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A student-run research publication at the University of Pennsylvania, the Penn Undergraduate Law Journal seeks to foster scholarly discourse on topical and historical issues pertaining to law or the legal system. In this spirit, the Journal's principal objective is to publish exceptional undergraduate works, drawn from an array of disciplinary perspectives, that evaluate and elucidate the intricacies, vagaries, and nuances of law as they relate to domestic and international affairs, business, academia, and society. PULJ aims to sustain and enrich a vibrant discussion about law at the undergraduate level because it recognizes that the student writers of today will be the leaders, lawyers, and scholars of tomorrow.

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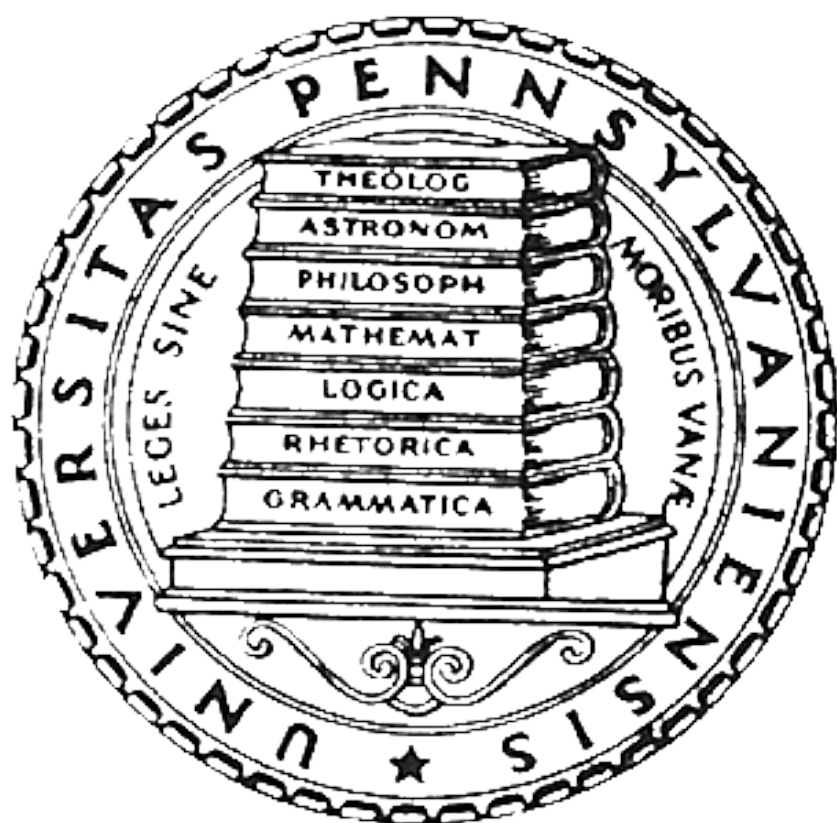
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## *Letter from the Editors*

Dear Reader,

It is our special honor to present issue two of the Penn Undergraduate Law Journal's second volume – a venture we have overseen from conception to inception to thriving publication and student group. Now, more than two full years after the founding of PULJ, we are proud to finish our tenure as Editors-in-Chief on a high and resounding note, with a latest issue featuring three exemplary pieces of undergraduate scholarship worthy of praise and careful study.

Our first piece, authored by Thomas Gaudett of Harvard University and entitled Historical Gloss and the Separation of War Powers, presents the arguments around Obama's controversial use of the War Powers Resolution during the Libyan crisis as well as the sometimes tenuous legal justifications deployed in its defense. Gaudett particularly focuses on the Krass Memorandum, so named after author Caroline Krass of the U.S. Attorney General's office, and the precedents which gave rise to the historical "gloss" that, in the view of some, vindicated Obama's authorizations and ultimate circumvention of Congress.

Equally compelling, though more sweeping in scope, is Matteo Godi's paper, entitled Re-Framing Sovereignty: The Italian Legal and the European Human Rights Regime. Wide-ranging in the disciplines engaged throughout, Godi's piece addresses the conceptual evolution of sovereignty through the lens of the Italian Constitutional Court, the European Court of Justice, and the European Convention on Human Rights. Though it examines the 60-year relationship between these entities and their contributions to the shaping of the concept, Re-Framing Sovereignty more broadly brings to bear important philosophical considerations on the analysis and formation of frameworks, legal or otherwise.

Finally, David Hamburger of Columbia University discusses *Cleburne v Cleburne Living Center, Inc.*, a 1985 U.S. Supreme Court ruling on intellectual disabilities, in 30 Years After Cleburne: A Look Back at a Landmark Decision for Intellectual Disability Jurisprudence. The piece centers on a ruling that, in the view of the author, led to unfair judicial treatment for the intellectually disabled in U.S. court systems. In particular, the author argues that this class of citizens should fall within the bounds of quasi-suspect labeling and be subject to a more exacting standard of judicial scrutiny. The Court's ruling on this matter, as a corollary, was therefore inconsistent.

We remain deeply grateful to the University of Pennsylvania and the mentors that aided in the publication's formation. In particular, we would like to thank Phil Nichols of the Legal Studies Department for his encouragement and sponsorship as well as a number of faculty members, institutes, and departments, all of whom are listed on our website and in every issue, that collectively oversaw the founding of this journal. It is because of them this publication exists.

Upon reflection, the journal has morphed into something far more exten-

sive, and at this point, more refined, than we could have ever envisioned. PULJ has now has four departments – The Roundtable, Editorial, Business, and Programming & Communications – that contribute meaningfully to the objectives of our publication and to the university’s broader goal of cross-disciplinary undergraduate engagement.

PULJ has averaged more than 90 submissions per issue, with papers submitted from countries as distant as South Africa, Australia, and New Zealand. Our blog, equally international in character, features authors from Asia, Europe, and elsewhere. As a result of these great accomplishments, our team’s enthusiasm, and the countless hours spent on refining our publication for print, our journal is now featured on HeinOnline, the world’s largest image-based repository of legal journals. All this is to say that the journal occupies a unique role, and fills a special space, at Penn and beyond. We remain confident the journal will continue to grow, and flourish, under the strong leadership of Davis Berlind, our Editor-in-Chief.

To all journal members, family, friends, authors, faculty, and readers, we extend a sincere thank you for giving us the privilege of witnessing what bright, young minds can assemble in so little time. For this and so much more, we remain eternally grateful.

Appreciatively,



Tomas E. Piedrahita



Gautam Narasimhan

*Founders & Editors-in-Chief*

# INTRODUCTION

## IN DEFENSE OF ANIMALS

Professor Nicolas Cornell<sup>†</sup>

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This issue of the *Penn Undergraduate Law Journal* highlights the value of young people thinking seriously about the progressive challenges of creating more inclusive legal institutions, whether that be in disability law<sup>1</sup> or international human rights law.<sup>2</sup> Alongside these topics, one of the greatest challenges for the next generation of legislators, lawyers, judges, and legal scholars will be the law surrounding nonhuman animals.<sup>3</sup> Legally categorizing animals simply as chattel—mere property—is increasingly unsatisfactory. It fails to do justice to our modern social understandings, to our relationships with animals, and to the animals themselves. When an “owner” no longer has use for a creature, it is abhorrent to have it destroyed like an old piece of furniture.<sup>4</sup> When a beloved family pet is killed, fair-market-value is obviously not adequate compensation.<sup>5</sup> And when living creatures are kept in squalid or solitary conditions that cause them sickness, hunger, or depression, we recognize that as something far worse than wasteful.<sup>6</sup> In short,

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<sup>†</sup>Assistant Professor, Legal Studies & Business Ethics Department, The Wharton School, University of Pennsylvania.

1 See David Hamburger, *30 Years After Cleburne: A Look Back at One of the Supreme Court's Biggest Missteps*, 4 U Pa Undergrad L J 123 (2015).

2 See Matteo Godi, *Re-Framing Sovereignty: The Italian Legal Order and the European Human Rights Regime*, 4 U Pa Undergrad L J 67 (2015).

3 See Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard 2007) (describing disability law, human rights law, and animal law as the three big unresolved issues for the law).

4 See *Smith v Avanzino*, No. 225698 (Cal Sup San Francisco County 1980) (invalidating a provision in a will that would have ordered that the decedent's dog be destroyed).

5 See *Rabideau v City of Racine*, 627 NW2d 795, 798 (Wis 2001) (“[W]e note that we are uncomfortable with the law's cold characterization of a dog, such as Dakota, as mere “property.” Labeling a dog “property” fails to describe the value human beings place upon the companionship that they enjoy with a dog. A companion dog is not a fungible item, equivalent to other items of personal property. A companion dog is not a living room sofa or dining room furniture. This term inadequately and inaccurately describes the relationship between a human and a dog.”). Nevertheless, in some cases, the law's valuation of nonhuman animals may be worse than it would be for personal property. See *Strickland v Medlen*, 397 SW3d 184, 192 (Tex 2013) (distinguishing sentimental damages available for the destruction of heirloom property from “emotion-based liability,” which was not available for the death of a dog).

6 See, for example, *State v Zawistowski*, 82 P3d 698 (Wash App 2004) (holding that evidence of malnourishment was sufficient on its own to prove cruelty toward horses).

we know that nonhuman animals aren't merely property.<sup>7</sup> Major change is both necessary and inevitable.<sup>8</sup>

But the path forward is less clear. If nonhuman animals are not simply property, then how should the law treat them? One natural answer involves recognizing that animals have rights of their own. To this end, progressive activists have sought to have the claims of animals recognized. Spain has amended its constitution to acknowledge Great Apes as legal persons.<sup>9</sup> As this journal goes to press, the Nonhuman Rights Project, led by the vision of Steven Wise, is litigating habeas corpus claims for various chimpanzees held in captivity across the state of New York.<sup>10</sup>

These proposals, however, strike many as extreme. People squirm or scoff at the idea of a chimpanzee—let alone a horse or an octopus—entering court as a party of its own. Even if animals are more than property, the argument goes, they are less than right-holding persons. Animals can't be given rights because it would be absurd to treat them as litigants.

I do not believe that having legal rights necessarily means having the standing to enter court as a complainant. Having a right is not the same as being able to litigate. Rather, having legal rights is a matter of being owed legal duties. One way that legal duties are realized is by allowing a party to go to court seeking enforcement. But there are also other ways that the law recognizes duties. In this Foreword, I want to focus on another way that the law can—and perhaps sometimes does—treat nonhuman animals as having rights.

My topic is whether American law recognizes defense of others with respect to nonhuman animals. That is, can a defendant offer as an affirmative defense that her otherwise illegal conduct was necessary to defend the rights of a nonhuman animal?

Generally, the answer has been no. But what I hope to suggest is that there is more precedent for this defense than one might guess. Some decisions have countenanced something like a defense of animals, and those decisions that have rejected it can largely be explained on other grounds. To the extent that this is true,

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7 A recent Gallup poll found that 32% of Americans believe that animals deserve the same rights as people “to be free from harm and exploitation,” up from 25% in 2008. See Alan Yuhas, *A third of Americans believe animals deserve same rights as people, poll finds* (The Guardian, May 19, 2015), online at <http://www.theguardian.com/world/2015/may/19/americans-animals-human-rights-poll> (visited July 20, 2015).

8 Cf. *Morgan v Kroupa*, 702 A2d 630, 633 (Vt 1997) (“[M]odern courts have recognized that pets generally do not fit neatly within traditional property principles.... Instead, courts must fashion and apply rules that recognize their unique status.”).

9 See *Spanish Parliament to Extend Rights to Apes* (Reuters, Jun 25, 2008), online at <http://www.reuters.com/article/2008/06/25/us-spain-apes-idUSL256586320080625> (visited July 20, 2015).

10 See *Arguing in Court Whether 2 Chimps Have the Right to ‘Bodily Liberty’* (NY Times, May 27, 2015), online at <http://www.nytimes.com/2015/05/28/nyregion/arguing-in-court-whether-2-chimps-have-the-right-to-bodily-liberty.html> (visited July 20, 2015).

defense of others may be an opening for recognizing the legal rights of nonhuman animals. Admittedly, the practical effect of this legal protection may be significantly more modest than granting legal standing to bring suit. But, conceptually, I think that it might whittle away at the myth that legally acknowledging nonhuman rights is radical or deeply problematic.

Part I discusses the conceptual significance of defense of others, suggesting that the defense arises out of an acknowledgement of rights. Part II discusses the minority of cases in which courts actually have shown some receptivity towards defense of animals. Part III then turns to the cases in which the defense has been rejected.

## I. RIGHTS AND PRIVATE ENFORCEMENT

What does it mean to have a legal right? One answer would be that it implies the ability to go to court and get a remedy. According to such a view, the struggle for animal rights is a struggle for legal standing.<sup>11</sup> But a different answer is that having a right involves being owed a duty.<sup>12</sup> According to this view, I have a legal right that you act in such-and-such way just in case you legally owe it to me to act in such-and-such way. The key idea here is that the duty is directed—you don't just have a duty; you have a duty *owed to me*.

A duty that is directed in this way—owed to another person—can be contrasted with general or nondirected duties. You may, for example, have some kind of a duty not to destroy a historical structure on your property. We could think of that duty as owed to the state, or owed to the community, or owed to no one particular at all. But it's not a legal duty that you owe me. In contrast, you have a legal duty not to kill me, and that's a duty that you do owe *to me*. For this reason, we might say that I have a legal right that you not kill me, but I don't have a legal right that you preserve the old building.

The way to understand this difference is to think about the connection between me and your respective duties. I have a claim that you not kill me; it's something that I can demand of you. You owe it to me not just in the sense that it is something that I ought to receive, but in the sense that it is something I can demand and require. Along these lines, Immanuel Kant conceived of the realm of rights as demarcated in part by the fact that it involves those matters over which coercion is permissible.<sup>13</sup> One can see the appeal of this understanding: I have a right that you not kill me insofar as it is permissible for me to force you to fulfill that duty. Maybe you also shouldn't take destroy historical buildings, but that's not something that I

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11 This approach is discussed nicely by Cass Sunstein, *Standing for Animals*, 47 UCLA L Rev 1333 (2000).

12 See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (Yale 1919).

13 Immanuel Kant [1784], *Naturrecht Feyerabend* (unpublished 2003) (Lars Vinx, trans).

can force upon you insofar as that's not a matter of violating rights.

Protecting rights can be the basis for coercion by others as well as by the right-holder. My right not to be killed by you means that, if someone sees you about to kill me, that person can use force against you to prevent it, just as I might have. Here, again, it is important that you don't simply have a duty *regarding* me; rather, you *owe it to me*. You have a duty regarding the historical building, but a third party can't intervene to enforce that duty.

So, in this light, what would it mean for nonhuman animals have rights? It would mean that we have duties not just *with respect to* animals but *owed to* animals. One way that this difference would manifest itself would be if our duties concerning animals authorized private enforcement. If your duties with regard to nonhuman animals were like your duties owed to me, as opposed to your duties regarding, e.g., historical structures, then we might say that you owed those duties to the animals. The appropriateness of enforcing these duties would be a mark of their correlation with rights.

The law of self-defense can be viewed in this light. The law permits self-defense because it is an individual enforcing his or her rights not to be injured or killed. Similarly, the law permits individuals to use force to defend another person against injury or death.<sup>14</sup> I can use force against you to make sure you don't kill anyone, but I cannot use similar force against you to ensure that you fulfill your duties regarding inanimate objects.<sup>15</sup> This is a deep signifier of the fact that people, unlike inanimate objects, have rights to be protected. If the law were to recognize defense of others as applied to nonhuman animals, it would be recognition that nonhuman animals have legal rights.<sup>16</sup> So this prompts the question: Does the law ever recognize defense of others as applied to nonhuman animals? Should it?

## II. GLIMMERS OF HOPE

It may come as a surprise that courts have, in certain contexts, seemed to embrace some actions in defense of nonhuman animals. That is, there are occasional glimmers of an understanding that using force to protect an animal is different and more warranted than using force to make another person fulfill any

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<sup>14</sup> See, for example, Model Penal Code § 3.05.

<sup>15</sup> In the Foreword, I focus mainly on defense of others as opposed to the related necessity defenses. In some jurisdictions, necessity will afford an individual a basis for acting in defense of property. But such authorization is based on a utilitarian calculus rather than an idea of protecting rights. Still, the two defenses often become intertwined. For a nice discussion of the necessity of defense in the context of protecting animals, see Jenni James, *When Is Rescue Necessary? Applying the Necessity Defense to the Rescue of Animals*, 7 *Stan J Animal L & Pol* 1 (2014).

<sup>16</sup> Cf. *People v Kurr*, 654 NW2d 651 (Mich App 2002) (holding that defense of others was available where a woman asserted that she was acting in defense of her fetus because the law affords a fetus rights of its own).

old duty. None of these amount to fully embracing the defense, but they do seem to acknowledge it indirectly.

For a relatively old example, consider *McCall v State*.<sup>17</sup> McCall was convicted for animal cruelty after he was found to be keeping twelve dogs that were malnourished and in need of medical attention.<sup>18</sup> Among the defendant's arguments on appeal, he claimed that the evidence of his offence was illegally obtained insofar as a member of the humane society had taken it upon herself to enter onto his property and seize the dogs and photograph their condition. In rejecting this argument, the court explained:

Appellant kept the dogs in an open field clearly in view of neighbors and passersby. If it was apparent that the animals were not being properly cared for in possible violation of the law, it was not unreasonable to go onto the property and seize them and the introduction into evidence of photographs of the animals was not error.<sup>19</sup>

Here, the court seemed to acknowledge that private entry onto the property—essentially trespass—was permissible to protect the dogs. So, while not raised as a criminal defense, defending animals was judged a justification for otherwise prohibited conduct.

Along similar lines, courts have sometimes been willing to accept the necessity defense where a defendant acted to protect abused animals. For example, in *Carr v Mobile Video Tapes, Inc.*,<sup>20</sup> a Texas court held that the Humane Society could argue necessity as a defense in a civil trespass action. A couple brought suit after an investigator for the Humane Society entered a pasture where the couple kept forty-five malnourished horses.<sup>21</sup> While the court rejected the Humane Society's argument that it enjoyed its own special privilege to enter the property, the court allowed the argument as a form of the general necessity defense.<sup>22</sup> The necessity defense is not the same as defense of others, but it is still suggestive.

Another suggestive decision formally based on other grounds is *State v Pepin-McCaffrey*.<sup>23</sup> Defendant was convicted of domestic violence for punching her husband in the groin.<sup>24</sup> She sought to argue that she had struck her husband in defense of their dog, which she alleged he was kicking.<sup>25</sup> On appeal, the court

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17 *McCall v State*, 540 SW2d 717 (Tex Crim App 1976).

18 *Id* at 718.

19 *Id* at 720–21.

20 *Carr v Mobile Video Tapes, Inc.*, 893 SW2d 613 (Tex App 1994).

21 *Id* at 616.

22 *Id* at 623–24.

23 *State v Pepin-McCaffrey*, 929 NE2d 476 (Ohio App 2010).

24 *Id* at 478.

25 *Id* at 479.



determined that the trial court had not given her adequate opportunity to present her affirmative defenses. With regard to the dog, the state argued, “defense of an animal is not recognized as a defense in Ohio because an animal would not fall within the ‘defense of another’ category.”<sup>26</sup> The appeals court rejected the state’s position, though it did so by noting that Ohio law affords some rights to defend property.<sup>27</sup> In other words, while the court did not explicitly endorse the idea that the dog counted as “another” for defense purposes, it did reverse defendant’s conviction in part on the grounds that she should have been able to argue that she was defending the dog.

An even more idiosyncratic, but also suggestive, example is found in *Koivisto v Davis*.<sup>28</sup> Plaintiff Kathy Koivisto sued defendants under Michigan’s dog-bite statute after being bitten by their two huskies. Koivisto alleged that the two dogs had escaped from their kennel, entered onto her property, and attacked her two cats. When the dogs caught one cat and “started to tear it apart,”<sup>29</sup> Koivisto allegedly charged the dogs and stuck her fingers in the dogs eyes to get it to stop, at which point the dogs started biting at her.<sup>30</sup> The dogs then attacked the other cat, and Koivisto kicked the dogs to free the cat from their jaws. One of the cats survived but the other did not, and Koivisto received 28 puncture wounds to her hands.<sup>31</sup>

The Michigan statute in question basically imposed strict liability for any dog bite, as long as it was unprovoked.<sup>32</sup> Defendants argued that Koivisto had provoked the bites by charging at the dogs, sticking her fingers in their eyes, and kicking them. Koivisto countered that she was only acting in defense of her cats. While the court refused to accept a theory explicitly based on defense of others,<sup>33</sup> the court flatly rejected Defendants’ provocation argument. To describe the absurdity of Defendant’s theory, the court explained how that theory would lead to unacceptable results:

The flaw in defendants’ argument and the trial court’s approach to this issue is best illustrated with an example. If plaintiff had responded aggressively to stop the dogs from attacking a sleeping baby in her care and the dogs turned their attack onto her, plaintiff would not have a claim under the dog-bite statute for her injuries. A potential claim under the statute for bite injuries to the baby would exist, but plaintiff would not have a claim

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26 Id at 480.

27 Id (citing *State v Bruckner* (Sept. 30, 1993), 8th Dist. No. 63296, 1993 Ohio App LEXIS 4643).

28 *Koivisto v Davis* 745 NW2d 824 (Mich App 2008).

29 Id at 826.

30 Id.

31 Id.

32 Mich Comp Laws § 287.351(1).

33 See *Koivisto*, 745 NW2d at 827.

because she ‘provoked’ the attacking dogs. This absurd result is certainly not the intent of the legislation. It does not matter that in the fictional scenario plaintiff was defending a sleeping baby and in this actual case plaintiff was defending her cats.<sup>34</sup>

The analogy here is significant. Defending the cats could not count as provocation any more than defending a sleeping baby would.

In my view, these decisions are correct and they reveal that nonhuman animals have rights of their own to be defended. They are not simply property. To see the point, imagine the difference it would make in these cases if what was protected were a rose bush. It strikes us as appropriate to enter private property in order to save a malnourished horse or dog, but it would be quite surprising to take the same position about watering a malnourished rose bush. If Kathy Koivisto had poked and kicked the neighbors’ dogs to prevent them from trampling her roses, we might very well say that she had provoked the bite. We recognize that defending an animal is different—it involves defending something with rights of its own.

A big step in this direction has recently been taken by Tennessee. A new law passed just this year relieves anyone who breaks into a car in order to save an animal from any civil liability.<sup>35</sup> Through an unprecedented expansion of the state’s Good Samaritan law, the legislature authorized private citizens to defend animals facing heat stroke in parked vehicles. Though a quite narrow circumstance, it is a positive acknowledgment that animals are not mere property, but also beings with rights to be defended.

### III. SUBSTANTIVELY FAILED DEFENSES

Despite the intuitive appeal and its occasional acknowledgement, most courts that have addressed the application of defense of others to nonhuman animals have rejected it. If one were trying to offer a neutral assessment of the current case law, one would probably conclude that the defense is unavailable. I want to suggest, however, that this apparent consensus is far weaker than it might appear. Most of the cases apparently deciding that no defense was available can, and probably should, be understood as grounded on other considerations.

First, some cases in which the courts have rejected a defense of others by apparently holding that “others” must mean humans can more plausibly be read as based on a defendant’s failure to satisfy the requirements of the defense. That is, some decisions don’t require rejecting the defense and can instead be read as

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<sup>34</sup> Id at 828–29.

<sup>35</sup> 2015 Tenn. Pub. Acts 166, codified at Tenn. Code Ann. § 29-34-209. For a discussion of the new law, see *Groundbreaking Tennessee Law Lets Good Samaritans Save Dogs Trapped In Hot Cars* (Huffington Post, Jul. 7, 2015), online at [http://www.huffingtonpost.com/2015/07/07/tennessee-dog-hot-car\\_n\\_7746944.html](http://www.huffingtonpost.com/2015/07/07/tennessee-dog-hot-car_n_7746944.html) (visited Jul. 28, 2015).

finding the conditions for the defense lacking. For example, in *Commonwealth v Grimes*,<sup>36</sup> Tammy Grimes, the founder and director of a non-profit organization called Dogs Deserve Better, received a phone call about a dog chained outside a home that appeared to be in need of medical attention. The caller said that she had reported the situation to the Humane Society and received no response. Grimes and another employee of the organization went to the home, photographed the condition of the dog, knocked on the door but received no answer, and then took possession of the dog. The dog was taken to a veterinarian office where it received medical care. Upon the dog's release, Grimes refused to surrender the dog either to the owners or to the police, instead placing the dog in foster care. She was then charged with theft and receiving stolen property.

Grimes attempted to avail herself of the justification defense authorized by Pennsylvania statute, which protects conduct that an actor "believes to be necessary to avoid a harm or evil to himself or to another."<sup>37</sup> Rejecting this defense, the court concluded that the statute applies "only when it is a person who is in danger of harm" and that "another" could not refer to a dog.<sup>38</sup> The court supported this conclusion by noting that a dog is personal property under Pennsylvania law.<sup>39</sup>

While the *Grimes* decision may look like a clear rejection of applying the defense of others to nonhuman animals, I think that the story is more complicated. A humane officer was present when Grimes brought the dog to the veterinarian and the officer allowed the dog to be treated.<sup>40</sup> It was only after Grimes refused to surrender the dog to police custody that she was charged.<sup>41</sup> After rejecting the application of the justification defense, the court explained that, even if the defense were available, Grimes would not have satisfied the requirement of proving that there was "no legal alternative."<sup>42</sup> This second rationale is more likely what truly supports the *Grimes* decision. One can appeal to defense of others only in the face of imminent necessity.<sup>43</sup> Once that passes, a continued resistance to the law will not be excused. This fact, rather than the complete inapplicability of defense of others to animals, seems like the lesson to draw from *Grimes*.

Second, rejections of defense of others are sometimes based on the fact

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36 982 A2d 559 (Pa Super 2009).

37 18 Pa.C.S. § 503.

38 *Grimes*, 982 A2d at 562.

39 *Id.*

40 *Id.* at 561.

41 *Id.*

42 *Grimes*, 982 A2d at 563 (citing *Commonwealth v Capitolo*, 498 A2d 806, 809 (Pa 1985)).

43 *Grimes* may be usefully compared with *State v Boyles*, 2006 Wash App LEXIS 1949 (Wash App 2006). In *Boyles*, a woman rescued a loose, unkempt dog from a roadway during the winter. She took the dog home and, after identifying the owner a couple days later, refused to return the dog. The woman was charged and convicted of theft, both because she could have taken the dog to a shelter and because she refused to return the dog. *Boyles* is clear that the necessity defense failed in light of the later conduct once the immediate danger had passed. I suggest that *Grimes* is similar.

that the defense is being offered not to vindicate existing legal rights of animals but to circumvent the legal regime. Most notably, the defense has been unsuccessfully offered on a couple of occasions by members of the animal liberation movement after vigilante attempts to free captive animals.<sup>44</sup> For example, in *Hawaii v LeVasseur*,<sup>45</sup> an undergraduate student participated in freeing two dolphins from laboratory research. The court held that the dolphins did not qualify as “others” within the scope of Hawaii’s choice of evils statute.<sup>46</sup> Similarly, in *State v Troen*,<sup>47</sup> a court rejected the defense of a fifty-seven-year-old former elementary school teacher who had participated in breaking into a University of Oregon laboratory and removing 125 research animals. The court held that because the laboratory’s research was sanctioned by existing law, it could not be the basis for a necessity defense.<sup>48</sup> In these cases, the defendants sought to defend rights that animals, sadly, did not have. So, while the courts seem to say that animals do not count as others, it seems more plausible that the real obstacle is that the substantive rights supposedly being defended are not acknowledged.<sup>49</sup>

A similar interpretation—that the substantive elements were absent—is available to explain other cases as well. In *People v Youngblood*,<sup>50</sup> a California woman hoarding 92 cats in a 7-foot by 11-foot trailer attempted to defend herself against animal cruelty charges by arguing that her actions were necessary to defend the cats from euthanasia.<sup>51</sup> The court noted that the defense could not be offered as a way of circumventing the state’s public policy judgment about what was best for stray cats.<sup>52</sup> Here, again, the problem seems not so much that the defendant was trying to protect animals, but that the defendant was not actually defending legally recognized rights against imminent threat. One need not reject the formal availability of defense of others in order reach these decisions.

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44 For more on the animal liberation and the law, see Laura G. Kniaz, *Animal Liberation and the Law: Animals Board the Underground Railroad*, 43 *Buf L Rev* 765 (1995).

45 613 P2d 1328 (Hawaii App 1980).

46 *Id.* at 1332–33 (noting that the law explicitly defined “another” as “any other person”).

47 786 P2d 751 (Or App 1990).

48 *Id.* at 754 (“[F]ederal law expressly allows what the victim of the crime was doing, so defendant may not offer a choice of evils defense when he interfered with that activity because of his belief that what the laboratory was doing is morally wrong.”).

49 For comparison, notice that I could not defend myself against allegations that I cut a hole in the fence at Walt Disney World by claiming that I was defending impoverished people’s rights to go to Disney World. The problem isn’t that impoverished people aren’t “others,” but that there is no right to go to Disney World.

50 *People v Youngblood*, 109 *Cal Rptr 2d* 776 (2001).

51 *Id.* at 780.

52 *Id.* at 781–82 (“To utilize a term from preemption analysis, these statutes occupy the field of what to do with stray cats. The defendant is not at liberty to impose her own will over the public will. Her assertion that it was necessary for her to keep the cats instead of passing them on to animal control flies in the face of legitimately adopted public policy.”).

## IV. FORMAL AVAILABILITY

What about cases in which there were not these substantive barriers to a defense of others argument? If an imminent danger does exist and it is not a case of circumventing the existing legal regime, should courts allow a defense of others argument?

Perhaps because such cases are less likely to be prosecuted, there is not much case law to draw on here. It is hard to find an opinion rejecting the application defense of others to nonhuman animals where the defense would not have been substantively problematic. Perhaps the closest—though still very imperfect—example comes from the Florida case, *Brooks v State*.<sup>53</sup> Christopher Brooks was convicted of driving under the influence (DUI) after being stopped for speeding. Brooks did not deny that he was driving or that he was intoxicated, but argued that he was the only person available to transport his friend's sick cat to an all-night veterinary clinic. The court noted that this proposition may not have been as preposterous as it initially sounds:

Although Mr. Brooks' defense is unusual, he presented some evidence to support it. He was transporting a cat, and the cat was very ill. There is a veterinary clinic near the highway exit where the deputy stopped Mr. Brooks. The cat's owner and two of his acquaintances were passengers in Mr. Brooks' car. One of these persons was apparently giving Mr. Brooks directions to the clinic when the deputy stopped Mr. Brooks' vehicle. While Mr. Brooks explained the unusual circumstances of his errand to the deputy, the cat's owner pleaded, "My cat is fixing to die!" In fact, the cat did die, during or shortly after the vehicle stop that resulted in Mr. Brooks' arrest.<sup>54</sup>

Despite giving credence to Mr. Brooks story and noting that "Mr. Brooks' wish to obtain treatment for the ailing feline is understandable,"<sup>55</sup> the court rejected his attempt to raise a necessity defense. The court read the plain language of the statute as precluding defense of animals: "[T]he first of the five elements of the necessity defense requires that the defendant reasonably believe that his action was necessary to avoid an imminent threat of danger or serious bodily injury to himself or others. We do not interpret the phrase 'or others' as applying to animals."<sup>56</sup> In short, the court simply concluded that animals aren't "others" for the purposes of the affirmative defense.

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53 122 S3d 418 (2013).

54 *Id.* at 419–20.

55 *Id.* at 422.

56 *Id.*

*Brooks* is a difficult case because alleging the necessity of intoxicated driving is quite different than alleging direct defense of another. We would probably have qualms about the necessity defense even if it were a sick friend, rather than a sick cat.<sup>57</sup> We might wonder whether the substantive elements of the defense were actually present, in particular the requirement that “there existed no other adequate means to avoid the threatened harm” and the requirement that “the harm sought to be avoided was more egregious than the criminal conduct perpetrated to avoid it.”<sup>58</sup> So the case hardly presents an unencumbered presentation of whether nonhuman animals should be included within the definition of “others” for the purpose of defense of others.

I believe that the formal rejection of the defense is a mistake. There may be many cases in which the defense substantively fails on the merits. But that is little reason to say that animals are not “others.” We can try to defend them and, in doing so, we may be acting to protect something with rights of its own. Mr. Brooks’ action, whether warranted or not, is fully intelligible in a way that it would not be if it were a mere inanimate object that he was seeking to protect. Property can be replaced and lacks legal significance of its own. But, intuitively, we recognize that animals aren’t quite like that. They don’t simply serve us; there are also things that we owe them. Recognizing this fact need not have radical practical consequences, but it would have the important conceptual consequences of acknowledging that nonhuman animals have rights of their own.

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<sup>57</sup> Though, in one respect, there would be less of an argument for necessity there, since one could call 911 if it were a human emergency.

<sup>58</sup> *Reed v State*, 114 S3d 969, 972 n.5 (Fla App 2012) (cited in *Brooks*, 122 S3d at 422).



<b>ARTICLE</b>
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## **HISTORICAL GLOSS AND THE SEPARATION OF WAR POWERS**

Thomas Gaudett<sup>†</sup>

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**ABSTRACT:** *In response to the Libyan Uprising against the Qaddafi government in 2011, President Obama unilaterally authorized the involvement of American armed forces in an American-led coalition to assist the Libyan rebels. This unilateral authorization, which had been defended on the grounds that it complied with the War Powers Resolution of 1973 and was within the Article II war powers of the President, was not unlike the unilateral authorizations of military force made by many of Obama's recent predecessors. However, this case was unique in that the Obama Administration asserted that a "historical gloss" has been placed on the President's power to unilaterally authorize conflicts short of "war" due to the acquiescence of Congress to such presidential power in the War Powers Resolution and in inter-branch practice since. This article explores the nature of this historical gloss claim with respect to the separation of constitutional war powers first by laying out the details of the historical gloss framework of constitutional interpretation and the specific historical gloss claims made in this case. This article will then challenge the internal validity of the executive's historical gloss argument by challenging the notion that Congress has acquiesced to the claimed presidential war powers. This article will next turn to the external validity of the executive's historical gloss argument by challenging the constitutionality of entrenching the constitutional views of Congress through the historical gloss framework. This article will conclude by examining the pitfalls of the historical gloss framework, proposing instead a formalist framework for constitutional interpretation.*

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## INTRODUCTION

It was 4:10 P.M. on March 15, 2011 when President Obama met with advisors in the Situation Room at the White House to discuss possible courses of action in Libya. Just a month prior, the arrest of human rights activist Fethi Tarbel precipitated riots in Benghazi that rapidly spread to other Libyan cities. Resisting mounting pressure from the rebels to step down, Muammar Qaddafi, who had gained power in a coup d'état in 1969, was now moving his army towards Benghazi to eliminate the rebel movement. Western human rights groups warned that tens of thousands of Libyans were likely to be slaughtered in the ensuing violence, and the United Kingdom and France were considering establishing a no-fly zone in Libya.

In the meeting, Pentagon officials offered the President two options. The United States could work with other European nations to establish a no-fly zone. Alternatively, the United States could simply do nothing. Frustrated by both the option of doing nothing and the reality that a no-fly zone would not stop Qaddafi's military, which was using tanks and jeeps, Obama sought more nuanced options for taking action.

Convening again in the Situation Room at 7:30 P.M., the Pentagon now presented President Obama with a new option: seek a U.N. Security Council Resolution "to take 'all necessary measures' to protect Libyan civilians and then use American airpower to destroy Qaddafi's army." Obama quickly settled on this new course of action and immediately worked to secure the support of NATO allies. On March 17, the U.N. Security Council passed Resolution 1973, "Authoriz[ing] Member States...to take all necessary measures...to protect civilians and civilian populated areas under threat of attack."<sup>1</sup> By March 19, NATO air strikes halted the advance of Qaddafi's army on Benghazi, effectively tilting the balance of the civil war in favor of the rebels. And finally, on October 20, Muammar Qaddafi was captured and killed, officially liberating Libya of his dictatorship.<sup>2</sup>

*War Powers after the War Powers Resolution*

In one sense, this series of events with respect to the Libyan uprising is not all that remarkable. President Obama made a unilateral decision concerning U.S. foreign policy and the level of military intervention that was necessary to prevent the slaughter of Libyan civilians, not unlike the decisions of many of his predecessors since the passage of the War Powers Resolution in 1973 in areas as disparate as Haiti, Panama, and Kosovo. As many scholars have noted, the

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1 *Resolution 1793*, UN Security Council, 6498th mtg (Mar 17, 2011), UN Doc S/RES/1793.

2 Michael Lewis, *Obama's Way*, 626 *Vanity Fair*, 210–17 (2012). (This entire story of Obama's decision is attributed to Lewis).

War Powers Resolution, which was passed in the wake of the unpopular Vietnam War, has not achieved its aim of limiting presidential exercises of war powers or restoring Congress's constitutional war powers. There is no clearer evidence for this than the fact that presidents have made at least fifteen significant deployments of U.S. armed forces abroad since 1973 while receiving congressional approval for only three of them.<sup>3</sup>

The executive's legal justification for ignoring the War Powers Resolution's congressional consent requirements in these cases has always been grounded in the Constitution. Article I of the Constitution states that the "Congress shall have Power...To declare War..."<sup>4</sup> Article II makes the President "Commander in Chief,"<sup>5</sup> with whom "executive power shall be vested."<sup>6</sup> Taken together, the Executive Branch has interpreted the Constitution as giving the President the power to unilaterally authorize deployments of American armed forces short of those that would constitute a "war," which would require congressional consent. It is the legitimacy of this argument in relation to the War Powers Resolution that has been at the forefront of war powers scholarship.

On the other hand, the President's unilateral decision-making with respect to Libya is remarkable in light of the significant addition the administration made to its legal justification. In what is commonly known as the Krass Memo,<sup>7</sup> Principal Deputy Assistant Attorney General Caroline Krass defended President Obama's decision to act alone by making the novel argument that the Executive Branch's understanding of the President's Article II war powers is supported by the practice of the political branches over time.<sup>8</sup> Suggesting that Congress has essentially "acquiesced" to presidential war powers in the War Powers Resolution of 1973 and in interbranch practice since, Krass draws on a notion from Justice Felix Frankfurter's decision in the *Youngstown Sheet & Tube Co. v Sawyer*<sup>9</sup> steel seizure case that a historical "gloss" has been placed on the President's power to unilaterally authorize armed conflicts short of "war."<sup>10</sup>

The scholarly literature provides a solid foundation for understanding why, under the War Powers Resolution regime, the President has been able to usurp war powers at the expense of congressional war powers. However, a notable exception to this is that there has not yet been an in-depth analysis conducted on the legitimacy the "historical gloss" argument, which has only recently come to prominence. The purpose of this paper is to fill this void in the literature by

3 Curtis A. Bradley and Jack L. Goldsmith, *Foreign Relations Law* 253 (Aspen Pub Inc 2d ed 2006).

4 US Const Art I, § 8 cl 11.

5 US Const Art II, § 2 cl 1.

6 US Const Art II, § 1 cl 1.

7 It shall from this point on be referred to as the "Krass Memo."

8 "Political branches" refers to the Legislative and Executive Branches.

9 *Youngstown Sheet & Tube Co. v Sawyer*, 343 US 579 (1952) (Frankfurter concurring).

10 Id at 610–11.

assessing the internal and external validity of the executive's historical gloss claim with respect to the war power. In particular, I will argue that the Executive Branch's historical gloss claim is grounded in a framework that is flatly antithetical to our constitutional order.

To accomplish this goal, I will begin in Chapter One with an assessment of the Executive Branch's historical gloss claim by laying out the details of the historical gloss framework of constitutional interpretation and the specific historical gloss claims being made with respect to war powers. This will lay the groundwork for a critique of the Executive Branch's argument in Chapters Two, Three, and Four.

In Chapter Two, I will challenge the internal validity of the executive's historical gloss claim by arguing that the Congress neither acquiesced to broad presidential war powers in the Wars Powers Resolution of 1973 nor in interbranch practice since. In Chapter Three, I will begin to assess the external validity of the executive's argument by challenging the constitutionality of entrenching the constitutional views of Congress through the historical gloss framework. Finally, in Chapter Four, I will examine the pitfalls of using the historical gloss framework and propose a formalist framework for understanding the separation of war powers.

## CHAPTER ONE: HISTORICAL GLOSS

Presidents over the last few decades have consistently cited inherent Article II powers in asserting their authority to unilaterally authorize armed conflicts. However, there has been a recent addition to the Executive Branch's explicit interpretation of the President's Article II war powers, articulated in the Office of Legal Counsel's "Krass Memo," justifying President Obama's unilateral authorization of force in Libya. The memo argues that congressional "acquiescence" with respect to executive war powers has painted a "historical gloss" on the President's unilateral authority to authorize armed conflicts short of "war."

This chapter will look at this argument in two parts. First, this chapter will explore the nature of the historical gloss framework of constitutional interpretation. It will examine the justifications for affording congressional acquiescence legal weight, and it will provide background on cases in which the historical gloss framework has been utilized to adjudicate separation of powers controversies. In Part II, this chapter will put forth recent Executive Branch interpretations of Article II war powers and will present the evidence of congressional acquiescence that is the foundation of the executive's historical gloss claim. This will lay the critical foundation for an assessment of the merits of this argument in Chapter Two, Chapter Three, and Chapter Four.

## I. THE NATURE OF HISTORICAL GLOSS ARGUMENTS

In debates regarding the constitutional separation of powers, proponents of the historical gloss framework of constitutional interpretation argue that constitutional legitimacy is accorded to the actions of one branch when a coequal branch acquiesces in that practice over time. The concept of “historical gloss” can be traced back to Justice Felix Frankfurter’s concurring opinion in *Youngstown Sheet & Tube Co. v Sawyer*<sup>11</sup>: “[A] systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive power’ vested in the President by §1 of Article II.”<sup>12</sup> Short of the formalist view on presidential power expressed in the opinions of Justices Black and Douglas, Frankfurter accepted the idea that presidential power could be discerned through a long history of conduct without objection from Congress. This opinion is considered the foundation of the historical gloss framework of constitutional interpretation.

In a general treatment of the use of custom in separation of powers disputes, Michael Glennon expounds on the role of historical practice in constitutional law, outlining three essential elements that must be present in order for the practice to be constitutionally significant. “First, the custom in question must consist of acts; mere assertions of authority to act are insufficient. Second, if a coordinate branch has performed the act, the other branch must have been on notice of its occurrence. Third, the branch placed on notice must have acquiesced in the custom.”<sup>13</sup> From Justice Frankfurter’s concurring opinion in *Youngstown*, it is clear that one can determine whether there has been “acquiescence” by one branch in the practice of another by looking at both action and inaction. In his extensive concurring opinion, Frankfurter examined both statutes and historical interbranch practices to assess whether Congress had acquiesced to the notion of a unilateral seizure power belonging to the President. Under the historical gloss framework, both express agreement and silence with respect to the practice of the coordinate political branch are indicative of acquiescence. And, as Bradley and Morrison suggest, acquiescence is of fundamental importance to the historical gloss framework because “[i]t is what gives otherwise merely unilateral acts legal significance.”<sup>14</sup>

There are several reasons why one might privilege the customs that develop as a result of the relationship between the political branches. First, what

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11 *Youngstown Sheet & Tube Co. v Sawyer*, 343 US 579 (1952) (Frankfurter concurring).

12 *Id.* at 610–11.

13 Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 *BU L Rev* 109, 134 (1984).

14 Curtis A. Bradley and Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 *Harv L Rev* 412, 432 (2012).

is universally true of historical gloss arguments is that they call for deference to the long-standing historical practices of the political branches because the political branches are thought to be, at least according to Madison in *Federalist No. 51*, well-suited by their natural ambition for power to check and balance each other.<sup>15</sup> Meanwhile, many justiciability limitations prevent courts from ruling in cases that are moot, not ripe for judicial review, or deemed to be political questions.<sup>16</sup> Overall, it is not only acceptable under the historical gloss framework to defer to the political branches because all three branches possess an independent and coordinate authority to interpret the Constitution, but is also desirable since the political branches are thought to be best able to enforce the constitutional balance of power between them.<sup>17</sup>

A second justification for privileging acquiescence is that the acquiescence of one branch in the practices of the other over time may reflect an agreement between the branches on constitutional meaning.<sup>18</sup> While the only direct evidence of agreement between the President and the Congress is when they expressly agree on the constitutionality of a practice, such as when a statute recognizes certain powers of the President, such expressions of agreement are not common. When such evidence is lacking, the acquiescence of one branch with respect to the practices of another over time may be construed as a constructive agreement

15 *Federalist 51* (Madison), in *The Federalist Papers* 319 (New Am Lib 1961) (Clinton Rossiter, ed).  
 16 Curtis A. Bradley and Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 *Colum L Rev* 1097, 1131 (2013). (“For a variety of reasons, including justiciability limitations, immunity doctrines, and judicial deference to coordinate institutions, it has long been understood that the Constitution is not fully enforced by the Courts”).

17 Bradley and Morrison, 126 *Harv L Rev* at 434 (cited in note 14). (“Although the academic debate between ‘judicial supremacists’ and ‘departmentalists’ persists, everyone recognizes that constitutional interpretation has never been the exclusive province of the judiciary”).

18 *Id.* at 433. *Dames & Moore v Regan*, 453 US 654, 680–86 (1981). (The case states that “[c]rucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement,” and basing that conclusion on “the inferences to be drawn from the character of the legislation Congress has enacted in the area, such as the [International Emergency Economic Powers Act] and the Hostage Act, and from the history of acquiescence in executive claims settlement”). Office of Legal Counsel, *Whether Uruguay Round Agreements Required Ratification as a Treaty*, at 235 (1994) (accessed online at <http://www.justice.gov/sites/default/files/olc/opinions/1994/11/31/op-olc-v018-p0232.pdf>). (The memorandum refers to historical practice as reflecting “the considered constitutional judgments of the political branches”). Harold H. Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair* at 70 (Yale U P 1990). (Koh describes “quasi-constitutional custom” as including “executive practice of which Congress has approved or in which it has acquiesced [and] formal and informal congressional actions with which the president has consistently complied,” and characterizes these customs as “carry[ing] greater normative weight than self-serving justifications that one branch may offer, without another branch’s endorsement”). H. Jefferson Powell, *The President’s Authority over Foreign Affairs: An Executive Branch Perspective*, 67 *Geo Wash L Rev* 527, 539 (1999). (“Agreement between the political branches on a course of conduct is important evidence that the conduct should be deemed constitutional”).

between the political branches on constitutional meaning.

