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Letter from the Editors

Dear Readers,

Hello, and a very warm welcome to the Fall 2023 edition of the Michigan Journal of Political Science. There is no doubt that 2023 has been a year filled with landmark themes: apocalyptic weather, devastating global violence, and artificial intelligence claiming its place in our daily lives—all on the eve of the biggest global election year in history. The role of free discourse, informed by critical inquiry and analysis, is more important than ever in promoting diversity of thought and new ideas. MJPS was founded in 1981 to foster discussions of contemporary thought-provoking political issues by publishing original academic, non-partisan undergraduate papers. We are proud to continue this legacy, featuring work from eight authors worldwide in our latest edition. We hope these pieces serve as a springboard for lively discussion.

From analyzing and advocating for the abolition of juvenile life without parole sentencing to unpacking how restructured national debt might advance sustainable economic development and conservation goals, our authors navigate a spectrum of topics, both theoretical and empirical. Pieces like "A Case of Coastal Policy Learning: How the Events of the East Side Coastal Resiliency Project Affected Local Non-Governmental Participation within the Lower Manhattan Coastal Resiliency Project" and "The Conditions of Effectiveness: Lessons from UN Decisions in Syria" spotlight the conditions necessary for effective governance amid crises. The verdict: consensus is key. Meanwhile, "Politics Over Policy: Context & Consequences of Moving the U.S. Embassy in Israel to Jerusalem" explores the decisive geopolitical implications of the action, and "Spain and Switzerland: The Importance of Colonialism on Nationalism" examines the historical nexus between colonialism and nationalism, uncovering lasting influences on contemporary political landscapes. As nearly 50% of the world's adult population prepares to head to the polls in 2024, "How Important is Social Class as a Guide to Voting Behaviour in the UK and US?" provides a real-world analysis of Marxist social class theory on voting patterns. Concluding this edition, "The Philosopher-King's Microphone: Socio-Political Dicta as Rhetorical Preemption" articulates the understated role of moral arguments in judicial rhetoric. We hope you enjoy reading these eight pieces as much as we have enjoyed preparing them.

Our deepest gratitude goes out to the entire Editorial Board, particularly Senior Editors Alexa, Bailey, Shihan, and Syd. Their attention to detail, commitment to academic rigor, and dedication to quality of writing have been instrumental during the publication process. Thank you to the Department of Political Science—namely Alice Austin, Brian Min, Joseph Johnson, and Dustin Hahn—for their continued support, without which our Journal would not be possible. Finally, to our readers, thank you. Your readership helps ensure a future where political science research is transparent, accessible, and helpful in understanding the political world around us.

Sincerely,
Amal Deochand and Selin Baytan
Editors-In-Chief

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American Politics

Young, Dumb, and Incarcerated: Abolishing Juvenile Life Without Parole Sentencing

Elaina Tenfelde

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Introduction

In the United States, children as young as 13 are sentenced to life in prison without parole. These sentences, also known as juvenile life without parole or JLWOP, deny individuals the opportunity for rehabilitation and reintegration. As it stands, the United States is the only country in the world still actively engaging in these sentencing procedures.[1] Proponents of JLWOP believe that these sentences are only reserved for the most dangerous offenders and are needed to protect society from incorrigibly criminal individuals. However, these claims are false. Psychological evidence and specific case studies support the idea that juvenile offenders are more responsive to rehabilitative action and do not deserve to spend their lives behind bars. JLWOP constitutes "cruel and unusual punishment," thus violating the Eighth Amendment.

I. Juveniles and the Court: An Evolving Relationship

In the past 20 years, the Supreme Court has shown an increased interest in distinguishing between adult and juvenile offenders within the criminal system. This evolution was likely prompted by lobbying from prominent interest groups and emerging social science evidence that posits multiple developmental, cognitive, and emotional differences between juveniles and adults. These differences create a disparity in culpability between juveniles and adults, even when committing the same crimes. As a result of this disparity, the Court now sees age as a factor in sentencing and, over the past few years, has adjusted the types of sentences juveniles can receive. These adjustments should continue, and juveniles should no longer receive life sentences without the possibility of parole. To properly understand the logic of this argument, it is necessary to examine the history of juveniles in the justice system and the relevant case law, along with the way that the two have evolved and interacted with each other.

The first juvenile court was founded in 1899 in Cook County, Illinois, and others began appearing around the country soon thereafter. Until then, juveniles were considered "mini adults" and were tried and sentenced in the criminal justice system. This situation prompted many to push for an organized juvenile justice system because of the widely accepted notion that youths should not serve time alongside hardened criminals. Consequently, in the 1960s, several Supreme Court decisions formalized the juvenile justice system. This new system, which focused more on the rehabilitation of juvenile offenders and their reentry back into civil society, differed greatly from the much more punitive adult system. The Court identified the prevention of delinquent offenders from becoming adult criminals as one of the main goals of the juvenile court system. Today, the juvenile justice system continues to focus on reform as opposed to punishment, since juveniles are more malleable and receptive to restorative justice practices than adults.[2]

For the past 100 years, the criminal justice system has recognized the differences between juvenile and adult offenders, as evidenced by the creation of a separate system for youths. However, the juvenile justice system and the criminal justice system remain tethered in certain cases, despite their distinct purpose and operation. All juveniles who are charged with a crime begin in juvenile court. Sometimes—based on factors such as the severity of the crime, the circumstances of the offense, or the incorrigibility of the

[1] Joshua Rovner, "Juvenile Life Without Parole: An Overview," The Sentencing Project, May 24, 2021, https://www.sentencingproject.org/policy-brief/juvenile-life-without-parole-an-overview/.
[2] "Juvenile Justice History," accessed May 7, 2023, https://www.cjcj.org/history-education/juvenile-justice-history.

offender—the case is transferred to the adult court, where the juvenile is then sentenced.[3] In instances where the juvenile is transferred to the criminal justice system, the Supreme Court has issued several decisions carving out these individuals' sentencing. Overall, these decisions have directed courts away from sentencing juveniles to the harshest punishments.

In 2005, the Court held in *Roper v. Simmons* (2005) that executing minors constitutes "cruel and unusual punishment" and is, therefore, prohibited by the Eighth Amendment. In making this decision, the Court examined the popularity of capital punishment for juveniles both in the United States and internationally. The consensus was that juveniles should be exempted from the death penalty. Additionally, the Court determined that the death penalty is a disproportionate punishment for minors. Although sentencing juveniles to the death penalty was acceptable at one point in time, the "standards of decency" that the Court uses to assess punishments have evolved so that capital punishment is now deemed "cruel and unusual" for juvenile offenders.[4] *Roper* remains a landmark case for how the Court approaches juveniles and Eighth Amendment claims. Not only was this case the first instance wherein the Court alluded to the concept that age was a mitigating factor in sentencing, but it also became the bedrock for a line of cases that shaped the relationship between juveniles and the criminal justice system.

Five years after *Roper*, in 2010, the Supreme Court found in *Graham v. Florida* that sentencing a juvenile to life in prison without the possibility of parole for non-homicidal crimes also violates the Eighth Amendment. Using a categorical analysis, the Court ruled that life in prison without parole for non-homicidal crimes was unconstitutional because it violated the objective cruelty standards of the time and the withstanding, relevant precedents. The Court emphasized that life without parole sentencing for juveniles was distinctly severe compared to the same sentencing for adults, stating, "Life without parole is an especially harsh punishment for a juvenile. Under this sentence, a juvenile offender will on average serve more years and a greater percentage of their life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only." The excess time that a juvenile offender would spend in prison only emphasizes the cruel and unusual nature of the punishment. Additionally, the Court gave merit to the fact that such punishment is largely rejected around the world.[5]

In yet another landmark decision, the Court found in *Miller v. Alabama* (2012) that, under the Eighth Amendment, mandatory sentencing of life without parole was unconstitutional for juvenile homicide offenders. At the crux of this ruling was the finding that, for sentencing purposes, children are constitutionally different from adults. This finding directly articulated and reinforced the constitutional differences between adults and children in the context of sentencing. Using the case law of *Roper* and *Graham*, as well as a plethora of social science research, the Court held that "those findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'"[6] In reaching this conclusion, the Court affirmed that the major difference between adult and juvenile offenders was the relative potential for reform that youths demonstrate. Due to the uniqueness of one's development, the Court reasoned that judges should have some discretion in sentencing to prevent situations wherein "every juvenile will receive the same sentence as every other—the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one. Still worse, each juvenile will receive the same sentence as the vast majority of adults committing similar homicide offenses."[7] Simply put, in juvenile cases, emotional, cognitive, and behavioral developments are so variable that imposing a mandatory

[3] "Juvenile Transfer to Criminal Court," accessed May 7, 2023, https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/reform2/ch2_j.html#221.
[4] Roper v. Simmons, 543 U.S. 551 (2005).
[5] Graham v. Florida, 560 U.S. 48 (2010).
[6] Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455 (2012).
[7] Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455 (2012).

minimum of life without parole is unconstitutional, especially when social science research indicates that juvenile offenders show greater capacity for rehabilitation.

Although *Miller* was a landmark case because it recognized that developmental immaturity was an aggravating factor for juvenile offenders, there remained a large question around the country about what to do with the people serving life without parole sentences for homicides when they were juveniles. Therefore, in 2016, the Court ruled in *Montgomery v. Louisiana* (2016) that *Miller* indeed applied retroactively. Because *Miller* established a substantive rule and not a procedural rule, the ruling must apply as such. As a result, many states were forced to reexamine old cases and look at how the individual's development had changed their mental faculties.[8]

Although the Court has made substantial progress regarding how it views juveniles by limiting the severity of the sentences that juvenile offenders may receive, the views of the Court have shifted in the past few years. Specifically, with the retirement of Justice Kennedy, who authored the majority opinions in *Roper, Graham,* and *Montgomery*, the Court lost a major voice for juvenile justice reform. This change was evidenced in 2021 with *Jones v. Mississippi* (2021) when the Court ruled that a sentencing authority did not need to prove that a juvenile offender was "permanently incorrigible" to sentence them to life without parole. This lowers the bar for sentencing an individual to life without parole. As Justice Sotomayor wrote in her dissent, this ruling walked back the message in *Miller* that sentencing authorities should have the authority to distinguish "between the juvenile offender whose crime reflects unfortunate and transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[9] By arriving at the majority's conclusion in *Jones*, the Court has weakened the precedent that age is a mitigating factor in sentencing.

II. The Cruel and Unusual Nature of JLWOP Sentencing

The Eighth Amendment to the US Constitution states, "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[10] The Framers' use of the phrase "cruel and unusual punishment" has led to a bulk of case law that seeks to define those terms. Unlike any of the other amendments to the Constitution, the Eighth Amendment uniquely requires the Court to consider the moral and ethical standards of the day to define the ever-evolving definition of both "cruel" and "unusual." A body of Supreme Court cases affirms the adaptability of the Eighth Amendment. In *Weems v. United States* (1910), the Court held that "what constitutes a cruel and unusual punishment has not been exactly decided."[11] Reiterating this fact, in *Trop v. Dulles* (1958), the Court found that "the words of the Amendment are not precise, and their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[12] In order to assess whether or not a particular practice violates the "evolving standards of decency," the Court has created and employed a two-part test to assess both the cruelty and the unusualness of a given practice.[13] Juvenile Life Without Parole Sentencing fails both parts of this test and, as a result, violates the Eighth Amendment of the US Constitution.

The first aspect of the test attacks the unusualness of a given practice using majoritarian, objective indicia. In the past, the Court has looked at state statutes, finding that if 30 or more states prohibit a given punishment, then it is considered unusual.[14] Currently, only 27 states and the District of Columbia have banned juvenile life without parole, leaving 33 states still allowing juvenile life without parole sentencing. However, in addition to the 27 states that ban JLWOP sentencing, there are six states that have no

[8] Montgomery v. Louisiana, 136 S.Ct. 718 (2016)
[9] Jones v. Mississippi, 593 U.S. __ (2021)
[10] U.S. Const., Eighth Amendment
[11] Weems v. United States, 217 U.S. 349 (1910)
[12] Trop v. Dulles, 356 US 86 (1958)
[13] William W Berry Iii, "Cruel and Unusual Non-Capital Punishments," AMERICAN CRIMINAL LAW REVIEW 58 (n.d.)
[14] William W Berry Iii, "Cruel and Unusual Non-Capital Punishments," AMERICAN CRIMINAL LAW REVIEW 58 (n.d.).

incarcerated individuals currently serving JLWOP sentences.[15] Of those six states—Maine, New York, Rhode Island, Missouri, Montana, and Minnesota—several effectively banned juvenile life without parole without writing explicit statutes against it. In Maine, parole has been eliminated regardless of circumstance. Nevertheless, the state actively avoids dolling out life sentences for juveniles. According to the Office of the Attorney General, Maine has never sentenced a juvenile to life in prison. In fact, not only does Maine have some of the lowest incarceration rates in the country, but the number of incarcerated juveniles dropped by more than 50% from 1995 to 2010.[16] This could be due to the bolstering of programs that support alternatives to incarceration for juvenile offenders such as counseling and restorative justice.[17] In New York, the only crime for which a juvenile can be sentenced to life without parole is terrorism. As it stands, no juvenile has ever been convicted of this crime, and, on the whole, New York courts are committed to the idea that age is a mitigating factor for sentencing. Finally, Rhode Island not only has no individual serving JLWOP sentences, but has never sought a life without parole sentence for a juvenile offender.[18] Therefore, although only 27 states have banned JLWOP using black letter sentencing guidelines, the actual number of states that have de facto banned these sentences is 30, which raises them to the level of "unusual" based on the Supreme Court's two-part test.

In addition to considering the majoritarian opinion of the states, there is also substantial international opposition to juvenile life without parole sentencing to consider. In *Miller*, the Court looked at an amicus brief filed by Human Rights Watch and 25 other organizations, which highlighted disparities in juvenile justice between the United States and its foreign counterparts. The brief highlights the various treaty obligations that the United States has to abolish JLWOP sentences, namely the *International Covenant on Civil and Political Rights*, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, and the *International Convention on the Elimination of All Forms of Racial Discrimination*. As a result of these treaties, many countries have opened up parole hearings for juveniles sentenced to life in prison or have informally halted their use of such sentencing measures.[19] Aside from the United States, the only other country that sentences individuals to life in prison without parole for crimes committed before the age of 18 is Israel. Across the entire world, around 2,388 juveniles have received a life without parole sentence. Only seven of those individuals are Israeli. The United States is responsible for 99.99% of all juvenile life without parole sentences in the world.[20] When considering the international standards of decency, there is no other word than "unusual" that can be used to describe JLWOP sentencing in the United States.

The second aspect of the Supreme Court standards of decency test involves the "cruelty" of the punishment. At this stage, the Court must look at the proportionality of the punishment, assessing if its imposition is justified by one or more of the purposes of punishment: retribution, deterrence, incapacitation, and rehabilitation. If none of these purposes justify the punishment, it is considered cruel. The nature of imposing life without parole sentences on juveniles is cruel because none of the aforementioned purposes are justified by these sentencing practices.[21]

Retribution is one of the most notable purposes of the American justice system. On principle, the criminal justice system engages in retributive justice when it expresses "society's moral condemnation of a crime" and seeks "restoration of the moral

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[15] "States That Ban Life without Parole for Children," Campaign for the Fair Sentencing of Youth | CFSY, accessed May 9, 2023, https://cfsy.org/media-resources/states-that-ban-juvenile-life-without-parole/.
[16] "State Of Maine Has Long Avoided Life Sentences For Juveniles," accessed May 9, 2023, https://www.wabi.tv/content/news/State-Of-Maine-Has-Long-Avoided-Life-Sentences-For-Junveniles-437709993.html.
[17] "Maine," accessed November 6, 2023, https://www.njjn.org/our-members/maine.
[18] "A State-by-State Look at Juvenile Life without Parole | AP News," accessed May 9, 2023, https://apnews.com/article/9debc3bdc7034ad2a68e62911fba0d85.
[19] "US: End Life Without Parole for Juvenile Offenders," Human Rights Watch (blog), January 26, 2012, https://www.hrw.org/news/2012/01/26/us-end-life-without-parole-juvenile-offenders.
[20] Michelle Leighton, "Sentencing Children to Die in Prisons" (University of San Francisco School of Law, n.d.), https://www.humanrightsadvocates.org/wp-content/uploads/2010/05/LWOP_Final_Nov_30_Web.pdf.
[21] William W Berry Iii, "Cruel and Unusual Non-Capital Punishments," AMERICAN CRIMINAL LAW REVIEW 58 (n.d.).

imbalance."[22] At the center of the morality debate is the notion of an individual's culpability in committing a crime. This is why the retributive action for manslaughter is often lower than for murder because the person committing the crime made a conscious and deliberate choice to do so. According to the majority's ruling in *Roper,* "the case for retribution is not as strong with a minor as with an adult."[23] Kennedy addresses the proportionality question head-on, writing that "retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."[24] Due to the nature of juveniles' relative immaturity, their culpability is inherently diminished. As a result, it makes no sense to subject them to the same draconian sentences as adults. Diminished culpability is unique to the juvenile experience and should be reflected in sentencing guidelines by eliminating life without parole sentencing for individuals under the age of 18.

Proponents of harsher sentencing guidelines and "tough on crime" attitudes tend to jump to deterrence through fear as the main reason for implementing such punishments. However, in cases involving juveniles, punitive action is rarely a deterrent. Studies have shown that harsher punishments—including longer prison sentences and reduction of freedom within detention facilities—have no deterring effect on juveniles. In fact, many of these actions have criminogenic outcomes.[25] The Court recognizes this difference in juveniles, citing in *Roper* that "the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence."[26] The differences in the juvenile and adult psyche lead to yet another reason why they should be subjected to different sentencing guidelines. Sentencing juveniles to life without the possibility of parole does not conclusively lead to deterrence from committing crimes. Therefore, it is a disproportionate use of punitive action.

To address the concept of incapacitation as it relates to the criminal justice system, it is important to note that the purpose of incapacitating an individual is to prevent them from further harming the community. By sentencing someone to life in prison without the possibility of parole, a court sends a message to that person that they will forever be a danger to society. That message goes against everything that is known about juvenile development. As the majority stated in *Miller*, "Deciding that a 'juvenile offender forever will be a danger to society would require making 'a judgment that [they are] incorrigible'—but 'incorrigibility is inconsistent with youth.'"[27] Not only are courts ill-equipped to make such decisions about juveniles—there is simply no way that they could do so effectively. There are so many fluctuating factors throughout maturation, from emotional development to cognitive development to social development, that it is nearly impossible to decide whether an individual will be a threat to society for the rest of their life. Therefore, JLWOP sentencing cannot be justified for its incapacitated nature because it deprives the individual of too much liberty to be considered constitutional. If somebody is incarcerated for almost their entire life, it would be nearly impossible for them to commit another crime. But, in doing so, that person would be unduly deprived of their rights as an American.

The final justification for punishments in the legal system is rehabilitation. Similar to the aforementioned goals, rehabilitation in juvenile cases is nullified by life without parole sentencing. Without the opportunity to reintegrate into society and move away from the justice system, there exist no meaningful opportunities for rehabilitation. The court again recognized this in *Miller*, outlining that "rehabilitation could not justify that sentence. Life without parole 'forswears altogether the rehabilitative ideal'… it reflects "an irrevocable judgment about [an offender's] value and place in society," at odds with a child's capacity for change."[28] The Court and social sciences have already determined that juvenile offenders show the greatest likelihood of rehabilitation because

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[22] Kallee Spooner, "Juvenile Life Without Parole" 8 (2012), https://vc.bridgew.edu/cgi/viewcontent.cgi?article=1216&context=undergrad_rev.
[23] Roper v. Simmons, 543 U.S. 551 (2005).
[24] Roper v. Simmons, 543 U.S. 551 (2005).
[25] Thomas A Loughran et al., "Studying Deterrence Among High-Risk Adolescents," n.d.
[26] Roper v. Simmons, 543 U.S. 551 (2005).
[27] Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455 (2012).
[28] Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455 (2012).

the same factors that contribute to a juvenile offender's relative developmental immaturity also make them more malleable and reactive to intervention. Yet, these factors are ignored when sentencing a juvenile to life in prison without the opportunity for parole. Such a sentence is not only inconsistent with and contradictory to the precedence of the Court, but it also is disproportionate to the goal of the punishment.

Juvenile life without parole sentencing fails to proportionally achieve any of the four goals of punishment. Therefore, such procedures fail the second prong of the standards of decency test and are thereby deemed "cruel." Through this, JLWOP sentences can be deemed "cruel and unusual punishment" and a violation of an individual's Eighth Amendment rights.

Having made the argument that JLWOP sentences are both cruel and unusual using legal precedence and philosophical abstractions, I will now turn to relevant case studies in America's legal system. The individuals facing these sentences are more than numbers on a page. They are living, breathing examples of the need for criminal justice reform. The arguments that have been laid out in this paper are merely snapshots of their day-to-day lives. They are the victims of procedures that deprive them of their dignity. Failing to humanize them in the argument against JLWOP sentences only victimizes them further. To break the cycle of violence in the criminal justice system, their experiences must be integrated into the campaigns for their freedom. Therefore, the remainder of this paper will explore juvenile life without parole sentencing in two of these states—Michigan and Pennsylvania—to deepen the understanding that JLWOP sentencing must be abolished.

JLWOP in Michigan

In 1992, Jennifer Pruitt became a 16-year-old runaway in Pontiac, Michigan. In need of a home and without stability in her young, adolescent life, she accepted a neighbor's offer to take her in. This neighbor, Donnelle Miraclet, planned to rob another home in the neighborhood. Jennifer agreed to help the person graciously sheltering her, even suggesting that the pair break into the home of Elmer Heichel, an elderly man whom Jennifer had known for a decade because he had money. On the day of the robbery, Jennifer and Miracle knocked on Mr. Heichel's door and he allowed the pair to enter. Jennifer asked to use that bathroom. When she returned, she found Miracle stabbing Mr. Heichel to death. Shocked and terrified, Jennifer did not intervene. Later that night, once the neighbor had fallen asleep, Jennifer escaped their home and fled to a nearby residence, where the police were called.[29] Despite not actually committing the murder and being a much younger, more impressionable accomplice, Jennifer was still convicted of murder which carried a mandatory minimum of life in prison without parole in the state of Michigan.

After the 2016 ruling in *Montgomery v. Louisiana* (2016), the state of Michigan was forced to reconsider Jennifer's case. In 2017, Judge Martha Anderson resentenced Jennifer to a 30- to 60-year sentence, making her eligible for parole in 2022. In her announcement, Judge Anderson remarked that Jennifer "is one of the rare few who has used her incarceration to better herself and become a better person than she was." The resentencing procedures also acknowledged that Jennifer was sexually victimized by prison guards in the 90s, for which she joined a class action lawsuit against the state of Michigan.[30] In addition to her demonstrated rehabilitation and recognition for the cruelty she faced in prison, the resentencing procedures allowed certain members of Heichel's family to testify. Lynda Martin, one of Heichel's granddaughters, spoke on Jennifer's behalf, stating, "I never felt she deserved a life sentence. She has done some great things (in prison)."[31] Jennifer's crimes were a direct result of her youth compounded by her unfortunate circumstances. She remains living proof that juvenile offenders have a higher

[29] "Hill et al. v. Granholm - Client Profiles," American Civil Liberties Union, accessed May 9, 2023, https://www.aclu.org/other/hill-et-al-v-granholm-client-profiles.
[30] John Wisely, "Convicted of Murder as Teen, Jennifer Pruitt Wins Shot at Parole," accessed May 9, 2023, https://www.freep.com/story/news/local/michigan/2017/03/02/jennifer-pruitt-sentence-parole/98633072/.
[31] "Juvenile Lifer, Convicted at 16, Gets Reduced Sentence," accessed May 9, 2023, https://www.detroitnews.com/story/news/local/michigan/2017/03/02/juvenile-lifer-resentenced/98648706/.

propensity for rehabilitation and that harsh sentencing procedures do not adequately address the wrongs of the past.

Although punishment remains the predominant goal of the justice system, JLWOP sentencing fails to adequately address these goals, which only furthers the argument that it is cruel and unusual. Unfortunately, the state of Michigan has not learned the same lesson from Jennifer's case. Of the 49 other juvenile cases in Oakland County at the time of Jennifer's resentencing, the prosecutor's office planned to seek life without parole in 44 of them.[32] In all, the state of Michigan has sentenced over 360 juveniles to life in prison without parole, making the state one of the epicenters of JLWOP sentences. Michigan's justice system is set up to fail juveniles as it allows individuals of any age to be tried as adults and excludes 17-year-olds from juvenile court proceedings.[33]

JLWOP in Pennsylvania

January 21, 1990, was Robert Holbrook's 16th birthday. A local drug dealer named George Padilla, for whom Robert had been working, and who had a reputation for being a "hitman," approached Robert and offered him $500 to help him with a drug deal. The allure of money combined with a fear of Padilla compelled Robert to accept the offer. That evening, Robert learned that the "drug deal" in question was actually the home invasion of a rival drug dealer. The inhabitant of the home, Elsie Olmeda, was home alone with her two children because her husband was incarcerated. Padilla and the other co-conspirators knocked Olmeda down, dragged her upstairs, and began to beat her mercilessly. Terrified and silent, Robert kept watch over the sleeping children downstairs. Attempting to avoid Padilla's wrath, Robert said nothing as he listened to the struggling Olmeda upstairs, or as he retrieved an extension cord from the kitchen, or as he watched Olmeda's murderers walk downstairs with blood on their sleeves. Elsie Olmeda was found hogtied, strangled, and stabbed to death. Robert did not take part in her death directly, nor did he witness it. He remained downstairs for the duration of the invasion, only leaving his post to fetch the extension cord. Yet, Robert was still convicted of murder in the first degree and sentenced to life in prison without the possibility of parole.[34]

A resident of Philadelphia, Robert was charged in a state that did not initially treat the *Miller* ruling as retroactive. Therefore, it was not until 2016 that Robert was granted the opportunity for a second look at his case. In 2017, after nearly 30 years in prison, Robert was re-sentenced and is today a free man.[35] Having spent his time behind bars earning his GED, taking paralegal courses, and publishing several pieces about the injustice of juvenile life without parole sentencing, Robert was able to re-enter society as a fully functional member ready to change the system for the better.[36] Robert has demonstrated that mistakes of one's youth are not determinate of one's future character or conduct. He is a founding member of the Human Rights Coalition and the Coalition Against Death by Incarceration, two groups that seek to support and educate incarcerated people and their families. He also serves as the executive director of the Abolitionist Law Center.[37] As a "decarcerated" individual, Robert is an advocate for reforming the justice system. When reflecting on his experience, Robert observed, "what I saw in the courtroom, and what many other people like me saw—we don't see justice in courtrooms. We see politics being expressed in the courtroom."[38] Through his advocacy work, Robert

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[32] "Juvenile Lifer, Convicted at 16, Gets Reduced Sentence," accessed May 9, 2023, https://www.detroitnews.com/story/news/local/michigan/2017/03/02/juvenile-lifer-resentenced/98648706/.
[33] "Juvenile Life Without Parole | ACLU of Michigan," July 26, 2012, https://www.aclumich.org/en/juvenile-life-without-parole.
[34] Com. v. Holbrook, 427 Pa. Superior Ct. 387 (1993).
[35] "Facing Life," The Appeal, accessed May 9, 2023, https://theappeal.org/life-in-prison-pennsylvania-portraits/.
[36] Richard Wolf, "Supreme Court Considers Reprieve for Kids Who Kill," accessed May 9, 2023, https://www.usatoday.com/story/news/politics/2015/10/11/supreme-court-juvenile-life-without-parole-murder/73594976/.
[37] "Facing Life," The Appeal, accessed May 9, 2023, https://theappeal.org/life-in-prison-pennsylvania-portraits/.
[38] Ian Ward, "How Progressives Are Knocking Out Local Judges Across the Country - POLITICO," accessed May 9, 2023, https://www.politico.com/news/magazine/2021/09/03/robert-saleem-holbrook-conservative-judges-criminal-justice-506966.

has made substantial progress toward a more equitable justice system. Unfortunately, JLWOP sentencing persists in his home state of Pennsylvania.

As of February 2023, Pennsylvania had 520 individuals serving life without parole sentences for crimes that they committed before the age of 18. This makes Pennsylvania the largest population of juvenile lifers in the country and, thereby, the world.[39] More than 300 of these individuals are from Philadelphia, Robert's home city.[40] While many of these cases are currently pending before the court, the state of Pennsylvania had a slower start to revisiting JLWOP cases than other states because it did not apply *Miller* retroactively until the *Montgomery* decision in 2016.[41] This means that there are still hundreds of individuals deprived of their ability to meaningfully mature and reintegrate into society, and this number could grow each day. By continuing to allow JLWOP sentences, the state of Pennsylvania is actively punishing its citizens in cruel and unusual ways and denying them their Constitutional rights.

III. Conclusion

Juvenile life without parole sentencing is both cruel and unusual. The Court must correct this violation of Constitutional rights and abolish life without parole sentences for juveniles. While some fear that this action is a slippery slope that will lead to weakened sentences for violent adult criminals, the evidence simply does not support this outcome. The basis of abolishing JLWOP is the finding that juveniles are distinct from adults due to their relative immaturity. Additionally, doing away with JLWOP still allows the state to incarcerate violent and incorrigible offenders for life while eliminating the possibility that individuals are held for disproportionate amounts of time by forcing the state to consider all juvenile offenders for parole. This is the only way to address the contradictions that the justice system has made by acknowledging that juveniles are more likely to be rehabilitated while simultaneously denying them the opportunity for that rehabilitation. All life sentences for juveniles must carry the possibility of parole both in the future and retroactively. To suggest otherwise is to deny a future to hundreds of American citizens and remain complicit with one of the greatest injustices in the criminal justice system.

[39] "Juvenile Lifers Information," Department of Corrections, accessed March 27, 2023, https://www.cor.pa.gov:443/About%20Us/Initiatives/Pages/Juvenile-Lifers-Information.aspx.
[40] "Juvenile Life Without Parole," Defender Association of Philadelphia (blog), accessed May 9, 2023, https://phillydefenders.org/practice-units/juvenile-life/.
[41] "Juvenile Life Without Parole," Defender Association of Philadelphia (blog), accessed May 9, 2023, https://phillydefenders.org/practice-units/juvenile-life/.

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American Politics

A Case of Coastal Policy Learning: How the Events of the East Side Coastal Resiliency Project Affected Local Non-Governmental Participation within the Lower Manhattan Coastal Resiliency Project

Nathan R. Tillo

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While the effects of climate change pose a prominent threat to all levels of government, local governments are a key avenue for climate change mitigation. Traditionally, governments have utilized climate change prevention strategies to solve climate change in the long run.[1] However, as the climate has grown more volatile in recent years, this timeframe might not be realistic for local governments, who face the need to protect their citizens in the present.[2] Thus, many cities have turned to Climate Change Adaptation (CCA) policies instead.[3] While these CCA policies try to protect citizens, they are not widely accepted. Local governments are challenged with balancing a variety of opposing interests during the implementation of local CCA policies, most predominantly from citizens within their city. This raises the question: how should urban governments account for local, non-governmental interests in the implementation of CCA policies?

Seeking to answer this question, this paper will investigate the influence of local, non-governmental actors on two of New York City's CCA policies: the East Side Coastal Resiliency (ESCR) project and the Lower Manhattan Coastal Resiliency (LMCR) project. I will begin by illustrating how Hurricane Sandy led former New York City Mayor Bill de Blasio to propose these two CCA policies. Then, I will outline each of these policies individually, highlighting how each proposal dealt with the interests of local, non-governmental actors. Ultimately, I argue that the conflicts faced by New York City during the ESCR project were a case of instrumental policy learning for the current LMCR project, enabling the latter to better capture the interests of local, non-governmental actors.

