that it is all right with me if you wish to accommodate him.”\(^{32}\) Once again, Marshall remained unfazed. If Blackmun genuinely did disagree with how this case would affect the federalism question, he certainly wasn’t being particularly aggressive about it. It was only after Powell circulated a separate opinion concurring in the judgment that Blackmun’s views became clear:

Dear Thurgood: I expressed to you some time ago my discomfort with the implications of the opinion, and in my note of January 15 I indicated my sympathy with Lewis’ points of view as set forth in his letter of the preceding day. I have now determined that my views coincide with those of Lewis. I am therefore joining his separate concurrence and am withdrawing my joinder in your opinion.\(^{33}\)

Faced with a significantly weaker majority (and the possibility of its dissolution altogether), Marshall decided to accommodate Powell and Blackmun by removing the original offending paragraph, inevitably limiting the scope of both *Fry* and *Wirtz*. Blackmun’s switch from a “strong affirmance” to a separate concurrence in the judg-
ment offers us more insight into his own decision-making process on this issue. On one hand, he did express a slight bit of doubt about the decision because he agreed with his clerk about wanting to limit the expansive nature of *Wirtz*, highlighting his sympathies for the state sovereignty side of the question. However, he was also unwilling to join Rehnquist’s dissent. In Blackmun’s annotated copy of Rehnquist’s first circulation of his dissent, Blackmun makes several notes expressing concern about how “he would OR [overrule] *Wirtz*.34 It seems that *Fry* wasn’t enough to convince Blackmun to overturn *Wirtz* yet, even though this is exactly what *National League of Cities* ended up doing. Indeed, he was still prepared to accept the opinion until Powell expressed his discontent. Perhaps Blackmun himself wasn’t sure about how to go convincing Marshall to change the opinion to his liking and he saw Powell’s separate concurrence as an opportunity to get what he wanted. Regardless, Blackmun’s papers offer us important insight into his views on the federalism question: in spite of voting with the Marshall majority on this case, he seemed relatively unsure about the federalism question itself, and this doubt would become even more manifest one year later with the Court’s decision in *National League of Cities*.

With this evidence we see more credibility for the personnel-based hypotheses. Powell’s reluctance as well as Rehnquist’s determined opposition seem to have had great influence on Blackmun’s decision in this case. Moreover, his clerk David Becker offered many insights that Blackmun eventually took into consideration (such as wanting to limit the expansive nature of *Wirtz*). In this context, Blackmun’s vote in *National League of Cities* the following year makes more sense, and we can see these same themes manifest themselves even more in Blackmun’s papers. Before *National League of Cities* was heard before the Court in the 1974 term, Blackmun wrote a supplemental memorandum expressing his thoughts about the case. Since *Fry* was still being decided in the same term, Blackmun felt that “on balance we ought to hold up *Fry* until we know where we are going in the present case. *Fry* certainly regards *Wirtz* as still good law.”35 Blackmun’s memorandum reveals that this was certainly a difficult case for him:

> Ultimately, what this gets down to, I suppose, is one’s philosophy of governmental structure in this Country. Surely this is not the kind of thing contemplated by the founders. I doubt if the nation
will fall apart if we either overrule Wirtz or distinguish it...On the other hand, I suppose also that the nation will not fall apart if Wirtz is affirmed and if the appellants here do not prevail.\textsuperscript{36}

Blackmum goes on to confess that he “voted with the majority in Fry basically on the ground of a narrow opinion, the precedent in Wirtz, and the emergency nature of the wage controls at issue there” and that the trend of decision in cases like Wirtz is “contrary to my initial reaction.”\textsuperscript{37} Finally, his clerk Karen Moore “suggests that the Court must consider the continuing effectiveness of Wirtz. If Wirtz is not good law today, the present legislation cannot be upheld.”\textsuperscript{38}

However, in spite of Blackmum’s own personal tendency to strike down the FLSA, he was still uncomfortable going along with Rehnquist’s opinion, underscored by his decision to write separately on the matter. Indeed, his clerks might largely have influenced that decision as well. A note from his clerk William Block doesn’t have kind things to say about the majority opinion:

Frankly, I think that Justice Rehnquist’s proposed opinion is the weakest opinion I have seen this year. It either misuses or ignores the prior doctrines in its effort to reach a per se rule...I think that a separate concurrence is both necessary and appropriate. As a sort of “fall back” recommendation, you might have a one-line concurrence, stating that you understand the case not to reach the situations, such as environmental protection, where the federal interest is greater. In light, however, of Justice Rehnquist’s per se rule, I do not think that a one-line concurrence, without explanation of the balancing test that lies behind it, would be very satisfactory.\textsuperscript{39}

The \textit{National League of Cities} papers go far to outline how Blackmun’s “balancing approach” to complement Rehnquist’s opinion came about.\textsuperscript{40} He repeatedly brings up the distinction between “proprietary” and “governmental functions,” and to him, “on balance, I feel that when a state engages in proprietary functions it clearly should be subject to federal controls.”\textsuperscript{41} This is a distinction that both he and his clerks seemed to agree upon. Blackmun didn’t want to go touting a new constitutional rule because he did feel there were cases where federal intervention was necessary. As his supplemental memos illustrate, Blackmun believed that this was a case where “the Court is
called upon to balance this national concern with a primary state and city concern... *Fry* is consistent with this balancing." In a case like *Fry*, “the national act saved money for the States,” but in *National League of Cities* “all the Act does is increase the cost to taxpayers and thereby to reduce government employees and services.” Blackmun’s decision-making process here also illustrates personnel influence: his clerks went a long way to affect his decision to concur in the result and it’s obvious Rehnquist’s more absolutist stance made him uncomfortable.

Blackmun’s shift in *Garcia* seems far less haphazard when one sees how uncomfortable he was with Rehnquist’s opinion in the first place, but to explain the change fully we must analyze more fully some of the subsequent cases the court decided between 1976 and 1985. *Hodel v. Virginia Surface mining and Reclamation Association* and United Transportation Union v. *Long Island Railroad Co* were two unanimously decided cases concerning the rule created in *National League of Cities*, and in both cases the Court found in favor the federal government. *Hodel*, another opinion written by Marshall, was perhaps most notable for helping to create a more fleshed-out three-prong test to apply the rule Rehnquist espoused in *National League of Cities*: in order for a challenged federal statute to be deemed unconstitutional, it must “regulate the states as states,” address matters that are “indisputably attributes of state sovereignty,” and it must be obvious that the State’s compliance with the law would “impair their ability to structure integral operations in areas of traditional governmental fields.” Marshall, in spite of being in the dissent in *National League of Cities*, was able to craft an opinion that maintained the ruling in that case without further extending it, and as a result he was able to maintain a unanimous Court. Blackmun, however, didn’t seem to have much trouble going along with Marshall’s majority rationale from the beginning though: in his notes from conference, he expresses how in a case like this, “C Cl [Commerce Clause] prevails” and he would have no problem reversing the lower court’s decision. Additionally, in his clerk’s recommendation to join Marshall’s opinion, the clerk makes it clear the Marshall’s discussion of *National League of Cities* shouldn’t “cause you any problems” because the rationale from *National League of Cities* “is inapplicable to Congressional attempts to regulate private parties, even if the regulations conflict with state regulations of those same parties.”

*Long Island Railroad* in the following term dealt with the ap-
plication of the third prong of the *Hodel* test and whether or not the *Railway Labor Act* oversteps the federal government’s power when applied against a state-owned railroad.\(^4\) Once again, the Court unanimously found in favor the federal government, and once again Blackmun didn’t have much trouble siding with the majority. In his notes from conference Blackmun writes how the third prong of the *Hodel* test is the one he had the hardest time defining in *National League of Cities* and that this was exactly why he concurred separately.\(^5\) His clerk Charles Rothfield was also quick to point out the somewhat random nature of what exactly is an “integral state function” and what isn’t: “Virtually everything the state does is designed to benefit the public in some way; whether it is ‘essential,’ and whether it can be provided only by the government, are likely to be subjective and factually complex inquiries. It is difficult to believe that the *Tenth Amendment* was designed to embody such fine-spun distinctions.”\(^6\) In addition, Rothfield was critical of Burger’s final opinion because “while the opinion disavows a blind reliance on history in determining the nature of those traditional state functions that are immune from federal regulation, it never states precisely how one goes about identifying such functions.”\(^7\) Rothfield was quick to point out the muddled nature of Burger’s opinion: managing railroads, after all, certainly wasn’t a “traditional state function,” and although the Court might have agreed in this case that the federal government ought to prevail the case also shed light on how the “traditional state functions” approach was proving unworkable. Finally, in a supplemental memorandum to the case Rothfield expressed fear that “if lower courts are permitted to balance the value of particular federal programs, I think that the test becomes too individualized and unmanageable.”\(^8\) Both Blackmun’s and his clerks’ uncertainty about the *National League of Cities* rule become more apparent with each case, and this uncertainty only escalates as the Court’s unanimity in its decisions over these cases breaks down.

*FERC* v. *Mississippi*\(^9\) and *EEOC* v. *Wyoming*\(^10\) are two more cases centered on questions similar to *National League of Cities*, but unlike the previous two cases, these cases split 5-4. *FERC*, in fact, was handed down in the same term as *Long Island Railroad* and the opinion was written by none other than Blackmun himself. Blackmun wrote that “this case is only one step beyond *Hodel*” and that the regulations that the federal government was imposing upon the states “do not threaten the States’ ‘separate and independent existence’ and do not impair the ability of the states ‘to function effectively in a federal
This was a rationale that other members of the Court had a more difficult time buying, and an ideological divide was certainly becoming more clear. In another one of Rothfield’s memos, the clerk expressed his own troubles with coming to a conclusion on this case:

I must admit that I find the idea of using a balancing approach in this area to be an extremely troubling one...I also have some doubts as to whether the federal courts are well-suited to serve as referees in what will inevitably be extremely delicate disagreements between the federal and state governments...I think that the decision of this case must be affected by the more basic debate about the nature of state and federal sovereignty--and that it is difficult to decide this case without leaning towards one or the other of the fundamental approaches outlined above.\textsuperscript{57}

Moreover, Rothfield was astute in pointing out after the Court handed down its opinion that “both the \textit{FERC} majority and SOC’s [Sandra Day O’Connor] dissent disclaimed any sort of balancing analysis.”\textsuperscript{58} No doubt Blackmun was becoming more aware that the balancing test he had promulgated in \textit{National League of Cities} wasn’t actually being employed by the justices when deciding similar cases, including himself. Interestingly enough, Blackmun’s notes here damage the credibility of the idea that Brennan was a large influence on Blackmun’s shift. While we might assume that Brennan would have assigned the opinion since he was the most senior justice in the majority, Blackmun’s correspondence with his clerks in his \textit{EEOC v. Wyoming} papers reveals that Burger actually assigned the opinion to Blackmun and subsequently changed his vote after Blackmun circulated the opinion.\textsuperscript{59} Finally, there’s also evidence that Blackmun was growing perturbed by the dissenting justices, especially O’Connor. A memo from Rothfield after O’Connor circulated her opinion highlighted how “the language is occasionally harsh, her dissent is highly rhetorical, and it seemed to me that a response in kind might be appropriate.”\textsuperscript{60}

Decided the following year, \textit{EEOC v. Wyoming} split along the same lines that \textit{FERC} did. Blackmun in his notes expressed a desire to decide this case under the 14th Amendment rather than under Congress’s commerce power, which would have circumvented a discussion of \textit{National League of Cities} entirely.\textsuperscript{61} However, as his clerk David Ogden pointed out, Justice Brennan ultimately avoided the 14th
Amendment approach in his opinion because Justice Stevens indicated he wouldn’t have joined such an opinion. Regardless, Ogden indicated that Brennan’s rationale—the third prong of the *National League of Cities/Hodel* test—was “the soundest ground in my opinion” and that the Age Discrimination of Employment Act was “less intrusive than the law at issue in *National League of Cities*, permitting the States to achieve the legitimate objectives it advances through more careful means than those it originally chose.” Chief Justice Burger and the other dissenters, however, saw the law as “very intrusive, and that Congress cannot require the state legislatures to enact more careful laws.” That Brennan’s rationale ultimately relies on the same reasoning Blackmun used in *FERC* might have been a strategic move on his part to move Blackmun further from his vote in *National League of Cities*.

Of course, Blackmun’s shift culminates in none other than *Garcia* itself. The *Garcia* papers unfortunately don’t offer much that the Yarbrough and Greenhouse biographies didn’t already mention. Those two sources already amply demonstrate the effect that clerks Scott McIntosh and Mark Schneider had on crafting the final *Garcia* opinion. However, the response that Blackmun’s opinion evoked among the other members of the Court is noteworthy. Schneider wrote to Blackmun after Powell and O’Connor circulated their opinions that he found O’Connor’s dissent “quite remarkable...it is peculiar for what it is not. It is absolutely silent as to why the judgments below should not be reversed...Nor is there any attempt to rebut the central arguments made in your majority opinion concerning the traditional governmental functions test.” Blackmun only responded to Schneider’s claim with an emphatic “Yes!” in the margin. The response that Blackmun’s opinion evinced might have validated his fear that the Rehnquist bloc was planning on extending *National League of Cities* to a degree that Blackmun was uncomfortable with. Schneider reminds Blackmun that “none of the dissents is willing to defend the ‘traditional governmental functions’ test, and that none propose any other substantive standard to replace it with,” and this might be exactly why Blackmun felt he needed to kill the *National League of Cities* doctrine in the first place.

**Conclusion**

Unfortunately, it might be just about impossible for us to get a definite idea of exactly why Blackmun changed his vote between
National League of Cities and Garcia without being able to ask him directly. However, the data provided by the papers he left behind is still telling and gives us a reasonably definite answer to the question. Blackmun’s papers remind us that his clerks as well as the other members of the Court played an especially important role in his decision-making. It’s important to remember that decision-making certainly does not occur in a vacuum. As Justice Felix Frankfurter once said, “A member of the Supreme Court is at once a soloist and a part of an orchestra.” Regardless of Blackmun’s own personal misgivings surrounding the National League of Cities opinion, it’s highly likely he wouldn’t have reached the same conclusions without the influence of his clerks in helping him form opinions or the fear that justices like O’Connor and Rehnquist wouldn’t extend the National League of Cities doctrine to an extent that he viewed as irresponsible.

Though this research might help to answer this one specific question, it certainly does a lot to raise other significant questions. First of all, this is only one policy area in which Blackmun shifted. Is Blackmun’s shift here representative of a wider “left-shift” in his jurisprudence, or is the reasoning behind Blackmun’s switch here more limited to the cases at hand? It would be interesting to compare the results of Blackmun’s shift here to his shift on other issues over his tenure on the Court like criminal law and discern if this shift is something anomalous. Additionally, it would be interesting to conduct other studies on similar “swing justices” on the Court. Blackmun is certainly not the only justice to have switched preferences in the Court’s history, and it would be worth studying whether or not the process by which he changed is limited only to him or if there is a pattern among other “swing justices” that end up changing their votes. As the papers of other justices become available in the coming years, it will become easier to conduct such studies and reach more conclusions about the judicial decision-making process.
END NOTES

1. Papers of Justice Harry Blackmun, Box 412
4. 426 U.S. 833, Blackmun J. Concurring
7. Ibid, at Page 566
9. Ibid, at Page 45
10. Ibid
11. Ibid
12. Ibid, at Page 46
13. Ibid
15. Ibid, at Page 148
18. Ibid, at Page 262
20. Ibid
21. Papers of Harry Blackmun, Box 196
22. Ibid
23. Ibid
24. Ibid
25. Ibid
27. Ibid
28. Papers of Justice Thurgood Marshall, Box 143
29. Ibid
30. Ibid
31. Ibid
32. Papers of Harry Blackmun, Box 196
33. Ibid
34. Ibid
35. Papers of Justice Harry Blackmun, Box 217
36. Ibid
37. Ibid
38. Ibid
39. Ibid
40. 426 U.S. 833, Blackmun J. Concurring
41. Papers of Justice Harry Blackmun, Box 217
42. Ibid
43. Ibid
46. 452 U.S. at 288
47. Papers of Justice Harry Blackmun, Box 328
48. Ibid
49. 455 U.S. at 683
50. Papers of Justice Harry Blackmun, Box 353
51. Ibid
52. Ibid
53. Ibid
56. 456 U.S. at 755
57. Papers of Justice Harry Blackmun, Box 351
58. Ibid
59. Papers of Justice Harry Blackmun, Box 368
60. Papers of Justice Harry Blackmun, Box 351
61. Papers of Justice Harry Blackmun, Box 368
62. Ibid
63. Ibid
64. Ibid
65. Papers of Justice Harry Blackmun, Box 412
66. Ibid.
Introduction

Cheers and fears regarding John Roberts’s conservatism have been rampant since before his appointment hearings. It is easy to see why one could draw the conclusion that he would shift the Supreme Court in a conservative direction just based on his background. He was appointed by George W. Bush (a president opposed to affirmative action), worked in the Reagan Administration under the Attorney General, and clerked for William Rehnquist. A New York Times article alleging that Roberts had “produced a torrent of memorandums explaining why the Reagan administration was right to oppose new provisions in the Voting Rights Act that had just passed the House” was part of the vein of discourse arguing that his appointment would curb civil rights achievements. Perhaps not surprisingly, according to the Brennan Center for Justice, 160 law professors urged the Senate not to approve Roberts’s appointment, writing that he “[h]olds a limited view of Congress’s authority to enact key worker, civil rights and environmental protections and a similarly narrow view of the vital role our courts and our government play in safeguarding individual rights, especially civil and women’s rights.”