A third reason why one might afford interbranch customs constitutional weight is that such customs may reflect an agreement between the political branches on a desirable, acceptable, or practical balance of powers between them. This argument is similar to the last in that there is interbranch agreement on constitutional meaning. However, this sort of justification is functionalist in nature, because it sees the acquiescence of one branch in the practice of another over time not as an affirmation of a formal, legal agreement, but rather as a functional agreement that will enforce mutually agreeable terms of checks and balances. While not conforming to a formalist view of the constitutional separation of powers, it can be assumed that accommodations that have been reached by the President and Congress over time are normatively desirable,<sup>19</sup> giving us “reason to believe that those accommodations make institutional sense.”<sup>20</sup>

A final justification for giving constitutional weight to interbranch customs is that they may result from implicit interbranch bargains that preserve an appropriate balance of power. Although such agreements do not reflect agreement between the political branches on constitutional meaning in either the formal or functionalist sense, a particular practice may become so entrenched that others may have formed expectations around that practice. In particular, the coordinate branch may have reacted to this long-standing practice by assuming new countervailing powers.<sup>21</sup> For example, in light of the fact that the Senate has historically played little role in the formation of treaties, it has taken on a new power of adopting “reservations” with respect to particular treaty terms.<sup>22</sup> Another possible example is the fact that the President has adopted a practice of issuing “constitutional signing statements” to express disagreement on the constitutionality of bills as a result of the rise of omnibus bills that are hard to veto in their entirety.<sup>23</sup> As Justice Lamar suggested in *United States v Midwest Oil Co.*<sup>24</sup>, “officers, lawmakers and citizens naturally adjust themselves to any long-continued action of” the branches “on the presumption that unauthorized acts would not have been allowed to be so

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19 J. Gregory Sidak, *To Declare War*, 41 Duke L J 27, 63 (1991). (“Regardless of the initial assignment of powers under the Constitution, and as long as transaction costs are not too high, the Coase Theorem suggests that the three branches will be able to reassign those powers in any manner that achieves greater efficiency in the production of public goods”).

20 Cass Sunstein, *Burkean Minimalism*, 105 Mich L Rev 353, 401 (2006).

21 Bradley and Morrison, 126 Harv L Rev at 435 (cited in note 14). See also *id* at 436. (“A possible example of such an implicit bargain relates to the treaty process. Although the Constitution specifies that the Senate is to provide ‘Advice and Consent’ to the conclusion of treaties, Presidents have not accorded the Senate a substantial advisory role in the making of treaties since early in U.S. history. Partly as a result of this exclusion, the Senate has long exercised the power to condition its consent to treaties on the adoption of ‘reservations’ that decline to consent to particular treaty terms”).

22 Bradley and Morrison, 126 Harv L Rev at 436 (cited in note 14)

23 *Id* at 436 (cited in note 14).

24 *United States v Midwest Oil Co.*, 236 US 459 (1915).

often repeated as to crystallize into a regular practice.”<sup>25</sup> Therefore, giving weight to long-standing custom is a way of honoring these implicit interbranch bargains, which “may be viewed as less problematic than unilateral aggrandizements of power.”<sup>26</sup>

### A. *Reliance on Interbranch Practice Historically*

Although the term “historical gloss” was not coined until Justice Frankfurter’s concurrence in *Youngstown*, there have been many episodes throughout American history in which historical practice was relied upon to support a particular understanding of the balance of powers between the political branches. Historical practice is most commonly used to define the scope of presidential power rather than congressional power since there are very few explicit constitutional prerogatives listed in Article II, whereas congressional power is well defined and enumerated in Article I. This causes the President to rely on Article II’s language that “[t]he executive Power shall be vested in a President of the United States of America,”<sup>27</sup> which is then defined and expounded on through interbranch practice over time.

One of the first cases in which historical practice was used to expound on executive power was *United States v Midwest Oil Co.* The question in this case was whether the President could, without special authorization from Congress, withdraw public lands from private acquisition after Congress had opened them to occupation. In his ruling that the President did in fact have this power, Justice Lamar stated that this practice dates back to an early era in American history and had never before been repudiated by Congress. He stated that a “long-continued practice known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent.”<sup>28</sup> Based on the congressional acquiescence clearly present in this case, the President’s authority in question was sustained.

A similar logic was used by the Court in *Ex Parte Grossman*<sup>29</sup> to determine whether the President’s pardon power extended to a contempt-of-court conviction. In deciding that the President did have this power, the Court reasoned that “long practice under the pardoning power and acquiescence in it strongly sustains the construction it is based on.”<sup>30</sup> Later in the *Pocket Veto Case*<sup>31</sup>, the Court again used

<sup>25</sup> Id at 472–73.

<sup>26</sup> Bradley and Morrison, 126 Harv L Rev at 436 (cited in note 14).

<sup>27</sup> US Const Art II, § 1 cl 1.

<sup>28</sup> *Midwest Oil Co.*, 236 US at 474.

<sup>29</sup> *Ex Parte Grossman*, 267 US 87 (1925).

<sup>30</sup> Id at 118–19.

<sup>31</sup> *Okanogan, Methow, San Poelis, Nespelem, Colville, and Lake Indian Tribes v US*, 279 US 655 (1929) (“Pocket Veto Case”).

historical practice in deciding that the pocket veto (when the President does not sign a bill before Congress recesses) was constitutional. The Court stated that “[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character.”<sup>32</sup>

In *United States v Curtiss-Wright Export Corp.*<sup>33</sup>, the Supreme Court used historical practice to investigate the limits of the President’s foreign affairs powers granted in Article II. The specific question in the case was whether the President had the authority to criminalize arms sales to nations that were involved in a conflict in Latin America.<sup>34</sup> The Court ruled that such actions were constitutionally permissible. Citing a long history of congressional delegations of authority to the President with respect to foreign affairs, the Court concluded that such authority was encompassed by the President’s constitutional foreign affairs power contained in Article II.

The *locus classicus* of this practice, as previously mentioned, was Justice Frankfurter’s decision in *Youngstown*. In April of 1952 during the Korean War, President Truman issued an executive order directing the Secretary of Commerce to take over most of the nation’s steel mills. He did this because he feared that a strike by the United Steelworkers of America would disrupt steel production that was crucial to the war effort. The Court ruled 6-3 that this action was outside of the President’s powers since there was neither authorization from Congress nor constitutional authority granted to the President as Commander in Chief. Among the several opinions in the case, Justice Frankfurter issued a concurring opinion based on an analysis of historical practice, seeking to answer the question of whether Congress had acquiesced in such a presidential power over time. If it had, according to Frankfurter, a “historical gloss” would have been placed on the presidential power in question. Using this practice-based analysis, Frankfurter concluded that President Truman had acted outside of his power based on a determination that Congress had not acquiesced, instead making a conscious choice not to grant the President seizure power.

Since *Youngstown*, the Court has occasionally used historical practice to validate claims of presidential power. For example, in *Dames and Moore v Regan*<sup>35</sup>, the Court was confronted with the question of whether President Reagan, acting pursuant to an agreement ending the Iranian hostage crisis, was permitted to transfer claims against Iran to a new international tribunal. The Court sustained (8-1) this exercise of executive power, arguing that there was a long history of interbranch practice whereby Congress acquiesced in executive claims settlements.<sup>36</sup> More than

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32 Id at 689.

33 *United States v Curtiss-Wright Export Corp.*, 299 US 304 (1936).

34 Bradley and Morrison, 126 Harv L Rev at 420 (cited in note 14).

35 *Dames and Moore v Regan*, 453 US 654 (1981).

36 Id at 654.



two decades later, in *Hamdi v Rumsfeld*<sup>37</sup>, a plurality of the Court viewed the long history of the President detaining combatants in military operations as supporting the notion that the President could detain enemy combatants in Afghanistan under the Authorization for the Use of Military Force passed by Congress after 9/11.<sup>38</sup>

The Court has also applied a practice-based approach to invalidate a claim of presidential authority. In *Medellin v Texas*<sup>39</sup>, the Court considered the legality of a presidential memorandum that instructed state courts to give effect to a decision of the International Court of Justice. The Court concluded that, “if pervasive enough, a history of congressional acquiescence can be treated as a ‘gloss on “Executive Power” vested in the President by § 1 of Art. II.’”<sup>40</sup> However, the Court found that this was an “unprecedented action,” not rooted in any interbranch custom.<sup>41</sup> Given the lack of evidence of congressional acquiescence in this matter, the Court found that treaties can only be binding on domestic law when Congress enacts legislation enforcing them, or when treaties are self-executing.<sup>42</sup>

Finally, the Supreme Court’s recent decision in *National Labor Relations Board v Noel Canning*<sup>43</sup> demonstrates the Court’s willingness on certain occasions to rely on historical interbranch practice to determine the scope of presidential power. The case presented the question of whether three members of the National Labor Relations Board were validly appointed by President Obama under the Recess Appointments Clause of the Constitution. In deciding that the appointments were not constitutionally valid, the Opinion of the Court purported to “put significant weight upon historical practice.”<sup>44</sup> It did so, believing that the “Court has treated practice as an important interpretive factor even when nature and longevity of that practice is subject to dispute, and even when that practice began after the founding era.”<sup>45</sup> Given that the Court had never before heard a case interpreting the Recess Appointments Clause, the majority insisted that it “must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached.”<sup>46</sup>

## II. HISTORICAL GLOSS ON PRESIDENTIAL WAR POWERS

Having established the nature of historical gloss arguments, the various

37 *Hamdi v Rumsfeld*, 542 US 507 (2004).

38 *Id.* at 507.

39 *Medellin v Texas*, No 06-984, slip op (Mar 25, 2008).

40 *Id.* at 531.

41 *Id.* at 532.

42 *Id.* at 525–26. (“The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress”).

43 *National Labor Relations Board v Noel Canning*, No 12-1281, slip op (Jun 26, 2014).

44 *Id.* at 6.

45 *Id.* at 8.

46 *Id.* at 9.

reasons why branches might privilege acquiescence, and cases in which the historical gloss framework has been used to support a particular understanding of the separation of powers, we must now examine the specifics of the Executive Branch's historical gloss claim. In particular, it is instructive first to understand what the Executive Branch's conception of Article II war powers encompasses and second to analyze how the Congress has acquiesced so as to support that conception.

### A. *The Executive Branch Claim of Article II War Powers*

Since the passage of the War Powers Resolution, the Office of Legal Counsel, which assists the Attorney General in advising the President on legal matters, has developed a consistent Executive Branch understanding of the nature of the President's ability to authorize armed conflicts. The central contention of the Executive Branch is that "the President ha[s] constitutional authority, as Commander in Chief and Chief Executive and pursuant to his foreign affairs powers, to direct such limited military operations abroad, even without prior specific congressional approval."<sup>47</sup> The President does this pursuant to his "unique responsibility" over "foreign and military affairs."<sup>48</sup>

The Executive Branch does recognize that the Constitution "divides authority over the military between the Congress and the President, assigning to Congress the authority to 'declare War,' 'raise and support Armies,' and 'provide and maintain a Navy,' as well as general authority over the appropriations on which any military operation necessarily depends."<sup>49</sup> Additionally, the Executive Branch recognizes certain limitations on presidential war powers, such as to military action taken "for the purpose of protecting important national interests"<sup>50</sup> and short of "a planned military engagement that constitutes a 'war' within the meaning of the Declaration of War Clause."<sup>51</sup> However, the OLC claims that these limitations do not "[cover] every military engagement, however limited, that the President initiates."<sup>52</sup> Instead, the President has an important role as well as a great amount of unilateral authority in the foreign policy and national security domains. This

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47 Office of Legal Counsel, *Memorandum Opinion from Caroline D. Krass, Authority to Use Military Force in Libya* 7, 14 (Apr 1, 2011). Referred to hereafter as "Krass Memorandum."

48 Krass Memorandum at 6 (quoting *Sale v an Centers Council, Inc.*, 509 US 155, 188 [1993]) (cited in note 47).

49 Krass Memorandum at 6 (quoting US Const Art I § 8 cl 1, 11–14) (cited in note 47).

50 Krass Memorandum at 6 (quoting Office of Legal Counsel, *Authority to Use United States Military Forces in Somalia*, 6, 9 [1992]) (cited in note 47).

51 Krass Memorandum at 8 (citing Office of Legal Counsel, *Proposed Deployment of United States Armed Forces into Bosnia*, 327, 331 [1995] and Office of Legal Counsel, *Deployment of United States Armed Forces into Haiti*, 173, 177 [1994]) (cited in note 47).

52 Krass Memorandum at 8 (cited in note 47).

authority exists “at least insofar as Congress has not specifically restricted it.”<sup>53</sup>

A critical argument made by the OLC in the Krass Memo is that the aforementioned executive war powers are supported by a “historical gloss” that has developed over 200 years of interbranch history. The OLC asserts that “[t]he scope and limits” of Congress’s Article I authority to declare war is in fact defined by the historical relationship between the Congress and the President.<sup>54</sup> Furthermore, the OLC contends that this historical practice over time is significant “because it reflects the two political branches’ practical understanding, developed since the founding of the Republic, of their respective roles and responsibilities with respect to national defense.”<sup>55</sup>

### B. *The War Powers Resolution*

One example of acquiescence that the Executive Branch cites to support this purported historical gloss is the War Powers Resolution of 1973. Right from the outset in Section 2(a), the resolution states its purpose “to fulfill the intent of the framers of the Constitution of the United States.” Therefore, the executive argues that what follows in the resolution must be consistent with Congress’s understanding of constitutional meaning.<sup>56</sup>

The OLC argues in the Krass Memo that the War Powers Resolution presupposes the existence of unilateral presidential power to authorize armed conflicts, which is indicated by the resolution’s structure.<sup>57</sup> For instance, Section 4(a) “provides that, in the absence of a declaration of war, the President must report to Congress within 48 hours of taking certain actions, including introduction of U.S. forces ‘into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.’”<sup>58</sup> Then, Section 5(b) instructs the President to terminate the use of armed forces within sixty days after reporting to Congress pursuant to 4(a)(1), unless Congress extends the limit, enacts specific statutory authority, or declares war.<sup>59</sup> Citing these provisions, the OLC claims that the War Powers Resolution “recognizes and presupposes the existence of

53 Krass Memorandum at 8 (citing *Haiti Deployment* at 178) (cited in note 47).

54 *Id.* at 7.

55 *Id.*

56 War Powers Resolution, Pub L No 93–148, 87 Stat 555 (1973), codified at 50 USC § 1541.

57 The OLC has also consistently made the argument, and did so in the Krass Memo, that the War Powers Resolution does not provide affirmative statutory authority to the President to unilaterally commence military operations. It is on the basis of this assumption that the OLC is then able to make the argument that the War Powers Resolution presupposes Article II war powers. See Krass Memorandum at 8 (cited in note 47). (“[T]he WPR does not itself provide affirmative statutory authority for military operations”).

58 Krass Memorandum at 8 (quoting *War Powers Resolution*, 50 USC § 1543(a) [cited in note 56]) (cited in note 47).

59 *War Powers Resolution*, 50 USC § 1543(b) (cited in note 59).

unilateral presidential authority” to deploy armed forces into hostilities or imminent hostilities, arguing that these provisions only make sense if the President may act without prior congressional approval.<sup>60</sup>

Furthermore, the Krass Memo suggests that the real congressional intent behind the War Powers Resolution, evidenced by the 60 to 90 day statutory window for withdrawing armed forces, is to prevent “major, prolonged conflicts such as the wars in Vietnam and Korea.”<sup>61</sup> The resolution is therefore not an attempt by Congress to limit the President from unilaterally authorizing “more limited engagements.”<sup>62</sup>

### C. *Precedents Since the War Powers Resolution*

The second element of acquiescence that the Krass Memo points to as supporting this historical gloss on presidential war powers is historical practice following the War Powers Resolution, suggesting that history “is replete with instances of presidential uses of military force abroad in the absence of prior congressional approval.”<sup>63</sup> In particular, the memo directly cites several instances

60 Krass Memorandum at 8 (citing *Haiti Deployment* at 175 [cited in note X]) (cited in note 47).

61 Krass Memorandum at 9.

62 Krass Memorandum at 9 (citing *Haiti Deployment* at 175 [cited in note 51]) (cited in note 47).

63 Krass Memorandum at 7 (quoting Office of Legal Counsel, *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, 185, 187 [1980]) (cited in note 47). The Krass Memo makes the claim that the historical gloss on presidential power has been “placed on the Constitution by two centuries of practice.” However, for the purposes of this paper, I shall only consider and analyze, particularly in Chapter Two, the possible historical gloss that has been placed on the President’s constitutional war powers by the War Powers Resolution of 1973 and interbranch practice since. There are three reasons why I find this to be appropriate. First, the War Powers Resolution of 1973 is an extremely important turning point in American history with respect to war powers. See Louis Fisher and David Gray Adler, *The War Powers Resolution: Time to Say Goodbye*, 113 Pol Sci Q at 113 (1998). It is “generally considered the high-water mark of congressional reassertion in national security affairs,” and modern-day war powers disputes are framed in light of the War Powers Resolution. Therefore, like the work that has been done by many other scholars, this paper shall focus on the nature of the presidential and congressional war powers debate in the era from 1973 on in which the War Powers Resolution was in effect. Second, as I shall demonstrate in this chapter, the Krass Memo itself, while claiming that a historical gloss has been placed on presidential power by practice over the last two centuries, only cites the War Powers Resolution and interbranch practice during specific armed conflicts since 1973 to support its historical gloss claim. This may be because of the reason I cited above concerning the War Powers Resolution as a crucial turning point in the war powers debate, although the text of the Krass Memo does not yield a clear answer to this question. Regardless of the exact reason, it is best to analyze the Executive Branch’s historical gloss claim based on that which is specifically used to support its argument, rather than analyzing pre-1973 evidence which is not cited or discussed. Finally, there is no harm done by limiting my historical gloss analysis to War Powers Resolution and interbranch practice to these years because, if there has in fact been a historical gloss placed on presidential war powers by the acquiescence of Congress, we would, as the Krass Memo seems to suggest, see it during this period of interbranch practice. Furthermore, if the Krass Memo is correct that there has been a historical gloss placed on presidential war powers since 1973, that would be sufficient under the historical gloss framework of constitutional interpretation to sustain the Executive Branch’s argument, despite what the pre-1973 evidence might suggest.

since 1973 in which the President unilaterally authorized without specific statutory authorization, including the “bombing in Libya (1986), an intervention in Panama (1989), troop deployments to Somalia (1992), Bosnia (1995), and Haiti (twice, 1994 and 2004), air patrols and airstrikes in Bosnia (1993-1995), and a bombing campaign in Yugoslavia (1999).”<sup>64</sup> For the OLC, the fact that the President authorized these military actions without either the consent or pushback from Congress is indicative of agreement that the presidents during these conflicts were exercising powers rightly belonging to them. Importantly, the memo points out that this has been the case for presidents of both political parties.

For the OLC, the question of whether the President has the constitutional authority to unilaterally authorize an armed conflict without the consent of Congress hinges on whether the armed conflict amounts to “war” under the Declaration of War Clause of Article I. Therefore, part of the historical gloss on presidential war powers includes cases in which presidents have unilaterally authorized large troop deployments and uses of force while still falling short of “war,” triggering congressional prerogatives. In assessing what historical practice dictates about the meaning of “war,” the Krass Memo highlights two recent conflicts.

First, the memo highlights the 1994 intervention in Haiti. Seeking to ensure the peaceful transition of power back to the democratically elected president Jean-Bertrand Aristide who was ousted by a military coup, President Clinton planned and executed a deployment of 20,000 U.S. troops to Haiti. The Krass Memo states that at the time, the OLC concluded that the conflict fell short of “war,” taking into account the “anticipated nature, scope, and duration of the planned deployment, and in particular the limited antecedent risk that United States forces would encounter significant armed resistance or suffer or inflict substantial casualties.”<sup>65</sup>

Second, the Krass Memo highlights American participation in the United Nations and NATO intervention in Bosnia and Herzegovina under President Clinton. In an effort to provide humanitarian support in the region as a result of the deaths and famine caused by rivalries between Serbs, Croats, and Muslims, the United States military joined a multinational coalition to protect civilians and U.N. peacekeeper by enforcing a no-fly zone. As the memo points out, the United States alone “attacked hundreds of targets” and flew 2,300 sorties in this military effort.<sup>66</sup> Later, in 1995, President Clinton introduced 20,000 ground troops into Bosnia and Herzegovina without the consent of Congress. While this action admittedly increased the risk of American casualties in the conflict as well as the difficulty of withdrawing armed forces from the region, the OLC concluded at the time “that the anticipated risks were not sufficient to make the deployment a “war” in any

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64 Krass Memorandum at 7 (citing Richard F. Grimmett, *Instances of Use of United States Armed Forces Abroad*, R41677 Cong Research Serv at 1798–2010 [2011]) (cited in note 47).

65 Krass Memorandum at 9 (citing *Haiti Deployment* at 179 [cited in note 51]) (cited in note 47).

66 *Id.* at 9.

sense of the word.”<sup>67</sup>

Overall, what the Krass Memo points out, which is also supported by the testimony<sup>68</sup> of State Department Legal Counsel Harold Koh before the Senate Foreign Relations Committee on the matter, is that historical practice is evidence that the President has the power to unilaterally authorize armed conflict and that the limits of this power are also best defined by the historical examples in which the President has acted on his own authority.<sup>69</sup> Taken together, the OLC concludes that the War Powers Resolution of 1973 and the fact that the President has unilaterally authorized several armed conflicts without significant backlash or legislative action from Congress is “evidence of the existence of [the President’s] broad constitutional power.”<sup>70</sup>

## CHAPTER TWO: ASSESSING THE CLAIM OF CONGRESSIONAL ACQUIESCENCE

In recent years, the Executive branch has gravitated towards the claim that congressional acquiescence has painted a historical gloss on presidential war powers. Therefore, as with all historical gloss claims, the legitimacy of the argument relies on the weight of the evidence that Congress has in fact acquiesced.<sup>71</sup> In *Youngstown*, Justice Frankfurter, using the historical gloss framework for assessing presidential power, decided that the history of interbranch practice regarding steel seizures amounted not to acquiescence by Congress, but to a “conscious choice” not to grant the President seizure authority.<sup>72</sup> In over fourteen pages of appendices to his concurring opinion, he supported this conclusion by assessing the executive’s acquiescence argument in terms of both legislation and interbranch practice.<sup>73</sup> Because the modern executive’s historical gloss claim with respect to war powers cites both legislation and interbranch practice, it is fitting to rely on Frankfurter’s style of historical gloss analysis here.<sup>74</sup>

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67 Krass Memorandum at 9 (quoting *Bosnia Deployment* at 333–4 [cited in note 51]) (cited in note 47).

68 *Hearing on Authorization For Use Of Military Force After Iraq And Afghanistan before the Senate Committee on Foreign Relations*, 113th Cong, 2d Sess (2014) (statement of Harold H. Koh, Sterling Professor of International Law, Yale Law School).

69 Krass Memorandum at 9 (citing *Haiti Deployment* at 179 [cited in note 51]) (cited in note 47).

70 *Id* at 7.

71 David J. Bederman, *Custom as a Source of Law* at 111 (Camb U P 2010). (Bederman notes that for historical practice to inform the interpretation of separation of powers, one must ask “whether the opposing branch in the separation-of-powers struggle has actually accepted or ‘acquiesced’ in the practice”).

72 Alison LaCroix, *Historical Gloss: A Primer*, 126 Harv L Rev 75, 76 (2012).

73 “Synoptic Analysis of Legislation Authorizing Seizure of Industrial Property” and “Summary of Seizures of Industrial Plants and Facilities by the President” in *Youngstown v United States*, 343 US at 615 and 620 (Frankfurter concurring).

74 *Id* at 615–28.

Therefore, I will evaluate this purported acquiescence in three parts. First, I will assess the degree to which Congress has acquiesced by presupposing the presidential power to unilaterally authorize armed conflicts in the War Powers Resolution of 1973. Relevant to this inquiry will be statutory language and legislative intent. Second, I will argue that there are many ways in which members of Congress have pushed back on presidential exercises of war powers since 1973, contrary to the argument that Congress has acquiesced.<sup>75</sup> Finally, I will contend that there are many plausible explanations other than acquiescence that explain the fact that congressional pushback against presidential war powers has been limited, further weakening the argument that Congress has acquiesced in presidential war powers.

### I. IS THE WAR POWERS RESOLUTION ACQUIESCENCE?

The War Powers Resolution of 1973 has been subject to a great amount of criticism from liberal and conservative scholars alike. From the liberal perspective, the law abdicates congressional war powers and enables the President to usurp war powers beyond those possessed by the executive in Article II. From the conservative perspective, the law is an unconstitutional infringement on the President's Article II powers as Commander in Chief and Chief Executive. But despite vastly differing viewpoints on constitutional meaning, one thing is clear from both perspectives: Congress passed the War Powers Resolution to limit presidential war powers and to protect its own.<sup>76</sup>

Right at the beginning of the War Powers Resolution, Congress articulates its purpose in creating the act. Section 2(a) states:

“It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.”

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75 See note 48 for an explanation for why I am restricting my analysis of the historical gloss claim to the War Powers Resolution and precedents since.

76 For the liberal perspective, see Louis Fisher, *Presidential War Power* at 144 (U Press of Kansas 3d ed 2013). (“After decades of intense debate, Congress passed legislation in 1973 in an effort to limit presidential war power”). For the conservative perspective, see Robert F. Turner, *Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy* at 33 (Brassey's Inc 1991). (“Congress turned its attention to reassuring the public that no future president would be permitted to drag the nation into an unpopular foreign war against the will of Congress”).

The key to interpreting congressional intent in Section 2 is that Congress wanted to assure “collective judgment of both the Congress and the President,” signaling a limitation on unilateral exercises of power by the President that had become commonplace during and after World War II.<sup>77</sup> Interestingly, as we saw in Chapter One, the Executive Branch has used the language above to suggest that the intent of the Framers is consistent with the fact that presidents have unilaterally authorized armed conflicts on many occasions since 1973. This theory, however, very clearly is in conflict with the stated intentions of many members of Congress before and after the law’s passage.

In 1965, expressing his concern about diminishing congressional power in the area of foreign policy, Chairman of the Senate Foreign Relations Committee J. William Fulbright stated:

“There is no need at this time to rehearse all the evidence in support of this view, held by most members of this body, that the authority of the Congress in many respects has been dwindling throughout the years since our entry into the Second World War....In no area is the constitutional imbalance more striking and more alarming than in the field of foreign policy.”<sup>78</sup>

Of particular concern to members of Congress at this time were the extraordinary usurpations of war powers that took place during the Korean War, which President Truman unilaterally authorized by claiming authority under a U.N. Security Council resolution, and the Vietnam War, in which President Johnson escalated American involvement following the Gulf of Tonkin Resolution.<sup>79</sup> In both cases, Congress was largely on the sidelines as the Presidents made the important decisions concerning American military involvement and how to conduct the war effort. However, with the rise of a strong anti-war sentiment among the American public following the Vietnam War, members of Congress realized that they needed

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77 As discussed in the “Review of Literature,” members of Congress felt that the War Powers Resolution was a necessary solution to the problem of executive aggrandizement of war powers that developed during the Korean War and Vietnam War. In the case of the Korean War, President Truman unilaterally authorized American military intervention in Korea, having only the support of the UN Security Council. In the case of Vietnam, President Johnson used the Gulf of Tonkin Resolution as a platform to expand the war effort in Vietnam and Cambodia, without seeking specific congressional authorization to do so.

78 *Hearings before the Senate Foreign Relations Committee*, 89th Cong at 20702 (July 31, 1967) (statement of Senator J. William Fulbright).

79 Remy Jorritsma, *The War Powers Consultation Act of 2009—A Means of Congress to Curb An Imperial President?* \*5 (August 9, 2009), online at <http://dx.doi.org/10.2139/ssrn.2248227> (visited July 28, 2015) (“Faced with the humiliating lessons drawn from Korea and especially Vietnam, Congress felt that it had to reassert its congressional prerogatives in light of the Framers’ intentions”). See also Daniel S. Papp, Loch K. Johnson and John E. Endicott, *American Foreign Policy—History, Politics and Policy* at 279 (Pearson Longman 2005).



to take action to prevent wars like Korea and Vietnam from happening again in the future without congressional consent.<sup>80</sup>

Members of Congress understood that the fundamental problem was that presidents were able to commit American armed forces into hostilities without specific congressional authorization to do so. While they did not deny that the President possessed significant war powers as Commander in Chief, the goal in crafting the War Powers Resolution was to ensure that the President would be accountable to Congress<sup>81</sup> and would have to obtain its consent in order to commit American military forces to hostilities.<sup>82</sup> Therefore, Congress crafted a bill that limited exercises of war powers by the President to actions “only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”<sup>83</sup> By implementing these conditions, as Senator Jacob Javits suggested at the time, “[t]he War Powers Act would assure that any future decision to commit the United States to any warmaking must be shared in by the Congress to be lawful.”<sup>84</sup>

The intentions of members of Congress in creating the War Powers Resolution are consistent with the way that members of Congress understood the bill as it was eventually written. For example, Representative Paul Findley provided a very comprehensive understanding of the bill as written on the day that Congress overrode President Nixon’s veto:

“The language was carefully drafted so it could not conceivably be interpreted by a President as congressional authorization for the introduction of Armed Forces into hostilities abroad. Of course, Presidents have made such introductions in the past, and Presidents in the future may do the same. But no future President can cite this language as the authority for such action.

“In the absence of a declaration of war or other specific authority by

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80 *Hearings in the US House of Representatives*, 93rd Cong, 1st Sess p 119 pt 28 p 36216 (1973) (statement of Representative Keith Sebelius). (“Out in...my congressional district, most folks want to see Congress take some appropriate action so that we will not again become involved in another limited, political conflict similar to Korea and Vietnam”).

81 Edmund Muskie, *The Reins of Liberty: Congress, the President, and American Security* in Robert A. Goldwin and Robert A. Licht, ed, *Foreign Policy and the Constitution* at 97 (AEI Press 1990).

82 *Hearings in the US House of Representatives*, 93rd Cong, 1st Sess p 119 pt 2 p 36217 (1973) (statement of Representative John Anderson). (The War Powers Resolution was “designed to insure that we will never again be involved in a situation like the Vietnam War in which a President alone can conduct a protracted conflict without specific authorization from Congress”).

83 War Powers Resolution, Pub L No 93-148, 87 Stat 555 (1973), codified at 50 USC § 1541.

84 *Hearings in the US Senate*, 93rd Cong, 1st Sess p 119 pt 2 p 1394 (1973) (statement of Senator Jacob Javits).

Congress, only one use of Armed Forces in conflict abroad is recognized. That lone exception is a national emergency created by an attack on our Armed Forces or upon our territory.”<sup>85</sup>

The statements of many of Findley’s colleagues support this understanding of the purpose of the War Powers Resolution.<sup>86</sup>

Therefore, the notion advanced by the OLC that Congress presupposed the President’s Article II authority to unilaterally authorize armed conflicts is factually incorrect. Scholars have made very clear how structural problems in the War Powers Resolution have prevented it from serving its intended purpose and have effectively enabled the President to usurp war powers more properly belonging to the Congress under the Constitution. But poorly designed as it may be, the War Powers Resolution by no means represents acquiescence to presidential war powers. Instead, as was suggested by the Senate Foreign Relations Committee, the War Powers Resolution is “an invitation to the executive to reconsider its excesses, and to the legislature to reconsider its omissions, in the making of foreign policy.”<sup>87</sup> It is this understanding of the purpose of the War Powers Resolution that has been the basis of opposition within Congress to presidential usurpations of war powers in armed conflicts since 1973.

## II. CONGRESSIONAL ACQUIESCENCE SINCE THE WAR POWERS RESOLUTION

Having determined that Congress intended the War Powers Resolution to be a limitation on presidential war powers as opposed to a license, I will now turn to the question of whether Congress has acquiesced in presidential war powers since 1973. As I discussed in Chapter One, the OLC claims that presidents have acted to unilaterally authorize armed conflicts many times since 1973 without

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85 *Hearings on the War Powers Resolution in the US House of Representatives*, 93rd Cong, 36206 (Nov 7, 1973) (statement of Representative Paul Findley).

86 *Hearings on the War Powers Resolution in the US House of Representatives*, 93rd Cong, 36202 (Nov 7, 1973) (statement of Representative Clement Zablocki). (He called the resolution “a legitimate effort to restore [Congress’s] rightful and responsible role under the Constitution”). *Hearings on the War Powers Resolution in the US House of Representatives*, 93rd Cong, 36208 (Nov 7, 1973) (statement of Representative Spark Matsunaga). (“It merely enunciates a procedure by which we in the Congress may assert that sole power vested in the Congress, the power to declare war”). *Hearings on the War Powers Resolution in the US House of Representatives*, 93rd Cong, 36209 (Nov 7, 1973) (statement of Hugh Carey). (“We are simply restating and making more explicit what is our constitutional function with regard to peace-keeping, and with regard to the powers to make war”). *Hearings on the War Powers Resolution in the US House of Representatives*, 93rd Cong, 36214 (Nov 7, 1973) (statement of Michael Harrington). ([T]he “[War Power Resolution] would help restore the lawful authority of Congress in the process of committing our Nation to war”).

87 U.S. Congress, Senate, *National Commitments: Senate Report No. 91-129*, 91st Cong, 1st Sess at 80 (Apr 16, 1969).

substantial pushback from Congress. As a result, the OLC asserts that Congress has placed a historical gloss on such powers.

The fundamental flaw in the OLC's claim is that it assumes the existence of congressional acquiescence because of a lack of much *formal* pushback by Congress in reaction to exercises of presidential war powers. Formal congressional actions in this case would be impeachment or legislation directly asserting the President's lack of constitutional authority generally—as in the War Powers Resolution—or with respect to particular situations. But the reality is that Congress rarely resorts to formal checks on presidential power to correct situations in which members believe the President has acted in an unconstitutional manner. Importantly, this is not to say that Congress does not act at all. Instead, Congress commonly resorts to informal and indirect measures to assert its own powers and check those of the executive. Moreover, “[i]f the point of looking to past practice is to determine the presence or absence of institutional acquiescence, the analysis must consider whether members of Congress have employed such instruments to express *nonacquiescence*.”<sup>88</sup> In the case of war powers, Congress has clearly demonstrated nonacquiescence by both exercising its own constitutional authority to authorize armed conflicts and checking presidential action through congressional soft powers.

#### A. *Exercises of Congressional War Powers*

First, Congress has clearly indicated that it believes that the President must obtain congressional consent for American participation in armed conflicts by granting the President “specific statutory authority within the meaning of Section 5(b) of the War Powers Resolution” for three armed conflicts since 1973: Iraq (1991), the War on Terrorism (2001-present), and Iraq (2003-2011). And despite the fact that in each case the President claimed broad unilateral war powers under Article II, the President sought and obtained a joint resolution from Congress in each of these cases authorizing the armed conflicts before engaging in hostilities. This is quite unlike the completely unilateral action taken by President Reagan with respect to the bombing in Libya (1986) and the intervention in Panama (1989), or the completely unilateral action taken by President Clinton with respect to the troop deployments to Somalia (1992), Bosnia (1995), and Haiti (twice, 1994 and 2004), the air patrols and airstrikes in Bosnia (1993-1995), and the bombing campaign in Yugoslavia (1999). This is also significantly different than the way that President Reagan handled the conflict in Lebanon in 1983 in which he first unilaterally authorized the deployment of American armed forces and then later sought the support of Congress via a joint resolution.

Furthermore, it is clear that there has been presidential reliance on the statutes authorizing these three armed conflicts. This is especially true in the case

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88 Bradley and Morrison, 126 Harv L Rev at 450 (cited in note 14).

of the War on Terror in which both President George W. Bush and President Barack Obama have relied heavily on the Authorization for the Use of Military Force (AUMF) passed by Congress in 2001 after the attacks on 9/11 to take a whole series of war powers actions. In fact, there are “[thirty] occurrences of a publicly disclosed presidential reliance on the AUMF to take or continue military action or related action,” eighteen of which were under President Bush and twelve of which were under President Obama.<sup>89</sup> Because of this reliance, it is hard to take seriously the Executive Branch notion that the President may act unilaterally under his own constitutional war powers.

Furthermore, given these three cases in which Congress clearly indicated the need for congressional consent for armed conflicts and exercised that power, it does not really make sense for the Executive Branch to argue that the Congress has consistently acquiesced to a presidential power to unilaterally authorize armed conflicts. At best, the Executive Branch could argue that Congress has consistently acquiesced to broad presidential war powers, with these three cases being special exceptions. Of course at worst for the executive, this post-1973 history could mean, as I will explain in more depth in Part III of this chapter, that Congress has always held the belief that it must consent to all armed conflicts, but that Congress only chooses to act to protect this congressional power under certain conditions which were satisfied in these three cases.

### B. *Congress's Soft Powers*

Also important to any evaluation of purported congressional acquiescence is the exercise of soft power in Congress. Soft power includes a variety of informal congressional actions, such as public speeches, oversight hearings, nonbinding resolutions, and public disclosure of information. Used much more frequently by members of Congress than formal legislation, soft power is a tool that can be used to assert congressional power as well as to push back against presidential power.

Since the War Powers Resolution passed in 1973, members of Congress have exercised a great deal of soft power to challenge belligerent presidential actions and to argue for the necessity of congressional consent for deployments of American armed forces involved in hostilities. Most commonly, members of Congress have done this by taking to the floor of the House or Senate to make public speeches, especially during armed conflicts initiated without the consent of Congress. Soft power has also been exercised through congressional committee hearings, such as the Senate Foreign Relations Committee hearing regarding the legality of the President Obama's unilateral deployment of American armed forces in Libya. And there have been several occasions since 1973 in which the chambers

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<sup>89</sup> Mathew Weed, *The 2001 Authorization for Use of Military Force: Background in Brief*, CRS Report 7-4589 (Congressional Research Service 2013).

of Congress passed “sense of the House” or “sense of the Senate” resolutions expressing the constitutional necessity of congressional consent for any armed conflict.<sup>90</sup>

While the Executive Branch has clearly left soft power out of its congressional acquiescence analysis, there are two reasons why it ought to be taken into consideration. The first reason is that soft power has the potential to demonstrate disagreement with the Executive Branch on the separation of constitutional war powers. “Congress uses soft law to convey information about its beliefs...both factual and normative.”<sup>91</sup> Therefore, any congressional acquiescence analysis must include soft law to truly understand whether members of Congress really believe that the President has the broad constitutional war power being claimed by the executive. Indeed, conducting such analysis can undermine the notion that there has been interbranch agreement on constitutional meaning.

Second, soft power ought to be taken into account in any acquiescence analysis because it can have the effect of constraining executive action. “Congress... uses soft law to convey information about future intentions to enact hard law, allowing people to adjust their behavior in advance of binding statutes and in some cases avoiding constitutional requirements that apply to hard law.”<sup>92</sup> And “if people adjust their behavior in anticipation of hard law, hard-law enactment might not be necessary.”<sup>93</sup> Presidents are mindful of congressional soft power because members of Congress can use it to inflict political costs on the President.<sup>94</sup> And in the case of war powers, members of the opposition party have successfully employed soft power to limit the scope and timing of presidential war powers actions.<sup>95</sup> The result of such constraints on presidential action is the absence of an

90 For example, in the case of the conflict in Bosnia (1993-1995), there were two “sense of the House” and two “sense of the Senate” resolutions passed before and during the conflict expressing Congress’s understanding that President Clinton needed to obtain the consent of Congress before deploying American armed forces and using Defense Department funds for the armed conflict.

91 Jacob E. and Eric A. Posner, *Soft Law: Lessons From Congressional Practice*, 61 *Stan L Rev* 573, 587 (2008).

92 *Id.* at 586–87. (“Soft law is preferable to hard law when the signal conveys information more reliably or more cheaply than hard law does”).

93 *Id.* at 586.

94 Bradley and Morrison, 113 *Colum L Rev* at 1138 (cited in note 16). (“[T]he opposition party in Congress, especially during times of divided government, will have both an incentive and the means to use media to criticize unsuccessful presidential uses of force. The additional political costs that the opposition party is able to impose in this way will in turn make it less likely that Presidents will engage in large-scale military operations”).

95 William G. Howell and Jon C. Pevehouse, *While Dangers Gather: Congressional Checks on Presidential War Powers* at 222 (Princeton U Press 2007). (“[T]hose presidents who face large and cohesive congressional majorities from the opposite party exercise military force less regularly than do those whose party has secured a large number of seats within Congress. Additionally, other statistical models reveal that partisan opposition to the president reliably depresses the likelihood of a military response to specific crises occurring abroad and significantly extends the amount of time that transpires between the precipitating event and the eventual deployment”). See also Gersen and Posner, 61 *Stan L Rev* at 603 (cited in note 91). (“Resolutions that assert congressional authority

exercise of presidential war powers. As Bradley and Morrison suggest, “[s]uch absences need to be taken into account when defining the scope of the executive practice to which Congress can be said to have acquiesced.”<sup>96</sup>

### C. *Still Acquiescence?*

Taking into account these forms of informal and indirect congressional actions on war powers issues, it is clear that the OLC’s historical gloss argument is much weaker than the OLC suggests. The reality is that the presence of acquiescence cannot be determined on the basis of direct formal action alone. Having said that, it is still very curious that members of Congress who are convinced that presidents have acted unconstitutionally on multiple occasions with respect to war powers issues have not done more to curtail presidential war powers and exercise their own. After all, there have been at least fifteen significant deployments of U.S. armed forces abroad since the War Powers Resolution, only three with explicit and ex ante congressional approval.<sup>97</sup> Based on this analysis, the OLC’s historical gloss claim does seemingly have *some* merit. The next part of this chapter seeks to take evaluation of the congressional acquiescence claim a step further by considering reasons why congressional “acquiescence” may not be indicative of agreement with the executive.

## III. DOES THE MADISONIAN MODEL REFLECT REALITY?<sup>98</sup>

Though Congress has acted in certain cases to protect its constitutional war powers, the question is, why would a Congress “with equivalent ambitions of maximizing [its] power” ever seem to acquiesce in a custom of expansive executive war powers?<sup>99</sup> The answer lies in the operation of our system of checks and balances.

The notion that there could be a historical gloss on presidential power as

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or limitations on presidential authority may influence the way that the two political branches share power with each other”).

<sup>96</sup> Bradley and Morrison, 126 Harv L Rev at 451 (cited in note 14).

<sup>97</sup> Bradley and Goldsmith, *Foreign Relations Law* at 253 (cited in note 3).

<sup>98</sup> In Part III of this Chapter, I discuss the many reasons why I believe we cannot rely on the Madisonian Model to maintain the proper balance of constitutional war powers. In doing so, I rely heavily on the work of Trevor and Morrison in *Historical Gloss and the Separation of Powers*. Having written a foundational piece on the role of historical practice in separation of powers disputes, Trevor and Morrison build on the work of many other scholars in pointing out the various ways in which the Madisonian Model cannot and does not in practice operate in a way that protects the institutional powers of Congress. In this section, I seek to restate and reemphasize the concerns that Trevor and Morrison raise, as well as to expand on their thoughts with additional commentary and new ideas that are unique to the separation of war powers.

<sup>99</sup> Eric A. Posner and Adrian Vermeule, *The Credible Executive*, 74 U Chi L Rev 865, 884 (2006).

a result of congressional acquiescence assumes that the branches are consistently acting according to a simplified Madisonian model, whereby the branches check each other so as to protect their respective constitutional powers. Articulating his conception of the separation of powers under the Constitution, James Madison wrote in *The Federalist No. 51* that the Constitution thwarts the aggrandization of powers by any single branch by granting each “the necessary constitutional means, and personal motives, to resist encroachments of the others.” Furthermore, he stated that the “ambition” of each branch would “counteract ambition” of the others so that the government’s “constituent parts” would, “by their mutual relations, be the means of keeping each other in their proper places.”<sup>100</sup> However, as Posner and Vermeule suggest, “[w]hether or not this picture was ever realistic, it is no longer today.”<sup>101</sup> Indeed, several features of the modern day Congress together complicate its ability to check presidential power in the ways that Madison theorized, contributing to the apparent acquiescence that exists with respect to war powers.

### A. *Veto Gates*

One major complication of the Madisonian model is that there are numerous veto gates that prevent legislation from becoming law. The most obvious example is the President’s Article II veto power, which effectively requires two-thirds of Congress to override the presidential use of force. Though a majority of the members of Congress may desire to assert its constitutional prerogatives or put limitations on the Executive Branch, the threat of a veto by the President can deter them from moving forward with the legislation. Because of the odds of overcoming a presidential veto, members of Congress are most often discouraged from even trying to pass legislation, fearing that the legislation will not become law in the long run.<sup>102</sup>

Other hurdles to the passage of legislation are intra-institutional. “A bill must pass through subcommittees, full committees, and floor votes in the House and Senate; it must be endorsed in identical form by both houses; and it is threatened along the way by party leaders, rules committees, filibusters, holds, and other roadblocks.”<sup>103</sup> Each of these veto gates, which must be overcome for Congress to check presidential power, prevents Congress from taking formal action to assert

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100 *Federalist 51* (Madison), in *The Federalist Papers* 319 (New Am Lib 1961) (Clinton Rossiter, ed). See also Posner and Vermeule, 74 *U Chi L Rev* at 884 (cited in note 91). (The Madisonian model reflects a “policy of supplying, by opposite and rival interests, the defect of better motives”).