I. Hurricane Sandy and the Development of New York's CCA Policies

In anticipation of Hurricane Sandy in 2012, New York City began to prepare for the effects of the monumental storm. The city shut down its schools and public transit systems, evacuated citizens from flood-prone regions, and even closed the New York Stock Exchange.[4] Despite the various precautions New York City took in protecting its citizens, it was impossible to prevent the damages the superstorm would cause. On the evening of October 29th, Hurricane Sandy arrived in New Jersey and, by the 30th, reached New York City.[5] During the storm, 17% of the city flooded, damaging its infrastructure and preventing first responders from reaching the fires that broke out, resulting in 126 residential homes burning down.[6] Hurricane Sandy finally dissipated on November 2nd, killing a total of 44 New Yorkers and resulting in approximately $19 billion in damages.[7] However, the distribution of the damages was not equal, clustering in

[1] Brian J Gerber, "Local Governments and Climate Change in the United States: Assessing Administrators' Perspectives on Hazard Management Challenges and Responses." *State & Local Government Review* 47, no. 1 (2015): 48–56. http://www.jstor.org/stable/24638841.
[2] Ibid.
[3] Ibid.
[4] Jacob William Faber, "Superstorm Sandy and the Demographics of Flood Risk in New York City." *Human Ecology* 43, no. 3 (2015): 363–78. http://www.jstor.org/stable/24762762.
[5] Winnie Hu and Patrick Mcgeehan, "A Timeline of Hurricane Sandy," The New York Times, October 28, 2022, https://www.nytimes.com/2022/10/28/nyregion/hurricane-sandy-timeline.html.
[6] Ibid.
[7] "Lower Manhattan Coastal Resiliency," NYCEDC, accessed March 15, 2022, https://edc.nyc/project/lower-manhattan-coastal-resiliency.

downtown Manhattan.[8] With the goal of protecting the city's most vulnerable area, Mayor de Blasio and his council began developing ways to reduce future floodings in Manhattan. Consequently, New York City's local government proposed two CCA policies.

CCA policies are best understood as one of three strategies utilized by coastal governments to reduce their city's vulnerability to environmental hazards.[9] The first is "protect," which seeks to reduce the harms of a climate event by decreasing its probability.[10] Second, "retreat" aims to reduce the harms of a climate event by limiting its potential effects.[11] Finally, the "accommodate" strategy seeks to increase the coastal city's ability to cope when these events inevitably occur.[12] CCA policies fall under this third strategy, aiming to "adjust the actual or expected harms that climate change brings upon [an area]."[13] Unlike the other two strategies, CCA policies do not aim to fix climate change or reduce its effects. Instead, they seek to bolster the resilience of local infrastructure to climate change's effects.[14] As the disastrous effects of Hurricane Sandy revealed the potential harms that Manhattan would face in the event of a future hurricane, New York City's local government began planning to implement two CCA policies to keep Manhattan's citizens safe, the first of which was the ESCR Project.

II. The ESCR Project

The initial concept for the ESCR project was born out of the 2014 Hurricane Sandy Design Competition, jointly created by Rebuild by Design and the U.S Department of Housing and Urban Development (HUD).[15] Under the initial project title "The BIG U," the proposal sought to protect the low-lying topography of Manhattan from floodwater, storms, and other hazardous effects of climate change across 10 miles of Lower Manhattan's coastline.[16] The BIG U proposal broke down the project into various sub-proposals to allow the city to better adapt the project to fit the needs of individual communities.[17] On June 2, 2014, HUD Secretary Shaun Donovan announced that the BIG U project was one of the competition's winning designs, granting New York City's local government $335 million to begin the project's development.[18] From this initial design, New York City's leaders began adapting the BIG U proposal into smaller, more feasible coastal resiliency projects, each targeting specific communities in Manhattan. The ESCR project was thus formed out of both the need to split the BIG U proposal into pieces New York City's local government could execute on and the need to tailor the proposal to the distinct areas it was implemented across.

The ESCR project spans 2.4 miles of coastline along Manhattan's Lower East Side, from East 25th Street and Montgomery Street.[19] It seeks to reduce the risks to property and business owners in the East River Park area during severe storms and hurricanes.[20] To achieve this goal, the ESCR project utilizes flood prevention techniques, such as floodwalls, floodgates, and combined sewer systems to divert flood water away from Lower East Manhattan during storms.[21] Moreover, the ESCR project seeks to raise the East River Park 10 feet above its current position to combat the rising sea levels that accompany hurricanes.[22] While the entire project stemmed from the initial goal of coastal resiliency, New York City has also used this large-scale developmental project to address

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[8] Faber, "Superstorm Sandy and the Demographics of Flood Risk in New York City", 363–78.
[9] Richard J. T. Klein, Robert J. Nicholls, Sachooda Ragoonaden, Michele Capobianco, James Aston, and Earle N. Buckley. "Technological Options for Adaptation to Climate Change in Coastal Zones." *Journal of Coastal Research* 17, no. 3 (2001): 531–43. http://www.jstor.org/stable/4300206.
[10] Ibid., 531
[11] Ibid., 531
[12] Ibid., 531
[13] Ben D Wallace and Ilan Kelman, "Governing Climate Change Adaptation in New York City," essay, in *Governance of Risk, Hazards and Disasters: Trends in Theory and Practice*, ed. Giuseppe Forino, Sara Bonati, and Lina Maria Calandra (London: Routledge, Taylor et Francis Group, 2021), 117.
[14] Ibid.
[15] Rebuild by Design. Accessed March 13, 2022. https://rebuildbydesign.org/.
[16] Ibid.
[17] Ibid.
[18] Ibid.
[19] "East Side Coastal Resiliency." The Official Website of the City of New York. Accessed March 13, 2022. https://www1.nyc.gov/site/escr/index.page.
[20] Ibid.
[21] Ibid.
[22] Ibid.

other concerns held by local citizens. In particular, the entire ESCR project seeks to achieve three goals: reduce flood risk ahead of future storms and rising sea levels; improve local citizens' access to the Lower East Manhattan harbourfront; and enhance the harbourfront by updating facilities, creating new furnishings, and developing new multi-use spaces for the community.[23] In total, the BIG U budget estimated that the ESCR project would cost a total of $1.045 billion.[24] However, the multi-governmental nature of the proposal allows for the funding of the project to burden all three levels of government.[25] In the fall of 2020, the city began construction on the ESCR project and is currently constructing the project's 32,000-pound floodgate across the Stuyvesant Cove Park Waterfront.[26] While the Stuyvesant Cove Park segment of the project is predicted to reach completion by the end of 2024, the entire ESCR project is expected to continue into 2026.[27]

However, when local governments introduce such large developmental proposals, conflicts may arise due to misaligned interests between them and the citizens they represent. While local governments tend to consider their citizens' safety and security interests, they might fail to consider others, such as environmental protection. Local governments might attempt to push past these issues, viewing their own agenda as more important. This could lead to conflicts of interest within local government as, within urban governance, elected officials are not the only ones in power.

III. Local Non-Governmental Participation within the ESCR Project

Power within local governance can be understood through a plethora of theories, many of which have been built off Floyd Hunter's "Community Power Structure," proposed in 1953.[28] In the case study of Atlanta, Georgia, Hunter found that the power within the city existed as a type of pyramid where, at the top, a "small and homogenous group of men worked their will upon the rest of the population," ultimately forming what is now referred to as an elitist theory of power.[29] However, this theory was critiqued by other sociologists and political scientists, including Robert Dahl.[30] What Dahl attacked within Hunter's argument was Hunter's particular conception of power, arguing that power ought to be more accurately examined by looking within the "series of concrete decisions" that are made within a city.[31] This understanding of power as decision-making formulates what Dahl calls a pluralist theory of power. Instead of concluding that power resides within a small group of elites, pluralists argue that power is shared by a small group of political leaders and voters themselves as the latter's democratic right to vote can also affect urban decision-making.[32]

Still, Dahl's pluralist theory of power has not been immune to criticism. In particular, some political theorists object that Dahl's theory only focuses on those who participate in political decision-making and fails to consider those individuals who do not directly engage in decision-making.[33] This critique was introduced by Bachrach and Baratz, who argued that Dahl's previous account of power fails to incorporate those who neither vote nor run for local office.[34] In their analysis, Bachrach and Baratz argue that the type of power Dahl describes is only a first face of power that prioritizes power within the decision-making process. They go on to explain that power can also exist when one "devotes [their] energies to creating or reinforcing social and political values," as this

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[23] Ibid.
[24] Rebuild by Design. Accessed March 13, 2022. https://rebuildbydesign.org/.
[25] "East Side Coastal Resiliency." The Official Website of the City of New York. Accessed March 13, 2022.
[26] Dean Moses, "New York City's First Floodgate Arrives on the East River Waterfront." amNewYork, February 28, 2022. https://www.amny.com/news/new-york-city-first-floodgate-east-river-waterfront/.
[27] Ibid.
[28] Thomas J Anton. "Power, Pluralism, and Local Politics." Administrative Science Quarterly 7, no. 4 (1963): 426. https://doi.org/10.2307/2390960.
[29] Ibid., 426
[30] Sarah F Anzia. Local Interests: Politics, Policy, and Interest Groups in US City Governments. Chicago: The University of Chicago Press, 2022.
[31] Anton, "Power, Pluralism, and Local Politics", 436
[32] Ibid.
[33] Ibid.
[34] Peter Bachrach and Morton S. Baratz. "Two Faces of Power." *American Political Science Review* 56, no. 4 (1962): 947–52. https://doi.org/10.2307/1952796.

inherently alters the scope and priorities that local elected officials act upon.[35] They define this type of power as a second face of power that works in tandem with the first. Both faces of power operate within the overall domain of urban governance.[36]

One prominent demonstration of this second face of power is seen in urban social movements, which Manuel Castells first defined as the rarest and most important examples of collective action.[37] In particular, he believed they were conflicts that created fundamental changes in power relations at the urban and societal levels. While this definition of urban social movements has changed over time, Gordana Rabrenovic outlined three common factors that all modern urban social movements possess: the mobilization of resources, the use of political opportunity structures, and the ability to frame the issues' narrative.[38] Overall, as urban social movements hold this second face of power through their ability to shape public interests, they inherently possess power within urban governance—an inherent power that ought to be respected.

Returning to the New York City case, the failure to recognize this second face of power held by urban social movements is partially what caused the ESCR project's many issues. By failing to accurately consider local, non-governmental actors' alternative interests, various urban social movements have mobilized against the ESCR project. This has forced New York City to contend with several lawsuits, various displays of public protest, and significant negative media coverage.[39] The most dominant urban social movement that has vocalized its opposition to the ESCR project is the East River Park ACTION (ERPA) organization.

ERPA is an association composed of local homeowners from the area surrounding East River Park within the Lower East End of Manhattan.[40] Working under the slogan "Don't Kill a Great Park for a Bad Flood Control Plan," ERPA aims to protect the environmental greenery and community space of East River Park. These ulterior environmental interests would be tarnished by the ESCR project.[41] By continuing its development of the ESCR project, the city would take away one of the community's important social landmarks, leaving citizens of the Lower East Side of Manhattan without any alternative park space.[42] Consequently, in attempts to bring awareness to the project's potential harm, ERPA staged various public protests at East River Park, brought the issue to the media through their organization's journalists, and sent an open letter to the city's councilmembers.[43] While ERPA's actions reflect value-shaping power, citizens' ability to impose goals and values on the collective community is the most prominent example of how this second face of power can influence the capabilities of local governments was seen in ERPA's utilization of the judicial system.

In February 2020, ERPA spearheaded a lawsuit against the City of New York based upon two claims.[44] First, ERPA argued that the city failed to provide an open vote when they decided to swap the community-built version of the ESCR project for one the city privately developed.[45] Second, ERPA attempted to hold the city in contempt of court for continuing construction against the judge's orders.[46] Looking into the first claim of the lawsuit, when the city was initially adapting the BIG U proposal into the ESCR project, they utilized two community input groups—the Community Board 3 Committee and the Community Board 6 Committee—to allow the public to adjust the developmental plans to

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[35] Ibid., 948
[36] Ibid.
[37] Gordana Rabrenovic. "Urban Social Movements." In *Theories of Urban Politics*, edited by Jonathan S. Davies and David L. Imbroscio, 2nd ed., 239–54. Los Angeles: Sage, 2009.
[38] Ibid.
[39] Nathan Kensinger. "NYC Says Goodbye to East River Park." Gothamist, December 31, 2021. https://gothamist.com/news/photos-nyc-says-goodbye-east-river-park.
[40] "East River Park Action." East River Park Action: Advocating for the health of the Lower East Side and the planet with science-based solutions. Accessed March 14, 2022. https://eastriverparkaction.org/.
[41] Ibid.
[42] Ibid.
[43] Ibid.
[44] Ari Ephraim Feldman. "City Wins East River Park Lawsuit That Had Delayed Resiliency Construction." City wins East River Park lawsuit, December 16, 2021. https://www.ny1.com/nyc/all-boroughs/news/2021/12/16/city-wins-east-river-park-lawsuit-that-had-delayed-construction.
[45] Ibid.
[46] Ibid.

fit community interests.[47] However, after four years of integrated community engagement, New York City's Mayor's Office announced that it was swapping the community-built proposal for one that was designed solely by the city's engineers.[48] However, shifting to this new ESCR project would completely destroy East River Park, as the project sought to turn the park into a 10-foot-tall floodwall.[49] Furthermore, the city failed to overtly express why they decided to swap the community-built project, citing a value engineering study as the sole reason for the change in plans.[50] Thus, ERPA applied for a Freedom of Information Act (FOIA) request, by which the New York City government released a heavily redacted version of the Value Engineering Study.[51] While this provided a small win for ERPA, New York State Supreme Court Justice Melissa Crane ultimately dismissed the lawsuit, siding with the city and allowing them to continue developing their proposed ESCR project.[52] As these factors illustrate, the case of ERPA and the ESCR project highlights both the second face of power urban social movements possess as well as how New York City must strive to better incorporate local, non-governmental actors' interests to avoid such conflicts in the future.

IV. The LMCR Project: A Case of Instrumental Policy Learning

As the ESCR project moved on to its construction phase, New York City has begun working on the next portion of coastal resiliency outlined by the BIG U project: the Lower Manhattan Coastal Resiliency (LMCR) project. The LMCR project is not an urban development proposal like the ESCR project, but instead exists as a master plan consisting of four individual CCA projects: Brooklyn Bridge-Montgomery Coastal Resilience, the Battery Coastal Resilience, Battery Park City Resilience Projects, and the FiDi-Seaport Climate Resiliency Master Plan. All these sub-projects seek to implement on-land CCA adaptation, such as floodwalls and storm gates, to protect against the increase of flooding accompanying the 100-year storm surge expected in the 2050s. Of these sub-projects, the FiDi-Seaport Climate Resiliency Master Plan is the predominant project currently in development, spearheaded by the New York City Economic Development Council and the Mayor's Office of Climate Resiliency. The sub-project seeks to finalize its development phase by 2022 and is expected to be completed by 2025. The other LMCR sub-projects, such as the Battery Coastal Resilience and the Two Bridges Coastal Resilience, are expected to follow a similar timeline.

It is within this LMCR project that my argument ultimately develops. The LMCR sub-projects and ESCR project grant a unique opportunity for empirical analysis due to their similar makeup, development, and purpose. In particular, the disastrous events between the ESCR project and ERPA have acted as a case of instrumental policy learning for New York City's local leaders, teaching them how to incorporate local, non-governmental interests more successfully in the current LMCR project.

Policy learning is a phenomenon in which governments utilize feedback from previously implemented policies to enhance their learning capacity for future policy implementations.[53] While this initial conception of policy learning is extremely broad, Peter May outlines two types of policy learning for local governments: instrumental policy learning and social policy learning.[54] Instrumental policy learning is when previous policy proposals result in "new understandings about the viability of policy interventions or implementation designs" surrounding new policies the government aims to implement.[55] On the other hand, social policy learning is when the city's previous policies create a "new or reaffirmed social construction of a policy by the policy elites of a given policy

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[47] "East River Park Action." East River Park Action: Advocating for the health of the Lower East Side and the plent with science-based solutions.
[48] Ibid.
[49] Ibid.
[50] Feldman, "City Wins East River Park Lawsuit That Had Delayed Resiliency Construction."
[51] "East River Park Action." East River Park Action: Advocating for the health of the Lower East Side and the plent with science-based solutions.
[52] Lincoln Anderson. "Judge Rules East Side Resiliency Project Can Start." The Village Sun, August 21, 2020. https://thevillagesun.com/judge-rules-east-side-resiliency-project-can-start.
[53] Peter J May. "Policy Learning and Failure." *Journal of Public Policy* 12, no. 4 (1992): 332. http://www.jstor.org/stable/4007550.
[54] Ibid.
[55] Ibid., 335

domain."[56] In this type of policy learning, what the government has learned does not change the implementation of its policies. Instead, it helps adapt its policies to address different societal goals.[57] While these two differing forms of policy learning exist, Bennett and Howlett argue that all cases of policy learning follow a general framework built upon three central aspects. First, they all contain a subject of learning.[58] Policy learning requires an individual, most often the government, to learn from a previous policy. Second, there must exist an object of learning, best understood by answering the question: What have previous policies allowed the government to learn?[59] Finally, policy learning must display the results of learning, commonly seen in the implementation of more successful proposals of similar jurisdictions.[60]

In applying this concept of policy learning to the current LMCR project, I aim to demonstrate how New York City's local officials have utilized instrumental policy learning from the ESCR project to better incorporate the interests of local non-governmental actors. I believe that this instrumental policy learning occurs within two aspects of the LCMR project: the developmental phase and the response to opposing interests.

First, in comparing the developmental phases of the ESCR and LMCR projects, the local community had limited input within the developmental phase of the ESCR project compared to that of the LMCR project. Other than the two community boards, there were no opportunities for citizens to engage with the ESCR project's development.[61] Hence, when New York City's local officials scrapped the community-built ESCR project, all community contribution was effectively terminated. However, within the LMCR project, there has been a much richer involvement of local citizens in the developmental phase. Looking into the LMCR project itself, New York City officials have re-introduced the use of two community boards, Community Board 1 and Community Board 3, allowing for additional community input.[62] Further, local officials increased the number of these meetings and offered different types of "ongoing engagement opportunities" within these board meetings, such as in-person scoping tours of the developmental sites that move beyond the attendance of citizens at board meetings.[63] In a testimony given by one of the community board members who signed up for a scoping tour, she professed that "the in-person tours really mattered," helping her and other local citizens understand the city's perspective on the LMCR project.[64]

In addition to creating more engaging community board meetings, New York City's local government has also adapted its developmental phase by allowing for the LMCR project's developmental team to include the Hester Street organization, a local urban planning and development non-profit.[65] Hester Street consistently seeks to incorporate the interests of local citizens into each project they undertake.[66] Within the LMCR project, Hester Street has worked on contributing to aspects such as asset mapping, training workshops, and planning and engagement toolkits for utilization by the LMCR project.[67] By creating more engaging community boards and including local non-profit developers within the project, New York City's government has shaped the developmental phase of the LMCR project, building on the ESCR project's previous failure to incorporate important local, non-governmental interests.

Beyond simply shaping the LMCR project's more inclusive developmental phase, the ESCR project has also informed the city on how to better handle urban social movements that could mobilize against the ongoing CCA projects. One of LMCR's sub-

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[56] Ibid., 337
[57] Ibid.
[58] Colin J. Bennett and Michael Howlett. "The Lessons of Learning: Reconciling Theories of Policy Learning and Policy Change." *Policy Sciences* 25, no. 3 (1992): 275–94. http://www.jstor.org/stable/4532260.
[59] Ibid., 283
[60] Ibid.
[61] "East Side Coastal Resiliency." The Official Website of the City of New York. Accessed March 13, 2022.
[62] "Progress." Past Meetings and Workshops - LMCR. Accessed March 15, 2022. https://www.nyc.gov/site/lmcr/progress/meetings-and-workshops.page.
[63] Ibid.
[64] Patrick Sisson. "How NYC's Battery Park City Is Preparing for Rising Seas." Bloomberg.com, July 26, 2022. https://www.bloomberg.com/news/features/2022-07-26/how-nyc-s-battery-park-city-is-preparing-for-rising-sea, para. 16.
[65] "About." Hester Street, June 11, 2020. https://hesterstreet.org/about/.
[66] Ibid.
[67] Ibid.

projects, the Battery Park City Resiliency Project, seeks to raise the elevation level of Wagner Park, a local park within the Battery Park City neighbourhood.[68] However, the planned raising of the park has opened the LMCR project up to conflicts similar to those faced by the ESCR project as there were numerous movements that have risen in response to the planned destruction of Wagner Park.[69] In particular, the Battery Park City Neighbourhood Association and the Battery Alliance are two local urban social movements that rose against the LMCR project's implementation.[70] Moreover, New York City reacted to these urban social movements differently; unlike in the case of the ESCR project and ERPA, New York City's local officials were more transparent and sought to build a more positive relationship with these urban social movements. For example, following an open letter sent by the Battery Park City Neighbourhood Association, New York City's local government, for the first time, responded to and engaged with some of their demands.[71] Therefore, it appears New York City's local leaders have learned from their mistakes by creating a more open dialogue between the two. Both the LMCR project's better design of their developmental phase and New York City's better handling techniques of urban social movements demonstrate that the city has utilized the ESCR project as a case of instrumental policy learning to better consider the interests of local, non-governmental actors.

V. Conclusion

While both the ESCR and LMCR projects were created from the same Hurricane Sandy Design Competition proposal, the BIG U, this paper has investigated the difference of how both CCA policies have integrated the interests of local, non-governmental actors. The ESCR project's failure to successfully incorporate local citizens' interests resulted in a devastating sequence of events for the city, which reminded them of the second face of power that local, non-governmental actors, such as urban social movements, possess. Further, the current LMCR project utilized the events of the ESCR project as a case of instrumental policy learning, marked by the incorporation of greater community input in its developmental phase and more transparent relationships with the urban social movements mobilizing against them. Because of the difficulty associated with balancing various interests in the development of CCA policies, it is inevitable that urban governments will make mistakes. However, what matters most is how governments learn from and use them to better their cities at large.

[68] Sisson, "How NYC's Battery Park City Is Preparing for Rising Seas."
[69] Ibid.
[70] Ibid.
[71] "Response to BPCA ." Battery Park City Neighbourhood Association. Accessed March 16, 2022. https://bpcna.org/.

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Section 2:

International Politics

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Featuring:

International Politics

Politics Over Policy: Context & Consequences of Moving the U.S. Embassy in Israel to Jerusalem

Stephen Blinder

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Introduction

In 1947, United Nations (UN) General Assembly Resolution 181, with United States (U.S.) support, proposed the partition of Palestine into two states. It also established the proposition that Jerusalem, with its unique religious status and competing interests, should be a special international city, a *corpus separatum*, under neutral UN control.[1] This vision was never realized. Instead, what followed was war and conflict with no resolution and no reconciliation of rival claims to Jerusalem. In fact, Israel unilaterally moved its seat of government to the city in 1950, and after the Six-Day War in 1967, occupied East Jerusalem, the Golan Heights, the West Bank, Gaza, and the Sinai Peninsula. These occupations were a breach of international law, and the UN Security Council unanimously issued Resolution 242 calling for Israeli withdrawal from these territories and for every State in the region (ostensibly Egypt, Israel, Jordan, Lebanon, and Syria) "to live in peace within secure and recognized boundaries free from threats or acts of force."[2] Specifics were not detailed, nor was there mention of the Palestinians or the city of Jerusalem. The U.S. supposably maintained a commitment to the provisions of the 1947 UN resolution but pivoted policy to focus on negotiations determining Jerusalem's status.

After the October War (1973), the U.S. took the lead in diplomacy, launching a process to broker lasting peace. Even after the Israeli government passed a law in 1980 unilaterally declaring Jerusalem the "complete and united" capital of Israel (including occupied territory in East Jerusalem), U.S. presidents avoided formal recognition of the city as such.[3] They maintained a policy focused on the negotiated settlement of Israeli and Palestinian land, including Jerusalem and respective Israeli/Palestinian capitals, so as not to prejudge the outcome or jeopardize the peace process and America's legitimacy as its impartial facilitator. They managed the delicate balance of tension between this policy and rising political pressure from growing hardline pro-Israel supporters at home. That stance changed in 2017 with President Trump. He instead chose to recognize Jerusalem as Israel's capital and initiate the move of the U.S. Embassy from Tel Aviv. This paper explores that shift and its impacts, arguing that President Trump's action was a triumph of politics (self-serving appeasement of powerful pro-Israel lobbyists, donors, and constituents) over policy (a long-standing diplomatic position of American neutrality and non-affirmation of Israel's assertion of sovereignty over Jerusalem and territory captured in the Six-Day War). Further, this paper suggests that Trump's decision to recognize Jerusalem as the Israeli capital compromised U.S. stature as the primary arbiter of negotiations and opened the floodgates for further suppression of Palestinian interests and potentially greater consequent regional conflict and instability.

I. History of U.S. Policy

President Trump's decision was not the sudden, radical departure from prior policy that it appeared to be. Instead, it was the culmination of a decades-long struggle in the American political arena. Post Israel's 1980 unilateral declaration of Jerusalem as its capital, Congress was heavily lobbied by the American Israel Public Affairs Committee

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[1] United Nations General Assembly Resolution 181, "Resolution Adopted on the Report of the Ad Hoc Committee on the Palestinian Question," 1947, https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/038/88/PDF/NR003888.pdf?OpenElement.
[2] United Nations Security Council Resolution 242, "Resolution 242: The Situation in the Middle East," 1967, https://peacemaker.un.org/sites/peacemaker.un.org/files/SCRes242%281967%29.pdf.
[3] Basic Law: Jerusalem, Capital of Israel, "BASIC-LAW: JERUSALEM THE CAPITAL OF ISRAEL (Originally adopted in 5740-1980)," 1980, https://m.knesset.gov.il/EN/activity/documents/BasicLawsPDF/BasicLawJerusalem.pdf.

(AIPAC), a powerful pro-Israeli organization, to force recognition of the declared Israeli capital and move the U.S. Embassy from Tel Aviv. The first congressional step toward that recognition and move can be traced to Sen. Jesse Helms (R-NC), who was propelled to victory in a tightly contested 1984 re-election campaign due largely to contributions from pro-Israel supporters.[4] Sen. Helms put forth an amendment (S.Amdt.2682) in 1988 to H.R.4782 (an appropriations bill of the 100th Congress), proposing the construction of two "diplomatic facilities" in Israel, one in Tel Aviv and another in Jerusalem.[5] After introducing his amendment, Sen. Helms acknowledged tensions between the State Department, which was adamant about maintaining U.S. neutrality by keeping its embassy in Tel Aviv, and senators like himself, who supported the move.[6] Helms viewed his amendment as a compromise because it allowed for the construction of two equally viable sites but left the president to decide which would be the embassy. While the amendment failed to yield immediate action, the Reagan administration, on Reagan's final day in office in 1989, entered a "Land Lease and Purchase Agreement" with Israel. The purchase was a parcel of land in Tel Aviv, and the lease, at a cost of one U.S. dollar annually over 99 years with the option to renew, was for a parcel in West Jerusalem, each to house "diplomatic facilities."[7] James A. Boyle, Professor of International Law at the University of Illinois, observed shortly after the lease agreement, in a letter to Rep. Lee Hamilton (chairman of the House Subcommittee on Europe and the Middle East), that it could "only be interpreted as a last minute attempt by the Reagan administration to lock its successors into a policy of moving the embassy from Tel Aviv to Jerusalem…"[8] Until 1994, however, disputed intentions for the Jerusalem site prevented material progress on plans for development. While Israel pressured for the land to be specifically designated for the embassy, U.S. presidents refused to commit to anything less vague than a diplomatic facility, maintaining the appearance of neutrality with respect to the status of Jerusalem. Israeli pressure did, however, abate with progress in Israeli-Palestinian negotiations. In late 1994, Prime Minister Yitzhak Rabin decided that progress on the site could proceed without further specification of its purpose.[9] Development might have moved forward but for other issues that emerged.

While not slowing congressional efforts toward movement on the Jerusalem land, challenges to land rights for the property contributed to the lack of executive branch approval of construction proposals. Perhaps most important were claims dating back to 1989 that around 70 percent of the parcel constituted part of the Al-Khalili *waqf*.[10] This was private property belonging to Palestinian refugees that had been leased to the British Mandate Government of Palestine and illegally seized by Israel through its 1950 "Absentee Property Law."[11] In a special research report on this land in 2000, Walid Khalidi, co-founder of the Institute for Palestine Studies and a former professor at Oxford, American University at Beirut, and Harvard, posited that, in addition to the sheer optics of building an embassy on land that was not rightfully Israel's, "It impinges on four major aspects of the final status negotiations: Jerusalem, the settlements, refugees, and the size of an eventual Palestinian state."[12] This alluded to the Israeli-Palestinian

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[4] Donald Neff, "Congress Has Been Irresponsible on the Issue of Jerusalem," *Washington Report on Middle East Affairs*, (1998): 90–91, https://www.wrmea.org/1998-january-february/middle-east-history-it-happened-in-january-congress-has-been-irresponsible-on-the-issue-of-jerusalem.html.
[5] U.S. Congress, Senate, *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1989*, S Amdt 2682, 100th Cong., 1st sess., proposed in Senate July 26, 1988. https://www.congress.gov/100/crecb/1988/07/26/GPO-CRECB-1988-pt13-4-1.pdf.
[6] Senator Jesse Helms, speaking on S. Amdt. 2682, 100th Cong., 1st sess., *Congressional Record* (July 26, 1988): S 18739, https://www.govinfo.gov/content/pkg/CREC-1995-10-24/html/CREC-1995-10-24-pt1-PgS15522.htm.
[7] "Land Lease and Purchase Agreement," *The Palestine Yearbook of International Law* 5 (1989): 327-333, http://proxygt-law.wrlc.org/login?url=https://heinonline.org/HOL/P?h=hein.intyb/palesyb0005&i=327.
[8] "Letter to Lee H. Hamilton, September 6, 1989," *The Palestine Yearbook of International Law* 5 (1989): 338-339, http://proxygt-law.wrlc.org/login?url=https://heinonline.org/HOL/P?h=hein.intyb/palesyb0005&i=338.
[9] Walid Khalidi, "The Ownership of the U.S. Embassy Site in Jerusalem," *Journal of Palestine Studies* 29, no. 4 (2000): 83, https://doi.org/10.2307/2676563.
[10]Walid Khalidi, "The Ownership of the U.S. Embassy Site in Jerusalem," *Journal of Palestine Studies* 29, no. 4 (2000): 80, https://doi.org/10.2307/2676563.
[11] "Will the U.S. Government Recognize Jerusalem as the Capital of Israel?," *The Palestine Yearbook of International Law* 5 (1989): 325-345, http://proxygt-law.wrlc.org/login?url=https://heinonline.org/HOL/P?h=hein.intyb/palesyb0005&i=345.
[12] Walid Khalidi, "The Ownership of the U.S. Embassy Site in Jerusalem," *Journal of Palestine Studies* 29, no. 4 (2000): 94, https://doi.org/10.2307/2676563.

negotiations conducted in 1993 and 1994. In those negotiations, interim agreements were made on relations between Israel and the Palestinians. Permanent status arrangements, including competing claims to Jerusalem, Israeli settlements and expansion in occupied territories, rights of return and recompense for Palestinian refugees, and the borders, water rights, and security of Israeli and Palestinian states, were all left to later negotiations. Still, Congress kept attempting to force the hands of future presidents to construct a U.S. Embassy in Jerusalem; such was the power of AIPAC and its wealthy political donors.