But how conservative is the now Chief Justice on civil rights really? Even the narrative of his background is not completely without liberal anomalies. For example, he provided free assistance to a gay rights group seeking to overturn a Colorado statute that would have barred laws and regulations preventing discrimination against gay people, a statute which the Supreme Court eventually found unconstitutional in Romer v. Evans (1996). And in his confirmation hearings, Roberts told Senator Kennedy that he approved of Sandra Day O’Connor’s 2003 opinion upholding affirmative action and that he found nothing constitutionally suspect about the Civil Rights Act.

Nevertheless, the Roberts Court has shifted further to the right than the Rehnquist Court or Burger Court according to statistics from...
the Supreme Court Database. (The database codes rulings that are in favor of employers and prosecutors as conservative while those ruling in favor of people claiming discrimination and criminal defendants as liberal). And though the Court has not been found to be more judicially active (as measured in this data set by the number of precedents reversed and laws found unconstitutional), its activism is in favor of conservative rulings. Anecdotally, John Paul Stevens said in an April 2010 interview that all 11 justices, including himself, who had come onto the bench since 1975 were more conservative than the judge that he or she replaced.

But these are findings regarding the Roberts Court, not John Roberts himself. In fact, according to the same database, John Roberts is slightly more liberal than William Rehnquist (if Rehnquist’s years as associate justice are also considered). I will argue that John Roberts is certainly a conservative justice who has voted, not without exception, against the protection of discrete and insular minorities in employment, voting, and education. But he is not the primary driver behind the Court’s rightward shift. Neither his voting record nor his opinion assignments to other justices are as conservative as people feared they might be. He is no Scalia or Thomas. His decisions in some cases have also been circumscribed by popular opinion and Congress. On several issues, he and his Court have avoided deciding contentious constitutional civil rights issues. Though Roberts’s decisions are conservative, it is important to show how his conservatism is tempered in order to not misattribute the Court’s rightward shift to him. In fact, it is the conservative Alito’s replacement of the more moderate Sandra Day O’Connor which has tipped case outcomes rightward (though that is another essay), not extreme conservatism on the part of the Chief Justice.

To understand John Roberts’s stance on civil rights is to understand how our civil rights have shifted in the law since his appointment in 2005, how these decisions came about and affect society, and how they might foreshadow future rulings. Though the Chief Justice does wield only one of nine votes on the Court, he has the power to set the tone for the Court and decide who writes the decisions. Furthermore, issues surrounding race are clearly still relevant today. As one piece of evidence amidst many, “Blacks and Latinos comprise 80% of the student population in extreme-poverty schools and 63% of the student population in high-poverty schools.”^2
Employment

The Court has heard more civil rights cases related to employment discrimination than related to any other issue, and Roberts’s opinions on it have been somewhat of a mixed bag. In most cases, he has voted in a way that would seem to diminish anti-discrimination employment rights. In Domino’s Pizza, Inc. v. McDonalds (2006), he voted with the unanimous decision ruling that someone who suffers personal injuries from the termination of a contract (to which he was not a party) but that he alleges was terminated because of his race cannot not sue under 42 U.S.C. Section 1981. Furthermore, he assigned the opinion to Justice Scalia, who would probably write an opinion limiting as much as possible who can sue for discrimination under this law. In the blockbuster case Ledbetter v. Goodyear Tire & Rubber Co. (2007), he was part of the 5-4 majority that affirmed the decision that a person could not bring a Title VII suit based on salary discrimination if the discrimination occurred outside the 180-day limitation period. This could have had massive ramifications. Deborah Brake argued that it adopted a narrow and restrictive conception of what constitutes discrimination and that it further diluted the strength of antidiscrimination law, giving Congress less room to legislate under Section 5 of the Fourteenth Amendment and in general contributing to a legal structure that understands discrimination narrowly. But the decision’s effect was curtailed when Congress seemed to take Ginsburg’s dissenting advice that “the Legislature may act to correct this Court’s parsimonious reading of Title VII” and passed the Lilly Ledbetter Fair Pay Act of 2009, the first bill President Obama signed into law.

In Gómez-Perez v. Potter (2008), the Court ruled that the Age Discrimination in Employment Act (ADEA) did prohibit employer retaliation against federal employees who file age discrimination complaints. Roberts dissented, writing that “the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” Though this is in response to a statutory case, this is precisely the type of language that was used to prevent Fourteenth Amendment Equal Protection from being extended to groups other than previously enslaved blacks (e.g. Strauder v. West Virginia (1880)). His reasoning behind the dissent is that federal employees are already protected by Congress from retaliation through the civil service process and that Congress retaliation protection cannot be assumed any time Congress proscribes discrimination. To further limit the implica-
tions of the majority’s ruling in favor of victims of employer retaliation in age discrimination, he assigned Alito to write the majority opinion. Later we will see how Roberts is actually in favor of protection for victims of employer retaliation for filing discrimination complaints, but this was a case where he thought the protection would be redundant given other channels of anti-retaliation protection already in place.

In *AT&T v. Hulteen* (2009) Roberts voted with the 7-2 majority that AT&T’s policy calculating employee pension and retirement benefits without including maternity leave was not a violation of the Pregnancy Disability Act (PDA) because the discrimination took place prior to the passage of the act. The Court clearly limited the number of people who would be able to bring suit under the PDA, which had actually been passed in response to another limited court decision in *General Elec. Co. v. Gilbert* (1975) ruling that pregnancy did not constitute sex-based classification.

In *Ricci v. Destefano* (2009), Roberts voted with the usual conservative five justice bloc (including Scalia, Alito, Thomas, and sometimes Kennedy). Kennedy wrote that what might be called reverse or benign discrimination against the racial groups that did well on the firefighter test could only occur if there was a “strong basis in evidence” that there would be “disparate impact liability” if discriminatory action was not take, which was not proven here. This decision was probably tempered by Roberts assigning the opinion to the waffling Kennedy (perhaps to get Kennedy’s necessary fifth vote). The opinion slyly avoided answering the question of whether the disparate impact clause of Title VII was compatible with the Equal Protection clause or not, which Scalia noted in his concurrence. Perhaps what is even more interesting is that it shows what kind of scrutiny and doctrine Roberts would like to apply to Equal Protection cases. It is significant that the opinion invokes heightened scrutiny even though the discrimination is not against African Americans. Although one might argue that Hispanics are a discrete and insular minority, Kennedy does not use this language in his decision and, moreover, the unconstitutional discrimination was also against white men, who have certainly not been considered an insular and discrete minority group in the past.

The protection of a group that includes white people from discrimination is reminiscent of Roberts’s opinion in Parents Involved, to be discussed later. Is Ricci an example of the move toward colorblind doctrine in the area of employment mirroring the same sort of move in education? *Meacham v. Knolls Atomic Power Laboratory* (2008)
might support the notion that it is not that Roberts is against protecting disadvantaged groups in employment, but rather that he does not equate these groups with the “discrete and insular minorities” that have tended to be racial minorities. In Meacham, Roberts voted with the 7-1 majority placing the burden on the employer rather the employee to show that an age discrimination policy was reasonable, making it easier for age discrimination plaintiffs to prove their case. In other words, here Roberts has voted to make employment discrimination easier to prove but not for what has typically been considered a discrete and insular minority group. Again, this protection against ageism here is compatible with Roberts’s stance in Gómez-Perez because that was a special case involving federal employees.

Finally, in Walmart v. Dukes (2011), Roberts voted with the 5-4 majority that class action suits could not be brought for gender discrimination because the company has an anti-discrimination policy and that discrimination would have to therefore be proven in each individual case. Significantly, Roberts assigned the opinion to Scalia in a case that will prevent many people from bringing suit against large corporations because lawyers will not be willing to take on the huge task of going to court against these corporations when the payoff will be so minimal (in individual cases versus class action cases). If we stopped here, it would seem as though Roberts is staunchly against laws and policies that protect women, historic discrete and insular minorities, etc. from discrimination in the workplace by making it harder for them to bring suit in Court and reading statutes in a limited, “to-the-letter” way. Further, Ricci might show that he is doing this while simultaneously making it easier for whites to bring suit.

For example, in Chamber of Commerce v. Whiting (2010), Roberts wrote for a 5-3 Court. He wrote that the Arizona law requiring states to check the immigration status of job applicants before they are hired was constitutional in that it did not preempt the federal government’s immigration laws. Some would view this as a diminishment of job applicants’ civil rights in line with the string of cases outlined above. But is this Roberts’s hostility towards civil rights or might the decision be explained by a states rights lens? The Roberts Court’s emphasis on preemption cases in favor of state sovereignty is seen in another case as well. In Williamson v. Mazda Motor of America, Inc. (2010), the Court ruled unanimously that the National Highway Traffic and Safety Administration law (allowing either lap-only seatbelts or lap/shoulder seatbelts) did not preempt California law (which man-
dated all lap/shoulder seatbelts), ruling in favor of the family bringing suit. It seems that the Roberts Court will rule against large corporations and in favor of more restrictive laws if it means voting for state law over federal law.

Despite the fact that, as previously mentioned, based on seven employment cases presented so far, Roberts would seem to be antagonistic towards decisions that would have extended civil rights in the work place (such as allowing retroactive damages payments for pregnancy discrimination, preventing class action suits, etc.), many of his decisions in the realm of employment also show that the caricature of Roberts as a pure conservative in the mold of Scalia or Thomas is not accurate. We have already seen the exception for ageism in Meacham. And in Arbaugh v. Y&H Corp. (2006), the court ruled unanimously in favor of the woman filing a sexual harassment complaint against her employer, writing that an inadequate number of employees a company has does not mean that the court cannot hear Title VII claims. Roberts even assigned Ginsburg, one of the most liberal judges on the court, to write the unanimous opinion. This may show that the Roberts or the court in general was more liberal at the very beginning of its tenure, which would be supported by the Supreme Court Database numbers: the Court ruled conservatively 58 percent of the time in its first five years, but 65 percent of the time (the highest number in a year since 1953) in its sixth year. Alternatively, one could argue that this case is dressed as an Equal Protection case, but actually has very little implications for civil rights because it is really a technical subject-matter jurisdiction case. Goodman, Robinson, and Nichols seem to argue that the greatest repercussions of Arbaugh will be for small business, writing that “[t]here is little doubt that Arbaugh will indeed place greater risk management burdens on small businesses.” Though they do not directly address the increased opportunity for potential victims to bring suit, they do write that as a result of the case “it must be assumed that Title VII’s definition of employer imposes no limitation on federal courts jurisdiction in hearing Title VII violations.” I would argue that this ability of the courts to hear Title VII violations even if companies do not meet the numerosity requirement is an expansion of civil rights protection for women.

But Arbaugh is not the only case that would seem to contradict the narrative of curbing rights in the work place. The Court ruled unanimously in favor of Sheila White in Burlington Northern & Santa Fe Railway v. White (2006) that there was retaliatory action against
her filing of a sexual harassment suit in violation of Equal Protection. The test that they apply is whether the employer’s action would have deterred other employees from filing a complaint, and in this case it would. Further, Breyer, writing for the majority, says that the “anti-re-
taliation provision does not confine the actions and harms it forbids to
those that are related to employment or occur at the workplace”… “nor
is it anomalous to read the statute to provide broader protection for
retaliation victims than for victims of discrimination.” Alito concurrs in
the decision only, mainly because of this latter reasoning; he says that
the criteria for discrimination and retaliation should be the same. It is
important to note that Roberts does not join Alito’s concurrence, but
stands by Breyer’s more expansive opinion covering retaliation outside
the workplace.

Though Mary Newman argued in the Harvard Law Review
that Burlington’s expansive precedent was not upheld in a district
court case called Sykes v. Pennsylvania State Police (2007) and that
this might have important consequences for whether Burlington will
actually be a victory for Title VII plaintiffs in practice. I would argue
that as far the Roberts Court goes, its commitment to anti-retaliation
protection is confirmed in CBOCS West, Inc. v. Humphries (2008). In
a 7-2 majority including Roberts, Brennan writes that there is a heavy
burden to be met for any employer arguing against anti-retaliation
claims. This is regardless of the fact that Congress did not include an
explicit provision for anti-retaliation in the Civil Rights Act of 1866,
section 1981 or its amendment in 1991 on which the claim was based.
This was a major point of contention for Thomas with Scalia in dissent
(from which Roberts is notably missing). Anti-retaliation measures
were protected again in Crawford v. Nashville (2009), this time unani-
mously and under Title VII. Interestingly, again Roberts chooses not
to assign the majority decision to one of the more conservative justices
and does not join Alito’s concurrence (joined by Thomas) in which
he “emphasize[s] [his] understanding that the Court’s holding does
not and should not extend beyond employees who testify in internal
investigations or engage in analogous purposive conduct.” This shows
that Roberts was not concerned with limiting possible anti-retaliation
discrimination claims. The discussion of John Roberts’s case decisions
here shows that he tends to be against the extension of civil rights in
the realm of employment with exceptions for anti-retaliation and age-
ism.
Civil rights leader and Democratic House Representative John Lewis commented during John Roberts’s nomination hearings: “in 1965, Judge Roberts was only 10 years old. He may be a brilliant lawyer, but I wonder whether he can really understand the depth of what it took to get the Voting Rights Act passed” (Washington Post). Two cases have been decided by the Roberts Court involving voting rights that could show whether this characterization is true. In *League of Latin American Citizens (LLAC) v. Perry* (2006), the Court ruled that Texas’s new redistricting plan was a violation of the Voting Rights Act because it denied Latino voters the ability to elect a candidate of their choice. Though Roberts dissented, it was not due to hostility towards the Voting Rights Act. In fact, in his dissent Roberts applied strict scrutiny as the majority did but simply saw the evidence showing that the new redistricting plan was actually more representative of the Latino vote than the previous one and was therefore not a case of vote dilution. He cites the same precedents as the majority (most importantly *Thornburg v. Gingles* (1986)) for deciding whether vote dilution has taken place. This would seem to show that Roberts is actually concerned with protecting minority rights. But interestingly, Roberts also cites *Shaw v. Reno* (1993) in which a minority representation plan was struck down, and he emphasizes that based on Shaw “states retain broad discretion in drawing districts to comply with the mandate of §2.” What those like Lewis would find even more alarming, however, is that Roberts writes that he is not sure whether any standard for examining unconstitutional political gerrymanders exists or whether these are even issues that the courts should be deciding, but he seems to take the easy way out by saying that is not the issue being argued here. While this would not seem to augur well for advocates of judicially enforced protection of minority voting rights, it is important to note that Roberts did not go as far as Scalia and Thomas’s dissent to say that there is no justiciable case.