101 Bradley and Morrison, 126 *Harv L Rev* at 451 (quoting Posner and Vermeule, 74 *U Chi L Rev* at 98 [cited in note 99]) (cited in note 14).

102 Bradley and Morrison, 126 *Harv L Rev* at 440 (citing Derek Jinks and Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 *Yale L J* 1230, 1255 [2007]) (cited in note 14).

103 *Id* at 1255.

congressional power and check executive power. Furthermore, because these veto gates exist, we do not know what formal actions Congress would have taken in the absence of these veto gates, making it difficult to discern whether Congress is actually acquiescing to presidential war powers.

### B. *The Value of Preserving Institutional Integrity*

Another major impediment to the effective operation of the Madisonian model is that members of Congress have little incentive to preserve the institutional integrity of the Congress. Madison correctly asserts in *The Federalist No. 51* that in order for a branch to effectively check and balance the powers of the others, “The interest of the man must be connected with the constitutional rights of the place.”<sup>104</sup> However, as many scholars have noted, Congress is a “they,” not an “it.”<sup>105</sup> As a result, each individual member of Congress has little to gain from efforts to protect Congress’s institutional power. Meanwhile, each member potentially has much to gain by orienting their focus to the concerns of their constituents, since reelection is their primary motivation.<sup>106</sup>

One of the best ways of framing the problem is that “[members of Congress] are trapped in a prisoners’ dilemma: all might benefit if they could cooperate in defending or advancing Congress’s power, but each has a strong incentive to free ride in favor of the local constituency.”<sup>107</sup> We can imagine how this might play out in the context of war powers. If the President unilaterally authorizes an armed conflict that has the popular support of the American public, members of Congress will be disincentivized from exercising congressional power, including soft power, to reign in presidential power. Thus, the parochial interests will override the interest

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104 Bradley and Morrison, 126 Harv L Rev at 451 (quoting Federalist 51 at 319 [cited in note 15]) (cited in note 14).

105 Bradley and Morrison, 126 Harv L Rev at 451 (citing Kenneth A Shepsle, *Congress Is a ‘They,’ Not an ‘It’: Legislative Intent as Oxymoron*, 12 Intl Rev of L and Econ 239 [1992]) (cited in note 14).

106 Id at 442 (“Political science scholarship has made clear, however, that a primary motivation for many members of Congress is reelection”). (Also cites e.g. David Mayhew, *Congress: The Electoral Connection* at 13 [Yale U Press, 1974]. R. Douglas Arnold, *The Logic of Congressional Action* at 5 [Yale U Press, 1990]. [“Although [members of Congress] are not single-minded seekers of reelection, reelection is their dominant goal”]. Morris P. Fiorina, *Congress: Keystone of the Washington Establishment* at 39 [Yale U Press 1977]. [“[T]he primary goal of the typical congressman is reelection”]).

107 Terry M. Moe and William G. Howell, *The Presidential Power of Unilateral Action*, 15 J of L Econ & Org 132, 144 (1999). See also Bradley and Morrison, 126 Harv L Rev at 442 (cited in note 14) (“In its pursuit, legislators often focus on the views and interests of their local constituents, who are concerned more with specific policy outcomes than congressional power”). (citing Neal Devins, *Party Polarization and Congressional Committee Consideration of Constitutional Questions*, 105 Nw U L Rev 737, 762 [2011]). [“Although each of the 535 members of Congress has a stake in Congress’s institutional authority to independently interpret the Constitution, parochial interests overwhelm this collective good.”]).



in protecting Congress's institutional power. Overall, this creates a situation in which the collective good that underlies the proper functioning of the Madisonian model is compromised, leading to the acquiescence on war powers that we see from Congress today.

### C. Political Party

Related to the fact that members of Congress are motivated by reelection is the issue that they may be reluctant to protect the institutional interests of the Congress if doing so would be at odds with the interest of their political party. "[I]ndividual members of Congress tend overwhelmingly to act in accord with the preferences of their party,"<sup>108</sup> and the party of a member of Congress is a much better predictor of their position on a presidential action than is institutional identity.<sup>109</sup> Thus, even in situations in which the President unilaterally authorizes and armed conflict, members of Congress will tend to stake out policy positions on the merits of those particular armed conflicts rather than stake out positions on the legitimacy of unilateral presidential action.

The influence of party identity is most obvious with respect to members of Congress who are of the same political party as the President. Because "the President's co-partisans stand to gain little from attacking the policies of their partisan ally in the White House and instead risk electoral losses from a tarnished party label," they are less likely protect the Congress's institutional powers from executive encroachment.<sup>110</sup> In addition, under unified government, Congress is less likely to invoke soft law such as investigations<sup>111</sup> Therefore, the political nature of the Legislative Branch is such that party label has the potential to take on an elevated status to the detriment of institutional integrity.

### D. Issues Unique to Armed Conflicts

While the problems with the Madisonian model presented thus far are applicable to issues beyond war powers, armed conflicts also present unique reasons why members of Congress might be reluctant to counter an unconstitutional

108 Bradley and Morrison, 126 Harv L Rev at 443 (cited in note 14). See also Samuel C. Patterson and Gregory A. Caldeira, *Party Voting in the United States Congress*, 18 British J of Polit Sci 111, 111 (1988). ("Despite the fact that the congressional parties are weak by European standards, research on congressional decision making has repeatedly shown that 'party' remains the chief and most pervasive influence in Congress").

109 Bradley and Morrison, 126 Harv L Rev at 443 (citing Daryl J. Levinson and Richard H. Pildes, *Separation of Parties, Not Powers*, 119 Harv L Rev 2311, 2324–25 [2006]) (cited in note 14).

110 Bradley and Morrison, 126 Harv L Rev at 443 (quoting Douglas Kriner, *Can Enhanced Oversight Repair 'The Broken Branch'?*, 89 Boston U L Rev 765, 784 [2009]) (cited in note 14).

111 Douglas Kriner and Liam Schwartz, *Divided Government and Congressional Investigations*, 333 Leg Stud Q 295, 297 (2008).

usurpation of congressional war powers by the President. One of the most obvious problems is what members of Congress should do if they support American military involvement in an armed conflict, but believe that the President acted unconstitutionally by unilaterally authorizing the conflict without the consent of Congress. The Madisonian model suggests that Congress can jealously protect its institutional prerogatives to check the President, such as by defunding the war effort or passing a law that requires withdrawal. However, for an armed conflict in which members of Congress believe that there should be American military participation, the incentive to check the President is lacking for obvious reasons.

Similarly, there may be disincentives for members of Congress to check presidential war powers in an armed conflict already unilaterally authorized by the President because of geopolitical concerns. Especially if the President commits the United States to a particular cause, like ensuring a peaceful transition of power to the democratically elected President of Haiti in 1994, or to a multinational effort, such as in Kosovo in 1998 and Libya in 2011, members of Congress may find it unwise for the United States to renege on its commitments, regardless of whether the commitment was made by the President in an unconstitutional manner.<sup>112</sup>

In these cases, the defense of congressional prerogatives might not take precedence over other policy concerns. And in cases in which policy concerns outweigh institutional power concerns, we simply cannot tell when members of Congress are truly acquiescing to presidential war powers.

### E. *Low-Stakes Constitutional Violations*

Having considered the aforementioned factors that inhibit Congress's ability to assert and defend its institutional war powers, it is important to note the circumstances in which these factors will play a decisive role. Congress is least likely to overcome these various institutional barriers to exercising its power in low-stakes cases, and is ever more likely to overcome these barriers as the stakes rise. For instance, members of Congress did very little to challenge President

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112 Certain actions taken by the House of Representatives with respect to the 2011 conflict in Libya after the expiration of the sixty-day statutory threshold of the War Powers Resolution may be indicative of these geopolitical concerns. The House voted on a measure expressing disapproval of the use of ground forces in Libya, which passed on a vote of 268-145. See Richard F. Grimmert, *War Powers Resolution: Presidential Compliance* 13 (Congressional Research Service, 2012), online at <http://www.fas.org/sgp/crs/natsec/RL33532.pdf> (visited July 28, 2015). This defeated a bill that would have authorized the operations in Libya, defeated on a vote of 295-123. Grimmert, *Presidential Compliance* at \*14 (cited in note 112). Yet, the House also defeated a measure that would have directed the President to withdraw U.S. forces from Libya within fifteen days, defeated on a vote of 268-145. Grimmert, *Presidential Compliance* at \*13 (cited in note 112). While we cannot be certain why the House acted as it did, it seems very plausible that a majority in the House wanted to express disapproval of the President's actions with respect to Libya, while not actually withdrawing American support for the mission given the commitment to NATO allies.

Obama's unilateral authorization of force in Libya in 2011. Yet, as Bradley and Morrison suggest, "If, instead of quickly toppling the Qaddafi regime, U.S. forces had become mired in a protracted conflict, it is quite possible that legal questions surrounding the operation would have intensified."<sup>113</sup> Therefore, when unilaterally armed conflicts go awry, become protracted, or greatly lack public support, the political calculus changes.<sup>114</sup> The opposition party gains a greater advantage by criticizing and restraining the President, and it becomes a political imperative for members of the President's party to do the same.

Unsurprisingly, Congress is increasingly likely to employ its institutional powers to check presidential power as the severity of the constitutional violation increases. However, it again undermines the assumption that the Madisonian model is always at work in our system of checks and balances. Congress often chooses not to make serious efforts to restrain presidential war powers, not because Congress agrees that the President possesses the powers in questions, but rather because the stakes are low, thereby lowering the incentives to act. One may argue that Congress acquiesces in such low-stakes examples. This then raises the question of what that acquiescence indicates. For the Executive Branch, these instances in which the President gets away with exercising certain powers may be used to support future like actions. Therefore, the danger is that "[i]llegal practices have the potential to build up around low-stakes examples."<sup>115</sup>

#### F. *Features of the Executive Branch*

Finally, to get a more complete picture of why Madison's conception of checks and balances does not hold in modern American government, we can look at the ability of the President to assert executive authority and fight against legislative encroachments. What is key about the presidency is that "the President's personal interests and the presidency's institutional interests are often one and the same."<sup>116</sup> This is because the personal interests of the President, such as reelection and legacy, are often furthered by demonstrations of power and leadership, which are

113 Bradley and Morrison, 113 Colum L Rev at 1147 (cited in note 16).

114 Jorritsma, *Consultation Act*, at \*2 (cited in note 79). ("In general, even if Congress is of the opinion that the President acts beyond his authority, the Legislature – individual members left aside – is less inclined to take opposing measures if the conflict is short in duration, considered successful in terms of 'winning the war' and not subject to considerable opposition from the electorate").

115 Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 Tex L Rev 773 (2013).

116 Neal Devins, *Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way to Stop Presidential Initiatives*, 45 Willamette L Rev 395, 399–400 (2009). See also Bradley and Morrison, 126 Harv L Rev at 442 (cited in note 14). ("Presidents, in contrast, enjoy a greater share of the power of their institution than members of Congress, and thus have more incentive to expend resources protecting and enhancing this power").

also institutional interests.<sup>117</sup> In this way, the interest of the man is truly connected to the constitutional rights of the office, just as Madison theorized in *The Federalist No. 51*.

In comparison to the Congress, the President pursues Executive Branch policies without much of a collective action problem.<sup>118</sup> This stems partly from the President's incredible ability to act unilaterally by issuing executive orders and directives, making agreements with foreign leaders, and directing the military as Commander in Chief, all without the consent or even the participation of Congress. And even though the Executive Branch is much larger than just the President, it can act with much greater force and unity than Congress because the President has a high degree of bureaucratic control.

With respect to lawmaking, the veto power of the President is an effective tool that can be used to prevent incursions on presidential power. Meanwhile, due to the complexities of foreign policy and national security, the administrative state, and the economy, the Congress often delegates authority to the President,<sup>119</sup> with "[s]ome of the starkest cases of such wholesale delegations of authority have come in war powers."<sup>120</sup> Furthermore, it may be the case that the existence of the Office of Legal Counsel, which provides advice to the President on important legal questions, gives the President an enhanced ability to defend and exercise executive

117 Moe and Howell, 15 J of L Econ & Org at 136 (cited in note 107). ("[M]ost presidents have put great emphasis on their legacies and, in particular, on being regarded in the eyes of history as strong and effective leaders. They have a brief period of time—four years, perhaps eight—to establish a record of accomplishments, and to succeed they must exercise as much control over government and its outcomes as they can"). Of course, this is not to say that all demonstrations of power and leadership by presidents bolster their legacy or chances of reelection. Notable examples within the area of war powers in which presidents were greatly damaged politically by their unilateral decisions are the wars of choice of Lyndon Johnson in Vietnam and George W. Bush in Iraq.

118 Bradley and Morrison, 126 Harv L Rev at 442 (cited in note 14). Posner and Vermeule, *The Credible Executive*, U Chi L Rev at 886 (cited in note 99). ("To be sure, the executive too is a 'they,' not an 'it'...however, the contrast is striking: the executive can act with much greater unity, force, and dispatch than Congress, which is chronically hampered by the need for debate and consensus among large numbers").

119 Kriner, 89 Boston U L Rev at 769 (cited in note 110). ("[T]he general pattern over the past fifty years has been for Congress to delegate ever more authority to the executive branch"). Moe and Howell, 15 J of L Econ & Org at 141 (cited in note 107). (Congress gives "broad delegations of authority on many occasions, granting presidents substantial discretion to act unilaterally").

120 Kriner, 89 Boston U L Rev at 769 (cited in note 110). (In most cases involving delegations of authority by Congress to the Executive Branch, the courts are able to hear and adjudicate delegation controversies, thereby enforcing nondelegation doctrines that maintain the proper constitutional separation of powers between the branches. The reason why we ought to be particularly concerned about the broad delegations of war power to the Executive Branch is because, unlike most other cases, the courts are not able to adjudicate most war powers cases under the judiciary's justiciability doctrines, such as the political question doctrine and the ripeness doctrine).

power.<sup>121</sup>

Therefore, “[t]hanks both to the singularity of the office and the power to execute, Presidents are well positioned to advance their policy agenda and, in doing so, expand the power of the presidency.”<sup>122</sup> And this relative imbalance in the relative ability of the Congress and the President to assert and protect their respective prerogatives demonstrates that the Madisonian model does not accurately describe modern government.

### *G. Has There Been Congressional Acquiescence?*

Madison’s understanding of our system of separation of powers has been undermined by the fact that Congress has not jealously guarded its legislative power, but instead has allowed for the transfer of legislative power to the Executive Branch. As a result, the shortcomings of the Madisonian model have created a “fundamental imbalance” whereby “Presidents have both the will and the capacity to promote the power of their own institution, but individual legislators have neither and cannot be expected to promote the power of Congress as a whole in any coherent, forceful way.”<sup>123</sup>

This reality has great implications on the way that we should view congressional acquiescence in separation of powers controversies. The value of congressional acquiescence under the historical gloss framework of constitutional interpretation is that it is thought to be indicative of an interbranch agreement on constitutional meaning, a functional balance of power, or an institutional waiver. However, given the many political factors that take precedence over institutional interests in Congress, it is really hard to know whether Congress is truly acquiescing with respect to any particular Executive Branch practice. This poses a great challenge to the historical gloss framework generally and to the Executive Branch’s historical gloss claim with respect to war powers.

Therefore, if one is to use the historical gloss framework to define the

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121 Bradley and Morrison, 113 Colum L Rev at 1123 (cited in note 16). (“[T]he fact that OLC does exist—and that presidents regularly seek its advice on high-profile legal questions—may suggest that, on balance, OLC enhances the overall ability of presidents to take their preferred actions”). See also Trevor W. Morrison, “Libya, ‘Hostilities,’ the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation,” 124 Harv L Rev Forum 62, 63 (2011). (“When OLC concludes that a government action is lawful, its conclusion carries a legitimacy that other executive offices cannot so readily provide”).

122 Devins, 45 Willamette L Rev at 399 (cited in note 116). See also Moe and Howell, 15 J of L Econ & Org at 148 (cited in note 95). (The President holds a substantial advantage over Congress “due largely to the disabling effects of Congress’s collective action problems and to the relative ease with which presidents can block any congressional attempts to reverse them. Presidents are well positioned to put their powers of unilateral action to use, as well as to expand the bounds of these powers over time”).

123 Moe and Howell, 15 J of L Econ & Org at 145 (cited in note 107).

constitutional separation of powers,<sup>124</sup> then I concur with the conclusion of Bradley and Morrison that “where acquiescence is a touchstone of the analysis, the standard for legislative acquiescence should be high.”<sup>125</sup> This is not to say that there is never acquiescence by Congress or that arguments of congressional acquiescence can never be sustained. Instead, setting a high bar for what congressional practice counts as acquiescence means that we must be reasonably certain that Congress has in fact acquiesced before the practice in question can be afforded legal weight regarding the constitutional separation of powers.

Bradley and Morrison provide two ways that this high bar for acquiescence can be met. First, if Congress “specifically refers to and approves of a particular executive practice,” it has acquiesced to that practice.<sup>126</sup> For example, Congress explicitly recognizes in the War Powers Resolution that the President has the power to use military force in response to “a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”<sup>127</sup> Second, Congress acquiesces to a presidential power if “a legislative enactment clearly implies congressional approval of an executive practice.”<sup>128</sup> Bradley and Morrison offer the potential example of executive settlement of claims of American citizens against foreign nations, for which Congress has prescribed procedures for the distribution of the settlement funds.<sup>129</sup> Thus, only in cases in which there is explicit consent or Congress takes actions that reasonably imply consent can the high bar for acquiescence be met.

### H. Conclusion

As this chapter has explained, the Executive Branch’s historical gloss claim, which relies on congressional acquiescence with respect to the President’s unilateral power to authorize armed conflicts, cannot be sustained. As most scholars agree, the War Powers Resolution of 1973 was an attempt by Congress to preempt and prevent future unilateral war actions by the President. Therefore, to echo Justice Frankfurter in *Youngstown*, the Congress made a “conscious choice” not to recognize a presidential power to unilaterally authorize armed conflicts. In the history following the War Powers Resolution, Congress did assert its own constitutional war powers to authorize armed conflicts short of “war,” and members frequently used their soft power to challenge and limit presidential uses of war powers. To the extent that Congress has failed to counteract presidential usurpations

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124 As I shall explain in Chapter Three and Chapter Four, I do not think one should use the historical gloss framework because it is not constitutionally legitimate.

125 Bradley and Morrison, 126 Harv L Rev at 448 (cited in note 14).

126 Id at 449.

127 Id at 434.

128 Id at 449.

129 Bradley and Morrison, 126 Harv L Rev at 449 (cited in note 14).

of war powers, the Executive Branch claim of congressional acquiescence is greatly undermined by the many factors, particularly in the realm of war powers, that inhibit members of Congress from protecting Congress's institutional interests. Therefore, since the Executive Branch's historical gloss argument requires a high bar for congressional acquiescence, the notion that there has been a historical gloss on the President's Article II powers to unilaterally authorize armed conflicts does not stand up to reason.

### CHAPTER THREE: ENTRENCHING ACQUIESCENCE

Thus far, the historical gloss argument that has been made by the Executive Branch has only been assessed for internal validity—that is, whether there has indeed been a historical gloss painted on an executive power to initiate armed conflicts. Because congressional acquiescence cannot be demonstrated either by the War Powers Resolution or by interbranch practice since 1973, I have concluded that the historical gloss claim is weak and should not be relied upon by the American people for an understanding of the balance of constitutional war powers between the President and Congress. Now I shall turn to the question of whether the historical gloss framework of constitutional interpretation, which gives constitutional weight to acquiescence in the practice of another branch over time, is valid at the level of constitutional theory.

In this chapter, I shall focus attention on the fact that, under the historical gloss framework, acquiescence of one branch in the practice of another over time is used to solidify a particular understanding of the constitutional separation of powers. In the case of war powers in particular, the Executive Branch makes the case that the acquiescence of Congress over time to the President's unilateral decisions to authorize armed conflicts short of "war" should be given significant legal weight in our determination of the President's Article II war powers. The reason for privileging such acquiescence is because it is indicative of mutual agreement between the President and Congress over time.

This, however, raises fundamentally important questions that are not addressed in the scholarly literature. What is the status of the historical gloss when the previously acquiescing branch breaks with its tradition and no longer acquiesces? Is the previously acquiescing branch bound today and in the future by its past acquiescence?

In this chapter, I will evaluate these questions as they apply to congressional acquiescence, particularly with respect to the supposed acquiescence of Congress to broad presidential war powers. I will demonstrate in this chapter that congressional acquiescence over time is treated under the historical gloss framework in a manner similar to legislative entrenchment—when a legislature's enactments bind the actions of future legislatures—because it has the effect of binding Congress to a particular interpretation of the constitutional separation of powers. In Part

I, I explain why legislative entrenchments are almost universally regarded as impermissible under our constitutional order.<sup>130</sup> In Part II, I liken acquiescence under the historical gloss framework to legislative entrenchments and explain why giving constitutional weight to congressional acquiescence over time would not make sense in our constitutional order.

## I. THE IMPERMISSIBILITY OF LEGISLATIVE ENTRENCHMENT

In our constitutional system, there is no question that the actions of Congress can be limited. Our Constitution inherently exists as a form of higher law that both enables and constrains the powers of the branches. Article I of the Constitution enumerates powers that belong to Congress, which it may rightfully exercise.<sup>131</sup> However, many other provisions of the Constitution limit the authority of Congress. Examples of this are the First Amendment which forbids the Congress from enacting laws “abridging the freedom of speech,”<sup>132</sup> and Article I, Section 7 which prescribes a particular process that Congress must follow in order for legislation to be properly enacted.<sup>133</sup> Thus, the real question is not if the Congress may be bound, but rather, who can do the binding?<sup>134</sup>

### A. *Can Congress Bind a Future Congress?*

While the Constitution has the status of higher law, the enactments of Congress today are not of a higher status than those of either past or future Congresses. Therefore, “the power of Congress legislatively to bind subsequent Congresses is limited,” and any statute that purports to bind a future Congress

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130 Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 Yale L J 191 (1972). (Black calls the prohibition on entrenchment “so obvious as rarely to be stated”). Posner and Vermeule disagree with the argument that entrenchment should be prohibited. See Eric A. Posner and Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 Yale L J 1665, 1666 (2002). (“Our claim is that the rule barring legislative entrenchment should be discarded; legislatures should be allowed to bind their successors....”). Though in disagreement, Posner and Vermeule also recognize that scholars universally disagree with them, see *id.* at 1665. (“[T]he academic literature take the rule as given, universally assuming that legislative entrenchment is constitutionally and normatively objectionable”). For a list of scholars who find legislative entrenchment objectionable, see *id.* at 1665. While much of scholarly literature on legislative entrenchment focuses on statutory provisions that require supermajorities for future enactments, I will look at the broader question of whether one Congress can bind future Congresses outside of merely supermajoritarian provisions.

131 US Const Art I.

132 US Const Amend I.

133 US Const Art I, § 7.

134 Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 12 Am Bar Found Legal J 381, 394 (1987).



can be repealed.<sup>135</sup> This is true because each Congress is equal, and possesses the equivalent sovereignty and authority of all other Congresses.

William Blackstone, arguing that legislatures may not bind the authority of future legislatures, stated in his *Commentaries on the Laws of England*:

Acts of parliament derogatory from the power of subsequent parliaments bind not....Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been, if it's [*sic*] ordinances could bind the present parliament.<sup>136</sup>

Likewise, Chief Justice John Marshall stated in *Fletcher v Peck*<sup>137</sup>, a case in which the Supreme Court barred the Georgia legislature from revoking land grants made by a prior state legislature, “that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.” Furthermore, Marshall stated that “[t]he correctness of this principle, so far as respects general legislation can never be controverted.”<sup>138</sup>

The Court continued to enforce this doctrine throughout early American history. In one of the leading Supreme Court cases on legislative entrenchment, *Ohio Life Insurance & Trust Co. v Debolt*<sup>139</sup>, Chief Justice Taney wrote the opinion of the Court holding that legislatures cannot limit the ability of its successors to impose taxes:

The powers of sovereignty confided to the legislative body of a State are undoubtedly a trust committed to them, to be executed to the best of their judgment for the public good; and no one Legislature can, by its own act, disarm their successors of any of the powers or rights of sovereignty confided by the people to the legislative body.<sup>140</sup>

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135 Laurence H. Tribe, *American Constitutional Law* at 125 (Foundation Press 3d ed 2000). *Manigault v Springs*, 199 U. S. 473, 487 (1905). (“A general law...may be repealed, amended or disregarded by the legislature which enacted it,” and “is not binding upon any subsequent legislature”). Because Congress is well aware of the fact that legislative entrenchment is not constitutionally permissible, the courts now apply the “Implied Repeals Doctrine” to laws that conflict with previously enacted laws. Under this doctrine, courts will find that a later statute impliedly repeals an earlier statute when the two statutes irreconcilably conflict, or when the later statute covers the whole subject of the earlier statute and is thus clearly intended as a complete substitute for it.

136 William Blackstone, *Commentaries on the Laws of England* at 90 (1765) (cited in *United States v Winstar Corp.*, 518 US 839, 872 [1996]).

137 *Fletcher v Peck*, 10 US 87 (1810).

138 *Id* at 135.

139 *Ohio Life Insurance & Trust Co. v Debolt*, 57 US 416 (1853).

140 *Id* at 431.

And again in *Newton v Commissioner*<sup>141</sup>, the Court strongly affirmed the principle that every legislature is of equal sovereign authority. When considering the legitimacy of an Ohio statute that established a particular town as the permanent county seat of Mahoning County, Ohio, the Court stated:

Every succeeding legislature possesses the same jurisdiction and power with respect to [public interests] as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil.<sup>142</sup>

The Court later ruled in *Reichelderfer v Quinn*<sup>143</sup> that the prohibition on legislative entrenchment applies with equal force to the U.S. Congress.<sup>144</sup> Since then, no one has seriously challenged the basic principle that no legislature has the power to, by its enactments, bind the enactments of future legislatures, and it has become a well understood part of our constitutional history.<sup>145</sup>

### B. *Why Not Allow Legislative Entrenchment?*

As Thomas Jefferson eloquently wrote in a correspondence with James Madison, “The earth belongs always to the living generation.”<sup>146</sup> In our democratic republic, the people periodically elect representatives to Congress who then make laws on their behalf. Importantly, however, “the people’s mandate has temporal limits,” and representatives possess their power only for as long as the people grant it to them through the electoral process.<sup>147</sup> “Each election furnishes the

141 *Newton v Commissioner*, 100 US 548 (1879).

142 *Id* at 559.

143 *Reichelderfer v Quinn*, 287 US 315 (1932).

144 *Id* at 318. (“[T]he will of a particular Congress ... does not impose itself upon those to follow in succeeding years”).

145 Eule, 12 Am Bar Found Legal J at 381 (cited in note 134). (The tenet that “a legislature [is] incapable of binding its successors...has seldom been scrutinized in American legal literature”). John C. Roberts and Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professor Posner and Vermeule*, 91 Cal L Rev 1773, 1809 (2003). (“It is no mystery that legislators, judges, and scholars [until Professors Posner and Vermeule] have generally rejected the concept of legislative entrenchment”).

146 Marvin Meyers, *The Mind of the Founder: Sources of the Political Thought of James Madison* at 229 (University Press of New England 1973) (quoting a letter from Thomas Jefferson to James Madison on Sept 6, 1789).

147 Eule, 12 Am Bar Found Legal J at 405 (cited in note 134).

electorate with an opportunity to provide new direction for its representatives.”<sup>148</sup> This allows for the citizenry to effectively hold the representatives accountable to the will of the people, or to renew their mandate. The problem with legislative entrenchment is that it violates “one of the most basic principles of democratic rule: one session of a legislature cannot tie the hands of another.”<sup>149</sup> The rule exists because “[the democratic] process would be reduced to an exercise in futility were the newly elected representatives bound by the policy choice of a prior generation of voters.”<sup>150</sup>

Legislative entrenchment undermines this democratic process by enabling incumbent members of Congress to embed their preferences in statutes today such that it would be hard or impossible for future members to make changes, “even if circumstances, knowledge, or public values evolved.”<sup>151</sup> On one level, we can imagine how entrenchment would be harmful if it prevented future Congresses from fixing drafting errors in prior legislation. Yet on another level, we can imagine how entrenchment provisions can embed ideas and values that were once important to voters, but no longer are. For example, had Congress entrenched legislation that gave broad powers to the Executive Branch to conduct foreign and domestic intelligence as a result of the public concerns about security after 9/11, that would prevent citizens today who are increasingly concerned with privacy from scaling back the executive’s intelligence-gathering mandate.

Similarly, legislative entrenchment can undermine the democratic process by allowing Congress to embed legislation “temporarily afflicted by pernicious influences that would result in undesirable laws.”<sup>152</sup> Whereas “[u]nwise legislation can be passed under our current system, [] a determined majority can and usually will change it in the future” once those influences subside.<sup>153</sup> Furthermore, it would also be possible through legislative entrenchment provisions for the Congress to “commit itself (if perhaps reluctantly) to a future course of conduct that it knows might be unpalatable when the time for action comes.”<sup>154</sup>

All of these different scenarios are possible under a system that allows legislative entrenchment, and are in direct conflict with the spirit of our constitutional democracy. Legislative entrenchments, by virtue of the fact that they diminish the power of future Congresses, diminish the power of the people.

148 Id at 404.

149 Roberts and Chemerinsky 91 Cal L Rev at 1819 (cited in note 145).

150 Id at 404–405.

151 John O. McGinnis and Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 Va L Rev 385, 418 (2003). See also Roberts and Chemerinsky 91 Cal L Rev at 1810 (cited in note 145). (“[S]olutions that seem obviously desirable at the time to members of Congress and the public at large may seem misguided at a later time”).

152 McGinnis and Rappaport, 89 Va L Rev at 410 (cited in note 151).

153 Roberts and Chemerinsky, 91 Cal L Rev at 1809 (cited in note 145).

154 Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Entrenchment Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J of L and Pol 1 at 370 (2003).

“This simply cannot be right under a Constitution adopted by ‘we the people’ that embodies a commitment to democratic self-government.”<sup>155</sup>

### C. *Entrenchment Is Constitutionally Impermissible*

Legislative entrenchments are also problematic from a constitutional standpoint. The first and most basic issue is that legislative entrenchment provisions essentially change Article I’s procedural requirements for the enactment of legislation by a later Congress, whereby legislation is properly enacted after a majority of both chambers of Congress approve it. By erecting barriers to the passage of the legislation, legislative entrenchment provisions are in direct conflict with the Supreme Court’s ruling in *Immigration and Naturalization Service v Chadha*<sup>156</sup>, which asserted that legislation is properly enacted when it follows the procedure set forth in Article I.<sup>157</sup>

A related constitutional issue with legislative entrenchment is its amendatory nature. If legislation is passed that is unrepealable in the future, then it effectively has the status of a higher law that binds the actions of Congress while avoiding the double supermajoritarian process for passing constitutional amendments, since legislative entrenchments can be passed by simple majorities in Congress.<sup>158</sup> Furthermore, by changing the rules for the passage of future legislation, legislative entrenchments effectively amend the procedural requirements for the proper passage of legislation put forth in Article I.<sup>159</sup>

However, “a legislature has no power to [place certain matters beyond the powers of the branches of government] by tying the hands of future sessions of the legislature without going through the amendment process.”<sup>160</sup> Article V of the Constitution does not allow Congress to, on its sole authority, amend the Constitution. Yet, “only by constitutional amendment can one truly bind the future.” As Tribe suggests, “Unless we keep clearly in mind that distinction between a constitutional amendment and a bill or resolution, we have really lost our way.”<sup>161</sup>

155 Roberts and Chemerinsky, 91 Cal L Rev at 1819 (cited in note 145).

156 *Immigration and Naturalization Service v Chadha*, 462 US 919 (1983).

157 *Id* at 951. (The Court declared that legislative veto provisions were unconstitutional and explained that legislative action is only permissible when it follows the procedure provided in Article I, section 7).

158 McGinnis and Rappaport, 89 Va L Rev at 387 (cited in note 151).

159 *Id* at 400.

160 Roberts and Chemerinsky, 91 Cal L Rev at 1786–1787 (cited in note 145).

161 *Hearings on HRJ Res 638 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 95th Cong, 1st Sess 38, 51 (1977) (statement and testimony of Laurence H. Tribe, Professor of Law, Harvard University).

## II. CONGRESSIONAL ACQUIESCENCE BINDING FUTURE CONGRESSES

### *A. Acquiescence Is Like Entrenchment*

The Executive Branch makes the claim that we ought to privilege the acquiescence of Congress because there has been a historical gloss placed on this presidential power to unilaterally authorize armed conflict short of war. Under the historical gloss framework, this supposed practice of Congress can be used to settle this separation of powers inquiry because there is seemingly mutual agreement between the President and Congress on what is constitutionally permissible.<sup>162</sup>

Because the historical gloss framework uses acquiescence by Congress to an executive practice over time to settle on an understanding of the separation of powers, the historical gloss framework is effectively doing the same thing as legislative entrenchment: it allows the past practices of Congress to bind the future actions of Congress, this time at the level of constitutional law. If one is to accept that the historical gloss framework can legitimately use the past acquiescence of Congress for the purposes of defining a particular constitutional separation of powers today, then one must also accept that Congress would be bound in the future to its previous acquiescence and the particular separation of powers that results from it. Thus, as with legislative entrenchment, the historical gloss framework embeds the majority views of past Congresses in a way that makes them unrepealable by a majority of a future Congress.

Therefore, just like legislative entrenchment, the entrenchment of the constitutional views of Congress via the historical gloss framework is unconstitutional. First, it is illogical to privilege the past acquiescence of Congress in constitutional terms because of congressional agreement with a presidential practice and then bind Congress to that view when it later disagrees. If constitutional interpretation hinges on agreement between the political branches and there ceases to be agreement, then it only makes sense that the previous constitutional view does not stand. Second, just as with legislative entrenchment, entrenching that past acquiescence (or agreement) is unconstitutional because it does not respect the equal sovereignty of successive Congresses to make their own decisions regarding

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<sup>162</sup> To reiterate from Chapter One, the historical gloss framework comes from Justice Frankfurter's decision in *Youngstown*. *Youngstown*, 343 US at 610–611 (Frankfurter concurring). (“[A] systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive power’ vested in the President by §1 of Article II”). See also Bradley and Morrison, 126 Harv L Rev at 432 (cited in note 14). (Under the historical gloss framework, acquiescence of one branch in the practice of another is significant because “[i]t is what gives otherwise merely unilateral acts legal significance.” Acquiescence is privileged because it is thought to represent mutual agreement between the branches on constitutional meaning, a functional balance of powers between the branches, or an institutional waiver).

the constitutional separation of powers.

### B. *Why the Historical Gloss Framework Is Unworkable*

In *Youngstown*, Justice Frankfurter provides a rationale for using the historical gloss theory to understand the separation of powers: “The Constitution is a framework for government. Therefore, the way the framework has consistently operated fairly establishes that it has operated according to its true nature.”<sup>163</sup> Thus, because the branches are likely to operate in accordance with their proper constitutional authority, Frankfurter would suggest that we should give weight to the historical practice of the political branches over time in our understanding of the constitutional separation of powers.

The heart of the problem with this approach is that it does not at all address the problem of changes in interbranch practice over time. The historical gloss framework necessarily relies on the constant dialogue that occurs between the branches of government in order to solidify constitutional interpretations. However, the dialogue between the branches is never finished, and the nature of that dialogue is subject to change over time. If the dialogue never concludes, then for the purposes of constitutional interpretation, the historical gloss framework needs to address the question of when it is appropriate to cut off that dialogue. Frankfurter’s historical gloss framework does not provide a clear answer to this, nor does modern legal scholarship address the question.

In practice, proponents of the historical gloss would seemingly cut off the relevant interbranch dialogue at the time a constitutional inquiry regarding the separation of powers arises, such as in a court case. Then we would look back on relevant interbranch practice up to that point, and give legal weight to the practice if it was consistent over time. But therein lies the problem. By doing that, we are elevating the constitutional views of past Congresses when they acquiesce to a particular presidential power to the status of higher law that binds the future interactions between the branches, thereby diminishing the possible contradictory constitutional views of future Congresses. Since the entire framework is based on the premise that we should privilege mutual agreement between the political branches, the historical gloss framework should not disregard the future opinions of Congress. Similarly, due to the reasons mentioned in Part I of this chapter, the future views of Congress cannot be disregarded in favor of the past views of Congress. This effectively renders the historical gloss framework unworkable because it cannot be used to solidify and enforce a particular constitutional interpretation on the basis of interbranch agreement, which could later be undermined by a change

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163 *Youngstown*, 343 US at 610 (Frankfurter concurring).

in constitutional interpretation by Congress.<sup>164</sup>

### *C Implications for Discerning the Separation of Powers*

The unconstitutionality of entrenching the views of Congress implies we must respect the Congress's present constitutional views, even in the face of a long history of Congress holding the contrary view. In the case of war powers, even if the Executive Branch is correct in its assertion that Congress has acquiesced to the President's extra-constitutional power to unilaterally authorize armed conflicts, we must respect any decision by a present or future Congress to break with Congress's tradition of acquiescence and assert that the President does not have this constitutional power. Even if Congress acquiesces to broad presidential war powers ninety-nine times, that cannot bar Congress from *nonacquiescence* the one hundredth time. To prevent Congress from nonacquiescence that one hundredth time, except through a judicial interpretation of constitutional meaning, is to unconstitutionally entrench the views of prior Congresses.

Finally, this leads to the conclusion, which I shall discuss in much more depth in Chapter Four, that a formal reading of the Constitution should be our preferred method of constitutional interpretation. The historical gloss framework of constitutional interpretation looks to historical practice to define the separation of powers, even though practice does not have the status of higher law and cannot bind the Congress. Thus, the ninety-nine instances of acquiescence cannot tell us where the constitutional separation of war powers lies any better than the one instance of nonacquiescence. Meanwhile, formalism looks to the text of the Constitution, which is the higher law that can and does bind congressional action, for constitutional answers. "[T]he legislative powers granted to the Congress by the Constitution therefore cannot be modified, diminished or enhanced by mere acts of Congress, but only through constitutional change."<sup>165</sup> And in the process of trying to understand the separation of war powers between Congress and the President, it is formalism, not the historical gloss framework, that will yield true constitutional meaning.

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164 The notable exception to this, as I will mention in Chapter Four, is that consistent historical practice is widely considered a legitimate tool for constitutional interpretation when the practice dates back to the Founding. Such historical practice is not considered significant for the same reason the historical gloss framework might suggest, which is interbranch agreement. Instead, historical practice from the time of the Founding is considered valuable as a tool to help us understand today what the text of the Constitution meant to the Framers in 1789.

165 Brett W. King, *Deconstructing Gordon and Contingent Legislative Authority: The Constitutionality of Supermajority Rules*, 6 U of Chi L Sch Roundtable 133, 188 (1999).

## CHAPTER FOUR: HISTORICAL GLOSS VICES, FORMALISM VIRTUES

Having determined that the Executive Branch's historical gloss claim with respect to war powers is not constitutionally valid because it entrenches the constitutional views of individual Congresses without regard for the Article V process, I will now engage in a deeper exploration of the constitutional impermissibility of using the historical gloss framework to define the constitutional separation of war powers. In particular, I will look at whether the historical gloss framework is useful for constitutional interpretation, setting aside the question of true acquiescence dealt with in Chapter Two and the entrenchment issue considered in Chapter Three.

What is crucial to this inquiry is an understanding of what it means for law to constrain. Under the historical gloss framework of constitutional interpretation, law constrains when the branches use their respective powers to check the powers of the others. This, however, is a flawed view of legal constraint. True, the Founders did establish a system in which each branch has an incentive to check the power of its coordinate branches. It is also true that, as Chapter Two demonstrates, "constitutional law in this area is not entirely distinct from politics, and that it is both informed by and shapes political contestation."<sup>166</sup> Having said that, it is not the case that the law does not or ought not to constrain in situations in which coordinate branches fail to act.<sup>167</sup> Furthermore, political considerations, such as those in Chapter Two, are not meant to define when the law constrains, but rather, the conditions under which interbranch constraints are or are not likely to occur.

Even in situations in which historical practice has run afoul of constitutional meaning, "the Constitution [always] provides" each branch a "basis for the legitimate regulation" of the others.<sup>168</sup> Absent judicial enforcement of constitutional meaning, the Constitution is still binding law on the activities of the federal government.<sup>169</sup> Therefore, understanding that the Constitution does constrain the branches, regardless of whether there is interbranch enforcement, I will first explain in this chapter the specific pitfalls of using the historical gloss framework to define what is constitutionally permissible. I will then suggest utilizing a formalist framework of constitutional interpretation as a better alternative method of constitutional interpretation, including how this method of constitutional interpretation is relevant

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166 Bradley, 92 Tex L Rev at 773 (cited in note 115).

167 Bradley and Morrison, 113 Colum L Rev at 1147 (cited in note 16). ("[A] potentially interactive relationship among operations success, political cost, and legality does not mean that the last factor imposes no constraint").

168 Catherine H. Gibson, *Frankfurter's Gloss Theory, Separation of Powers, and Foreign Investment*, 36 N Ky L Rev 1, 134–5 (2013).

169 Bradley and Morrison, 113 Colum L Rev at 1129 (cited in note 16). ("Courts and scholars commonly accept that judicially underenforced constitutional norms retain the status of law beyond the extent of judicial enforcement").



to the debate over the separation of constitutional war powers.

## I. THE PITFALLS OF THE HISTORICAL GLOSS FRAMEWORK

### A. *Can Practice Tell Us Constitutional Meaning?*

One possible meaning of acquiescence by one branch in the practice of another over time is that there is an explicit or implicit agreement between the branches on constitutional meaning. The historical gloss framework of constitutional interpretation understands such acquiescence to carry legal weight. And especially in context of war powers, —an area of the law in which the courts have repeatedly declined to adjudicate cases under the political question and other justiciability doctrines—this historical practice approach gives even more weight to executive-legislative interactions because they are the only precedents that can be relied on. However, by doing so, the historical gloss framework runs into a pitfall, the assumption that the historical interaction between branches will tell us where the constitutional balance of power lies.

While it is reasonable to suspect that in many cases the historical interactions between the branches are consistent with the constitutional separation of powers, one should not simply look to historical practice for constitutional meaning or assume that a consistent history of interbranch practice will yield constitutional meaning. The reason for this is basic. It is not the exercised powers of the branches that ought to define and constrain constitutional meaning, but rather, it is constitutional meaning that ought to define and constrain the powers being exercised by the branches. Assuming this basic principle is true, we should be concerned with the possibility that one might consider historical interactions between the branches dispositive in separation of powers controversies given the possibility that these interactions are inconsistent with constitutional meaning. To allow historical practice to always be dispositive in such cases is essentially to recognize that the branches, through their interactions, have the ability to repeal provisions of the Constitution.

An exemplary case for the proposition that the historical practice of the branches, though creating a historical gloss, should not be dispositive in defining branch powers is *INS v Chadha*. At issue in this case was a statute that gave Congress one-house legislative veto power over the Attorney General, an Executive Branch official, with respect to suspensions of INS deportation orders. Chief Justice Burger, writing for the majority, stated that the one-house legislative veto was odds with the legislative process established by the Constitution, which is based on the principle of bicameralism and prescribes presentment of all legislation to the President. As such, the statutory provision in question was constitutionally impermissible.

In his dissent, Justice White argued for the constitutionality of the one-

house legislative veto on the premise that historical practice and the interaction of the Executive and Legislative Branches supported the constitutionality of such vetoes. Justice White pointed out that the device had been recognized for five decades since the 1930s as constitutional by the Executive Branch and that “[t]he device [was] known in every field of governmental concern: reorganization, budgets, foreign affairs, war powers, and regulation of trade, safety, energy, the environment, and the economy.” Further, he stated, “Today the Court not only invalidates § 244(c)(2) of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a ‘legislative veto.’”

The constitutional inquiry in this case demonstrates why even historical glosses created by the branches of the federal government cannot be relied on to define the constitutional balance of power. Simply put, it is possible that the practice of the branches is inconsistent with the Constitution. The fact that Congress enacted many legislative veto provisions over five decades is irrelevant from a constitutional standpoint because “Jagdish Chadha was entitled to claim the Constitution’s protections in challenging such a veto that threatened him with deportation.”<sup>170</sup> Moreover, to allow practices at odds with constitutional meaning to withstand constitutional muster is effectively to allow the branches to repeal constitutional provisions through their actions.

The decision of the district court in *Youngstown* arrived at a similar thought with respect to presidential war powers. In weighing whether President Truman had the authority to order a federal takeover of steel mills during the Korean War, Judge Pine considered the Executive Branch’s argument that “former presidents, some during war and several shortly preceding war, without the authority of statute,” engaged in similar seizures.<sup>171</sup> Judge Pine questioned the assertion that “several acts apparently unauthorized by law, but never questioned by the courts, by repetition clothe a later unauthorized act the cloak of reality.”<sup>172</sup> Wisely dismissing the executive’s claim of authority in this case, Judge Pine concluded that “repetitive, unchallenged, illegal acts” cannot “sanctify those committed thereafter.”<sup>173</sup>

Judge Pine sets an example of how we must consider the separation of powers questions of our day. Should we look to past interbranch practices and define the scope of branch powers based on those precedents, or should we assess branch practices, and all similar exercises of power unchallenged before it, for their constitutional validity? The answer is the latter. Branches will inevitably assert, as a result of their natural ambition and inclination for power, authority

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170 Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv L Rev 1221, 1282 (1995).

171 *Youngstown Sheet Tube Co. v Sawyer*, 103 F. Supp. 569 (D.D.C. 1952)

172 *Id.*

173 *Id.*

beyond that which has been granted by the Constitution. However, past practices cannot change the scope of their rightful constitutional powers. Furthermore, “[r]epetition of such casual treatment [of the Constitution] over time would simply compound error with error, not provide legitimacy.”<sup>174</sup> Given that practices cannot reliably give us constitutional meaning, it would be folly to defer to historical practice to determine the constitutional separation of powers.