In May 1995, Senators Bob Dole (R-KS) and Jon Kyl (R-AZ) introduced the "Dole-Kyl Bill" that required the embassy to move to Jerusalem by May 31, 1999, calling for groundbreaking on the facility in 1996 and, if that deadline were not met, withholding half the State Department funding for Acquisition and Maintenance of Buildings Abroad.[13] Later called the Jerusalem Embassy Act of 1995, the bill was first proposed alongside identical legislation in the House by Speaker Newt Gingrich (R-GA). This Congressional move was once again influenced by pro-Israel lobbying—both Dole and Gingrich promised the proposal of such bills at AIPAC's annual convention earlier that year. Sen. Dole, running in a crowded Republican presidential primary, sought the financial backing of pro-Israel supporters. In his speech to AIPAC the day before introducing the act, Sen. Dole said, "Jerusalem is today as it has been for three millennia, the heart and soul of the Jewish people. It is also, and should remain forever, the eternal and undivided capital of the state of Israel."[14] Dole promised to relocate the embassy to Jerusalem. Notably, President Clinton strongly opposed the legislation, both because it violated long-standing U.S. foreign policy and, in its original conception, was unconstitutional.[15] Specifically, the Justice Department released a memorandum arguing that the legislation obstructed the president's constitutional "exclusive authority" to oversee foreign affairs and dictate policy concerning recognition.[16] While Dole had widespread support for the bill, he eventually changed the legislation to address this issue by adding waiver authority to the president for six-month periods at a time should the president determine it in the best interests of national security.[17] Despite this, Clinton viewed the bill as a substantial threat to Israeli-Palestinian negotiations and never signed it. Aware of its veto-proof support, Clinton instead allowed the act to automatically become law on November 8, 1995.[18] As Senator Robert Byrd (D-WV) said in opposition to the legislation at the time, "It ill behooves us now to undermine what is arguably the single most sensitive issue of the negotiations, that of the status of the holy city of Jerusalem, by impetuously acting to side with one party to the negotiations."[19] Sen. Byrd, like President Clinton, argued that America's support for Israel was "well known" and moving the embassy would only serve to undermine "the incentive for the Palestinians, who also have political and religious claims to the city, to participate in the talks."[20] Presidents Clinton, George W. Bush, and Obama exercised the waiver, refusing to move

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[13] Malvina Halberstam, "The Jerusalem Embassy Act," *Fordham International Law Journal 19*, no. 4 (1995): 1379-1392, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1500&context=ilj&httpsredir=1&referer=; U.S. Congress, Senate, *Jerusalem Embassy Act of 1995*, S 1322, 104th Cong., 1st sess., introduced in Senate October 13, 1995, https://www.congress.gov/104/plaws/publ45/PLAW-104publ45.pdf.

[14] Robert J. Dole, "Address to annual AIPAC convention," transcript of speech delivered at the AIPAC annual convention, Washington, D.C., May 8, 1995, https://dolearchivecollections.ku.edu/collections/speeches/098/c019_098_021_all.pdf.

[15] Malvina Halberstam, "The Jerusalem Embassy Act," *Fordham International Law Journal 19*, no. 4 (1995): 1381, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1500&context=ilj&httpsredir=1&referer=.

[16] U.S. Department of Justice, Office of Legal Counsel, exhibit on S. 770, 104th Cong., 1st sess., *Congressional Record* (October 23, 1995): S 15468, https://www.govinfo.gov/content/pkg/CREC-1995-10-23/pdf/CREC-1995-10-23-senate.pdf.

[17] Senator Robert Dole, speaking on S. 1322, 104th Cong., 1st sess., *Congressional Record* (October 24, 1995): S 15528, https://www.congress.gov/104/crec/1995/10/24/141/165/CREC-1995-10-24-senate.pdf.

[18] Malvina Halberstam, "The Jerusalem Embassy Act," *Fordham International Law Journal 19*, no. 4 (1995): 1379-1380, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1500&context=ilj&httpsredir=1&referer=.

[19] Senator Robert Byrd, speaking on S. 1322, on October 24, 1995, 104th Cong., 1st sess., *Congressional Record* 141, pt. 165, https://www.govinfo.gov/content/pkg/CREC-1995-10-24/html/CREC-1995-10-24-pt1-PgS15522.htm.

[20] Senator Robert Byrd, speaking on S. 1322, on October 24, 1995, 104th Cong., 1st sess., *Congressional Record* 141, pt. 165, https://www.govinfo.gov/content/pkg/CREC-1995-10-24/html/CREC-1995-10-24-pt1-PgS15522.htm.

the embassy on grounds of national security risks while asserting unwavering support for Israel to mitigate fallout.

Despite off-the-record statements of ambivalence or even support for Israel's claim to Jerusalem as its capital, the importance to negotiations of official non-recognition of Jerusalem as the Israeli capital was well-understood in the executive branch until the Trump administration. In a leaked transcript of a 2009 meeting between U.S. officials, led by Senator George Mitchell (D-ME), and Palestinian negotiators, headed by Dr. Saeb Erekat, Sen. Mitchell made clear an important element of the executive position concerning Jerusalem and non-recognition of Israeli encroachment. Sen. Mitchell told Palestinian negotiators that "…if they [Israel] make a provocative announcement, the US has the leverage to state that this undermines the process, and that Israel is acting in bad faith in the negotiations."[21] Thus, the long-standing U.S. policy of non-recognition was believed to be a key bargaining chip deployed to help bring to the negotiating table the Palestinians, who underscored during the 2009 meeting the "central position of Jerusalem in the conflict."[22] In fact, it was believed to be perhaps the only chip the U.S. had, serving as the glue that held together any prospect of honest negotiations, until rejected as such by President Trump.

II. Shift in Stance Under President Trump

President Trump's decision to abandon the decades-old policy, though thinly wrapped in infrequently articulated hopes for peace, fundamentally was a play to his political base and his own personal branding. The Trump base included right-wing Jewish Americans who had lobbied heavily for the move, major Jewish donors, such as Sheldon Adelson, the highly influential conservative Jewish members of his inner circle, and the Christian evangelicals. Indeed, at a 2020 campaign rally, President Trump proclaimed, "And we moved the capital of Israel to Jerusalem. That's for the evangelicals."[23] President Trump also made clear that, unlike other presidents who had reneged on campaign promises to move the U.S. Embassy to Jerusalem, he keeps his promises, a cornerstone trait in his personal branding.

Certainly, Trump's strong desire to appease his base and show he always delivers on his promises were factors in the decision, as evident in the Trump White House Fact Sheet concerning the embassy's move, but so too was the counsel of those surrounding him both on the campaign trail and in office.[24] During the 2016 campaign, David Friedman, then Trump's pick for Ambassador to Israel, claimed the embassy previously had not been relocated because the State Department was "anti-Israel and anti-Semitic for the past 70 years."[25] Similar skewed views were pervasive once Trump took office, as were views that the risks to the peace process of moving the embassy were overblown. During a 2017 congressional hearing before the House Subcommittee on National Security titled "Moving the American Embassy in Israel to Jerusalem: Challenges and Opportunities," National Security Advisor John Bolton said, "…if the peace process is such a delicate snowflake that moving our Embassy would destroy it, you have to ask what its viability is to begin with."[26] Jared Kushner, one of the administration's lead Israeli-Palestinian peace brokers, also pushed for the president to settle the status of Jerusalem rather than continue leaving it part of a final negotiated peace. Indeed, he did so despite multiple condemnations by the UN in 2017. Both Security Council Draft Resolution S/2017/1060, vetoed by the U.S., and Resolution ES-10/19 adopted by the

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[21] "Meeting Summary: Dr. Saeb Erekat – Senator George Mitchell," *Jewish Virtual Library*, October 1, 2009, https://www.jewishvirtuallibrary.org/jsource/arabs/PalPaper100109.pdf.
[22] "Meeting Summary: Dr. Saeb Erekat – Senator George Mitchell," *Jewish Virtual Library*, October 1, 2009, https://www.jewishvirtuallibrary.org/jsource/arabs/PalPaper100109.pdf.
[23] Donald Trump, "Speech in Oshkosh, Wisconsin," Campaign speech, Wittman Airport, Oshkosh, WI, filmed August 17, 2020, video of speech, 52:51. https://www.c-span.org/video/?474841-1/president-trump-give-acceptance-speech-white-house-week.
[24] "President Donald J. Trump Keeps His Promise To Open U.S. Embassy In Jerusalem, Israel," *Trump White House Archive*, May 14, 2018, https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-keeps-promise-open-u-s-embassy-jerusalem-israel/.
[25] Andrew Kaczynski, "Trump Israel ambassador pick said State Department has been anti-Semitic for 'past 70 years'," *CNN*, February 28, 2017, https://www.cnn.com/2017/02/28/politics/kfile-friedman/index.html.
[26] U.S. Congress, House, Subcommittee on National Security, *Moving The American Embassy In Israel To Jerusalem: Challenges And Opportunities*, 115th Cong., 1st sess., November 8, 2017, https://www.govinfo.gov/content/pkg/CHRG-115hhrg28071/pdf/CHRG-115hhrg28071.pdf.

General Assembly, stated that "any decisions and actions which purport to have altered the character, status or demographic composition of the Holy City of Jerusalem have no legal effect, are null and void…"[27] In a leaked email obtained by *Foreign Policy Magazine*, Kushner wrote in the aftermath of these rebukes, "Our goal can't be to keep things stable and as they are, our goal has to be to make things significantly BETTER! Sometimes you have to strategically risk breaking things in order to get there."[28]

Influenced by trusted advisors like Kushner, Trump adopted the same unambiguous position. In Trump's remarks at the embassy opening proclamation ceremony, he said, "This is a long-overdue step to advance the peace process and to work towards a lasting agreement," while not addressing how it might be such a step, given the context of competing Israeli and Palestinians claims of sovereignty.[29] He went on to say, "This is nothing more, or less, than a recognition of reality."[30] The reality in Jerusalem remains, however, up for debate between the Israelis and Palestinians, and Trump's specific interpretation of what reality is may end up at the heart of the consequences that result from his decision.

III. Intent, International Law, and World Opinion

Israel's claim of a "complete and united" Jerusalem as its eternal capital was, in addition to its occupation of Palestinian territory, a violation of international law and seen as such by the UN and the international community at large. Hence, Security Council Resolution 478 (1980) condemned illegal Israeli encroachment into Jerusalem, asserted non-recognition of Israeli law making the city its capital, and called for Member States to "withdraw such [diplomatic] missions from the Holy City…"[31] Furthermore, despite President Trump's assurance that specific boundaries remained to be negotiated, Israel's effective unilateral annexation of territories and establishment of settlements indicates an intent for permanent control. The U.S. decision to legitimize Israel's claim with the move of the U.S. Embassy was denounced by the European Union, Britain, and even the Pope, among countless others.[32] With the exception of a handful of countries, most refrained from following suit and moving embassies to Jerusalem. While Australia initially made the decision to move its embassy to Jerusalem in 2018, it recently pivoted back and again will defer to final status negotiations between Israel and Palestine.[33] Although the decision to move the U.S. Embassy bolstered Israel's hopes for regional dominance, it did not garner broad world support and damaged prospects for a future negotiated Palestinian state and peace between the sides.

IV. Fallout From the Embassy Decision

In the aftermath of the announcement to relocate the embassy to Jerusalem, the Final Communiqué of the 2017 Organization of Islamic Cooperation (OIC) Summit referred to it "…as an announcement of the US Administration's withdrawal from its role as sponsor of peace and its realization among all stakeholders and an encouragement of Israel, the occupying Power…" While there have been protests, clashes, and violence

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[27] United Nations Security Council Draft Resolution S/2017/1060, "Egypt: draft resolution," 2017, https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2017_1060.pdf; United Nations General Assembly Resolution ES-10/19, "Resolution adopted by the General Assembly on 21 December 2017," 2017, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/462/00/PDF/N1746200.pdf?OpenElement.
[28] Colum Lynch, "Document of the Week: Jared Kushner's Mideast Peace Email," *Foreign Policy*, April 19, 2019, https://foreignpolicy.com/2019/04/19/document-of-the-week-jared-kushners-mideast-peace-email/.
[29] Donald Trump, "Statement by Former President Trump on Jerusalem," transcript of speech delivered at the Diplomatic Reception Room, Washington, D.C., December 7, 2020, https://il.usembassy.gov/statement-by-president-trump-on-jerusalem/.
[30] Donald Trump, "Statement by Former President Trump on Jerusalem," transcript of speech delivered at the Diplomatic Reception Room, Washington, D.C., December 7, 2020, https://il.usembassy.gov/statement-by-president-trump-on-jerusalem/.
[31] United Nations Security Council Resolution 478, "Resolution 478 (1980)," 1980, https://digitallibrary.un.org/record/25618?ln=en#record-files-collapse-header.
[32] Jason Horowitz, "U.N., European Union and Pope Criticize Trump's Jerusalem Announcement," *The New York Times*, December 6, 2017, https://www.nytimes.com/2017/12/06/world/europe/trump-jerusalem-pope.html.
[33] "Reversal of recognition of West Jerusalem," *Minister of Foreign Affairs*, October 18, 2022, https://www.foreignminister.gov.au/minister/penny-wong/media-release/reversal-recognition-west-jerusalem.

within the Arab world, the reaction has yet to reach the heights of the 1987-1993 and 2000-2005 intifadas. That may be a function of recent confluences of distraction from ongoing wars in Syria and Yemen, Iran presenting an immediate threat, and economic issues and political unrest that continue to plague the region. However, reactions and impacts continue to unfold. In early 2023, the Arab League met for the "Summit on Jerusalem." Despite clear division on normalization with Israel, there was shared condemnation of Prime Minister Benjamin Netanyahu's far-right government and its intent to impose Jewish identity on all of Jerusalem and restrict Palestinian access. Perhaps the most concerning emergence is reflected in the Washington Institute for Near East Policy's Palestinian public opinion polls from 2014 to 2020 with several Palestinian polling organizations. They show a considerable shift since 2017 in Palestinian sentiment, away from a negotiated two-state solution toward "regaining all of historical Palestine from the river to the sea." Thus, the question may not be if further, more serious conflict will emerge, but when. Unfortunately, if the U.S. Embassy in Jerusalem continues as planned, it may prove an irrecoverable blow to U.S. legitimacy in negotiating a resolution to the Israeli-Palestinian conflict, leaving the peace process with no honest, impartial facilitator.

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International Politics

Debt-for-Climate Swaps: Examining Debt Conversion in the Seychelles and Belize

Anna-Liisa Eklund

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The ongoing climate crisis poses an immense threat to the security of nations worldwide, demanding creative, equitable, and practical policy interventions. Global warming has already increased sea levels, caused agricultural failure, and contributed to more destructive natural disasters. Scientists warn that the global climate's precarious state will only deteriorate without drastic action. An emerging benchmark affirms that if global warming exceeds 1.5 degrees Celsius by 2030, anthropogenic climate change will be irreversible.[1] As policymakers grapple with the consequences of climate change, many have begun to examine the mechanisms available to finance resilience interventions.

Nations of the Global South experience the most severe climate threats but have poor access to the necessary funding to boost resilience [Fig. 1]. Additionally, low-income nations have contributed the lowest percentages of overall global carbon emissions despite bearing extreme costs to food security, economic stability, and human wellbeing.[2] Climate change presents complex equity challenges, especially because the consequences of emitting are not evenly distributed. The threat of increased warming is existential and requires unique approaches to policy and, perhaps most importantly, resilient finance. Heavily indebted countries face many constraints in financing adaptation measures, which has contributed to the growing interest government, international development, and academia have in linking climate and debt issues. Sejal Patel and other scholars argue that "[climate] risks are a key factor that can not only further undermine the sovereign debt burden, but also make the cost of borrowing more onerous," noting the compounding obstacles of debt and adaptation.[3]

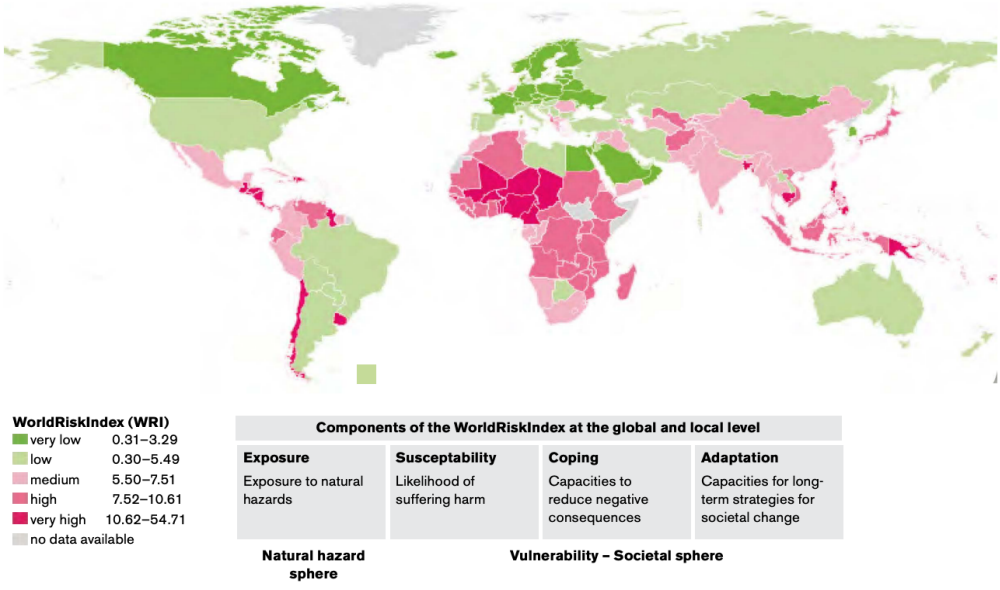

Figure 1) Worldwide Climate Risk Index, Steele and Patel (2019)

[1] Sejal Patel, et al, "After the Paris Agreement, the Debt Deluge: Why Lending for Climate Drives Debt Distress," International Institute for Environment and Development, 2022, 10.
[2] Paul Steele and Sejal Patel, *Tackling the Triple Crisis Using Debt Swaps to Address Debt, Climate and Nature Loss post-Covid-19*, International Institute for Environment and Development, 2020, 11.
[3] Patel, et al, "After the Paris Agreement, the Debt Deluge: Why Lending for Climate Drives Debt Distress," 10.

Enter debt conversion: a novel financing measure that policymakers have implemented in indebted countries with high climate risks. Initially titled "debt-for-nature swaps," these efforts aim to restructure sovereign debt to redirect funding to resilience and conservation. International development organizations tend to present debt swaps as a practical alternative to traditional loans; however, conservationists, economists, and academics continue to criticize linking climate finance and debt relief. Debt swaps do not always create additional fiscal space and may not always generate sufficient resources for new programming.[4] Additionally, debt-for-climate swaps may not be as effective in addressing severe debt problems—a challenge many underdeveloped, climate insecure nations face.[5] This paper will explore the benefits and drawbacks of debt-for-climate swaps through two case studies, Seychelles (2015) and Belize (2021), to examine the efficacy of debt conversion in promoting climate adaptation. Overall, despite the many pitfalls of adaptation-oriented debt conversions, these finance mechanisms are more likely to yield conservation benefits rather than deep debt relief. As such, debt-for-climate swaps are a precarious financing tool that requires careful engineering to achieve both conservation and debt relief aims.

First, debt-for-nature swaps are distinct financing measures which link debt relief, conservation, and climate objectives. Debt-for-nature swaps first emerged in the 1980s as a strategy to curb rapid biodiversity loss in heavily indebted, underdeveloped countries.[6] The concept was initially proposed in 1984 by Dr. Thomas Lovejoy, former vice-president of the World Wildlife Fund, who worried excessive debt would facilitate or even accelerate environmental degradation.[7] Countries that take on significant foreign currency-denominated debt will often seek to increase their export earnings to pay back the debt.[8] The increase of commercial agriculture and livestock production can contribute to deforestation and soil degradation, while catering to tourism can involve creating hotel infrastructure, which may also hinder conservation goals.[9] Dr. Lovejoy's proposal began to materialize between 1985 and 1996, where debt-for-equity swaps involved almost $40 billion of debt to increase global conservation.[10] Bosmans and de Mariz note, "[according] to the United Nations Development Programme (UNDP), the value of debt for climate and nature swap agreements exceeded US $2.6 billion from 1985 to 2015, with US $2 billion of this occurring prior to 2000."[11] Due to increased prices of debt in the secondary market alongside a shift towards large-scale debt relief programs like the Heavily Indebted Poor Countries (HIPC) initiative, debt swaps became less popular after 2000.[12] However, since the mid 2010s, international development organizations and debtor nations have demonstrated increased interest in debt conversion programs as debt-for-climate swaps, aimed at boosting climate resilience.[13]

Debt conversions involve many actors such as creditors, debtors, NGOs, and international institutions like the International Monetary Fund and World Bank. However, the number of parties involved varies since conservation-oriented debt conversions take three forms: bilateral debt swaps, three-party debt swaps, and multilateral debt swaps.[14] Bilateral debt swaps involve the debtor and creditor nations. However conservation organizations may provide assistance to develop the deal.[15] One such deal involved the United States and Indonesia (2009), which swapped almost US

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[4] Dennis Essers, Danny Cassimon, and Martin Prowse, *Debt-for-climate swaps: Killing two birds with one stone?* Global Environmental Change 71, 2021, 2.
[5] Essers, Cassimon, and Prowse, *Debt-for-climate swaps: Killing two birds with one stone?* 3.
[6] Jwala Rambarran, *Debt for Climate Swaps: Lessons for Caribbean SIDS from the Seychelles' Experience*. University of the West Indies, Social and Economic Studies 67: 2&3, 2018, 273.
[7] Dennis Essers, Danny Cassimon, and Martin Prowse, *The pitfalls and potential of debt-for-nature swaps: A US-Indonesia case study*, Institute of Development Policy and Management (IOB), University of Antwerp, 2010, 95.
[8] Brian Joseph MacFarland, "Conservation of Tropical Coral Reefs: A Review of Financial and Strategic Solutions." Palgrave MacMillan, 2021, 493.
[9] MacFarland, "Conservation of Tropical Coral Reefs: A Review of Financial and Strategic Solutions," 493.
[10] Essers, Cassimon, and Prowse, *Debt-for-climate swaps: Killing two birds with one stone?* 1.
[11] Steele and Patel, *Tackling the Triple Crisis Using Debt Swaps to Address Debt, Climate and Nature Loss post-Covid-19*, 18.
[12] Essers, Cassimon, and Prowse, *Debt-for-climate swaps: Killing two birds with one stone?* 1.
[13] Essers, Cassimon, and Prowse, *Debt-for-climate swaps: Killing two birds with one stone?* 1.
[14] Rambarran, *Debt for Climate Swaps: Lessons for Caribbean SIDS from the Seychelles' Experience*, 273.
[15] Essers, Cassimon, and Prowse, *The pitfalls and potential of debt-for-nature swaps: A US-Indonesia case study*, 94.

$30 million of Indonesian government debt owed to USAID.[16] The debt would be converted over the next 8 years to finance conservation of Sumatra's tropical forests.[17] Conversely, in a three party swap, an international conservation non-governmental organization (NGO) buys the debt on the secondary market at a discounted rate.[18] The NGO will likely purchase the debt with a combination of its own funding and financing from governments, development banks, and other private organizations. Then, the debt is sold back to the debtor country at a higher price than the NGO sale price, although less than the secondary market rate. The proceeds are then placed in a fund for conservation projects, often administered by the NGO, representatives from local environmental groups, and the debtor government.[19] Evidently, a careful chain of exchanges facilitates conservation debt swaps [Fig. 2; Fig. 3]. Lastly, a multilateral debt swap will generally involve the same participants as a three-party debt swap but may also engage additional governments and development banks to provide funding and insurance.[20]

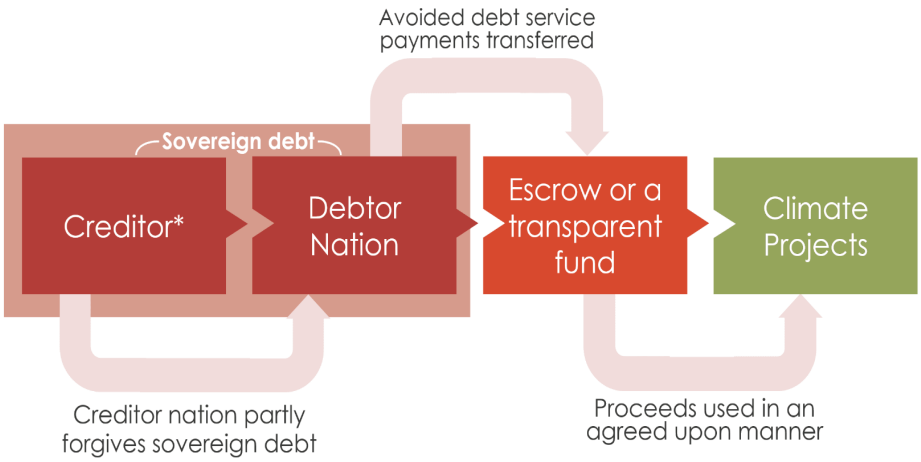

Figure 2) Debt-for-climate Swap Mechanics, Climate Policy Initiative

[16] Essers, Cassimon, and Prowse, *The pitfalls and potential of debt-for-nature swaps: A US-Indonesia case study*, 94.
[17] Essers, Cassimon, and Prowse, *The pitfalls and potential of debt-for-nature swaps: A US-Indonesia case study*, 94.
[18] Rambarran, *Debt for Climate Swaps: Lessons for Caribbean SIDS from the Seychelles' Experience*, 273.
[19] Rambarran, *Debt for Climate Swaps: Lessons for Caribbean SIDS from the Seychelles' Experience*, 273.
[20] Pieter Bosmans and Frederic de Mariz, *The Blue Bond Market: A Catalyst for Ocean and Water Financing*. Journal of Risk and Financial Management 16: 184, 2023, 8; Steele and Patel, *Tackling the Triple Crisis Using Debt Swaps to Address Debt, Climate and Nature Loss post-Covid-19*, 18.

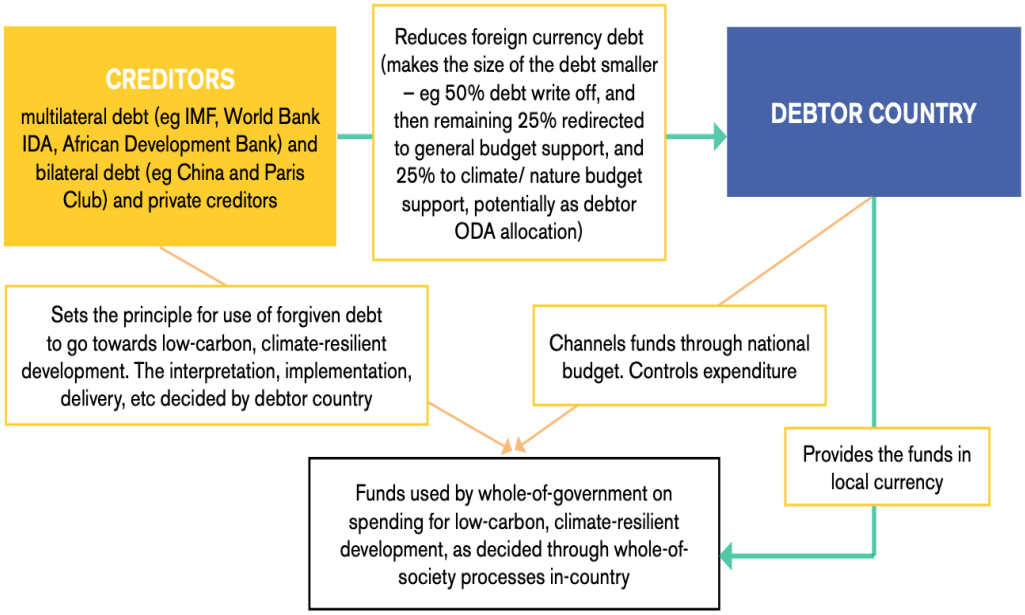

Figure 3) Model of Climate-oriented Debt Conversion, Steele and Patel (2019)

Although debt-for-nature swaps have decreased since 2000, both creditor and debtor countries, alongside conservation organizations, have displayed more interest in this financing mechanism. In 2018, the Seychelles finalized a debt-for-climate swap plan, which would direct US $27 million towards climate resilient infrastructure, sustainable fisheries, biodiversity conservation, and ecotourism.[21] The Seychelles swap is a landmark debt conversion program, which is also illustrative of the greater trend in international development "aligning debt sustainability with climate and nature action."[22] Moreover, some researchers claim the trend towards climate oriented debt swaps has only accelerated since the beginning of the COVID-19 pandemic, which has placed greater strain on developing countries' economies.[23] Climate change is imminent, and governments worldwide are seeking new ways to finance resilience objectives such as furthering the green energy transition and expanding conservation infrastructure. Conservationists applaud debt-for-climate swaps as opportunities to integrate green financing objections and debt management frameworks.[24] However, international economists Essers, Cassimon, and Prowse question if these swaps "kill two birds with one stone," since scholars debate whether debt conversion programs truly achieve their climate aims.

The 2015 Seychelles Climate Adaptation and Impact Investment Debt Swap is a monumental debt conversion program, especially since the swap was the first of its kind to protect the marine environment.[25] Seychelles is a small island developing state (SIDS) and is located off the coast of East Africa. Seychelles' 115 islands provide the country with an Exclusive Economic Zone (EEZ) of 1.4 million square kilometers.[26] Since the island nation's ocean space is almost 3,000 times larger than its land area, Seychelles has a "blue economy."[27] Fishing comprises approximately 30% of the nation's GDP while tourism accounts for nearly 60%, two industries heavily reliant on oceanic resources.[28] Starting in 2012, the Seychelles government approached The Nature Conservancy (TNC) to begin

[21] Steele and Patel, *Tackling the Triple Crisis Using Debt Swaps to Address Debt, Climate and Nature Loss post-Covid-19*, 4.
[22] Patel, et al, "After the Paris Agreement, the Debt Deluge: Why Lending for Climate Drives Debt Distress," 34.
[23] Steele and Patel, *Tackling the Triple Crisis Using Debt Swaps to Address Debt, Climate and Nature Loss post-Covid-19*, 8.
[24] Patel, et al, "After the Paris Agreement, the Debt Deluge: Why Lending for Climate Drives Debt Distress," 34.
[25] MacFarland, "Conservation of Tropical Coral Reefs: A Review of Financial and Strategic Solutions," 498.
[26] MacFarland, "Conservation of Tropical Coral Reefs: A Review of Financial and Strategic Solutions," 497.
[27] Rambarran, *Debt for Climate Swaps: Lessons for Caribbean SIDS from the Seychelles' Experience*, 277.
[28] MacFarland, "Conservation of Tropical Coral Reefs: A Review of Financial and Strategic Solutions," 497.

financing and developing a Marine Spatial Plan (MSP) to boost sustainable management of its ocean ecosystems.[29] Seychelles then began negotiating in 2015 with Paris Club creditors which hold 15% of Seychelles' external debt.[30] The third party, TNC, then purchased $26.6 million of Seychelles debt at a 5.4% discount.[31] Next, TNC transferred ownership of the Seychellois debt to the Seychelles Conservation and Climate Adaptation Trust (SeyCCAT), an independent, nationally based, public-private trust.[32] Thus, rather than direct certain debt service payments back to Paris Club creditors, the Seychelles repays SeyCCAT, which allows the organization to further ocean conservation.[33] Aside from funding SeyCCAT's endowment, Seychelles' debt service payments also repay impact investors and fund marine and coastal conservation projects, including nature-based adaptation and risk reduction.[34] Seychelles' debt repayment period was also extended from 8 years in the original agreement, to 20 years, reducing annual payments by $2 million.[35]

The Seychelles swap presents crucial implications for the efficacy of future climate-oriented debt conversions. Notably, the variety of involved actors has both drawbacks and benefits. To reiterate, the Seychelles swap involved three main parties: the Seychelles' government, Paris Club creditors, and The Nature Conservancy. In her study of 36 debt swaps from 1987 to 2010, Rambarran finds that three-party swaps resulted in significantly less conservation funding than bilateral swaps—amounting to $140 million.[36] However, Rambarran also notes that three-party swaps have been viewed as more successful since third parties, like TNC, help establish oversight frameworks to monitor conservation progress.[37] Conversely, the bilateral US-Indonesia swap essentially disseminated the conservation funding through grants proposals, involving a wider variety of actors which appears to undermine effective monitoring frameworks.[38] Compared to the Indonesia deal, involving TNC seems to streamline the management and oversight of the redirected funding mobilized by the debt swap. First, SeyCCAT publishes yearly audits of its governing documents, internal archives, and meeting records, which strengthens transparency and stakeholder engagement.[39] Additionally, TNC has maintained an "on-the-ground" role to help facilitate SeyCCAT's conservation action, especially as it pertains to developing the MSP. Since 2014, TNC and the MSP steering committee have led over 265 meetings, ranging from one-on-one discussions to larger, multi stakeholder assemblies.[40] TNC's assistance has evidently yielded greater monitoring and oversight compared to a standard bilateral swap, strengthening the case for third-party, NGO involvement.