It is really in *Northwest Austin Municipal Utility District Number One (NAMUDO) v. Holder* (2009) that Roberts’s views on the constitutionality of the Voting Rights Act could be tested. Though the act had a long history of precedents validating its constitutionality, NAMUDO argued among other things that because Texas has become so heterogeneous, section 5 of the act was no longer necessary. As a result, the Roberts Court had the opportunity to rule in favor
of NAMUDO and strike down the act, but chose not to do so in an 8-1 decision, with Roberts writing for the majority. But this was not an explicit win for advocates of the Voting Rights Act or necessarily evidence that Roberts is a proponent of the act. The Court does some maneuvering to extend the definition of “subdivisions” which can be exempt from section 5 to include NAMUDO and sends the case back to lower courts to decide, thereby taking care of this particularities of this district without “reach[ing] the constitutionality of section 5.” The Court not only avoids affirming the constitutionality of one of the most seminal pieces of legislation to end discrimination by Roberts’s own admission but even suggests that it might be unconstitutional. Couched in much distracting dicta (perhaps purposefully placed), Roberts writes that the preclearance issue raises significant doubts about the constitutionality of the act and that Congress should reexamine it. The opinion is restrained in that to get the majority Roberts did not directly argue against the constitutionality of the act, but he does make a kind of threat. He writes that though the Court can decide the case by other means and has therefore done so here, that still “the Court will not shrink from its duty ‘as the bulwark of a limited Constitution against legislative encroachments.’” His doubts about the constitutionality of the act seemingly stem from his view that the problems the act was meant to address have largely been solved, from his concern for “federalism costs” or “authorize[d] federal intrusions into sensitive areas of state and local policymaking,” and from the fact that the act does not treat all states equally. Interestingly, these are some of the same states’ rights issues that Roberts voted to defend in the previous section’s employment discrimination and preemption cases. Roberts did not go as far as Thomas’s concurring opinion, however, that the Court should have addressed the constitutionality of section 5 to find that it goes beyond Congress’s power to enforce the 15th Amendment.

This decision may have been due to the public outcry that would have occurred with the striking down of the Voting Rights Act, as the case was being watched closely. As Friedman goes on to argue, Congress had just reauthorized the law unanimously in the Senate and with an overwhelming majority in the House, both of which were in Democrats’ control, and the first African American had been elected to the presidency. If the Court had declared the Voting Rights Act unconstitutional, they might have faced something more formidable than public outrage: perhaps a retaliatory law like the Lilly Ledbetter Fair Pay Act, which, significantly, Congress passed in the same year as the
NAMUDO case. LLAC and NAMUDO both show that Roberts will apply the Voting Rights Act but that he does so with increasing skepticism as to the constitutionality of the law because of its infringement on state sovereignty. It remains to be seen if in future cases Roberts will go further and join Thomas in his condemnation of the Voting Rights Act.

**Education**

The Roberts Court has only ruled on one case that involves discrimination in education. That case is *Parents Involved in Community Schools v. Seattle School District No. 1* with the companion *Meredith v. Jefferson County Board of Education* (2007) case, and its ruling flies in the face of the preference he has shown for local control in employment and voting discrimination cases. Roberts wrote the 5-4 decision with the same five-justice coalition as in *Ledbetter* and *Walmart*, although here it was a plurality because Kennedy did not join the opinion, thereby limiting the precedential power of Roberts’s opinion. The Court declared Seattle’s voluntary public high school admission process unconstitutional because of its use of race in school assignment tiebreakers. Essentially, Roberts wrote that the program was 1) not justified because Seattle had never had a dual race system (though he writes in the companion case that the racial tiebreakers are not justified even if there was past discrimination), 2) that achieving diversity went beyond achieving racial diversity, 3) that the racial tiebreakers used were not the kind of individualized and holistic review of candidates allowed by *Grutter v. Bollinger* (2003) which was for higher education, and 4) that the pedagogical contribution of racial diversity is not valid enough to justify racial discrimination (here against non-minorities). Roberts seems to be applying heightened scrutiny not to prevent discrimination against discrete and insular minorities but to prevent discrimination based on race as a whole, echoed two years later in *Ricci*. If anything smacks of a move toward color blind doctrine (first advocated by Harlan in his dissent in *Plessy v. Ferguson* (1896)), this is it.

But Roberts does not endorse the color blind doctrine outright. Does this mean that he has misgivings about it? Or does it mean that he hedged his opinion mainly in order to get Kennedy’s crucial vote? The latter seems very probable. The fact that Kennedy does not join the part of Roberts’s opinion arguing that racial balancing is not a state
interest shows that he is less extreme than Roberts on the issue of what is excluded from being “a compelling state interest.” Roberts quotes, *Milliken v. Bradley* (1974) in his opinion, a case which did not overturn Swann’s outlined recommendations for how to integrate school systems but did limit it from extending into districts where there was no de jure segregation. Interestingly, like *Parents Involved, Milliken* may also have been hedged by the Nixon appointees in order to get Stewart to join their opinion for the crucial fifth vote. Roberts’s use of Milliken is even more significant since it ruled that segregation by choice and not by state action did not have constitutional implications. Once again, this citation seems to indicate that Roberts is not concerned with the judiciary’s role in promoting racial diversity.

Roberts’s dismissal of Grutter also suggests that he does not regard promoting racial diversity as a valuable endeavor of the courts. In *League of Latin American Citizens*, Roberts wrote “I do not believe it is our role to make judgments about which mixes of minority voters should count for purposes of forming a majority in an electoral district… It is a sordid business, this divvying up by race.” Roberts carries this disdain for appropriating mixes in electoral districts to appropriating racial mixes in schools. In perhaps the most famous line of the Parents Involved opinion, he writes “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” To put it even more explicitly, he writes “Racial balancing is not transformed from ‘patently unconstitutional’ to a compelling state interest simply by relabeling it ‘racial diversity.’”

The battle over *Brown* continues. Nothing exemplifies this better than the fact that the five opinions in the case referred to *Brown* 90 times. Breyer’s 77 page dissent in *Parents Involved* charged Roberts and the plurality with judicial activism for overturning precedent. Though many conservative observers would have lauded Roberts for this decision, this is not an example of what Roberts had declared his goal to be at the Congress appointment hearings: “a modest judge” (which he might have claimed in a case like NAMUDO where he slyly avoided overturning the Voting Rights Act). Some argue that *Parents Involved* is not an isolated case but one which continues what they see as a troubling line of cases encouraging the tide of resegregation, including *Keyes v. School District No. 1* (1972), *Milliken v. Bradley* (1974), *Board of Education v. Dowell* (1991), and *Freeman v. Pitts* (1991). This is the type of decision that would support the idea that the Roberts Court will not hold the line of the Rehnquist Court but
reverse on civil rights, going from bad to worse. Several of Siegel’s points explaining why he thinks this is so are present in this case. These include 1) the identity of the justices; Alito for O’Connor is a big change and one wonders whether she would have joined the opinion, 2) Rehnquist was part of results oriented school of conservatives, while Alito and Roberts are concerned with means and keeping in line with a Reagan-esque ideological conservatism; Roberts seems to be acting in line with the positions he wrote in memos while working in the Reagan administration, 3) there is an unwillingness to consider real world consequences and how this will negatively affect racial diversity in schools, and 4) Roberts is more than willing to overrule precedent.

**Conclusion**

John Roberts has limited employment discrimination rights (though this may be a product of his preference for state sovereignty) with important exceptions such as in anti-retaliation cases, did not strike down the Voting Rights Act (though this might have been due to outside pressure rather than his personal affection for the statute), and in education struck down an affirmative action policy that seems to be moving the Court towards a colorblind doctrine. It is this latter move that would support the notion of Roberts’s hostility to the civil rights of discrete and insular minorities the most, particularly because it cannot be defended by a supposed preference for local rule (since the plan was voluntary/locally imposed). The implications of the ruling are significant because 1,000 of 15,000 school systems currently use plans that consider race in school assignments.

But Roberts’s position on education should not cancel out his less extreme and more nuanced stances on other issues, outlined above. Time after time he did not join Scalia or Thomas (e.g. CBOC West), and on numerous occasions he assigned opinions to justices who would write less restrictive opinions with respect to civil rights (e.g. Burlington and Ricci). And just because his hints toward colorblind doctrine reduce preferential rights for racial minorities, this does not mean that he limits civil rights for all groups (e.g. Meacham).

This less extreme conservatism on the part of Roberts can be seen in *Snyder v. Louisiana* (2008), which suggests that it could extend beyond employment discrimination and voting to juries. In *Snyder*, Roberts voted with the 7-2 majority holding that the state’s dismissal of all potential black jurors was a violation of Equal Protection, revers-
ing the lower court’s decision. Here Roberts had the opportunity to overturn *Batson v. Kentucky* (1986), but chose not to. It is one example of how Roberts is in some cases less conservative than Rehnquist, because Rehnquist was in dissent in the Batson case. More to the point, Roberts did not join Scalia and Thomas in dissent to say that Batson required a lower level of scrutiny.

I am not arguing that Roberts is a liberal justice by any means. But the case history shows that he is not as far right as Thomas and Scalia and that his replacement of Rehnquist is not the force moving the Court to the right. It remains to be seen how far right Justice Alito’s replacement of Justice O’Connor will move the Court and to what extent the solidification of the right bloc of the Court will embolden John Roberts’s future decisions.
END NOTES


6. James, South Carolina Law Review.
Introduction

William Rehnquist served as an Associate Justice under Chief Justice Burger from 1972 to 1986 and was promoted to Chief Justice by President Reagan in 1986. Prior to his appointment to the Supreme Court, he expressed an advocacy for original intent while he was a clerk to Justice Jackson in a memo on Brown v. Board of Education. Early in his judicial career on the Supreme Court, Rehnquist wrote The Notion of a Living Constitution in which he criticizes the concept of an evolving or “living” Constitution and advocates an adherence to original intent jurisprudence. The doctrine of original intent consists of seeking to understand and apply the intent of the Framers of the Constitution and the original meaning of their words in judicial decisions. Rehnquist asserts that the Constitution must be interpreted with respect to the framer’s intent, consistent with the “language and intent of the document.” From these early documents, adherence to original intent appears foundational to Rehnquist, but how do Rehnquist’s statements on original intent in Living Constitution comport or conflict with his actual judicial behavior on the Supreme Court? In other words, was Justice Rehnquist consistent in his proclaimed adherence to the doctrine of original intent? His actions on the Supreme Court reveal that he did not remain as consistent as his early statements would suggest. Justice Rehnquist was consistent only in part, and inconsistent as a whole. In matters of Equal Protection, his judicial behavior was consistent during his terms as Associate Justice, but he deviated from his stated position after his promotion to Chief Justice. In matters of
Church/State, he rarely applied original intent except in a few isolated cases.

**Jackson Memo and Living Constitution**

Two documents authored by Rehnquist, one written prior to his appointment to the Supreme Court and another from early in his career on the Supreme Court, serve as clear evidence of his stated position on original intent.

The earliest of these documents was written in 1952 while Rehnquist was working as a law clerk to Justice Jackson. He wrote a memo to Jackson regarding *Brown v. Board of Education* (1954) when the decision was still undecided. In his memo, he urged Jackson to adhere to the text of the Constitution and uphold *Plessy v. Ferguson* (1896). He held that the Court was “being asked to read its own sociological views into the Constitution.” He frowned upon this notion, stating that “there are standards to be applied other than the personal predilections of the Justices.” He asserts that judicial decisions should not be made based on the social values of the times because such standards will fade over time to become nothing but “the sentiments of a transient majority of nine men.”

The second document, *The Notion of a Living Constitution*, was written four years after Rehnquist’s appointment as Associate Justice. In addressing the concept of a living Constitution, he examines two definitions. The first is the idea that the Framers could not have foreseen all of the events of the future and appropriately they used vague language in the Constitution as would allow it to endure through the ages; in this respect the Constitution may be considered a living document that can be applied to circumstances never envisioned by the Framers. In reference to Justice Holmes’ majority opinion in *Missouri v. Holland,* he calls this first definition the “Holmes version.” The second definition is the idea that the meaning of the Constitution is dependent upon the ideologies and opinions of the judiciary; that judges interpret the Constitution to solve social problems without respect to popular will or to the framers’ intent. In this manner the Constitution is living to the extent that it can be bent by the will of judges. In reference to “a brief filed in a U.S. District Court on behalf of state prisoners” which exemplifies this understanding of the Constitution, Rehnquist calls this the “brief writer’s version.” The majority of his argument is a critique of the second definition. He considers this view
“the substitution of some other set of values for those which may be
derived from the language and intent of the framers,” criticizing any
development from the “language and intent of the document.” His con-
clusion is essentially that allowing non-elected judges to impose their
will in political decisions under the guise of interpreting a “living”
document is antithetical to the principles of democratic society as well
as in contradiction to the experience afforded by history.

He ultimately asserts that original intent is the only true way of
interpreting the Constitution. He holds that the language of the Consti-
tution was not intended to solve modern social problems; rather that it
was written to prevent the abuse of the past and cannot be changed by
judges today. In both documents he gives a strong statement on how
the constitution should be interpreted, but he does not provide a meth-
odology for applying original intent in judicial decisions. The next
section seeks to determine whether he upheld this standard in practice.

Rehnquist’s Original Intent on the Court

Two areas of constitutional law in which Rehnquist’s applica-
tion of original intent is evident are Equal Protection and Church/State
relations. In Equal Protection, he consistently applied original intent
during his tenure as Associate Justice but deviated from the practice as
Chief Justice. In questions of Church/State relations, he was not con-
sistent even as an Associate in applying original intent. He proclaimed
a strong preference for original intent in his dissent in *Wallace v. Jaf-
free* (1985), but his argument remained almost entirely isolated to that
case and did not reemerge in later decisions.

**Equal Protection**

*Associate Justice*

Rehnquist’s memo to Justice Jackson in 1952 set the ground-
work for his perspective on the Equal Protection Clause of the Four-
teenth Amendment. In the memo he stated that Plessy v. Ferguson
(1896) was correct and should be upheld. During Senate nomination
hearings he responded to controversy over this statement by explaining
that it did not reflect his personal opinion but was written to reflect that
of Jackson. He nevertheless maintained a narrow interpretation of
the amendment and sought to keep it from expanding beyond its origi-
nal application to classifications of race. While an Associate Justice he was consistent in voting and writing opinions in light of an original intent understanding of the Constitution. From 1972 to 1986, the Court faced a number of cases on issues of race, illegitimacy, and gender. In many decisions Rehnquist dissented, often being the lone dissenter; Hudson notes that he “wrote 62 lone dissents during his time on the Burger Court.”

In matters of race, the first notable opinion by Rehnquist came in *Moose Lodge No. 107 v. Irvis* (1972) in which a private club discriminated against Irvis, a black guest, by not serving him at the club’s restaurant entirely on the basis of his race. Rehnquist wrote the majority opinion, holding that the club’s discriminatory policies did not violate the Equal Protection Clause. While he did not reason by original intent, this early decision was an application of his narrow interpretation of the Equal Protection Clause certainly informed by original intent. The following year, Rehnquist dissented from desegregation case *Keyes v. School District No. 1* (1973) and continued to advocate a narrow interpretation of the Equal Protection clause. The case involved an allegation that a school board was intentionally segregating students by controlling attendance zones and through other forms of manipulation. The Court held that the actions of the board unconstitutional. Rehnquist did not see the board’s actions as comparable to a state law mandating segregation as in *Brown v. Board of Education* and therefore the actions were insufficient to violate Equal Protection. Sue Davis notes that “Rehnquist has never voted to uphold a school desegregation plan.”