### B. *Is Functionality A Constitutional Priority?*

In addition to an agreement on constitutional meaning, acquiescence can also be indicative of a functional arrangement that is mutually acceptable to both political branches. Under the historical gloss framework of constitutional interpretation, such functional agreements are given legal weight. By doing so, this framework suffers from a second pitfall, the notion that functionality can be used as a legitimate constitutional basis for branch actions.

We generally expect that when one political branch acts outside of its constitutional authority that the other political branch will have the motivation to oppose and counteract it. However, this is not true of situations in which the political branches mutually agree on a functional arrangement for how government ought to operate. The basic problem with this from a constitutional standpoint is that the Framers did not intend to establish a system of checks and balances among the branches in order to promote efficiency in government. Rather, the Framers found value in the friction that would inevitably occur as a result of the competing ambitions of the branches, including the protection of individual liberty and the preclusion of exercises of arbitrary power by government.<sup>175</sup> Thus, asserting the notion that “convenience and efficacy are not the primary objectives—or the hallmarks—of democratic government,” Chief Justice Burger stated in his opinion in *INS v Chadha* that “our inquiry is sharpened rather than blunted by the fact that congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies.”<sup>176</sup>

For the sake of functionality, the branches may find a particular separation of powers arrangement favorable for government; however, this does not tell us what the proper constitutional balance of powers is. For this reason, we cannot simply give weight to historical glosses between branches of government in order to determine constitutional meaning simply for the sake of efficiency. Rather, we must assess in every case whether or not the power being exercised by a branch

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174 *Id.* at 1282.

175 Rachel E. Barkow, *Separation of Powers and Criminal Law*, 58 *Stan L Rev* 990-1 (2006). See also *Myers v United States*, 272 US 52, 293 (1926) (Brandeis dissenting). (“The doctrine of separation of powers was adopted by the Convention of 1787 not to promote efficiency, but to preclude the exercise of arbitrary power”).

176 *Chadha*, 462 US at 944.

properly belongs within the constitutional domain of that branch. Indeed, “the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.”<sup>177</sup>

### C. *Can the Branches Engage in Institutional Waivers?*

Finally, the acquiescence of one political branch to the practice of another may be given legal weight under the historical gloss framework because it represents an interbranch bargain on the separation of powers, resulting in an institutional waiver of power by one of the branches to another. By affording this sort of arrangement legal weight, the historical gloss framework suffers from its third pitfall, which is the assumption that the branches, by their mutual relations, can change where the constitutional balance of powers lies.

Seemingly important under the historical gloss framework is the fact that such bargains involve an agreement by both of the political branches. Indeed, if the interests of the branches were all that mattered under our constitutional system, then there would be no harm done by such an arrangement. However, as Laurence Tribe accurately points out, “[t]he Constitution’s architectural safeguards were specially designed to protect the states, citizens, and each branch of the federal government both from aggrandizement of power and from neglect of constitutional responsibility by those who temporarily hold public office even when such aggrandizement or neglect seems wise as a matter of policy.”<sup>178</sup> In other words, there is still a constitutional interest that extends beyond the interests of the branches, which is to prevent the tyranny that would inevitably result from the aggrandizement of too much power by any one branch of the federal government.<sup>179</sup>

Therefore, the impermissibility under our constitutional structure of interbranch bargains involving an institutional waiver of constitutional power is beyond question. This includes even the smallest departures from constitutional meaning which can give momentum to and become the justification for future illegal actions that have the effect of causing the very harms the Constitution seeks to protect against. “It is not the prerogative of those who hold public office, whether elected or appointed, to abdicate constitutional protections essential to the architecture of our government.”<sup>180</sup> In fact, the Framers made textual assignments of authority in the Constitution so as to prevent transfers of authority between

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<sup>177</sup> *Id.* at 944.

<sup>178</sup> Tribe, 108 *Harv L Rev* at 1282 (cited in note 170).

<sup>179</sup> *Bond v United States*, 131 S Ct 2355, 2365 (2011). (“The structural principles secured by the separation of powers protect the individual”). See also *Myers*, 272 US at 293. (“The purpose [of the separation of powers] was not to avoid friction but...to save the people from autocracy”).

<sup>180</sup> Tribe, 108 *Harv L Rev* at 1281 (cited in note 170).

the branches.<sup>181</sup> Thus, with the understanding that the Constitution prohibits the branches from engaging in “conscious end-run[s] around constitutional requirements,” interbranch bargains involving constitutional exchanges of power should never be considered constitutionally legitimate.<sup>182</sup>

## II. AN ALTERNATIVE FRAMEWORK: FORMALISM

James Madison wrote in Federalist No. 51, “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.” Knowing that angels do not govern, it was the intent of the Framers to establish a system wherein the powers of the branches would be separate, such that too much power would not be concentrated in one branch and bring about tyranny. Given that historical gloss framework for constitutional interpretation does not prevent, and in fact could be used to solidify, the aggrandizement of power by a single branch, a formalist framework is a necessary alternative for the constitutional interpretation of war powers. Such a formalist approach serves the dual purpose of deriving constitutional meaning and maintaining the proper constitutional separation of powers.

The basic principle of formalism is that the law should be applied as it has been established, not according to normative values that take into account social interests, public policy, and other considerations. This approach differs from the historical gloss framework because it does not rely on interbranch practice to *define* the limits of the Constitution. Rather, this approach looks to historical practice as *evidence* of constitutional meaning. The Supreme Court has utilized formalism to understand where the balance of powers lies among the branches, particularly by identifying the two ways in which the separation of powers doctrine is violated: 1) When one branch “interfere[s] impermissibly with the other’s performance of its constitutionally assigned function,” and 2) When “one branch assumes a function that more properly is entrusted to another.”<sup>183</sup>

### A. Textual Analysis

Formalism first seeks to conduct a textual analysis of the words of the Constitution to identify constitutionally assigned functions since many branch actions can be supported by explicit textual grants of power in Articles I, II, and III. In the area of war powers, for instance, there are some separations of power that are supported by very explicit language. Article I, Section 8 grants Congress the

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181 Sidak, 41 Duke L J at 68 (cited in note 19). (“By requiring formality, the Constitution raises transaction costs and thus intentionally discourages certain bargains that otherwise could be struck between the branches of the federal government in the production of public goods”).

182 Tribe, 108 Harv L Rev at 1280 (cited in note 170).

183 *Chadha*, 462 US at 963 (Powell concurring).

power “to declare War.” The unambiguous and unchallenged reading of this text is that Congress is the branch that has the power to officially declare war against other states and *can* authorize armed conflicts short of declaring war.<sup>184</sup> Article II states that the President is the “Commander in Chief of the Army and Navy of the United States.” The unambiguous and unchallenged interpretation of this text is that the President has command and control over the armed forces of the United States.

Thus, there are many areas in which the separation of power is explicit. In these cases, formalism prescribes a literal interpretation of the Constitution to identify constitutionally assigned functions. To do otherwise, such as to allow practice to define the balance of powers in a way different than the text, would be to effectively repeal provisions of the Constitution.

### B. *Structural Analysis*

However, the notion that we should rely on the plain meaning of constitutional text when it is explicit is not hotly debated. The real difficulties arise when the text of the Constitution is unclear such that the answer to the constitutional inquiry cannot be derived through a simple textual analysis. Indeed, the most common critique of the formalist framework of constitutional interpretation is that it relies on the text of the Constitution, which is not always clear about which branch possesses the power in question.

Upon further inspection, however, this critique is only partially correct. It is true that the Founders did not construct the Constitution with clear textual grants of authority for *all* of the powers that are encompassed by each branch of government. This does not mean that we cannot use the Constitution as written to answer separation of powers inquiries in which the text itself is not clear. As Tribe suggests, “Read in isolation, most of the Constitution’s provisions make only a highly limited kind of sense.”<sup>185</sup> However, “[t]he Constitution describes in words a framework of government that clearly is of more dimensions than can be depicted in a series of sentences. It is only natural then that the map of our government presented in the Constitution’s text cannot fully represent the many contours of the governmental architecture it describes.”<sup>186</sup> Therefore, we must look at the interconnected nature of the Constitution’s provisions in order to discern how they construct our government.<sup>187</sup> Indeed, by “reading between the lines,”<sup>188</sup> we can understand the “logic and design of the governing institutions created by

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184 This is not to say that there is an agreement that Congress *must* authorize armed conflicts short of war.

185 Tribe, 108 Harv L Rev at 1235 (cited in note 170).

186 Id at 1239.

187 Id at 1235.

188 Id at 1236.

the Constitution.”<sup>189</sup>

In the context of war powers, although the question of whether the President may unilaterally authorize an armed conflict short of “war” is not obvious on a purely textual basis, one may arrive at the best understanding of the constitutional meaning in this case by conducting a structural analysis. While I do not intend to solve this debate over war powers here, it is possible to think how one might employ structural analysis in this case by making inferences based on the powers that are explicitly granted to each branch. Article I grants Congress the power to “provide for the common Defense,” “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water,” “raise and support Armies,” “provide and maintain a Navy,” “make Rules for the Government and Regulation of the land and naval Forces,” “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,” and “provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States.” Article II makes the President “Commander in Chief of the Army and the Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.” Thus, one might conclude from this constitutional structure that Congress, not the President, has been entrusted by the Constitution with all powers pertaining to the military, including committing the military to armed conflict, with the notable exception that the President may lead and direct the armed forces once they have been committed.

### *C. The Relevance of Historical Practice*

In the case of both textual and structural analysis, history plays a limited although, in some cases, important role. In the event that a historical practice dates back to the time of the founding, that historical practice may be evidence of the meaning of the text or structure of the Constitution as intended by the Framers. If it does reliably reveal the intended meaning of the text or structure of the Constitution, it ought to be given weight; however, arguments based on the historical practices of the branches “should rarely be persuasive unless that practice extends back to our nation’s founding, rather than being adopted as a conscious end-run around constitutional requirements,” as is the case with most historical gloss arguments today.<sup>190</sup>

### *D. Conclusion*

The formalist framework is preferable from a separation of powers

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189 Tribe, 108 Harv L Rev at 1233 (cited in note 170).

190 Id at 1280.

perspective because it is truly a security against the encroachment of one branch on the powers of another. Whereas with the historical gloss framework of constitutional interpretation, it is possible that the balance of power among the branches could change depending on the interaction of the branches, the formalist approach maintains a consistent and constitutionally-rooted balance of power determined not by the actions of the branches but by the text and structure of the Constitution. Under this framework, it is never permissible for one branch to usurp the power that rightfully belongs to another, nor can a branch be so acquiescent as to relinquish its power. The Framers sought to protect the citizenry from such seizures of power that could lead to tyranny. It is this ideal that informs our need to engage in formalist constitutional interpretations and not to let the branches, through their practices, effectively repeal provisions of the Constitution.

## CONCLUSION

Because the Constitution does not provide clear *textual* demarcations for the separation of war powers, tension exists between Congress and the President as to whether congressional consent is necessary for American military participation in armed conflicts short of “war.” Given the structural weaknesses of the War Powers Resolution and the President’s advantage over Congress in protecting their respective institutional prerogatives, “[t]he [P]resident is an ideal position to take advantage of this ambiguity.”<sup>191</sup>

Since the Korean war, the President has not only been able to assert broad presidential war powers, but has also exercised them on several occasions without the consent of Congress. The Executive Branch via the Krass Memo has defended this broad conception of the President’s war powers on the basis of historical gloss. However, upon close examination, the Executive Branch’s historical gloss claim lacks much credulity and workability in our constitutional order.

The premise of the executive’s historical gloss claim is that Congress acquiesced to broad presidential war powers in the War Powers Resolution and in interbranch practice since, but the history and text of the War Powers Resolution clearly demonstrates that the statute was a demonstration of *nonacquiescence* by Congress—a conscious choice to check the President. In terms of interbranch practice, the Congress has not only asserted its own authority to authorize armed conflicts short of “war,” but has used soft powers to check presidential exercises of broad war powers.

At first glance, Congress appears to have acquiesced to many armed conflicts, but in reality, the Executive Branch has failed to account for the many institutional and political reasons that Congress was unable to check those presidential actions. Congress’s relative inability to defend its institutional prerogatives, therefore,

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191 Moe and Howell, 15 J of L Econ & Org at 137 (cited in note 107).



necessitates setting a high bar for what amounts to congressional acquiescence. The Executive Branch has failed to meet this high standard.

The Executive Branch's argument with respect to war powers also fails because the historical gloss framework of constitutional interpretation cannot stand up to constitutional scrutiny. The historical gloss framework seemingly seeks to entrench the constitutional views of Congress, as demonstrated by congressional acquiescence, but present and future Congresses are legislatures of equal power that can only legitimately be bound by the Constitution, not the actions of past legislatures. The historical gloss framework also fails to provide constitutionally legitimate answers to inquiries concerning the separation of powers between the branches. As a result, the historical gloss framework cannot be relied upon as a constitutionally legitimate framework for discerning the separation of war powers between Congress and the President.

The Constitution binds the branches, even in the case of war powers in which there is disagreement between the political branches and a lack of judicial involvement.<sup>192</sup> Our commitment in separation of powers controversies, therefore, must be to constitutional meaning. In our quest for constitutional meaning, only formalism, which takes into account the text and structure of the Constitution with considerations of historical practices dating back to the Founders, can help us to understand the constitutional separation of war powers.

#### *A. Contribution to the Literature*

This paper builds upon a solid foundation of scholarly literature that has explained in great detail the history of interbranch practice with respect to war powers and the reasons why the President has been able to exercise broad war powers under the War Powers Resolution regime. The argument in this paper also relies heavily on prior scholarship regarding the role of historical practice in discerning the separation of powers. I seek to fill a void in this literature by evaluating the Executive Branch's novel justification for broad war powers, which is the supposed historical gloss that has been placed on executive war powers by congressional acquiescence.

In doing this, I make two major contributions to the literature. First, like other scholars who have looked at how the historical gloss framework applies to particular separation of powers debates, such as treaty termination and holding on to national security secrets, I have evaluated the historical gloss framework as it applies to the executive's claim of broad war powers. This is accomplished

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<sup>192</sup> Bradley and Morrison, 113 Colum L Rev at 1129 (cited in note 16). (“[I]n the U.S. context, the notion that constitutional law is not law unless it is judicially enforceable does not fit with the political question and other nonjusticiability doctrines, which readily accept that constitutional law extends beyond what the courts do”).

through an assessment of the internal validity of the historical gloss as it applies to war powers by looking at whether Congress has acquiesced to broad presidential war powers, as well as through an assessment of its external validity by looking at whether the historical gloss framework is a constitutionally valid framework for understanding the separation of war powers.

Second, in assessing whether the historical gloss framework is a constitutionally valid framework for discerning the separation of war powers, I contribute to the scholarly literature by likening the historical gloss argument for congressional acquiescence to ordinary legislative entrenchment, which is widely acknowledged to be illegitimate. While scholars have questioned the constitutional authority of the historical gloss framework, no scholarship to date has considered the question of whether giving constitutional weight to past congressional acquiescence would unconstitutionally bind Congress thereafter to its previously held constitutional viewpoint. As I explain in Chapter Three, this entrenchment analysis is extremely important in evaluating the constitutional validity of the historical gloss framework because it renders the framework unworkable in our constitutional order.

### *B. Future Research*

Given that scholarship has only recently begun to take a strong interest in the role of historical practice in separation of powers debates and that the Executive Branch only recently applied historical gloss analysis to war powers, there is much fertile ground for future scholarly research.

One area for future scholarly research is to evaluate interbranch practice with respect to war powers from the Founding to 1973. As I explain in Chapter One, I have limited my congressional acquiescence analysis to the War Powers Resolution and historical practice thereafter because the War Powers Resolution was a major turning point in the war powers debate, because the Krass Memo only specifically supports its argument on the basis of acquiescence from 1973 onward, and because, if there was congressional acquiescence to a broad presidential war power, it would be manifested in historical practice during this period. Future scholarship can extend the analysis done in this paper by exploring whether consistent acquiescence to broad presidential war powers can be demonstrated pre-1973.

Another major question that arises from this paper, as well as from the work of Bradley and Morrison with respect to historical gloss, is whether apparent acquiescence by Congress can be discounted because of the way Congress is structured as an institution. In Chapter Two, I sought to apply and expand upon the work of Bradley and Morrison by suggesting that the Madisonian model does not accurately describe the operation of modern day government. In doing so, I explained how veto gates—such as the presidential veto, congressional committees,

and filibusters—contribute to Congress’s inability to check unconstitutional presidential exercises of war powers. However, this analysis raises a question—one that I admittedly do not address in this paper—if it is reasonable to set a high bar for congressional acquiescence when it is the result of how Congress is intended to operate.

Congress has specifically chosen to set itself up with a committee structure and filibuster rules that slow down and hinder the passage of legislation. In so doing, Congress has established its own institutional procedures for the proper passage of legislation, which is effectively the voice of Congress on policy and constitutional questions. There is a real question, therefore, as to whether it makes sense to discount the congressional acquiescence that results from these institutional procedures.

A similar question arises with respect to the fact that the existence of a presidential veto effectively requires a two-thirds majority of Congress to check presidential power. The presidential veto and the two-thirds majority needed to override it are constitutionally prescribed, perhaps as an intentional restraint on legislative power by the Founders.<sup>193</sup> Therefore, it would be useful for future scholarship to address the logic of discounting acquiescence on this basis.

Finally, scholarship can benefit from more analysis on the practical role that historical practice plays in the operation of modern day government. For example, while Chapter Two explains many reasons why Congress may not be able to or have the incentive to check unconstitutional exercises of presidential power, one question for future scholarship is whether Congress *ever* opposes presidential action on purely legal terms and what that looks like. Similarly, scholarship can benefit from a systematic empirical analysis examining if and to what extent the President is constrained by practice-based law.

### *C. Preserving the Role of Congress With Respect to Armed Conflicts*

In *The Federalist No. 48*, James Madison states that “[a] mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all of the powers of government in the same hands.”<sup>194</sup> This statement is as true today as it was at the time of the Founding. Though the Constitution is binding law regarding the actions of the branches, only the branches themselves can give effect

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193 Federalist 42 (Madison), in *The Federalist Papers* 312 (New Am Lib 1961) (Clinton Rossiter, ed). See also Federalist 73 (Hamilton), in *The Federalist Papers* 441 (New Am Lib 1961) (Clinton Rossiter, ed). (The former notes “the tendency of republican governments is to an aggrandizement of the legislative at the expense of the other departments” and the latter notes “[t]he propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments”).

194 Federalist 48 (Madison), in *The Federalist Papers* 310 (New Am Lib 1961) (Clinton Rossiter, ed).

to it. Therefore, while I have suggested in this paper that interbranch practice lacks constitutional authority, this is not to say that interbranch practice is not important. In fact, interbranch practice is crucially important in ensuring that constitutional meaning is adhered to in modern day government.

The implications of this in the context of war powers is that if Congress believes that congressional authorization is required for armed conflicts short of “war,” Congress must take positive steps to ensure its involvement in war powers decisions and to check those of the President. Indeed, “even where the Constitution specifically envisions legislative participation, Congress must take positive steps to preserve its role.”<sup>195</sup>

This is especially important in light of the Krass Memo. Up until American participation in the conflict in Libya, presidents relied on favorable interpretations of the War Powers Resolution and broad, undefined constitutional powers to make war powers decisions without the consent of Congress. Now, the Executive Branch has made a further justification for these war powers, which relies on the acquiescence of Congress. This justification—the application of the historical gloss framework to the President’s war powers—could have an effect of entrenching broad presidential war powers at the expense of Congress even greater than that of the War Powers Resolution. Indeed, this is made all the more possible by the fact that the executive’s historical gloss argument is in some sense a synthesis of the executive’s constitutional, War Powers Resolution, and historical practice arguments for broad war powers.

Therefore, given that the courts have been and are unlikely to settle the debate over the proper constitutional separation of war powers due to justiciability limitations, more than ever, Congress must act if it desires to have a significant role in future war powers decisions. Asserting its own constitutional powers, amending the War Powers Resolution, and checking presidential war powers are all steps that can be taken to preserve Congress’s role with respect to war powers. As Justice Jackson suggested in *Youngstown*, “only Congress itself can prevent power from slipping through its fingers.”<sup>196</sup> Thus, the fate of the historical gloss argument with respect to war powers ultimately lies with Congress.

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195 Gibson, 36 N Ky L Rev at 135 (cited in note 168).

196 *Youngstown*, 343 US at 654 (Frankfurter concurring).



<b>ARTICLE</b>
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**RE-FRAMING SOVEREIGNTY:  
THE ITALIAN LEGAL ORDER AND  
THE EUROPEAN HUMAN RIGHTS REGIME**

Matteo Godi<sup>†</sup>

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*ABSTRACT: Over the centuries, the concepts of maiestas, potestas, imperium, and auctoritas have been conflated into one overarching idea: sovereignty. This essay emphasizes the inadequacy of traditional frameworks of sovereignty; in particular, the birth of the European human rights regime has exemplified that sovereignty, not only ontologically but also theoretically, is pluralistic rather than unified—and yet, I claim, it is neither dead nor pooled. In this article, I focus on the complex 60-year-long relationships between the Italian Constitutional Court (ICCT), the European Court of Justice, and the European Convention on Human Rights (ECHR), by analyzing a number of relevant, more and less prominent Italian judicial decisions. I argue that the plethora of interlocking and overlapping European sovereignty-claiming orders is to be characterized and theorized vis-à-vis a new paradigm shift: from the individual sovereign, to institutional sovereignty, to popular sovereignty, and at last, to sovereignty qua maiestas of fundamental principles (as a subset of human rights). This framework maintains some of the traditional characteristics of the concept of sovereignty: its unity, its position above positive law, and its finality of instance. Through their supreme status and dignity, namely, through their sovereignty qua maiestas, fundamental principles—as the common basis shared by the national and supranational European constitutions, and as counter-limits—mediate, mitigate, and stabilize the plurality and heterarchy of European sovereignty claims.*

## INTRODUCTION

*Sovereignty* is an historical concept. It is a product of history, and as such, it must evolve with history. At the onset, as far as the Western tradition is concerned, it may be helpful to identify the notions of *internal* and *external* dimensions of sovereignty as the most fundamental, classic, and, in this sense, “original” dichotomy of this concept. Internal sovereignty, on the one hand, refers to the polity’s absolute and ultimate political authority within a territory; external sovereignty, on the other hand, is a political unity’s claim to independence, within its own borders, *vis-à-vis* others. Moreover, traditionally, *state* sovereignty has been distinguished from *popular* sovereignty. State sovereignty is the capacity of a polity to act as the final and indivisible holder of authority over the use of force, the distribution of socio-economic justice, and the management of the economy; popular sovereignty is tied to the idea that the people are at the same time subjects and objects of the law.<sup>1</sup> But just as the idea of “polity” evolved throughout the centuries—from the individual king to the institution of a government—we also have witnessed a series of paradigm shifts in the conceptualization of sovereignty. The metamorphoses of sovereignty over the course of history, as a response to globalization and the spread of international organizations, have been multiple, ambivalent, and hard to theorize.

This essay offers a *framework* of sovereignty, a new paradigm shift, in light of today’s sovereignty *claims*.<sup>2</sup> It refuses to simply abandon the notion of sovereignty as obsolete, a notion that still appears to be a crucial element of our legal and political discourse. Departing from the present political reality in Europe, and particularly in Italy, this piece hopes to reconcile the normative and the political spheres in which sovereignty discourse seems to play a fundamental role. Different levels of analysis—historical, political, legal, theoretical, and normative—will weave into my discussion. This discussion aims to make sense of the relationship between the European Convention on Human Rights (ECHR, or simply Convention), the European Union (EU), and Italy. Italy’s Constitutional Court has strongly resisted supranational sovereignty claims, thus raising interesting questions surrounding the conceptualization of sovereignty. My framework, which is both descriptive and normative, inductively looks at the Italian experience and defines sovereignty in terms of *fundamental principles*.

Before moving on to a roadmap of this essay, however, I must clarify what I refer to as “fundamental principles.” Overall, the definition of fundamental *rights*

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1 Seyla Benhabib, *Dignity in Adversity: Human Rights in Troubled Times* at 97 (Polity 2011).

2 Borrowing Professor Neil Walker’s terminology, one may draw a distinction between sovereignty *qua* frame (which allows us to make sense of the legal and political word) and sovereignty *qua* claim (as authority claims made by institutions, agencies, or other entities). See: Neil Walker, *Sovereignty Frames and Sovereignty Claims in Sovereignty and the Law: Domestic, European and International Perspectives* 18–33 (Oxford 2013).



may vary from one polity to the other, often due to historical, cultural, and societal differences.<sup>3</sup> This essay will look at three different orders protecting individual rights: (i) the ECHR, which establishes minimum standards, letting contracting parties create higher protections—if they wish to do so; (ii) the EU, with its evolution from an economic to a constitutional supranational order<sup>4</sup> protecting individual rights, and the Charter of Fundamental Rights of the European Union, entered into force with the Lisbon Treaty in 2009 and based on the ECHR; (iii) the member states' constitutions, which represent the foundation of the previous two and thus often overlap with the rights enshrined by the ECHR and the Charter. Given the high number of decisions handed down every year by the European Court of Human Rights (ECtHR),<sup>5</sup> these three systems of rights do not coincide in some cases, either in theory or in practice. Nevertheless, it is possible to identify a core among these rights-protecting orders, one that is shared both by the regional and the national levels. This core is what I mean by fundamental principles.

Section I of this essay will offer a general outline of the history of the evolution of the concept of sovereignty, both at the level of theory and at that of practice—namely, as frames and as claims. Departing from the Latin notion of sovereign as the supreme *maiestas*, *potestas*, *imperium*, and *auctoritas*, it will trace the modern concept of sovereignty back to Machiavelli, from the Peace of Augsburg (1555) and the Peace of Westphalia (1648), through the theories of Bodin, Hobbes, and Rousseau. This is what I will refer to as the “first wave” of sovereignty. Within this wave, we witnessed two paradigm shifts: (i) from an idea of an individual sovereign to that of institutional sovereignty and (ii) from institutional to popular sovereignty. With this idea of sovereignty in mind, we will move on to the limitation of sovereignty witnessed after WWII, with the international human rights organizations and treaties, and subsequently, to the creation of the European Community and the ratification of the ECHR.

The second section, dealing with the “second wave” of sovereignty, will focus on how the birth of the EU has challenged these now “traditional” views of sovereignty, necessitating new sovereignty frames. It will, first of all, examine the Italian legal system, its courts, and their relationship with the European supranational organizations. After a brief introduction to the legal structure of Italy, I will offer an

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3 See also: Joseph Weiler, *Fundamental Rights and Fundamental Boundaries: on the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space in The Constitution of Europe* at 102–103 (Cambridge 1999).

4 See: Eric Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 1 *American J of Int L* (1981) (As Eric Stein famously put it almost 35 years ago, “Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe.”).

5 See *European Court of Human Rights Statistics 2014* (European Court of Human Rights Oct, 2014), online at [http://www.echr.coe.int/Documents/Stats\\_month\\_2014\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_month_2014_ENG.pdf) (visited Mar 23, 2013) Thus far, in 2014, 72,655 applications have been decided, with 78,000 pending as of November.

analysis of the evolution and “judicial construction”<sup>6</sup> of Europe. First, an economic organization focused on border controls and market building, the European Community, particularly through its Court, began to advance claims that moved beyond its members’ economic goals. Market integration is no longer capable of accounting for and legitimizing the reach of the European Constitution into the member states’ constitutional orders, extending to the protection of individual rights.<sup>7</sup> I will look at landmark decisions by the European Court of Justice (ECJ) that have opened up space in the European sphere for the adjudication and protection of human rights. Such claims by the EU have challenged member states’ sovereignty within their own borders.

The following section will focus on the European Convention and Italy. As I will show, the issue of reconceptualizing a sovereignty framework that can explain the relationship between the two is in some ways analogous to, and in others more challenging than, the needs created by EU integration alone. I will first analyze the history of the relations between the Convention and Italy in light of the jurisprudence of the Italian Constitutional Court (ICtC, *Consulta*, or *Corte Costituzionale*). Next, I will outline the 2001 Italian Constitutional reform, and the following decisions by the ICtC that constructed the ECHR as an *interposed norm*—a sub-constitutional norm that cannot be directly applied by ordinary judges in disregard of national law. I will then discuss instances in which non-constitutional courts have nonetheless justified the Convention’s direct applicability, and particularly of Article 6 on fair trial, by appealing to a triangular argument—namely, by connecting the Italian legal order, the Convention, and EU law. These decisions have *de facto* recognized the ECHR’s sovereignty claims. This discussion, along with Section II on the EU, will set up the historical background against which I inductively propose a frame of sovereignty *qua* fundamental principles.

In Section IV, I will briefly survey two theories developed in light of the scenarios described in Section II. Traditional frames of sovereignty discussed in Section I must be reconceptualized in order to account for the evolution of the European human rights regime.<sup>8</sup> I will analyze more recent theories of sovereignty by Miguel Maduro and Neil Walker in an attempt to shed light on the conflict between national and regional sovereignty claims. By expanding on different aspects of these theories, particularly Walker’s *constitutional pluralism* and Maduro’s *contrapunctual sovereignty*, and by focusing on the common core shared by the different actors of this pluralism, I will construct my own framework of analysis.

Section V outlines the framework of sovereignty *qua* fundamental

6 See Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford 2004).

7 Miguel Poiares Maduro, *Europe and the constitution: what if this is as good as it gets?* in Joseph Weiler and Marlene Wind eds., *European Constitutionalism Beyond the State* 77 (Cambridge 2003).

8 By “European human rights regime,” I mean the pluralistic European system aimed at protecting individual rights, comprised of the European Union and the ECHR.

principles. Descriptively, this lens of analysis explains the Italian Constitutional Court's reaction to the sovereignty claims of the European human rights regime. This framework takes as its starting point the more empirical and legal discussions from Section III. It then expands on the theoretical models analyzed in Section IV, consciously moving at times from the descriptive to the normative sphere. Theoretically, it engages in this task against the history of sovereignty theories surveyed in Section I. Such framework entails a third paradigm shift: from the idea of sovereignty as embodied by an institution to that of sovereignty *qua* fundamental principles.

I will argue that this core of fundamental principles can allow these different systems to work *contrapunctually*<sup>9</sup> within European constitutional pluralism. Principles, as counter-limits, mediate and mitigate these separate, distinct, and intertwined sovereignty-claiming orders; this is because they possess a supreme status and dignity, namely *maiestas*, which renders them *sovereign*. It is by appealing to this concept of sovereignty *qua* fundamental principles that we are able to grapple with the necessity of reconceptualizing and re-framing sovereignty in light of the present relationship between Italy and the European human rights regime.

## I. A BRIEF HISTORY OF SOVEREIGNTY

The history of sovereignty claims and the history of sovereignty frames have been indissolubly intertwined. The following overview of the history of sovereignty will provide my reader with the necessary basic tools and vocabulary for analyzing the present-day debate over this concept. Before doing so, however, I need to make two points. First, it must not be forgotten that this paper as a whole, and in particular the analysis of the concept of sovereignty, is solely concerned with the modern Western tradition. Second, my overall approach—departing from the assumption that sovereignty is an historical concept—is focused on understanding each theory of sovereignty in light of the historical and political background of the time.

For this essay, I will not delve into a discussion of the concept of sovereignty as it was developed in the Roman and early Medieval literature; it will suffice here to briefly flesh out the differences between four Latin terms, whose distinct etymology was blurred over the course of the centuries into the concept of *superanus*.<sup>10</sup> *Maiestas* (from *maior*, “greater”) is connected to the idea of being naturally and necessarily superior, in virtue of some intrinsic higher dignity. *Potestas* (from *possum*, “to be able”) originally denotes the potential intrinsic to

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<sup>9</sup> Meaning “harmoniously.” This concept will be discussed in more details in Section IV. See: Miguel Poiares Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action* in Neil Walker, ed, *Sovereignty in Transition* at 501, 537 (Hart 2003).

<sup>10</sup> For a discussion of these evolutions, see: Nicola Matteucci, *Sovranità* in Lo Stato Moderno, 81–99 (Il Mulino, 1993).

something, which can be activated or suspended by some external will or authority (as in the case of *vitae necisque potestatem habere in aliquem*, to have power of life or death over someone); it is a possibility or faculty to command, though to a lesser degree than *imperium*.<sup>11</sup> *Imperium* (from *impero*, “to order”) is the right and faculty to coercively command and punish in case of non-compliance. Lastly, those who have *auctoritas* (from *auctor*, “author, founder, guarantor” and *augeo*, “to increase”) are able to emanate or validate orders without any coercion, since such commands are perceived as legitimate, coming from—namely, *auctum*, in the sense of being created out of—a source universally recognized as supreme due to some specific qualities.<sup>12,13</sup>

While I believe it is particularly useful to keep in mind the nuances of these terms, over the centuries the supreme *maiestas*, *potestas*, *imperium*, and *auctoritas* have tended to be used as synonyms, converging into what has been referred to as *sovereignty*. In the modern state, over the 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, and 18<sup>th</sup> centuries, this idea began to be defined as the power, within a polity, which is seen as absolute, exclusive, indivisible, inalienable, and imprescriptible. In my historical analysis of this concept, I will depart from the writings of Machiavelli, which I believe mark the beginning of the modern tradition of sovereignty literature. Machiavelli’s *principe*, Bodin’s monarch, Hobbes’s Leviathan, and Rousseau’s people were all vested with the absolute power necessary to maintain peace in times of turmoil. Putting an end to political and religious conflict was the driving force behind the Peace of Augsburg (1555) and the Peace of Westphalia (1648), which had a long-lasting impact on the way in which sovereignty has been perceived in Europe. Only following the World Wars, with the increased relevance of issues of collective security and the creation of international human rights law, did this first wave of sovereignty become descriptively inaccurate and unattainable.

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11 See: Agamben’s discussion on the possibility of suspending and activating *potestas* in: Giorgio Agamben, *State of Exception* at 79 (UChicago 2005).

12 See Emile Benveniste, trans. Elizabeth Palmer, *Indo-European Language and Society* \*422 (Coral Gables 1973), online at <http://chs.harvard.edu/CHS/article/display/3961> (visited Mar 27, 2015) (For a discussion of this meaning of the verb *augeo*, pointing out: “in its oldest uses *augeo* denotes not the increase in something which already exists but the act of producing from within itself; a creative act which causes something to arise from a nutrient medium ... Much the same sense is evident in the uses of the agent noun *auctor*. The term *auctor* is applied to the person who in all walks of life ‘promotes,’ takes an initiative, who is the first to start some activity, who founds, who guarantees, and finally who is the ‘author.’ ... This is how the abstract *auctoritas* acquired its full force: it is the act of production or the quality with which a high magistrate is endowed, or the validity of a testimony or the power of initiative, etc.”).

13 For a discussion on the evolution of this term, see: James Greenough, *Latin Etymologies* at 143–146, *Harv Studies Classic Philology* 4 (1893).

### A. *From the Middle Ages to the Great Revolution*

Even though he never systematically addressed this concept, the writings of Niccolò Machiavelli (1469–1527) represent a crucial first step for the modern theory of sovereignty. Machiavelli was writing at a time in which numerous city-states (including Firenze, Milano, and Venezia) as well as the papacy, France, and the Holy Roman Empire were fighting for control of Italy. Conflict and corruption were widespread. Machiavelli's response, in light of this historical backdrop, was a conceptualization of sovereignty as performative human agency. The sovereign, as the one described in *Il Principe*, must be able to act as he deems necessary to maintain a flourishing city-state. As Machiavelli wrote, a prince who wishes to preserve his own power must learn how “not to be good,” and how to use this ability according to necessity;<sup>14</sup> in fact, the prince may often be forced to act “against his faith, against charity, against humanity, and against religion.”<sup>15</sup> He must be able to act against natural law in order to foster the strength and order of its city-state. The prince must possess *virtù*—those personal qualities necessary to a competent application of power, leading to the accomplishment of “great things”—and is guided by *ragione di stato* (*reason of the state*). In order to act in such a way, the prince must have absolute and excessive power to limit the ambition and corruption of other powerful members of society.<sup>16</sup> As Louis Althusser puts it, “Machiavelli's Prince is an absolute sovereign to whom history assigns a decisive ‘task’: ‘giving shape’ to an already existing ‘material,’ a matter aspiring to its form—the nation.”<sup>17</sup> Sovereignty, for Machiavelli—just like the Laws in Plato's *Crito*—is personified: it is that absolute agency that is able to establish and maintain the foundation of the state.

As Joseph Strayer claimed, the English and French monarchs may have been considered sovereigns as early as the 14<sup>th</sup> century<sup>18</sup>—in the Machiavellian sense of the term. Only over two centuries later, due to the long-lasting conflict between sovereigns and over sovereignty, Europe saw the birth of a somewhat codified system of sovereign states. It was not until 1555 with the Peace of Augsburg that the inviolability of state sovereignty, through the principle of *cuius regio eius religio* (whose realm, his religion [must be followed]), was recognized. The Peace of Augsburg, between Charles V and the alliance of Lutheran princes (Schmalkaldic League), officially ended the religious struggle within Europe. Its provision of *cuius regio eius religio* allowed German princes to enforce their own faith within their territory—whether it be Lutheranism or Catholicism. This marked

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14 Niccolò Machiavelli, trans. Peter Bondanella, *The Prince* at 53 (Oxford 2005).

15 *Id* at 61.

16 Niccolò Machiavelli, trans. Harvey Mansfield and Nathan Tarcov, *Discourses on Livy* at 112 (UChicago 1996).

17 Louis Althusser, trans. Gregory Elliott, *Machiavelli and Us* at 13 (Verso 1999).

18 Joseph Strayer, *On the Medieval Origins of the Modern State* at 3–56 (Princeton 1970).

the recognition of the power of the prince as sovereign over his own territory, to regulate its subjects' religion independently from the Pope and the Holy Roman Empire. However, the Peace of Augsburg was unstable; many critical problems arose, in particular due to the absence of any protections for confessions such as Calvinism, culminating in the Thirty Years War.

Jean Bodin (1530–1596) was arguably the first philosopher to thoroughly theorize the concept of sovereignty.<sup>19</sup> His major work, *Six Livres de la République*, was written in 1576, only four years after the St. Bartholomew's Day massacre, a series of assassinations targeted against the Huguenots (French Calvinist Protestants). His goal was strengthening the power of the king and creating a structure capable of bringing about peace in the midst of the conflicts following the Peace of Augsburg. Bodin hoped that an absolute sovereign—removed from any theory of divine right—could moderate the religious conflicts that were lacerating France. He focused on the sovereign's obligation, rather than need, to maintain the state.<sup>20</sup> Both Bodin and Machiavelli “felt that the times were desperately sick, and were in deep need of a doctor who would cure them by wielding unlimited power.”<sup>21</sup> Just like Machiavelli, Bodin saw sovereignty as belonging to the individual (a monarch) who represented the State's authority; however, he did not rule out the possibility of an *undivided* sovereign assembly or people. For Bodin, the *souveraineté* is the “supreme, [perpetual,] and absolute power over citizens and subjects” (*maiestas est summa in cives ac subditos legibusque soluta potestas*, where the sovereign is other times referred to as *summum imperium*).<sup>22</sup> Bodin sketched a concept of sovereignty in terms of legal theory. The sovereign is responsible for creating and executing the laws; it is the ultimate, positive lawgiver, and thus can also modify, abrogate, or suspend the laws. According to Carl Schmitt, the central question addressed by Bodin is: “To what extent is the sovereign bound to laws, and to what extent is he responsible to the estates?”<sup>23</sup> Unlike Machiavelli, Bodin believed that the sovereign is bound by natural, or divine, law. As Max Shepard puts it, for Bodin, “a sovereign in the fullest sense, as distinguished from a tyrant, has *potestas* and *imperium* but not *dominium* [power over private property], a truly legal difference.”<sup>24</sup> The sovereign cannot be immune to *all* laws, but only to positive law. Natural law limitations on sovereignty stem from principles such as the necessity to abide by agreements and to respect private property. It is unclear,

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19 Bartelson, Jens. *A Genealogy of Sovereignty* at 141 (Cambridge 1995).

20 Harvey Mansfield, *Machiavelli's Virtue* at 281–294 (UChicago 1996).

21 Friedrich Meinecke, trans. Douglas Scott, *Machiavellism: The Doctrine of Raison D'État and Its Place in Modern History* at 58 (Transaction 1998).

22 Julian Franklin, *Bodin: On Sovereignty* at 1 (Cambridge 1992).

23 Carl Schmitt, trans. George Schwab, *Political Theology: Four Chapters on the Concept of Sovereignty* at 8 (UChicago 2005).

24 Max Shepard, *Sovereignty at the Crossroads: A Study of Bodin*, *Political Science Quarterly* 589 (1930).

however, what Bodin believed the ends of the state should be, except the very self-presentation of the state itself. The highest good was neither merely Aristotle's *eudaimonia* nor material utility. And therefore, as George Sabine points out, Bodin failed to explain the reason why citizens must obey the sovereign.<sup>25</sup> Bodin removed the idea of divine right, but then did not offer a natural theory of the aggregation of individuals, nor of the source of sovereignty. Hobbes did.

Thomas Hobbes (1588–1679) outlined a theory of the creation and justification of sovereignty under the framework of the social compact. Hobbes's theory is a direct offspring of the English Civil Wars. The *Leviathan* was written in France during the 1640s, where Hobbes—affiliated with the royalist faction—fled for fear of being persecuted due to his monarchical orientation<sup>26</sup>. Similar to Bodin, who wrote during a time of conflict, Hobbes defined sovereignty as the absolute, indivisible, unified, unlimited power, placed above the law. In both England and France, the monarch had up until then been unable to be truly sovereign; Bodin's theory was meant to support the necessity of an absolute government, which he associated with an absolute monarch. However, unlike Bodin, who held that “a society or a community is rooted in mutual affection” and in the unit of the family, Hobbes argued that individuals were united solely by their individual subjection to a common power: man is not social, but selfish.<sup>27</sup> In the state of nature, every man is enemy of every man, forming a mere multitude subsisting in a state of solitude.<sup>28</sup> In order to “bridle [men's] ambition, avarice, anger, and other Passions,” there is the need for coercive power (*summam potestatem*); reason suffices for the creation of such power, but not for the bridling of self-interest.<sup>29</sup>

The people thus create a commonwealth, a corporation, and appoint a man, or an assembly of men, as its head, i.e., its sovereign. For Hobbes, a monarch is best suited to ensure peace, stability, and the preservation of the commonwealth by preventing individuals from harming each other, but he did not outright reject other forms of government. “The laws of nature are the postulates by which Hobbes's rational construction of society is to take place.”<sup>30,31</sup> Hobbes, unlike both Bodin

25 George Sabine, *A History of Political Theory* at 403–404 (Holt, Rinehart and Winston, 1961).

26 Tuck, Richard, ed. *Hobbes: Leviathan* at x (Cambridge 1996).

27 Bodin, Jean. *Six Books of the Commonwealth*, trans. by M. J. Tooley at 97 (Blackwell UK 1955).

28 Quentin Skinner, *The Sovereign State: a Genealogy* in Hent Kalmo and Quentin Skinner, eds, *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* at 35–36 (Cambridge 2010).

29 Richard Tuck, ed, *Hobbes: Leviathan* at 96 (Cambridge 1996).

30 George Sabine, *A History of Political Theory* at 465 (Holt, Rinehart and Winston, 1961).

31 See: Richard Tuck, ed, *Hobbes: Leviathan* at 91–115 (Cambridge 1996) (Hobbes's first law of nature is: “a man is forbidden to do, that, which is destructive of his life, or taketh away the means of preserving the same; and to omit, that, by which he thinketh it may be best preserved.” The second law of nature is derived from the first one: “a man be willing, when others are so too, as far-forth as for peace and defence of himself he shall think it necessary, to lay down this right to all things, and be contented with so much liberty against other men as he would allow other men against himself.” Hobbes lists seventeen additional laws of nature.).

and Machiavelli, distinguished the state from society, thus creating a concept of the state as representation of society—an “impersonal state [conceived] as an artificial person whose words and deeds were ‘owned’ by his subjects.”<sup>32,33</sup> Hobbes does not identify sovereignty as residing in one human being (a monarch) but rather in the state—namely, the fictitious person that represents the unification of a multitude into a political unity. This unity is brought to life by the social compact.<sup>34</sup> In contrast to his predecessors, Hobbes discusses how the unity of will created out of the multitude of individualisms is institutionalized and transformed into the logic of the state. Sovereignty, for Hobbes, is about the logic of the operation of the state. The compact of sovereignty emerges through an act of authorization: it is not a contract between a sovereign and the people, but rather between all individuals who transfer their natural rights to the commonwealth. The monarch, therefore, cannot possibly be more powerful than its subjects.<sup>35</sup>

The period of turmoil that sparked the philosophical theories of Bodin and Hobbes did not end until 1648 with the Peace of Westphalia. As Andreas Osiander puts it, “the 1648 peace [of Westphalia] was the outcome of the breakdown of the Augsburg religious peace of 1555.”<sup>36</sup> Peace of Westphalia commonly refers to a series of treaties signed between May and October 1648 in Osnabrück and Münster. Leo Gross explains that the Treaties of Osnabrück and Münster provided some protections for religious minorities, established measures for the maintenance of peace, and legitimized military intervention as a means of enforcement of the Treaties.<sup>37</sup> However, in order to account for the role played by the Peace of Westphalia in international relations, one must “search not so much in the text of the treaties themselves as in their implications, in the broad conceptions on which they rest and the developments to which they provided impetus.”<sup>38</sup> What Gross refers to is the “laicization of international law” and of the principle of territorial exclusivity.<sup>39</sup> The old world, a Christian commonwealth organized in a hierarchical fashion around the spiritual and temporal authority of the Pope and Emperor, was revolutionized with Westphalia. The new system was characterized by the coexistence of a multiplicity of equal states, sovereign within their own territory, and free from interference by any external authority.<sup>40</sup>

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32 Harvey Mansfield, *Machiavelli's Virtue* at 294 (UChicago 1996).

33 Richard Tuck ed. *Hobbes: Leviathan* at 111–112 (Cambridge 1996).

34 *Id.* at 120.