Aside from the benefits and drawbacks of multilateral swaps, critics also warn against linking ocean-based industries and debt-for-climate swaps. Unlike the Indonesia plan, the Seychelles debt conversion deal encompasses both conservation and economic development.[41] SeyCCAT not only aims to protect the Seychellois seas, but also directs its funding towards sustainable fisheries and ecotourism.[42] Baird and Plummer argue the Seychelles swap is "predicated on an economic development approach that opens up small island and coastal developing state economies[, which] may render them *more*

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[29] Mara Booth and Cassandra M. Brooks, "Financing Marine Conservation From Restructured Debt: A Case Study of the Seychelles," *Frontiers in Marine Science* 10 (2023), 3.
[30] Rambarran, *Debt for Climate Swaps: Lessons for Caribbean SIDS from the Seychelles' Experience*, 277.
[31] MacFarland, "Conservation of Tropical Coral Reefs: A Review of Financial and Strategic Solutions," 499.
[32] Rambarran, *Debt for Climate Swaps: Lessons for Caribbean SIDS from the Seychelles' Experience*, 279.
[33] Julia Baird and Ryan Plummer, *Water Resilience: Management and Governance in Times of Change*, Springer, 2020, 250.
[34] MacFarland, "Conservation of Tropical Coral Reefs: A Review of Financial and Strategic Solutions," 499.
[35] MacFarland, "Conservation of Tropical Coral Reefs: A Review of Financial and Strategic Solutions," 499.
[36] Rambarran, *Debt for Climate Swaps: Lessons for Caribbean SIDS from the Seychelles' Experience*, 273-274.
[37] Rambarran, *Debt for Climate Swaps: Lessons for Caribbean SIDS from the Seychelles' Experience*, 286.
[38] Essers, Cassimon, and Prowse, *The pitfalls and potential of debt-for-nature swaps: A US-Indonesia case study*, 98-99.
[39] Booth and Brooks, "Financing Marine Conservation From Restructured Debt: A Case Study of the Seychelles," 8.
[40] Baird and Plummer, *Water Resilience: Management and Governance in Times of Change*, 251; Booth and Brooks, "Financing Marine Conservation From Restructured Debt: A Case Study of the Seychelles," 7-8.
[41] Essers, Cassimon, and Prowse, *The pitfalls and potential of debt-for-nature swaps: A US-Indonesia case study*, 94.
[42] Steele and Patel, *Tackling the Triple Crisis Using Debt Swaps to Address Debt, Climate and Nature Loss post-Covid-19*, 4.

vulnerable to international market fluctuations."[43] They criticize the commercialization of oceanic resources as a method of "sustainable development," however a solely conservation-oriented swap seems unfeasible given that Seychelles' economy is already deeply integrated with its oceans. The Seychelles MSP Initiative outlines that the plan serves to "provide guidance for decision makers and of ocean space using a public, participatory approach to plan for the ocean and address multiple objectives: ecological, economic and social."[44] Although some scholars may caution against such an economic development strategy, the linking of conservation and sustainable enterprises is necessary in Seychelles precisely because of the country's blue economy. More broadly, the ongoing debate regarding the integration of conservation and economic development emphasizes the importance of pragmatic action. The MSP serves as a robust ocean resource management system which can oversee all human activity in Seychelles' oceans, which inevitably links environmental protection and a more resilient blue economy.

The Seychelles debt conversion program illustrates key benefits and criticisms of such swaps, while also providing crucial insight into the development of debt-for-climate swaps since the US-Indonesia deal from 2009. The MSP, financed by the Seychelles deal, has helped to protect a marine area larger than the land territory of Germany, representing a major achievement in global ocean conservation and climate-resilient, local economic development.[45] The more recent Belize debt restructuring (2021), has partially replicated the Seychelles deal, aiming to conserve oceans and boost marine based industries.[46] Although both marine conservation plans involved TNC, the Belize deal is a significantly larger financial project than the Seychelles transaction—emphasizing the growing trend in international development to reinvigorate debt conversion tools.[47]

The Belize deal represents a monumental scaling up of the Seychelles model, which brings its own crucial strengths and weaknesses. As Belize's debt level neared 130% of its GDP in 2020, its government approached TNC to help coordinate a debt restructuring plan to conserve its oceans and coastal regions.[48] The Belize deal allowed the country to restructure nearly US $550 million of external commercial debt.[49] A TNC subsidiary offered Belize a loan worth US $364 million, which the organization raised through the sale of "blue bonds" arranged and underwritten by Credit Suisse.[50] The loan enabled Belize to buy back its debt at a 45% discount which will be paid off over the next 20 years.[51] The deal also benefited from the participation of the US development bank, International Development Finance Corporation (DFC), which provided risk insurance to improve Belize's terms.[52] The US $550 million formed 30% of the country's GDP, and the TNC loan helped reduce Belize's national debt by 12%.[53] The TNC-Belize agreement also ensures the Belizean government will spend $4 million each year to protect marine ecosystems until 2041.[54] Overtime, the full deal will mobilize the US $180 million into the conservation of Belize's ocean ecosystems, helping the country reach its goal of protecting 30% of its ocean territory.[55] The Belize debt restructuring plan will also help the country complete a Marine Spatial Plan (MSP), allowing policymakers to measure the efficacy of water management.[56]

The Belize plan has similar economic development components to Seychelles, but presents distinct challenges given the much larger financial transaction. Like the

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[43] Baird and Plummer, *Water Resilience: Management and Governance in Times of Change*, 251.
[44] Seychelles Marine Spatial Plan Initiative. "Seychelles Marine Spatial Plan Initiative."
[45] Rambarran, *Debt for Climate Swaps: Lessons for Caribbean SIDS from the Seychelles' Experience*, 262.
[46] Bosmans and de Mariz, *The Blue Bond Market: A Catalyst for Ocean and Water Financing*, 33.
[47] The Nature Conservancy, "How Belize Is Transforming the Caribbean."
[48] White, Natasha."Wall Street's New ESG Money-Maker Promises Nature Conservation — With a Catch,"; The Nature Conservancy. "How Belize Is Transforming the Caribbean," 2021.
[49] The Nature Conservancy. "How Belize Is Transforming the Caribbean." 2021.
[50] Owen, Nicholas. "Belize: Swapping Debt for Nature." International Monetary Fund, 2022.
[51] Vales-Robles, Stephen. *2022 Grunin Prize Winner: The Nature Conservancy's Blue Bonds for Ocean Conservation Program*, 4:17.
[52] Bosmans, Pieter and Frederic de Mariz. *The Blue Bond Market: A Catalyst for Ocean and Water Financing*, 33.
[53] The Nature Conservancy, "How Belize Is Transforming the Caribbean."
[54] Owen, Nicholas. "Belize: Swapping Debt for Nature." International Monetary Fund, 2022.
[55] The Nature Conservancy, "How Belize Is Transforming the Caribbean," 2021.
[56] Bosmans and de Mariz, *The Blue Bond Market: A Catalyst for Ocean and Water Financing*, 33.

Seychelles-Paris Club-TNC deal, the Belize plan also specifically finances its oceanic industries like fishing and ecotourism. As critics of debt-for-nature swaps continue to voice, economic development may undermine the dual objectives of conservation and debt relief. Like Seychelles, Belize's economy relies heavily on tourism, a sector which accounts for 41% of the national income.[57] Approximately 25% of Belize's tourism is reef based, especially since the country is home to the largest barrier reef in the Western Hemisphere.[58] It is also important to reiterate the different sizes of the two debt conversions, since the Belize deal is at a financial scale 15 times larger than Seychelles.[59] Given the significant increase in scale, compared to the initial model, Credit Suisse and DFC's participation was crucial for the deal to materialize. DFC's insurance ensured the blue bonds received a strong investment grade rating, allowing TNC to raise sufficient funding to restructure Belize's debt.[60] Evidently, high profile financial institutions enabled TNC to scale up the Seychelles model to restructure a higher percentage of sovereign debt in the Belize deal.

Although more actors can increase the scale of debt swaps and boost their perceived legitimacy, multilateral deals present a variety of drawbacks. As Rambarran notes, the greater number of actors involved in debt conversions generally increases total transaction costs, thus reducing financing for conservation.[61] However, multilateral deals may also not be any more effective at alleviating the debt burden of countries seeking to restructure their debt. Daniel Munevar, of the United Nations Conference on Trade and Development (UNCTAD), claims the Belize deal will actually be a hindrance to the country's debt challenges.[62] Munevar specifically criticizes Belize's Blue Bond Proposal (BBBP), expressing skepticism that Belize will be able to meet the bond service payments by 2034.[63] Compared to studies on Belize's 2023-2031 fiscal outlook from Oxford Economics (OE) and the IMF, the BBBP is predicated on overly-optimistic fiscal projections. The BBBP estimates a primary surplus of 3 percent, compared to 0.5 percent GDP (OE) and 1.2 percent GDP (IMF) [Fig. 4].[64] If Belize does not meet the fiscal projections assumed by the BBBP, the government may need to adjust its fiscal planning through raising revenues or lower expenditures. In Munevar's estimation, the Belize deal provides too little relief for the country to reach debt sustainability, even if the deal achieves its conservation goals.

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[57] The Nature Conservancy, "How Belize Is Transforming the Caribbean."
[58] The Nature Conservancy, "How Belize Is Transforming the Caribbean;" Stephen Valdes-Robles, *2022 Grunin Prize Winner: The Nature Conservancy's Blue Bonds for Ocean Conservation Program*, 2:10.
[59] The Nature Conservancy, "How Belize Is Transforming the Caribbean."
[60] Owen, "Belize: Swapping Debt for Nature."
[61] Rambarran, *Debt for Climate Swaps: Lessons for Caribbean SIDS from the Seychelles' Experience*, 263.
[62] Daniel Munevar, "Making Sense of Belize's Blue Bond Proposal." European Network on Debt and Development (Eurodad), 2021.
[63] Daniel Munevar, "Making Sense of Belize's Blue Bond Proposal;" "Blue bonds are debt instruments that finance the protection of critical clean water resources, as well as marine and ocean-based projects with positive environmental and social benefits," Bosmans and de Mariz, 1.
[64] Daniel Munevar, "Making Sense of Belize's Blue Bond Proposal."

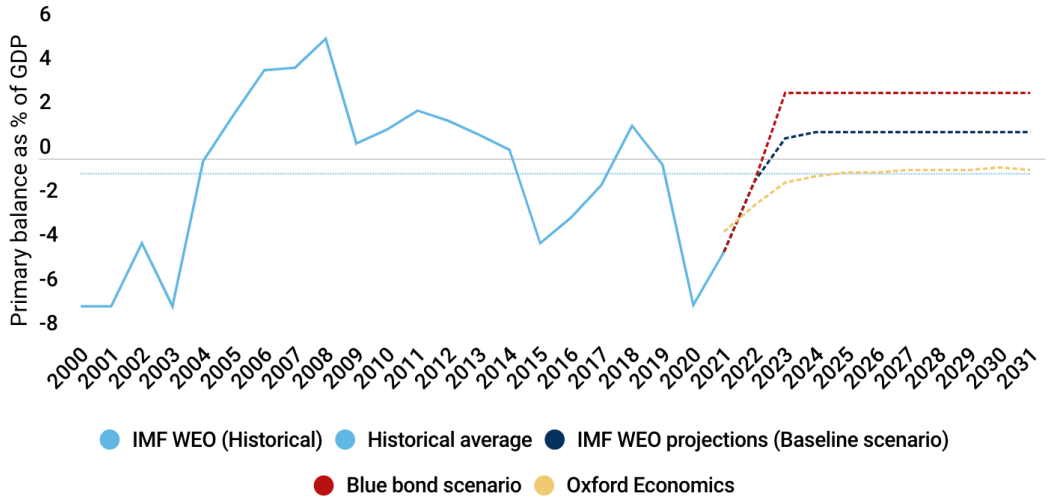

Figure 4) Fiscal Projections for Belize's Economy, Primary Balance as % of GDP

Despite their great potential for furthering conservation aims, debt-for-climate swaps are fraught with contradictions, pitfalls, and inefficiencies. Policymakers must navigate the immense challenge of funding climate adaptation with minimal financial resources. As such, key actors are becoming increasingly interested in debt conversion as a novel financing tool, which may be an alternative to traditional loans. Creditors, debtors, NGOs, and international financial institutions must be creative to help low-income nations, with high climate risks, become more resilient in the face of this existential crisis. However, debt conversions are far from the perfect solution. As scholars have outlined, these tools are not capable of yielding sufficient debt relief in grave situations. Current scholarship underscores that debt-for-climate swaps are ineffective at providing "deep, comprehensive debt restructuring," and should not be presented as a solution to severe sovereign indebtedness.[65] Although the TNC deals offered both Seychelles and Belize partial debt relief, scholars worry the restructuring plans may demand increased costs overtime, which possibly outweighs the minimal relief.

Despite these deals' murky track record at yielding debt relief benefits, they do appear to further their conservation goals to a certain extent. Both the Seychelles and Belize plans are making headway in achieving their conservation aims by creating Marine Spatial Plans, designating coral reefs as protected zones, and boosting monitoring mechanisms. However, there are certainly benefits and drawbacks to involving The Nature Conservancy as the architect of these plans. Compared to the bilateral Indonesia deal, the Seychelles deal has greater oversight and administrative design because of TNC's involvement. However, some environmental advocates criticize the dominant role played by TNC, a private actor possibly undermining the autonomy of recipient countries. Scholars like Steele and Patel propose debt conversion programs shift towards financing budget support to debtor countries, which would allow them greater control over adaptation efforts; however, this alternative has yet to materialize with an environmental focus.[66] Budget support would center around policy innovation as opposed to conservation projects, as debt-for-climate swaps have focused on in the past, and may also create greater "fiscal space" in indebted nations.[67] Evidently, conservation and sustainable economic development are TNC's primary focus, so shifting the focus of these debt swaps to budget support would possibly reduce the need for third-party involvement of an environmental NGO.

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[65] Essers, Cassimon and Prowse, *Debt-for-climate swaps: Killing two birds with one stone?* 3.
[66] Steele and Patel, *Tackling the Triple Crisis Using Debt Swaps to Address Debt, Climate and Nature Loss post-Covid-19*, 4.
[67] Steele and Patel, *Tackling the Triple Crisis Using Debt Swaps to Address Debt, Climate and Nature Loss post-Covid-19*, 19.

Lastly, aside from the drawbacks of the tool of debt conversion itself, debt-for-climate swaps reignite the debate over the monetary valuation of natural resources. Some conservation organizations promote such valuation, noting that quantifying "ecosystem services," can help policymakers assess the cost and value of their interventions.[68] Despite the practicality of natural resource valuation, certain climate advocates caution large financial institutions against co-opting this tool. Multinational banks are capitalizing off environment, social, governance (ESG) funding, which can be linked to debt conversions. Oliver Withers, head of biodiversity at Credit Suisse, noted debt swaps are attractive since they are "[products] that are 'scalable and that can be replicated," and noted that duality is, "the really exciting thing with debt swaps [since] it ticks both of those boxes."[69] Many conservationists worry the increasing participation of banks like Credit Suisse will hurt conservation more than they will help. The economic development components of the Seychelles and Belize debt conversion plans reaffirm the same dilemma over infusing conservation with profit seeking. Scholars like Baird and Plummer claim linking economic development with conservation undermines the long-term efficacy of environmental protections. However, blue economy countries like Seychelles and Belize must integrate conservation and sustainable enterprise to ensure their marine industries are resilient in the face of climate change. Evidently, debt swaps exemplify complex sustainable development questions—all while acting as terrifying reminders of the alternative to zero climate action. Despite their critiques, debt conversion is one of the best tools available to finance climate resilience, and policymakers are running out of time. As TNC moves forward with replicas of the Seychelles deal, conservationists, debtors, academics, and other critics must continue to voice their concerns for this tool to become more effective. Policymakers must work between practicality and idealism to navigate global indebtedness and the climate crisis to forge a more resilient future.

[68] According to The Economics of Ecosystems and Biodiversity (TEEB), Ecosystem services refer to the "provisioning services, regulating services, habitat or supporting services, and cultural services," delivered by natural resources. For example, rainforests provide services such as heat regulation, water cycle facilitation, and carbon sequestration.

[69] White, Natasha. "Wall Street's New ESG Money-Maker Promises Nature Conservation — With a Catch."

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International Politics

The Conditions of Effectiveness: Lessons from UN Decisions in Syria

Dina Kobeissi

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Introduction

In March of 2011, Syria broke out into war, fueling one of the world's largest humanitarian crises. It is currently estimated that 6.9 million Syrians are internally displaced, 5.6 million Syrian refugees are registered globally, and 14.6 million Syrians are in need of humanitarian assistance. Many of these statistics come from United Nations (UN) agencies such as the UN Refugee Agency (UNHCR) and the UN Office for the Coordination of Humanitarian Affairs. Over the decades, the UN has helped to end numerous conflicts, often through actions of the Security Council (UNSC)—the organ with primary responsibility, under the United Nations Charter, for the maintenance of international peace and security. However, the effectiveness of the UN in Syria has been questioned. Studying the impact of the UN in Syria and the various factors that promoted or inhibited success can contribute to the larger discussion on the effectiveness of the UN, potentially influencing future UN decision-making. I argue UN decisions in Syria are more effective when they involve agreement within the Security Council and support from the host government. Similarly, decisions involving a lack of support from the host government and disagreement within the Security Council are less effective. To test these hypotheses, this paper employs mostly qualitative analysis, investigating the effectiveness of three UN Security Council decisions regarding Syria. My findings support the idea that the UNSC's decisions were more effective in Syria when there existed considerable agreement between permanent members of the Security Council and compliance from the host government.

I. Literature Review

I argue that Security Council unanimity and host country support increase effectiveness of UN decisions and vice versa. Although this theory does not directly oppose current literature, I augment existing arguments and observations about the impacts of negotiation and local government support on the ground to provide a more comprehensive and accurate account of drivers of effectiveness in improving the situation in Syria.

Hypothesis 1: Decisions by the UN Security Council that have seen negotiation and agreement between major actors, primarily the United States and Russia, are more effective.

The United States and Russia have been heavily involved, both directly and indirectly, in the war in Syria. The US has provided various Syrian rebel groups with training, money, and intelligence while Russia has heavily backed the Syrian regime.[1] Each hopes to limit the other's influence in the region. Although there are upwards of 20 actors involved in the conflict in Syria, only the United States and Russia are powerfully positioned in the UN, holding two of five permanent member positions on the UN Security Council.[2] The Security Council can pass legally binding decisions for all states, determine when and where a UN peace operation should be deployed, and authorize the use of armed force. However, permanent members can veto any peace resolution. Thus, UN action in the region, or lack thereof, is heavily dependent on unanimity. In "The UN Security Council: Decisions and Actions," Peter Wallensteen and Patrik Johansson explain that the remarkable post-Cold War resurgence of the UN Security Council was a result of the "high degree of cooperation among the permanent members, resulting in

[1] Fiol-Mahon, Alexandra. 2018. "How Russia and the U.S. Factor into Syria: A Briefing Report." *Foreign Policy Research Institute*. June 13.
[2] "Syria Actors, Country of Origin Information Report." *European Asylum Support Office*. December 2019.

constructive engagement in a series of armed conflicts."[3] With regard to Syria, however, negotiations and agreements between major powers, mainly Russia and the US, have not seen much agreement despite their vitality for the deployment of effective UN action.

Since the start of the conflict in Syria in 2011, Russia has vetoed 17 Security Council resolutions on Syria ranging from imposing sanctions on the Assad regime to referring the situation in Syria to the International Criminal Court (ICC).[4] Richard Gowan, an expert on peacekeeping, underscores the significant geostrategic challenge impacting the future of UN peace operations, emphasizing the prolonged tensions among the Permanent Five (P5) in the Security Council. Gowan observes, "the most obvious geostrategic challenge to the future of UN peace operations is the high level of tension among the P5 in the Security Council. We have seen a decade of friction between Russia and the U.S."[5] The continuation of this tension and lack of agreement impacts the UN's decision making and in turn its ability to conduct any potentially beneficial action in Syria. Peter Nadin, a seasoned Security Council observer, echoes this sentiment and contends that the Council's effectiveness is hindered whenever there is a lack of unity among its members, stressing that "whenever the Security Council membership is not unified, the Council cannot be effective. There are no exceptions…On Syria, the Council has been deadlocked."[6]

If a lack of unification has led the Security Council to be ineffective in Syria, the solution lies in resolutions that see agreement between the permanent members. In his review of the council's internal dynamics, Edward Luck explains, "those attributes that encourage cooperation among the permanent members need to be strengthened, not weakened, through the reform process."[7] Reaching agreement often comes with significant compromise, collaboration and understanding. Richard Gowan supports this idea, explaining that "peacekeeping mandates…are often the result of significant compromise and improvisation that results from competing interests of Council members, regional players, troop-contributing countries, and host nations, as well as unforeseen developments in volatile crises."[8] Hence, comprehending the challenge of effectiveness faced by the P5 in reaching a consensus in Syria is rooted in understanding the difficulty of achieving collaboration and compromise in decision-making. The ability to foster a peacekeeping mission alone is not necessarily enough of an indication of "significant compromise" as Gowan describes it. The Security Council's competing interests in Syria, and the greater international relations landscape in which it is posited, deems decisions of compromise as especially susceptible to failure. Jeremy Greenstock, who served as the UK's ambassador on the Security Council in the early 2000s explains that the "Council's crisis management function has been complicated by the growing difficulty in reaching multilateral consensus in a world with an ever greater number of states…[and] proliferation and fragmentation of multilateral decision making processes"[9] Indeed, there are many actors involved in Syria, or who have interests with the government or in the region at large. For example, although less involved in the ground and with fewer vetoes used in resolutions related to Syria, China has also been a major obstacle in the Security Council, vetoing more than eight draft resolutions. However, China's position on vetoing resolutions is in line with Russia's, and thus, an agreement that Russia finds suitable would almost certainly be no problem for China, further complicating the volatility of agreements reached with the United States. Ultimately, the situation in Syria is complicated by world politics in which allyship and greater political

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[3] Wallensteen, Peter and Patrik Johansson. 2016. "The UN Security Council: Decisions and Actions." In *The UN Security Council in the 21st Century*, edited by Sebastian von Einsiedel, David Malone, and Bruno Stagno Ugarte, 27-56. Boulder: Lynne Rienner.
[4] "Russia's 12 UN vetoes on Syria." RTE. April 2018.
[5] Gowan, Richard. 2020. "UN Peacekeeping in a Fragmenting International Order." *International Crisis Group*. November 25.
[6] Nadin, Peter. 2016. "How the UN Security Council failed Syria." *The Interpreter*, August 30.
[7] Luck, Edward. 2016. "The Security Council at Seventy: Ever Changing or Never Changing?" In *The UN Security Council in the 21st Century*, edited by Sebastian von Einsiedel, David Malone, and Bruno Stagno Ugarte, 195-214. Boulder: Lynne Rienner.
[8] von Einsiedel, Sebastian, David Malone, and Bruno Stagno Ugarte. 2016. "Introduction." In *The UN Security Council in the 21st Century*, edited by Sebastian von Einsiedel, David Malone, and Bruno Stagno Ugarte, 1-14. Boulder: Lynne Rienner.
[9] Ibid.

aims, much of the time in place of morals or values, influence a country's stance on issues.

Hypothesis 2: The UN Security Council's missions in Syria are more effective when UN presence is coupled with cooperation from the host government.

Unlike many of its surrounding neighbors, the government in Syria remained in power following the Arab Spring. Thus, the United Nations has had to navigate its relationship with the regime which has retained its hold on parts of Syria and only regained control of more and more of the country's territory since the peak of the war. While the Syrian government has been cooperative with some UN decisions, it has resisted others. I argue this resistance has negatively impacted UN effectiveness.

A report by the Effectiveness of Peace Operations Network (EPON), explains that "the attitude of the host state is key to the way the UN mission will be able to implement its mandate."[10] If the host country is willing to cooperate, the effectiveness of the UN will significantly improve. However, as Alexandra Novosseloff identifies in "The Effectiveness of the UN Mission in the Democratic Republic of the Congo," a "diminishing degree of host state cooperation" can be harmful, posing a "strategic constraint that can challenge the robustness of UN peacekeeping missions."[11] Although Novosseloff focuses on the effectiveness of UN peacekeeping missions, the benefits of host cooperation extend to different types of UN decisions, especially those involving work on the ground. A host country is most aware of its own region and thus best able to navigate its own territory, providing a higher chance of mission success.

Especially in conflict where there exists various dangers and armed groups on the ground, the host country can identify safety concerns that pose a threat to UN effectiveness. In Syria, the emergence and growth of ISIS and other terrorist groups meant many roads and areas were unsafe, posing a risk of kidnapping or death to travelers. The UNSMS Security Policy Manual delineates the importance of engaging in security partnerships with host governments as an essential component of the United Nations' comprehensive approach to safeguarding United Nations personnel, property, and operations.[12]

Host consent impacts the safety of personnel and in turn their ability to operate, improves security collaborations, and provides helpful information regarding "situational awareness, analysis of threats and vulnerabilities regarding UN personnel, premises and operations, and strategies for communication with the local population and other target audiences to promote understanding of the United Nations mandates and activities."[13] On the other hand, a lack of host consent can cause "restrictions of movement, delays in visa procurement, communication fall outs, delays and/or restrictions on the import and transportation of critical supplies, obstruction of human rights investigations, and in the worst of cases, attacks on peacekeepers."[14] Ultimately, host country support can amplify UN missions and resolutions, boosting effectiveness, but a lack of host country consent can lead UN decisions to experience significant setbacks and prompt ineffectiveness.

II. Methods

I explore whether different UN Security Council decisions have been effective in Syria using primarily qualitative analysis. I investigate three of the most widely publicized UN decisions regarding Syria because they each center on a different kind of Security Council action: peacekeeping, chemical weapons disarmament, and humanitarian aid. For each decision, I analyze the context leading up to the resolution, the goal of the decision, and the result of its attempted implementation to ultimately determine its level of effectiveness. Given "effectiveness" looks different in each of the three UN decisions,

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[10] Novosseloff, Alexandra. 2019. "The Effectiveness of the UN Mission in the Democratic Republic of the Congo." *Global Observatory*, December 19.
[11] Ibid.
[12] "UNSMS Security Policy Manual–Relations with Host Countries on Security Issues. Policy on Security Risk Management. Chapter II. United Nations Security Management System (UNSMS)." *United Nations Security Management System (UNSMS)*. April 2012.
[13] Ibid.
[14] Gregory, Julie. 2022. "Host-Country Consent in UN Peacekeeping: Bridging the Gap between Principle and Practice." *Stimson Center*. September 8.

each decision's effectiveness is measured slightly differently. For Decision #1, the peacekeeping mission, I will look at the fulfillment of goals of the mission in addition to violence levels before and after the mission. For Decision #2, the OPCW-UN Joint Mission, I will look at the fulfillment of goals of the mission in addition to reports of chemical weapons use in Syria overall before and after the mission. Lastly, for Decision #3, humanitarian aid, I will look at reports detailing different measures of civilian plight and life conditions before and after UN measures in addition to any changes in aid deliveries with regard to size and location.

To test my hypotheses about conditions that foster effectiveness, I determine whether there was agreement within the Security Council regarding each decision in addition to whether the host country allowed for and supported the decision. For decisions I assess to be ineffective, I expect to find disagreement between Russia and the US and a lack of support from the Syrian government. For decisions I assess to be effective, I expect to find more agreement between Russia and the US and more support from the Syrian government.

UN Decision #1: Resolution 2043 (Peacekeeping Mission)

Background and Determining Effectiveness

Resolution 2043 was passed by the UN Security Council in April 2012. It established a United Nations Supervision Mission in Syria (UNSMIS) for an initial period of 90 days. The mission centered on fulfilling a mandate with two primary goals. The first goal was to monitor a cessation of armed violence in all its forms by all parties. The second goal was to monitor and support the full implementation of the Envoy's six-point peace plan which ultimately sought to bring about cessation of armed violence and arbitrary imprisonment while addressing the legitimate aspirations and concerns of the Syrian people. While the UNSMIS managed to establish around 300 observers on the ground and to deploy teams to eight centers beyond Damascus to report what was happening, fighting began to escalate again in May and violence continued. Since the mandate was only set for 90 days, the Security Council was unsure whether to renew it. Russia proposed a resolution extending UNSMIS for another 90 days without any changes, while the UK, backed by other Western states, countered with a resolution containing a 45-day mandate extension and a threat of sanctions against Syria if the government did not "visibly and verifiably" fulfill its commitments under the Annan plan in ten days. The Council compromised, passing Resolution 2059 in July of 2012, extending the peacekeeping mission for 30 days, agreeing to only renew it if "the Secretary-General reports and the Security Council confirms the cessation of the use of heavy weapons and a reduction in the level of violence by all sides sufficient to allow UNSMIS to implement its mandate."[15] However, with no further improvements made, the mission officially ended in August, about four months after it started. Described as a "small, short-lived and unsuccessful attempt," the UNSMIS was clearly unable to help end the Syrian war, but it also failed to fulfill its own goals. Thus, I conclude this decision by the UN Security council was ineffective.[16]

Analysis of Host Government Involvement

A ceasefire was a key part of the plan, which was accepted by Syrian President Bashar al-Assad on March 27.[17] However, despite the regime's acceptance of the plan and mission, cooperativeness on the ground proved to be unstable. UNSMIS press releases and statements help understand fluctuations in cooperativeness with the mission. Before the mission deployed, "the Council called on the Syrian government to ensure the effective operation of UNSMIS" through various facilitations including the "deployment of its personnel and capabilities…(and) ensuring its full, unimpeded, and immediate freedom of movement."[18] In May of 2012, a report from the Head of UNSMIS, Major

[15] "UNSMIS Mandate." *United Nations*. April 2012.
[16] Gowan, Richard, and Tristan Dreisbach. 2015. "United Nations Supervision Mission in Syria (UNSMIS)." In *The Oxford Handbook of United Nations Peacekeeping Operations*.
[17] "Text of Annan's six-point peace plan for Syria." *Reuters*. April 2012.
[18] "UNSMIS Mandate." *United Nations*. April 2012.

General Robert Mood, directly acknowledged the "advance level of cooperation from the Syrian Government" while another included accounts of the Syrian army providing escort for "the UNSMIS delegation…on its way from Damascus for a visit to Dar'a."[19] In the beginning, it seemed host cooperation was high. However, later reports reveal a decline in host country support. For example, a report on June 8, 2012 details how UN observers were at first prevented from entering the village of Mazraat al-Qubeir because their mission was obstructed by "observers being stopped at Syrian Army checkpoints and in some cases turned back."[20] The UNSMIS expressed concern for such restrictions on its movement which "impede [its] ability to monitor, observe and report." In this case, it was delayed in its ability to "verify reports of large-scale killings in the village."[21] Furthermore, Syria and UN officials were "unable to agree on a Status of Mission Agreement and clashed over administrative issues such as visas for UN personnel."[22] Ultimately, the initial hope for robust cooperation from the Syrian regime towards the UN Supervision Mission in Syria gradually waned, with disagreement between the UN and Syrian government leading to a significant hindering of the mission's capacity to effectively carry out its mandate.