While he held a narrow interpretation of Equal Protection in matters of race, he refused to approve of it extending beyond race into classifications of illegitimacy and gender. In *Weber v. Aetna Casualty and Surety Co.* (1972), he articulates a decidedly original intent opinion on illegitimacy. The case involved a man who had died during the course of his employment and his six surviving children: four legitimate, two illegitimate. The state workmen’s compensation law did not extend to illegitimate children, so two of his children received no compensation benefits. The Court held that the state law excluding illegitimates violated the Equal Protection Clause and struck down the statute. Rehnquist wrote a strong dissent, stating that the Court’s approach was “an extraordinary departure from what I conceive to be the intent of the framers of the Fourteenth Amendment … devoid of any historical or textual support in the language of the Equal Protec-
tion Clause.” Further, he held that:

“Our who framed and ratified the Constitution and the various amendments to it chose to select certain particular types of rights and freedoms, and to guarantee them against impairment by majority action... but the right of illegitimate children to sue in state court to recover workmen’s compensation benefits is not among them.”

The following year Rehnquist reasserted this position, dissenting from New Jersey Welfare Rights Organization v. Cahill (1973) in which the Court relied on the Weber majority to invalidate a New Jersey financial assistance program that excluded illegitimates.

Later, in Trimble v. Gordon (1977) the Court struck down a provision of the Illinois Probate Act which denied inheritance to illegitimate children except from their mothers’ estate. Petitioner Trimble was unable to inherit her father’s estate due to illegitimacy, and the Court held it violated equal protection. As in Weber and Cahill, Rehnquist again delivered a strong dissent arguing on the basis of the intent of the framers, defining his perspective on the intent of the Equal Protection Clause. He declared that the framers of the Fourteenth Amendment intended it to only apply to classifications of race and national origin and that the equal protection clause “makes sense only in the context of a recently fought Civil War.” He sees the court’s treatment of equal protection as equating to a council of revision, which was a concept rejected at the Constitutional Convention. Moreover, he holds that “equal protection does not mean that all persons must be treated alike. Rather, its general principle is that persons similarly situated should be treated similarly.”

His reasoning as expressed in Trimble is evident also in issues of gender discrimination. In Craig v. Boren (1976), an Oklahoma law discriminating against women in regards to alcohol sales was challenged on equal protection grounds. The court invalidated the law, holding the discrimination based on gender classifications to be unconstitutional. As expected, Rehnquist wrote a lengthy dissent arguing that gender is not a suspect classification to which Equal Protection extends. Rehnquist’s response to Craig was not an isolated incident, either. Sue Davis points out that, at least up until 1984 when her article was published, “Rehnquist has disagreed with the majority in seven of the nine cases in which the Court invalidated classifications based on
In her 1984 article, Sue Davis suggests that Rehnquist’s philosophy could be described as such: “while women may need special protection, such protection is not to be found in the equal protection clause.” In light of Rehnquist’s opinions as Associate Justice, Davis’ statement seems correct; however, after his elevation to Chief Justice, he deviates from that stance. After previously rejecting the notion of expanding equal protection to women, he changes and accepts it in *United States v. Virginia* (1996). The case arose when the United States sued Virginia and the Virginia Military Institute (VMI), an exclusively male state school, claiming that the school’s male-only admissions policy violated the Equal Protection Clause. Rehnquist voted with the majority and wrote a concurring opinion. In Virginia, Rehnquist cited the Craig majority favorably and held that VMI violated the equal protection clause because the state had not provided a corresponding equal educational institution for women. He noted: “it is not the ‘exclusion of women’ that violates the Equal Protection Clause, but the maintenance of an all men school without providing any—much less a comparable—institution for women.” Thus it would seem that he extended “similarly situated” to classifications of gender.

He extends equal protection to women again in *Nevada Dept. of Human Resources v. Hibbs* (2003). He wrote the majority opinion upholding the Family Medical Leave Act, which sought “to protect the right to be free from gender-based discrimination in the workplace.” He again cites the Craig majority favorably, noting that “…We have held that statutory classifications that distinguish between males and females are subject to heightened scrutiny.” He refers to gender discrimination as unconstitutional and held that the FMLA served the purpose of protecting against such discrimination.

Rehnquist’s stance on illegitimacy shifted while he was Chief Justice as well. He voted with the majority in *Clark v. Jeter* (1988) in which the Court struck down a state law on Equal Protection grounds. The challenged law contained a 6-year statute of limitations on illegitimate’s paternity suits. Justice Sandra Day O’Connor delivered the opinion of the Court, holding “that the 6-year period is not substantially related to an interest in avoiding the litigation of stale or fraudulent
claims and accordingly was unconstitutional.

As an Associate Justice, Rehnquist’s position on equal protection remained consistent with the statements in the Jackson memo and Living Constitution. He advocated judicial restraint and a narrow reading of the Equal Protection Clause. He never supported extending Equal Protection to classifications of gender or illegitimacy. Sue Davis found that “In Rehnquist’s view, the fourteenth amendment was not intended to be an affirmative guarantee of equality. Its purpose was simply to prohibit the states from treating blacks and whites differently under the law.” He articulated his reliance on original intent interpretation of the amendment in Trimble v. Gordon (1977). However, he broke this consistency and abandoned a strict adherence to such a stance after his elevation to Chief Justice, voting and writing opinions that extended Equal Protection beyond the Civil War context of racial classifications only.

**Church/State**

*Associate Justice*

Derek Davis describes Rehnquist’s judicial approach to religion clauses as “accommodationist.” Accommodation may be characterized by neutrality that does not completely separate and does not attack religion, consistent with a narrow interpretation of the religion clauses. Prior to Wallace v. Jaffree (1985), Rehnquist did not significantly rely on original intent in religion cases. One of his earliest treatments of religion is found in Meek v. Pittenger (1975). Pennsylvania residents challenged the constitutionality of state statutes which authorized public school officials to supply educational materials, including lending textbooks, hiring staff, and rendering auxiliary services, to nonpublic elementary and secondary schools including many religious schools. Appellants claimed that the laws violated the Establishment Clause because the majority of schools affected by the laws were religious schools; the laws thus facilitated an excessive government entanglement with religion. The Court struck down all but one provision of the statutes. The Court applied the Lemon test, which requires government action to 1) have a secular legislative purpose, 2) neither advance nor inhibit religion, and 3) not result in an “excessive government entanglement with religion.” Rehnquist wrote a dissenting opinion in which he rejects and criticizes the degree of neutrality demanded by
the test and holds that the Court misunderstood the religion clauses. He stated that “Nothing in the First Amendment or in the cases interpreting it requires such an extreme approach to this difficult question,” but he does not argue on the basis of original intent. His reasoning rests predominantly on a narrow interpretation of the Establishment Clause.

In *Stone v. Graham* (1980), Rehnquist dissents from the Court’s decision to strike down a Kentucky state law mandating that a copy of the Ten Commandments be posted on the walls of public school classrooms. He echoes his reasoning from Meek, noting that “The Establishment Clause does not require that the public sector be insulated from all things which may have a religious significance or origin.” However, instead of attacking the Lemon test, he applies the test and accepts a limited understanding of “secular purpose”, arguing that Kentucky law did not violate the lemon test.

Rehnquist’s use of original intent in Church/State matters emerges a year later in *Thomas v. Review Board of the Indiana Employment Security Div.* (1981) where the Court held that a denial of unemployment benefits to petitioner, who quit his job because it conflicted with his religious beliefs, violated the Free Exercise Clause. Rehnquist argues in dissent that the tension which the court has created between the Establishment and Free Exercise clauses conflicts with the understanding of the drafters of the First Amendment. He holds that incorporating the First Amendment to the states by the Fourteenth Amendment is in conflict with the intent of the drafters of the Bill of Rights. The tension is in part caused by incorporation as well as by the Court’s “overly expansive interpretation of both clauses.” His argument against incorporation is one of original intent and his argument against the Court’s decision is that “it reads the Free Exercise Clause too broadly and it fails to squarely acknowledge that such a reading conflicts with many of our establishment clause cases.” Asserting a narrow interpretation in conjunction with original intent is certainly consistent with Living Constitution, but Rehnquist does not maintain this approach.

In *Mueller v. Allen* (1983), Rehnquist writes for the Court and applies the Lemon test, upholding a statute similar to the one challenged in Meek. In *Mueller*, a Minnesota law permitted parents to deduct from taxes the cost of education expenses in elementary and secondary schools; the majority of schools affected were religious. Rehnquist found that the statute was sufficiently neutral to
pass the Lemon test and withstand challenge on Establishment Clause grounds.\textsuperscript{67}

The following year Rehnquist voted with the majority in \textit{Lynch v. Donnelly} (1984).\textsuperscript{58} In Lynch, respondents sued the mayor of Pawtucket, Rhode Island, alleging that including a nativity scene in the city’s Christmas display violated the Establishment Clause. Chief Justice Burger wrote for the court and maintained a loose interpretation of the “wall of separation” to mean accommodation, not complete separation.\textsuperscript{69} He applied the Lemon test and held that the nativity display had “legitimate secular purpose” and was otherwise sufficiently neutral to remain constitutionally permissible.\textsuperscript{70}

However, 1985 was the golden year for Rehnquist and original intent, without which one could hardly claim that he applied original intent in Church/State relations. \textit{Wallace v. Jaffree} (1985)\textsuperscript{71} marked a significant contrast from his previous opinions and is the height of his use of original intent. In \textit{Wallace}, the Supreme Court struck down an Alabama law that permitted prayer in public school classrooms, ruling that it violated the Establishment Clause. Justice Rehnquist wrote a lengthy dissent advocating original intent interpretation of the Establishment Clause. Rehnquist argues against the Court’s reliance on maintaining a “wall of separation” of religion and state as articulated in \textit{Everson v. Board of Education} (1947).\textsuperscript{72} He holds that Thomas Jefferson’s statement on a “wall of separation between church and state” in 1861 was not intended to be a controlling and guiding principle.\textsuperscript{73} The Framers expressed no intent that the government should be “absolutely neutral between religion and irreligion.”\textsuperscript{74} He concludes that the intent of the Establishment Clause was to forbid “[E]stablishment of a national religion, and […] preference among religious sects or denominations.”\textsuperscript{75} Further, he sternly attacks and rejects the Lemon test, holding it entirely invalid.\textsuperscript{76} He asserts that the test is unpredictable and weak because it is not founded on history or on the declared purposes of Framers.\textsuperscript{77}

Rehnquist’s reasoning in \textit{Wallace} is carried over into his dissents in religion clause cases \textit{Aguilar v. Felton} (1985),\textsuperscript{78} \textit{Grand Rapids School District v. Ball} (1985),\textsuperscript{79} and presumably in \textit{Thornton v. Caldor} (1985),\textsuperscript{80} though he did not write an opinion. In \textit{Aguilar} and \textit{Grand Rapids}, he states that he dissented for the same reasons as in \textit{Wallace}.\textsuperscript{81}
In 1986 Rehnquist was elevated to Chief Justice by President Reagan. Based on Rehnquist’s dissents in 1985 it might appear that he would shift away from applying the Lemon test, but he did not take that route.

In *Zobrest v. Catalina Foothills School District* (1993), he makes a large departure from his assertions in Wallace, instead employing reasoning far more consistent with *Mueller* and *Stone*. Rehnquist wrote the majority opinion, holding that allowing the school district to provide a sign language interpreter to a deaf student enrolled in a Catholic school did not violate the Establishment Clause. He came to this conclusion not by original intent, but by applying the Lemon test (which he recently rejected in Wallace) and finding that the challenged action was sufficiently neutral to pass the test.

In *Zelman v. Simmons-Harris* (2002) the Court was confronted with the Pilot Project Scholarship Program, an Ohio tuition aid program that affected public, private, secular, and religious schools. Ohio taxpayers challenged the program on Establishment Clause grounds claiming that it was advancing religion because the aid could be directed toward religious schools. Rehnquist, writing for the Court, held that the program did not violate the Establishment Clause. He relied on Supreme Court precedent, including *Mueller* in that the aid was made neutrally available and not directed exclusively to religious schools, and on *Zobrest* in that “government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge.” Similar to the sign language service in *Zobrest*, he notes that “the Ohio program is neutral in all respects toward religion.” He distinguished between the government’s “disbursement of benefits” and the individual’s decision to direct it toward religious schools. Here Rehnquist relied on precedent in which he applied the Lemon test and he made no use of original intent. He did not mention Wallace or any line of reasoning from his dissent.

Near the end of his career, he still did not resurrect his argument in Wallace. In *Van Orden v. Perry* (2005), Thomas Van Orden sued Texas state officials on Establishment Clause grounds, requesting an injunction to remove a monument of the Ten Commandments from the premises of the Texas state capitol. As Chief Justice, Rehnquist had the opportunity to bring the reasoning from his dissent in *Stone v. Gra-
ham (another Decalogue challenge) into a majority opinion. However, he did not attack the majority in *Stone* but distinguished the challenged monument from the classroom placards. While he notes that the monument would pass the Lemon test, he found the test inapplicable, but nevertheless ruled that it did not violate the Establishment Clause. He made reference to “the intent of the Framers” but his reasoning in the decision rested on a narrow interpretation of the Establishment Clause.

While Rehnquist is not consistent in original intent, he is consistent with a narrow interpretation of the religion clauses: he dissents from decisions taking a broad view and joins those that rely on a narrow understanding. While a narrow interpretation is not inconsistent with original intent, it is clearly not the same as reasoning by original intent. He uses original intent on a few occasions while Associate Justice and only in dissents, but never while Chief Justice. Thomas, Wallace, and the other 1985 cases remain an anomaly in his judicial career.

**Analysis and Conclusion: Selective Use of Original Intent**

The Jackson memo and Living Constitution might suggest that Rehnquist advocates an all-encompassing original intent approach to judicial reasoning, but an examination of his behavior on the court shows otherwise. He does maintain strict original intent in Equal Protection as Associate Justice, but he departs from the approach after his promotion to Chief Justice. In both Equal Protection and Church/State, whenever he applied original intent he was 1) dissenting and 2) an Associate Justice. It appears that his behavior can in part be explained by his position on the court. As an Associate Justice, he had the ability to write lengthy, pointed, and often lone dissents. He was not in a controlling position so he did not need to be concerned with whether or not other justices joined his opinions. When he writes for the Court (both as an Associate, as in *Mueller* and Chief Justice, as in *Hibbs*) he employs reasoning that affords greater agreement on the Court. Since no one joined his dissents in Wallace and Trimble, when writing a majority opinion there would be little sense in repeating unpopular arguments when writing for the majority. As Chief Justice he was responsible for governing the entire Court and no longer used original intent to achieve his ends.

In Equal Protection, his consistency with original intent as
associate directly is broken after his promotion on the Court. It appears that once he was elevated to Chief Justice he recognized that he could no longer write unpopular opinions as before. His new position required greater responsibility and less freedom; his responsibility extended beyond his position as Justice to the Court as a governmental institution. Given that other justices rarely joined his dissents, he likely recognized that he would have to alter his strategy in order to ensure five votes and preserve some sense of unity on the Court. Sue Davis argues that Rehnquist is guided by original intent, but her assumption only analyzes a limited portion of his time on the Court. Under her perspective in 1984, she may not have anticipated Rehnquist joining Clark or concurring in Virginia. In Clark the Court struck down a restriction affecting illegitimacy. By joining the majority, Rehnquist relaxed his stance on Equal Protection. If he voted in opposition to extending Equal Protection to illegitimacy as he did in Weber and Trimble, he would likely have written another lone dissent and be in a position with no influence on the majority. By joining the majority as Chief Justice he at least would have the ability to assign opinion-writing and select a justice who may reflect his views more closely. As an Associate Justice in Trimble, voting with the majority would have given him no potential advantage. It is certainly possible that he wrote the majority in Hibbs for similar reasons: to control the scope of the outcome by choosing who writes the opinion (in this case writing it himself), even if he may have preferred to vote against extending Equal Protection to women as he did previously in Craig.