35 *Id.* (“This done, the Multitude so united in one Person, is called a COMMON-WEALTH”). I’m also grateful to Professor Boris Kapustin for these ideas.

36 Andreas Osiander, *Sovereignty, International Relations, and the Westphalian Myth* 270 *International Organization* 55.02, 270 (2001).

37 Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 *American Journal of International Law* 20, 21–25 (1948).

38 *Id.* at 26.

39 *Id.*

40 *Id.* at 28.



While it must be recognized that Westphalia did not just “create” a sovereign states system, it is nevertheless true that it had significant impact on sovereignty within Europe. First, by separating each state from the Holy Roman Empire and the Papacy, the Peace of Westphalia allowed for the birth of *in nuce* (*newly beginning*) sovereign states. Second, Westphalia re-enforced the Augsburg principle of *cuius regio eius religio*, allowing each sovereign to regulate religion within his own territory—without having to answer to the Emperor or the Pope, which in previous periods were free to impair a prince’s sovereignty.<sup>41</sup> In this sense, the sovereignty of the princes over religion within their own territories was finally established, after the ruinous attempt of 1555.

Post-Westphalia, and following Hobbes, the idea of the sovereign state as a distinct, fictitious person from the people was firmly entrenched in Europe. It was in this environment that Louis XV was able to claim: “It is in my person alone that sovereign power resides.”<sup>42</sup> Jean-Jacques Rousseau (1712–1778) published *Du Contrat Social ou Principes du Droit Politique* in 1762, at a time of political despotism and inequality that built up until the French Revolution. His aim was pushing back against this idea of *l’État, c’est moi*. Like Bodin and Hobbes, Rousseau preserved the idea of an indivisible and inalienable sovereign; however, he importantly distanced himself from his predecessor in his identification of the sovereign as the collective people, ruling through the *volonté générale* (*general will*).<sup>43</sup> Rousseau believed that sovereignty did not arise from the state but rather from the unity of the people—and it indeed belongs to the people, as an associative body of citizens. It is a voluntary act of all citizens, exercising their natural freedom to submit themselves to the deliberations and decisions of the sovereign as it declares its will, the general will.<sup>44</sup> Sovereignty, for Rousseau, is absolute, sacred, and inviolable.<sup>45</sup> Laws are created by the sovereign, as a unity of equal citizens, and, while the people may delegate some powers to the government, they can also withdraw them. Sovereignty is inalienable and, thus, the government is not a *representative* of the sovereign people.<sup>46</sup> For Rousseau, “so long as a number of men gathered together consider themselves as a single body, they have a single will

41 For a position of disagreement, see: Andreas Osiander, *Sovereignty, International Relations, and the Westphalian Myth* Organization 55.02, 272 (2001).

42 Nicholas Dent, *Rousseau* at 135 (Routledge 2005).

43 Jean-Jacques Rousseau, *Discourse on Political Economy and The Social Contract* at 67 (Oxford 1994) (As Rousseau claims, “If the state or City is solely a collective person which exists through the union of its members, and if its fundamental concern is its own conservation, it must have a coercive force of universal scope, in order to move and control each part in the manner most advantageous to the whole.”).

44 Dent, *Rousseau* at 147 (cited in note 42).

45 Rousseau, *Discourse on Political Economy* at 70 (cited in note 43).

46 *Id* at 127 (“Sovereignty cannot be represented, for the same reason that it cannot be transferred; it consists essentially in the general will, and the will cannot be represented; it is itself or it is something else; there is no other possibility”).

also, which is directed to their common conservation and to the general welfare.”<sup>47</sup> The people can only be truly sovereign if every member of society participates in the expression of the general will—that is, popular sovereignty.

This discussion of the history of sovereignty frames and claims will be instructive for the later sections on the re-framing of sovereignty in light of the relationship between Italy and the European human rights regime. These theories function as the backdrop against which any theory of sovereignty is necessarily compared, and provide the analytical tools for the creation of new paradigms. First with Bodin, and then more sharply with Hobbes and Rousseau, we see a move away from Machiavelli’s individualism, towards the idea of sovereign structures and institutions. All of these theories have explored the idea that sovereignty was absolute, indivisible, unified, and unlimited—in some more or less explicit way conflating the ideas of *maiestas*, *potestas*, *imperium*, and *auctoritas* into the figure of the sovereign. The interests that each sovereign represents, however, are different: they evolved from the individual interests of the prince, to the overall interests of the state, to the interests of the people. There was also a paradigm shift through the centuries. Sovereignty no longer resides in the individual monarch, but has become a fictitious person, an institution, either as a representation of the individual citizens, or as the people themselves. Accepted for centuries, the historical paradigm of sovereignty as absolute, inalienable, and unified has become inadequate and must be reconceptualized. Over the last seventy years, following WWII, the creation of international organizations, and particularly in light of European integration, a highly fragmented system of sovereignty claims came into being. The ideal—arguably never fully reached, but rather only fictitious—of an absolute sovereign unity was openly challenged by the pluralism of sovereign claims during the 20<sup>th</sup> century, thus demanding a new approach.

### B. *After the World Wars: International Human Rights Norms*

The World Wars, in a way, proved that the equilibrium between European powers allegedly achieved post-Westphalia had gradually deteriorated to the point at which it was unable to ensure stable and peaceful relations among nations, which had now extended far outside the boundaries of Europe. From the traditional idea of sovereignty as a way of fostering peace within national borders, the World Wars introduced a new necessity, namely that of collective security. Three hundred years after the Peace of Westphalia (1648), which stood up for the rights of the sovereign nation state to regulate internal matters, the Genocide Convention and the Universal Declaration of Human Rights (UDHR) (1948) proclaimed the rights of the individual. Following the World Wars, many international leaders felt the necessity, more pressing than ever, to limit state sovereignty. If the goal

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<sup>47</sup> Id at 70.

of maintaining peace within the state prompted earlier theorists to auspicate for a stronger, absolute, unified sovereign, the struggle for world peace urged a move away from absolute sovereignty. States wanted to shift some sovereign rights to a supranational level, abridge states' rights to freely enter into war, and create accountability for sovereign states in the international sphere. The exaltation of absolute and unrestrained state sovereignty was seen as the cause of WWI.

The creation of international human rights obligations, in a sense, has aimed at bringing about this kind of accountability at the international level.<sup>48</sup> Thomas Pogge has advocated for an even wider dispersion of sovereignty in the vertical dimension in order to protect the cosmopolitan citizen from violations of human rights.<sup>49</sup> Many theorists, however, have seen human rights as compromising the more traditional notions of sovereignty, discussed in Section I.a.<sup>50</sup> John Rawls<sup>51</sup> and Joseph Raz,<sup>52</sup> among others, have argued that human rights are limitations to the *external* dimension of states' sovereignty. Others, such as Professor Seyla Benhabib, believe that human rights norms—"while prying open the black box of state sovereignty"<sup>53</sup> actually strengthen rather than weaken popular sovereignty through processes of "democratic iterations,"<sup>54</sup> which provide human rights norms with "flesh and blood."<sup>55</sup> Without referring to the question of the ontology of human rights, this section will take an historical perspective and sketch the rise of the concept of human rights *vis-à-vis* sovereignty. As I will later discuss, it was only with the European Court of Human Rights that human rights were adjudicated against nation-states; it is a sub-category of these rights, which I refer to as fundamental principles, that play a crucial role in our present-day concept of sovereignty.

Following WWI, the need for an international order, capable of promoting

48 See Section VIII on "Human Rights" in: Samantha Besson and John Tasioulas eds., *The Philosophy of International Law* at 321-373 (Oxford 2010) (I must note here that my brief remarks on the relationship between human rights and sovereignty are merely descriptive, and do not wish to enter into the discussion surrounding the ontology of human rights, divided between what we may call "functionalist" and "foundationalist" approaches).

49 See Thomas Pogge, *Cosmopolitanism and Sovereignty*, 103 *Ethics* 48, 75 (1992). (Pogge argues against the concentration of sovereignty at a single level, namely the national one, something that is no longer defensible from the standpoint of cosmopolitan morality).

50 Stephen Krasner, *Sovereignty: Organized Hypocrisy* at 105-126 (Stanford 1999).

51 John Rawls, *The Law of Peoples* at 27 (Harvard 2000).

52 Joseph Raz, *Human Rights without Foundation* in Samantha Besson and John Tasioulas, eds. *The Philosophy of International Law* 1, 328 (Oxford 2010).

53 Benhabib, *Dignity in Adversity* at 98 (cited in note 1).

54 See: Seyla Benhabib, *The Future of Democratic Sovereignty and Transnational Law*, "On Legal Utopianism and Democratic Skepticism," Straus Institute Working Paper Series 3/12 41-42 (2012). (Democratic iterations are "complex processes of public argument, deliberation and exchange through which universalist rights claims are contested and contextualized, invoked and revoked, posited and positioned throughout legal and political institutions as well as in the associations of civil society").

55 Benhabib, *Dignity in Adversity* at 130 (cited in note 1).

international rule of law and peace, became palpable.<sup>56</sup> Woodrow Wilson, 28<sup>th</sup> President of the United States, strongly pushed for the creation of a league of nations, one ideally based on the notion that aggression against one member is aggression against all member states.<sup>57</sup> In 1919, concerns over the situation of the Jews in Eastern Europe led to the birth of the League of Nations minority rights regime. Minority rights became the tool used by the League to legitimize and recognize states, as testified by the numerous unilateral declarations, bilateral treaties, and multilateral treaties signed right in the aftermaths of WWI.<sup>58</sup> But European powers were skeptical, and the United States eventually failed to join. The goals of the League of Nations were noble; however, while the League did indeed succeed in unifying nations into an international community, its impotence made it unable to prevent Italy's invasion of Ethiopia in 1936. Ultimately, it failed to stop sovereign states from entering into another World War.

Established on October 24, 1945 to promote international cooperation, the United Nations (UN) replaced the League of Nations with the goal of preventing further global conflicts. Like the League of Nations, the UN was a community of independent states, but it explicitly rested on the doctrine of the sovereign equality among its members.<sup>59</sup> As Mark Mazower pointed out, "the UN, even more than the League, was to be run by the great powers and far less confidence was reposed in international law as a set of norms independent from, and standing above, power politics."<sup>60</sup> Unlike the League of Nations, dominated by European powers, the UN saw the emergence of the United States as the new world power—with Europe bent on its knees following WWII. Over the years, the UN General Assembly emerged as more powerful than the drafters of the Charter had originally planned, with the clear objective of breaking up the colonialist empires. Many nations gained independence during this wave of decolonization and joined the UN.

Unlike the League of Nations, which mostly focused on minority rights, the post-WWII era has been characterized by *human* rights. Even though the United Nations "is based on the principle of the sovereign equality of all its Members,"<sup>61</sup> some have argued that the signing of UN Treaties by nation-states has circumscribed their sovereignty; others saw this act as a manifestation of states' sovereignty.<sup>62</sup> This debate parallels our upcoming discussion of the case of the European Union and its limitations on member states' sovereignty. Numerous

56 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* at 124 (Cambridge 2007).

57 *Id.* at 127.

58 Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* at 24 (Princeton 2013).

59 *Id.* at 149.

60 *Id.* at 150.

61 UN Charter Art 2.

62 Michel Troper, *The Survival of Sovereignty* in Hent Kalmo and Quentin Skinner, eds, *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* 1, 140 (Cambridge 2010).

international human rights agreements have been signed since 1945, most under the umbrella of the UN. The UN today has 193 member states and has sponsored almost 300 human rights treaties, conventions, covenants, and protocols, including those of specialized and regional organizations.<sup>63</sup>

The Genocide Convention and the UDHR are emblematic of this shift toward human rights norms. Over the course of two years, starting in December 1946, the General Assembly debated a convention on genocide, particularly due to Raphael Lemkin's lobbying.<sup>64</sup> In December of 1948, a day before the UDHR was approved by the Assembly, the Genocide Convention was adopted unanimously. It was eventually ratified two years later. However, only the stripping of the clause on cultural genocide—seen as a threat to smuggle into the Convention minority rights—allowed for its adoption.<sup>65</sup> Minority rights were believed to belong to the past, to the League of Nations; the world was now moving toward the concept of human rights, which were seen as powerful enough to shape public opinion and power politics, instead of merely recognizing the fragmentation of states into minorities. The UDHR represents a clear step in this direction. After three years of debate, in 1948, the UN General Assembly adopted the Universal Declaration of Human Rights. The declaration specifies personal rights such as: fair and public hearings by an independent and impartial tribunal; the right to the freedom of thought; and, the prohibition against arbitrary arrests, detentions, and cruel, inhuman, or degrading punishment. However, neither the Genocide Convention nor the UDHR gave rise to rights enforceable in front of an adjudicating body and did little to deter mass human rights violations in the upcoming years. The world had to wait for the Treaty of Rome and the case law of the European Court of Justice to see the rise of a legally enforceable human rights regime, which created strong sovereignty claims directly clashing with the sovereignty of member states.

This shift in focus from national to international peace, the addition of interests larger than the maintenance and preservation of peace within a polity's territorial borders, and the emphasis on human rights as means to achieve such goals have shed some doubts on the very possibility of unified sovereignty. Post-1945, the world has witnessed the appearance of multiple sources of sovereignty claims. While the theories and the history of the concept of sovereignty that I have outlined earlier in this section have to be rethought, the fundamental analytical tools and overall frameworks they established remain useful in understanding sovereignty in the 20<sup>th</sup> century, as shown in the upcoming discussion of European integration. With the UN Charter, and in particular Article 55 and 56, we saw the unprecedented recognition that a state's behavior infringing upon the human rights

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63 Data retrieved by the author from: University of Minnesota Human Rights Library. *International Human Rights Instruments*. Last updated on Nov 10, 2014, online at <http://www1.umn.edu/humanrts/instrument/instree/ainstls1.htm> (visited Nov 14, 2014).

64 Mazower, *No Enchanted Palace* at 128–29 (cited in note 58).

65 Id at 130–31.

of its citizens is a matter of international concern. The idea of external sovereignty clashed with the concept of human rights, but no court existed to adjudicate over such a dispute. This was not the case in the European Union.

## II. ITALY AND THE EUROPEAN UNION: A SHIFT IN PERSPECTIVE

European integration has circumscribed the external dimension of state sovereignty. By briefly reconstructing the evolution of European integration and the birth of the European Union—with a particular attention to Italy and its Constitution—I set two objectives. First, I will outline the evolution of the conflict between claims to sovereignty of both the member states and the EU, a regional organization that was striving to obtain authority over matters that went exponentially beyond its initial focus on market integration and border controls. Second, by pointing out these different perspectives—the member states' and the EU's—over the respective claims to authority, I will show how a space was opened for a European dialogue on fundamental rights and a new understanding of sovereignty. This second wave of sovereignty directly challenged the idea of sovereignty as an absolute unity, creating a pluralism of sovereignty claims that were (at least at first) strongly rejected by Italy. This opposition, which I will discuss in more detail in Section II.b (regarding the EU) and in Section III (concerning the ECHR), raises interesting questions on the nature of sovereignty today.

After the establishment of the European Coal and Steel Community in 1951 (ECSC) and the creation of the European Economic Community (EEC) by the Treaty of Rome in 1957, the aims of the European Community were merely economic, and mostly focused on border controls, market integration, and eventually monetary union. Belgium, the Netherlands, and Luxemburg (BeNeLux)—as well as France, Germany, and Italy—signed the Treaty of Paris establishing the ECSC. This community was, at least in part, the outcome of the 1950 Schuman Declaration, in which the French Foreign Minister advocated for a supranational community ensuring

the supply of coal and steel on identical terms to the French and German markets, as well as to the markets of other member countries; the development in common of exports to other countries; the equalization and improvement of the living conditions of workers in these industries; [...] the establishment of compensating machinery for equating prices, and the creation of a restructuring fund to facilitate the rationalization of production. The movement of coal and steel between member countries will immediately be freed from all customs duty, and will not be affected

by differential transport rates.<sup>66</sup>

The Treaty of Paris also gave birth to the High Authority (now the European Commission) and the Common Assembly (European Parliament). The goal of the ECC, namely a balanced economic growth, was to be sponsored by the establishment of a customs union with a common external tariff and common policies for agriculture, transport, and trade. On the one hand, countries like the BeNeLux, with their export-oriented approach and already low tariffs, favored a liberal trade policy with third countries, reducing the common market custom duties; on the other hand, countries like Italy, with less competitive economies, pushed for a high common market tariff, protecting themselves from external competition and strengthening their bargaining position in relation to third countries.<sup>67</sup>

This essay, however, does not wish to indulge in an account of the evolution of the European Community from an economic to a political and constitutional order, a discussion that simply falls outside of its scope.<sup>68</sup> In a nutshell, I only highlight the market building efforts that first guided the activity of the ECJ, aimed at creating the foundation for an integrated economy through the harmonization of the different national legal orders. As Miguel Maduro points out, this act of market building shifts the rationality of market agents and political actors away from the national sphere: it “focuses on promoting the new set of rights brought by the larger integrated area and to break the path-dependence of actors from national systems.”<sup>69</sup> It suffices to say that, following the 1960s and 1970s, the goal of market integration was no longer capable of accounting for, and legitimizing, the reach of the European Constitution into the member states’ constitutional orders.<sup>70</sup> The claims made by the European Community over the course of the years, moving away from an exclusively market-oriented agenda, have had important repercussions on the sovereignty claims of the member states, as well as on the theory of sovereignty frames.

### A. *Italian Sovereignty? The Italian Judicial Structure and the Constitution*

In Section II.b I will look in more detail at the evolution of the European

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66 See *The Schuman Declaration – 9 May 1950* (European Union), online at [http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index\\_en.htm](http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm) (visited July 20, 2015).

67 Raymond Bertrand, *The European Common Market Proposal*, 10 *International Organization* 559, 561 (1956).

68 See Joseph Weiler, *The Constitution of Europe* at 10–101 (Cambridge 1999). (for a discussion of this evolution)

69 Miguel Poiares Maduro, *We the court: the European Court of Justice and the European Economic Constitution* at 88 (Hart 1998).

70 Maduro, *Europe and the constitution: what if this is as good as it gets?* at 77 (cited in 7).

Constitution, focusing in particular on the doctrines of direct effect, supremacy, and human rights protections—which most evidently impacted the sovereignty of member states. This discussion becomes relevant for our present goal of re-framing sovereignty in the case of Italy. Italy’s Constitutional Court most strongly upheld its own jurisdiction over conflicts between national and supranational law, refusing to outright recognize any hierarchical superiority of the latter over the former. Before examining the ways in which the Italian legal order has been adapting to and resisting European integration and its sovereignty claims, I will outline the judicial structure of the Italian system, so that the reader will have a better understanding of the different actors involved.

Italy has three supreme courts. Besides the *Corte Suprema di Cassazione* (Supreme Court of Cassation, for criminal and civil matters) and the *Consiglio di Stato* (Council of State, for administrative matters), Italy also has a *Corte Costituzionale* (Italian Constitutional Court, or ICCt, or *Consulta*). Historically, the relationship between the *Corte Costituzionale* and the *Cassazione* has been tense. At times it has earned the appellation of “war of the courts” (*guerra tra le due corti*), as was the case in 1965<sup>71</sup> and again between 1998 and 2005.<sup>72</sup> While the two courts have different kinds of jurisdiction and duties, the force (or lack thereof) of their decisions and their encroachment on one another have been sources of tension and conflict.

The *Corte Costituzionale* is only activated by preliminary references submitted by other courts; it has sole and ultimate jurisdiction over questions of constitutionality of statutory laws, and has the power to declare them void. Notably, the ICCt has no direct capacity to review the constitutionality of final judgments adopted by other national courts.<sup>73</sup> The *Corte di Cassazione* is the highest court of last resort; its duty is to “ensure the exact observance and the uniform interpretation of the law.”<sup>74</sup> All of the decisions by the *Cassazione* have only persuasive authority, and its precedents do not have any *erga omnes* effect (that is, other courts are not bound by a decision). The same can be said for one of the favorite ruling mechanisms employed by the *Consulta*—namely, the interpretative decision of rejection (*sentenza interpretativa di rigetto*).<sup>75</sup> Since these decisions

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71 John Henry Merryman and Vincenzo Vigoriti, *When Courts Collide: Constitution and Cassation in Italy*, *The American Journal of Comparative Law* 665, 686 (1966).

72 Elisabetta Lamarque, *Il seguito delle decisioni interpretative e additive di principio della Corte costituzionale presso le autorità giurisdizionali (anni 2000-2005)*, 3 *Rivista Trimestrale di Diritto Pubblico* 717 (2008).

73 See: Valeria Marcenò and Zagrebelsky Gustavo, *Giustizia Costituzionale* (Il Mulino 2012).

74 See: Article 65 in Royal Decree n. 12 (January 30, 1941).

75 In a *sentenza interpretativa di rigetto*, the statutory interpretation of the lower judge is rejected, as well as the question submitted; the ICCt advances its own interpretation of the law, according to which the law is constitutional. Implicitly, the ICCt rejects all of the other possible interpretations of the law. This decision, unlike sentences of admission (*sentenza di accoglimento* and *interpretativa di accoglimento*) does not have an *erga omnes* effect. There can be two kinds of *sentenza interpretativa*



are not binding, unlike sentences of admission (*sentenze di accoglimento*), it is possible for the two courts to legitimately contradict each other by advancing different interpretations and doctrines. This internal tension has incentivized some degree of horizontal dialogue between the courts, and as I will later argue, it undeniably had an effect on the reception of the Treaty of Rome and the European Convention on Human Rights in the Italian legal system. It seems, in fact, to have been thanks to the activist role played by the *Cassazione* and ordinary judges that the ICCt was pushed to give up on its strict dualist view in regards to the EU law first, and to some extent, to the Convention later on.

The Italian Constitution of 1948 makes explicit reference to the concept of *sovereignty* twice. Pursuant to Article 1, “Sovereignty belongs to the people and is exercised by the people in the forms and within the limits of the Constitution.”<sup>76</sup> Originally, the draft read “emanates” instead of “belongs.”<sup>77</sup> This Rousseauian concept of popular sovereignty, which from the multiplicity of wills emanates one general will,<sup>78</sup> should be seen as an attempt to move farther away from the Fascist totalitarian regime headed by Mussolini, whose absolutist sovereign powers arose out of a state of exception. As Justice Marta Cartabia points out, Article 1 also outlines a contrast between the concepts of popular sovereignty and that of state sovereignty. According to her, “the key to resolving the quandary was found in the second part of article 1: the people exercise their sovereignty in the manner, and within the limits, laid down by the Constitution.”<sup>79</sup> Cartabia’s solution, however, seems to be only partial, and further complicates the puzzle of sovereignty. Could it be that the conflict between the sovereignty of the people and the sovereignty of the state, as exemplified by Article 1, simply results in an implicit declaration of the sovereignty of those norms and principles fundamental to the constitutional order? If so, who would be responsible for interpreting them? This essay aims at answering these questions.

The constitutional provision that has had the most tangible impact on Italy’s sovereignty is Article 11. According to Article 11, “Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may

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di rigetto:

i. *Sentenza correttiva* (corrective decision): in the case in which the interpretation of the ordinary judge moved out of the “living law” sphere (*diritto vivente*), the ICCt proposes its own interpretation, in conformity with the living law;

ii. *Sentenza adeguatrice* (adaptive decision): in the case in which no prevailing interpretation has been established by the living law, the ICCt provides a novel interpretation, which is in conformity with the constitution.

<sup>76</sup> Italy Const Art I.

<sup>77</sup> Giuseppe Branca, *Commentario della Costituzione* at 23 (Zanichelli 1975).

<sup>78</sup> *Id* at 23.

<sup>79</sup> Marta Cartabia, *The Legacy of Sovereignty in Italian Constitutional Debate* in Neil Walker ed., *Sovereignty in Transition* 1, 312 (Hart 2003).

be necessary to a world order ensuring peace and justice among the Nations.”<sup>80</sup> As in the case of Article 1, this provision can be read as an attempt to supersede the concept of absolute state sovereignty. As Antonio Cassese pointed out in his commentary on Article 11, the Italian founding fathers introduced such a clause while having in mind both the alliance with the USA (as opposed to the USSR), as well as international organizations like the United Nations. Any reference to a community of European nations, while proposed by various members of the constitutional assembly, was eventually excluded. Such mention was believed to be implied by the wording, which was later approved; in addition, some felt the need to clearly allow for limitations of sovereignty not only at the European level but also among all nations.<sup>81</sup> The absence of a direct reference to Europe in the Constitution, however, turned out to be a source of debate, especially during the 1960s, when the far-reaching jurisprudence of the ECJ began to create a pluralism of sovereignty claims.

Article 11 has been used as a legal basis for Italy’s joining the European Union, but the limited transfer of sovereignty to the EU had to be construed in compatibility with the whole Constitution. This is because the people of Italy are the holders, as a unity, of sovereignty. Thus, to what extent can sovereignty be transferred from the Italian people to the European supranational structures, and yet still remain with the people? The Constitution allows for limitations of this sovereign power, thus allowing for a pluralist rather than a unified sovereign. However, nothing is explicitly said on the extent of such limitations.

### B. *The Italian Legal Order and the Evolution of the European Union*

The sovereignty of the people described in the Constitution was threatened by this external entity (the European Union) that was presenting itself as a higher source of authority. It was perceived to be infringing on the absolute nature of Italy’s sovereignty. Soon after the Treaty of Rome, EU law, through the ECJ, claimed not only direct applicability within national jurisdictions, as stated in *Van Gend en Loos* (1963), but also supremacy over national laws (*Costa v ENEL*, 1964). Italy, and in particular the ICCT, was reluctant to accept such propositions. What implications have these limitations had on Italy’s sovereignty, and more generally on the concept of sovereignty? I will answer this question by addressing the aforementioned decisions in turn. As I will argue, these sovereign powers allowed the European Union to create a space within which individual rights could be adjudicated at the European level. This discussion, along with Section III on the ECHR, will set up the historical background against which I propose a frame of sovereignty *qua* fundamental principles.

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<sup>80</sup> Ita Const Art XI.

<sup>81</sup> Guisepe Branca, Vol. 1 *Commentario della Costituzione* at 578 (Zanichelli 1975).

It was with this institutional structure in the background—namely, three supreme courts and no explicit mention of Europe in the Constitution—that, in the 1960s, the ECJ began making strong claims to sovereignty. This process, what Professor Stone Sweet refers to as the *constitutionalization* of the European Community, led to the evolution of the Treaty of Rome from “a set of legal arrangements binding upon sovereign states into a vertically integrated legal regime conferring judicially enforceable rights and obligations on legal persons and entities, public and private, within EC territory.”<sup>82</sup> Supremacy of the Treaty of Rome and direct effect of EU law were the driving forces behind this evolution, but the member states never explicitly provided for the creation of these strong sovereignty claims. They were the product of a judge-made order, driven by the interaction of member states’ citizens and the ECJ, through national court.

In 1963, the ECJ handed down its first decision on the *direct effect* of EU law within the member states. In the Netherlands, Van Gend en Loos contested a tax charged on chemicals imported from Germany. It brought suit before a Dutch tax court, appealing to the now Article 30.<sup>83</sup> The reference the ECJ had to answer was whether an individual party, and not only a member state, could invoke EU provisions in front of a national court. The Court, after claiming that “the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields,” answered the question in the affirmative.<sup>84</sup> According to the ECJ, the Treaty has thus created not only an independent supranational legal order but also, and most importantly, a sovereign one. This judicial doctrine was further developed in subsequent decisions.<sup>85</sup> This sparked reactions by member states, which still saw themselves as independent, sovereign unities in accordance with a “traditional” concept of sovereignty. Now, a state’s breaching of EU law was to be adjudicated in front of national courts, in suits brought by their own country nationals.

Italy’s ratification of the Treaty of Rome by means of statute rather than constitutional amendment, and the direct effect of European Law as declared by the ECJ, subsequently raised sovereignty issues in terms of hierarchy of laws.<sup>86</sup> The whole controversy, which led to the declaration of the *supremacy* of European law, was brought in front of the ECJ in 1964, in the case of *Costa v E.N.E.L.*—a

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82 Stone Sweet, *The Judicial Construction of Europe* at 65 (cited in note 6).

83 Article 30 reads: “Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature.” See: The Treaty on the Functioning of the European Union.

84 *Van Gend en Loos v Nederlandse Administratie der Belastingen* n. 26/62 (European Court of Justice 1963).

85 For more information, see: Trevor Hartley, *The Foundations of European Union Law* at 203–255 (Oxford 2014).

86 On this topic, see also: Francesco Ruggeri Laderchi, *Report on Italy* in Anne-Marie Slaughter, Alec Stone Sweet, and Joseph Weiler, ed, *The European Court and the National Courts: Legal Change in its Social, Political, and Economic Context* at 147–170 (Oxford 1998).

dispute over €0.99 (1,925 Lire). Mr. Costa, an Italian lawyer, owned shares in an electricity company and opposed the nationalization of the electricity sector in Italy. Out of an act of protest, he refused to pay his electricity bill and was sued by the newly created state electricity company, E.N.E.L. As Costa claimed that the nationalization was in breach both of the Treaty of Rome and the Italian Constitution, the lower judge decided to submit a question to both the ICCT and the ECJ. In case n. 14, the *Consulta* claimed that, while it is true that—in accordance with Article 11 of the Constitution—Italy had limited its sovereignty by signing the Treaty of Rome, this had no effect on the status of the EC treaty within the Italian system. In the end, a problem of constitutionality “should be established between the law that established E.N.E.L. and the law through which the Treaty of Rome was implemented in Italy: such a contrast is inadmissible, since the law that ratified the EC treaty does not have the status of a constitutional norm.” And thus, since the EC ratification “lacks any particular constitutional resistance,” the principle of *lex posterior derogat priori* should apply. According to the ICCT, the Electricity Nationalization Act of 1963 would prevail over the law that implemented the Treaty of Rome in 1957.<sup>87</sup>

The ICCT was taking a dualist position of the Italian legal order, influenced by a Kelsenian view of sovereignty in terms of a hierarchy of legal norms. As Hans Kelsen wrote, “as soon as the international legal system rises above the legal systems of the individual states, the state can no longer be understood as the sovereign legal system.”<sup>88</sup> This was the fear of the *Consulta* in relation to the European Union. If the ICCT were to recognize EU law as supreme over Italian national law, as Costa was asking, then Italy would have lost its sovereignty—in the sense of “the capacity, unrestricted by any higher legal system, to extend its validity territorially as well as materially.”<sup>89</sup> The ECJ was pushing for that exact position—namely, monism—by claiming in *Costa v ENEL* that “the law stemming from the treaty [...] could not, because of its special and original nature, be overridden by domestic legal provisions, however framed.”<sup>90</sup> For Italy, however, allowing for the existence of a legal order hierarchically higher than the Italian legal system—one which, moreover, was directly applicable within the national boundaries—seemed to necessitate the denial of its own sovereignty altogether.

The Constitutional Court was reluctant to accept the ECJ’s position in *Costa* and wished to retain jurisdiction over conflicts between Community law

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87 See *Decision n. 14* (Italian Constitutional Court 1964). For Italian text see <http://www.giurcost.org/decisioni/1964/0014s-64.html> (visited Dec 7, 2014).

88 Hans Kelsen, *Introduction to the Problems of Legal Theory*, trans. Bonnie Litschewski Paulson and Stanley Paulson at 100 (Clarendon 2002).

89 *Id.*

90 See *Costa v ENEL*, case C-6/64 (European Court of Justice 1964), online at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61964CJ0006&from=EN> (visited Dec 7, 2014).

and national law.<sup>91</sup> In *Italian Minister of Finance v Simmenthal* (1978), the ECJ directly criticized the approach taken by Italy following *Costa*. The ECJ stated that national ordinary judges should directly apply Community law and refrain from applying incompatible national legislation, with no need to wait for a decision from higher national courts.<sup>92</sup> Eventually, in 1984, in what became known as the *Granital* case, the ICCt agreed with the position held by the ECJ,<sup>93</sup> still preserving a dualist approach. In fact, according to the Court, EU law

cannot abrogate, modify, or derogate from conflicting national norms. That would have been the case only if the European and the Italian orders were a unity. According to this Court, however, even though coordinated, the systems are distinct and reciprocally autonomous. Therefore, the predominance of European regulations must be understood . . . in the sense that the national law does not interfere with the sphere of competence occupied by European norms.<sup>94</sup>

Thus, while maintaining dualism, the ICCt carved out a space of competence in which EU law could be supreme without (at least in theory) affecting Italy's sovereignty. The *Consulta* still pointed out the possibility of reviewing EU law under special circumstances, in accordance with what became known as the doctrine of counter-limits (*controlimiti*). It referred to its decision n. 183 from 1973, in which it stated that limitations of sovereignty pursuant to Article 11 of the Constitution may appear to allow Community organs to violate fundamental principles of our constitutional order, or inalienable human rights. Nevertheless, to

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91 See *Decision n. 183* (Italian Constitutional Court 1973), online at <http://www.giurcost.org/decisioni/1973/0183s-73.html> (visited Dec 7, 2014) (In 1973, in case n. 183, the ICCt partially gave in and officially recognized the supremacy of EC law, pursuant to Article 11 of the Italian Constitution. This recognition was only partial and denied the possibility of direct disapplication by lower judges: the *Consulta* claimed that the national norm incompatible with EU law is *unconstitutional*, and its potential disapplication had to be adjudicated by the ICCt itself. The appeal to Article 11 entailed a bit of a stretch for the Court. While Article 11 was originally meant to address Italy's joining the United Nations, the *Consulta* claimed that it "was inspired by general principles which are concretely put into practice by the EC." The Court went on listing the foundational principles of the EC and finding that there is no doubt Article 11 applies to it. While claiming that EC law and national law appear to be "autonomous and distinct juridical systems, even though coordinated," it recognized that "EC law must have full and mandatory efficacy within the member states, and must be directly applied without need for any implementation.").

92 *Amministrazione delle Finanze dello Stato v Simmenthal S.p.A.*, case C-106/77 (European Court of Justice 1978).

93 EU law, being directly applicable, should be immediately applied by the ordinary judge—with no need to send a preliminary reference to the *Consulta*—even in the case in which it leads to the disapplication of national legislation. See: *Decision n. 170* (Italian Constitutional Court 1984). For Italian text see <http://www.giurcost.org/decisioni/1984/0170s-84.html> (visited Dec 7, 2014).

94 *Id.*

the ICtC, it is “obvious” that, in case of such an “aberrant interpretation,” the Court would retain jurisdiction in relation to the compatibility of the Treaty with such fundamental principles.<sup>95</sup> If this were not the case, this limitation would actually entail the extinction of Italy’s sovereignty.<sup>96</sup>

The Italian approach in n. 183 and *Granital* is slightly more aggressive than, but very similar to, the one taken by Germany in the *Solange* saga. Like the Italian courts, the Germans saw in the doctrine of supremacy, combined with direct effect, a threat to national rights protection. In what became known as *Solange I* (1974), the Bundesverfassungsgericht (BVerfG) retained jurisdiction over conflicts between national law and EU law “as long as the integration process has not progressed so far that Community law also receives a catalogue of fundamental rights [...] adequate in comparison with the catalogue of fundamental rights contained in the Basic Law.”<sup>97</sup> In reaction to this decision, the ECJ more explicitly formulated and guaranteed the fundamental rights it had promised to protect. Eventually, in 1986, the BVerfG held that “so long as the European Communities, in particular European Court case law, generally ensure effective protection of fundamental rights” similar to those protected by the German Constitution, the BVerfG will not exercise its jurisdiction over conflicts between EU law and national law.<sup>98</sup> Unlike the *Consulta*, the BVerfG did not stress the independent nature of the EU and national order, nor did it explicitly deny the possibility of EU law abrogating German statutes. It agrees with the ICtC, however, that while maintaining its own jurisdiction over conflicts between Community law and domestic law, it would not exercise it so long as so-called fundamental principles are not infringed upon.

As I have outlined, the German and the Italian Constitutional Courts eventually backed down from their initial positions, persuaded by the space that the ECJ created for the adjudication of fundamental rights at the European level. In *Nold* (1974), the ECJ recognized that international human rights treaties signed by the member states (and thus also the ECHR) “supply guidelines which should be followed within the framework of Community law.”<sup>99</sup> Two months later, the ECJ decided *Dassonville*,<sup>100</sup> ruling against any measures “capable of hindering,

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95 See *Decision n. 183* (Italian Constitutional Court 1973), online at <http://www.giurcost.org/decisioni/1973/0183s-73.html> (visited Dec 7, 2014).

96 Marta Cartabia, *The Italian Constitutional Court and the Relationship Between the Italian legal system and the European Union*, in Slaughter, Stone Sweet, and Weiler, ed. *The European Court and the National Courts: Legal Change in its Social, Political, and Economic Context* at 138 (cited in note 86).

97 Damian Chalmers, Gareth Davies, and Giorgio Monti, *European Union Law: Text and Materials* at 227 (Cambridge 2014).

98 *Id.*

99 *Nold v Commission*, case C-4/73 (European Court of Justice 1974).

100 For a discussion on *Dassonville*, see Stone Sweet, *The Judicial Construction of Europe* at 122–124 (cited in note 6).

directly or indirectly, actually or potentially, intra-Community trade;<sup>101</sup> in the following years, it further advanced in its efforts of building a common market by defining its position on the free movement of goods.<sup>102</sup> Two years later, in 1976, the ECJ clearly took a step away from economic rights, entering the domain of individual rights. In *Defrenne II*,<sup>103</sup> for example, the ECJ on Article 141 and gender equality transformed a provision originally aimed at preventing social dumping, as Professor Stone Sweet points out, into a basic right to gender equality in the workplace.<sup>104</sup> By developing its rights-based jurisprudence, the ECJ not only augmented the effectiveness of free movement of goods but also *de facto* went beyond the EU's original intent of merely establishing an economic union.

It is true that, if we look at this European sovereignty conflict from a unilateral perspective, the traditional view of sovereignty in the Kelsenian understanding of hierarchy of laws has not been challenged. In fact, from the perspective of the member states, it would be possible to understand the authority of EU law as stemming from the voluntary limitations of sovereignty that each member state agrees to by signing the Treaty, pursuant to the principle of *pacta sunt servanda*. Such understanding, however, is not compatible with the kinds of assertions made by the European Union. By claiming a spot at the apex of the pyramid of laws, EU law did not challenge the traditional concept of sovereignty. Rather, it directly attacked the state's understanding of its own sovereignty—which, as in the case of Italy, may constitutionally allow for limitations of sovereignty, but does not allow for the existence of another legal system with ultimate authority.

These distinct and incompatible claims are exactly the reason why a space has been created within the European sovereignty discourse for fundamental rights and principles. The clash of these sovereignty claims can be understood, as I will later argue in Section V, in light of a framework of sovereignty *qua* fundamental principles. The European legal order, through its evolution into a sovereign system thanks to the doctrines of direct effect and supremacy, has expanded to include the protection of fundamental rights. However, some member states, and most strongly Italy, held back against this expansion of authority, placing fundamental rights and principles as counter-limits to supranational sovereignty claims. Nevertheless, throughout the direct dialogue that was established between the ICtJ, the Italian national judges, and the ECJ, EU law was able to climb up the Italian hierarchical ladder of the sources of law and reach a constitutional status—so long as it did

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101 *Procureur du Roi v Benoît and Gustave Dassonville*, case C-8/74 (European Court of Justice 1974).

102 See, for example: *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, case C-120/78 (European Court of Justice 1979).

103 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, case C-43/75 (European Court of Justice 1976).

104 For a discussion on *Defrenne II*, see: Stone Sweet, *The Judicial Construction of Europe* at 152–156 (cited in note 6).

not infringe upon fundamental principles. Presently, the ECHR lacks any judicial reference mechanism.<sup>105</sup> In order to avoid similar sovereignty limitations and enter into a conflict over the Convention, the *Consulta* was cautious to avoid the question of the status of the ECHR for almost 50 years. The ICCT, however, was not entirely successful.

### III. THE STATUS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN ITALY

In the previous section, I have briefly retraced the steps of European integration, as well as the judicial construction of the supranational legal order. The cases of Germany and Italy represent particular examples of resistance against the expansion of sovereignty claims by the EU. Traditional theories of sovereignty were challenged by this situation of pluralism, implicitly denying the existence of one sovereign unity in favor of a multiplicity of limited and interlocked sovereigns. Traditional sovereignty frames, however, were not abandoned; both the EU and Italy, in fact, wished to protect their positions as absolute sovereigns, understood in terms of unrestrained legal authority. The EU claims to supremacy and direct effect were countered by the *Consulta*'s position circumscribing EU law to a different sphere of competence, into which the ICCT willingly decides not to intervene, unless there is violation of principles fundamental to the democratic order.

Similar issues arose in Italy in relation to the European Convention on Human Rights. As I will discuss after a brief overview of the structure of the ECHR, the Convention brought concerns over its direct applicability and supremacy over national law. I believe that the case of the ECHR, however, is more interesting than that of the EU when it comes to molding a new framework of sovereignty. The Convention, weaker in structure if compared to the European Union, was nonetheless able to slowly infiltrate itself into the Italian system notwithstanding the resistance of the *Corte Costituzionale*. As in the case of EU law, the major actors in this process were ordinary judges, who—in lack of a reference mechanism—“simply” applied Convention norms on their own. The debate surrounding the ECHR and Italy is instructive in understanding the need for a new shift in the

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105 As per the draft of Protocol N. 16 to the Convention, a mechanism of “advisory opinions” could be implemented, in order to enable and promote “a dialogue between the highest national courts and the European Court.” See: *European Court of Human Rights*, Opinion of the Court on Draft Protocol No. 16 to the Convention extending its competence to give advisory opinions on the interpretation of the Convention (May 6, 2013), online at [http://www.echr.coe.int/Documents/2013\\_Protocol\\_16\\_Court\\_Opinion\\_ENG.pdf](http://www.echr.coe.int/Documents/2013_Protocol_16_Court_Opinion_ENG.pdf) (visited Dec 7, 2014). This Protocol, in order to enter into force, must be ratified by ten High Contracting Parties (see Article 8). See *Steering Committee For Human Rights (CDDH)*, Draft Protocol N. 16 to the Convention (Nov 30, 2012), online at [http://www.coe.int/t/dghl/standardsetting/cddh/cddh-documents/CDDH\(2012\)R76\\_Addendum%20V\\_EN.pdf](http://www.coe.int/t/dghl/standardsetting/cddh/cddh-documents/CDDH(2012)R76_Addendum%20V_EN.pdf) (visited Dec 7, 2014).



paradigm of sovereignty.

The human rights and fundamental freedoms protected by the ECHR, while clearly inspired by the same concerns and principles behind the Universal Declaration of Human Rights, evolved to represent a stronger protection. In particular, the European Convention was a product of the wish both to prevent another Holocaust and to halt the possible expansion of Communism, seen as a threat to democratic society—whose values and principles appear so central for the ECHR. At the end of 1948, the UK, France, and Belgium agreed to establish a Council of Europe and invited Ireland, Italy, Denmark, Norway, and Sweden to join in the negotiations, followed by Luxembourg and the Netherlands.<sup>106</sup> The Council was eventually established on May 5, 1949 by the Treaty of London; over that summer, representatives from the ten original member states gathered in Strasbourg for the first meeting of the Council's Consultative Assembly to draft a charter of human rights and establish a court to enforce it. The list of rights initially included was the product of a compromise.<sup>107</sup> As one of the drafters said, "Who does not appreciate that these rights are fundamental, essential rights, and that there is no State which can, if it abuses them, claim to respect natural law and the fundamental principle of human dignity?"<sup>108</sup> Within one year of joining the Council of Europe, all member states must become a party to the Convention.<sup>109</sup> The Convention was signed in Palazzo Barberini in Rome on November 4, 1950, and it officially entered into force on September 3, 1953. Italy ratified it through Legislative Decree n. 848 of August 4, 1955.<sup>110</sup> Importantly, in 1998, Protocol No. 11 allowed individuals to directly petition the Strasbourg Court, which was granted compulsory jurisdiction over the 47 member states, and a population of over 820 million people. While the EU is permitted to accede to the Convention as a consequence of the 2009 Treaty of Lisbon, this has not yet occurred.

After 1955, over the course of the following 60 years, the Italian approach to the ECHR has significantly metamorphosed. First departing from utmost closure in the 1960s and 1970s, the *Corte Costituzionale* did not even consider it necessary to pronounce itself over the status of the Convention relative to other domestic sources of law. Its norms were merely seen as programmatic.<sup>111</sup> In the

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106 Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* at 16 (Cambridge 2006).

107 Robin White and Clare Ovey. *Jacobs, White & Ovey: The European Convention on Human Rights* at 4 (Oxford 2010).

108 Council of Europe, Vol. 1 *Collected edition of the "travaux préparatoires" of the European Convention on Human Rights* at 268-270 (Martinus Nijhoff 1975).

109 *Resolution 1031*, (Parliamentary Assembly of the Council of Europe 1994), online at <http://assembly.coe.int/Documents/AdoptedText/TA94/ERES1031.HTM> (visited Dec 7, 2014).

110 See *Legge n. 848* (Italian Republic 1955). For Italian text see <http://www.privacy.it/legge1955848.html> (visited Decem 5, 2014).

111 Mercedes Candela Soriano, *The Reception Process in Spain and Italy* in Helen Keller and Alec Stone Sweet, ed. *A Europe of rights: The impact of the ECHR on national legal systems* at 405 (Oxford 2008).

1980s, the ICtCt finally explicitly recognized the ECHR's statutory status and denied any possibility of constitutionalization of the Convention. As a response to the *Cassazione's* decisions of the late 1980s and early 1990s finding the direct applicability of the Convention, the ICtCt took a new perspective on the ECHR, recognizing its atypical and reinforced nature, and stating that some of the principles it enshrines (in particular, Article 6) are fundamentally protected by the Italian Constitution.