Analysis of Security Council Dynamics

In "United Nations Supervision Mission in Syria," Richard Gowan and Tristan Dreisbach shed light on the disputes surrounding the mission's drafting within the Security Council. Although they ultimately did agree on a mandate, they had different perspectives on what the focus should be and what would be most effective. While the "Western members of the Security Council held a broader conception of the mandate, hoping to include a strong civilian component in the mission…Russia largely [confined] the mission to tracking military matters."[23] The contrasting geopolitical interests of the US and Russia, along with their differing visions for the mission's scope, underscore the divergent objectives pursued within the Security Council. Though the countries eventually came to a compromise, which reflected the "desire of all sides in the Security Council to get UNSMIS on the ground fast [and] gave UN officials some flexibility," the disagreement within the "big powers' competing visions of the operation's ultimate purpose" remained.[24]

Even prior to disagreements over the mission, there were already complications given previous disagreements in the Security Council surrounding the Libyan war and Russia's support for Assad's government. Thus, perspectives on intervention in Syria altogether were heavily disputed; while "UN officials first [raised] concerns over Syria before the Security Council in April 2011, Russia made it clear that it viewed the conflict as an entirely internal affair." The "broader strategic tensions between Western states, Russia, and China over the future of Syria"[25] meant the permanent members of the Security Council maintained fundamentally different strategic goals in the Syrian crisis, which complicated "both initial debates over the mandate for UNSMIS, arguments over its findings in Syria, and the eventual debate on its closure later in 2012."[26] Ultimately, conflicts over the mandate mirror larger disputes concerning the entirety of the Syrian situation and differing visions for the role of the global community overall.

UN Decision #2: OPCW-UN Joint Mission in Syria

Background and Determining Effectiveness

In August 2013, a chemical attack in the Syrian town of Ghouta shocked the world. A United Nations investigation confirmed that chemical weapons were used, and a few months later, in October 2013, the OPCW-UN Joint Mission in Syria was formally

[19] Ibid.
[20] Ibid.
[21] Ibid.
[22] Gowan, Richard, and Tristan Dreisbach. 2015. "United Nations Supervision Mission in Syria (UNSMIS)." In *The Oxford Handbook of United Nations Peacekeeping Operations.*
[23] Ibid.
[24] Ibid.
[25] Ibid.
[26] Ibid.

established. The mission sought to oversee the elimination of the chemical weapons programme of the Syrian Arab Republic. The mission set a goal to eliminate Syria's chemical weapons programme by June 30, 2014. However, it wasn't until September 30, 2014, that the OPCW-UN Joint Mission completed its mandate, and its operations drew to a close. Although it may not have met its goal on the exact projected day, it was still declared that "the total of declared chemical weapons materials destroyed or removed from Syria (was brought) to 100 percent,"[27] only a few months within the goal time frame. While the Secretary-General announced that "the Mission had successfully conducted its work under extremely challenging and complex circumstances," incidents of chemical weapons continued to be recorded in the conflict in subsequent years.

Multiple OPCW reports refer to the use of chemical weapons, mainly chlorine, in Syria from 2014 onwards.[28] There is no UN or OPCW entity to identify the party responsible for the continued chemical weapons attacks in Syria. The Human Rights Watch attributes the majority to the Syrian government. The Syrian government has consistently denied any involvement in the use of chemical weapons, and Russia, Syria's prime ally, claims the Ghouta attack was carried out by opposition forces trying to push for foreign military intervention.[29] Human Rights Watch did report use by other parties, identifying that the Islamic State group (also known as ISIS) carried out three chemical weapon attacks using sulfur mustard, and one attack was by non-state armed groups using chlorine and admits that those responsible for the remaining attacks in the data set are unknown or unconfirmed.

The OPCW-UN Joint Mission, even if able to garner complete cooperation from the Syrian government in eliminating all uses of all forms of chemical weapons, fails to consider access and use of chemical weapons by other parties operating in the country that would hinder a complete halt. Moreover, although OPCW prohibits the use of chlorine as a weapon, it does not ban its civilian use. The unconfirmed attacks with unknown sources in Human Rights Watch reports in fact reflect that this partial prohibition poses a divergence between the OPCW's mission and actual prevention of chemical attacks in Syria. Human Rights Watch's analysis of 85 chemical weapons attacks in Syria from 2013 to 2018 revealed that 42 of these incidents involved chlorine.[30]The restricted chlorine elimination resulted in a gap for the mission's overarching goal of limiting the use of chemical weapons in the region.

Ultimately, I conclude that this decision by the UN Security Council was somewhat effective in that the OPCW was able to completely fulfill its mission of removing all chemical weapons based on the declaration and its own Convention guidelines. However, the mission operated under the mistaken assumption that the targeted weapons for elimination represented all those held within the region. It failed to consider the possibility of undeclared and unaccounted stockpiles as well as high levels of use of omitted substances such as Chlorine, leading to its failure in effectively preventing chemical weapon attacks throughout Syria.

Analysis of Security Council Dynamics

The UN Security Council's mandating of the Joint Mission with the Organisation for the Prohibition of Chemical Weapons involved rare negotiation between Russia and the United States. However, the mission followed the Obama administration's threatening of military strikes on Syria in August 2013, thus providing Russia an incentive to keep American involvement to a minimum. However, more recently, Russia has resisted continued efforts to disarm the Syrian government of chemical weapons, citing the politicization of the OPCW, which it believes has become a weapon of the West to hold other countries to higher standards and be a means of control.

Analysis of Host Government Involvement

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[27] "Syria and the OPCW." *United Nations: Department of Political and Peacebuilding Affairs*. August 2013.
[28] Stellstrom, Ake. 2019. "The role of the OPCW and the Syrian conflict: How the OPCW can develop its cooperation with states parties." *Stockholm International Peace Research Institute*.
[29] "Witnesses Describe Syria's Ghouta Chemical Attack." *AP News*. March 2018.
[30] "Syria: A Year of Chemical Weapons Attacks Persist." *Human Rights Watch*. April 2018.

In August 2014, the Secretary General expressed his appreciation for the cooperation of the government of the Syrian Arab Republic in the mission to remove all chemical weapons from the country.[31] Arguably, the government was largely cooperative during the process of weapons removal in 2014. However, there exists disagreement over whether the Syrian government has in fact identified all of its chemical weapons to the OPCW. More recent reports indicate a reduced level of compliance from the government regarding the Convention, having yet to provide the necessary clarity on all outstanding matters. For example, in April of 2022, the OPCW Secretariat reported they have "not yet received certain requested information from Syria" while the deployment of the Declaration Assessment Team has been delayed due to Syria's "continued refusal to issue an entry visa for one of the Team's experts."[32] As of July 2023, "Syria's Chemical Weapons Declaration (is) Still Inaccurate" according to the United Nations department for disarmament affairs.[33] Although the United States cited the recent OPCW report to strongly condemn the Syrian regime's repeated deployment of chemical weapons, Russia criticized the OPCW, accusing it of favoring Western interests and politicizing reports, thereby eroding its credibility. Although Syrian representative did underscore (Syria's) cooperation with the OPCW, facilitating access for investigations and expressing a willingness to address concerns raised, UN reports on cooperation are ongoing. Ultimately, while the Syrian government initially demonstrated cooperation in the mission to eliminate chemical weapons, reports of ongoing challenges hindering UN efforts have raised concerns about the willingness for declaration and control of chemical weapons in the region.

UN Decision #3: UN Humanitarian Aid to Syria

Background and Determining Effectiveness

In February 2014, the Security Council unanimously adopted Resolution 2139, which demanded that all parties in Syria allow delivery of humanitarian assistance, cease depriving civilians of food and medicine indispensable to their survival, and enable the rapid, safe, and unhindered evacuation of all civilians who wish to leave. Despite the resolution adoption, the number of people in need in Syria only increased after 2014. According to a report by the United Nations Office for the Coordination of Humanitarian Affairs, the number of people in need in Syria in 2014 was 12.2 million. In 2016, that number increased to 13.5 million with 8.7 million people newly identified as "people in extreme and catastrophic need."[34] Northwest Syria was and continues to be the area with the most people in need and with the highest severity of need.

Furthermore, the resolution did not lead to a more adequate humanitarian response with funding only worsening; "combined Syria crisis appeals were only 57% funded in 2014, compared with 71% in 2013."[35] UN agencies did deliver 1,130 aid convoys of humanitarian goods through NGO partners, using cross-border routes from Turkey into Syria in 2014. However, almost no "services" such as urgent healthcare were delivered. On top of the inadequate aid, there was a reported 63% reduction in the number of people reached by inter-agency convoys from within Syria during 2014 compared to 2013, meaning even fewer people in need were reached than had been previously. Ultimately, I conclude this UN decision was ineffective; it failed to meet its direct goals on top of its inability to limit the humanitarian disaster in Syria, which only exacerbated following the resolution's adoption.

Analysis of Security Council Dynamics

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[31] "Ban Ki-Moon Welcomes the Destruction of the Declared Chemical Weapons Material." *YouTube*, August 20, 2014.
[32] "Syria's Failure to Remedy Pending Issues of Chemical Weapons Use Is 'Wake Up Call' for International Community, Disarmament Chief Tells Security Council." *UNSC*. April 2022.
[33] "Syria's Chemical Weapons Declaration Still Inaccurate, Unfinished, Top Disarmament Official Tells Security Council, Reiterating Need for Damascus to Fully Cooperate." United Nations: Meetings Coverage and Press Releases. July 2023.
[34] "Humanitarian Needs Overview: Syria Arab Republic." *OCHA*. February 2022.
[35] "Failing Syria: Assessing the impact of UN Security Council Resolutions in protecting and assisting civilians in Syria." 2015. *Oxfam Policy and Practice*. December 3.

How assistance should be implemented in Syria was and continues to be a source of debate between members of the Security Council. Russia is concerned about potential "undermining [of] Syria's sovereignty" with unestablished border crossings to deliver goods and unauthorized entrance in and out of Syria. On the other hand, the United States and European states are concerned with the "instrumentalization and diversion of aid by the government of Syria."[36] They argue the Syrian government's allocation and distribution of resources is "excessively time-consuming and unreliable,"[37] making it necessary for deliveries to be made without government approval and with a focus on non-government held areas where aid is most needed, mainly Northwest Syria. Although compromise persisted despite disagreements in the past, Russia vetoed a measure in July 2022 "that would have allowed the last U.N. aid route into Syria to remain open for another year,"[38] marking a deviation from past compromise on the issue of humanitarian aid delivery in Syria.

Analysis of Host Government Involvement

Especially because of its familiarity with the territory, the Council has called on the Syrian authorities to "ensure that aid reach people through the most direct routes."[39] However, it has been reported that the Syrian government has "hamper(ed) the work of aid agencies," preventing international humanitarian workers from traveling within Syria and giving many agencies "ongoing problems with registration and with obtaining visas for their staff, severely limiting aid operations."[40] In July and December 2014, the UNSC adopted two additional resolutions, Resolution 2165 and 2191, which authorized UN aid operations to enter Syria from neighboring countries without requiring the consent of the Syrian government. This only furthered tensions between the missions and the Syrian government.

III. Results

Table 1: Summary of Results
UN Decision Effectiveness in Relation to Proposed Conditions for Effectiveness

	UN Decision #1: Peacekeeping Mission	UN Decision #2: OPCW-UN Joint Mission in Syria	UN Decision #3: Humanitarian Aid Resolution(s)
Effective?	**No**	**Somewhat**	**No**
Agreement in Security Council?	**Somewhat**	**Yes***	**Yes****
Host government cooperation/support?	**Somewhat**	**Yes*****	**Somewhat**

*Council agreement on chemical weapons has deteriorated since Joint Mission in 2013
**Council agreement on aid distribution has deteriorated since the resolutions in 2014
***Government compliance with chemical weapons disarmament has deteriorated since Joint Mission in 2013

[36] "An Avoidable Crisis." *The Carter Center*. May 2021.
[37] Ibid.
[38] Jakes, Lara. 2022. "Russia Votes to Shut Down Last U.N. Aid Route Into Syria." *The New York Times,* July 8.
[39] "Resolution 2139." *United Nations Security Council.* February 2014.
[40] "Failing Syria: Assessing the impact of UN Security Council Resolutions in protecting and assisting civilians in Syria." 2015. *Oxfam Policy and Practice*. December 3.

In line with predictions, the UN decision that was somewhat effective, the OPCW-UN Joint Mission, involved agreement within the Security Council and support from the host country, while the UN decisions that were ineffective, the Peacekeeping Mission and Humanitarian Aid Resolutions, involved a lack of support from the host country and/or disagreement within the Security Council. It is important to note that the measures in the table represent the conditions at the time of agreement adoption, so the stance of P5 council members or the Syrian government may have shifted in recent years. However, shifts and resulting impacts on efficiency are also in line with hypotheses. For example, although agreement on chemical weapon disarmament has decreased in the Security Council along with host government support, such missions have also been less effective.

In line with predictions, decisions by the UN Security Council where negotiation and agreement between Russia and the US were lacking saw less effectiveness and vice versa. Compromise alone is not enough to pass a resolution or mandate. Rather, efficiency is highly dependent upon deeper agreement between powers that can provide support, or at the very least, a lack of disruption, for the decision. With Decision #1, the "lack of diplomatic cohesion behind UNSMIS was arguably the most important factor in ensuring its ultimate failure."[41] The permanent members of the Security Council maintained fundamentally different strategic goals in the Syrian crisis, which left the mission operating "on an extremely weak political basis." With the OPCW-UN Joint Mission, concerns over US airstrikes increased Russia's compliance and in turn effectiveness, which has since decreased because of shifting views by Russia and the lack of present threat by the US. Humanitarian aid has always seen some disagreements in recent years, but the inefficiency seems to also be more deeply rooted in a lack of adequate funding and aid deployment efforts than dispute among P5 members.

Also in line with predictions, decisions by the UN Security Council that lacked cooperation and permission from the host government were less effective; the Syrian government proved to have a vital impact on effectiveness. Syrian officials were able to aid in the effectiveness of UNSMIS with benefits like security measures, but also to hinder progress with checkpoints and administrative issues. Such issues stalled the mission's ability to function, and ultimately its effectiveness in even the little that it was accomplishing, mainly reporting on the situation on the ground. With the OPCW-UN Joint Mission, the Syrian government's cooperation was fundamental to identifying and removing chemical weapons in its possession. Its recent shift toward non cooperativity has caused a complete halt in calls for further chemical weapons investigation and removal. By creating administrative difficulties and hindering supplies for areas most in need, the Syrian government's opposition to UN Humanitarian Aid efforts in areas where it does not govern has significantly impacted opportunities for mitigating the humanitarian crisis.

With Decision #2, the OPCW-UN Joint Mission in Syria, the presence of both conditions of host compliance and security council agreement complement one another. It is very plausible that the Syrian government complied with handing over weapons in 2014 because of Russia's support for the mission. However, in more recent years, the OPCW has been more politicized and seen by Russia as a means of control by the West with the representative for the Russian Federation claiming "whatever Damascus does in fulfilling its obligations, it's never enough."[42] The polarization surrounding the issue of chemical weapons in Syria within the Security Council has thus led to less compliance from the Syrian government and ultimately less effectiveness in chemical weapons elimination as compared to in 2014. Ultimately, this political discord has negatively impacted the OPCW's ability to fulfill its responsibilities effectively.[43] Similarly, with Decision #3, the Syrian government likely feels less pressure to comply and assist with humanitarian aid deliveries especially to areas not under its control given Russia's shift toward a veto in the Council on the matter. Ultimately, the Security Council agreement

[41] "UNSMIS Mandate." *United Nations*. April 2012.
[42] "Syria's Failure to Remedy Pending Issues of Chemical Weapons Use Is 'Wake Up Call' for International Community, Disarmament Chief Tells Security Council." *UNSC*. April 2022.
[43] Ibid.

can influence host government cooperation, giving Russia's stance an especially crucial role in determining UN decision effectiveness in Syria.

IV. Limitations

Despite concluding with evidence supporting the idea that host government compliance and Security Council agreement have a positive impact on the efficiency of UN decisions in Syria, there are several limitations with my research. First, I look at only a limited number of UN decisions, which may not be representative of the broader collection of UN decisions on Syria, posing an internal validation issue. As for the generalizability and external validity of my findings, Syria's unique position makes it hard for the findings to speak to a broader dynamic. The degree to which the Security Council is unanimous is more important in countries where P5 members have an especially strong interest. For example, strong agreement may not be necessary for the efficiency of Council resolutions regarding certain countries such as Sudan, which are less controversial on the world stage. Even if disagreements were to exist, the Council members are less likely to work to inhibit the decision's goals. When the Council passed Resolution 1556 demanding the Sudanese government disarm the Janjaweed militia and bring to justice those who had committed violations of human rights in Darfur, China said some measures included in the text of the resolution were "unhelpful," and thus it abstained. However, disagreement by a permanent member in this case held much less weight, if any, compared to a disagreement held by China in anything concerning Syria because China's relationship with, and interest in, Sudan is much less significant.

Likewise, the importance of host country compliance is dependent on how involved the government is within the country. If the government has retained control of some or all of the country, like in Syria, it is significantly better positioned to influence UN effectiveness compared to a government that is seeing decreased authority and which is losing all control; failed states such as Libya after the fall of Gaddafi, see little benefit arising from host country compliance with the UN. Thus, if a government is unable to provide the benefits of host cooperation because of their lack of power and influence, efficiency of UN decisions is not expected to increase.

Lastly, given the intense situation on the ground in Syria, there exists multiple factors that contribute to the ineffectiveness of UN decisions. Despite very effective Security Council agreement and host country cooperation, missions can be impacted by unexpected violence and complications that come naturally with instability and war on the ground. Especially given the presence of terrorist groups like ISIS and Al-Qaeda in Syria, host cooperation may prove to be more impactful in places where the host is the sole or one of the primary actors involved in the conflict.

V. Conclusion

Although a lack of UN effectiveness in Syria is widely attributed to Russian and Chinese vetoes, the Security Council has struggled to implement mandates and carry out missions that it has passed. In this paper, I seek a significant relationship between Security Council unanimity and host government cooperation with UN decision effectiveness in Syria. The results of investigating three UN decisions support the two presented hypotheses, ultimately suggesting that UNSC unanimity and host government cooperation increase a UN decision's effectiveness in Syria. It also seems that the first hypothesis regarding UNSC agreement may complement the second, with the Syrian government more likely to abandon cooperation when its allies veto or disagree with mandates. Although this study provides an interesting dive into the relationship between UN effectiveness and UNSC agreement and host cooperation, it also raises further questions for exploration. Future research should challenge the hypotheses' applicability to other countries or conflicts. Especially considering current discussions surrounding UN effectiveness in Ukraine, studying the potential drivers of effectiveness and ineffectiveness in UN decisions may influence decisions surrounding the future of effective conflict mitigation.

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Section 3:

Comparative Politics

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"Spain and Switzerland: The Importance of Colonialism on Nationalism"

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"How Important is Social Class as a Guide to Voting Behaviour in the UK and US?"

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Comparative Politics

Spain and Switzerland: The Importance of Colonialism on Nationalism

Lauren Hidalgo

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Introduction

As seen by those in the field of nationalism, Switzerland is a unique nation-state. While many other polyethnic nations have seen domestic conflicts between ethnic groups over the rise of nationalism, Switzerland has been a stable state in this regard. The modern state of Switzerland was founded in 1848 through the negotiation of a constitution after civil war broke out between cantons. There are four different recognized national languages in Switzerland: German, French, Italian, and Romansh. As a state, Switzerland is also divided into 26 cantons that are highly autonomous. This makes Switzerland a confederation, leaving the cantons to manage their own affairs, such as healthcare and education. However, the level of autonomy granted to each canton has not led to a rise in nationalist movements within Switzerland. Rather, Swiss nationalism has remained a powerful force within the state, unifying the different ethnic groups.

A country similar to Switzerland in political structure is Spain. Both Spain and Switzerland are Western European countries with their own forms of nationalism. Spain, like Switzerland, is divided into several autonomous communities. This was a result of the 1978 Constitution that was ratified after the death of dictator Francisco Franco in 1975. Although both states are structured in a way that gives a considerable amount of political power to regional governments, Spain has encountered difficulties maintaining Spanish nationalism as a legitimizing mechanism for state power. This is due to the rise of both Catalonian and Basque nationalism. The public sentiment towards further self-determination and even independence from Spain has remained strong in Catalonia and the Basque region. As recently as 2017, the Catalonian parliament brought forth a referendum on the question of independence from Spain. Although the Spanish central government deployed police troops to prevent the referendum from taking place, about 43% of the eligible voting population in Catalonia casted votes.[1] International observers did not view the referendum as legitimate, and many voters who did not support the independence movement did not vote. However, the mere fact that the referendum took place and was strongly supported by the Catalonian parliament points to the strength of Catalonian nationalism. A similar type of referendum was proposed by the Basque parliament in 2008. However, this referendum was blocked by the Supreme Court of Spain before it could take place. While the referendum did not go through, it points to a nationalist movement that was strong enough to gather support for a referendum concerning independence from Spain. These referenda stand in stark contrast to the political landscape of Switzerland.

Both Spain and Switzerland are polyethnic nations with strong regional governments. In the case of Spain, nationalist movements have grown over time and continue to cause conflict between autonomous communities and the Spanish central government. However, in Switzerland, the issue of competing forms of nationalism has not become a significant political issue. The inquiry that will guide this paper is as follows: Why has Switzerland maintained stability as a polyethnic nation while Spain has not? The next section of the paper will focus on previous research centered on reasons for Switzerland's success in fostering Swiss nationalism. The section following will contain my proposed theory in response to the question, followed by an analysis of evidence

[1] "El Govern Trasllada Els Resultats Definitius Del Referendum de l'1 d'octubre al Parlament de Catalunya," govern.cat, accessed November 4, 2023, https://web.archive.org/web/20171006212613/http://www.govern.cat/pres_gov/govern/ca/monografics/303541/govern-trasllada-resultats-definitius-referendum-l1-doctubre-parlament-catalunya.html.

relating to my theory. The final section will contain alternatively proposed theories, followed by a brief conclusion.

The comparison between Spain and Switzerland is one that has not previously appeared in research on nationalism and national cohesion. As a result, this new approach to the nationalist puzzle that Switzerland poses will rely on sources that research either Spain or Switzerland. However, these sources produce effective evidence and claims in response to the question of why Switzerland has maintained national cohesion. The literature review will consider previous theories attempting to explain the Swiss success in preventing competing forms of nationalism. These theories are incomplete because the sources only examine Switzerland and list factors also found in Spain. Despite this, the literature review provides a sample of what has been put forth as a response for a peculiar case of national cohesion.

I. Literature Review

There have been many different theories proposed to explain the success of Switzerland as a polyethnic nation. However, given that the focus of this paper is the comparison between Switzerland and Spain as cases of polyethnic nations, the previous literature cannot address the specific reasoning behind how Switzerland has maintained national stability while Spain has not. Regardless, the previous literature provides insight into the different theories that have been put forth to explain the unique success Switzerland has enjoyed. One such theory proposed by Giudici and Grizelj was that there is a connection between the Swiss national identity and the emphasis on multilingualism. This stands in contrast to the primordialist and perennialist theories of nationalism that emphasize one standard language under which a nation is united, such as that of Geertz and Hastings. They found that in the early 20th century, nine cantons had linked language teaching with the Swiss identity.[2] The reasoning behind this connection was to promote the idea that the Swiss people were not confined to their cantons and could communicate with their co-nationals. The relationship between Swiss nationalism and multilingualism in education as a way of explaining the stability of the Swiss nation appears to be one that logically follows. However, Spain is another nation where there are autonomous communities with distinct languages. Their education system is similar regarding language learning as the autonomous communities have the choice to teach students the regional language. In Catalonia, students typically learn both Catalan and Spanish, with Catalan being viewed as the primary language. In the Basque autonomous community, students are also taught in Basque and Spanish. Therefore, the reasoning for the embrace of multilingualism as a national characteristic would not stand when viewed in comparison to Spain. Additionally, Giudici and Grizelj also observed that the messaging associated with the promotion of multilingualism also included the economic utility of learning more than one language.[3] This observation is another reason why the argument of multilingualism as a common characteristic of the Swiss identity is not very strong. Economic considerations as a factor that is as compelling to Swiss educators as cementing a national identity affirms the idea that it is a weak reason behind the success of Swiss nationalism.

An interesting argument brought forth by Bendix is that although it is no longer as relevant in the present day, Swiss nationalism was strengthened by political rituals. She used the creation of the holiday of August 1st. August 1st became a popular holiday in Switzerland as it commemorated the date that the Old Swiss Confederacy was formed in 1291. Bendix made a similar argument to Guidici and Grizelj in that the emphasis on diversity is a significant characteristic of Swiss nationalism that sets it apart from the nationalisms of other nations. Bendix, however, expanded the meaning of diversity to include political and cultural elements as well as linguistic differences. In describing the August 1st celebrations, Bendix noted that they were at their highest relevance among the

[2] Anja Giudici and Sandra Grizelj, "National Unity in Cultural Diversity: How National and Linguistic Identities Affected Swiss Language Curricula (1914–1961)," *Paedagogica Historica* 53, no. 1–2 (2016): 151, https://doi.org/10.1080/00309230.2016.1229348.
[3] Giudici and Grizelj, "National Unity," 148.

Swiss population during World War II.[4] This was due to the Swiss central government believing that national unity was needed to combat the rise of Nazism across Europe. The August 1st celebration remains the only federal holiday in Switzerland as other holidays are decided on by the cantons. Bendix's argument is also one that does not explain the differences between the level of stability in Switzerland in contrast to Spain. Spain also has federally recognized holidays celebrated by the autonomous communities. These holidays are the National Day of Spain and the Spanish Constitution Day. Additionally, Spain gives a similar level of autonomy to the different regions as the Swiss central government does, manifested through the power each autonomous community has in choosing to declare other important days as public holidays within their region. Another weakness of this argument is that the enthusiasm among the Swiss people over the August 1st celebration was not sustained to the modern day. Bendix described a sense of apathy among many Swiss people toward the holiday after World War II.[5] This would mean that for the purposes of this paper, the argument for invented traditions is not very strong, because it is not a tradition that has been strengthened with the passage of time. Given that the Catalonian and Basque nationalist movements have risen in influence more recently, the idea of the August 1st holiday constituting a uniquely important unifying force for Swiss national identity is also weak.

Torriani proposed an interesting argument for the reasoning behind the stability of the Swiss nation, expressed through the examination of the Swiss National Exhibitions of 1939 and 1964. Like the aforementioned August 1st celebrations, Swiss National Exhibitions were held to promote the idea of a unified Swiss national identity in a top-down approach as they were organized and held by government institutions. Torriani compared the two exhibitions and found that the functions they served differed. In the 1939 exhibition, the main purpose of fostering Swiss nationalism was to emphasize the elements that differentiated Switzerland from other nations, such as its political system.[6] These differences would constitute the justification for the Swiss nation, providing a stronger case for a Swiss national identity. However, the 1964 exhibition shifted from the idea of Switzerland as a unique nation in Europe to highlighting commonalities between European cultures and fostering a sense of cooperation and collaboration.[7] As a result of these changes, Swiss nationalism was perceived to be less pronounced in the 1960s. Torriani's reasoning for this trend lies in the historical context surrounding the first Swiss National Exhibition. In 1939, World War II had begun, and Switzerland felt threatened by the adjacent Nazi Germany. As a result, the central government felt there was a need for national unity. However, at the time of the 1964 exhibition, the war had been over for 15 years. This meant that the Swiss central government no longer deemed it necessary to promote nationalism to the public. Torriani's argument that arose as a result of comparing the two exhibitions was that the stability of the Swiss nation is a result of the tendency for Swiss nationalism to arise primarily in situations when the state feels threatened by an external force.[8] The argument rests on the idea that the Swiss nation is aided by the lack of a strong national identity. With this assumption in mind, the logical conclusion is that Swiss nationalism has been almost entirely dominated by stronger sentiments toward the canton that a Swiss person resides in rather than the Swiss nation itself. However, this would render the nation vulnerable to internal threats to Swiss cohesion from powerful cantons. Additionally, this argument cannot be applied to Spain as Catalonian and Basque nationalism have been influential movements in both times of war and times of peace. Although this argument introduces an interesting perspective, it is flawed because if applied to a country with a similar structure, such as Spain, the lack of stability and presence of competing forms of nationalism is made apparent.

The different positions put forth as to why Switzerland is uniquely stable as a polyethnic nation are flawed when Switzerland is compared to the Spanish nation.

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[4] Regina Bendix, "National Sentiment in the Enactment and Discourse of Swiss Political Ritual," *American Ethnologist* 19, no. 4 (1992): 780, https://doi.org/10.1525/ae.1992.19.4.02a00080.
[5] Bendix, "National Sentiment," 782.
[6] Riccarda Torriani, "The Dynamics of National Identity: A Comparison of the Swiss National Exhibitions of 1939 and 1964," *Journal of Contemporary History* 37, no. 4 (2002): 563, https://doi.org/10.1177/0022009402037004040l.
[7] Ibid.
[8] Torriani, "The Dynamics of National Identity," 572.

Giudici and Grizelj argued that the connection between Swiss national identity and multilingualism constituted a factor in the stability of Switzerland as a nation. However, when compared to Spain, this argument does not hold up. Given that Spain and Switzerland have educational systems that include the learning of multiple languages, it cannot be the differentiating factor that explains the stability of Switzerland and the instability of Spain. The impact of political rituals, as promoted by Bendix, is also limited due to the diminishing relevance of these rituals in Switzerland over time despite continued stability on the national level. It was also flawed due to the presence of celebrated federal holidays in Spain. Torriani's argument was that having a reactive nationalism—one that responds to threats—is the key to Swiss national stability. This argument, while interesting, is limited in scope because the competing forms of nationalism in Spain have been at odds regardless of external threats to the Spanish state. The previous literature, although illuminating, has proven insufficient since it does not use the comparative method in examining the unique national situation in Switzerland.

The literature on Swiss nationalism has considered interesting factors that could potentially explain the success of Switzerland in cultivating a national identity. However, examinations of Swiss practices have utilized only the lens of the country itself. Therefore, these sources could not explain why Spain would fail to prevent competing nationalist movements from developing while Switzerland would not. The central theory of this paper will therefore be a new claim not made in the previous literature; instead, it will be supported by sources that have examined Spain's troubled history with maintaining a national identity. This central theory will consider foundational theories of nationalism and national development while also disproving the more common arguments for the success of Swiss nationalism and the fraught history of Spanish nationalism.

II. Central Theory

When constructing the theory in response to the research question, several potential answers emerged. These answers were related to the previous literature, but not entirely the same arguments. A common argument used to explain Switzerland's success as a nation is its economic prosperity. The belief is that when a nation is wealthier, its people are less likely to develop nationalist movements local to their region. This argument points to a strong association between the economic status of a nation and the level of nationalism within the nation. However, Spain has been an economically powerful country both on the European and global levels. The Spanish economy in the 21st century is the fifth largest economy in Europe and the fifteenth largest economy in the world.[9] By the logic of the economic argument, Spain should be more nationally stable than Switzerland as it is more economically powerful and prosperous by the metric of gross domestic product. However, this is not the reality of the situation. A comparison of the economic statuses of both countries disproves the economic argument. Proponents of the economic argument have not compared these two specific cases of nationalism and rather addressed Switzerland alone. As a result, the argument has a limited reach and cannot be applied to cases of nations like Switzerland, such as Spain.

Another argument often cited as the reason for Switzerland's unique stability as a polyethnic nation is the country's incorporation of federalism into its political system, giving each canton a voice in its internal politics. Although this is an interesting argument, it also cannot explain why Switzerland is stable on the national level while Spain is not, since the countries employ similar political structures. The Catalonian and Basque regions have a significant amount of power in deciding their internal politics. One such area is the field of education as previously discussed in the literature review. Both countries have competing systems of government between the central government and regional governments. Considering only Switzerland, this argument appears to be the most persuasive, partially due to its applicability to other countries like the United States, which has both a central government and state governments. Brazil is another case where there is both federalism and stability on national lines. In the case of Brazil, the United States, and Switzerland, each nation is stable, polyethnic, and politically structured as a

[9] The Economist Intelligence Unit's quality-of-life index, accessed November 5, 2023, https://www.economist.com/media/pdf/QUALITY_OF_LIFE.pdf.

federation. However, when applied to Spain, the argument does not hold up. Although Spain shares those characteristics with the other nations listed, Spanish nationalism has not been powerful enough to act as a stabilizing force in the nation. Therefore, this argument is not sufficient for this comparison.