In Church/State, it is relevant that Wallace is a dissent. It is not clear why he chose to assert original intent and write in opposition to the Lemon test as a whole, given that he accepted the Lemon test both prior to and after Wallace. Perhaps he never intended the approach to be put into judicial practice, but simply wished to voice a personal opinion. Regardless of his motivations, it seems fair to conclude that he used original intent not as a governing philosophy, but as a strategic tool in achieving the result of narrow Constitutional interpretation. It seems that he dissented from Wallace not because the Court used the Lemon test itself (contrary to what he stated in dissent from Wallace) but with a broad interpretation of the test. When he does apply the test (as in Mueller and Zobrest), he interprets it consistent with a narrow interpretation of the religion clauses to achieve the same result as he
could by original intent: accommodation. He joins in Lynch where the Court rejected complete separation and upheld the legitimacy of the nativity display. Derek Davis argues that Rehnquist’s decisions are informed by original intent, but nearly the only case Davis relies on is Wallace. Davis’ statement is insufficient in describing Rehnquist’s judicial philosophy as a whole. In order to reach this result of narrow interpretation he employs varying methods, of which original intent is but one. Therefore, the most accurate characterization of Rehnquist’s legacy in Establishment Clause matters appears to be one of “neutrality and private choice” in pursuit of “a limited reading of the Establishment Clause.”
END NOTES

6. “Segregation Cases.”
7. “Segregation Cases.”
20. 413 U.S. 189, 254-255 (1973)
21. 413 U.S. 189, 256-257 (1973)
24. 406 U.S. 164, 166-167 (1972)
29. 430 U.S. 762, 777 (1977)
30. 430 U.S. 762, 777 (1977)
31. 430 U.S. 762, 779 (1977)
32. 430 U.S. 762, 778 (1977)
33. 430 U.S. 762, 780 (1977)
35. 429 U.S. 190, 220-221 (1976)
43. 538 U.S. 721, 728 (2003)
44. 538 U.S. 721, 728 (2003)
52. 421 U.S. 349, 356 (1975)
53. 421 U.S. 349, 358 (1975)
54. Lemon v. Kurtzman, 403 U.S. 602 (1971)
55. 421 U.S. 349, 395 (1975)
58. 449 U.S. 34, 46 (1980)
60. 449 U.S. 34, 46 (1980)
63. 450 U.S. 707, 720 (1981)
64. 450 U.S. 707, 727 (1981)
73. 472 U.S. 38, 92-98 (1985)
74. 472 U.S. 38, 98 (1985)
75. 472 U.S. 38, 106 (1985)
76. 472 U.S. 38, 92; 110 (1985)
77. 472 U.S. 38, 110 (1985)
81. 473 U.S. 402, 420 (1985); 473 U.S. 373, 400 (1985)
83. 509 U.S. 1, 13-14 (1993)
84. 509 U.S. 1, 13-14 (1993)
86. 537 U.S 639, 648 (2002)
88. 537 U.S 639, 651 (2002)
89. 537 U.S 639, 653 (2002)
90. 537 U.S 639, 652 (2002)
92. 545 U.S. 677, 703 (2005)
93. 545 U.S. 677, 703-704 (2005)
94. 545 U.S. 677, 693 (2005)
95. S. Davis, “Interim Analysis,” 713.
98. Conkle, “Indirect Funding,” 78.
Introduction

During the final weeks of Summer 2005, Spanish media featured shocking footage of bloody and bruised immigrants – primarily refugees and asylum seekers – attempting to cross the militarized border separating the Spanish exclaves of Ceuta and Melilla from Morocco, Africa. Five individuals were shot and killed while climbing over the fence, and another six died later in “clashes” with security forces. These immigrants were fleeing political and social conflicts in regions of sub-Saharan Africa, countries that included Cameroon, Niger, Mali, and Burkina Faso, not expecting to leave one realm of hostility only to enter another tumultuous environment.1 The pictures and stories that accompany this border violence characterize a struggle that continues to plague Spanish life today, especially the country’s human rights record. Spain, a relatively “new pole of attraction” for immigrants, must now evaluate immigration not only as a crucial policy issue that calls for legislative and societal reform, but also as critical “question [that] cuts across all dimensions of contemporary Spanish society.”2

As one of the “three most important subjects in [Spain’s] national political agenda, together with unemployment and terrorism,” immigration from Africa is at the forefront of public policy concerns in Spain.3 However, this issue is not confined to Spain or even the Iberian region. In many ways, Spain’s dilemma can be seen as an illustration of immigration conflict across the globe. It serves as the southern “gate” into Europe, acting as a crucial access point for Africans that permits rapid growth of the immigrant population in Spain, which compounds an already unstable economic situation in the European Union as a whole. The Spanish government has tried a range of measures to impede population growth, including tougher immigration
laws and stricter border patrol. Yet these regulations have many times inflicted such harm to the individuals migrating into Spain that any good accomplished for the nation’s economic welfare is overshadowed. Immigration solutions have created a “discourse and a public opinion...that all immigrants are ‘illegal,’ which means, criminals, and therefore, sources of insecurity.” This unexpected response, that more stringent enforcement creates an inflated problem, “parallels that of undocumented Mexicans seeking to enter the US” – the more the government closes off entry, the more desperate immigrants become. In other words, Spain is not alone in this struggle. The country has entered into an extremely influential position in the international discourse on refugee rights. The specific issue of immigration into Spain (especially with regard to refugees and asylum-seekers) reveals that these individuals are at the core of a stringent security policy that seeks to preserve the integrity and selectivity of the nation’s borders.

Motivations

In its 2010 annual report, the Comisión Española de Ayuda a Refugiado (CEAR, a Spanish advocacy organization for refugee rights) wrote that “la historia de los refugiados es una sucesión de crisis iguales unas a otras: tienden a producir compasión, pero desbordan la capacidad de entendimiento [The history of the refugees is a succession of crises one after another: they tend to produce compassion, but they exceed the ability of understanding.]” After weeks of interviews, conversations, and observations of migrant life in Spain during the summer of 2011, we found that the dilemmas of both refugees and the Spanish government are, in fact, often beyond the comprehension of outsiders who have never faced displacement, isolation, and the need for asylum. So, how did we gain this understanding of the laws and legislation that govern immigration into Spain as well as learn the intimate stories of migrants risking their lives for a better one? Oftentimes, our research was catalyzed by a simple gesture or question. In particular, the inquiry, “De dónde es?” or, “Where are you from?” was the key in gaining the opportunity to listen to the migrant story.

For most of the men and women who cross Spain’s borders (whether legally or illegally), an existence of displacement pervades their identity, immediately separating them from the rest of a native, Spanish society. Any interest taken in their history, family, origin, or journey is rare, if not nonexistent, and most seemed eager to recount
this information to a couple of unknown students from Texas. Perhaps it was our own effort to maneuver through a foreign country and language that established a point of commonality between us and the migrants we met: our shared experience of the unknown formed a bridge for conversation. In a world where national security precautions can often escalate into infringement on individual human rights, many of these refugees were probably subject or witness to horrible violence. Yet, they did not speak of those experiences. Their siblings, language, and the traditions that they were forced to leave behind were the subjects of dialogue. This was the essence of our research; we wanted a holistic view, not only of the issues surrounding immigration in Spain, but also of the people who make the journey to Spain’s borders. We wanted to know the individual stories and the faces that humanize the statistics and news articles on migration from continental Africa. We wanted to understand the human dilemma woven into the border issue.

**Organization and Thesis**

This paper will be broken down into three sections, each covering a unique geographic region with its corresponding policy theme relevant to African immigration into Spain. We hope to present a progressive analysis that tracks the figurative journey of a refugee from Sub-Saharan Africa through the Maghreb, the Northern coast of the continent, to Spain and, more generally, the territory of the European Union. In section one, we consider the first step in this international journey: the Spanish exclave of Ceuta, a heavily militarized port city located on the Strait of Gibraltar. After evaluating the restricted access to refugee shelters and observing public xenophobia towards them in this port city, we will outline the elementary stages of assimilation seen in Spain’s third-largest urban area, Valencia. Here, grassroots organizations are most prevalent, effectively facilitating the transition of newly arrived migrants into Spanish culture. Our final section focuses on Spain’s bustling capital, Madrid, where government regulations and policy dominate the immigration debate.

In each of these three locations, our analysis is composed of: a general introduction to the region, a brief history of its interaction with African migrants, an in-depth look into the city’s prominent non-profit organization that aids African migrants, and finally, a humanistic perspective on what it means to survive as a refugee in a country that is not your own.
Through this three-part presentation, we hope to give a complete picture of Spanish immigration policy and shed light on the deeper implications of major population movements for Spain’s natives and those migrants seeking a better life. In addition to this academic objective, we also feel compelled to share a largely unheard story: that of the invisible, who live, work, and travel alongside Spanish men and women unnoticed, simply seeking survival. They represent a population of more than 9.2 million refugees worldwide, a staggering number that seems disproportionate to the minimal amount of acknowledgement and care they receive.

Red Tape in Ceuta: The preliminary steps towards Spain

Located on the Northern Coast of Africa in Morocco, Ceuta is at the forefront of the immigration tensions between Africa and Spain. As an autonomous exclave of Spain, it serves as an access point from continental Africa to the Strait of Gibraltar, funneling travelers to Europe. Due to this location, Ceuta is ideal as a point of departure for immigrants and refugees traveling northward, individuals often carrying hopes of crossing over onto European soil. In her article on Spanish immigration policy, Nieves Ortega Pérez asserts, “[Spain’s] proximity to the sending countries in the Maghreb spurs intense historical and economic bonds between both shores of the Mediterranean.” These “bonds” become tangible and visible through the mixing of two distinct cultures in one location; while Spanish is spoken as the primary language, the influence of African and Muslim traditions is deeply rooted in Ceuta’s architecture, religious life, dress, and cuisine. Ceuta is “una ciudad a la vez española y africana,” that is, a city influenced almost equally by Spain and Africa. Thus, this small region carries great significance for individuals and families funneling into Spain: it is a transition point where they can slowly acclimate to elements of Spanish culture, such as the language, while still grasping comfortable features of their homelands.

In the Summer of 2011, the Horn of Africa experienced record drought and famine conditions, displacing thousands of people who fled elsewhere in search of more stable environments for economic sustainability and survival. Oftentimes, cities such as Ceuta are the next stop in the arduous journey from perilous conditions, such as these, to places of greater prosperity, opportunity, and safety. Our timing for conducting research in Spain could not have been at a better
time. The economic, social, and political turmoil that characterizes much of Africa’s history was playing out before our eyes; the articles we were reading and the broadcasts on Spanish news channels visibly impacted the operations of the organizations we were researching. With these pressures from within continental Africa pushing families and individuals to seek refuge elsewhere, Ceuta, and its similar, neighboring Spanish exclave Melilla, came to fulfill the role described of them in the literature of our initial research. In an article outlining the position of these cities in Spanish immigration, Ceuta and Melilla were considered “transformado en guardianes del Estrecho de Gibraltar y en puertas de entrada al territorio comunitario, un papel que la geopolítica contemporánea les atribuye inexorablemente [transformed into guardians of the Strait of Gibraltar and entryways to a communal territory, a role that contemporary global politics inexorably attributes to them.]” Therefore, it is undeniable that the physical location of Ceuta directly influences its critical position within the immigration issue. For immigrants fleeing their homes all across Africa, arrival in Ceuta is like water for thirsty tongues. While their journey certainly does not end in Morocco, this port brings the goal of a better life into tangibility: on a clear day, the shores of Spain can be seen from Ceuta, separated by a mere twenty-two miles of water.

With the growing presence of a refugee population in Ceuta, the need to address the needs of these individuals, primarily by providing shelter and basic care to those migrating into the area, is unavoidable for the Spanish government. The solution to controlling access to Spain’s borders is highly complex due to the variety of factors that influence migration, fluctuations in immigration trends, and sensitivity to the individual. Nevertheless, Spain’s response to African migration in Ceuta, as gathered from our observations and interviews, can be best categorized into two fixed courses of action: militarized control versus the influence of non-profit organizations, which spur the provision of facilities designed to hold and screen refugees. We found that both of these methods used to manage the influx of refugees into Spain, while starkly different in approach, share a common thread: both have come under significant attack and criticism from a human rights perspective. La Comisión Española de Ayuda al Refugiado (CEAR, Spanish Commission for Refugee Aid), in its annual report on immigration in Spain, addressed the situation in Morocco as being, in its own way, just as perilous as the conditions from which refugees flee. The document states, “[los refugiados] están expulsados periódicamente a la frontera
en condiciones violentas: los Marruecos rompen sus documentos, les roban, y violan las mujeres [refugees are expelled periodically to the border within violent conditions: Moroccans destroy their documents, rob them, and violate women]. The sheer quantity of immigrants flowing into Morocco en route to Spain has created a novel problem that, due to lack of resources and previous experience with refugees, is often addressed with brutality and secrecy.

Ceuta is “surrounded by parallel twenty-foot fences topped with barbed wire, [looking] more like a jail than a city.” Visually, the environment is highly inhospitable to migrants travelling through the area. CETI, El Centro de Estancia Temporal de Inmigrantes (Center of Temporary Stay for Immigrants), a very controversial solution to the regulation of immigration through Africa to Spain, is equally formidable, located on the outskirts of Ceuta proper, in the hills of Morocco, surrounded by gates, barbed wire, security cameras, and guards. Established by Spain’s Public Administration, the shelter was designed to counter the flow of individuals through Ceuta by impeding their efforts to cross the Strait of Gibraltar with detention, offering temporary medical treatment and housing. Eventually, these individuals are forced to return to their homelands. But, CETI has proven to be grossly insufficient for this task. In accommodating the thousands of refugees arriving in Ceuta annually, this organization is failing. CETI appears to exist as more of a formality, for it merely places a band-aid on the flesh wound that is uncontrollable migration into Spain. The staggering number of refugees worldwide, which in 2009 stood around 43 million and grows exponentially each year, “has awoken in the world a passion without precedent. Nevertheless, it is uncertain whether these victims benefit from this enthusiasm.” The shortcomings of CETI are reinforced by the majority of Spanish news headlines that feature the holding center: “El CETI de Ceuta supera un 35% de capacidad [Ceuta’s CETI exceeds 35% capacity],” “El Gobierno amplía la seguridad en el CETI tras la revuelta [The government amplifies CETI security after revolt].” Clearly, the organization is characterized by issues of overcrowding and abuse, but concrete evidence of these conditions is minimal and fragmented. An overarching blanket of secrecy pervades the operation. Our own journal entries, following an afternoon trip to CETI, reflect much of this character: “On the drive up [to CETI], the road was lined with refugees walking to and from the site – chatting in groups, carrying groceries… For the first time on our trip we were completely iso-
lated and had no idea what to expect. The entrance was heavily secured – an iron gate and guards separated us from groups of refugees we could see through the grate on the other side… It had been one thing to talk to an office or an organization, but a heavily guarded, controversial and hidden African refugee shelter? It knocked the wind right out of us. How do you say you are “investigating” the very people that are standing in front of you, staring and listening? It felt like any sense of empathy was absent… We stood there like two mute children- all we could say was ‘gracias’ and nod our heads. If we felt fear, I cannot imagine how those migrants must feel every day. Even on the doorstep of this issue, looking face-to-face with African migrants, they remain hidden and untouchable. The issue remains invisible” (29 July 2011).

From our inability to gain adequate, honest information from the organization emerged our new, amplified focus. Beyond the nuances of the “immigration issue” that included logistical processes of documentation, acquisition of jobs, housing, and healthcare, we felt the strong pull of the migrant as an individual. We were researching the ways in which a face could at last be put to the numbers and an identity given to move beyond the broad classification of these people as “refugees.”

Grassroots in Valencia

Valencia’s picturesque beaches and tourist-filled streets on the eastern coast of Spain create a stark contrast to the intimidating shoreline of Ceuta. The purpose of this expedition to Valencia, however, was not to observe the city’s boardwalks and urban attractions, but rather to meet with members of an organization known as ACCEM, La Comisión Católica Española de Migración [Spanish Catholic Commission of Immigration]. This non-profit, non-governmental organization represents a community-oriented approach to the refugee issue in Spain. Its “grassroots” base is successfully reaching the migrant population in Valencia, “providing aid to individuals regardless of origin, sex, race, religion, or social group.” Instead of offering legal services and more technical types of assistance, ACCEM operates under the informal motto: “no questions asked.” Refugees from all over the world find these offices, usually through word of mouth, with no possessions,
often just their families. They are given immediate food, shelter, and clothing to survive – at least for the short term. This office does not display the same military-level security as the edifices in Ceuta. Rather, it bustles with the activity of volunteers who, with coffee in hand, seem to dedicate their lives to serving migrants in their city.