The 2000s also witnessed, along with the Title V Constitutional Reform, the activism of non-constitutional judges directly applying the Convention and disapplying national law. While supported by the Cassation Court, such activism was attacked by the ICtCt's 2007 twin decisions. However, this was not enough to halt ordinary judges' attempts to apply the ECHR, and particularly Article 6 on fair trial, in disapplication of national law. This partly adversarial, partly cooperative horizontal dialogue between the *Consulta* and *Cassazione*, later on joined by the *Consiglio di Stato*, furthered the progress of the protection of human rights within the Italian borders. At the same time, this process led to a new form of dualism in Italy—or perhaps, to the abandonment of dualism all together. In fact, the distinction between constitutional law and international human rights law has been, to some extent, blurred by the ICtCt. As the upcoming empirical and legal analysis will highlight, this process of conflict and overlap in sovereignty claims has had important effects on the very notion of sovereignty within Italy—whose actual extent, I will argue in Section V, can be explained by appealing to an alternative framework of sovereignty.

#### A. *The ECHR throughout the 1960s, 1970s, and 1980s*

Throughout the 1970s, the ICtCt refused to take a stance as to whether the ECHR should have constitutional or statutory status within the Italian system. In decision n. 104 of 1969,<sup>112</sup> the ICtCt found it “unnecessary, in order to solve the issues brought in the present proceeding, any further investigation” of what status the ECHR should be granted within the domestic system.<sup>113</sup> The ICtCt reinforced its position—namely, its *refusal* to take a position—through a series of decisions

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112 See *Decision n. 104* (Italian Constitutional Court 1969), online at <http://www.giurcost.org/decisioni/1969/0104s-69.html> (visited Dec 5, 2014).

113 The referring ordinary judge wondered whether the ECHR was able to infiltrate itself within the Italian domestic system through Article 10 of the Constitution, which reads: “The Italian legal system conforms to the generally recognised principles of international law.” Noticeably, the *Consulta* cited its decision n. 32 of 1960, in which it found that Article 10 refers to international norms broadly recognized and not to single treaties signed by the State within the international sphere. *Ibid.*, par. 5. My own translation. See also *Decision n. 32* (Italian Constitutional Court 1960), For Italian text see <http://www.giurcost.org/decisioni/1960/0032s-60.html> (visited Dec 5, 2014).

in the following years, including n. 123 in 1970<sup>114</sup> and n. 123 in 1976.<sup>115</sup> Such a cautious position of the *Consulta* was, at least in part, a reaction to the then recent conflict between the ICCt and the ECJ, in regards to the supremacy and direct applicability of European law. The ECHR, by potentially claiming a spot at the top of the hierarchy of laws in virtue of the importance of the human rights it enshrines, was seen as another threat to Italian sovereignty.

In the 1980s, the ICCt was eventually explicit about the ECHR's statutory status and denied any possibility of constitutionalization of the Convention. In 1980, in decision n. 188, the ICCt clearly found that the ECHR, being merely an international treaty, has the same status of the measure that implemented it within the domestic system.<sup>116,117</sup> In the case of the Convention, such measure was the Legislative Decree n. 848 of August 4, 1955. The ICCt here clearly wanted to prevent the norms of the ECHR from being granted a constitutional status, and thus being able—just like EU law—to override national statutory law. While excluding the possibility that Article 10 could be applied to international treaties, the ICCt reinforced its position regarding the status of the ECHR in decision n. 323 of 1989, by rejecting the very possibility that the *Consulta* later adopted following the 2001 Title V Constitutional Reform.<sup>118</sup> According to the ICCt, in the hierarchy of sources of law, the ECHR can neither hold a constitutional status nor can it be above statutes. This was seen as a threat to the Kelsenian view of sovereignty, which I have already argued is particularly strong within the ICCt. The only option available under the constitutional framework in place in the 1980s was to consider the Convention at the same level as the ordinary law that implemented it. While

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114 See *Decision n. 123* (Italian Constitutional Court 1970). For Italian text see <http://www.giurcost.org/decisioni/1970/0123s-70.html> (visited Dec 5, 2014).

115 See *Decision n. 123* (Italian Constitutional Court 1976). For Italian text see <http://www.giurcost.org/decisioni/1976/0123s-76.html> (visited Dec 5, 2014).

116 See *Decision n. 188*, (Italian Constitutional Court 1980), online at <http://www.giurcost.org/decisioni/1980/0188s-80.html> (visited Dec 7, 2014) (In its decision n. 188 of 1980, the ICCt was asked to rule over the constitutionality of Article 125 and Article 128 of the Code of Penal Procedure in light of Article 6(3)c of the ECHR. The ICCt found that “in lack of a specific constitutional provision, treaty norms, implemented into the domestic system of the Republic, have the status of statutory law.”).

117 See *Decision n. 15*, (Italian Constitutional Court 1982), online at <http://www.giurcost.org/decisioni/1982/0015s-82.html> (visited Dec 5, 2014) (Moreover, with decision n. 15 of 1982, the ICCt openly denied the possibility of granting the Convention the status of a constitutional norm. In fact, the ECHR “cannot position itself, on its own, at the constitutional level.”).

118 See *Decision n. 323*, (Italian Constitutional Court 1989), online at <http://www.giurcost.org/decisioni/1989/0323s-89.html> (visited Dec 5, 2014) (In decision n. 323 of 1989, the *Consulta* found that the provision of Article 10 of the Constitution does not apply to the ECHR. It claimed, moreover, that “it has remained a position held by a minority of the scholarship—never shared by the Court of Cassation or by the Constitutional Court—that international treaties, even though introduced into our legal system via an ordinary law, may assume a constitutional status or in any case a status above statutory law, so that it would not be possible to abrogate or modify them through another ordinary law.”).

scholars have argued in favor of granting a constitutional status to the ECHR in virtue of either Article 2, Article 10, or Article 11, the ICt has not bought into their arguments.<sup>119</sup>

### B. *A New Approach by the Cassazione and the Consulta: ECHR as Supra-Statutory*

In the 1980s and early 1990s, in parallel with the previously cited decisions by the ICt, the Court of Cassation slowly went down a path that granted more authority to the provisions of the Convention, and in particular to Article 6 (on fair trial), with clear impacts on the hierarchy of laws and sovereignty. The first section of the *Cassazione Penale* handed down a series of decisions (December 7, 1981, *Faglietti*; April 20, 1982, *Bonfanti*; October 27, 1984, *Venditti*), which held that the Convention norms were directly applicable. Until the end of the 1980s, however, this was a minority position; it gained more force in 1988. The *Cassazione Sezioni Unite*, with its *Polo Castro* decision, strengthened the precedents of its first section and recognized the direct applicability of the ECHR—a topic that had been carefully avoided by the ICt, also because it technically lied outside of its jurisdiction.<sup>120</sup> Moreover, in 1991, a further decision by the *Cassazione* (n. 7662) showed how the status of the ECHR gave power to at least one of its provisions—

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119 Italy Const Art II (Article 2, which reads “The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed,” may be seen as an open clause allowing for the protection of new rights.). See also Giuseppe Martinico and Oreste Pollicino. *The National Judicial Treatment of the ECHR and EU Laws* at 283 (Groningen: Europa Law Publishing 2010) (In this regard, as Martinico and Pollicino pointed out in their “Report on Italy,” the ICt “clarified that the guarantee provided by Article 2 is intended to refer only to the rights expressly enunciated in the Constitution and to those directly connected to them” (283). This implicitly excluded those rights listed in the ECHR.). See also *Decision n. 32*, (Italian Constitutional Court 1960). *Decision n. 104*, (Italian Constitutional Court 1969). *Decision n. 48*, (Italian Constitutional Court 1979) (In regards to Article 10—which explicitly grants a constitutional status to “generally recognized principles of international law”—the ICt has firmly held, over the years, that it cannot apply to international treaties.). See also *Decision n. 188*, (Italian Constitutional Court 1980), online at <http://www.giurcost.org/decisioni/1980/0188s-80.html> (visited Dec 7, 2014) Giuseppe Martinico and Oreste Pollicino. *The National Judicial Treatment of the ECHR and EU Laws* at 269–299 (Groningen: Europa Law Publishing 2010) (Lastly, as far as Article 11 is concerned—the article that allowed EU law to come into the Italian system at the constitutional level—no issue arises in regard to the ECHR, “since it cannot be identified, with reference to the specific treaty norms here considered, any limitation of the national sovereignty.”).

120 *Decision Polo Castro*, (Corte Suprema di Cassazione Penale Sezioni Unite 1988) (According to the Cassation Court, “The norms of the ECHR, except those whose content must be considered so vague that they are unable to delineate a sufficiently specific prohibition, have an immediate application in our Country and must be concretely evaluated in their incidence on the broader legal system that has been created as a consequence of their introduction into the Italian legal system.”).

Article 6—to abrogate any prior, incompatible legislation.<sup>121,122,123</sup>

Eventually, in 1999, the *Consulta* made a noteworthy step forward, anticipating in a way the 2001 Constitutional Reform and taking an entirely new perspective on the ECHR. In decision n. 388, the ICCT found that some human rights enshrined in the Convention (in this particular case, Article 6) are also protected by the Constitution. According to the ICCT,

independently from the status that must be granted to treaty norms, [...] it must be noted that human rights, guaranteed also by universal or regional conventions ratified by Italy, find expression, and no weaker protection, in the Constitution.<sup>124</sup>

In support of its reasoning, the Court cited Article 2 and its recognition of fundamental human rights, in addition to the coincidence and interrelatedness of constitutional rights and human rights.<sup>125</sup> The ICCT, thus, wanted to distinguish

121 *Decision n. 7662*, (Corte Suprema di Cassazione Civile Sezioni Unite 1991) (The Cassation Court found that “Article 6 of the ECHR must be considered directly and immediately applicable, with abrogative power” in regards to the ordinary law allowing for the discussion, in a session closed to the public, of the charges brought against a magistrate.).

122 See *Decision n. 10*, (Italian Constitutional Court 1993), online at <http://www.giurcost.org/decisioni/1993/0010s-93.html> (visited Dec 7, 2014) (The debate was picked up by the ICCT two years later. Interesting, but forgotten by the Court for almost fifteen years (until decisions n. 348 and n. 349 of 2007), was the position of the *Consulta* in decision n. 10 of 1993. This decision was arguably a response to the Cassation’s position that the Convention has direct applicability within the Italian system, even though nowhere did it explicitly cite the decisions by the Cassazione. In this 1993, The ICCT took into consideration whether the constitutional provision that failed to require arrest warrants to be accompanied by a translation in the language spoken by the plaintiff was unconstitutional. The case of this Yugoslavian national inevitably considered Article 6(3)a of the ECHR. First of all, the *Consulta* reminded that the status of international norms is dictated by the status of the law that implemented them within the national system. Secondly, and most importantly, the ICCT, in its orbiter dicta, pointed out that the ECHR has not been, and cannot possibly be, abrogated by conflicting subsequent amendments of the Code of Penal Procedure. This is the case, according to the Court, because the ECHR represents a set of “norms derived from a source that can be traced back to an atypical competency, and as such, insusceptible of abrogation or modification by dispositions of statutory law.” The ICCT, however, was cautiously silent regarding the Convention’s position relative to constitutional norms, as well as regarding its direct applicability by domestic judges or its value as a standard to assess the validity of any given law. While often referred to by following decisions by ordinary and administrative courts, as well as in the legal scholarship, this case was not cited in any subsequent ICCT rulings regarding the ECHR, and was actually contradicted by the following case law.).

123 See also: Sciarabba, Vincenzo, *Tra fonti e corti—diritti e principi fondamentali in Europa: profili costituzionali e comparati degli sviluppi sovranazionali*, at 313 (CEDAM, 2008).

124 See *Decision n. 388*, (Italian Constitutional Court 1999), online at <http://www.giurcost.org/decisioni/1999/0388s-99.html> (visited Dec 7, 2014).

125 Italy Const Art II (“The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed.”).

the Convention itself from the rights it enshrined. In a sense, the ICCt was taking a position similar to the one that the German Constitutional Court explicitly recognized only in May 2011, in *Preventive Detention* (as a reaction to the ECtHR's decision in *M. v Germany*): namely, that the rights recognized by the Convention may aid in interpreting, and complementing, domestic constitutional rights.<sup>126</sup> While maintaining that the Constitution occupied the apex of the hierarchy of laws, the ICCt seemed to move towards a concept of sovereignty of fundamental principles.

### C. *The Empowerment of Ordinary Judges: Disapplication and Interpretation*

The ICCt's jurisprudential moves between the 1960s and the 1990s, and the *Cassazione's* case law, created some level of confusion and frustration for ordinary judges. Confusion arose because, as a consequence of this new approach, different ECHR's norms could hypothetically be granted different levels of protection within the Italian system.<sup>127</sup> I argue this was a matter of drawing a line between those non-fundamental and those fundamental sovereign principles. Frustration arose because lower courts were dissatisfied with the role played by the ICCt, which had thus far only sporadically, and without due attention, dealt with the rights enshrined by the Convention. Especially beginning around the year 2000, due to this confusion and frustration, many ordinary courts started to directly disapply national laws conflicting with the provisions of the Convention. As highlighted in a conversation with Justice Sabino Cassese, they were in part incentivized by the fact that the ICCt would reject any reference it received, unless ordinary judges had made an attempt of interpreting the national law in conformity with the Convention. Ordinary judges were circumnavigating the Italian mechanism to assess the constitutional validity of a statute—namely, the ICCt—by resorting to a new approach meant to assess the *conventionality*<sup>128</sup> of the domestic norm. Ordinary judges were creating a *de facto competition* between

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126 Birgit Peters, Germany's Dialogue with Strasbourg: *Extrapolating the Bundesverfassungsgericht's Relationship with the European Court of Human Rights in the Preventive Detention Decision*, German Law Journal, 765 (2012).

127 On the one hand, the ICCt was paying the obsequie to the *Cassazione's* jurisprudence on the matter of direct application of the Convention within the Italian legal system. By claiming that the fundamental human rights provisions of the ECHR were protected by Article 2, the ICCt did in fact recognize that they enjoy a higher status than statutes, and may thus led to the disapplication of incompatible national law. On the other hand, the Consulta's actions may be read as an attempt to re-gain control over the application of the Convention inside the national borders. By granting that Article 6 of the Convention finds its way into the Italian system through Article 2 of the Constitution, the ICCt was implicitly taking under its own jurisdiction—being, at this point, a matter of constitutionality—the adjudication of Article 6 of the ECHR and the potential disapplication of incompatible domestic laws.

128 By "conventionality" I mean the compatibility of any national law with the Convention.

Strasburg and the ICCt.<sup>129</sup> This behavior was sensibly different from the situation that unfolded in Germany during these years, as exemplified in the *Görgülü* saga—which importantly also stands for the issue of the rights of third-country nationals. German ordinary judges were, in fact, refraining from applying the Convention as interpreted in the ECtHR’s case law, rather than taking up an activist role like the Italian non-constitutional courts.<sup>130</sup>

As testified by a series of decisions by the Tribunal of Genoa in November 2000<sup>131</sup> and June 2001,<sup>132</sup> followed by a ruling of the Court of Appeals of Rome at the beginning of 2002,<sup>133</sup> non-constitutional judges were prone to valorize the status of the Convention within the Italian system.<sup>134</sup> There seemed to be an incentive for ordinary judges to appeal, whenever possible, to the ECHR instead of looking at the Constitution (which would entail sending a preliminary reference to the ICCt). This approach to disapplication was supported by the Court of Cassation in its decision n. 10542 of July 2002.<sup>135</sup> As the next chapter of this dialogue illustrates, the Constitutional Court did not share the same enthusiasm exhibited by the *Cassazione* and the ordinary judges in disapplying national statutes, which was seen as a threat to the authority of the Constitutional Court, and in turn to the sovereignty of fundamental principles.

129 Andrea Guazzarotti, *I giudici comuni e la CEDU alla luce del nuovo Article 117 della Costituzione*, Quaderni Costituzionali, 25–51 (2003).

130 See Gertrude Lübke-Wolff, *ECHR and National Jurisdiction—The Görgülü Case*, Humboldt Forum Recht 12 (2006) online at <http://www.humboldt-forum-recht.de/deutsch/12-2006/seite1.html>. (visited Jan 3, 2015)

131 See: Paola Ivaldi, *Integrazioni al Minimo, Estinzione dei Giudizi e Convenzione Europea di Salvaguardia dei Diritti dell’Uomo e delle Libertà Fondamentali*, Informazione Previdenziale 592–597 (2002).

132 Andrea Guazzarotti, *I giudici comuni e la CEDU alla luce del nuovo Article 117 della Costituzione*, Quaderni Costituzionali, 25–51 (2003).

133 Guazzarotti and Angela Cossiri, *L’efficacia in Italia delle sentenze della Corte europea dei diritti dell’uomo secondo la prassi più recente*, Rassegna dell’Avvocatura dello Stato 15–32 (2006).

134 See: *Decision of June 4, 2001*, (Tribunale di Genova 2001) (The Genovese judges appealed to the Consulta’s decision n. 10 of 1993 and Article 6(2) (then Article F(2)) of the Treaty of Maastricht in order to support the direct applicability and supremacy of Convention.)

135 See *Decision n. 10542* (Corte Suprema di Cassazione Civile 2002), online at <http://www.ambientediritto.it/sentenze/2002/lug-dic/C.%20Cass.%202002%20n.%2010542.htm> (visited Nov 21, 2014) (The Cassazione, first of all, was careful to rectify the interpretation of the lower courts, concerning Article 6(2) of the Treaty on European Union: while mentioned in the Treaty, the ECHR is not part of Community law. Nevertheless, the Cassation also found that, on top of the atypical nature of Convention declared by the ICCt in 1993, Article 11 of the Constitution should be interpreted as applying to the Convention. Thus, the ECHR should be treated just like EU law when it comes to a conflict with domestic legislations. The Court claimed: “The possibly direct application of Article 1 Prot. N. 1 of the Convention is up to the national judge, who—in instances in which it exists a conflict with a national provision—must give precedence to the treaty norm, which is immediately applicable to the concrete case, even when such application would mandate the disapplication of a domestic norm.”).

#### D. Title V Constitutional Reform of 2001 and the 2007 “Twin” Decisions

Up until 2007, the *Consulta*'s position could have been understood as state-centric. All that mattered, it seems, was the protection of the foundation of the domestic system—let this be the Constitution or simply its independence from external interference. However, following the Title V Constitutional Reform of October 2001 and the way in which the ICCt interpreted it in 2007, this explanation results are incomplete at best, if not mistaken. As I will show, the ICCt effectively engulfed the ECHR into the Italian Constitutional order. The Constitutional judge wants to retain, at least within Italy, the status as the sole authority to adjudicate and resolve a conflict between an ECHR norm and a national norm. And at the same time the ICCt wants to ensure that, by maintaining sole and exclusive jurisdiction over it, the ECHR does not infringe upon those fundamental principles at the basis of the Italian order. But why is this the case? Don't these Constitutional principles, after all, coincide with those of the ECHR? There thus seems to be a pluralism of sovereignty claims—by Italy, supported by the ICCt, and by the Convention, supported by ordinary Italian judges and the ECtHR—operating in the name of a same entity. It is, in particular, against this more recent historical background that I will advance my framework of sovereignty as an explanatory tool.

Title V opened a new door through which the ECHR could enter the national legal system. Based on a mere textual reading, the ECHR's status remained somewhat unclear. Article 117(1) was amended to read: “legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations.”<sup>136</sup> There was a *de facto* confluence of the domestic legal system into the one of the Community, blurring the line drawn by *Granital* between the two, allegedly independent, orders. There was now an explicit textual recognition of the legitimacy of the EU claims to sovereignty. Article 117 thus clearly represented a further restriction of Italy's sovereignty. In regards to EU law, no other option was available; the supremacy and direct applicability of Community Law had to be considered a matter of fact. But was this the case of the ECHR as well?<sup>137</sup> Not being activated by any reference from other courts, the ICCt remained silent on

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136 Italy Const Art 117.

137 See Antonio D'Atena, *La nuova disciplina costituzionale dei rapporti internazionali e con l'Unione Europea* (2002), online at <http://archivio.rivistaaic.it/materiali/convegni/aic200201/datena.html> (visited Dec 7, 2014) (While the effects of Title V did not revolutionize Italy's approach to EU law but merely constitutionally recognized what had been the status quo for decades, its effects on the ECHR system were unclear. Some scholars, including Antonio D'Atena, believed that the amendment of Article 117(1) had a two-fold consequence. First, international treaties ratified by Italy were argued to be effective in the national order with no need of implementation by the national legislation. Second, international treaties were believed to have gained a constitutional status—in the sense that a statute conflicting with a treaty would be unconstitutional. This thesis thus argues for the end of dualism in Italy by hand of Article 117(1)).



this issue for over five years.

Finally, in 2007, in decisions n. 348 and n. 349, the ICCt capitalized on this opportunity to programmatically clarify its position on the topic of Convention norms—extending its *obiter dicta* far outside of the issue raised by the reference of the lower court.<sup>138</sup> While it is undeniable that the norms of the Convention are comparatively more resistant to disapplication than ordinary laws, Article 117(1) attracts the jurisdiction of the ICCt.<sup>139</sup> The outcome of decisions n. 348 and n. 349 clearly shows the extent to which the *Consulta* was unhappy with the fairly widespread practice of disapplying domestic statutes if in contrast with ECHR norms.<sup>140,141</sup> This sense of discomfort also emerged from conversations with Justice Sabino Cassese, who was serving on the Court at the time. As he put it: “are we constitutional justices or land surveyors?”<sup>142</sup> If disapplication by ordinary judges became the norm, and if the *Consulta* approved such a practice, constitutional judges would have become powerless. The Court wanted to maintain its own authority, necessary—as I will later argue—for the protection of fundamental principles.

The appeal to Article 117—which, due to its location at the very bottom of the Constitution, would have otherwise been of secondary importance—was ultimately instrumental. By absorbing as much of the ECHR as possible into the constitutional realm, the ICCt wished to claim the monopoly over the disapplication of *unconventional*<sup>143</sup> domestic law, and put an end to the judicial activism shown by ordinary courts in the previous years. According to Justice Cassese, this approach was in part due to the *Consulta*'s concern that lower judges would misinterpret fundamental principles enshrined by the Convention—principles which, in most cases, overlap with those of the Constitution.

The ICCt, first of all, took pains to draw a bright line between the

138 See *Decision n. 348*, (Italian Constitutional Court 2007), online at [http://www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/S348\\_2007\\_Eng.pdf](http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S348_2007_Eng.pdf) (visited Dec 7, 2014).

139 *Id.* (According to the ICCt, “The ordinary courts do not therefore have the power to set aside ordinary legislation in contrast with the ECHR, since the alleged incompatibility between the two takes the form of a question of constitutional legitimacy due to an eventual violation of Article 117(1) of the Constitution, falling under the exclusive jurisdiction of the Constitutional Court”).

140 See, for some comments on the 2007 twin decisions: Carmela Salazar and Antonio Spadaro, ed, *Riflessioni sulle sentenze 348–349/2007 della Corte Costituzionale*. (Giuffrè Editore 2009).

141 These “twin” decisions are not different in content but rather in scope. While decision n. 349 was more practical and pragmatic, meant to clearly address the mechanism of resolving a potential conflict between the Convention and national law, n. 348 was more theoretical and thoroughly analyzed the legal basis for the status and applicability of the ECHR within the Italian legal system.

142 Author’s conversation with Justice Sabino Cassese (Justice Sabino Cassese, during this specific conversation with the author here referenced, was making allusion to the jurisdiction of the ICCt (“Siamo giudici costituzionali o agrimensori?”). Besides constitutionality issues, the *Consulta* has jurisdiction over disputes between the State and the regions, thus including regional boundaries. If deprived of the former, the ICCt would have maintained only the latter kind of jurisdiction.)

143 By *unconventional*, I here mean incompatible with the European Convention on Human Rights.

Convention and the EU legal system. The *Consulta* claimed that the Convention, unlike EU law, cannot be interpreted as entering the Italian legal system through Article 11 of the Constitution.<sup>144,145</sup> A further distinction that must be drawn between the Convention and EU law, according to the Court, is that the former does not create a supranational legal and judicial order, and thus does not give rise to sovereignty claims and directly applicable norms.<sup>146</sup> For this reason, for the ICCt, it is not possible to draw an analogy between the way in which EU law is applied and the way in which the Convention should be enforced.

According to the ICCt, the Convention should be interpreted as *norma interposta*, holding a hierarchical position that is subordinated to the Constitution, but above ordinary law.<sup>147</sup> Convention norms are only indirectly adjudicated by the ICCt—namely, to the extent to which they complete, give concreteness to, and are *interposed* to the constitutional obligation to comply with EU legislation and international treaties. As an outcome of this mechanism, the Court claims, there is an absolute and binding requirement that the Convention's *norme interposte* conform to the Constitution as a whole. This is necessary, according to the ICCt, in order to avoid the paradoxical situation in which an ordinary law is disappplied on the grounds of its incompatibility with a *norma interposta*, which is itself

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144 See Italy Const Art 11 (“Italy ... agrees, on conditions of equality with other states, to the limitations of sovereignty necessary for an order that ensures peace and justice among Nations.”) See also: Marta Cartabia, *All'incrocio tra Costituzione e CEDU: Il rango delle norme della Convenzione e l'efficacia interna delle sentenze di Strasburgo*, “La Cedu e l'Ordinamento Italiano: Rapporti tra Fonti, Rapporti tra Giurisdizioni” 1-26 (Giappichelli Editore, 2007) (If the ICCt chose to allow the Convention in through Article 11, an option that many scholars had at first envisaged, this would have allowed ordinary judges to bypass the *Consulta*).

145 See *Decision n. 348* par. 3.3, (Italian Constitutional Court 2007), online at [http://www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/S348\\_2007\\_Eng.pdf](http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S348_2007_Eng.pdf) (visited Dec 7, 2014) (As a further support for such a distinction between the ECHR and the community law, the ICCt cited the amendment of Article 117(1), which clearly opposes, on the one hand, the constraints deriving from EU legislation, and on the other, those stemming from international obligations, and thus the ECHR. The *Consulta* went on to explain that, for these reasons, ECHR norms “do however not produce effects on the internal legal order which can found the jurisdiction of the national courts to apply those provisions in disputes before them, at the same time not applying any conflicting internal provisions”).

146 See *Decision n. 348*, (Italian Constitutional Court 2007), online at [http://www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/S348\\_2007\\_Eng.pdf](http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S348_2007_Eng.pdf) (visited Dec 7, 2014) (It is true that the Convention creates duties for the member states, which must abide by them; however, it does not entail the inclusion of the Italian legal order into a larger system, which is able to create laws that bind all of its members.).

147 *Id* at par. 4.5 (The structure of Article 117(1) is such that its application is triggered only if “placed in a close relationship to other non-constitutional (sub-costituzionale) provisions necessary to give a substantive content to a principle [Article 117(1)] which limits itself to setting out in general terms a quality which the laws referred to in it must possess”).

incompatible with the Constitution.<sup>148,149</sup>

In 2007, the *Consulta* was careful not to allow for any modification of and limitations on the national constitutional system by external sources like the Convention. While this conditional approach may remind us of the *Consulta*'s decision n. 183 (1973) and of the German *Solange* decisions, in which the court claimed that the Treaty can be applied conditionally upon its compatibility with the fundamental constitutional protections,<sup>150</sup> the case of the ECHR is different. The ICCt reserves for itself "a duty to declare the inability of the Constitution to supplement that principle [of the ECHR, which results incompatible with any part of the Constitution], providing, according to established procedures, for its removal from the Italian legal order."<sup>151</sup> This approach, similar to the one of the

148 Id at par. 4.7. See also: *Decision n. 183*, (Italian Constitutional Court 1973) (It is interesting here to compare the norma interposta mechanism with the one employed in regards to EU law. The Italian Constitutional Court, in its decision n. 183 (1973), claimed it inadmissible for European bodies, in any circumstance, "to violate the fundamental principles of our constitutional order, or inalienable human rights." This "Solange approach" has been upheld in subsequent decision. Thus, whether a hypothetical conflict between Community law and the rights enshrined in the Constitution is of vertical or of horizontal nature is unclear.)

149 See *Decision n. 349* par 6.2, (Italian Constitutional Court 2007), online at [http://www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/S349\\_2007\\_Eng.pdf](http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S349_2007_Eng.pdf) (visited Dec 7, 2014) (Decision n. 349 is important for its more pragmatic and schematic approach to the process meant to regulate to the adjudication of potential conflicts between national legislation and Convention provisions. The status of the ECHR as *norma interposta* led to the creation of a new procedure that ordinary judges must follow while adjudicating ECHR norms. As explained in n. 349, "it is a matter for ordinary courts to interpret national law in accordance with the international law in question [namely, ECHR]. Where this is not possible, or where the court doubts the compatibility of the national law with the 'interposed' Convention provision, it must seize this Court with a corresponding question concerning its constitutionality in the light of Article 117(1)." This mechanism thus has two levels of adjudication and interpretation. In the first stage of the adjudication, the national judge has been deprived of the ability to legitimately disapply incompatible national norms. If the ordinary judge cannot find an interpretation of the national norm that is compatible with the Convention, the judge must submit a preliminary reference to the Constitutional Court.)

150 See also: *Decision n. 183* par 9, (Italian Constitutional Court 1973) ("it must be excluded the possibility that such limitations, concretely clarified in the Treaty of Rome, may imply the EC's inadmissible power to violate the fundamental principles of our constitutional order, or inalienable human rights.")

151 See *Decision n. 349*, (Italian Constitutional Court 2007), online at [http://www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/S349\\_2007\\_Eng.pdf](http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S349_2007_Eng.pdf) (visited Dec 7, 2014) (The Court here is not clear as to whether this would lead to the annulment of (i) the entire law implementing the Convention or (ii) only the specific section of such law that provided for the implementation of the specific norm considered to be unconstitutional. The latter option is the one that would appear most reasonable, and that has been employed in the case of EU law). See also: *Decision n. 73* par 3.1, (Italian Constitutional Court 2001). This is also the interpretation supported by: Claudio Panzera, *Riflessioni sulle sentenze 348-349/2007 della Corte Costituzionale*, "Il bello dell'essere diversi. Corte costituzionale e Corti europee ad una svolta" 240 (Giuffrè Editore, 2009).

German Constitutional Court in *Görgülü*,<sup>152</sup> but unlike what was envisaged by the ECtHR in *United Communist Party of Turkey and Others v Turkey*,<sup>153</sup> maintains that the Convention will be applied *so long as* it is compatible with the Constitution as a whole.

### E. Ordinary Judge's Continued Application of the ECHR and the ICtJ's Reaction

In 2009, the entering into force of the Treaty of Lisbon brought a modification of Article 6 of the Treaty on European Union (TEU). In particular, Paragraph 2 states: "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties." Paragraph 3, moreover, holds that fundamental rights, as guaranteed by the ECHR and resulting from the constitutional traditions common to the Member States, shall constitute general principles of EU law. Additionally, Protocol No. 14 of the ECHR (June 2010) allows the European Union to accede to the ECHR. Representatives of the 47 Council of Europe member states and of the EU have finalized the draft of the accession agreement of the EU to the ECHR. The ad-hoc group of "47+1" held its last meeting in Strasbourg in April 2013.<sup>154</sup> Since then, the accession has been in stall. However, ordinary Italian judges have in practice anticipated history.

Notwithstanding the clear rejection of such an approach by the *Corte Costituzionale* in 2007, several ordinary courts, including one of Italy's highest courts—the *Consiglio di Stato*—once again began to directly apply the Convention in disapplication of incompatible domestic law. Their legal reasoning has been

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152 See *Görgülü decision*, 2 BvR 1481/04 ¶ 62 (German Federal Constitutional Court 2004) ("As long as applicable methodological standards leave scope for interpretation and weighing of interests, German courts must give precedence to interpretation in accordance with the Convention. The situation is different only if observing the decision of the ECHR, for example because the facts on which it is based have changed, clearly violates statute law to the contrary or German constitutional provisions, in particular also the fundamental rights of third parties. 'Take into account' means taking notice of the Convention provision as interpreted by the ECHR and applying it to the case, provided the application does not violate prior-ranking law, in particular constitutional law."), online at [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2004/10/rs20041014\\_2bvr148104en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2004/10/rs20041014_2bvr148104en.html) (visited Dec 7, 2014).

153 See *United Communist Party of Turkey and Others v Turkey*, No. 19392/92, ¶ 30 (European Court of Human Rights 1998) "The political and institutional organisation of the member States must accordingly respect the rights and principles enshrined in the Convention. It matters little in this context whether the provisions in issue are constitutional ... or merely legislative .... From the moment that such provisions are the means by which the State concerned exercises its jurisdiction, they are subject to review under the Convention.", online at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58128#{"itemid":\["001-58128"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58128#{) (visited Dec 7, 2014).

154 See Council of Europe, *Accession of the European Union to the European Convention on Human Rights* (Council of Europe), online at [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/default\\_en.asp](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/default_en.asp) (visited Dec 1, 2014).

structured *as if* the EU had already joined the ECHR. In particular, I would like to bring to attention: *Consiglio di Stato* n. 1220 of 2010,<sup>155</sup> *T.A.R. Lazio* n. 11984 of 2010,<sup>156</sup> *Corte d'Appello di Milano* n. 1200 of 2010,<sup>157</sup> and *Corte dei Conti* n. 672 of 2011.<sup>158</sup> Remarkably, all of these decisions dealt with Article 6 of the Convention. Such provision of the ECHR has also been adjudicated both by the *Consulta* in decision n. 388 of 1999 and by the *Cassazione* in n. 7662 of 1991. In the four non-constitutional precedents I have cited, the ordinary courts' logic has resorted to the creation of a triangle between the Italian legal order, the Convention, and EU Law. In most of them, Article 6 TEU was interpreted as prescribing that the national judge is to directly disapply national law incompatible with the Convention. This willingness of non-constitutional judges to apply the ECHR may be explained as self-interested augmentation of their powers as judges; however, as I will discuss in Section V, I believe it was underlined by motivations similar to those of the ICtCt. Needless to say, the *Consulta* rejected such a claim in its decision n. 80 of 2011, relying on the failed accession of the EU to the ECHR.<sup>159</sup>

Thirty years after the *Granital* decision on the supremacy of EU law, such an activist approach by the supreme administrative court and by ordinary judges represents a new threat to the concept of Italian sovereignty. This new wave of "traitors" risks making national law subordinate to Convention law, and thus revolutionizing the domestic hierarchy of laws and courts. As I will discuss in Section V, these decisions—directly applying the ECHR over national law—also have the potential to impair the ICtCt's authority. The *Corte Costituzionale*, becoming the sole and ultimate adjudicator of a potential conflict between national law and international (ECHR) law, has led to a conventionalization of the Constitution through Article 117(1). In turn, after years of careful approach to the Convention, it has contributed to a process of constitutionalization of the ECHR. It has engulfed the ECHR into the Constitution as an interposed norm, in order to gain as much jurisdiction and control over it as possible, leading to a structured and controlled process that Professor Stone Sweet refers to as "domestication."<sup>160</sup> As I will argue, this was a necessary step in ensuring the protection of the sovereign

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155 See *Decision n. 1220* (Consiglio di Stato 2010), online (visited Dec 2, 2014).

156 See *Decision n. 11984* (Tribunale Amministrativo Regionale per il Lazio 2010), online (visited Dec 2, 2014).

157 See *Decision n. 1200* (Corte d'Appello di Milano 2010), online (visited Dec 2, 2014).

158 See *Decision n. 672* (Corte dei Conti, Sezione Puglia 2011), online at [http://www.europeanrights.eu/public/sentenze/Corte-Conti\\_ciquera-sent.n.pdf](http://www.europeanrights.eu/public/sentenze/Corte-Conti_ciquera-sent.n.pdf) (visited Dec 2, 2014).

159 See *Decision n. 80* (Italian Constitutional Court 2011), online at <http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2011&numero=80> (visited Dec 7, 2014).

160 Alec Stone Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, 1 *Journal of Global Constitutionalism* 53, 65 (2012) (The term *domestication* describes the process through which the ECHR, and in general any international human rights treaty, is incorporated into domestic legal orders, becoming part of the body of law that can be adjudicated by national judges).

principles.

#### IV. MODERN THEORIES OF SOVEREIGNTY IN LIGHT OF EUROPEAN INTEGRATION: WALKER AND MADURO

In the case of Italy, as I have shown, there is an institutional point of conflict between the European Court of Human Rights (ECtHR), the ECJ, and the *Consulta*. The ICtC sees itself as the sole court in Italy allowed to interpret, and capable of interpreting, the Constitution and the principles it enshrines. National judges, in the series of decisions from the early 2000s and in those post-2007 discussed above, have played the role of “vassals” of the ECtHR. They claimed for themselves the authority to disapply national law incompatible with the Convention, thus diminishing the caseload of the ECtHR. The *Consulta*, in the 2007 twin decisions and again in n. 80 of 2011, took pains to prevent this approach, distinguishing the ECHR from the EU. It recognized that the Convention creates duties for its member states, but claimed that it does not, however, entail the inclusion of the Italian legal order into a larger legal and judicial system able to give rise to sovereignty claims.<sup>161</sup> This statement is questionable in light of the behavior of Italian non-constitutional judges. The statement is not accurately descriptive, but rather normative; the Court did not recognize and legitimize the ECHR as a sovereign system. However, the actions of ordinary judges, both in the early 2000s and post-2007, gave *de facto* concreteness and recognition to the ECHR’s sovereignty claims. The ECJ, for now, has sided with the ICtC; *Kamberaj v Bolzano* (2012) held that EU law, notwithstanding the reference made by Article 6 TEU to the ECHR, does not require national judges, in case of conflict between a provision of national law and one of the ECHR, to apply the Convention directly, disapplying the provision of domestic law incompatible with it.<sup>162</sup>

First, when it came to EU law in the 1960s and 1970s, then concerning the ECHR, Italy’s sovereignty was threatened by the activist approaches of national judges. In the case of the ECJ, lower judges activated the Luxemburg Court by sending references and later applying its decisions, based on European law. In the case of the ECHR, it was once again national judges, this time in lack of a reference mechanism, who began directly disapplying national law incompatible with the Convention. This approach has been seen by the ICtC as a threat to Italian sovereignty, strictly understood in Kelsenian terms. On the one hand, twenty years after *Costa*, the ICtC had to eventually give in and accept EU law’s supremacy, leading to a pluralism of sovereignty claims within Europe. In the case of the

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161 See *Decision n. 348* par. 3.3 (Italian Constitutional Court 2007), online at [http://www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/S348\\_2007\\_Eng.pdf](http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S348_2007_Eng.pdf) (visited Dec 7, 2014)

162 See *Servet Kamberaj v Bolzano*, case C-571/10 (European Court of Justice 2012), online at [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/default\\_en.asp](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/default_en.asp) (visited Dec 7, 2014).

ECHR, on the other hand, the *Consulta* has been able to hold its position until the present day, in an attempt to maintain the authority necessary to ensure protection of fundamental rights. This historical and institutional background, as outlined by the legal analysis of Sections II and III, has created the necessity of re-framing our theories of sovereignty. What implications does this European plethora of sovereignty-claiming orders have on the very concept of sovereignty? Different positions have been taken in recent years.

Globalization, and in this case the institutional setup of the European Union, is claimed by some to have led to the demise of sovereignty, or to the emergence of a concept of post-sovereignty. It is undeniable that the dimensions of internal and external sovereignty, as described at the beginning of this essay, have lost much of their descriptive power. As such, sovereignty as is not able to play the same conceptual role it did in the Westphalian tradition. Concepts of popular sovereignty and absolute state sovereignty have evolved and lost some of their defining characteristics. The creation of supranational entities has led to multiple levels of claims to authority. The United Nations, the World Trade Organization, and the European Union are just some examples of regional and international organizations that have made such claims. Theorists, including Neil MacCormick, have thus wondered whether sovereignty is like property—i.e., it can be given up to someone else—or whether, once lost, it is lost once and for all.<sup>163</sup> For MacCormick, “neither member states nor the European Union of which they are members can strictly be said to enjoy sovereignty at the present time.”<sup>164</sup> Sovereignty, for many, has lost much of its absolute and unified character, in the tradition of Bodin, Hobbes, and Rousseau. They argue that sovereignty cannot be pronounced dead or alive, for we have moved beyond it.<sup>165</sup>

As Professor Neil Walker eloquently, and rhetorically, asks:

Why are we constantly “questioning sovereignty”?<sup>166</sup> Why are we inclined to accuse sovereignty of “hypocrisy”<sup>167</sup> or to reduce it to a “game”?<sup>168</sup> Why are we concerned to “relocate”<sup>169</sup> sovereignty or to search for its

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163 Walker, *Sovereignty Frames and Sovereignty Claims* at 27 (cited in note 2) (In this sense, Professor Walker’s answer is clear: “Sovereignty will not fade and become irrelevant in a conceptual vacuum, but only to the extent that such an alternative emerges and catches on.”).

164 Neil MacCormick, *Questioning Sovereignty: Law, State, and Practical Reason* 126 (Oxford 2002).

165 See Neil MacCormick, *Sovereignty and After*, in Hent Kalmo and Quentin Skinner, eds, *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept*, 151–168 (Cambridge 2010).

166 Neil MacCormick, *Questioning Sovereignty* (Oxford 1999).

167 Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Stanford 1999).

168 See Rebecca Adler-Nissen and Thomas Gammeltoft-Hansen, eds, *Sovereignty Games: Instrumentalizing State Sovereignty in Europe and Beyond* (Palgrave 2008).

169 See Neil Walker, ed, *Relocating Sovereignty* (Ashgate 2006).

“fragments”?<sup>170</sup> Why do we consider sovereignty to be “in transition,”<sup>171</sup> perhaps even in “in crisis”?<sup>172</sup> Why do we feel ourselves in such danger of losing focus on sovereignty that we must strive, as in the present volume, to keep it ‘in perspective’?<sup>173</sup> Frankly, if sovereignty is such trouble and if sovereignty is in such trouble—so incoherent, so illusory, so recondite, so degraded, so superannuated, so dispersed and diffuse—then why bother with it?<sup>174</sup>

Scholars, including Walker and Miguel Maduro, have upheld the view that sovereignty is not “in such trouble” and that it still plays an important explanatory role at a conceptual level.<sup>175</sup> I will briefly outline and critically analyze their theories

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170 See Kalmo and Skinner, eds, *Sovereignty in Fragments* (cited in note 28).

171 See Walker, ed, *Sovereignty in Transition* (cited in note 9).

172 See Joschka Fischer, *Europe's Sovereignty Crisis*, Social Europe (Social Europe July 31, 2011) online at <http://www.socialeurope.eu/2011/08/europes-sovereignty-crisis/>. (visited Dec 7, 2014)

173 Rawlings, Leyland, and Young, eds, *Sovereignty and the Law* (cited in 2).

174 Id at 18.

175 Among others, the debate between Jürgen Habermas and Dieter Grimm is worth noticing. Grimm and Habermas, while agreeing on the overall “diagnosis” of the current pluralistic European environment, disagree on the applicability of the concept of sovereignty to the EU. On the one hand, Jürgen Habermas has been concerned with the question of what role the ideal of popular sovereignty can continue to play in today’s pluralistic society. In today’s Europe, Habermas sees a conflict between what he identifies as *demos* and *ethnos*. Habermas believes that the concept of popular sovereignty has a radically democratic content, and thus is strongly connected with the concept of *demos*. Popular sovereignty is understood as the transfer of legislative powers “to the totality of citizens, who alone can generate communicative power from their midst” and thus creates political power: it is the sovereignty of the *demos*. For Habermas, sovereignty does not belong to a united collectivity in the Rousseauian term, but rather is embodied in the circulation of reasonably structured deliberations and decisions: sovereignty is procedural, and it manifests itself in communicative power. On the other hand, Dieter Grimm argues that a sovereign political community must be based on political unity. Grimm appears to be committed to the necessity of an *ethnos*, understood in terms of communal culture, language, and traditions. Thus, for Grimm, since there is no European *ethnos*, the EU cannot be considered sovereign. This, however, does not mean that sovereignty is dead. Rather, for Grimm, sovereignty in our pluralistic society is to be defined at the level of *Kompetenz-Kompetenz*, namely, the competence to decide about one’s own competence. Sovereignty is about self-determination at the level of democratic powers. The EU lacks such authority, which still resides with the member states—as the position taken by Italy in *Granital* and the one by the German Constitutional Court in *Solange* (and more recently in the decisions on the Maastricht and Lisbon Treaties) clearly testify. Concerning Habermas’s theory, see, among the others: Jürgen Habermas, *Remarks on Dieter Grimm’s ‘Does Europe Need a Constitution?’*, *European Law Journal* 1.3, 303 (1995); *Popular Sovereignty as Procedure* in Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, 463 (MIT 1996) (William Rehg, trans); *The Crisis of the European Union: A Response* (Polity 2012) (Ciaran Cronin, trans); For Grimm, among the others: Dieter Grimm, *Does Europe Need a Constitution?*, *European Law Journal* 1.3, 282 (1995); *Comments on the German Constitutional Court’s Decision on the Lisbon Treaty: Defending Sovereign Statehood against Transforming the European Union into a State*, *European Constitutional Law Review*, 353 (2009); *Sovereignty Within the EU*, Lectures on The European Union in the New Millennium, La Trobe University (2012) online at <https://itunes.apple.com/us/itunes-u/european-union-in-new-millennium/id507313218?mt=10>. (visited Dec 7, 2014)



in turn. These positions must be understood while keeping in mind the process of European integration and the pluralism of sovereignty claims discussed in Section II and III. This task, necessarily building on the historical analysis of Section I, will allow me to proceed to the inductive creation of a theoretical framework—already sketched throughout the previous sections—able to explain the case of Italy, its relations with the ECHR and the European human rights regime, and the resulting conflicts of sovereignty.