An argument that is more specific to the changing political situation in Spanish history is one that identifies the fascist Francoist regime as a factor that led to the rise of Catalonian and Basque nationalism. Unlike Spain, Switzerland did not undergo a period of fascist government. Switzerland has had a long history as a democratic federation, with the threat of fascism only surfacing during World War II. Therefore, this difference is a possible reason for the development of nationalism, primarily as a response to and rejection of the Spanish nationalism propagated by the Francoist regime. This line of reasoning appears to approach a framework that could address the differences between these two nations. As a historical argument, however, it does not explain the emergence of Catalonian and Basque nationalism because both forms of nationalism developed before the fascist regime came to power. Although the regime may have further exacerbated the nationalist sentiments of the Catalonian and Basque people, it did not result in the creation and spread of these movements. These movements became prominent in the 19th century, long before the rise of Francisco Franco. As a result, this argument cannot be the primary factor in the development of competing forms of nationalism in Spain.

The theory that best explains the difference between outcomes in Spain and Switzerland is related to Nairn's theory of nationalist development. Nairn posited that nationalism developed from uneven development in peripheral areas as compared to the central and more powerful core.[10] Although Spain is economically strong, this theory explains the competing forms of nationalism within Spain that do not exist in Switzerland. This is because Nairn discussed colonialism as a central phenomenon for the development of nationalism. The theory put forth in this paper, taking influence from Nairn's theory of nationalist development, is that the Spanish nation was united under the idea of Spain as a powerful colonial empire. As a result, when the Spanish empire began its decline, Catalonian and Basque nationalism arose. This pattern did not spread to Switzerland because it did not have a colonial empire. Swiss nationalism did not develop as a result of colonialism and is therefore more stable despite the country consisting of people with four different languages and two different religious sects. The comparison between Switzerland and Spain is the best model to explain the difference in national cohesion due to their similarities in structure and position in the world economy. This is a result of addressing a major difference in the history of the two nations that also aligns with the history of the development of nationalism in Catalonia and the Basque region.

The analysis of Spanish nationalism failing to produce national cohesion will begin with examining how the Spanish empire influenced the Catalonian and Basque nationalist movements. The movements to reestablish a strong sense of Spanish national identity will then be discussed, specifically the Generation of '98 and the idea of Hispanism. After this analysis of Spanish colonialism, the Swiss national history will be examined, including the absence of a colonial empire. These sources will reinforce the theory that colonialism is the most significant factor in the different outcomes for these two countries.

III. Analysis

The success of the Spanish empire united the different ethnic communities within the nation. Unlike Nairn's theory that nationalism first developed in the more economically disadvantaged peripheral regions, the argument made in this paper is that the more economically prosperous communities of Catalonia and the Basque regions formed nationalist movements because of the decline of the Spanish empire. This is because they lost the economic privileges that came with successful colonization. According to Muro and Quiroga, the loss of the Spanish colonies of Cuba, Puerto Rico,

[10] Tom Nairn. *The Break-up of Britain: Crisis and Neo-Nationalism* (Brooklyn: Verso, 2021), 335.

and the Philippines in the late 19th century significantly contributed to the Catalonian and Basque nationalist movements.[11] The loss of colonial territories during this period was especially important due to the political context of the period in Western Europe. Unlike the Spanish empire, those of the British, Germans, and French continued to enjoy success into the 20th century. These successes contributed to the inclusion of the public into the imperial project of those respective nations.[12] This inclusion was important as it helped form a stronger definition of the nation and foster a sense of unity that would endure the decline of the empires surrounding Spain. However, this same idea did not apply to Spain by the elites. The public from each autonomous community was not equally included in the idea of imperial Spain, and the Spanish empire did not lead to a strong sense of Spanish nationalism that endured the decline of the empire. This became clear when the Spanish empire began losing colonies in the mid-nineteenth century, a time in Europe considered the age of nationalism. Although examples of formations of nations had occurred earlier in the late eighteenth century, such as in France, the pattern continued into the nineteenth, and the number of European nations had grown. It was during this time that the Spanish empire, the primary unifying force for the Spanish people, had begun to lose power on the global stage. Catalonian and Basque nationalists began to follow the examples of successful nationalist movements in neighboring countries. The example cited by Muro and Quiroga of the losses of the Philippines, Puerto Rico, and Cuba also led to calls by Spanish elites and intellectuals to form a "national regeneration," which became more associated with an artistic search for a Spanish identity.[13] The term itself implies that the Spanish nation was weakening and that a revival was necessary. The vulnerable Spanish nation after the loss of colonies, instead of fostering a strong sense of Spanish national identity before the empire's decline, found its national regeneration efforts unsuccessful in curbing the development of Catalonian and Basque nationalism. The public felt stronger ties to their local communities and languages rather than the Spanish language and homeland, and this difference became more apparent as the Spanish empire fell while surrounding European nations flourished.

The case of Spanish nationalism competing with Catalonian and Basque nationalism does not completely align with Nairn's theory. As previously mentioned, Catalonia and Basque Country are both areas of Spain that are economically prosperous, which contradicts Nairn's idea that nationalism would begin first in the more underdeveloped regions of a nation. However, there are other dimensions by which Nairn's theory can explain the emergence of these two forms of nationalism in opposition to Spanish nationalism. Medrano noted that Nairn's theory of nationalism could be applied to Catalonia and the Basque region as forms of peripheral nationalism that formed as a result of the loss of Spanish colonies along with the political changes that occurred after the fall of the Spanish empire.[14] These changes included centralization efforts to soften the blow to the Spanish economy that had occurred as a result of losing the last of their colonies. These political changes affected Catalonia and Basque Country the most as both regions had maintained their local political and legal systems with minimal central Spanish interference. Medrano also mentioned that both regions not only maintained their own systems of government but were also the two regions that were linguistically differentiated from the other communities.[15] Catalonian and Basque elites took advantage of these divisions when they mounted opposition efforts through a nationalist lens. Medrano also credits the organization of Catalonians and Basques by elites along national lines with the development of nationalism throughout Europe during the period.[16] However, Medrano does not believe that Nairn's theory provides the full reasoning behind the emergence of these nationalist movements. An area this paper critiques Nairn's theory of nationalist development is the nature of the two nationalist movements. There is also the assertion that Nairn could not explain the separatist nature

[11] Diego Muro and Alejandro Quiroga, "Spanish Nationalism," *Ethnicities* 5, no. 1 (2005): 15, https://doi.org/10.1177/1468796805049922.
[12] Muro and Quiroga. "Spanish Nationalism," 16.
[13] Ibid.
[14] Juan Diez Medrano, "Patterns of Development and Nationalism: Basque and Catalan Nationalism before the Spanish Civil War," *Theory and Society* 23, no. 4 (1994): 543, https://doi.org/10.1007/bf00992827.
[15] Ibid.
[16] Ibid.

of the Basque nationalist movement in contrast to the non-separatist Catalonian nationalist movement. The issue with this argument is that this characterization of the Catalonian nationalist movement is no longer accurate. The paper was written before the efforts by the Catalonian Parliament to hold a referendum for independence in 2017 had occurred. This significant change does not detract from Medrano's argument, but it points to an evolution of the movement that brought both nationalist movements together in terms of their political strategies. Although Medrano opposes Nairn's theory on the grounds that the two nationalist movements contained different characteristics despite both coming from highly developed regional areas, the argument in this paper is not identical to that of Nairn's theory. The argument does not account for the differences between peripheral nationalisms, but rather seeks to explain why those nationalist movements emerged despite the similarities in political structure and economic wealth to Switzerland. These differences between the manifestations of peripheral nationalist movements in polyethnic nations is a possible topic for further research in nationalism studies.

An additional source points to the end of the Spanish empire as the catalyst for the Basque nationalist movement due to the instability of the nation-state. In this source, the history of Spain is presented as one characterized by instability. Mees notes that from the time of the establishment of the Spanish state, the Spanish nation-building process was not viewed as the highest priority.[17] Mees builds upon the previously discussed sources by reiterating the dramatic fall of the Spanish empire in the nineteenth century, depicting the trajectory of the Spanish nation as one that had great imperial influence on a nation on the brink of bankruptcy. More specific to this source, the way in which this fall contributed to the Basque nationalist movement was established through a political victory. In the same year that Spain had lost the remaining colonies, Sabino Arana had "won his first mandate in Parliament".[18] Arana was the founder of the Basque Nationalist Party, and this victory symbolized the strength of the movement as opposition to the weak Spanish nationalism was initially promoted to establish a sense of Spanish national identity. The link between the political victory of the Basque Nationalist Party and the period when Spain was perceived as a weak nation is an example of the strong relationship between colonialism and Spanish nationalism. The weakness of Spanish nationalism was described through many of the specific shortcomings of the process. Specific characteristics cited by Mees included, at the time, the lack of a well-funded national army, the late development of national symbols, and the lack of a developed public education system.[19] These weaknesses in building the Spanish nation were significant because of their established importance in the development of a national identity. The adjacent French example provides a different picture in nation-building as the state supported nation-building efforts through conscription and a strong education system that standardized language and taught French history. Although the remainder of the paper discusses the effects that economic processes and political transformations had on Basque nationalism after the fall of the Spanish empire, these later events were a result of the loss of economic prosperity associated with colonialism. As was previously stated, the decline of the empire, along with the time it occurred, led to the centralization of political and financial institutions. These efforts led to a particularly strong Basque backlash through the establishment of political parties such as the Basque Nationalist Party. The Spanish central government's methods to prevent nationalist movements from emerging in Catalonia and Basque Country further fueled the opposition to Spanish nationalism. The failure of Spanish elites to establish strong institutions that instilled a Spanish national identity before the empire experienced the loss of colonies resulted in the instability of Spanish nationalism that began in the nineteenth century and continued with the Generation of '98.

A consequence of Spain's colonial decline was the search for a Spanish national identity for the people to unite around. At the same time the Generation of '98 had begun

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[17] Ludger Mees, "Politics, Economy, or Culture? The Rise and Development of Basque Nationalism in the Light of Social Movement Theory," *Theory and Society* 33, no. 3/4 (2004): 317, https://doi.org/10.1023/b:ryso.0000038602.33658.92.
[18] Ibid.
[19] Ibid.

to emphasize Spanish identity through art and literature, the Basque nationalist movement began developing its own myths and sense of shared history. The aforementioned Sabino Arana was an instrumental figure in the construction of a linear Basque history and the idea of a Basque Golden Age.[20] The development of the Basque Golden Age, defined as the time when the independent Basque nation existed, aided in legitimizing the idea of a Basque national identity. As a result, the movement grew stronger around the same time as the Generation of '98 struggled to create an all-encompassing Spanish national identity. In 1892, Arana wrote a book that discussed Basque history, including the defeats they had suffered at the hands of the other Spanish communities. These events were important to note because of the language Arana used to discuss Basque history. Arana described the Basque political situation in Spain as one of occupation.[21] He believed that the Basque region had been colonized by Spain and France. Arana also believed that the decline of the Basque nation was a result of Spanish occupation. Within the Basque nationalist movement, the language of colonialism persisted and was acknowledged as an important lens of analysis. However, the language shifted from colonialism as a beneficial vehicle for economic prosperity to exploitation of an occupied territory. Although Catalonian nationalism did not adopt this type of language, the case of the Basque nationalist movement underscores the importance of the colonial relationship regarding both forms of nationalism. Catalonian nationalism developed around the same time due to the similar autonomous structure that existed in the Basque region. However, the Catalonian nationalist movement manifested differently from the Basque movement. The movement was also guided by the Catalonian elite because of the Spanish centralization efforts and the Restoration regime in the late nineteenth century.[22] The elite believed that they were excluded from the political project of establishing Spanish nationalism and therefore, along with Catalonian intellectuals, mobilized the public along national lines. Early Catalonian nationalism's emphasis was on the political process. The Restoration regime in Spain came to power largely because of the declining Spanish empire, therefore providing a similar link to colonialism that was established between the Generation of '98 and the creation of a Basque Golden Age. The imperial decline of Spain had a profound impact on the creation of the Catalonian and more specifically the Basque nation through the spread of myths and a constructed Golden Age period. The various methods used by Spanish officials and intellectuals were unsuccessful in preserving the unity of the Spanish identity that was once present during the height of the Spanish imperial era.

Another attempt to establish a form of Spanish national identity that was related to the fall of the Spanish empire was the emphasis on Hispanism. The perception of the Spanish empire throughout Europe in the eighteenth and nineteenth centuries was one of decadence—part of the Anglo-Saxon countries seeking to distinguish themselves from the Latin countries. Latin countries were broadly viewed during the time as having lost prominence on the global stage as Anglo-Saxon countries began to rise in power in the Americas. However, the same degree of negativity was not applied to France or Italy. Furthermore, Loureiro notes that Spanish intellectuals held the belief that Spanish identity had become associated with imperial decline after the Spanish empire reached its peak in the sixteenth century.[23] Hispanism is the idea that there is a shared culture and identity between Spain and the Spanish-speaking former colonies of the Spanish empire.[24] It was most commonly used in reference to the similarities in culture and language between Spain and Latin America. Efforts to legitimize the idea of Hispanism rose in prominence in the late nineteenth century and were an aspect of the revitalization efforts of Spanish elites and intellectuals. Loureiro emphasizes that there have not been parallels to other former colonial powers in terms of the extent to which these powers

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[20] Diego Muro, "Nationalism and Nostalgia: The Case of Radical Basque Nationalism*," *Nations and Nationalism* 11, no. 4 (2005): 580, https://doi.org/10.1111/j.1469-8129.2005.00220.x.
[21] Ibid.
[22] Josep Maria Antentas, "Catalonia: The National Question and Labor's Strategic Dilemmas," *Labor History* 61, no. 5–6 (2020): 623, https://doi.org/10.1080/0023656x.2020.1836613.
[23] Angel G. Loureiro, "Spanish Nationalism and the Ghost of Empire," *Journal of Spanish Cultural Studies* 4, no. 1 (2003): 66, https://doi.org/10.1080/1463620032000058686.
[24] Loureiro, "Ghost of Empire," 68.

focused on colonies they no longer ruled.[25] This claim demonstrates the strength of the bond between the idea of a Spanish national identity and the acquisition of territories. Analyzing through the lens of loss and collapse in Spain, the insistence on Hispanism could be interpreted as an attempt to establish a more robust Spanish legacy that would extend beyond its borders. However, the idea of Hispanism would fail in the goal of achieving a cohesive form of Spanish nationalism. This is due to the nature of the ideology itself. The idea that there is a shared culture between Spain and its former colonies would weaken the insular nature of nationalism. In attempting to foster a greater sense of Spanish national identity, Spanish elites de-emphasized the national qualities of Spanish culture and the Spanish language. Furthermore, the importance placed on the Spanish language isolated Catalonia and the Basque region in particular. The difference in language made Hispanism less relevant and accessible for these two areas within Spain, further dividing them from the idea of Spanish nationalism. The spread of Hispanism was a direct consequence of the loss of colonial territories and as a result, cannot be isolated as its own phenomenon. Intended as a unifying force to replace colonial wealth, the promotion of Hispanism was not sufficient in establishing a common Spanish identity due to the emphasis placed on the Spanish language. Catalan and Basque were therefore not acknowledged as languages that could be associated with the Spanish nation. This had the effect of fueling the formation of movements in both regions along national lines.

Although Switzerland did not formally partake in the colonization of territories, the state continued to benefit from colonialism through other means. Switzerland, without having been a colonial power, participated in the trade between colonizing countries and colonized territories in support of colonizing efforts by other empires. Ulrich Ochsenbein, a member of the Swiss Federal Council in the first few years of the establishment of the Swiss nation-state, notably stated that the Swiss people would support the British empire in their colonialist pursuits due to the benefits they themselves received from distributing goods on a global scale.[26] Historians have studied the links between Switzerland, underdeveloped areas of the world, and the ways the Swiss nation benefited from colonization done by other countries or through participating in imperialist practices without a conventional empire. An example of Swiss participation in an activity considered imperialist would be the trade relations with the Levant established on unequal grounds.[27] The perception of Switzerland having taken advantage of a less economically prosperous region would fall under economic imperialism as it was a form of economic exploitation without conquering territory and establishing a mercantile relationship. Another example of Swiss imperialism without explicit colonialism would be the Swiss participation in the trans-Atlantic slave trade. Swiss businesses monetarily profited from the trade of slaves by acting as a middleman between the two parties in the trading relationship.[28] It was through these methods that Switzerland partook in the flow of capital associated with colonization. This source appears to contradict the theory that the reason behind Switzerland's success with national cohesion is the absence of a colonial history. However, despite involvement in imperial practices in the Global South, Swiss elites did not include these practices as a significant characteristic of the Swiss national identity. Within this source, there were historians who labeled the Swiss involvement in the global colonial markets as "covert colonialism" or going as far as branding their activities as that of a "secret empire."[29] These characterizations contribute further to the idea that Swiss financial engagement in imperialist practices was not widely known to the Swiss people and therefore could not have been an important element of the Swiss national identity to unify under. Unlike the Spanish people, who had great pride in their empire at its height, the Swiss general public was largely unaware of Switzerland's participation in imperialism.

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[25] Loureiro, "Ghost of Empire," 65.
[26] Patricia Purtschert, Francesca Falk, and Barbara Lüthi, "Switzerland and 'Colonialism without Colonies,'" *Interventions* 18, no. 2 (2015): 291, https://doi.org/10.1080/1369801x.2015.1042395.
[27] Ibid.
[28] Purtschert, Falk, and Lüthi, "'Colonialism without Colonies,'" 292.
[29] Purtschert, Falk, and Lüthi, "'Colonialism without Colonies,'" 291.

The Spanish colonial decline contributed to the decay of Spanish national unity and resulted in the splintering of nationalist movements. As a result of the loss of economically prosperous colonies, regions such as Catalonia and Basque Country began to question the incentives of identifying themselves as Spanish versus by their regional identities. This questioning developed into nationalist movements, prompting responses from Spanish elites in Madrid to revive Spanish nationalism through forging ties with former colonies. Switzerland did not face these setbacks due to supporting colonialism without a formal empire. The idea of covert imperialism demonstrates that colonialism was not an aspect of Swiss nationalism and was not identified as such by the public. As a result, Switzerland benefited from colonial prosperity without suffering domestically from colonial decline. The next section focuses on alternative theories about the success of Swiss nationalism not raised in the previous literature. These arguments are more related to factors that are traditionally associated with nationalist development, such as the spread of education and the use of political and cultural rituals.

IV. Conclusion

A comparative analysis of Swiss and Spanish national development illustrates the significance of Spanish colonial history on the current political climate of Spain. The similarities between Spain and Switzerland provide an interesting lens through which to inquire about the instability along national lines in Spain when compared to Switzerland. The reliance on the colonial empire as a form of Spanish national identity led to the formation of Catalonian and Basque nationalism during the period in which the Spanish empire was in decline. The theory employed in this paper was one that was influenced by Nairn's theory of nationalist development. However, rather than stating that nationalism began in the underdeveloped areas of the Spanish nation as a result of the uneven economic development brought about by colonialism, the importance was placed on colonialism as a means of establishing national unity in the colonizing nation. This was the primary difference between Switzerland and Spain that provided an answer to the current nationalist movements in Catalonia and Basque Country. Although Switzerland participated in practices that would be considered imperialist, the absence of a formal Swiss empire is notable. Without explicit promotion of these imperial activities, Swiss engagement with colonial powers did not become a significant aspect of Swiss nationalism. The attempts to restore a sense of Spanish national character after the fall of the empire were also deeply connected to the imperial past. The efforts of the Generation of '98 and the promotion of Hispanism came as a result of disillusionment with Spanish identity after the loss of the last colonies. With Hispanism in particular, the emphasis on a cultural connection with Latin America further isolated Catalonians and Basques due to the difference in language. Through looking at the Spanish and Swiss cases in particular, the connection between colonialism and nationalism continues to be an important subject within the study of nationalist movements.

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Comparative Politics

How Important is Social Class as a Guide to Voting Behaviour in the UK and US?

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Introduction

Marxist class theory defines social classes by their relationship to the means of production. There are two separate and mutually exclusive groups: the bourgeoisie, who own the means of production, and the proletariat, who provide the labour necessary for production.[1] The bourgeoisie purchases and, according to Karl Marx, exploits the proletariat's labour power to generate profits and expand their capital. The proletariat, who do not own any property or capital, must rely on employment by the bourgeoisie in order to survive. These social classes form the basis of the attitudes, beliefs, and behaviour of citizens.[2]

Marxist class theory's simplification of society into only two classes assumes that the interests of everyone in these two classes are uniform and aligned. In other words, everyone in the bourgeois class has the same values and interests, and everyone in the proletarian class has the same values and interests. Political scientists who follow Marx's theory espouse that voters will vote according to their social class and, therefore, it is possible to accurately predict the voting behaviour of citizens in consolidated democracies. Generally, they state that where democratic practices such as strong political institutions, political actors with a legitimate right to rule, respect for the rule of law, and free and fair elections are firmly embedded, social class dictates voting behaviour.[3]

The division of society between the bourgeoisie and the proletariat oversimplifies modern class structures, where different types of jobs, incomes, and interests have formed new classes, such as the middle class. Furthermore, as discussed later in this paper, voting behaviour is not homogenous or always aligned with social class. Rather, external factors such as religious beliefs, the persona of a party leader, a party's stance on a particular issue that the voter values and regional interests can supersede social class when it comes to voting behaviour. This paper argues that social class may give a general understanding of voting behaviour; however, it is not an overriding predictor of voting behaviour. Rather, citizens take many other factors into account when determining whom to vote for, and these factors must be considered to gain a comprehensive understanding of voting behaviour. This paper will examine the voting behaviour of citizens in the United Kingdom and the United States. Both countries have a history of strong and stable democratic governance and demonstrate that predicting voting behaviour is complex and must consider factors beyond social class. A review of general elections in the United Kingdom and the United States will support this argument.

I. Marxist Social Class Theory

Marx's theory of societal division implies that the exploitation of the proletariat by the bourgeoisie as a means of expanding their capital would lead to an ever-widening economic gap between the bourgeoisie and proletariat, creating a class struggle as the

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[1] R.J. Rummel, *Understanding Conflict and War* 3 (Beverly Hills, California: Sage Publications 1979), ch. 5, accessed March 27, 2023 https://www.hawaii.edu/powerkills/NOTE12.HTM.
[2] Edward Andrew, "Class in Itself and Class against Capital: Karl Marx and His Classifiers," *Canadian Journal of Political Science* 16, no. 3 (1983): 578.
[3] Juan J. Linz and Alfred C. Stepan, "Toward Consolidated Democracies," *Journal of Democracy* 7, no. 2 (1996): 14, accessed March 27, 2023 https://muse.jhu.edu/pub/1/article/16745.

bourgeoisie struggles to retain their control over the means of production, and the proletariat struggles to improve their quality of life.

Marx theorized that, over time, societal struggle would move beyond the ownership of property and the means of production. In this progression, as the struggle moves beyond an individual level and progresses to the societal level, each class would increasingly homogenize.[4] According to Marx, the heightened class consciousness within each group would prompt individuals to realize that, through identifying common interests and forming coalitions, a class could enhance both its economic and political influence. Political classes would emerge from social classes, with the bourgeoisie in a capitalist society holding political power because they controlled the means of production (i.e., capital). The business of the bourgeoisie was the business of the state,[5] and all state decisions would align with their interests. The ever-widening gap between the bourgeoisie and the proletariat would culminate in a proletarian revolution.[6] A successful proletarian revolution, Marx predicted, would result in an equitable society without any classes, as the means of production would be owned by all.[7]

Marx's social class theory predicted that the bourgeoisie and the proletariat would always behave as distinctly homogeneous entities to advance their own interests. Suppose Marx's social class theory fits today's modern democratic society. In this case, each social class should vote for the individual or political party that advances the economic and social interests of that class. According to this theory, social class is an excellent predictor of voting behaviour. However, voting behaviour is more complex than Marx theorized.

II. The United Kingdom

In the post-World War II era, the two primary parties in the United Kingdom were the Conservative Party and the Labour Party.[8] The Labour Party emerged early in the 20th century when labour organizations and trade unions were gaining prominence as a proletarian alternative to the Conservative and Liberal parties, which were perceived as representing the interests of the bourgeoisie. The Labour Party claimed to embody the principles of democratic socialism and trade unionism, traditionally representing working-class voters.[9] Labour Party voters were traditionally trade union members, coal miners, and often the "poorest citizens." Clause IV of the 1918 Labour Party constitution states the following:

> *To secure for the workers by hand or by brain the full fruits of their industry and the most equitable distribution thereof that may be possible upon the basis of the common ownership of the means of production, distribution, and exchange, and the best obtainable system of popular administration and control of each industry or service.*[10]

In contrast, the Conservative Party has traditionally adopted economic policies favouring private ownership of property, enterprise, free markets, and socially conservative

[4] Rummel, *Understanding Conflict*, ch.5.
[5] Rummel, *Understanding Conflict*, ch.5.
[6] Rummel, *Understanding Conflict*, ch.5.
[7] Rummel, *Understanding Conflict*, ch.5.
[8] Duncan Watts, *Understanding US/UK Government and Politics* (Manchester, UK: Manchester University Press, 2003), ix, accessed March 27, 2023 http://www.untag-smd.ac.id/files/Perpustakaan_Digital_2/POLITICS%20AND%20GOVERNMENT%20Understanding%20US-UK%20government%20and%20politics%20a%20comparative%20guide.pdf,
[9] Matthew Worley, *The Foundations of the British Labour Party* (Farnham, UK: Ashgate Publishing, 2009): 4.
[10] Aisha Gani, "Clause IV: a brief history," *The Guardian,* August 9, 2015, accessed March 27, 2023 https://www.theguardian.com/politics/2015/aug/09/clause-iv-of-labour-party-constitution-what-is-all-the-fuss-about-reinstating-it.

stances.[11] Unlike the Labour Party, Conservative voters were historically upper-class citizens, such as business owners,[12] farmers,[13] and land and real estate developers.[14]

According to Marx's class theory, in the United Kingdom, the bourgeoisie will vote Conservative as the party's social and economic policies align with their desire to accumulate and expand their capital. On the other hand, the proletariat will vote for the Labour Party as their social and economic policies, such as the redistribution of wealth, favour the interests of labourers and the less well-off in society.

Social class has played a vital role in elections in the UK. In the 1945 UK General Election, the defeat of Winston Churchill's Conservative Party by Clement Atlee's Labour Party was a monumental victory for the working class.[15] The Labour Party's campaign policies targeted working-class voters who suffered from the Great Depression and World War II, advocating for a more socialist and interventionist welfare state that guaranteed full employment and the nationalization of key industries.[16] Conversely, the Conservative Party was seen as promoting the interests of the wealthy by lowering taxes, promoting private business interests, and stressing that social reform should be done privately rather than through the government.[17] In the 1945 UK general election, social class was a critical determinative factor in voting behaviour.

According to the British National Readership Survey (NRS), the social classes of the bourgeoisie and proletariat are further broken down into four separate "social grades" based on occupations, which provide a more comprehensive understanding of different social classes.[18] In this survey, each household receives a social grade based on the occupation of the "Chief Income Earner" (CIE). Respondents must answer questions about the CIE's occupation, the type of organization they work for, and their job title and standing in the corporate hierarchy.[19] The highest grade is AB, which includes "managerial, administrative, or professional" workers, then the middle-grade C1, which includes "supervisory, clerical, and junior managerial, administrative or professional" workers, and C2, which includes "skilled manual workers." The lowest grade is DE: "semi and unskilled manual workers, state pensioners, casual or lowest-grade workers, or unemployed with state benefits only."[20]

The 2015 UK General Election markedly departed from traditional, bifurcated social class voting behaviour. Using social grades to evaluate voting behaviour according to social class, this election highlighted the importance of the middle class in the UK, a class not contemplated by Marxist class theory. Predictably, the Conservative Party was favourable among bourgeois AB voters, earning 45% of the votes of those in managerial or professional occupations. and the Labour Party was favourable among the proletarian DE voters, earning 41% of the votes of semi-skilled or unskilled citizens.[21] Most significantly, however, the Conservatives earned 41% of votes from C1 voters and tied with Labour in earning the support of 32% of C2 voters.[22] The Conservative Party's vote share was significant among middle-class voters in "supervisory, clerical, and junior

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[11] Lord Norton of Louth and Paul David Webb, "Conservative Party," *Encyclopedia Britannica*, November 4, 2023, accessed March 27, 2023 https://www.britannica.com/topic/Conservative-Party-political-party-United-Kingdom.
[12] Iain McMenamin, "For the first time in a century, there is no British party which is clearly pro-business," *London School of Economics,* August 11, 2018, accessed March 27, 2023 https://blogs.lse.ac.uk/businessreview/2018/08/11/for-the-first-time-in-a-century-there-is-no-british-party-which-is-clearly-pro-business/.
[13] Joshua Nevett, "Why some farmers are turning away from the Tories," *BBC News,* May 25, 2022, accessed March 27, 2023 https://www.bbc.com/news/uk-politics-61443452.
[14] Peter Walker, "Tories have unhealthy financial reliance on property developers," *The Guardian,* July 21, 2021, accessed March 27, 2023 https://www.theguardian.com/society/2021/jul/12/tories-have-unhealthy-financial-reliance-on-property-developers-says-report.
[15] Steven Fielding, "What Did 'The People' Want?: The Meaning of the 1945 General Election" *The Historical Journal* 35, no. 3 (1992): 624.
[16] Fielding, "What Did 'The People,'" 634.
[17] Imperial War Museum, "How Winston Churchill And The Conservative Party Lost The 1945 Election," accessed March 27, 2023 https://www.iwm.org.uk/history/how-winston-churchill-and-the-conservative-party-lost-the-1945-election.
[18] Ipsos, "Social Grade," accessed March 27, 2023 https://www.ipsos.com/sites/default/files/publication/6800-03/MediaCT_thoughtpiece_Social_Grade_July09_V3_WEB.pdf.
[19] Ipsos, "Social Grade."
[20] Ipsos, "Social Grade."
[21] Ipsos, "How Britain voted in 2015," accessed March 27, 2023 https://www.ipsos.com/en-uk/how-britain-voted-2015.
[22] Ipsos, "How Britain voted."

managerial, administrative or professional" occupations and "manual skilled workers," two groups that do not fall under the traditional definitions of the bourgeoisie or proletariat classes.[23]

Moreover, the Conservative Party's election strategy deviated from core right-wing ideas. Instead, they chose David Cameron, a 'change candidate,' who was more pragmatic and moderate than previous candidates and favourable among socially liberal and ethnically diverse voters, who would traditionally fall into the proletarian class.[24] Cameron moved away from policies that core Conservative Party voters had traditionally supported and took more moderate stances on key issues that the liberal middle class valued, such as the environment and supporting the National Health Service, public education, and state pensions.[25] Consequently, Cameron and the Conservative Party were perceived by voters as having economic and leadership competence, encouraging them to separate themselves from the traditional norms of their class voting Labour. Cameron led the Conservative Party to a majority government of 331 seats in the House of Commons.[26]

In 2015, the Conservative Party defied the traditional characterizations as the party of the upper class and wealthy by targeting issues important to middle-class voters. Aided by a pragmatic leader who vowed to serve national and non-partisan or non-sectional interests,[27] the Conservative Party expanded the party's base to a new group of voters, causing class dealignment and shifting votes away from Labour. This victory is an example of how Marxist class theory overlooks factors such as the interests of the middle class or the appeal of a party leader when predicting voting behaviour.

In the 2019 UK general election, a promised return to regional economic prosperity played a greater role in influencing voting behaviour than social policies aimed at the poor, working class of Northern England. A "red wall," consisting of a cluster of constituencies stretching from North down into the midlands of Central England and over to the north of Wales (including Sedgefield, the former seat of Prime Minister Tony Blair),[28] had consistently voted for the Labour Party for decades.[29] "Red wall" voters tended to be working-class, live in small cities and villages, and work primarily in industrial and manufacturing centers.[30] This area voted Labour because of their economic and social policies, which benefitted manual labour workers, trade union members, and the overall interests of lower and working-class voters.