Marta, whose last name was not given, is a policy expert in ACCEM’s Valencia office who graciously took time to speak with us about the organization’s strategic mission in the community, which focuses on providing basic necessities to the refugees living within Valencia’s city limits. Access to washing machines, food supplies, and clothing banks allow refugee families to cover their initial needs while they adapt to life on a new continent. The NGO (non-governmental organization) offers two types of temporary shelter; a common house exists for adults and another for children. Once a housing arrangement is secured, migrants may begin working with ACCEM to find job opportunities, connections with fellow expats, and Spanish language lessons. Although these efforts are the physical substance of ACCEM’s work, simple fulfillment of these basic needs is not sufficient. Here, it’s about “conocimiento,” or understanding. If the professionals and volunteers at ACCEM do not take the time to grasp the political, social, and economic situations from which their refugee “clients” escape, it is impossible to bestow migrants with the emotional support and knowledge they need to survive within Spanish society. Around 40% of refugees who approach ACCEM often endure unimaginable adversity in their journey to Spain. Thus, as they attempt to reorient their lives in an unknown culture that stands in the midst of global economic hardship, a place to sleep and a meal is a critical first step in the healing process.

ACCEM’s services are extended primarily toward males from Sub-Saharan Africa, a large proportion of which do not have proper documentation and, as a result, do not seek government assistance. This is a result of “fear of deportation, prejudice, and language barriers… a simple misunderstanding of their rights [that] prevents immigrants and their families from obtaining proper care.” Thus, the organization’s “no questions asked” policy upholds its mission to help “todo el mundo, no importa la situación [everyone, regardless of the situation].” But, the reluctance of refugees to seek aid and the independence of ACCEM from the Spanish government creates a situation of dual hesitation towards action, making initial contact difficult. If migrants do not have proper documentation, they are inherently “illegal,” and thus are skeptical of any offers for assistance.
This is where the volunteer power of ACCEM really takes form. Students from universities around the city of Valencia serve as the eyes and ears of the organization, acting as the link between marginalized migrant populations and the NGO. These students reach out to refugees they encounter in their own neighborhoods and in their daily lives, often advocating for the services available at ACCEM and encouraging the spread of the non-profit’s information via an underground network composed of policy experts, passionate students, and other refugees. The model is a success story in activism for a cause and it seems to be working for this community. ACCEM is not a government tool or even a bureaucratic assistance program – it is an organization working to “modificar el sistema [change the system.]”

In a system where “many migrants still shy away due to social pressures and fear,” people like Marta must not only know how to process the necessary paperwork for refugees, but must be committed to seeing real, effective change in the way the Spanish government handles the refugee situation.

**The Faces of Migrants: Beach vendors in Valencia**

While the experience at ACCEM provided a view of grassroots strategies in action within the non-profit sector, an unexpected encounter with migrants in Valencia led us to a new understanding of the concept of “invisibility” among refugees in Spain. Given the current situation of high unemployment rates, Spain currently faces a challenging combination of increasing demand for work (much of which is coming from an influx of migrants) and a low supply of job opportunities. For refugees in a large urban center, employment options are scarce, meaning that many migrant families must search in unconventional places for ways to earn an income. A popular option is to work along the boardwalk on Valencia’s beaches. From purse and sunglass sales to hair wraps and live music, these migrants are attempting to find space to work and succeed in a crippled Spanish economy.

As vendors, however, many of the refugees working along the sandy walkways, overshadowed by clear water and world famous paella (a popular seafood rice dish) restaurants, leave a transient impression on the average beach goer. Most tourists simply pass by, waving away offers for reduced prices on merchandise or a new hairstyle. These men and women, individuals with darker skin and Spanish laced with a different accent, are, in effect, invisible to the public eye and do
not command immediate attention or interest. When this cover of invisibility is broken, however, by a simple, powerful inquiry, the results may be astounding. Once again, we found the question “De dónde eres?” (“Where are you from?”) yielded incredible openness. Women from Equatorial Guinea, while knotting our hair into small braids, explained their family’s history in Spain; a young man from Senegal spoke with excitement about his brothers and sisters back home in Africa. The stories exist, yet few people take the time to notice the diversity within this basic beach market. The food items and souvenir gifts are only surface articles; the owners, from all parts of the globe, offer much more than trinkets when known in the context of their heritage, culture, language, and origin.

Public Policy in Madrid

As the lifeblood of the nation, Madrid, the centrally located capital of Spain, is the largest city in the region, holding upwards of 6 million residents. As a result, this metropolitan area exerts powerful international influence in politics, economics, the arts, and science. In these realms, Spain’s history is incredibly rich, but, in the context of immigration, there is little depth. The prevalence of this issue has only recently come to the forefront of Spanish culture. Prior to the 20th century, Spain existed primarily as a conduit through which individuals travelled en route to Northern Europe or the Americas, an emigration pattern that, within the last 100 years, has dramatically changed. Madrid is now an idyllic destination for refugees migrating from Africa northward; Madrileños, or natives of Madrid, have reacted with less hostility than that seen in Ceuta, but still with some skepticism and defensiveness. Sonia, whose last name was also not given, is a CEAR employee from Equatorial Guinea (whose job description best mirrors the role of a social worker in the United States). She explained in an interview how the main obstacle for migrants in Madrid is merely ignorance, for they are perceived as “gente de fuera que tienen una vida más fácil…pues, son una molestia, una carga [a foreign people that have an easier life [in Madrid]…thus, they are seen as a nuisance, a burden.” But, despite this perception, Sonia characterized the success of migrants in acquiring jobs, housing, and overall better lives, as greatly eclipsing sporadic cases of prejudice and discrimination. In fact, her explanation of refugee life in Spain underlined the notion of equality as not just an ambiguous goal for the organization, but an
evidential reality.

As an integral piece of the immigration puzzle, Madrid evolved quickly into a window into the policies, documentation requirements, and laws that address the growing refugee presence in Spain. The Law on the Right to Asylum and Refugee Status, one of the first pieces of legislation that detailed refugee rights, was passed in 1984 and amended in 1994, a testament to the short timeframe in which the Spanish government has actively acknowledged the country’s position as a new home for African refugees.21 This document, and other similar legislation, outlines the rights of migrants and asylum-seekers to interpreter services, medical care, and legal counsel. CEAR is the umbrella organization through which refugees can access these services through a process known as “empadronamiento.” The direct translation of this word is “census,” a fitting term as it implies an innate humanness; one is bound, politically, economically, or socially, to a home country. For many refugees, this term denotes a sense of happy obligation to Spanish society that many envision at the start of their long journey to Europe. But, more officially, “el empadronamiento,” as described by Sonia in her explanation of the documentation process for migrants, refers to a document that “accredits to an individual a time of permanent residence in Spanish territory, regardless of nationality or situation.”22 This includes the distribution of “tarjetas de documentación” (identification cards) and “tarjetas sanitarias” (healthcare cards). CEAR spearheads the process of handling a refugee’s paperwork; staff members provide proper registration forms, explain the details of becoming a legal, documented Spanish resident, and direct individuals towards other non-profits, such as ACCEM. As discussed earlier, these organizations function as temporary safe houses for refugees who often reach the doors of CEAR in the precarious state of an illegal immigrant. The process to acquire cards for official documentation and healthcare takes one to two years and, until then, migrants are granted a form of subsidiary protection. They are provided lawyers for legal assistance, social workers to reunite families, and orientations (such as Spanish language classes) to ease the process of assimilation.

Spain’s migrant population is composed overwhelmingly by individuals from Equatorial Guinea, a small country located on the western coast of Africa. Somalia comes in second with number of annual migrants into Spain.23 This trend is logical, as one of the primary languages spoken in Equatorial Guinea is Spanish. The causes and effects of Spanish colonization during the 1800s in Equatorial Guinea
have had a profound impact on modern Spanish society, and a mere nod at the history of that relationship does not do it justice. But, our research unearthed what a general investigation of global immigration often overlooks: we saw and met generations of individuals living in Madrid who had migrated, either alone or with their families, from Equatorial Guinea to Spain, escaping hardship in their homes. Vito (whose last name was not given) is a native Equatoguinean, living and working for a Catholic church in Madrid. Our initial conversation with Vito centered on a desperate attempt for guidance, as we were painfully lost in a remote neighborhood of the city. Noting his heritage to be clearly not Spanish, and curiosity piqued, we once again inquired, “¿De donde es?” The power of this question always becomes immediately evident, as Vito began to explain, in detail, the history of his family and his home as well as his role in Spanish society.

Although, he confessed, he could not remember his native country, Equatorial Guinea, he attributed his knowledge of Spanish to be the critical variable in allowing him to move to, work, and live in Madrid. In his words, he possessed “greater opportunity.” His mother and sister also lived in the city, but the rest of his family was back home in Africa. We noted, within our short conversation, the difference in posture and demeanor of Vito when he spoke of “home.” He never once referred to Madrid or Spain as “mi país.” Equatorial Guinea was his country. This refrain, a repeated emphasis from migrants that Spain is not their first home, was woven through each of the conversations and interviews we had. This presented an interesting contrast between the uniform, dry, and detached process of “empadronamiento” discussed at CEAR. Beneath a paper exterior that makes the refugee “documented” and “legal” lies a personal history speckled with victories and defeats, hardships and joys. When unearthed, the identity of the refugee holds limitless influence. But oftentimes, the persona of a refugee is suppressed: by social barriers, education levels, fear, and language limitations. Migrants then retreat to what is comfortable – they band together. Refugees have altered the greater demographic of Spain’s major metropolitan cities by forming rich ethnic enclaves and dominating certain pockets of the job market.

Face of Migrants: The Lavapiés community in Madrid

In a country still trying to solidify its policy towards refugee settlement, the tendency for migrants to converge together for support
and security is a natural, common reaction. When placed in a foreign culture, migrants inherently come together with those who face similar situations and backgrounds. In Madrid, this phenomenon can be observed clearly in a small neighborhood known as Lavapiés – a series of narrow streets now lined with foreign cuisine, abandoned storefronts, and plenty of graffiti to keep away the more timid breed of tourists.

From Middle Eastern markets and Indian cafes to Arab newsstands and African clothing shops, this neighborhood seems to be a refuge for just about anyone who doesn’t fit the normal Madrileño description. And, for the most part, the “normal” populations of Madrid do not wander too close to the sector. Professor Alberto Pastor, a native of Madrid and currently a professor at Southern Methodist University, referred to Lavapiés as a “submundo” and “una comunidad aislada” [an underworld or isolated community]. The lack of outsider activity within this ethnic enclave made us easy to spot along the streets as we attracted attention simply with our presence. The degree of suspicion from locals was more than noticeable. Our notebooks, camera equipment, and backpacks warranted looks of both fear and curiosity from the men and women mingling on the streets, and there was an open resistance to any attempts we made to take photographs of the neighborhood. The reactions ranged widely, from confrontational, taunting calls from men along the road to nervous, shy retreats of young people near the central part of the block. Regardless of the response, the message was clear: we did not belong here.

Now, it would be somewhat ill informed to characterize the people living within the boundaries of Lavapiés as more dangerous or less socially acceptable than any other citizen of Madrid. The reputation of Lavapiés comes from a societal assumption that fear and ignorance are the adequate responses to this diverse area when, in fact, hesitation is not truly warranted. The inhabitants of this neighborhood live amongst each other because it is the safest solution. They can wear their own traditional clothing, speak their native languages, and avoid interaction with a society that, at times, treats them as invaders rather than asylum seekers. Ethnic enclaves such as Lavapiés offer a short-term solution to discrimination, but also can present harmful long-term effects. If migrants continue to seek shelter together as an alternative to assimilation, they risk of being further excluded from mainstream culture, an act that can destroy hopes of employment, housing, and general social acceptance. Existence as a refugee in Madrid, and for the most part all of Spain, is a complicated and fragile balancing act.
They must learn to adapt, to become part of an entirely new world, while simultaneously hold tightly to native traditions and culture. The solution is not obvious and the search for a perfect relationship between old heritage and a new home is far from simple. And yet, more and more people continue to make the journey to Spain’s border. Their success, though, now depends less their ability to reach the border itself and more on how they react to, and interact with, the world that lies beyond the boundary.

**Conclusion**

In a report published by Médicos Sin Fronteras (Doctors without Borders) in 1995, the pattern of reactions by national governments, in response to human rights crises such as major population displacements, are described as being “en un primer momento [una del] abandono y la retirada, y posteriormente, cuando ya era demasiado tarde, [una de] la compasión y la ayuda humanitaria [at first, a reaction of neglect and delay, and, later, when its already too late, one of compassion and humanitarian aid.]”26 Within the debate about how to best respond to significant changes in migration trends, cities, organizations, and individuals must focus “not necessarily only on the victims, but on a greater international order.”27 So, as an additional finding to the primary objective of our research, that of shedding light on the “individual” rather than the statistic of the border issue, we found a common trait that ran through each aspect of our investigation was the existence of a type of dualism, a separation existing within this greater “order.” A conditional segregation was present within each step of the migration process, as well as each facet of a culture: its politics, economics, and societal interactions.

Going back to the situation in Ceuta, the port city’s methods of response, political efforts to combat the overwhelming waves of migrants coming in from continental Africa, ran in two veins. Most visually apparent was the heavy military presence that permeated the city, a design installed to discourage movement of migrants into Spain. Barbed wire, concrete walls, guards, and watchtowers overtook this coastal landscape. In contrast, Ceuta was the home of CETI, a non-profit refugee shelter intended to serve the basic needs of those immigrants that do reach the coast. Yet unfortunately, while the latter’s mission was to aid and serve refugees, we found both of these tactics, while superficially distinct, were very similar. In both the attitude of
the military and the conditions within CETI’s walls, the government’s treatment of migrants pouring into this area was unwelcoming and hostile.

The thriving tourist destination of Valencia revealed a darker underside to the sleek urban exterior and sparkling beaches. Here, the paradox came in an economical context, for Valencia, known for its progressive, cosmopolitan and modern image, also holds (as do most major cities) an underbelly comprised of individuals, typically on the margins of society, trying to survive. The beach markets gave a lucid illustration of this phenomenon, for while hundreds of wealthy vacationers sunbathed on the sand, the migrants we interviewed worked tirelessly for business. Nevertheless, we found that this economic rift to be a gap easily bridged with genuine human interest. While from completely different homelands and backgrounds, we were all foreigners in a different country, who shared the same values of family, heritage, and personal identity.

Lastly, while societal segregation is the most universal, apparent consequence of migration into a foreign country, Madrid, by housing the largest population of African migrants of all Spanish cities, demonstrated beautifully the pattern of demographic clustering. The Madrid of our research took two different forms: the urban landscape comprised of native Madrileños and the ethnic enclave of Lavapiés. The former, in our contact, existed almost devoid of refugee presence and influence, with the exception of non-profit organizations such as CEAR spotted around the city. Lavapiés, on the other hand, was a “submundo” of African life. The grouping of migrants from continental Africa created an island of society that was linguistically, culturally, and aesthetically not Spanish. Yet we found that both sides, Spanish society versus the Lavapiés community, held a deeply rooted fear and misunderstanding of one another. Perhaps it is this common fear that allows segregation to persist.

In his book Trabajadores Invisibles: Precariedad, rotación y pobreza de la inmigración en España (Invisible Workers: The precariousness, rotation, and poverty of immigration in Spain), Ubaldo Martínez Veiga describes this notion of a two-sided culture as it applies to the immigrant work force in Spain. He states:

“Es fácil recopilar una lista de ‘dualismos’ y presentarlos como una teoría de la migración, [pero] este tipo de análisis deja sin resolver la cuestión fundamental de porque, a pesar de los el-
“[It’s easy to collect a list of ‘dualisms’ and present them as a theory for migration. But, this type of analysis ends, without resolving the fundamental issue of why, despite individual idiosyncratic elements and variant motives, population movements are produced of known magnitude and regularity, lasting long periods of time.]”