Miguel Maduro has a pluralistic view of sovereignty, emphasizing the different, one-dimensional approaches of the European bodies and the member states. Maduro refers to sovereignty in Europe as competitive sovereignty. Such a conception of sovereignty aims at describing the existence of “equal claims to independent political and legal authority that compete for final authority in a model of constitutional pluralism.”<sup>176</sup> According to Maduro, we have a non-hierarchical relationship between the national and the regional legal orders—orders that must, somehow, harmonize with one another. He compares his approach to “harmonising different melodies that are not in a hierarchical relationship *inter se*.”<sup>177</sup> This is what Maduro refers to as contrapunctual law. In Europe, we see claims to authority of both national and EU law; such claims must somehow be coordinated and integrated with one another in order to avoid the destruction of the respective legal orders. Counterpoint is the best solution we can achieve. His theory appears to be both descriptive and normative. Such harmonization, according to Maduro, can be fully achieved only if the European and national actors commit themselves to four principles: pluralism;<sup>178</sup> consistency and vertical and horizontal coherence;<sup>179</sup> universability;<sup>180</sup> and, institutional choice.<sup>181</sup> In understanding the national and regional authority claims within the EU, and their harmonization, we may borrow Maduro’s terminology and refer to *contrapunctual sovereignty* as the presence of multiple, non-hierarchical claims to sovereignty operating (and striving to operate) in harmony with one another.

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176 Maduro, Miguel Poiars. “Sovereignty in Europe—The European Court of Justice and the Construction of a European Political Community,” in Stack, John and Mary Volcansek eds., *Courts Crossing Borders* at 55 (Carolina Academic 2003).

177 Maduro, *Contrapunctual Law* at 523 (cited in 9).

178 Id at 526-527 (Pluralism “entails the recognition and adjustment of each legal order to the plurality of equally legitimate claims of authority made by other legal orders [as well as] a discourse to take place in such a way as to promote the broadest participation possible”).

179 Id at 528 (Namely, “when national courts apply EU law they must do so in such a manner as to make those decisions fit the decisions taken by the European Court of Justice but also by other national courts”).

180 Id at 530 (This means that “any national decisions on EU law should be argued in ‘universal’ terms [i.e.] grounded in a doctrine that could be applied [by any other national court in similar situations”).

181 Maduro, *Contrapunctual Law* at 530 (cited in 9) (In fact, “each legal order and its respective institutions must be fully aware of the institutional choices involved in any request for action in a pluralist legal community.”).

Professor Neil Walker's theory of sovereignty, similar to Maduro's, is indissolubly connected with his understanding of constitutional pluralism. For Walker, constitutional pluralism holds that states are no longer the sole locus of authority, but are rather joined by other sites of authority: the relationship between the two, namely state and non-state sites, is heterarchical rather than hierarchical.<sup>182</sup> It is a mosaic of legal and political capacities.<sup>183</sup> Walker believes that, in the EU, we are currently witnessing a sovereignty surplus, which refers to: (i) the excess and overlapping quality of claims to sovereignty in which ultimate authority is claimed at the national and the supranational level; and (ii) the competition over scarce legal, political, and cultural resources arising from the simultaneous pursuit of these claims.<sup>184</sup> Walker suggests that, instead of referring to *sovereignty* or *post-sovereignty*, we employ the term *late sovereignty*. One of the characteristics of this concept is distinctiveness.<sup>185</sup> Late sovereignty is distinctive in the sense that the autonomous unity advancing authority claims no longer needs to be monopolistic and absolute within the territory of its polity—unity does not coincide with monopoly anymore.<sup>186</sup> For Walker, what is true of late sovereignty is neither that sovereignty is pooled nor reconciled with a higher institution. Sovereignty, for Walker, is a discursive form. For any particular polity, such discursive form makes claims over the existence and the character of a supreme ordering power; this power aims at establishing and sustaining the identity and status of the polity, and at providing a continuous source of ultimate authority for that polity's juridical order.<sup>187</sup>

## V. A FRAMEWORK FOR ITALIAN SOVEREIGNTY *VIS-À-VIS* THE EUROPEAN HUMAN RIGHTS REGIME

I have briefly reviewed part of the contemporary literature on the evolution of the concept of sovereignty in light of European integration. Most importantly, for Professor Walker, both internal and external dimensions of sovereignty have been replaced, the first by partial authorities distributed between various political sites and levels, and the second by overlap, interlock, and mutual interference.<sup>188</sup> However brief, this discussion highlights two main characteristics

182 Neil Walker, *Late Sovereignty in the European Union* in Neil Walker, ed, *Sovereignty in Transition* at 4 (Hart 2003).

183 Neil Walker, Jo Shaw, and Stephen Tierney, eds, *Europe's Constitutional Mosaic* (Hart 2011).

184 Neil Walker, *Surface and Depth: The EU's Resilient Sovereignty Question*, in Jurgen Neyer and Antje Wiener, eds., *Political Theory of the European Union*, 95 (Oxford 2010).

185 Walker, *Late Sovereignty in the European Union* at 19-25 (cited in note 182) (The other three are continuity, irreversibility, and transformative potential).

186 Walker, *Sovereignty Frames and Sovereignty Claims* at 26 (cited in note 2).

187 Walker, *Late Sovereignty in the European Union* at 6 (cited in note 182).

188 Walker, *Sovereignty Frames and Sovereignty Claims* at 24 (cited in note 2).

of late sovereignty in the EU, which play a crucial role in my proposed paradigm shift toward sovereignty *qua* fundamental principles—namely, constitutional pluralism and contrapunctual law. As Walker highlights, and as Maduro agrees, there is a situation of constitutional pluralism within Europe—the presence of multi-level legal and political sovereignty claims replacing the state as the sole holder of authority. Maduro agrees with Walker on the non-hierarchical, and thus heterarchical, nature of the national and regional sovereignty claims. He believes that the concept of counterpoint best describes this situation as well as the need to harmonize authority claims with one another.

A framework of sovereignty that explains and inductively describes the relationship between Italy and the European human rights regime must recognize the need to achieve a heterarchically contrapunctual state in Europe’s constitutional pluralism. Today, sovereignty, broadly understood, is pluralism rather than unity. This does not mean that sovereignty is divided. If sovereignty becomes divided or pooled, one may as well argue that it metamorphoses into mere authority or competence, thus failing to remain sovereign. As Walker correctly points out, we are witnessing a state of sovereignty surplus in Europe, particularly in the excess and overlapping quality of heterarchical claims to sovereignty. However, to further Walker’s argument, I suggest that this surplus and overlapping quality necessarily highlight the differences between the regional and the domestic orders; it also, and most importantly emphasizes their commonalities.

Pluralism does not imply the need to completely abandon the idea of a unified and “absolute” (here in the sense of *superiorem non recognoscens*, i.e., with finality of instance) sovereign entity—the traditional foundation of the very concept of sovereignty discussed in Section I.a. The separate and inter-dependent orders and sovereignty claims have to work in harmony with one another. These different melodies and voices, to return to Maduro’s metaphor, must be heard at the same time in an harmonic manner; their relationship must be managed so that, from diversity and pluralism, we can bring about a beautiful harmonious melody “without generating conflicts that ultimately will destroy those legal orders and the values they sustain.”<sup>189</sup> Because they claim that diversity of legal sites is relevant, both concepts of constitutional pluralism and contrapunctual law emphasize that the different systems cannot simply strive to overcome one another. The quasi-positivist idea that each legal order is somehow a master of its own final authority is, however, powerful enough to produce a kind of harmony, provided that there is something shared and in common, accepted by all parties as coming from *within* their orders and not as imposed from above.

If pluralism is going to be workable and efficient—and here is where my argument becomes partly normative—there must be some sort of common basis that unifies the distinct, heterarchical claims by the different legal orders.

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189 Maduro, *Contrapunctual Law* at 524 (cited at 9).

With both Walker and Maduro, we are left in a situation of hope that law will, somehow, find its way despite this heterarchy. In this condition of pluralism, we are witnessing an interactive process, but there is the need for a “glue” to hold the plurality together. What I claim is that a common basis is required to achieve this kind of harmony, and that this is represented by a set of *fundamental principles* shared by the different actors.<sup>190</sup> It is in pursuit and endorsement of this common ground that the European bodies and member states are in part able to, and can hope one day to fully, *contrapunctually* work with one another—while still recognizing the fundamental distinctiveness of legal orders. The sovereignty claims discussed in Section II and III should be understood as being mediated and mitigated by fundamental principles, as counter-limits.

The protection of these principles has been strongly and firmly upheld by the Italian Constitution and its Constitutional Court. First, the Constitution itself leaves the door open to the recognition of fundamental rights through Article 2. Second, the Italian Constitutional Court, in *Granital* (1984), relied on the notion of *controlimiti* and made it clear that it retains jurisdiction over cases of infringement of “fundamental principles of our domestic order or of inalienable rights of human beings.”<sup>191</sup> Third, in the case of the ECHR, the ICtC cast its net even wider, claiming that “the examination of constitutionality cannot be limited to the possible violation of fundamental principles and rights or of supreme principles but must extend to any contrast between interposed rules and the Constitution.”<sup>192</sup> Fourth, Italian non-constitutional courts, dissatisfied with the *Consulta*’s failure over the years to give enough relevance to these fundamental principles, acted on their own and directly applied the ECHR.

These fundamental rights and principles, however, are not unique to the Italian order. Rather, while levels of protection may vary from the national to the supranational level, it is not the case that the Italian legal order is attempting to uphold what may be considered the *Italian* fundamental principles. As Justice Cassese recognizes, European values are at stake; these principles overlap with those norms contained in the national constitutions, becoming shadow, or surrogate, constitutions.<sup>193</sup> The fundamental rights and principles enshrined by the ECHR, and those protected by the ECJ, form a common basis for a pluralist order.

Moreover, fundamental principles are not merely a common basis

190 Id (Miguel Maduro claims that “for pluralism to be viable in a context of a coherent legal order there must be a common basis for discourse.” Maduro then proceeds to identify this common basis with four principles: pluralism; consistency and vertical and horizontal coherence; universality; and, institutional choice).

191 See Decision n. 170 (Italian Constitutional Court 1984, online at [www.giurcost.org/decisioni/1984/0170s-84.html](http://www.giurcost.org/decisioni/1984/0170s-84.html) (visited Dec 7, 2014).

192 See Decision n. 348 (Italian Constitutional Court 2007), online at [www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/S348\\_2007\\_Eng.pdf](http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S348_2007_Eng.pdf) (visited Dec 7, 2014).

193 Sabino Cassese, *La Giustizia Costituzionale: Bilancio di un'esperienza*, Torino, (2014).

of conversation for rights discourse *qua* discourse. Rather, they act, and are interpreted by courts, as *sovereign*. This, I emphasize, does not mean that principles *are* sovereign, at least not in the meaning traditionally attributed to the term. Sovereignty, as I have argued, still resides with those conflicting, overlapping, and heterarchically distinct national and supranational orders such as the ECHR, the EU, and Italy. Fundamental principles, forming the common basis shared by these systems, become the stabilizing mechanism of late sovereignty in the EU. This is the new paradigm shift I am proposing, and that the discussion offered in this essay highlights: from individual sovereign, to institutional sovereignty, to popular sovereignty, and at last, to sovereignty *qua* fundamental principles.

### A. *Sovereignty qua Fundamental Principles*

In the modern state, I claim, there is a shift toward sovereignty as embodied by fundamental principles—but what does this entail? At the outset of my answer, I must briefly attempt to clarify and summarize what I mean by “fundamental principles.” This essay has looked at three different orders protecting individual rights: the ECHR, the EU, and national constitutions. I believe that it is possible to identify a common and shared core among these distinct, interlocked, and overlapping systems of rights: this core is what I refer to as fundamental principles.

What I mean by “sovereign” here, in reference to fundamental principles, is a somewhat different notion than what I discussed in Section I.a. Both the individual and the institutional paradigms of sovereignty had a series of characteristics in common: sovereignty was absolute, unified, indivisible, inalienable, and imprescriptible. Sovereignty *qua* fundamental principles shares with those earlier paradigms the recognition of one entity, namely fundamental principles, as hierarchically supreme, with finality of instance over both the national order and the supranational order. It is, moreover, something internal to the polity, and not imposed from outside. Fundamental principles have thus become the “Archimedean point” of the legal order.<sup>194</sup>

Perhaps I can make my usage of the term ‘sovereignty’ clearer by appealing to the earlier discussion of the Latin notions of sovereignty.<sup>195</sup> I do not believe that *potestas*, *imperium*, or *auctoritas*—as characteristics of Bodin’s, Hobbes’s, or Rousseau’s sovereigns—have been transferred to the principles.<sup>196</sup> This essay shows that such faculties still reside within polities. However, I believe that, as a consequence of the role they play in the European human rights regime,

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194 Gaetano Silvestri, *La Stato Senza Principe*, Torino, 73 (2005).

195 See generally pg. 5.

196 Compare to the claims in: Gaetano Silvestri, *Lo Stato Senza Principe*, (2005).

fundamental principles possess *maiestas*.<sup>197,198</sup> They enjoy, within each polity, a supreme status and dignity that are to be respected above everything else. They are located, *à la* Bodin, above positive law—in the sense that no derogation from this restricted set of principles is allowed, neither by national nor by supranational orders. Furthermore, they are considered so important that both domestic and regional courts feel the need to ensure their protection *vis-à-vis* the plurality of sovereignty claims currently experienced in Europe. This is sovereignty *qua* fundamental principles.

That fundamental rights and principles can be thus understood as sovereign may seem too radical of a shift, sharply moving away from a personified to a wholly intangible sovereign. But sovereignty, and in particular *maiestas*, does not need to reside in a body, whether it be real or fictitious. This is not to deny that, whatever phenomenological form it takes, a sovereign must be able to shape and control the ways in which the legal order interacts with its citizens, and it can do so only if it is embodied, represented, or brought to life. As Professor Walker claims, “sovereignty is a ‘virtual’ category, one that has no phenomenal presence in its capacious entirety and so must always and can only manifest itself through iterative and more-or-less creative symbolic acts of representation.”<sup>199</sup> An entity lacking any phenomenal quality, such as fundamental principles, may be considered sovereign, manifesting itself through adjudication. Fundamental principles as both sovereign and “Archimedean point” of the legal order, therefore, cannot be completely detached from any concept of subjectivity, unlike Gaetano Silvestri claims.<sup>200</sup>

This discussion brings to surface another set of differences between the framework I am proposing and the “traditional” concept of sovereignty outlined in Section I. Most importantly, fundamental principles not only do not directly manifest themselves in lack of iterative and more-or-less creative symbolic acts of representation; also, they are not enforceable on their own. They need some kind of subjectivity, some agents, with *potestas*, *auctoritas*, or *imperium*. As the Italian case highlights, in order to ensure the sovereignty of fundamental principles, there must be a court (or a plurality of courts) that claims ultimate authority over the interpretation of these principles, and brings them to life. This explains the efforts of Italian lower courts to directly apply the ECHR in absence of the ICtJ’s willingness to do so. However, for the *Consulta*, this is not acceptable. Under the frame of sovereignty *qua* fundamental principles, such principles can only remain supreme if highly specialized, heterogeneous, and trained courts (such as the ICtJ,

197 See Davide Salvo, *Majestas*, in Roger Bagnall et al, eds, *The Encyclopedia of Ancient History*, Malden: Blackwell 4236-4238 (Here I refer to the concept of *maiestas populi romani* (the “being greater” or “superiority” of the Roman people), also discussed on pg. 5 of this essay).

198 Julian Franklin, *Bodin: On Sovereignty*, Cambridge, 1 (1992). (Compare to Bodin, where he defines to sovereignty (*maiestas*) as “summa in cives ac subditos legibusque soluta potestas).

199 Walter, *Sovereignty Frames and Sovereignty Claims* at 22 (cited in note 2).

200 Gaetano Silvestri, *Lo Stato Senza Principe*, Torino, Giappichelli Editore 73 (2005).

the ECtHR, or the ECJ)—namely, courts that have *auctoritas*—maintain sole jurisdiction over their adjudication and provide them with a phenomenological “body.”

The necessity to preserve this judicial authority over fundamental rights has been recognized, implicitly or explicitly, and over the course of half a century, by the *Consulta*. In Section II, I discussed the *Granital* decision, on retaining jurisdiction in cases of infringements of fundamental rights and principles by the EU. Section III, furthermore, described how the Italian Constitutional Court, at first, was careful not to define the status of the ECHR, and later on, claimed control over the Convention by constructing it as an interposed norm. In both cases, EU law and the Convention—respectively—were not perceived as a *direct* threat to fundamental principles, but rather as an *indirect* one. After all, as I already mentioned, the European discourse is unlike the U.S. discourse, where the Supreme Court displays a fear that international law and human rights treaties may impair *American* fundamental values and principles.<sup>201</sup> What is at stake in Italy, and in the pluralistic Europe, is an overlapping set of principles. EU law and the Convention are therefore perceived as an indirect threat to the sovereignty of fundamental principles in virtue of their affecting the authority (as *auctoritas*) of the ICt itself, authority that is necessary for ensuring the protection of fundamental principles. These systems grant “constitutional powers” to a myriad of non-constitutional judges. Under my proposed framework, it thus becomes clear why the activist role of lower judges in the early 2000s, and later post-2007 (in those decisions, among others, by the *Consiglio di Stato* and the *Corte dei Conti* discussed in Section III), worried the ICt. Their approach impaired the *Consulta*’s ability to ensure the protection and embodiment of sovereign principles.

A framework of sovereignty *qua* fundamental principles is therefore best suited to explain the present interactions between the Italian legal order and the ECHR. Under this framework it is clear that, for Italy, sovereignty, in all of its facets, cannot be maintained unless: (i) the *Corte Costituzionale* preserves its own authority as the sole interpreter of the Constitution and of fundamental principles, and thus protects the sovereignty of principles; and (ii) the domestic sovereignty either opens up and welcomes, or engulfs (see instrument of interposed norm), the sovereignty claims of supranational systems such as the ECHR, coming both from without and from within the national order. The first point ensures the protection of

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201 See *Foster v Florida*, 537, 990 (U.S. Supreme Court 2002) (For example, Justice Clarence Thomas’s claims in a case on lengthy delays between sentencing and death penalty execution: “While Congress, as a *legislature*, may wish to consider the actions of other nations on any issue it likes, this Court’s Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans.” (Thomas, J., concurring in denial of certiorari). Available on WestLaw. This position was echoed by Justice Antonin Scalia in his dissent in a case on the right to same sex sexual activity. *Lawrence v Texas*, 539 U.S. 558 (2003), online at <https://supreme.justia.com/cases/federal/us/539/558/case.pdf>.(visited Dec 7, 2014)

fundamental principles, making them in a sense tangible and phenomenologically concrete. The second point appears to be necessary in order guarantee the cooperation between the distinct, overlapping systems toward the achievement of a contrapunctual state.

*B. Pluralism within the Core, Human Rights as Limits,  
and the “Vagueness Objection”*

The framework of sovereignty *qua* fundamental principles aims at making sense of a series of phenomena described over the course of this essay: the apparent plurality of sovereignty claims made by different orders in the name of some fundamental principles; the appeal by the ICCt to fundamental principles and rights as counter-limits to regional sovereignty claims; the strong position held by the ICCt against the empowerments of non-constitutional courts, and its perception of their activism as a threat; the Italian non-constitutional courts’ interest in taking an active approach when it comes to rights and principles enshrined by the ECHR and EU law. This last section will address potential objections to a framework of sovereignty *qua* fundamental principles, namely pluralism within the core, human rights as limits, and the “vagueness objection.”

Since the core within a pluralism of sovereignty claims is comprised of multiple fundamental principles, my framework must account for this apparent pluralism within the core. These fundamental principles are not located in a hierarchical structure; they are, rather, a heterarchy. Thus, moving away from the theoretical level describing the ontology of such sovereign principles, toward the realm of practice, the problem of conflict and balancing seems to arise. How could the sovereignty of fundamental principles be upheld if we are to engage (as courts often do) in a balancing process? Any balancing act within the core of fundamental principles would entail proclaiming some right as supreme over another conflicting one, and the latter would fail to be sovereign. This, however, says little about the sovereignty of principles framework. Principles as a core remain sovereign not individually, but as a unity of sovereignty. This unified quality that I ascribe to sovereignty *qua* fundamental principles is a necessary relict of the traditional view of sovereignty described in Section I.

For some, it may appear as if the specter of the theories of rights as limitations to sovereignty briefly referenced earlier in the essay emerges here. John Rawls<sup>202</sup> and Joseph Raz,<sup>203</sup> among others, have argued that human rights are limitations on states’ sovereignty. This position resonates with what Scott Shapiro refers to as the “inverse correlation thesis:” protection of human rights is inversely

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202 John Rawls, *The Law of Peoples*, 27 (Harvard University Press 2000).

203 Joseph Raz, *Human Rights without Foundation*, in Samantha Besson and John Tasioulas, eds. *The Philosophy of International Law*, 328 (Oxford University Press 2013).



correlated to sovereignty.<sup>204</sup> If human rights and fundamental principles limit sovereignty, how can I claim that the two coincide? My argument combines two notions that may be seen as incompatible: fundamental principles and sovereignty. As I have claimed, the dimension of sovereignty upon which Raz and Rawls see rights *qua* limitations has become obsolete. Sovereignty, for Rawls and Raz, is freedom from *external* intervention—where intervention is understood in a stricter and broader sense, respectively.<sup>205</sup> The external dimension of sovereignty, as a frame, has lost much of its explanatory force in recent years. It has been replaced by overlapping and interlocking orders, mutually interfering with one another.<sup>206</sup> In today’s world, as many agree, external sovereignty is being constrained not necessarily by human rights but most importantly by political and economic considerations.<sup>207</sup> Sovereignty and human rights, moreover, are not intrinsically incompatible; “the fact that the internationalization of human rights norms and the weakening of state sovereignty are developing in tandem with each other,” writes Professor Benhabib, “decidedly does not mean that the one can be reduced to the other.”<sup>208</sup> Scholars, including Professor Benhabib and Habermas, have advanced theories according to which human rights strengthen,<sup>209</sup> or at least mutually presuppose,<sup>210</sup> *popular* sovereignty. Thus, strictly understanding human rights (and fundamental principles, as a subset thereof) *qua* limitations on sovereignty falls short of weakening my framework.

Most importantly, some may object: what principles, which fundamental rights? This concept of sovereignty of principles is so vague that is simply

204 Scott Shapiro, *Remarks on Sovereignty and the International Protection of Human Rights* by Cristina Lafont, in *Conference on Justification Beyond the State: Philosophy and International Law*, (Yale University 2014).

205 For Rawls, human rights need to meet a very high bar: they are only to provide the justifying reasons for war and military intervention, as a coercive intervention of one state against another. Raz distances himself from Rawl’s position by understanding intervention as varying from simple demands to litigation in international law, economic sanctions, and military intervention. Raz maintains the coercive aspects of intervention found in Rawls, but in order to have a more inclusive and complete theory of human rights, he needs to lower the threshold of intervention, so that a larger number of moral (and thus human) rights can meet it.

206 Walter, *Sovereignty Frames and Sovereignty Claims* at 24 (cited in note 2).

207 Scott Shapiro, *Remarks on Sovereignty and the International Protection of Human Rights* by Cristina Lafont, in *Conference on Justification Beyond the State: Philosophy and International Law*, (Yale University 2014) (This was an overall point of agreement during the discussion among Cristina Lafont, Darrel Moellendorf, Scott Shapiro, and Neil Walker).

208 Seyla Benhabib, *Twilight of Sovereignty or the Emergence of Cosmopolitan Norms? Rethinking Citizenship in Volatile Times* in Benhabib, *Dignity in Adversity* at 97 (cited in note 1).

209 *Id* at 98 (For Prof. Benhabib, “cosmopolitan norms enhance the project of popular sovereignty while prying open the black box of state sovereignty”).

210 See Habermas Jürgen, *Human Rights and Popular Sovereignty: The Liberal and Republican Versions*” 1-13 (Ratio Juris 1994) (In fact, “we can develop a perspective for a procedural notion of deliberative politics that yields a fuller understanding of how human rights and popular sovereignty mutually presuppose each other”).

irrelevant, inapplicable, and unable to effectively describe and frame the conflicting sovereignty claims advanced by Italy and the European human rights regime. In *Granital* and in the 2007 twin decisions, the ICtC claimed that EU law and the ECHR, respectively, must be compatible with those rights and principles fundamental to the Constitutional order. This statement by the Court, some may argue, is merely a self-interested attempt at the preservation of the *Consulta*'s powers, through the appeal to lofty, abstract, and vague principles. In fact, they may continue; there seems to be no reasonable way in which either the EU or the ECHR—supranational orders guaranteeing individual rights and freedoms—can collide with Italy's fundamental principles, which coincide for the most part with those protected at the regional level, as the ICtC itself recognizes.

While I do not commit to a list of fundamental principles, I believe that pointing at one such principle would help further clarify my argument. Take, for example, Article 6 of the ECHR. Article 6 protects the right to a fair trial, including the right to a public hearing before an independent and impartial tribunal within reasonable time, the right to be presumed innocent, the right to counsel, etc. This is also the specific provision of the ECHR that was the fulcrum of the “war” between non-constitutional courts and the ICtC post-2007. It substantially overlaps with Article 111 of the Italian Constitution.<sup>211</sup>

By referring to one identifiable principle, namely Article 6, the concept of fundamental principles accounts for at least part of the debate surrounding the application of the ECHR in Italy, as well as the claims to authority of the ICtC. As I outlined earlier, a series of court decisions (*Consiglio di Stato* n. 1220 of 2010, *T.A.R. Lazio* n. 11984 of 2010, *Corte d'Appello di Milano* n. 1200 of 2010, and *Corte dei Conti* n. 672 of 2011) took pains to craft legal arguments that supported the direct applicability of Article 6 of the ECHR. This activism allowed them to sidestep the *Corte Costituzionale* and decide on the conventionality of national law. Moreover, in decision n. 388 of 1999, the ICtC found that some human rights enshrined in the Convention—and in particular, Article 6—are also protected by the Article 2 of the Constitution (on inviolable rights of men). The *Consulta* claimed that “besides the coincidence in the catalogs of such rights, the different formulations that they express integrate each other, reciprocally completing their

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211 See Italy Const Article 11: (“All court trials are conducted with adversary proceedings and the parties are entitled to equal conditions before an impartial judge in third party position. The law provides for the reasonable duration of trials. In criminal law trials, the law provides that the alleged offender shall be promptly informed confidentially of the nature and reasons for the charges that are brought and shall have adequate time and conditions to prepare a defence. The defendant shall have the right to cross-examine or to have cross-examined before a judge the persons making accusations and to summon and examine persons for the defence in the same conditions as the prosecution, as well as the right to produce all other evidence in favour of the defence. The defendant is entitled to the assistance of an interpreter [...] In criminal law proceedings, the formation of evidence is based on the principle of adversary hearings”).

interpretations.”<sup>212</sup> The ICtC’s retention of jurisdiction in the name of fundamental rights and principles, therefore, should be understood as an attempt to ensure the most competent interpretation of fundamental principles in light of the overlapping nature of these distinct European rights systems.

## CONCLUSION

This essay has moved across different dimensions and levels of analysis: historical, empirical and legal, and normative. Departing from an historical analysis of the concept of sovereignty, Section I touched on the etymology of different Latin notions of sovereignty (*maiestas*, *potestas*, *imperium*, and *auctoritas*); it then focused on the classical theories of Machiavelli, Bodin, Hobbes, and Rousseau, all of whom were interested in ensuring peace within their respective national borders. It highlighted two paradigm shifts in the conceptualization of sovereignty, namely, (i) from the idea of an individual sovereign to that of institutional sovereignty, and (ii) from institutional to popular sovereignty. Following the World Wars and a shift in focus from national to international peace, nations self-limited their sovereignty. We saw the birth of international organizations and human rights regimes, such as the United Nations, the European Union, and the European Convention on Human Rights. The history of European integration, in particular, and its metamorphosis from an economic to a constitutional order as described in Section II, emphasized the inadequacy of the traditional frames of sovereignty in accounting for this new phenomenon of a pluralism (and plurality) of polities.

I then moved from the historical to a more legal and empirical dimension of analysis. Section II.b. further examined the process of constitutionalization and judicial construction of the EU. The doctrines of direct effect, supremacy, and individual rights protections were first strongly opposed by some member states, and in particular by Italy. The *Corte Costituzionale* eventually gave in to the sovereignty claims of the European Union and its Court, while still preserving its own authority and jurisdiction through the doctrine of counter-limits. In Section III, I discussed the approach of the ICtC to the ECHR. Over the years, the status of the Convention shifted in accordance with the interpretation of the ICtC: from no-status, the ECHR gained statutory prominence, and eventually the status of *norma interposta*. This legal discussion emphasized (i) the different, distinct, and conflicting sovereignty claims put forward by the European human rights regime and the Italian legal order, in a situation of constitutional pluralism, and (ii) the necessity to account for the conflicting, interactive, and interlocking qualities of such systems.

With Section IV, my focus transitioned into a normative and theoretical

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212 See *Decision n. 388* (Italian Constitutional Court 1999), online at [www.giurcost.org/decisioni/1999/0388s-99.html](http://www.giurcost.org/decisioni/1999/0388s-99.html) (visited Dec 7, 2014).

sphere. I summarized and analyzed the theories of Neil Walker and Miguel Maduro, as they pertain to the concept of sovereignty. Partly descriptive and partly prescriptive, both theories highlighted important aspects of what Professor Walker refers to as late sovereignty. In particular, Walker stressed the concepts of heterarchy and constitutional pluralism. On the one hand, the internal dimension of sovereignty has been replaced by partial authorities distributed between various political sites and levels, while on the other hand, overlap, interlock, and mutual interference took the place of external sovereignty.<sup>213</sup> Maduro advanced a more normative position with his idea of contrapunctual law. Harmony among the national and regional orders is going to be achieved only if their actors commit to four principles: pluralism, consistency and vertical and horizontal coherence, universability, and institutional choice.<sup>214</sup> While both positions explained important aspects of the legal debate discussed in the previous sections, they did not focus on what is already shared by these distinct polities. As the discussion of the Italian case highlighted, this is the concept of sovereignty, or *maiestas*, of fundamental principles.

The framework I proposed, sovereignty *qua* fundamental principles, is both a development of the theoretical dialogue between Walker and Maduro and a product of an inductive approach on the legal and empirical background discussed in this paper. Importantly, this sovereignty frame is also indissolubly connected with the traditional theories discussed in Section I on the history of sovereignty. This framework aims at combining two central ideas to this essay, namely sovereignty and fundamental principles (as a subset of human rights), by maintaining some of the traditional characteristics of the concept of sovereignty—its unity, its position above positive law, and its finality of instance. It ultimately relies on a specific understanding of sovereignty *qua maiestas*, which I believe is a valuable notion, at least in regard to defining the sovereignty of fundamental principles. Through their supreme status and dignity, fundamental principles—as the common basis shared by the plurality of European constitutions and as counter-limits—mediate and mitigate the European sovereignty claims. It is in the name of protecting these principles, and despite the myriad of sovereignty claims, that the ICCt has strived to maintain its own jurisdiction and *auctoritas*.

This essay departed from the understanding that sovereignty is an historical concept. If my endeavor has succeeded, my analysis has proven this statement correct. Over the centuries, the concepts of *maiestas*, *potestas*, *imperium*, and *auctoritas* have been conflated into the overarching idea of sovereignty. After all, sovereignty possessed all of the respective qualities: it was absolute, exclusive, indivisible, inalienable, and imprescriptible. What European integration has exemplified, along with the struggle and conflict among the distinct sovereignty

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213 Walter, *Sovereignty Frames and Sovereignty Claims* at 24 (cited in note 2).

214 Maduro, *Contrapunctual Law* at 526-530 (cited in 9).

claims, is that sovereignty, not only ontologically but also theoretically, is not unity but pluralism. Sovereignty as a concept has not become obsolete. Perhaps, as I have argued, all that is necessary to restore its original explanatory power is to re-frame sovereignty in light of its original components. The plethora of sovereignty-claiming orders is to be characterized and theorized in light of a number of sovereignty frames, among which are *maiestas*, *potestas*, *imperium*, and *auctoritas*. Sovereignty *qua* fundamental principles is one such frame—one that plays a fundamental descriptive and normative role in the relationship between the Italian legal order and the European human rights regime.

<b>ARTICLE</b>
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**30 YEARS AFTER CLEBURNE:  
A LOOK BACK AT A LANDMARK DECISION FOR  
INTELLECTUAL DISABILITY JURISPRUDENCE**

David Sunshine Hamburger<sup>†</sup>

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*ABSTRACT: 2015 marks the 30th anniversary of *Cleburne v Cleburne Living Center Inc.*, a rarely talked about but highly important Supreme Court case. In *Cleburne*, the Court invalidated an ordinance of the city of Cleburne, Texas that required a group home for the intellectually disabled to receive a special use permit in order to operate. However, in its ruling the Court found that the intellectually disabled did not constitute a suspect or quasi-suspect class and therefore were not subject to anything more than the lowest level of judicial scrutiny, the rational basis test. Being deprived of heightened scrutiny has severely disadvantaged the 4.6 million intellectually disabled Americans and their families in the courts. As legal scholar Michael Waterstone writes, since *Cleburne*, “constitutional law has evolved, but it has stayed frozen in time for people with disabilities.”*

*In this paper I make two arguments. First, I argue that the intellectually disabled should have been granted intermediate scrutiny because they meet the criteria of a quasi-suspect class. The Court’s analysis of the intellectually disabled in *Cleburne* was flawed and inconsistent with its previous considerations of suspect classes. Secondly, I contend that the Court’s decision to use a heightened rational basis test (without acknowledging it) and its resolution to strike the ordinance down only as applied to the respondents (instead of facially) broke with precedent and was insufficient and inappropriate. I also review the impact the case has had on the intellectually disabled as well as exploring reasons for why the Court may have come to the errant conclusions it did.*

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## INTRODUCTION

On July 1<sup>st</sup>, 1985 the Supreme Court invalidated a city ordinance of Cleburne, Texas that required a group home for the intellectually disabled to receive a special use permit in order to operate.<sup>1</sup> Many in the disability rights community hailed the Court's ruling as a triumph for the intellectually disabled. In fact, the case's plaintiff, Jan Hannah, a part owner of the group home, "greeted the decision as a victory, stating, 'I'm about to float out of the atmosphere.'"<sup>2</sup> However, members of the legal community were far less convinced that the Court's ruling marked a positive turning point in intellectual disability jurisprudence; the Court found that intellectually disabled individuals did not constitute a suspect or quasi-suspect class and therefore were not subject to anything more than the lowest level of scrutiny, the rational basis test. Furthermore, the Court did not overturn the ordinance on its face but rather as it applied solely to the specific home in question. As we near the 30<sup>th</sup> anniversary of the *City of Cleburne v Cleburne Living Center, Inc.*<sup>3</sup> ruling, it is clear that the Court's verdict accomplished little for the intellectually disabled. As Michael Waterstone writes, since *Cleburne*, "constitutional law has evolved, but it has stayed frozen in time for people with disabilities."<sup>4</sup> Likewise, according to Laura Bornstein, this has created a legal landscape where "government-sanctioned prejudice against mentally retarded persons has endured."<sup>5</sup> While no state today permits forced sterilization of the intellectually disabled (something the Court upheld in *Buck v Bell (1927)*<sup>6</sup>), the intellectually disabled are subject to discriminatory state laws in "family law, voting, commitment proceedings, and the provision of benefits."<sup>7</sup> By denying the intellectually disabled heightened scrutiny, the Court allowed them to remain vulnerable to federal, state, and local legislatures.

The *Cleburne* ruling has also received attention from the legal community for its divergence from traditional rational basis review. Many legal scholars, as well as Justice Marshall in his dissent, found that the Court used a *heightened* rational basis review in order to strike down the ordinance, not simply a traditional rational basis review as the opinion claimed. The majority's belief was that the conventional (and widely deferential) rational basis test, as established in

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1 I have opted to use the term "intellectually disabled" in this paper instead of "mentally retarded" as it is the preferred term of disability rights advocates. However, the term "mentally retarded" was common in the 1980s and will be found both in the opinions of the Court and in various law reviews I cite.

2 Laura Bornstein, *Contextualizing Cleburne*, 41 Golden State U L Rev 91, 97 (2010).

3 473 US 432 (1985).

4 Michael Waterstone, *Disability Constitutional Law*, 63 Emory L J 527, 529 (2013).

5 Bornstein, 41 Golden State U L Rev at 118 (cited in note 2).

6 274 US 200 (1927).

7 Waterstone, 63 Emory L J at 548 (cited in note 4).

*Williamson v Lee Optical Co. (1955)*<sup>8</sup> and *City of New Orleans v Duke*s (1976),<sup>9</sup> should have upheld Cleburne's ordinance.<sup>10</sup> In his dissent, Justice Marshall maintained that the *Cleburne* majority subjected the ordinance to "precisely the sort of probing inquiry associated with heightened scrutiny."<sup>11</sup> By not being forthright with its use of a heightened rational basis test, the Court left lower courts unsure of the appropriate standard they should use in cases of discrimination pertaining to the intellectually disabled. Furthermore, the Court created "a confusing precedent by striking only as applied an ordinance which had all of the characteristics of a law that should be held facially invalid."<sup>12</sup> Typically, if the Court strikes down an equal protection challenge, the statute is held facially invalid and "not left on the books" to potentially be used against other groups similarly situated to the respondents.<sup>13</sup> Thus, as Richard Saphire observes, "given the importance of standards, the occasions on which the Supreme Court signals its intent to alter a reigning standard or set of standards should be viewed as significant events."<sup>14</sup> Consequently, *Cleburne* warrants attention both for its impact on the intellectually disabled and its important break from traditional rational basis adjudication.

I make two arguments in this paper. First, I argue that the intellectually disabled should have been granted intermediate scrutiny because they meet the criteria of a quasi-suspect class. The Court's analysis of the intellectually disabled in *Cleburne* was flawed and inconsistent with its previous considerations of suspect classes. Second, I contend that the Court's decision both to use a heightened rational basis test (without acknowledging it) and that to strike the ordinance down only as applied to the respondents broke with precedent and was insufficient and inappropriate.

I divide this paper into five parts. In Part I, I provide a summary of the case and the three opinions the Court produced. In Part II, I demonstrate that the Court erred in not finding that the intellectually disabled constituted a quasi-suspect class. In Part III, I examine the Court's choice to use a heightened rational basis test instead of existing intermediate scrutiny or the traditional rational basis test. In addition, I examine the Court's decision to strike down the ordinance "as applied" rather than "facially." In Part IV, I examine the repercussions of the Court's ruling

8 348 US 483 (1955)

9 427 US 297 (1976)

10 *Williamson v Lee Optical Co.*, 348 US 483, 486 (1955); *City of New Orleans v Duke*s, 427 US 297, 303 (1976).

11 *City of Cleburne, Texas Et Al. v Cleburne Living Center, Inc. Et Al.*, 473 US 432, 458 (1985) (Marshall concurring and dissenting in part).

12 Ellen Halfon, *A Changing Equal Protection Standard: The Supreme Court's Application of a Heightened Rational Basis Test in City of Cleburne v Cleburne Living Center*, 4 Loyola LA L Rev 921, 969 (1987).

13 *Cleburne*, 473 US at 477.

14 Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of Cleburne Living Center, Inc.*, 88 Ky L J 591, 594 (1999).



and the impact it has had on the intellectually disabled. In Part V, I investigate why the Court came to the decision it did, and I offer various external and internal factors that could have influenced it.<sup>15</sup> I conclude by speculating on the future of intellectual disability constitutional law.

## I. CASE OVERVIEW

In July 1980, Jan Hannah purchased a building at 201 Featherston Street in the city of Cleburne, Texas with the intention of leasing it to Cleburne Living Center, Inc (CLC). CLC sought to use the property to house 13 intellectually disabled men and women. The city informed CLC that it classified the group home as a “hospital for the feeble minded” which under its zoning ordinance would require CLC to apply for a special use permit.<sup>16</sup> CLC complied with the city’s demands, but the City Council of Cleburne voted 3 to 1 to deny the special use permit. CLC filed a suit in Federal District Court claiming that the zoning ordinance discriminated against the intellectually disabled. The Federal District Court found that “if the potential residents of the Featherston Street home were not mentally retarded, but the home was the same in all other respects, its use would be permitted under the city’s zoning ordinance.”<sup>17</sup> Yet, the District Court acknowledged that the intellectually disabled had not previously been treated as a suspect or quasi-suspect class. Additionally, they identified no fundamental right at stake. As a result, the District Court proceeded to use the rational basis test to evaluate CLC’s equal protection claim and upheld the ordinance finding that it was rationally related to Cleburne’s interest in “the legal responsibility of CLC and its residents, ...the safety and fears of residents in the adjoining neighborhood, and the number of people to be housed in the home.”<sup>18</sup> CLC appealed the ruling, and the Court of Appeals for the Fifth Circuit reversed the lower court’s decision. The Appeals Court’s ruling hinged on labeling the intellectually disabled a quasi-suspect class. This meant that the ordinance was subject to intermediate scrutiny and would have to “substantially further” an important government interest to remain valid.<sup>19</sup> Cleburne’s zoning ordinance failed to meet this heightened standard

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15 I focus attention on the oral argument and re-argument of the case in addition to Justice Powell’s personal archives of the *Cleburne* ruling, which shed some light on the Court’s rationale. Both of these resources were not available in the immediate aftermath of the ruling when the majority of law reviews about the case were written. However, more recent law review articles seem to have overlooked these sources of information, with few citing them.

16 Only hospitals for the “insane,” “alcoholic,” or “drug addicts” as well as “penal or correctional institutions” were required to obtain special use permits whereas other multiple person dwellings such as dormitories, boarding houses, and hospitals did not need a special permit; *Cleburne*, 473 US at 436.

17 *City of Cleburne Et Al. v Cleburne Living Center, Inc. Et Al.*, 726 F2d 93, 94 (5<sup>th</sup> Cir 1984).

18 *Id* at 103.

19 *Cleburne*, 473 US at 438.

and the Appeals Court invalidated the ordinance facially and as applied to the respondents.

The Supreme Court affirmed in part and vacated in part the Appellate Court's ruling. All nine justices agreed that the ordinance was invalid as applied to the respondents. However, the majority opinion written by Justice White and joined by five others objected to the Appellate Court granting the intellectually disabled quasi-suspect classification and using intermediate scrutiny to adjudicate the case.<sup>20</sup> Instead, they used the rational basis test to strike down the ordinance, but only as applied to the respondents (declining to strike it down facially as the Appellate Court had ruled). I analyze the majority's opinion in greater detail throughout this paper, but its criticism of the Appellate Court's ruling can be divided into three main parts. First, the majority found that the reduced capacities of the intellectually disabled often meant that discriminatory legislation could be a legitimate factor in some cases. As Justice Stevens points out in his concurring opinion, a statute limiting an intellectually disabled individual to "operate hazardous equipment might well seem rational even though they deprived him of employment."<sup>21</sup> In addition, they found that the intellectually disabled are a "large and diversified group" whose treatment "under the law is a difficult and often technical matter, very much a task for legislators."<sup>22</sup> The Court decided not to constrain legislatures by requiring heightened scrutiny of their statutes for several reasons: some statutes that exclude the intellectually disabled are valid and legislation pertaining to intellectually disabled persons is challenging to enact. Second, the Court claimed that the intellectually disabled was not a suspect class in large part because its members were not politically powerless. Political powerlessness has traditionally been a criterion for determining whether a group is a suspect class. The Court pointed to the fact that, in recent years, federal and state legislatures have passed a host of legislation in favor of the intellectually disabled. The Court feared that heightening scrutiny would dissuade future positive legislative reforms. Third, the majority contended that granting the intellectually disabled suspect classification would open the floodgates to a host of other groups such as the aged or the mentally ill. The Court was concerned that it would dilute the ranks of previously determined suspect classes if many more groups were awarded suspect status.

The concurring opinion by Justice Stevens demonstrates the Justice's dissatisfaction with the current three-tier equal protection review.<sup>23</sup> He offers that a properly understood rational basis test is sufficient to cover any type of equal protection claim. He states, "the rational-basis test, properly understood, adequately explains why a law that deprives a person of the right to vote because

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20 Joined by Justices O'Connor, Rehnquist and Powell; joined in concurrence by Justice Stevens and Chief Justice Burger; Id.

21 Id at 454 (Stevens concurring).

22 Id at 443-44.

23 Joined by Chief Justice Burger

his skin has a different pigmentation than that of other voters violates the Equal Protection Clause.”<sup>24</sup> Justice Stevens argued that we “do not need to apply a special standard, or to apply ‘strict scrutiny’ to decide such cases.”<sup>25</sup> Turning to the case at hand, Justice Stevens finds that Cleburne’s zoning ordinance does not pass the rational basis test although he does believe that the intellectually disabled do call for “special supervision in some cases.”<sup>26</sup> I agree with the reading that Justice Stevens’ opinion “lends little support to Justice White’s majority” since it seems that the two opinions “merely agree for different reasons on the rational basis test as the lowest common denominator.”<sup>27</sup> Justice Stevens does not touch upon the rationale that the majority used to relegate the intellectually disabled to the rational basis test. Instead, he contends that rational basis test is appropriate in this case because it is appropriate in *all* equal protection cases.

Justice Marshall’s dissenting opinion argues that the Appellate Court’s ruling should have been upheld in its entirety.<sup>28</sup> Justice Marshall spends a considerable amount of time detailing the historical mistreatment of the intellectually disabled, which suggests that the intellectually disabled constitute a quasi-suspect class. In addition, he challenges the majority for not acknowledging that they are using what he sees as a heightened rational basis test to reach their verdict. Lastly, he faults the Court’s decision to not strike down the ordinance facially. Justice Marshall’s overall critique is that the Court has broken from tradition in its ruling in fundamental and precarious ways.

## II. THE INTELLECTUALLY DISABLED AS A QUASI-SUSPECT CLASS

The Supreme Court has never laid out a clear set of criteria of how it determines if a group of individuals constitutes a suspect class. However, a series of cases have illuminated three main factors that the Court seems to weigh.<sup>29</sup> The Court considers A) whether the group has faced a history of discrimination, B) whether the group is politically powerless, and C) whether the characteristic that defines the group is immutable but irrelevant to the groups’ ability to participate in society. I find that the intellectually disabled meet all three criteria; thus, they should have been elevated to a quasi-suspect class.