However, as the manufacturing industry began to die in these areas, voters felt forgotten and alienated from the rest of the country.[31] This was exacerbated by the Labour Party's shift from democratic socialism to a neo-liberal centrist party under the New Labour movement between 1997 and 2010.[32] During the 2016 Brexit Referendum, "red wall" voters defied the Labour Party's pro-European Union stance and voted overwhelmingly to leave the European Union. This behaviour was driven not by social class but by a combination of economic decline, a sense of alienation, and a hope that leaving the European Union would restore economic prosperity to the region.[33]

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[23] Ipsos, "Social Grade."
[24] Tim Bale and Paul Webb, "The Conservatives: Their Sweetest Victory?" *Parliamentary Affairs* 68, no. 1 (2015): 43.
[25] Bale and Webb, "The Conservatives," 43.
[26] Dr. Andrew Mullen, "Political consultants, their strategies and the importation of new political communications techniques during the 2015 General Election," in *UK Election Analysis 2015: Media, Voters and the Campaign*ed. Daniel Jackson and Einar Thoresen, (Poole, England: Centre for the Study of Journalism, Culture & Community, Bournemouth University, 2015): 42.
[27] Chris Byrne, Nick Randall and Kevin Theakston, "A disjunctive Prime Minister: assessing David Cameron's legacy," *London School of Economics*, January 16, 2017, accessed March 27, 2023 https://blogs.lse.ac.uk/politicsandpolicy/assessing-david-camerons-legacy/.
[28] Daniel Wainwright, "General Election 2019: How Labour's Red Wall Turned Blue," *BBC News,* December 13, 2019, accessed March 27, 2023. https://www.bbc.com/news/election-2019-50771014.
[29] Josephine Rothery, "Left Behind, Looking Forward: The 2019 General Election, The Red Wall and The Labour Party" (M.SC diss, Canterbury Christ Church University, 2021): 2.
[30] Deborah Mattinson, "The Red Wall: What is it? Where is it? Who Lives There?" in *Beyond the Red Wall: How Labour Lost, How the Conservatives Won and What Will Happen Next,* (London UK: Biteback Publishing, 2020): 7.
[31] Mattinson, "The Red Wall," 8.
[32] Andrew Gamble, "New Labour and Political Change," *Parliamentary Affairs* 63, no. 4, (2010): 640.
[33] Thomson Reuters, "Labour Party's Red Wall across England falls as voters clamour for Brexit," *CBC News,* December 13, 2019, accessed March 27, 2023 https://www.cbc.ca/news/world/labour-party-s-red-wall-across-england-falls-as-voters-clamour-for-brexit-1.5395046.

During the 2019 General Election, the Labour Party's Manifesto was designed to appeal to the proletarian interests in that region. They promised to nationalize core industries such as water and rail, taking these key industries away from profit-generating bourgeois capitalists.[34] Labour also pledged to increase funding to the National Health Service (NHS) to provide better healthcare and increase taxes on the rich while raising the wages of the poor.[35] All of these promises should have appealed to the working-class voters of the "red wall." Instead, the Conservative Party broke through the "red wall" mainly because the Conservatives had promised to "Get Brexit Done" and bring back economic prosperity.[36] For the poor, working-class constituents in this region, their interest in a return to prosperity overrode the appeal of the Labour Party's social policies. Contrary to Marx's theory, the proletarian social class did not vote as a homogenous body to further the interests of the whole class.

III. The United States

Since the middle of the 19th century, the United States has been a two-party democracy dominated by the Republican Party and the Democratic Party. The Republican Party, the victorious anti-slavery party at the end of the Civil War, stood for increasing the economic well-being and the expansion of political rights for citizens, particularly for Black Americans.[37] However, by the early 20th century, the Republican Party had transformed into a more economically conservative party that opposed centralized government.[38]

At the time of the Civil War, the pro-slavery Democratic Party opposed all initiatives to empower Black Americans while supporting farmers and rural voters, particularly in the South.[39] However, as the Republican Party shifted to a more conservative platform in the early 20th century, the Democratic Party embraced the welfare state, liberalism, and civil rights.[40]

Like the UK, the US has one major liberal party and one major conservative party. However, unlike the UK, the US' two-party system does not have explicit support along class lines. Both parties claim to represent the interests of the working American, yet both have also found support among the wealthy. This was exemplified in the 2008[41] and 2016 elections,[42] when both parties tied in voter support among those earning $100,000 or more.

Despite this, social class played a vital role in Ronald Reagan's victory over Jimmy Carter in the 1980 US Presidential election.[43] Reagan's campaign appealed to upper-class voters by focusing on lowering taxes to stimulate economic growth. This concept was known as "Reaganomics"[44] and was supported by many due to economic stagflation and high oil prices at the time. Meanwhile, in the poor economic climate of the time, Carter's policies, aimed at the working class, were criticized for being too focused on an interventionist welfare state aimed at the lower classes.[45] Reagan won in a landslide

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[34] Philip Rycroft, "The December 2019 UK General Election: Reflections," *French Journal of British Studies* 25, no. 3 (2020): 4.
[35] Labour Party, *It's Time For Real Change: The Labour Party Manifesto 2019* (London, UK: Labour Party, 2019): 32, accessed March 27, 2023 https://labour.org.uk/wp-content/uploads/2019/11/Real-Change-Labour-Manifesto-2019.pdf.
[36] Conservative and Unionist Party, *Get Brexit Done: Unleash Britain's Potential - The Conservative and Unionist Party Manifesto 2019* (London, UK: Conservative and Unionist Party, 2019): 5, accessed March 27, 2023 https://www.conservatives.com/our-plan/conservative-party-manifesto-2019.
[37] Maria J. Albo et al., *The Basics of American Government* (Dahlonega, GA: University Press of North Georgia, 2013): 113.
[38] Albo et al., *The Basics of American Government,* 113.
[39] Albo et al., *The Basics of American Government*, 112.
[40] Brian D. Feinstein and Eric Schickler, "Platforms and Partners: The Civil Rights Realignment Reconsidered," *Studies in American Political Development* 22, (2008): 24.
[41] Roper Center For Public Opinion Research, "How Groups Voted in 2008," (Ithaca, NY: Cornell University, 2008), accessed March 27, 2023 https://ropercenter.cornell.edu/how-groups-voted-2008.
[42] Roper Center For Public Opinion Research, "How Groups Voted in 2016," (Ithaca, NY: Cornell University, 2016), accessed March 27, 2023 https://ropercenter.cornell.edu/how-groups-voted-2016.
[43] Vincente Navarro, "THE 1980 AND 1984 ELECTIONS AND THE NEW DEAL: An Alternative Interpretation," *International Journal of Health Services* 15, no. 3 (1985): 366.
[44] Navarro, "THE 1980 AND 1984 ELECTIONS," 362.
[45] Navarro, "THE 1980 AND 1984 ELECTIONS," 366.

victory, with 66% of voters earning more than $50,000 voting for Reagan.[46] This election, like the 1945 UK General Election, underscored the separation of the working and wealthy classes. However, this time it was the wealthy class that prevailed.

Donald Trump's victory in the 2016 presidential election is a key example of how Marxist social class theory did not accurately predict voting behaviour. Trump ran on a populist "Make America Great Again" platform.[47] He appealed to anti-illegal immigration sentiments by promising to build a wall along the Mexican border. He promised to increase jobs by renegotiating the North American Free Trade Agreement (NAFTA) and repeal the Affordable Care Act, or "Obamacare," which expanded health care coverage to more citizens. He also promised to cut taxes for all, including the wealthiest.[48] His policies, according to Marxist social class theory, should have appealed more to the bourgeoisie, capitalist class. In contrast, his opponent, Hillary Clinton, promised to ensure the wealthy pay their fair share of taxes, bolster unions, increase good paying jobs, and expand health care—a platform which should have been attractive to the proletarian, working class.[49]

According to the Marxist Class Theory, the Republican Party's economic and social policies should not have appealed to working-class voters during the 2016 election. However, Trump won 41% of the working-class vote in 2016,[50] 3% higher than previous Republican Presidential candidate Mitt Romney during the 2012 election.[51] Trump's appeal also extended to a significant portion of the middle-class vote, beating his opponent Hilary Clinton 49% to 46%.[52]

Trump's campaign policies appealed to voters in key swing states dominated by working and middle-class voters. These included Rust Belt states such as Ohio, Indiana, Michigan, Pennsylvania, and Wisconsin, which had all voted for the Democrats in the 2012 election.[53] Trump's protectionist trade policies appealed to working-class voters in states adversely affected by the decline of manufacturing jobs and the outsourcing of labour due to free trade and globalization.[54] Voters in these regions de-aligned themselves from their traditional Democratic leanings, earning Trump 75 Electoral College votes.[55]

Prior to the 2016 US General Election, the Republican Party was not generally a party that appealed to the working or middle-class population. It was usually perceived as the party of the wealthy, beating or tying the Democrats in votes among voters earning $100,000 or more in all elections since 1996.[56] However, in 2016, the interests of the middle class, a non-existent class under Marxist class theory, became a determinative factor. As in the UK, the regional interests of voters in key swing states dominated by a proletarian working class won Donald Trump the election despite losing the national popular vote. These regions voted against class lines, rejecting Clinton's proletarian, working-class policies of social justice, equality, and a social safety net for the vulnerable.

The 2016 US presidential election also highlighted the significant regional differences in voting behaviour between "rich" urban and "poor" rural areas. 32% of Hillary Clinton's votes came from urban voters who were younger and college educated.[57]

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[46] Roper Center For Public Opinion Research, "How Groups Voted in 1980," (Ithaca, NY: Cornell University, 1980), accessed March 27, 2023 https://ropercenter.cornell.edu/how-groups-voted-1980.
[47] Linda Qui, "Donald Trump's Top 10 Campaign Promises," *Politifact* (St. Petersburg, FL: Poynter Institute, 2016), accessed March 27, 2023 https://www.politifact.com/article/2016/jul/15/donald-trumps-top-10-campaign-promises/.
[48] Qiu, "Donald Trump."
[49] The Office of Hilary Rodham Clinton, "Issues," accessed March 27, 2023 https://www.hillaryclinton.com/issues/.
[50] Roper Center, "How Groups Voted in 2016".
[51] Roper Center For Public Opinion Research, "How Groups Voted in 2012," (Ithaca, NY: Cornell University, 2013), accessed March 27, 2023 https://ropercenter.cornell.edu/how-groups-voted-2012.
[52] Roper Center, "How Groups Voted in 2016".
[53] Federal Election Commission, "2012 Election Results," (Washington DC: Federal Election Commission, 2012): 6, accessed March 27, 2023 https://www.fec.gov/resources/cms-content/documents/tables2012.pdf.
[54] Michael McQuarrie, "The revolt of the Rust Belt: place and politics in the age of anger," *The British Journal of Sociology* 68, no. 1. (2017): 123.
[55] Politico, "2016 Presidential Election Results," accessed March 27, 2023 https://www.politico.com/2016-election/results/map/president/.
[56] Roper Center For Public Opinion Research, "How Groups Voted in 1996," (Ithaca, NY: Cornell University, 1996), accessed March 27, 2023 https://ropercenter.cornell.edu/how-groups-voted-1996.
[57] Pew Research Centre, "An examination of the 2016 electorate, based on validated voters," (Washington DC: Pew Research Centre, 2018), accessed March 27, 2023 https://www.pewresearch.org/politics/2018/08/09/an-examination-of-the-2016-electorate-based-on-validated-voters/.

These voters prioritized issues such as the treatment of minorities (race and LGBTQ), climate change, and healthcare.[58] In contrast, 35% of poorer, less-educated rural voters supported Trump.[59] This demographic prioritized issues such as economic growth, national security, and immigration.[60] If Marx's class theory was accurate, the urban, educated elite would have voted for Donald Trump, the candidate whose policies favoured their bourgeoisie interest in retaining wealth. The less educated, poor rural voters would have voted for Clinton's more equitable social and economic policies. Instead, the opposite was true, with regional priorities taking precedence over class priorities.

IV. Conclusion

The application of Marxist class theory to voting behaviour in consolidated democracies such as the United Kingdom and the United States reveals that society is not simply divided between two social classes, the bourgeoisie and the proletariat, with each class voting as a homogenous body aligned with its respective economic interests. Rather, voting behaviour is highly nuanced and complex. It can be influenced by factors such as the emergence of a middle class, the appeal of a party leader, regional interests, and party stances on key issues.

Marxist class theory has yet to accurately predict recent elections in either the UK or the US. In the 2015 UK national election, the traditionally bourgeoisie-favoured Conservative Party drew votes from middle-class voters by appealing to their concerns about issues such as the environment and public education. In 2019, the regional economic concerns of voters in parts of the UK overshadowed traditional class-based considerations, driving voters away from the proletarian Labour Party and towards the Conservatives. In the US, Donald Trump's policies during the 2016 presidential election appealed to the bourgeoisie class of American society. However, these policies also appealed to US society's middle and working-class segments. Further, regional interests overshadowed class interests among voters in crucial swing states. Voters in the UK and US have clearly defied Marx's predictions of voting behaviour.

Voting behaviour is complex, with voters considering many diverse factors—some not necessarily aligning with the interests of their social class—when deciding how to cast their vote. Therefore, while social class can certainly be one predictor of voting behaviour, it is not a definitive predictor.

[58] Pew Research Centre, "Top voting issues in 2016 election," (Washington DC: Pew Research Centre, 2016), accessed March 27, 2023 https://www.pewresearch.org/politics/2016/07/07/4-top-voting-issues-in-2016-election/.
[59] Pew Research Centre, "An examination of the 2016 electorate".
[60] Pew Research Centre, "Top voting issues".

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Section 4:

Political Theory

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Featuring:

"The Philosopher-King's Microphone: Socio-Political Dicta as Rhetorical Preemption"

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Political Theory

The Philosopher-King's Microphone: Socio-Political Dicta as Rhetorical Preemption

Kenichi Lobbezoo

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Introduction

"It is the first duty of a judge to remove from his judicial work his own social and philosophical and political or religious beliefs, and not to think of himself as being here as some great *philosopher-king*."

— Potter Stewart, Justice of the U.S. Supreme Court (1958-1981)[1]

The much-derided image of judges as philosopher-kings—sitting in their life-tenured sinecures and imposing their own judgments of what is wise and good on a powerless public—is famous. That conception of judging is anti-canonical, and, with few exceptions, judges never openly embrace it.[2] But the philosopher-king instinct has not been eradicated entirely. It is common for judges to opine in dicta on political, social, and philosophical issues. Jurists use this kind of rhetoric, which I will call socio-political dicta, to debate and discuss the socio-political values they believe properly undergird American society. Recognizing the use of socio-political dicta allows us to see an underappreciated element of judicial opinion writing—something I will call rhetorical preemption. Judges use dicta to preempt opposing *legal* views on *socio-political* grounds. That is, they argue that because their opponent is wrong for some fundamental socio-political reason, their opponent's legal arguments are also necessarily wrong. Despite Justice Stewart's admonition, the judge-as-philosopher-king is alive and well—he's just been relegated to dicta.

This paper proceeds in three parts. Part I explains and clarifies the concepts of socio-political dicta and rhetorical preemption, laying the theoretical basis for the remainder of the paper. Part II examines rhetorical preemption in the opinions of five jurists—Justice Antonin Scalia, Justice Clarence Thomas, and Justice Anthony Kennedy on the U.S. Supreme Court and Judge Andrew Kleinfeld and Judge Alex Kozinski on the courts of appeals. This allows us to see what exactly rhetorical preemption looks like in practice and to elucidate its more subtle characteristics. This Part also discusses how justices of the Supreme Court use socio-political dicta to consistently advance a cohesive worldview—Scalia articulated a defense of conservative social mores; Thomas's rhetoric focuses on the inherent and enduring strength of the individual, which in his view cannot be altered by government action; and Kennedy's writings are characterized by an evolving conception of personal liberty, which it is the judiciary's role to define. Part III argues that, despite its potential dangers, rhetorical preemption is an appropriate tool of judicial rhetoric for three principal reasons: (1) it is not inconsistent with the separation of law and politics, (2) it is conducive to good writing, and (3) judges need a safe outlet for their socio-political views.

I. Hidden in Plain Sight

What exactly is socio-political dicta, and what is rhetorical preemption? Dicta refers to "statements in a judicial opinion that are not necessary to support the decision

[1] Barrett McGurn, *America's Court: The Supreme Court and the People* (Golden: Fulcrum Publishing, 1997), 105 (emphasis added). Justice Stewart made these remarks at a press conference announcing his retirement from the Court.

[2] Judge Harry Pregerson was one notable exception, openly declaring that "[i]f I had to follow my conscience or the law, I would follow my conscience." Sam Roberts, "Harry Pregerson, Judge Guided by Conscience, Dies at 94," *New York Times*, November 29, 2017, https://www.nytimes.com/2017/11/29/obituaries/harry-pregerson-dead-ninth-circuit-judge-guided-by-conscience.html (last accessed November 6, 2023).

reached by the court."[3] Socio-political dicta expresses social, political, or philosophical views. It is an *a fortiori* argument that a legal position is wrong for fundamental socio-political reasons.

There are two steps to rhetorical preemption. First, a judge argues for the existence or recognition of some socio-political value. Second, the judge argues that the opposing viewpoint is inconsistent with that value. In other words, the preemptive argument renders the opposing legal arguments academic; it asserts, "the opposing view is wrong on fundamental socio-political grounds, so who cares about the technical legal arguments anyway?" Socio-political dicta, in this way, attempts to head off a legal argument before it can even begin for reasons of philosophy, social values, or political morality. The basic structure, distilled in a syllogism, is as follows:

> MAJOR PREMISE: Legal arguments that rest on faulty *socio-political* grounds are faulty *legal* arguments.
> MINOR PREMISE: The opposing legal argument rests on faulty socio-political grounds.
> CONCLUSION: The opposing legal argument is faulty.

Some readers may be skeptical of the idea that a legal argument can be preempted on socio-political grounds. After all, can an argument not be correct as a matter of law even if it comes from a questionable socio-political root? Does the *a fortiori* argument really work? This may be a potent question as a matter of LSAT logic, but the judges who engage in socio-political dicta left law school long ago. Socio-political dicta is ultimately a rhetorical project, not a legal or logical one. It is a tool of opinion writing divorced from legal reasoning.

There are two ways to understand how socio-political dicta plays into judicial decision-making. The first is that it plays no role; socio-political dicta, in that case, is merely supplementary to the truly dispositive legal arguments. That is, socio-political dicta is downstream from the legal argument. The second way of understanding it is that it plays at least some decisional role, with judges' socio-political views driving their legal reasoning to some extent. Under that understanding, the legal argument is downstream from the socio-political argument rather than the other way around. This question strikes at the very heart of debates over the judicial role, but it is far beyond the scope of this paper.[4] Instead, this paper takes judges at their word and assumes that there is no widespread judicial practice of decision-making based on socio-political, rather than legal, reasoning.[5] Rhetorical preemption is, after all, just that—a rhetorical tool. That is, rhetorical preemption does not preempt any legal argument substantively, only rhetorically. The bare existence of socio-political dicta does not suggest that those philosophical reasons provide the real rationale for judges' votes. This paper therefore assumes that, by and large, *legal* rationales provide the true reasons for judicial decision-making. Socio-political dicta is simply a powerful and interesting rhetorical move that judges make.

As we will see, socio-political dicta is used as rhetorical preemption in opinions by judges of every ideology and background. Hiding in plain sight, it is an understudied and underappreciated element of judicial rhetoric.

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[3] Michael C. Dorf, "Dicta and Article III," *University of Pennsylvania Law Review* 142, no. 6 (January 1994): 2000. For a discussion of how to distinguish dicta from legal holdings, see Pierre N. Leval, "Judging Under the Constitution: Dicta About Dicta," *New York University Law Review* 81, no. 4 (October 2006): 1249-1282.
[4] Indeed, this issue is the subject of an entire field of (largely empirical) political science and legal scholarship. See, e.g., Lee Epstein, Andrew D. Martin, Kevin M. Quinn, and Jeffrey A. Segal, "Ideology and the Study of Judicial Behavior," in *Ideology, Psychology, and Law*, ed. John Hanson (Oxford: Oxford University Press, 2012); Richard A. Posner, "Foreword: A Political Court," *Harvard Law Review* 119, no. 1 (November 2005): 31-102; Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge: Cambridge University Press, 2002); Tracey E. George & Lee Epstein, "On the Nature of Supreme Court Decision Making," *The American Political Science Review* 86, no. 2 (June 1992): 323-337.
[5] This does not preclude the possibility that some judicial philosophies actively allow or require the consideration of socio-political values in legal decision-making. See, e.g., David A. Strauss, "Common Law Constitutional Interpretation," *University of Chicago Law Review* 63, no. 3 (Summer 1996): 877-935 (arguing that courts should consider socio-political values as a legitimate factor in judicial decision-making).

II. Evidence From the Federal Judiciary

Now that we know what rhetorical preemption is, we can observe it in practice. This Part discusses the opinions of five jurists—Justice Scalia, Justice Thomas, Justice Kennedy, Judge Kleinfeld, and Judge Kozinski—and analyzes their use of rhetorical preemption. This highlights some of the phenomenon's more subtle points. The Supreme Court opinions discussed reveal how the Justices have advanced a unique socio-political vision through their rhetorically preemptive arguments. Scalia defended conservative social values, Thomas argued for the enduring strength of the individual detached from governmental acts, and Kennedy advocated for an evolving conception of personal freedom. Judge Kleinfeld and Judge Kozinski's opinions demonstrate how socio-political dicta and rhetorical preemption, far from being phenomena unique to the Supreme Court, are everyday tools of judicial rhetoric.

Justice Scalia and the Moral Minority

Justice Scalia was a legal giant. At first a lonely champion of originalism and textualism, his judicial philosophy has come to dominate American law.[6] He dabbled in socio-political dicta with great frequency. He was known for his colorful and sarcastic style, but it is important to distinguish between his writing style and his use of socio-political dicta. Between biting jokes and innovative metaphors, Scalia articulated a defense of the conservative and traditional values of what this paper labels the "Moral Minority:" a sizable but diminishing cohort of American society that, certainly at the time of Scalia's writing, clung on to conservative notions of morality.[7] Scalia's dissent in *Lawrence v. Texas*[8] and concurrence in *Glossip v. Gross*[9] are emblematic. He devoted significant portions of these opinions to socio-political dicta aimed at rhetorically preempting the opposing legal points.

Lawrence held that the Constitution prohibits the criminalization of same-sex intimate conduct. Scalia spent much of the opinion outlining his legal arguments—*stare decisis*, rational basis review, and so on. But in the final part of his opinion, Scalia deployed socio-political dicta. He charged that the Court's opinion, "is the product of a law-profession cultur[e] that has largely signed onto the so-called homosexual agenda."[10] He lamented that "the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed."[11] He continued:

> Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as "discrimination" which it is the function of our judgments to deter. So imbued is the Court with the law profession's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously mainstream[.][12]

Scalia's defense of the Moral Minority is in full swing here. His views—and consequently his writings—are the product of an era that preceded the recent sea-change in attitudes towards the LGBTQ+ community. In this passage, Scalia was no longer

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[6] See Lawrence B. Solum, "We Are All Originalists Now," in Robert W. Bennett & Lawrence B. Solum, *Constitutional Originalism: A Debate* (Ithaca: Cornell University Press, 2011). See also William Baude, "Is Originalism Our Law?" *Columbia Law Review* 115, no. 8 (December 2015): 2349-2408.

[7] "Moral minority" is a term that has been used elsewhere. See, e.g., David R. Swartz, *Moral Minority: The Evangelical Left in an Age of Conservatism* (Philadelphia: University of Pennsylvania Press, 2012). I am not referencing those other usages here. This essay merely uses the phrase as a useful turn on the name of Reverend Jerry Falwell Sr.'s famous activist organization, the Moral Majority. Many of the socially conservative viewpoints espoused by the Moral Majority find echoes in Scalia's socio-political dicta, but Scalia often found himself in the minority on the Supreme Court. This essay expresses no opinion on the merits of the implicated cases or social issues.

[8] Lawrence v. Texas, 539 U.S. 558, 586 (2003).

[9] Glossip v. Gross, 576 U.S. 863 (2015).

[10] *Lawrence*, 539 U.S. at 602.

[11] *Lawrence*, 339 U.S. at 602.

[12] *Lawrence*, 339 U.S. at 602-3.

talking about the law. Gone are the Latin terms, the standards of review, the discussions of precedent. Here, Scalia wrote purely about the political morality of the Supreme Court imposing new rules that displace older notions of morality. This may well be *the* canonical example of socio-political dicta: Scalia maintained that, even putting aside the legal arguments, the Court's decision is wrong as a matter of political morality because judges should not be in the business of overturning long-standing traditions.

This excerpt demonstrates the two-step preemption argument that Scalia made—recall the syllogism from earlier. First, as a threshold philosophical matter, the Court should not be imposing social values. Second, *Lawrence* imposed social values. It was therefore wrong, Scalia believed, before the legal analysis even began. Scalia's legal views presumably provided the dispositive reasons for his vote, yet even this devotee of judicial restraint[13] still harbored a philosopher-king instinct. He channeled that instinct into socio-political dicta, using it as a threshold argument against the majority's legal conclusions.

Scalia deployed socio-political dicta as rhetorical preemption once again in *Glossip*. This case concerned whether Oklahoma's use of the sedative midazolam as part of a three-drug execution protocol violated the Eighth Amendment's ban on cruel and unusual punishment. In an opinion by Justice Samuel Alito, the Court decided in favor of Oklahoma's protocol. Justice Stephen Breyer filed a dissent, arguing that it is "highly likely that the death penalty [itself] violates the Eighth Amendment."[14]

Scalia authored a concurrence responding to Breyer. In it, he criticized Breyer's arguments with characteristic sarcasm, writing that, "[a] vocal minority of the Court, waving over their heads a ream of the most recent abolitionist studies (a superabundant genre) as though they have discovered the lost folios of Shakespeare, insist that *now,* at long last, the death penalty must be abolished for good."[15] He wrote that Breyer's "argument is full of internal contradictions and (it must be said) gobbledy-gook."[16] Toward the end of Scalia's opinion, however, the legal analysis again subsided and gave way to a passage of pure socio-political dicta:

> Capital punishment presents moral questions that philosophers, theologians, and statesmen have grappled with for millennia. The Framers of our Constitution disagreed bitterly on the matter. For that reason, they handled it the same way they handled many other controversial issues: they left it to the People to decide. By arrogating to himself the power to overturn that decision, JUSTICE BREYER does not just reject the death penalty, he rejects the Enlightenment.[17]

This passage presents rhetorical preemption in action. Since the death penalty "presents moral questions that philosophers, theologians, and statesmen have grappled with for millennia," and because it divided even the Framers, it should be "left…to the People to decide." The Court, Scalia argued, had no business deciding this fraught moral question. To do so would be tantamount to rejecting the Enlightenment idea of republican government. Scalia's point was that, because the Court has no business opining on the death penalty, the particulars of Breyer's legal arguments were just academic. That is rhetorical preemption.

At first glance, Scalia's *Glossip* concurrence might appear to undercut the Moral Minority theme. After all, Scalia was in the majority. Understood in context, however, the *Glossip* concurrence was part and parcel of Scalia's defense of the Moral Minority. Scalia's rhetoric in this opinion was aggressive even by his own standards (Justice Breyer, rejecting the Enlightenment?). That tone should be understood in the context of the time

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[13] See Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997); Antonin Scalia, "The Rule of Law as a Law of Rules," *University of Chicago Law Review* 56, no. 4 (Autumn 1989): 1175-1188; Antonin Scalia, "Originalism: The Lesser Evil," *University of Cincinnati Law Review* 57, no. 3 (1989): 849-866. See also John F. Manning, "Justice Scalia and the Idea of Judicial Restraint," *Michigan Law Review* 115, no. 6 (April 2017): 747-782.
[14] *Glossip*, 576 U.S. at 946. See also Stephen Breyer, *Against the Death Penalty* (Washington, DC: Brookings Institution Press, 2016).
[15] *Glossip*, 567 U.S. at 894.
[16] *Glossip*, 567 U.S. at 895.
[17] *Glossip*, 567 U.S. at 899.

at which *Glossip* was decided. The decision came down in the summer of 2015 when the 2016 presidential election cycle was well underway. The virtually unanimous expectation among the commentariat was that Hillary Clinton would win the next year's presidential election and, importantly, preside over the first majority of Democratic appointees on the Supreme Court since the chief justiceship of Earl Warren.[18] That was not to be, but this expectation explains why Scalia wrote with such aggressiveness. After all, he had served with death penalty opponents before—Justices Brennan,[19] Marshall,[20] Blackmun,[21] and Stevens[22]—but he had never expressed this much hostility toward their views. This time, when he attacked Breyer's opinion, he likely did so with the belief that Breyer's view might command a majority on the Court in the not-so-distant future.

Seen this way, Scalia's concurrence cohered with the rest of his socio-political dicta in defense of the Moral Minority. He used socio-political dicta to preemptively criticize what he saw as a coming attack on the death penalty by a future majority.

This pattern appeared throughout Scalia's tenure on the Court. In *Romer v. Evans*, the Court held that Colorado could not prevent localities from granting gay individuals sexual orientation-specific legal protections.[23] Scalia took the majority to task for overturning "a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores."[24] Presaging his *Lawrence* dissent, he maintained that the Court had "no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected."[25] In *United States v. Virginia*, the Court struck down the Virginia Military Institute's male-only admissions policy.[26] Scalia blasted the Court for "shut[ting] down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half,"[27] and accused a "self-righteous Supreme Court" of "impos[ing] its own favored social and economic dispositions nationwide."[28] Finally, in *Planned Parenthood v. Casey*,[29] when the Court reaffirmed the right to abortion established by *Roe v. Wade*,[30] Scalia wrote that:

> [B]y foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish [of the national divide over abortion].[31]

Scalia would not live to see the day when the Court overruled *Roe* and *Casey*.[32]

Over and over again, he used socio-political dicta to make the preemption argument—that, even beyond the legal technicalities, the Court fundamentally has no business imposing values contrary to those of the Moral Minority. On these culture war issues, Scalia's fight was often a losing one. His opinion in *Lawrence* was a dissent. So too in *Romer*, and *Virginia*, and *Casey*, even if some of his views later enjoyed a majority on the Court. Scalia knew it too. There is perhaps no greater example of socio-political dicta than three simple sentences in a largely forgotten case about local politics. In *Board of*

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[18] See, e.g., "What Hillary Clinton Wants in a Supreme Court Justice," *ABC News*, October 24, 2016, https://abcnews.go.com/Politics/hillary-clinton-supreme-court-justice/story?id=43014620 (last accessed November 6, 2023).
[19] See Furman v. Georgia, 408 U.S. 238, 257 (1972) (Brennan, J., concurring).
[20] See *Furman*, 408 U.S. at 360 (Marshall, J. concurring) ("[C]apital punishment…is morally unacceptable to the people of the United States.").
[21] See Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) ("From this day forward, I no longer shall tinker with the machinery of death.").
[22] See Baze v. Rees, 553 U.S. 35, 71 (2008) (Stevens, J., concurring in the judgment).
[23] Romer v. Evans, 517 U.S. 620 (1996).
[24] *Romer*, 517 U.S. at 636.
[25] *Romer*, 517 U.S. at 636. (internal citation omitted).
[26] United States v. Virginia, 518 U.S. 515 (1996).
[27] *Virginia*, 518 U.S. at 566.
[28] *Virginia*, 518 U.S. at 601.
[29] Planned Parenthood v. Casey, 505 U.S. 833 (1992).
[30] Roe v. Wade, 410 U.S. 113 (1973).
[31] *Casey*, 505 U.S. at 1002 (Scalia, J., dissenting).
[32] See Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022).

County Commissioners, Wabaunsee County v. Umbehr, Scalia wrote, "[t]he Court must be living in another world. Day by day, case by case, it is busy designing a Constitution for a country I do not recognize…I dissent."[33] That case happened to be about the power of local politicians to terminate contracts for political purposes (a practice that Scalia considered "routine in American political life"[34]), but those words would have fit just as well in *Lawrence*, *Romer*, *Virginia*, or *Casey*. Time and again, Scalia used socio-political dicta to argue that the Court's legal conclusions were preempted by traditional notions of morality.