Thus, we sought to address this very question of individuality and variant motives. By acknowledging the “dualisms,” or the two sides of the immigration issue observed in each geographic region, we could focus on the people who often go unnoticed in this theoretical “middle ground.”

So, by targeting our research between the two poles of each cultural sphere, we identified, spoke to, and empathized with a handful of refugees that had fled to Spain for a better life. Though our time there was short, the information gathered indicates that the future will remain progressive on this issue. Much has changed since the Spanish government’s initial focus on immigration as a national policy priority and non-profits, such as CEAR and ACCEM, continue to gain momentum and support for their missions and cause. But, more importantly, the resiliency and positive attitude of African migrants persists as the critical element in resolving the debate over migration into Spain. In the “dilema de la frontera,” or the border dilemma, it is their voice and their confidence that, when released, will most effectively catalyze positive change for Spain and for the world.
END NOTES


3. Ibid.

4. Ibid.


9. Ibid.


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The Impact of International Human Rights Legislation: Arab Nations and Their Compliance with the ICCPR

Gareth Riley-Ayers

Introduction

Human rights activists and political scientists attempt to theorize the actions of states to create legislature in order to protect the political and civil rights of their citizens. The dilemma in attempting to uphold human rights is in identifying their source and understanding the effectiveness of the legislation.

Human rights are our “right to have rights” and depend on one’s membership in a political community and the existence of a government to protect those rights. Some mistakenly argue that these rights are grounded solely in our existence as humans, however the illustration of a failed state serves to counter that claim. Hypothetically, if the United States were to dissolve would human rights still remain? Without a governing body upholding laws that support human rights, racial and gender discrimination, torture, and cruel punishment would run rampant in spite of each individual’s knowledge of “human rights.” Though these rights were created to be independent of all governments, no greater authority would protect them without membership within a state.

Hannah Arendt in The Human Contradiction continues to argue this point. She states that in spite of the belief that human rights are inherent to every person, without a national governing body to back an individual, their human rights will be abused:

The Rights of Man, after all, had been defined as “inalienable” because they were supposed to be independent of all governments; but it turned out that the moment human beings lacked their own government and had to fall back on their minimum rights, no authority was left to protect them and no institution
was willing to guarantee them.²

In other words, an international state only recognizes an individual’s human rights when that person has political membership within another internationally recognized state. She uses the stateless nation of Jews before the start of World War II as an example of people without a state having their rights infringed upon.

On the other hand, human rights cannot be entirely based in the legislature of an individual state. If that were the case, then an abusive state could just legalize oppressive laws. In actuality, there is some validity in both arguments; and for human rights to be most effective, it is necessary to have validity on an individual, national, and international level. Human rights legislators must be ever mindful of the content and characteristics of these rights. The instantiation of abstract concepts to their application in a real world setting lies in keeping this understanding. In fact, the United Nations, an international governing body, was created to uphold this delicate understanding.

In continuation of the fact, the UN creates international treaties in order to solidify and uphold these human rights expectations. The ICCPR, or the International Covenant on Civil and Political Rights, is a treaty that “commits its parties to respect the civil and political rights of individuals, including the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights, and rights to due process and a fair trial.” However, the question is whether or not the ratification of the ICCPR international treaty leads to better political and civil rights for a state’s citizens.

Through empirical study of the effects of the ICCPR on Arab countries—before and after treaty signing and constitutional ratification—one can apply the findings of CIRI Human Rights Data and analyze the real world effect of treaty ratification on civil and political rights.

The instantiation of human rights from abstract ideas to concrete action as well as the rightful origin of human rights are topics discussed in Hannah Arendt’s The Human Contradiction. Arendt argues that without a membership within a state, one cannot be protected against human rights abuses. She starts by describing the “stateless minority,” a group of people who had no governmental protection after World War I. They were represented and protected under “Minority Treaties” signed by nearly all nations. In spite of this legislative attempt to keep human rights for the stateless minority, it became a
strategy for totalitarians to denationalize these people: “those whom the prosecutor had singled out as scum of the earth—Jews, Trotskyites, etc.—actually were received as scum of the earth everywhere; those whom persecution had called undesirable became the indésirables of Europe.” And with the collapse of eastern European regimes like Prussia after World War I, over 100 million people in Europe could be classified as stateless. Undertones of immensely grave results resound clearly in the previously stated strategies. Repatriation was attempted, but failed due to the inability to find a state with which these nations of stateless people identified. Struggles in dealing with the refugees and stateless people, according to Arendt, are based in the legislature created not to solve the overall issue, but instead to serve as a stopgap. This led to state officials committing unlawful acts against these stateless people: “the state...was forced by the illegal nature of statelessness into admittedly illegal acts.” Arendt, in fact, argues that in these systems there is a greater incentive to commit crimes and be treated as a criminal citizen than as a stateless person. The issue with human rights is the assumption that all human beings are a part of a political community, and as a result change the rules when their rights are infringed upon. The stateless people lost their rights in three stages: their home, their country, and finally their ability to resist being persecuted.

Through Arendt’s explanation, one can understand how human rights are somewhat attached to one’s membership to a political community. At the same time, she inadvertently explains how human rights cannot be solely based on one’s membership within a state. The halfhearted legislative effort of those within the nations that organized the stateless people led to gross negligence in the planning and execution of the legislature. Therefore, a negligent state could create negligent legislature to infringe on the human rights of its citizens. Current scholars have come to understand that the relevance of human rights is more nuanced than entirely from the state or entirely from the essence of humanity, but more importantly the balance between both forces—superseding and being one with individual states. The United Nations was created to be the governing body that creates international legislature based on the understanding of the content and characteristics of human rights. Through the use of treaty bodies and states reports, the UN monitors the human rights status for its treaty’s signatories and makes suggestions to be implemented to exemplify the legislature.

The majority of this essay will discuss the effectiveness of this legislature. Oona A. Hathaway in “Do Human Rights Treaties make a Dif-
“Therence?” presents multiple theories in regards to the effectiveness of these human rights treaties.

**Theorists**

Hathaway discusses the history of the perceived effectiveness of human rights treaties. International lawyers over time have come to the general assumption that countries follow international law only to the extent to which it serves their immediate interests. This assumption reveals the surprisingly low incentive for a country to enforce these laws. Because the human rights oppression of a country’s own citizens has no direct bearing on other states, there is little to no retribution. As a result of these preconceived notions, international relations scholars and international lawyers took little to no interest in the effectiveness of these international treaties, and other parties largely ignored the unintentional breakthroughs in regards to that question.

Hathaway in an attempt to ease the confusion between these two disciplines classifies them in two main categories of theorists: rational actor models and normative theorists. Rational actor models suggest that a state fundamentally acts with rational self-interest, weighing the costs of each action and acting on their own benefit. While they agree that states act within their own self-interests in regards to international law, the manner of compliance varies among them. Some theorists see compliance as merely coincidental, also known as realism, others see it as a strategy to benefit them in the long run, or institutionalism, and the last see compliance as a result of a singular state’s domestic political situation, or liberalism.

Realists believe that international law is created and complied with “only when it is in the interests of a hegemon or a few powerful states, which coerce less powerful states into accepting the regime and complying with it.” In other words, they believe that international treaties are inherently epiphenomenal, meaning that they are a secondary effect or byproduct of other actions. According to Hathaway, this was the most popular political theory until the 1970s and 80s where this theory started to become empirically invalid, but has since been adjusted from being so concrete in its utilitarianism. Realism sees ratification of human rights legislature as structural posturing by states to promote their agenda. While some scholars believe that states ratify treaties in which they are already in accordance with, realism models state that any correlation or compliance between a state and the legislature is
Institutionalism sees the value in states as institutions that work together to create the highest utility. In other words, states see working together and limiting short-term power to maximize utility for long-term goals. International law is seen as having merit so as there are quantifiable sanctions for noncompliance. Therefore, according to institutionalism, in spite of possible costs towards adjusting the norms, compliance with international treaties is more beneficial than international sanctions. States ratification and compliance is solely for positive international appearances in order to have a positive long run relationship. Liberalism, in respect to international human rights legislation, has its roots in the democratic peace theory, fashioned by Immanuel Kant. Kant proposed that all nations should be democratic due to the fact that democratic nations do not go to war with each other. Liberal views of rational actor models go one step further in saying that democratic nations are not only less likely to go to war with each other, but also more likely to resolve their disputes legislatively with other democratic nations than with non-democratic states. And since, according to Hathaway, democratic nations are more likely to turn to legislatures, they have higher domestic consequences as a result of noncompliance. Therefore ratification of international human rights legislation, which is also more likely to happen in democratic or “liberal” states, leads to increased domestic attention and a higher probability of compliance.

Normative theorists, according to Hathaway, base their understanding of political ratification in the value and influence of political ideas and discussion. All models of normative theory are centered on the thought that “the transformative power of normative discourse and repeated interactions between transnational actors, rather than the calculation of political, military, or financial advantage, is responsible for the formation and continuation of human rights regimes.” Human rights treaties, according to normative theorists, are not created and signed to rationally adapt them, but instead to create a social network of countries to resolve issues. The managerial model of the normative theory is the most notable of models. It claims that the effectiveness of laws is not in the threat of retribution as a result of noncompliance, but in fact the opposite. Due to the lack of retribution, a state feels obligated to comply to legislature due to its societal normality. It is argued that retributive legislation is politically and economically damaging and not nearly effective enough to warrant that cost. And it
is equally difficult to empirically prove as other international human rights treaty compliance theories. The issue in this model is in dealing with noncompliance. Noncompliance in the managerial model is based in the “insufficient information or capacity on the part of the state.” More specifically in the text, Hathaway states that this model attempts to manage lack of compliance through dispute settlement mechanisms, transparency of expectations, and discourse between parties and the entire public to persuade compliance. In a manner similar to institutionalism within the rational actor theory, incentive to comply is due to the need to remain in what Hathaway aptly names the “complex web of international agreements.” The fairness model states that compliance with international human rights legislature is dependent upon the legitimacy and fairness of the rules. Rules must be transparent in their creation so as to limit confusion and have an inherent significance to the stability of the system or “symbolic validation.” As a result of symbolic validation on a domestic level, it would extrapolate to have value on an international level, meaning a noncompliance would separate you from the international sphere. The final and most recent manifestation of the normative theory is the transnational legal process model, which is based on recognizing the three designated phases of norm internalization: transnational interaction, repetitive application, and rule internalization. The combination of transnational actors who set agreed upon norms create an “epistemic community” to create baseline rules for conduct on an international level. In this model, compliance comes from repetitive interaction and internalizing the legislature as a norm, not retributive reinforcement.10

Before looking at the empirical evidence, and examining the political theories posed, I considered myself a rational actor theorist of the realist model. I had an understanding that the few elite countries that ran the world also controlled the funding, and time and resources for global advocacy groups like the UN or World Bank. As a result, I could logically envision these larger more powerful countries using their influence to create legislature and force ratification. Therefore, under this theory, I believed that there would be no direct correlation between compliance and ratification.

Method of Analysis

In order to analyze empirically, I went to the OHCHR website to get a working definition of goals set to be accomplished with the
ratification of the ICCPR: “the ideal of free human beings enjoying civil and political freedom and freedom from fear and want.” Using that information, I created a datasheet from the CIRI Human Rights Project using the preset filters, including extrajudicial killings, political imprisonment, freedom of speech and assembly, self determining elections, free and fair elections, women’s political rights, and independent judiciary systems. These characteristics are those of the CIRI dataset, which clearly exemplified “civil and political freedom.” The data was coded 0 through 2 varying on degree of violations—extreme violations such as genocides or massive imprisonment in times of war were coded with extremely negative numbers to account for the frequency. For example, the codebook states that

A score of 0 indicates that government censorship of the media was complete; a score of 1 indicates that there was some government censorship of the media; and a score of 2 indicates that there was no government censorship of the media in a given year. 

I personally coded the signing and ratification of the ICCPR treaty with a 0 if no signature or ratification, a 0.5 if signed but not constitutionally ratified, and a 1 if signed and ratified. The Middle Eastern region was chosen because the CIRI data set only goes back to 1981 and this region has a high percentage of regime changes within the last thirty years, and I hoped to capture the statistical variation from those regimes that did sign the treaty and those that chose not to sign it. However much to my chagrin, the CIRI dataset’s time period ends in 2009 and as a result does not cover the recent developments of the Arab Spring, but it is possible to make some conclusion by analyzing the human rights data for those countries that had protests and regime change.

Conclusion

After analyzing the data, I have come to the conclusion that treaties, in fact, do not have any discernable effect on the compliance of a nation to human rights doctrines. A possible weakness in the data set could be due to the inability to account for a comparatively recent state’s gradual transition into the acceptance of human rights norms. Conversely, since the CIRI Human rights project only has data starting
from 1981 and the ICCPR treaty was originally chartered in 1966, I am unable to fully account for human rights data before that time or the transition of practices before and after the creation of the treaty, which may skew the data some. Finally, some aspects I chose to represent civil and political rights may have more weight than others. In spite of those conclusions, human rights statistics, in my opinion were surprisingly low. With countries that had never ratified the ICCPR treaty, the average coding was -0.193, which is expected largely due to their adverse nature towards the treaty itself. The data becomes interesting when looking at the coding for countries that have ratified the treaty throughout the 30-year dataset, -4.43, which is well below the coding for those that never ratified. From these two codes one can make an inference that countries that have ratified these treaties do not necessarily have better human rights practices. Cyprus and Israel stand out as the only countries that met expectations of high levels of human rights compliance due to 30 years of ratification with coding of 1.81 and 1.17, respectively. The other countries have either marginal human rights compliance to terrible compliance as a result of war. On the other hand, Saudi Arabia follows as expected with a coding of -3.92 and no ratification. Surprisingly, two countries without the ratification of these treaties have higher human rights coding at 0.827 and 0.806 than most of those that did ratify the treaty: Oman and UAE, respectively. Transitionally, after removing the statistical outlier, Kuwait due to their occupation by Saddam Hussein during the Gulf War, the statistical coding for countries before they ratify, 0.935, is higher than after they ratify, 0.788. From this data one can conclude that the ratification of these treaties has no effect on a state’s human rights compliance. These results are directly in accordance with predictions made prior to seeing the data, specifically in regards to rational actor model. In fact, only three countries had higher human rights coding after ratifying the treaty: Bahrain, Georgia and Kuwait, which was earlier discussed.

In conclusion, the ratification of the ICCPR treaty does not have a direct effect on the civil and political rights of citizens within a state. However without further research, one cannot make an overarching position on international human rights treaties, according to the data recovered and interpreted.
END NOTES

THE ZEAL OF THE INTIFADA

Shervin Taheran

Events Leading to a Major Social Turning Point

There are several key points in the history of the state of Israel and the Israeli-Palestinian conflict which has ensued since the establishment of the state of Israel. In May of 1948, Israel declared independence as a nation on the 15th of the month, the day prior to the expiration of the British Mandate of Palestine. The next day, four Arab countries (Egypt, Syria, Jordan and Iraq) attacked this barely born nation and were defeated. At this point, Israel’s strength as a nation had been established and the land had been divided into three key areas: the State of Israel (including West Jerusalem), the West Bank (including East Jerusalem), and the Gaza Strip.¹ In June of 1967, what is informally known as the Six-Day War, Israel once again defeated Egypt, Syria and Jordan and captured the regions of the West Bank, the Gaza Strip, the Sinai Peninsula, and the Golan Heights.² Then in 1987, Palestinians embarked on their first aggressive resistance movement, known as the Intifada, which led to the introduction of Islam in Palestinian politics through the establishment of Hamas. The objective of this analysis is to track the setting in which the Intifada occurred and the effects which resulted from this Intifada, namely the founding of Hamas.