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24 *Cleburne*, 473 US at 452 (Stevens concurring).

25 *Id* at 453.

26 *Id* at 454.

27 James W. Ellis, *On the Usefulness of Suspect Classifications*, 3 Const Commen 375, 381 (1986).

28 Joined by Justice Brennan and Justice Blackmun.

29 Marcy Strauss, *Reevaluating Suspect Classifications*, 35 Seattle U L Rev 135 (2011); John Wilson, *Cleburne: An Evolutionary Step in Equal Protection Analysis*, 46 Md L Rev 163 (1986); Mark Wunder, *Equal Protection and the Mentally Retarded: A Denial of Quasi-Suspect Status in City of Cleburne v. Cleburne Living Center*, 72 Iowa L Rev 241 (1986).

### A. A History of Discrimination

In *San Antonio Independent School District v Rodriguez* (1973)<sup>30</sup> Justice Powell wrote that the poor are not a suspect class, in part because they did not have “the traditional indicia of suspectness” of having been “subjected to such a history of purposeful unequal treatment.”<sup>31</sup> Similarly, in Justice White’s *Cleburne* opinion he mentions that a lack of a “history of purposeful unequal treatment” is part of why the Court “declined to extend heightened review to differential treatment based on age” in *Massachusetts Board of Retirement v Murgia* (1976)<sup>32, 33</sup> While the absence of historical discrimination has been a partial cause for excluding groups from suspect classification, it is clear that it has also been a determinate factor in granting heightened review. In the landmark case *Frontiero v Richardson* (1973)<sup>34</sup>, in which “classifications based upon sex” were found to be “inherently suspect,” Justice Brennan recounted at length the “long and unfortunate history of sex discrimination.”<sup>35</sup> While Justice Brennan does review other elements, such as the immutability of one’s sex, historical discrimination against women was a primary factor in the Court’s granting of suspect classification. A history of discrimination is important in determining whether a group merits heightened scrutiny because it “indicates whether the legislative process has failed to protect it, warranting judicial intervention.”<sup>36</sup> While the Supreme Court is usually careful not to overstep its bounds and become a “super legislature,” a history of discrimination of a particular class has been a partial catalyst to granting heightened scrutiny.

Although the Court has never defined exactly what constitutes a history of discrimination, the intellectually disabled in the United States have suffered more than enough to qualify as a historically discriminated group. In his dissent, Justice Marshall states that the intellectually disabled have faced “segregation and discrimination that can only be called grotesque.”<sup>37</sup> He details that by the latter part of the 19<sup>th</sup> Century “a regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worse excesses of Jim Crow.”<sup>38</sup> By evoking “Jim Crow,” it is apparent that Justice Marshall is trying to demonstrate the fundamental similarity between discrimination faced by the intellectually disabled and by African Americans who were already a protected group due to racial classifications being suspect. He goes on to mention that the

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30 411 US 1 (1973).

31 *San Antonio Independent School District v Rodriguez*, 411 US 1, 28 (1973).

32 427 US 307 (1976).

33 *Cleburne*, 473 US at 441.

34 411 US 677 (1973).

35 *Frontiero v Richardson*, 411 US 677, 682, 684 (1973).

36 Strauss, 35 Seattle U L Rev at 150 (cited in note 29).

37 *Cleburne*, 473 US at 461 (Marshall concurring and dissenting in part).

38 *Id* at 462.

intellectually disabled have frequently been denied fundamental rights such as “the right to marry and procreate” and, with the blessing of the Court, were subject to “compulsory eugenic sterilizations laws between 1907 and 1931.”<sup>39</sup> In addition, the intellectually disabled committed to state mental institutions were often subject to mental and physical abuse, overcrowding, lack of adequate medical care, and denial of basic rights and freedoms.<sup>40 41</sup>

However, the Justice, and the Court as a whole, failed to acknowledge that the 1970s and 1980s was a period of renewed animosity and discrimination towards the intellectually disabled especially with regards to housing. During the 1970s, “a wave of class action lawsuits and pressure from disability rights groups exposed the horrendous conditions in which mentally retarded persons” were living in state institutions.<sup>42</sup> At first, these lawsuits sought to reform state institutions, but later they began to advocate for moving the intellectually disabled into smaller, less institutionalized settings (like the CLC). The change was dramatic, with two thirds of the intellectually disabled “released into the community during the 1970s, usually by court order,” which increased the number of group homes for the intellectually disabled tenfold.<sup>43</sup> However, many communities were extremely opposed to the influx of the intellectually disabled and met them with hostility. According to the U.S General Accounting Office in 1983 (two years before *Cleburne*), “37% of group home sponsors who participated in public hearings relating to establishment of their group homes faced considerable resistance from community members.”<sup>44</sup> Community tactics for resisting group homes ranged from arson and threatening property owners who intended to sell their houses for use as a group home to pressuring officials to move group homes to the outskirts of towns and adjusting zoning ordinances.<sup>45</sup> While Justice White mentions the passing of the 1973 Rehabilitation Act (which was one of the stimuli for the migration of intellectually disabled to group homes) to demonstrate that contemporary American politicians were in favor of the intellectually disabled living within American communities, we can see at a local level that discrimination and hatred persisted. Indeed, as Renea Hicks, the attorney for CLC stated in his oral argument before the Court, “the city’s actions in this particular case and its justifications for its actions are a crystallization...of the historical attitudes and mistreatment and underestimation of the mentally retarded people and their abilities.”<sup>46</sup> Thus, while Justice Marshall

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39 Id at 463.

40 Wilson, 46 Md L Rev at 177–78 (cited in note 29); Marie Appleby, *The Mentally Retarded: The Need for Intermediate Scrutiny*, 7 BC Third World L J 109, 112–17 (1987).

41 *Cleburne*, 473 US at 464 (Marshall concurring and dissenting in part).

42 Bornstein, 41 Golden Gate U L Rev at 100 (cited in note 2).

43 Id at 101.

44 Id at 102.

45 Id at 100–04.

46 Oral Argument of Hicks (Respondent) at 34:00, *City of Cleburne, Texas Et Al. v Cleburne Living Center, Inc. Et Al.*, 473 US 432 (1985).

does well to talk about the historical discrimination of the intellectually disabled, it is important to realize that discrimination persisted at the time of the Court's ruling; *Cleburne* was but one part of a widespread phenomenon that took place in several states.<sup>47</sup>

Incredibly, the majority opinion is completely devoid of a discussion of the historical discrimination faced by the intellectually disabled. In fact historical discrimination, a "traditional indicia of suspectness," is only mentioned once by the majority opinion, with regards to the previously quoted comment about the aged in *Murgia*. Interestingly, when Justice White reviews why women received heightened scrutiny he focuses on the immutability of sex and its irrelevance to differential treatment, not mentioning the fact that, as I have shown, the historical discrimination that women faced was clearly an important factor part in the Court's decision. Of course, this was not accidental. It is likely that "the plurality could find no effective way to discuss the extensive history of discrimination against the retarded without acknowledging the need for heightened scrutiny."<sup>48</sup> While a history of discrimination alone is not enough to award a class suspect status, it is clear that the historical treatment of the intellectually disabled, both in distant and contemporary U.S history, was grave enough to meet the first of the three characteristics needed to warrant heightened review.

### B. *Politically Powerless*

The motivation for the Court to use political powerlessness as a criterion for assigning suspect status is clear: if a group cannot rely on the normal political process to protect its interest then it requires the Court to act as a bulwark. However, as with determining a history of discrimination, the Court has not set a strict guideline as to how it defines a politically powerless group. Despite this challenge, Marcy Strauss finds that there are four main approaches that the Court normally uses to establish political powerlessness (either on their own or in combination):

These approaches consider (1) the group's ability to vote; (2) the pure numbers of the group; (3) the existence of favorable legislative enactments that might demonstrate political power; and (4) whether the members of the group have achieved positions of power and authority.<sup>49</sup>

Justice White denies the relevance of the second approach when he states "any minority can be said to be powerless to assert direct control over the legislature."<sup>50</sup>

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47 Bornstein, 41 Golden Gate U L Rev at 100 (cited in note 2).

48 Wilson, 46 Md L Rev at 178 (cited in note 29).

49 Strauss, 35 Seattle U L Rev at 154 (cited in note 29).

50 *Cleburne*, 473 US at 445.

Justice White offers that every small group can rightfully claim it does not wield power to “assert direct control over the legislature” but that does not mean they are all politically powerless. For example, Fortune 500 CEOs are a political minority yet no one would claim they are politically powerless.<sup>51</sup> Furthermore, this approach of looking at pure numbers seems irrelevant in the wake of the gender cases where women were deemed politically powerless despite actually being a majority of the population at the time of *Frontiero*.<sup>52</sup> In Justice White’s mind, the fact that intellectually disabled are a small minority unable to impact the legislative process directly is meaningless if, as he claims, they are still able to attract the legislature’s attention (the third approach). Nevertheless, I hesitate to dismiss this approach entirely. Size does matter in the sense that large minorities are better able to gain the attention of the legislature and affect legislation *indirectly*. Pundits often talk about how the Republican and Democratic parties are adjusting their platforms to win the “Black vote,” “Hispanic vote,” or “Women vote,” but rarely do pundits talk about parties trying to win the “intellectually disabled vote” because the intellectually disabled are not large enough to constitute an essential voting bloc.<sup>53</sup>

A second approach involves considering the group’s ability to vote. While it is true that the intellectually disabled constitute an inessential voting bloc, superseding this is the fact that 26 states at the time of *Cleburne* limited or barred the intellectually disabled from voting at all.<sup>54</sup> This means that at the time the intellectually disabled had close to zero ability to directly impact the political process. The intellectually disabled also pass the “underrepresentation test,” the fourth criterion for determining political powerlessness. The test emerged in *Frontiero*, where the plurality found that despite women not being a small minority they were “vastly underrepresented in this Nation’s decision-making councils.”<sup>55</sup> To the Court, the fact that women were underrepresented contributed to their political powerlessness. It goes without saying that the intellectually disabled would pass the “underrepresentation test” both then and now, as there has never been an intellectually disabled person to serve as an elected official in Washington. To summarize, of the three criteria of political powerlessness that I have reviewed so far the intellectually disabled have not only met all three, but they were a smaller group, less represented in government, and had less voting rights than women at the time of *Frontiero* when gender received suspect status.

Despite all these aspects of political powerlessness, Justice White would still counter that it is impossible for the intellectually disabled to be considered politically powerless when they are able to “attract the attention of lawmakers” and

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51 Strauss, 35 Seattle U L Rev at 165 (cited in note 29).

52 Id at 154.

53 Halfon, 4 Loyola LA L Rev at 945 (cited in note 12).

54 Boris Feldman, *Mental Disability and the Right to Vote*, 88 Yale L Rev 8 (1979).

55 *Frontiero*, 411 US at 677.

have had a recent history of legislation passed for the purpose of their benefits.<sup>56</sup> Justice White cites three different federal anti-discriminatory acts that were passed in the 1960s and 1970s, the goal of which was to assist the intellectually disabled (and indeed they did have a positive impact).<sup>57</sup> He also mentions, “the State of Texas has similarly enacted legislation that acknowledges the special status of the mentally retarded.”<sup>58</sup> In Justice White’s mind, “the legislative response, which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless.”<sup>59</sup>

Indeed, if the legislature was actually the intellectually disabled’s guardian angel that Justice White makes it out to be, then the intellectually disabled would not be politically powerless. However this evaluation is far from reality. In fact, at the time of *Cleburne*, the Reagan Administration was pursuing a “sophisticated and steady attack on the roots of the disability rights movement.”<sup>60</sup> During President Reagan’s first four years in office, federal funding of services for the intellectually disabled decreased each year.<sup>61</sup> Furthermore, the Reagan Administration worked to accomplish a drastic curtailment of the Education for All Handicapped Children Act of 1975 (one of the acts that Justice White uses in his opinion to demonstrate the federal government’s resolve to protect the intellectually disabled).<sup>62</sup> President Reagan did not operate alone; fellow Republicans joined him in these efforts. A closer examination of federal policies at the time shows that the legislature was not as fully in support of assistance to the intellectually disabled as Justice White suggests.<sup>63</sup>

However, even if one were to believe Justice White that the federal government was interested in aiding the intellectually disabled, it is wrong to assume that they should then not be deemed politically powerless. First, as Justice Marshall contends, the Court “has never suggested that race-based classifications became any less suspect once extensive legislation had been enacted on the subject.”<sup>64</sup> The idea that legislation in favor of a group reduces the need for judicial protection of it makes little sense. The Court errs when it assumes that “once legislation favorable to a group has been enacted, the ‘illness’ of prejudice is somehow miraculously

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56 *Cleburne*, 473 US at 438 (White).

57 The Rehabilitation Act of 1973, the Developmental Disabilities Assistance and Bill of Rights Act of 1963, and the Education of the Handicapped Act of 1975

58 *Cleburne*, 473 US at 438.

59 *Id.*

60 Bornstein, 41 Golden State U L Rev at 110 (cited in note 2),

61 *Id.* at 108.

62 *Id.* at 110.

63 It is also relevant to note that the Solicitor General, Assistant Attorney General, Deputy Solicitor General, and Deputy Assistance Attorney General were four out of the five amicus briefs that the Court received in favor of reversal of the Appellate Court’s decision. Again, this showcases the Reagan Administration’s assault of disability rights.

64 *Cleburne*, 473 US (Marshall dissent).



‘cured.’”<sup>65</sup> Second, just because some positive legislation exists does not mean that harmful legislation will not also be passed. Justice White himself admits that the Cleburne ordinance rested on “irrational prejudice against the mentally retarded,”<sup>66</sup> so it is clear that, while one level of government may pass beneficial legislation, another level of government may pass legislation to the opposite effect at the same time. Third, as made evident by the Education for All Handicapped Children Act of 1975, there is nothing stopping legislation from being reversed or eroding. It is important for the Court to reinforce legislative action because rulings by the Court that grants protections to a class “generally has a permanence and gravitas that statutory law does not.”<sup>67</sup> Fourth, the Court contradicts itself because in *Frontiero* “the plurality noted that Congress had become increasingly sensitive to gender-based classifications” and saw this as a reason for why “the judiciary ought to afford gender-based classifications stricter scrutiny.”<sup>68</sup> It is inconsistent to then claim in *Cleburne* that increased congressional action means less of a need for stricter scrutiny. Finally, the Court fails to understand its role in assisting the legislative efforts since “virtually all the legislative reforms benefitting the retarded have been the *result* of judicial action.”<sup>69</sup> Indeed, it must be acknowledged that much of the legislation that Justice White cites came on the heels of class action suits and court cases that sided in the favor of the intellectually disabled. This demonstrates that the intellectually disabled meet the suspect criterion of being political powerless by satisfying the four commonly used indicators. Furthermore, even if the intellectually disabled do “attract the attention of lawmakers,”<sup>70</sup> it does not follow that this should work against them receiving suspect status.

### C. Irrelevant Immutable Characteristic

None of the justices in *Cleburne* argue against the idea that being intellectually disabled is an immutable characteristic: “mental retardation cannot be successfully ‘treated,’ no medication or other therapy can significantly alter the intellectual thresholds set forth.”<sup>71</sup> One cannot opt to join the group and it operates like gender or race in the sense that someone becomes intellectually disabled “solely by the accident of birth.”<sup>72</sup>

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65 Halfon, 4 Loyola LA L Rev 921 at 947 (cited in note 12).

66 *Cleburne*, 473 US at 438 (White).

67 Waterstone, 63 Emory L J at 557 (cited in note 4).

68 Wilson, 46 Md L Rev at 182 (cited in note 29).

69 Elizabeth Sharpe, *House Is Not a Home: City of Cleburne v. Cleburne Living Center*, 6 Pace L Rev 267, 302 (1986).

70 *Cleburne*, 473 US at 445.

71 Peter Margulies, *Newest Equal Protection: City of Cleburne and a Common Law for Statutes and Covenants Affecting Group Homes for the Mentally Disabled*, 3 NY L Sch Hum Rts Ann 359, 359 (1985).

72 *Frontiero*, 411 US at 677.

However, immutability alone is not enough to help make a group suspect. After all, eye color, height, and hair color are immutable traits, yet those groups should not be labeled as suspect classes. Instead, the characteristic that defines that group must be irrelevant to legitimate state interest. The extent to which a characteristic needs to be considered irrelevant in order to help qualify a group for heightened scrutiny is a major point of contention in *Cleburne*. It is undeniable that “mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions.”<sup>73</sup> Certainly, as Justice Stevens adds in his concurring opinion, “every law that places the mentally retarded in a special class is not presumptively irrational.”<sup>74</sup> Yet, at the same time, it is clear that there are instances (such as the ordinance before the Court) where the intellectually disabled’s immutable trait is irrelevant to government legislation. Justice Marshall best explains the problem with the Court’s rationale when he says the following in his dissent:

Heightened scrutiny has not been ‘triggered’ in our past cases only after some undefined numerical threshold of invalid ‘situations’ has been crossed... Whenever evolving principles of equality, rooted in the Equal Protection Clause, require that certain classifications be viewed as potentially discriminatory, and when history reveals systematic unequal treatment, more searching judicial inquiry than minimum rationality becomes relevant.<sup>75</sup>

The question is not whether there are “valid situations” in which the trait can be used by legislatures or if the amount of “valid” usages outweighs times that the trait has been used for unfair discrimination. Instead, if a classification is “viewed as potentially discriminatory” and has been historically used for discriminatory purposes, it should satisfy the immutable and irrelevant benchmarks necessary for heightened scrutiny.

Justice White has also placed an unfair standard on the intellectually disabled. As Justice Marshall points out, “while *Frontiero* stated that gender ‘frequently’ and ‘often’ bears no relation to legitimate legislative aims, it did not deem gender an impermissible basis of state action in all circumstances.”<sup>76</sup> Furthermore, the Court has found that even race is “usable for remedying some kinds of past discrimination” and that “alienage is acceptable ground for exclusion from some kinds of government jobs.”<sup>77</sup> If the Court is willing to allow that discrimination based on gender, race, or alienage is sometimes valid, yet still grants

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73 *Cleburne*, 473 US at 438 (White).

74 *Id.* at 453 (Stevens concurring).

75 *Id.* at 461 (Marshall dissenting).

76 *Id.*

77 Ellis, 3 Const Commen at 368 (cited in note 27).

them suspect status, then to deny the intellectually disabled suspect status because discrimination based on their disability is sometimes valid is inconsistent and unfair. The intellectually disabled are a group defined by an immutable trait, and, while their immutability may sometimes bear a “relation to legitimate legislative aims,”<sup>78</sup> many times, as in the case of *Cleburne*, this immutability is not relevant. Thus, the intellectually disabled meet the third and final criterion that the Court uses to determine whether a group should be considered a suspect class.

### III. RATIONAL BASIS REVIEW WITH A “BITE”

Intermediate scrutiny is triggered if “the group in question bears sufficient resemblance to traditional suspect classes.”<sup>79</sup> Therefore, legislation dealing with the intellectually disabled ought to trigger intermediate scrutiny because, as I demonstrated in part II, they fulfill all three criteria generally used by the Court when determining whether a group warrants suspect status. The intellectually disabled may fall short of strict scrutiny due to the fact that their defining characteristic is not always irrelevant to government action (whereas race nearly always is), but “the middle tier can accommodate groups that match the traditional indicia of suspectness less perfectly than racial minorities.”<sup>80</sup>

There are high stakes in determining the level of scrutiny a case will receive. When a Court uses intermediate scrutiny, there is “a presumption of the law’s unconstitutionality that can be rebutted only if the government can establish that the classification is ‘substantially’ related to an ‘important’ (and, of course, an otherwise constitutionally legitimate) government interest.”<sup>81</sup> While intermediate scrutiny is not as stringent as strict scrutiny in which a classification must pass “exacting scrutiny” and can only survive if it is “justified by a compelling government interest,” it offers far greater protection than the rational basis test.<sup>82</sup> The rational basis test “requires only that there be a rational relationship between a statutory classification and a legitimate government interest.”<sup>83</sup> Under rational basis review, legislation is generally presumed to be constitutional and “courts are free to supply or hypothesize a government interest that may relate to the statutory classification” as well as seek only for a “plausible reason for a legislatures’ actions.”<sup>84</sup> History has shown that when the Court applies the rational basis review, legislation almost always passes the test—so much so that it has been labeled

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78 *Cleburne*, 473 US 469.

79 David Berge, *City of Cleburne, Texas v. Cleburne Living Center, Inc.: The Mentally Retarded and the Demise of Intermediate Scrutiny*, 20 *Valp U L Rev* 349, 362 (1985).

80 Ellis, 3 *Const Commen* at 383 (cited in note 27).

81 Saphire, 88 *Ky L J* at 602 (cited in note 14).

82 *Palmore v Sidoti*, 466 US 429, 429 (1984).

83 Wilson, 46 *Md L Rev* at 167 (cited in note 29).

84 *Id.*

a “virtual rubber stamp.”<sup>85</sup> A group is far better protected under intermediate scrutiny review because of the higher standards it affords compared to those under a rational basis review.

From 1971 through 1984, the Supreme Court invalidated only three statutes “without reference to strict or heightened scrutiny.”<sup>86</sup> Since the Court declined to find that the intellectually disabled qualified for intermediate scrutiny and sought to use rational basis review, tradition dictates that they would lose in *Cleburne*. The Court used the rational basis test but found that the ordinance was invalid as applied to the respondents. Yet Justice Marshall and many scholars have argued that the Court did not use the traditional rational basis test, but rather a heightened version to reach its decision. In his dissent, Justice Marshall wrote that “something more than minimum rationality review is at work here” and that “the rational basis test today is most assuredly not the rational-basis test of *Williamson v Lee Optical*.”<sup>87</sup> The city of Cleburne offered various explanations for why it rejected the special use permit: the city claimed that the home was too small to house all the occupants, that the location of the home was in a 500 year flood plain, and that its proximity to a junior high school could lead to the residents of the home being bullied. Normally, these reasons would sufficiently satisfy a Court using the rational basis review because they would all qualify as a “plausible reason for a legislature’s action.”<sup>88</sup> Nevertheless, the Court examined each reason closely and rejected them all. Furthermore, the Court put the burden on the legislature to convince them of the validity of their claims, something not typically done when using the rational basis test when the legislature is presumed valid.<sup>89</sup> A last break from the traditional rational basis test is found when Justice White concludes that the Court did not believe the city’s claim that “the Featherston home would pose any special threat to the city’s legitimate interests.”<sup>90</sup> It is strange that “special threat” appears here because, in traditional rational basis review, a legislature may attack a problem “one step at a time.”<sup>91</sup> Therefore, using traditional rational basis, “the Court would let the city single out the group home before convalescent homes in meeting its concern about the flood plain.”<sup>92</sup> Thus, no “special threat” is needed for the legislature to pass legislation singling one group under the rational basis test. What is clear is that the *Cleburne* majority subjected the ordinance to a higher

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85 Saphire, 88 Ky L J at 607 (cited in note 14).

86 Timothy Moore, *Shedding Tiers for the Mentally Retarded: City of Cleburne v. Cleburne Living Center*, 35 DePaul L Rev 485, 498 (1986).

87 *Cleburne*, 473 US at 462 (Marshall dissent).

88 Wilson, 46 Md L Rev at 167 (cited in note 29).

89 Gayle Lynn Pettinga, *Rational Basis With Bite: Intermediate Scrutiny by Any Other Name*, 62 Ind L J 779, 794 (1987).

90 *Cleburne*, 473 US at 439 (White).

91 *Cleburne*, 473 US at 461 (Marshall dissent).

92 Pettinga, 62 Ind L J at 794 (cited in note 89).

level of scrutiny than the rational basis test it claimed to use.

While Justice Marshall is correct that “the Court does not label its handiwork heightened scrutiny,” I do not believe the Court was unaware of what it was doing.<sup>93</sup> In an exchange during the case’s re-argument, Justice O’Connor tells the CLC’s lawyer that he is asking the Court to “apply a rational basis test with teeth in it.”<sup>94</sup> Furthermore, the Court struck down three other statutes using rational basis during the 1984-1985 session, more than it had in the thirteen years prior.<sup>95</sup> With that in mind, the Court’s decision to use a heightened rational basis test could be part of a larger effort by the Court to invigorate the rational basis test with a “bite” as a whole.

The Court also broke from tradition in striking down the ordinance only as applied to the respondents. Justice Marshall contends “the Court has never before treated an equal protection challenge to a statute on an as applied basis.”<sup>96</sup> The Court justified its decision by claiming that striking down the ordinance as applied “is the preferred course of adjudication since it enables the Court to avoid making unnecessarily broad constitutional judgments.”<sup>97</sup> The Court cites its rulings in *Brockett v Spokane Arcades, Inc* (1985), *United States v Grace* (1983), and *NAACP v Button* (1963) to back up its claim. Indeed, in each of the cases the Court did strike the statute down only as applied. However, each of those three cases “concerned statutes that did not expressly mention the plaintiff’s class but had been applied to them.”<sup>98</sup> The question then in those cases was whether the statutes in question were wrongly being applied to a certain class. Therefore, it made sense for the Court to only strike the statutes down as applied. Yet, in *Cleburne*, the ordinance was clearly crafted with the intellectually disabled in mind. In instances where “a statute overtly employs an impermissible classification,” the actual “preferred method of adjudication is to hold the statute invalid on its face.”<sup>99</sup>

The criticism of the Court’s decision is that “it acts almost as a non-ruling.”<sup>100</sup> The *Cleburne* Court states that the ordinance is invalid as applied to the respondents, but, by leaving the ordinance “on the books,” the Court indicates that it could be valid in other circumstances. However, the problem is that the Court does not provide to lower courts any “guidance as to the potentially valid, and invalid applications of the ordinance;”<sup>101</sup> the Court merely states that the ordinance

93 *Cleburne*, 473 US at 462 (Marshall dissent).

94 Justice O’Connor, Oral Argument at 36:46, *City of Cleburn, Texas Et Al. v Cleburne Living Center, Inc. Et Al.*, 473 US 432 (1985).

95 Moore, 35 DePaul L Rev at 498 (cited in note 86).

96 *Cleburne*, 473 US at 462 (Marshall dissent).

97 *Cleburne*, 473 US at 440 (White).

98 Halfon, 4 Loyola LA L Rev at 965 (cited in note 12).

99 *Id* at 966.

100 *Id*.

101 *Cleburne*, 473 US at 474 (Marshall dissenting).

may be valid but does not indicate under what circumstances. This means that intellectually disabled cannot be sure of “future standards of application” and that courts will be tasked with determining validity on a case-by-case basis, creating a likelihood of inconsistency.<sup>102</sup>

#### IV. THE IMPACT ON THE INTELLECTUALLY DISABLED

In the immediate aftermath of the *Cleburne* decision, there were scholars who felt that *Cleburne* held “a promise of equal protection under the rational basis test” for the intellectually disabled.<sup>103</sup> After all, the Court was not forced to use a heightened rational basis test, so its choice to do so could be seen as an indicator of the Court’s desire to protect the intellectually disabled even if it denied them quasi-suspect status and intermediate scrutiny. However, history has shown that *Cleburne* did not provide any relief for the intellectually disabled.

If the Court had applied intermediate scrutiny in *Cleburne*, it would have sent a clear precedent to the lower courts. Instead, it provided a murky message by using a heightened rational basis test but not acknowledging it. As a result, in the years directly following *Cleburne*, some courts used a heightened rational basis test in cases regarding the intellectually disabled while others adopted a traditional rational basis test.<sup>104</sup> The confusion regarding *Cleburne* was clarified by the Court’s ruling in *Heller v Doe* (1993),<sup>105</sup> which was a case involving a Kentucky statute that dealt with differential treatment in involuntary confinement between mentally ill and intellectually disabled individuals. Incredibly, the Court’s majority in *Heller* “claimed that the review that was used in *Cleburne* was the traditional rational basis test in which a statute is presumed constitutional.”<sup>106</sup> Justice Kennedy, who wrote the majority opinion, stated that “rational-basis review in equal protection analysis ‘is not a license for courts to judge the wisdom, fairness, or logic of legislative choices’” and that “courts are compelled under rational basis review to accept a legislature’s generalizations even when there is an imperfect fit between means and ends.”<sup>107</sup> These remarks are laden with the language of the traditional rational basis test. Justice Kennedy then goes on to claim the following:

We have applied rational basis review in previous cases involving the mentally retarded and the mentally ill. See *Cleburne v Cleburne Living*

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102 Halfon, 4 Loyola LA L Rev at 968 (cited in note 12).

103 Gordon Johnson, *Equal Protection and the New Rational Basis Test: the Mentally Retarded are not Second Class Citizens in Cleburne*, 13 Pepperdine L Rev 333, 355 (1986); Wilson, 46 Md L Rev 163 (cited in note 29).

104 Waterstone, 63 Emory L J 527 (cited in note 4).

105 509 US 312 (1993).

106 Heidi Boyden, *Heller v. Doe: Denying Equal Protection to the Mentally Retarded*, 21 New England Journal on Criminal and Civil Confinement 437, 444 (1995).

107 *Heller*, 509 US at 319, 321 (Kennedy).

*Center (1985)*; *Schwieker v Wilson*, supra. In neither case did we purport to apply a different standard of rational basis review from that just described.<sup>108</sup>

The rational basis test that Justice Kennedy described is very different than what the Court in *Cleburne* employed. However, since the *Cleburne* Court did not state that it used a heightened rational basis test, it enabled the Court in *Heller* to claim that only a rational basis test was used to reach the *Cleburne* decision. While, in the 15 years before *Heller*, some lower courts adopted a rational basis ‘with a bite’ to deal with cases pertaining to the intellectually disabled, “*Heller* fully reinstated the *Lee Optical* [traditional] paradigm of rational basis review [and today] *Cleburne* cannot be counted on by lawyers to persuade a Court to scrutinize seriously any classification” made to discriminate against the intellectually disabled.<sup>109</sup>

Instead of contributing to the rights of the intellectually disabled by adding heightened scrutiny, “subsequent lower courts have not understood *Cleburne* to require the application of anything more than traditional rational basis review to disability-based classifications.”<sup>110</sup> In *Matter of Harhut (1986)*,<sup>111</sup> the Supreme Court of Minnesota cited *Cleburne* to use the rational basis test in a case that determined the constitutionality of indeterminate commitment for the intellectually disabled. In *Does 1-5 v Chandler (1996)*,<sup>112</sup> both the District and Appeals courts mentioned *Cleburne* to justify using the rational basis test for a Hawaiian statute that limited the duration of time intellectually disabled could receive benefits. Finally, in *Adoption of Kay C. (1991)*,<sup>113</sup> the 6<sup>th</sup> District Court quoted *Cleburne* in order to use the rational basis test in a case challenging the validity of a California statute that “set aside a decree of adoption within five years of its entry where the adopted child manifests a developmental disability.”<sup>114</sup> Each case followed a similar trajectory: *Cleburne* was cited by the court to use the rational basis test, the rational basis test that was used was the traditional rational basis test of *Lee Optical* with no traces of a heightened approach, and in all three instances the court ruled against the intellectually disabled.<sup>115</sup> Beyond these specific cases, the rejection of intermediate scrutiny or even the acknowledgement of the Court’s use of a heightened rational basis test has helped contribute to denying the intellectually disabled fundamental rights. The right to vote, for example, is denied to “idiots or insane persons” in seven states and to those “adjudged mentally

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108 Id at 321.

109 Saphire, 88 Ky L J at 635 (cited in note 14).

110 Kenji Yoshino, *The New Equal Protection*, 124 Harv L Rev 747, 761 (2011).

111 385 NW2d 305 (1986).

112 83 F3d 1150 (1996).

113 228 Cal App 3d 741 (1991).

114 *Adoption of Kay C.*, 228 Cal App 3d 741, 746 (1991).

115 Waterstone, 63 Emory L Rev 527 (cited in note 4).

incompetent or incapacitated from voting” in sixteen states.<sup>116</sup> While I hesitate to draw a direct causal arrow from *Cleburne* to the lack of voting rights for the intellectually disabled, it is apparent that, had the *Cleburne* Court granted quasi-suspect classification to the intellectually disabled, states that deny voting rights to the intellectually disabled would have a very difficult time defending themselves in front of a court using intermediate scrutiny.

*Cleburne* and *Heller* have forced disability rights advocates to recognize that progress for the intellectually disabled will not likely come from the courts. As a result, “modern disability law is primary a statutory field.”<sup>117</sup> Indeed, in addition to the various pieces of legislature that Justice White cited in his majority opinion, disability rights advocates were able to pass the 1990 Americans with Disabilities Act (ADA) which “addresses discrimination in employment, government programs and services, and access to privately owned places of public accommodation.”<sup>118</sup> The ADA has positively impacted the lives of many intellectually disabled. Statutes like the ADA “go beyond what any heightened constitutional protection could provide because they extend deep into the private employment and accommodations sphere.”<sup>119</sup> Yet, this does not reduce the damage that *Cleburne* has caused. The three lower court decisions, as well as the limits on voting rights that many of the intellectually disabled face, show that *Cleburne* continues to disadvantage the intellectually disabled both in the courts and society.

## V. EXPLAINING THE CLEBURNE DECISION

Beyond Justice White’s equal protection justifications for the Court’s ruling, I believe there are a number of other factors that explain the Court’s unusual decision in *Cleburne*. First, it is not a given that the Court had to discuss the intellectually disabled quasi-suspect status at all in its verdict. As Justice Marshall writes “because the Court invalidates *Cleburne*’s zoning ordinance on rational-basis grounds, the Court’s wide-ranging discussion of heightened scrutiny is wholly superfluous to the decision of the case.”<sup>120</sup> Justice Marshall’s sentiment was actually shared by Justice Powell (who voted with the majority), who, in a letter to Justice White, stated that, since the Court found that the ordinance did not even clear rational basis review, it was “unnecessary to consider the quasi-suspect class question.”<sup>121</sup> The likely answer as to why the Court proceeded to rule on

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116 *Right to Vote*, Basic Legal Rights (Disability Justice) online at <http://disabilityjustice.tpt.org/right-to-vote/> (visited December 30th, 2014).

117 Waterstone, 63 Emory L J at 529 (cited in note 4).

118 *Id.*

119 *Id.* at 547.

120 *Cleburne*, 473 US at 456 (Marshall dissenting).

121 Lewis F. Powell Jr., *City of Cleburne, Texas v Cleburne Living Center Inc.* \*60 (Supreme Court Case Files Collection Box 117 Powell Papers, 1984), online at <http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1368&context=casefiles> (visited December 30th, 2014).



the question is that, in the years prior to *Cleburne*, several lower courts had used different levels of scrutiny for cases pertaining to the intellectually disabled.<sup>122</sup> The Court could very well have thought it needed to clarify the correct scrutiny that should be applied for the lower courts. This is supported by a letter that Justice Rehnquist wrote to Justice White in which he refutes Justice Powell by claiming that the case would be “deciding absolutely nothing” if it simply decided to “punt” on deciding the question of whether the intellectually disabled were a quasi-suspect class.<sup>123</sup>

Having examined why the Court decided to weigh in on the question of quasi-suspect class, it is important to assess what other factors might have contributed to why the Court ruled against the intellectually disabled. The most apparent reason, even addressed in the Court’s decisions, is that allowing the intellectually disabled to become a quasi-suspect class would somehow open the floodgates for a “variety of other groups who have perhaps immutable disabilities” to become quasi-suspect classes as well.<sup>124</sup> This concern is echoed in the question of Justice O’Connor when she asks Renea Hicks, the CLC’s lawyer, whether he thinks “there are other groups that in [his] view likewise merit heightened scrutiny which haven’t been given it in the past, such as the mentally ill or people who are homosexuals.”<sup>125</sup> Justice O’Connor’s remarks come across as an attempt to corner Hicks into tying the intellectually disabled’s pursuit of suspect status to other groups. The fears these two Justices reveal are part of a larger trend in the Court’s thinking that Kenji Yoshino calls “pluralism anxiety.” Yoshino defines “pluralism anxiety” as an “apprehension” about “demographic diversity.”<sup>126</sup> In the context of the Court, Yoshino finds that the Court is concerned with how to discern between the increasing number of minority groups within the United States that make claims of being a quasi-suspect class.

This is not necessarily an illogical interest; I agree with the assessment that “the Court can never give heightened scrutiny to classifications of, say, twenty groups without diluting the meaning of that scrutiny.”<sup>127</sup> But the question is whether accepting the intellectually disabled into the hallowed halls of the suspect classes would really open the floodgates like the justices seem to believe. They vastly overestimated what would happen since, as I have demonstrated in the case of the intellectually disabled, there are many criteria to satisfy in order to qualify for suspect status. Justice White mistakenly contends that it would be “difficult to find a principled way to distinguish” a group like the “aging” from the

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122 Wunder, 72 Iowa L Rev at 242 (cited in note 29).

123 Powell, *Cleburne v Cleburne Living Center* at \*61 (Case Files Collection).

124 *Cleburne*, 473 US at 445 (White).

125 Justice O’Connor, Oral Argument at 44:43, *City of Cleburn, Texas Et Al. v Cleburne Living Center, Inc. Et Al.*, 473 US 432 (1985).

126 Yoshino, 124 Harv L Rev at 751 (cited in note 111).

127 Id at 762.

intellectually disabled for several reasons.<sup>128</sup> First, the elderly are able to vote and have a direct impact on the legislative branch. Second, the elderly of our country, while certainly having faced some discrimination in the past, have faced nowhere near the degree of invidious discrimination faced by the intellectually disabled. Finally, the legislatures are more likely to be supportive of the elderly because they are destined to, one day, be subject to the laws pertaining to the elderly that they enact.<sup>129</sup> The elderly fail the test for suspect status because they have not been historically discriminated against (to the extent that existing classes have experienced), nor are they politically powerless, wielding both direct and indirect political power. This bolsters my argument that accepting one extra group does not mean that the test for strict scrutiny will crumble or be diminished. Yet it seems that the Court's "pluralism anxiety" won out and that it has persisted. As Yoshino points out the Court has not granted a group heightened scrutiny since 1977.<sup>130</sup> The Court did not just shut out the intellectually disabled, but, in the last thirty-eight years, it has also shut out all other groups seeking suspect status.

Laura Bornstein proposes three other thought-provoking factors that may have influenced the Court. The first of these is that the widespread animosity that the American public displayed towards the intellectually disabled at the time of the ruling may have influenced the justices. She claims that "just as Americans were not ready to let mentally retarded persons move in next door, the justices in the majority were not ready to extend to mentally retarded persons the constitutional status they deserved."<sup>131</sup> Her argument rests upon the idea that the Supreme Court is influenced by public opinion. While many scholars are proponents of this theory, there is certainly no consensus. Similarly, Bornstein's second possible factor is that the Court was influenced by the Reagan Administration's lobbying. Bornstein contends "the Court is responsive to the preferences of the political branches of government" and that the Reagan Administration, as made evident in its many amicus briefs, was clearly opposed to the recognition of intellectual disability as a quasi-suspect class.<sup>132</sup> Again, this theory hinges on the idea that the Court is moved by the views of the elected branches of government.

The third factor she mentions is that Justice White's writing of the opinion may have influenced its result. She observes that Justice White had a reputation of using rational basis in Fourteenth Amendment cases as well as being very deferential to the legislature and executive.<sup>133</sup> Bornstein conjectures that, if a different judge had written the opinion, it may have read very differently. Justice White's first and second drafts of the opinion were exceptionally careful and conservative. The

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128 *Cleburne*, 473 US at 445 (White).

129 Halfon, 4 Loyola LA L Rev at 921 (cited in note 12).

130 Yoshino, 124 Harv L Rev 747 (cited in note 111).

131 Bornstein, 41 Golden Gate U L Rev 106 (cited in note 2).

132 *Id* at 110.

133 *Id* at 91.

drafts show that he wanted to remand the case to the Appeals Court and issue the ruling that the Appeals Court should have reviewed whether the ordinance passed the rational basis test first before examining if it passed intermediate scrutiny.<sup>134</sup> It took the urging of other justices to create a ruling on the case. When he did make a ruling, in the third draft, it was to strike down the ordinance only as applied. Justice Powell and Justice O'Connor both said they preferred that the Court strike down the statute on its face.<sup>135</sup> This means that, after considering the three dissenting justices, there was actually a majority of the Court that thought the statute was facially invalid. In a letter to Justice Powell, Justice White states that there "is obviously a division among us on the question" of whether to hold the statute facially invalid and that his "principal reason for putting the issue aside is to avoid deciding it."<sup>136</sup> Justice White then goes on to say that they should strike the ordinance down as applied because it is the lowest common denominator of the Justices. The fact that Justice White originally did not want to weigh in on the question of whether the intellectually disabled was a suspect class, then seeking only to remand the case, and the fact that he finally fought off a majority of the Court who wanted to invalidate the ordinance on its face, show that he was trying not to make waves with his decision. It is hard to speculate as to how different the ruling would have been if another Justice had taken charge, but there is no doubt that Justice White left his mark on the Court's verdict.

## VI. WHAT DOES THE FUTURE HOLD?

It is unlikely that the Court will overturn *Cleburne* anytime soon, but there are two legal avenues that might provide the intellectually disabled a degree of reprieve. The first is that state courts may extend quasi-suspect status to the intellectually disabled based on their state constitutions.<sup>137</sup> As an example, in *Breen v Carlsbad Municipal Schools (2005)*,<sup>138</sup> the New Mexico Supreme Court invalidated a part of the New Mexico Workers' Compensation Act that granted up to 700 weeks of disability compensation for partial physical disabilities yet offered only 100 weeks of compensation to people with mental disabilities. To reach its decision, the court used intermediate scrutiny, which it saw as being appropriate because the intellectually disabled are a "sensitive class" and cited Justice Marshall's dissent in *Cleburne* to demonstrate the history of discrimination the intellectually disabled have faced.

The second possible avenue for the intellectually disabled is that they may gain from what Yoshino has described as the Court's recent use of "liberty-

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134 Powell, *Cleburne v Cleburne Living Center* at \*24; 45 (Case Files Collection).

135 *Id* at 66–67.

136 *Id* at 112.

137 Waterstone, 63 Emory L J 527 (cited in note 4).

138 120 P3d 413 (2005).

based dignity” claims.<sup>139</sup> Essentially, since closing the door to new groups seeking suspect classification, the Court has ruled in favor of some those groups under the justification that they have been denied fundamental liberties. An example of this is *Lawrence v Texas* (2003),<sup>140</sup> in which the majority struck down a Texas statute that criminalized same-sex sodomy.<sup>141</sup> The Court’s ruling focused on issues of liberty, not equality, offering that it is a fundamental liberty for someone to pick their sexual partner. Thus, “*Lawrence* was ultimately not a group-based equality case about gays, but rather a universal liberty case about the right of all consenting adults to engage in sexual intimacy in the privacy of their homes.”<sup>142</sup> The victory in favor of homosexuals in *Lawrence* perhaps offers encouragement that the intellectually disabled might be able win victories in the Supreme Court on liberty-based grounds.

After examining *Cleburne*, one begins to wonder if the Court’s entire system for allocating suspect status and its three-tier system of review is in need of a massive overhaul. As Randall Kelso notes, there has been a major splintering of the three-tier model in the last 30 years.<sup>143</sup> Kelso finds that just as the Court expanded the bounds of the rational basis test in *Cleburne*, it has similarly created subsets of intermediate scrutiny and strict scrutiny as a result of other rulings. For example, in *United States v Virginia* (1996),<sup>144</sup> a case involving gender discrimination (and therefore using intermediate scrutiny), Justice Ginsburg claimed that Virginia had to show an “exceedingly persuasive justification”<sup>145</sup> for its gender discrimination, rather than merely a “substantial relationship to important government interests.”<sup>146</sup> Justice Ginsburg appears to be using a higher standard than traditional intermediate scrutiny allows—a heightened intermediate scrutiny. Kelso argues convincingly that, today, the Court actually uses six standards of review. Because this many standards of review actually exist, and the Court only acknowledges its use of three standards, the lower courts are left in a quandary similar to what occurred in the aftermath of *Cleburne*. Furthermore, as I have demonstrated in my review of *Cleburne*, the Court’s granting of suspect status can be inconsistent; presented with terms like “political powerlessness” and “historical discrimination” to decide suspect status, a variety of interpretations can be produced. As Strauss writes, “an

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139 Yoshino, 124 Harv L Rev at 776 (cited in note 111).

140 539 US 558 (2003)

141 Yoshino, 124 Harv L Rev at 747 (cited in note 111).

142 Id at 778.

143 Randall Kelso, *Standards of Review under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The “Base Plus Six” Model and Modern Supreme Court Practice*, 4 U Pa L Rev 225 (2001).

144 518 US 515 (1996).

145 *United States v Virginia*, 518 US 515, 534 (1996), as cited in Kelso, 4 U Pa L Rev at 238 (cited in note 145).

146 Kelso, 4 U Pa L Rev at 238 (cited in note 145).

amorphous test risks unprincipled results and thwarts equality under the law.”<sup>147</sup> Perhaps, it is time to consider changing to one standard of review as Justice Stevens proposed in his concurring opinion, or to a “continuum approach that does not attempt to fit the factors within clearly circumscribed slots.”<sup>148</sup> These are important questions for future research, but not ones I attempt to resolve here.

Instead, I have demonstrated that the Supreme Court failed the intellectually disabled twice in *Cleburne*: first by not finding them to be a quasi-suspect class and granting them the intermediate scrutiny they deserved, and second by not being forthcoming about the heightened rational basis test that the Court used. This has not stopped the intellectually disabled from achieving significant gains through legislative action, yet, as I have shown, the Court’s ruling still negatively impacts the lives of the 4.6 million intellectually disabled individuals of this country and their families.<sup>149</sup> On this upcoming 30<sup>th</sup> anniversary of the Court’s decision, we should all take notice.

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147 Strauss, 35 Seattle U L Rev at 174 (cited in note 29).

148 Id at 173.

149 Sheryl A. Larson, et al, *Prevalence of Mental Retardation and Developmental Disabilities: Estimates From the 1994/1995 National Health Interview Survey Disability Supplements*, 106 Am J of Mental Retardation 231 (2001).