The Political Organization of Israel Just Prior to the Intifada

To understand the establishment and rise of Hamas in the Occupied Territories, one must first understand the setting in which Hamas was founded. The internal politics and political parties of Israel at this time were a major influence on the policies regarding Palestinians. The 1982 Lebanon Invasion of Israel resulted in the fragmentation of the political system within Israel and spawned an incredible number of many small political parties which took away the votes from the two major political parties, the Labor and the Likud. After the election of 1984, the two parties had to govern together under the
coalition named the National Unity Government. These two parties had different platforms regarding the issue of the Occupied Territories, with the Labor Party favoring territorial compromise and the Likud Party completely opposed to giving up the Gaza Strip or the West Bank. Initially, the leadership of the country was to rotate between Shimon Peres of Labor and Yitzhak Shamir of Likud, but though the Labor party attempted to advocate territorial compromise, the Likud party’s influence seemed to be stronger and therefore Israel’s actions regarding the Occupied Territories was one of opposition to territorial compromise and willingness to maintain the territory under any circumstance.

The policies which were set on Palestinians by the Israeli government were unjust and severe and seem to serve for a two-fold purpose: to encourage settlement by Israeli settlers into the territories to increase Jewish population and also to make life more difficult for the Palestinians to encourage them to leave the area. The government of Israel during this time even designated nearly $300 million for infrastructure projects to support Israeli settlers to migrate into the area. The Likud party held the belief that “all lands of Biblical Israel should be incorporated into the Jewish state” which led to the basis for encouraging Jewish settlers onto the Occupied Territories in order to eventually assimilate the territories under full Israeli control. Through this justification, the Likud was responsible for abruptly intensifying settlement and construction within the Occupied Territories and integrating into Israeli policy the commitment to incorporating the territories into Israel.

Israeli policies towards Palestinians were known as the “Iron Fist” policies, in that the policies were enforced strictly with little room for leniency. For example, the Israeli government was notorious for shutting down universities and other schooling institutions under the claim that “instead of pursuing their education students were engaging in political activities and were organizing opposition to the occupation.” As previously stated, Israel was clearly encouraging mass Jewish settlement in the Occupied Territories. In order to do this however, Israel would frequently confiscate plots of land belonging to Palestinians to give to the new Jewish settlers, leaving Palestinians landless and homeless. Many other policies were also in effect at this time, including administrative detention, in which it was legal for Palestinians to be arrested without an arrest warrant and to be held in detention for six months without a formal criminal charge.
security services were rapidly deporting an increasing number of suspected political activists, and Palestinians were required to carry identity cards and pay special taxes.\textsuperscript{12}

Meanwhile in the Occupied Territories, the main representative of the Palestinian people at this time was the Palestinian Liberation Organization (PLO). The PLO had been formed by the Arab League to “control Palestinian nationalism while appearing to champion the cause.”\textsuperscript{13} The Israeli government defined the PLO as a terrorist organization and refused to negotiate with the PLO as a representative of the Palestinian people.\textsuperscript{14} The PLO had four branches, the largest of which, with the most followers, was Fateh, which advocated secular nationalism.\textsuperscript{15} Fatah had Yasser Arafat as its leader.\textsuperscript{16} Even though just prior to the Intifada, the PLO was exiled from the Occupied Territories and Lebanon and was then based in Tunis, the PLO remained active in Palestinian territories right up to the beginning of the first Intifada.\textsuperscript{17}

\textbf{The Beginnings of the First Intifada}

On December 8th in the year of 1987, an IDF tank transport vehicle crashed into a civilian car carrying workers from Israel back home to the Gaza Strip; four of the Palestinian men died, several others were injured. That night, at the funeral for three of the men, what was originally intended to be a mourning ceremony quickly turned into a mass demonstration.\textsuperscript{18} This led to a protest by Palestinians which resulted in the Israeli army shooting some of the protestors in an attempt to suppress the protests. After the Israeli shootings, the rest of Gaza began passionately revolting. Armed protestors then began marching in the West Bank a few days later.\textsuperscript{19} These scattered protests soon turned into an organized movement known as the Intifada. Then the PLO formed the Unified National Leadership to take the reins of the uprising.\textsuperscript{20} Several of the demands that the Palestinian elite, the PLO and the UNL, claimed the Intifada to be fighting for were: the halt of settlement building by Israelis on Palestinian land, the cancellation of Palestinian taxes and restrictions, and the reorganization of an independent Palestinian state under the leadership of the PLO.\textsuperscript{21} The Israeli leaders soon came to realize that the consistent riots were no scattered coincidences but an actual organized movement with leadership, and this frightened the Israelis enough to increase their suppression tactics against the protestors. However, the more Palestinians were shot and killed, the more frequent and intense the riots became.\textsuperscript{22} The Israeli
militia began demolishing and blowing up the houses of Palestinians within the Occupied Territories under the guise that the buildings were housing protestors who had “thrown stones at the Israeli soldiers.” Even curfews were instated which would be in place for sometimes an entire week, in which citizens of the Occupied Territories could not leave their houses at any point, even to obtain food. The Israeli Minister of Defense, Yitzhak Rabin, would even order the bones of demonstrators to be broken as punishment to put down the demonstrations.

However, Palestinians consistently fought back through forms of civil disobedience as well as an attempt to make the continued occupation as much of a financial burden on Israel as possible, such as massive demonstrations, strikes, refusal to pay taxes, boycotts of Israeli products in an effort to become more economically self-sufficient, political graffiti, underground secret schools, and towards the end they became violent with stone throwing, Molotov cocktails and the putting barricades in place to increase the difficulty of movement for Israeli soldiers. Though these demonstrations and events were generally planned by the PLO’s Unified National Leadership, another strong organization was also emerging into the Occupied Territories to lead the Intifada: Hamas.

**The Emergence of Hamas**

Formally established in January 1988 (with the charter being introduced on August of 1988), Hamas (which is Arabic for the word “zeal”) is most easily defined as an off-shoot of the Muslim Brotherhood. Earlier on in the Palestinian-Israeli conflict, prior to the Intifada, the Muslim Brotherhood was socially active in the Occupied Territories but was not active in the Palestinian conflict like the PLO in regards to fighting directly against Israeli occupation. The Muslim Brotherhood’s goals were aimed at “the upbringing of an Islamic generation” and that is why the Muslim Brotherhood spent many resources to establish social welfare institutions such as schools, charity associations, social clubs, and other establishments. Prior to the Intifada, Sheikh Ahmad Yasin (who will become one of the founders of Hamas) established Al-Mujamma ‘al-Islami, the Islamic Center. This is the base of the Muslim Brotherhood in Gaza. Though the Islamic Center was intended to be established as a mosque, there was also a medical clinic, a youth sports club, nursing school, zakat committee, and a center for women’s activities. This Islamic Center will eventu-
ally come to play a big role in the establishment of Hamas as a solid alternative to the PLO as it begins to provide services to Gaza citizens which either Israel or PLO have failed to provide, thus winning the loyalty of these citizens.

The transition from Muslim Brotherhood to a separate organization named Hamas was due to immense concern over the reputation of the Muslim Brotherhood. Up until the Intifada, the Muslim Brotherhood had abstained from becoming involved in actively protesting against the Israeli occupation. Due to mounting criticism on the Muslim Brotherhood’s nonparticipation in armed struggle, the Muslim Brotherhood decided to become politically active. However, the problem which the Muslim Brotherhood faced was that to become politically active would be to recount their policy of remaining on the sidelines when it came to the direct physical occupation of Israel.

The solution which was proposed and accepted was the creation of a separate organization. This way, if the organization failed, the Muslim Brotherhood could disclaim the organization, but if the organization succeeded, the Muslim Brotherhood could claim the organization as its own.  

Hence, the Muslim Brotherhood created Hamas, whose active role in the Intifada gave the Muslim Brotherhood a much needed credibility within the Arab community and combated the PLO’s criticisms of the Muslim Brotherhoods inactivity.

Hamas Charter and Hamas’s Relationship with the PLO

The Hamas Covenant of 1988 gives insight into many of Hamas’s beliefs and policies regarding Palestine as a state, territorial compromise and its view on the Palestinian Liberation Organization. Even though Hamas is an off-shoot of the Muslim Brotherhood, there are a few differences such as the fact that Hamas first places emphasis on the Palestinian problem and Islamic jihad as a solution before focusing on transforming society; meanwhile, the Muslim Brotherhood orders the transformation to an Islamic society as ultimate priority. After careful analysis of the charter, outsiders have a better understanding of the radicalism and strict ideas Hamas seems to emulate. Key points which support Hamas’s Islamic standing and the extent of which Hamas wishes to incorporate Islam as a solution to the Intifada as well as beyond the Intifada are herein described.

Articles 1 and 2 within the Covenant (also referred to as Hamas...
Charter or Charter) right off the bat state blatantly that Hamas’s (translated in the Charter as the Islamic Resistance Movement) ideological starting-point is Islam. Islam is the guide to the Movement’s ideas, understandings and way of thinking. To further associate the organization with Islam, the Charter states that Hamas is an off-shoot of the Muslim brotherhood which is “a universal organization which constitutes the largest Islamic movement in modern times.” Even the last article in the section of the charter elaborating on the “Definition of the Movement” recaps the Islamic theme by claiming Hamas’s slogan to be: “Allah is its target, the Prophet is its model, the Koran its constitution: Jihad is its path and death for the sake of Allah is the loftiest of its wishes.”

The objectives of the Hamas organization, as described in Articles 9 and 10, are that without Islam, the world is reduced to chaos, and that Islam is what will encourage justice and save the world from chaos.

Article 11 is more specific and addresses the issue of Palestine in that it deems Palestine an Islamic Waqf, a land to be designated sacred for the future until Judgment Day. The evidence and support given for this statement is a story regarding Umar, the second caliph after his conquest of this land. He is claimed to have been asked who is to receive the land and his alleged answer is that the land should be “left with its owners who could benefit by its fruit. As for the real ownership of the land and the land itself, it should be consecrated for Muslim generations till Judgment Day.” To elaborate, this means that Palestine, as an Islamic Waqf, can only be owned by a Muslim, and to have Jews owning this sacred territory is a sin and wrong; therefore a two-state solution was impossible.

Article 13 is interesting and important in the sense that one learns of Hamas’s belief that international conferences and other outside mediation is a contradiction to the principles of Hamas since these conferences are “only ways of setting the infidels in the land of Muslims as arbitrators. When did the infidels do justice to the believers?” Then the charter states that the only solution Hamas deems acceptable to the Palestinian question is through Jihad. The idea of Jihad is later expanded upon in Article 15 when the Charter states that Jihad for the Liberation of Palestine is an individual duty, especially since it was the Jews who usurped Muslim land which makes this Jihad a defensive Jihad.

The last article which will be expounded upon is Article 27
describing Hamas’s view towards the Palestinian Liberation Organization. Summed up, the Article roughly says that Hamas feels as though it is kin to the PLO (like a brother, a cousin, a friend, etc.), but that they feel the Palestinian Liberation Organization is misguided in trying to be secular.\(^{40}\)

The PLO, at best, has an apprehensive relationship with Hamas mainly due to the differing ideologies of the organizations. As noted, Hamas staunchly believes in Islamic principals to rule in the government while the PLO is a huge proponent of secular nationalism. Because of Hamas’s Islamic principles, this makes it heresy to suggest that they consider territorial compromise, while the PLO is more willing to accept territorial compromise for Palestine. These discrepancies in ideology suggest that even if Israeli withdrawal was to actually occur, Hamas and the PLO would continue to disagree on whether the Palestinian government should be an Islamic state or a secular state.

The pro-PLO Unified National Leadership even tried to discredit the Hamas movement by saying that if the opposition realized there was a divide in the unity of Palestinians, they would thus be helping the enemy.\(^{44}\) However, Hamas stuck firm to its beliefs.

Surprisingly, what the UNL feared would occur (that enemies of Palestine would use the group division against each other) did, but this only greatly helped Hamas succeed as an organization. At the time of the first Intifada, Israel viewed only the PLO as any major resistance in regards to its occupation of West Bank and Gaza strip. Thus, they not only disregarded Hamas as a valid adversary but also allowed Hamas to continue in assimilating into society in hopes that the Islamism of Hamas would clash with the secularism of the PLO and that the two would weaken each other immensely. This ironic freedom granted to Hamas by the Israelis to continue to operate was exactly what led to the rapid growth of the organization, and what allowed Hamas to be a strong organization with as much influence in Gaza as the largest PLO party (the Fateh party) had.\(^{42}\)

**The Effects and Results of the Intifada**

During the Intifada, Likud leaders attempted to convince the Israeli nation that the uprising was not an accurate representation of the entire Palestinian population because most of the Palestinians were appreciative of the Israeli help in developing the West Bank and the Gaza Strip, and that it was due to the Israelis that their quality of life
and improved. The Likud party said that the riots were the cause of a few PLO radicals, not the entire Palestinian population. This created a divide within Israel between the Jewish citizens who were not sure whether to believe the Palestinian protests regarding their oppression, or to believe the Likud statement that these protests represented the few, not the many. Socially, the Israelis experienced rising discontent regarding the treatment of the Palestinians during the Intifada, even within the ranks of the militia.

Politically, the uprisings had an effective influence on Israel by generating arguments within Israel over whether the Occupied Territories were worth the cost of this uprising. Even IDF officers began to believe that the decision to stay in the territories was resulting in a higher security risk than the security risk involved with withdrawing from the Occupied Territories would be.

On the other side of the sea, the Intifada had also influenced Americans on their view towards Palestinians. Americans had actually become more sympathetic to the Palestinian cause and during this time they had begun to question Israel’s commitment to compromise and peace. A New York Times-CBS poll conducted just after the 1987 Intifada found that 64% of Americans were in favor of having contact with the PLO, while only 23% were opposed. This poll was regarding Israel’s refusal to negotiate with the PLO. The same poll counted 52% of Americans who believed that Israel was uninterested in compromise while only 28% truly believed that Israel was making an effort to make concessions.

By 1990, the dust stirred up during the Intifada was about ready to settle as at this point, most UNL leaders had been arrested which led to the Intifada reverting back to a disorganized movement which led to its decline. At this point, the numbers show that between 1987 and 1990: 1,025 Palestinians had died, nearly 250 of these killed by other Palestinians who had accused them of collaboration with occupation authorities. Furthermore, 56 Israelis died, 37,000 Arabs were wounded and between 35,000 to 40,000 Arabs were arrested.

Due to the emergence of Hamas, after the Intifada Palestine became a much more conservative society, even spreading to the PLO who began using Koranic verses and religious expressions in statements released by UNL.

As a society, the main message Palestinians wished to convey through the protests and uprisings was: “We exist and have political rights, and there will be no peace until these rights are recognized.”
This message defines the essence of the Intifada: that prior to the uprising Palestinians had been seemingly submissive towards the Israelis, such as being unable to stop the Israelis from confiscating Palestinian lands, and that this uprising was the turning point in which the Palestinians would be submissive no longer. Islam also comes to play an extensive role in Palestine from this point and on, due to the emergence of Hamas and Hamas’s justifications for fighting the occupations and all Israelis until the entirety of Palestine is returned. As a result, the peace process between Palestine and Israel has become nearly impossible. This is due to both Israel’s strict policies regarding the territorial dispute as well as the introduction of Hamas’s hard-line demands for the return of the Palestinian land. This is the “zeal” of the first Intifada.
END NOTES

2. Ibid.
4. Ibid.
7. Cleveland and Bunton, *Modern Middle East*, 474
10. Cleveland and Bunton, *Modern Middle East*, 474
11. Ibid.
12. Ibid.
14. Ibid.
17. Ibid.
20. Ibid.
21. Ibid.
23. Ibid.
28. Ibid.
31. Ibid.
33. Ibid, Article 2.
34. Ibid, Article 8.
35. Ibid, Article 9-10.
36. Ibid, Article 11
39. Ibid, Article 15
40. Ibid, Article 27
42. Mahmood Mamdani, *Good Muslim, Bad Muslim: America, the Cold War, and the Roots of Terror*, (New York: Three Leaves Press, 2005), 121.
44. Ibid.
45. Ibid.
46. Ibid.