Justice Thomas and the Enduring Strength of the Individual

Justice Thomas has been on the Court for thirty-one and a half years, longer than all but eleven of his predecessors. In his decades on the Court, Thomas has articulated a distinctive originalist vision of the law. Unlike Scalia, however, Thomas does not often infuse his opinions with socio-political dicta. A survey of individual rights and culture war cases where one might expect to find socio-political dicta—the Second Amendment,[35] abortion,[36] cross-burning,[37] etc.[38]—turns up next to none.[39] By and large, Thomas's opinions are filled to the brim with legal analysis discussing historical evidence, precedent, and the like, but little to no commentary on social, political, or philosophical issues.

There are, however, two major exceptions: *Adarand Constructors, Inc. v. Pena*[40] and *Obergefell v. Hodges*.[41] In these cases, through uncharacteristic socio-political dicta, Thomas espoused a vision of the inherent and enduring strength of the individual, which in his view cannot be altered by government action. Like Scalia, he used socio-political dicta as a tool of rhetorical preemption. Unlike Scalia's writings, these opinions were not a hybrid between legal reasoning and socio-political dicta. Rather, they were tantamount to essays consisting of *only* socio-political dicta. This clarifies one important element of rhetorical preemption, which is that an opinion need not offer legal arguments of its own to conduct a preemptive argument. It is entirely possible to argue that an opposing legal view is wrong for some fundamental socio-political reason without providing a legal counterargument of one's own. Rhetorical preemption is independent of legal reasoning. That is what enables jurists—as Thomas did here—to make an argument based only on socio-political dicta.

Adarand was an affirmative action case. In an opinion authored by Justice Sandra Day O'Connor, the Court struck down mandatory preferences for racial minorities in federal contracting as violative of the equal protection principle of the Fifth Amendment.[42] Justice John Paul Stevens and Ruth Bader Ginsburg filed dissenting opinions.[43] Thomas filed a concurring opinion.

Thomas's *Adarand* concurrence is a brief 631 words. Virtually all of it is socio-political dicta. He was frank about his purpose:

> I write separately…to express my disagreement with the premises underlying JUSTICE STEVENS' and JUSTICE GINSBURG's dissents: that there is a racial paternalism exception to the principle of equal protection. I believe that there is a

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[33] Board of County Commissioners, Wabaunsee County v. Umbehr, 518 U.S. 668, 711 (1996).
[34] *Umbehr*, 518 U.S. at 711.
[35] See McDonald v. City of Chicago, 561 U.S. 742, 802 (2010) (opinion of Thomas, J.); New York State Rifle & Pistol Association, Inc. v. Bruen, 142 S.Ct. 2111 (2022).
[36] See Stenberg v. Carhart, 530 U.S. 914, 980 (2000) (Thomas, J., dissenting); Gonzalez v. Carhart, 550 U.S. 124, 168 (2007) (Thomas, J., concurring); Box v. Planned Parenthood of Indiana and Kentucky, Inc., 587 U.S. ____, ____ (Thomas, J., concurring).
[37] See Virginia v. Black, 538 U.S. 343, 388 (2003) (Thomas, J., dissenting).
[38] See, e.g., Grutter v. Bollinger, 539 U.S. 306, 349 (2003) (opinion of Thomas, J.); Gratz v. Bollinger, 539 U.S. 244, 281 (2003) (Thomas, J., concurring); Kansas v. Marsh, 458 U.S. 163 (2006); Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 748 (2007) (Thomas, J., concurring); Graham v. Florida, 560 U.S. 48, 97 (2010) (Thomas, J., dissenting).
[39] I cannot, as a practical matter, go through each of these cases and lay out how Thomas's opinions generally lack socio-political dicta. I invite interested readers to check my work and see for themselves.
[40] Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).
[41] Obergefell v. Hodges 576 U.S. 644 (2015).
[42] See Bolling v. Sharpe, 347 U.S. 497 (1954). See also Metro Broadcasting, Inc. v. Federal Communications Commission, 497 U.S. 547 (1990) (overruled by *Adarand*).
[43] *Adarand*, 515 U.S. at 242 (Stevens, J., dissenting), 271 (Ginsburg, J., dissenting).

> "moral [and] constitutional equivalence," between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. *Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law*.[44]

Thomas was saying here not only that there is no *legal* difference between affirmative action and other forms of race-based discrimination, but also that there is also no *moral* difference between the two. Individuals, according to Thomas, can never be stripped of their inherent equal worth, no matter what the government does. The government might seek to harm people on the basis of race, it might seek to benefit others on the basis of race; throughout it all, each individual is inherently equal to all others, and no governmental act can change that basic truth. In his view, government can neither grant nor deny equality, so the entire enterprise of racial preferences is pointless. Such focus on morality is a hallmark of socio-political dicta and rhetorical preemption.

Thomas went on, writing that affirmative action programs "undermine the moral basis of the equal protection principle,"[45] and that racial "classifications ultimately have a destructive impact on the individual and our society."[46] He continued that:

> So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences.[47]

Here, Thomas was not engaging in legal analysis—he was not surveying historical evidence of the Constitution's original meaning, he was not talking about *stare decisis*, he was not applying canons of interpretation. This was pure socio-political dicta. When Thomas charged that "[t]hese programs stamp minorities with a badge of inferiority," he was discussing the socio-political, rather than legal, problems he sees in affirmative action programs.[48] Because affirmative action is wrong on these fundamental philosophical grounds, Thomas argued, legal arguments to the contrary are merely academic. Therein lies the preemptive argument.

Although dealing with a different issue, Thomas's opinion in *Obergefell* expresses the same ideas about the inherent and enduring strength of the individual. The Court held that the Constitution protects a right to same-sex marriage. Thomas dissented.

Justice Kennedy's majority opinion was abundant with discussion of human dignity. The Court wrote that marriage "always has promised…dignity to all persons, without regard to their station in life."[49] It stated that the Constitution protects "certain personal choices central to individual dignity"[50] and declared that "[t]here is dignity in the bond between two men and two women who seek to marry and in their autonomy to make such profound choices."[51] This concept of dignity—and the constitutional protection of it—was central to *Obergefell*. Thomas's dissent was almost singularly focused on refuting the dignity-based rationale. As he explained at the outset, his opinion was about the idea that "[t]he Court's decision today is at odds not only with the Constitution, but with the *principles* upon which our Nation was built."[52] The political philosophy of the

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[44] *Adarand*, 515 U.S. at 240 (quoting 243 (Stevens, J., dissenting)) (brackets in original) (emphasis added).
[45] *Adarand*, 515 U.S. at 240.
[46] *Adarand*, 515 U.S. at 240.
[47] *Adarand*, 515 U.S. at 241.
[48] The "badge of inferiority" is surely a turn on Justice Henry Billings Brown's infamous use of that phrase. See Plessy v. Ferguson, 163 U.S. 537, 551 (1896) ("We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority.").
[49] *Obergefell*, 576 U.S. at 656.
[50] *Obergefell*, 576 U.S. at 663.
[51] *Obergefell*, 576 U.S. at 666.
[52] *Obergefell*, 576 U.S. at 721 (emphasis added).

Constitution (not to mention American society), Thomas maintained, is inconsistent with the political philosophy exhibited in the Court's opinion.

In Part IV of his opinion, Thomas engaged in an extended discussion of the meaning of dignity. He wrote that, "human dignity has long been understood in this country to be *innate*."[53] He maintained that the Declaration of Independence, that foundation of American political philosophy, "referred to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth," and that this vision "is the foundation upon which this Nation was built."[54] Then this followed:

> The corollary of that principle is that human dignity cannot be taken away by the government. Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. Those held in internment camps did not lose their dignity because the government confined them. And those denied governmental benefits certainly do not lose their dignity because the government denies them those benefits. The government cannot bestow dignity, and it cannot take it away.[55]

This distinctive conception of individual dignity powered Thomas's dissent.[56] He concluded that, because *this* is the proper understanding of human dignity, "the majority's musings [about dignity] are…deeply misguided."[57] Just as in *Adarand*, Thomas argued for the inherent strength of the individual. In *Adarand*, he maintained that government could not create or destroy equality because it is inherent. In *Obergefell*, Thomas argued that the government "cannot bestow dignity, and it cannot take it away," because dignity too is inherent.

Thomas's socio-political point was that the Court's discussion of dignity is utterly contrary to the correct conception of dignity. He also argued that the legal conclusions which flow from the Court's understanding of dignity were wrong because of the threshold philosophical error. In his dissent's final paragraph, Thomas wrote that "[o]ur Constitution—like the Declaration of Independence before it—was predicated on a simple truth: One's liberty, not to mention one dignity, was something to be shielded from—not provided by—the State. Today's decision casts that truth aside."[58] That is the preemptive argument here: if the Court casts aside these basic philosophical truths, who cares about its technical legal arguments? Even as the other *Obergefell* dissenters criticized the majority for discussing soft concepts like dignity at all, Thomas met Kennedy in the open field of socio-political battle. That is the essence of rhetorical preemption.

Justice Kennedy and the Promise of Liberty

The socio-political dicta reviewed so far has appeared in separate opinions—both concurrences and dissents. Perhaps, then, socio-political dicta and rhetorical preemption are phenomena unique to separate opinions. Not so. Although more common in concurrences and dissents, socio-political dicta also appears in notable majority opinions. Justice Kennedy's jurisprudence is instructive. In a series of majority opinions, Kennedy uses socio-political dicta and rhetorical preemption to advance an evolving conception of personal liberty. His jurisprudence also exhibits a robust conception of the Supreme Court's role in determining what that liberty consists of. His opinions for the Court in two cases discussed previously—*Lawrence* and *Obergefell*—demonstrate this.

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[53] *Obergefell*, 576 U.S. at 735 (emphasis added).
[54] *Obergefell*, 576 U.S. at 735.
[55] *Obergefell*, 576 U.S. at 735 (parenthetical in original).
[56] Although he does not explicitly say so, one can speculate that Thomas's views were influenced by the writings of his one-time law clerk, Judge Neomi Rao, which neatly track Thomas's conception of dignity in *Obergefell*. See, e.g., Neomi Rao, "The Trouble with Dignity and Rights of Recognition," *Virginia Law Review Online* 99, no. 1 (August 2013): 29-38; Neomi Rao, "Dignity of Recognition and Federalism," *The Volokh Conspiracy*, Sept. 26, 2013, https://volokh.com/2013/09/26/dignity-doma-federalism/ (last accessed November 6, 2023); Neomi Rao, "Three Concepts of Dignity in Constitutional Law," *Notre Dame Law Review* 86, no. 1 (February 2011): 183-272; Neomi Rao, "On the Use and Abuse of Dignity in Constitutional Law," *Columbia Journal of European Law* 14, no. 2 (Spring 2008): 201-256.
[57] *Obergefell*, U.S. 576 at 735.
[58] *Obergefell*, U.S. 576 at 735.

Lawrence, once again, held that states are constitutionally barred from criminalizing same-sex intimate conduct. Kennedy held that so-called anti-sodomy laws fail rational basis review. Socio-political dicta permeates the entire opinion. At the very outset, Kennedy wrote:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.[59]

In this passage, Kennedy set forth a hard-to-pin-down, almost mystical conception of personal liberty. There is no legal analysis here. The paragraph is pure socio-political dicta, expressing a vision of the kind of liberty that properly animates American society. The expression of that vision is divorced from the specific requirements of any particular constitutional provision.

Kennedy builds on this theme at the end of the opinion, stating that the Framers of the Constitution "did not presume" to "kno[w] the components of liberty in its manifold possibilities."[60] They understood, according to Kennedy, that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress."[61] The socio-political dicta here is the flip-side of the dicta in Scalia's jurisprudence. Where Scalia criticized the Court for imposing values contrary to traditional notions of sexual morality, Kennedy argues that it is precisely American society's expansive sense of liberty that requires the Court to strike down anti-sodomy laws. That liberty, Kennedy says, is not static. It evolves as society evolves, and "persons in every generation can invoke [the Constitution's] principles in their own search for greater freedom."[62] Kennedy's socio-political dicta thus preempted the dissent's legal arguments—it implied Scalia's legal argument was fundamentally flawed from the beginning because the latter did not recognize the Court's role in protecting modern society's understanding of liberty.

Kennedy's conception of liberty is not just one that is expansive and evolving, but also one the Supreme Court has a privileged role in defining. If Scalia's socio-political point was that the Court has no business questioning traditional moral beliefs, Kennedy's is that it *must* be the Court's role to recognize newfound understandings of personal freedom.

Kennedy makes a similar socio-political argument in *Obergefell*. As discussed previously, statements about human dignity pervade the Court's opinion in that case. Echoing *Lawrence*, Kennedy spends much time discussing liberty. For example, he writes at the start of the opinion that "[t]he Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity."[63] He says that the Framers "entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."[64] The opinion also reiterates the evolving character of this conception of freedom, asserting that "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries."[65]

The preemption Kennedy offers here mirrors that used in *Lawrence*: American society is animated by an expanding notion of liberty; the dissents do not even recognize that as within the proper role of the Court; because the dissents suffer from that core

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[59] *Lawrence*, 539 U.S. at 562.
[60] *Lawrence*, 539 U.S. at 578-79.
[61] *Lawrence*, 539 U.S. at 578-79
[62] *Lawrence*, 539 U.S. at 579.
[63] *Lawrence*, 539 U.S. at 651-52.
[64] *Lawrence*, 539 U.S. at 664.
[65] *Lawrence*, 539 U.S. at 664.

philosophical problem, their legal points are necessarily wrong. *Lawrence* and *Obergefell* do not stand alone. Take this passage from the joint opinion in *Casey*, very likely written by Kennedy:

> At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[66]

This idea of liberty as an autonomous, evolving thing featured prominently in Kennedy's jurisprudence. In opinion after opinion, Kennedy used this rhetoric to preempt opposing legal arguments on socio-political grounds. For Kennedy, this specific protection of liberty is within the Court's ambit. This move rhetorically preempts any opposing argument that doesn't buy into this first premise. Just as Scalia articulated a defense of a Moral Minority and just as Thomas' elucidated a vision of the inherent strength of the individual, Kennedy advocated for an expansive conception of personal liberty.

In the Lower Courts

The rhetorical preemption discussed so far stems solely from Supreme Court decisions. Maybe, then, it is something relatively isolated to the highest court in the land. The justices of that court, after all, do not face a high case load.[67] Perhaps rhetorical preemption is exclusive to opinion writing where time is not a serious constraint. A preliminary look at the lower courts, however, shows this is not the case. Rhetorical preemption is, in fact, used frequently in the lower courts. It is not common in the federal district courts, where cases are typically presided over by a single judge,[68] but it is frequently deployed in the federal courts of appeals.

In January 2002, the Ninth Circuit denied rehearing *en banc*[69] in *Lavine v. Blaine School District*.[70] The three-judge panel had held that the First Amendment (as incorporated via the Fourteenth Amendment[71]) permitted a public high school's temporary expulsion of a student for writing a poem about a fictional school shooting that he perpetrated. Judge Andrew Kleinfeld filed a dissent. He would have reversed the panel

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[66] *Casey*, 505 U.S. at 851.

[67] On the Sixth Circuit, which is roughly in the middle of the pack when it comes to federal appellate caseloads, the average judge in active service decides 128 cases per year; the Supreme Court decided a mere 66 cases in its October 2021 Term. Compare "Table B—U.S. Courts of Appeals Statistical Tables for the Federal Judiciary," *Federal Judicial Center*, December 31, 2022, https://www.uscourts.gov/statistics/table/b/statistical-tables-federal-judiciary/2022/12/31 (last accessed November 6, 2023) with Angie Gou, Ellena Erskine, & James Romoser, "STAT PACK for the Supreme Court's 2021-22 term," *SCOTUSblog*, July 1, 2022, https://www.scotusblog.com/wp-content/uploads/2022/07/SCOTUSblog-Final-STAT-PACK-OT2021.pdf (last accessed November 6, 2023). The justices also get their summers off. As Chief Justice John Roberts wrote in a memorandum 22 years before joining the Court, "only Supreme Court justices and schoolchildren are expected to and do take the entire summer off." See, John M. Broder & Carolyn Marshall, "White House Memos Offer Opinions on Supreme Court," *The New York Times*, July 20, 2005, https://www.nytimes.com/2005/07/30/politics/politicsspecial1/white-house-memos-offer-opinions-on-supreme-court.html (last accessed November 6, 2023).

[68] Because cases in U.S. District Courts are typically heard by single judges, the back-and-forth rhetorical preemption we have seen at the appellate level is not possible at the trial level. District Courts do, however, retain the opportunity to engage in socio-political dicta and rhetorical preemption as a response to a litigant's argument.

[69] In the U.S. courts of appeals, rehearing *en banc* is a rehearing of a case by an entire court rather than the three-judge panel that heard the original appeal. The Ninth Circuit employs an *en banc* procedure unique among the federal courts of appeals: due to the sheer size of the court—there are fully twenty-nine active judgeships—*en banc* petitions are considered by the entire court, but *en banc* proceedings themselves are heard by (still sizable) panels of eleven judges. See, e.g. William Yeatman, "Ninth Circuit Review-Reviewed: Is CA9's En Banc Process Driving Disagreement?" *Notice & Comment*, *Yale Journal on Regulation,* December 10, 2020, https://www.yalejreg.com/nc/ninth-circuit-review-reviewed-is-ca9s-en-banc-process-driving-disagreement-by-william-yeatman/ (last accessed November 6, 2023).

[70] Lavine v. Blaine School District, 279 F.3d 719 (9th Cir. 2002).

[71] See Gitlow v. New York, 268 US. 652 (1925). A somewhat idiosyncratic nomenclature has arisen from the Supreme Court's incorporation jurisprudence. Even though incorporated rights are protected by the Fourteenth Amendment as a formal matter, judges and commentators routinely describe them as protected by the incorporated Bill of Rights provision instead.

decision, believing that the Supreme Court's school speech cases[72] did not allow the action on the issue. Laced through Kleinfeld's legal argument is a second, socio-political argument about society's values: he argued that the school's action—and the Ninth Circuit's approval thereof—are inconsistent with the values of a free society.

To Kleinfeld, the panel's holding and the Ninth Circuit's decision to leave it undisturbed was tantamount to the infantilization of high school students. He saw a society made so jumpy by a press-induced "hullabaloo"[73] that it perceived a fictional "dramatic monologue"[74] about past killings as a prospective threat to kill.[75] Kleinfeld went on that "[c]onstitutional law ought to be based on neutral principles, and should not easily sway in the winds of popular concerns, for that would make our liberty a weak reed that swayed in the winds," and "such constitutional law ought not to be based on [the panel's] vague popular sociology."[76] Kleinfeld was making a socio-political point about the importance of free expression in a societal, rather than legal, context. Still, his point was deeper. Kleinfeld ultimately believed that his colleagues on the Ninth Circuit—and society in general—had gone soft. He accused his colleagues of embarking on a project to "mak[e] high schools cozy places, like daycare centers, where no one may be made uncomfortable by the knowledge that others have dark thoughts, and all the art is of hearts and smiley faces."[77]

In Kleinfeld's view, the world is a harsh place full of disturbing and uncomfortable things. He believed it improper for the government to shield high school students from that reality and insulate them in a fictional "cozy" world free from the "knowledge that others have dark thoughts." To do so, Kleinfeld thought, is to infantilize these students. The rhetoric here was certainly provocative,[78] but helps us to see the rhetorical preemption more clearly at work. Putting the legal technicalities aside, Kleinfeld argued, the panel opinion was wrong on a socio-political level because it infantilized high school students. This is philosopher-king's work.

For another example, consider Judge Alex Kozinski's opinion dissenting from the denial of rehearing *en banc* in *White v. Samsung Electronics America, Inc.*[79] The case, also in the Ninth Circuit, concerned whether Samsung could lawfully produce an advertisement featuring a robot with similarities to Vanna White, co-host of *Wheel of Fortune*. A three-judge panel ruled in favor of White, and the full Ninth Circuit denied Samsung's petition for a rehearing *en banc*. Kozinski dissented.

Kozinski's legal points were quite orthodox: he saw Samsung's advertisement as merely *reminding* people of Vanna White in a humorous way, not stealing her image. He also believed the applicable statute did not preclude the commercial. Kozinski's rhetoric, however, is striking. Take just the opening lines of his opinion:

> Saddam Hussein wants to keep advertisers from using his picture in unflattering contexts. Clint Eastwood doesn't want tabloids to write about him. Rudolf Valentino's heirs want to control his film biography. The Girl Scouts don't want their image soiled by association with certain activities. George Lucas wants to keep Strategic Defense Initiative fans from calling it "Star Wars." Pepsico doesn't want singers to use the word "Pepsi" in their songs. Guy Lombardo wants an

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[72] See Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969); Papish v. Board of Curators of University of Missouri, 510 U.S. 667 (1973); Bethel School District v. Fraser, 478 U.S. 675 (1986); Hazelwood School District et al. v. Kuhlmeier et al., 484 U.S. 260 (1988). See also Morse v. Frederick, 551 U.S. 393 (2007).
[73] *Lavine*, 279 F.3d at 721.
[74] *Lavine*, 279 F.3d at 722.
[75] *Lavine*, 279 F.3d at 722
[76] *Lavine*, 279 F.3d at 728. This line is reminiscent of the famous (or perhaps infamous) aphorism that "those who would give up essential liberty, to purchase a little temporary safety, deserve neither liberty nor safety." Those words come from Benjamin Franklin, but their original context apparently does not support the meaning that popular culture has attributed to them. See Benjamin Wittes, "What Ben Franklin Really Said," *Lawfare,* July 15, 2011, https://www.lawfareblog.com/what-ben-franklin-really-said (last accessed November 6, 2023).
[77] *Lavine*, 269 F.3d at 721.
[78] Whatever one thinks of Kleinfeld's legal arguments or rhetorical choices, it is hard to conclude that he is *defending* the student's poem—he repeatedly calls it "disturbing." And Kleinfeld acknowledges that the poem would be categorically unprotected by the First Amendment if it qualified as a true threat (which the panel concluded it did not). But absent such a finding, it is (in Kleinfeld's view) merely a disturbing poem. His point, properly understood, is that society should not blind itself to such disturbing thoughts.
[79] White v. Samsung Electronics America, Inc, 989 F.2d 1512 (9th Cir. 1993).

> exclusive property right to ads that show big bands playing on New Year's Eve. Uri Geller thinks he should be paid for ads showing psychics bending metal through telekinesis. Paul Prudhomme, that household name, thinks the same about ads featuring corpulent bearded chefs. And scads of copyright holders see purple when their creations are made fun of. Something very dangerous is going on here.[80]

Many phrases can describe this passage, but *legal argumentation* is not one of them. It is not often that Saddam Hussein, George Lucas, and Pepsi are invoked within just a few sentences of each other. This is the beginning of Kozinski's socio-political argument.

In the following paragraph, he wrote that "[c]reativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before."[81] There is the preemptive argument. Kozinski characterized the majority's legal analysis as, in a sense, purely academic, because the majority opinion misunderstands the very way culture develops. In the penultimate paragraph of his opinion, Kozinski summarized his socio-political point as follows:

> For better or worse, we *are* the Court of Appeals for the Hollywood Circuit. Millions of people toil in the shadow of the law we make, and much of their livelihood is made possible by the existence of intellectual property rights. But much of their livelihood—and much of the vibrancy of our culture—also depends on the existence of other intangible rights: The right to draw ideas from a rich and varied public domain, and the right to mock, for profit as well as fun, the cultural icons of our time.[82]

As Kozinski saw it, the fatal socio-political flaw in the panel majority's opinion was the disparagement of those intangible rights that make a vibrant culture possible.

A comprehensive assessment of rhetorical preemption in the lower courts is well beyond the scope of this essay, and a task for future scholarship. For now, though, it is enough to conclude that major lower court opinions often contain socio-political dicta as rhetorical preemption. It is a common tool of judicial rhetoric.

III. A Proper Tool of Judicial Rhetoric?

The Massachusetts Declaration of Rights of 1780 announced that the people of that commonwealth—citizens of a nation which, just four short years ago, declared independence from the British Crown—would be ruled by a "government of laws and not of men."[83] That famous phrase sits firmly within the nation's historical canon. It is an axiomatic statement of the principles that properly define American government. The words' precise origins have been lost to history, but they have found a vaunted place in the pages of countless legal documents, public speeches, and judicial opinions.[84] If that principle means anything, it is that the democratically enacted law, rather than the personal predilections of individuals, should govern our society. Implicit in that notion is a prohibition on non-legal decision-making in the courts—no philosopher-kings allowed. To complain about imperfect fidelity to that principle is not novel. What has gone largely unnoticed, however, is the phenomenon of rhetorical preemption that this essay has elucidated.

So, is rhetorical preemption a proper tool of judicial rhetoric? Upon preliminary analysis, I submit the answer is yes. There are potential dangers, but rhetorical preemption is ultimately consistent with exclusively legal decision-making and serves important independent interests.

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[80] *White*, 989 F.2d at 1512-13 (internal citations omitted).
[81] *White*, 989 F.2d at1513.
[82] *White*, 989 F.2d at (emphasis in original).
[83] Mass. Const. of 1780 Art. XXX.
[84] Indeed, a quick Google search for the phrase (and only the phrase) yielded 284,000 results. A search on HeinOnline yielded 7,837 results.

First, rhetorical preemption is not inconsistent with a commitment to exclusively legal decision-making. As we have seen, jurists can rest their vote or decision purely on legal reasons and offer socio-political reasons that rhetorically support that decision. Remember that rhetorical preemption is merely a *rhetorical* tool—it is an instrument of argumentative writing to make an opinion more persuasive, not the decisional rationale itself. Indeed, there is not a hint in any of the opinions reviewed here that a judge's socio-political views, rather than their best understanding of the law, motivated their vote. Rhetorical preemption, therefore, survives the most serious challenge: it does not threaten the separation of law and politics.

Second, rhetorical preemption is conducive to good writing. There is no reason that formal writing—legal writing included—should be purely technical and consequently dull. In recent decades, there has been a lamentable decline in the stylishness and rhetorical vigor of American judicial writing. As Paul Kahn has argued, judicial opinions "are getting much longer and they require more footnotes," exhibit a "reluctance to speak directly," and "are largely composed by stringing together quotations from prior opinions" as if "writing an opinion has become a task of cutting and pasting."[85] At a time when judicial opinions are losing more and more of their personality,[86] rhetorical preemption is an appropriate way to inject some flourish back into the federal reporter.[87]

Further, rhetorical preemption does not just improve the readability of judicial writing, it can also improve the reader's *understanding* of cases. Particularly for a lay audience, rhetorical preemption can set up the stakes of a case. The opinions reviewed in this paper could have been far more opaque to non-lawyer readers had their authors forgone rhetorical preemption. *Adarand*, when reduced to its purely legal elements, is a case about the proper application of the tiers of scrutiny for the reverse-incorporated equal protection principle of the Due Process Clause of the Fifth Amendment. Rhetorical preemption, however, can explain the stakes: it is a case about affirmative action in the employment context. For these reasons, rhetorical preemption improves both the readability of opinions and a lay audience's ability to understand them. Rhetorical preemption is conducive to good writing.

Third, judges need a safe outlet for their socio-political values. It is foolish to pretend judges could or should have no views outside the law—they are human beings with real views on many subjects, and they need an outlet where they can express these views on matters political, philosophical, and social. As Judge Patricia Wald wrote, "[j]udges, like other writers, never succeed in altogether hiding their own personalities behind the black robes."[88] It is no accident that socio-political dicta shows up most frequently in dissents (though, as we have seen, there are exceptions). It is when a judge has lost on the legal merits that the need to undermine the majority on antecedent philosophical grounds is the strongest. As Wald has shown, dissents are "most apt to turn away from the technicalities of the majority holding and play to higher levels of aspirations and values."[89] It is also no coincidence that socio-political dicta appears most often in cases about social issues that divide the nation—gay rights, affirmative action, the death penalty, and so on. Those are the cases where jurists have the greatest opportunity to discuss and debate the values that properly undergird American society. It is in these moments when judges are the least restrained that socio-political dicta is the clearest. This kind of tangential expression of non-legal views has long been a common tool of judicial opinion writing, and rhetorical preemption is just one iteration of it. Rhetorical preemption is no less appropriate in this regard than socio-political dicta itself.

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[85] Paul W. Kahn, *Making the Case: The Art of the Judicial Opinion* (New Haven: Yale University Press, 2016), 11 (parentheticals omitted).
[86] For further criticism of modern judicial writing, see Richard A. Posner, "Legal Writing Today," *Scribes Journal of Legal Writing* 8 (2001-2002): 35-38.
[87] To be sure, not all recent judicial writing is dull. Particularly at the Supreme Court level, some judges still keep it lively. See, e.g., Selia Law LLC v. Consumer Financial Protection Bureau, 140 S. Ct. 2183, 2226 (2020) (opinion of Kagan, J.) ("What does the Constitution say about the separation of powers—and particularly about the President's removal authority? (Spoiler alter: about the latter, nothing at all.) The majority offers the civics class version of separation of powers—call it the Schoolhouse Rock definition of the phrase.") (internal citations omitted) (parenthetical in original).
[88] Patricia M. Wald, "The Rhetoric of Results and the Results of Rhetoric: Judicial Writings," *University of Chicago Law Review* 62, no. 4 (Autumn 1995): 1415.
[89] Wald, 1412.

In a similar vein, rhetorical preemption can also be an effective conduit for judges as public intellectuals. Judges are not just bureaucrats in robes—it has long been accepted in the Anglo-American tradition that judges may act as public commentators at least some of the time. Justice Scalia and Judge Richard Posner were perhaps the most prominent in recent memory.[90] Judicial opinions are, of course, not the main conduit for that genre of scholarship. The inclusion of socio-political dicta and rhetorical preemption nonetheless enables judges to appeal to lay readers and present a unified worldview.

None of this means that judges should use their opinions as freewheeling op-eds. It is one thing for Judge Kozinski to comment on the principles he thinks contribute to a vibrant culture; it would be another thing entirely for him to endorse a presidential candidate in the pages of the federal reporter. Restraint and judgment are necessary. Rhetorical preemption, like all socio-political dicta, should be pertinent and appropriate to the case at hand. To be sure, there is a potential danger here: if judges get in the habit of mixing their legal and socio-political arguments together in writing, they may start mixing the two together in their thinking. This possibility must be avoided at all costs. Rhetorical preemption is only an appropriate tool of judicial rhetoric if it can remain purely *rhetorical*. Judges should be accustomed to drawing a bright line of separation between their legal reasoning and their socio-political views. Legal reasoning, and legal reasoning alone, must decide the case. Everything else can only provide rhetorical gloss.[91] Judges who undertake the rhetorical activities of philosopher-kings must scrupulously exercise this kind of discipline.[92]

This potential danger, moreover, is not enough to overcome the benefits of rhetorical preemption. The risk that judges will resolve cases on non-legal socio-political grounds is always present, whether judges express their thoughts in preemptive dicta or not. Far better, in my view, for judges to show their socio-political work in the opinion and clearly demarcate their socio-political views and legal views than to keep the non-legal views secret and hidden. The problem is also a generic one. The problem that judges may not respect the proper limits on rhetorical preemption is no more serious than the problem that judges may not respect any other limits on judging. There is always a risk that an originalist judge, for example, will not do originalism properly. Likewise, there is always a risk that a judge who engages in rhetorical preemption will not do it properly. It is a risk that exists everywhere, and the judicial system has lived with it since its inception.

Some might object that, regardless of these benefits, the kind of editorializing that judges do when they make rhetorically preemptive arguments or write socio-political dicta generally is simply above a judge's paygrade. A judge's job, these objections would say, is to decide the case before the court on legal grounds and do nothing further. There are certainly judges who proceed this way, and they are entitled to do so. But if other judges desire to engage in rhetorical preemption here and there, what is the harm? Just as judges are entitled to deploy their own judicial philosophies when deciding cases, surely each judge is entitled to choose the rhetorical style of opinions. The very existence of rhetorical preemption—extensively documented in this essay—demonstrates that there is no norm against this kind of writing. If, as argued earlier, rhetorical preemption and

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[90] Posner served on the U.S. Court of Appeals for the Seventh Circuit and, in addition to his judicial work, published hundreds of scholarly articles and dozens of books. One of those works was a book on public intellectuals. See Richard A. Posner, *Public Intellectuals: A Study of Decline* (Cambridge: Harvard University Press, 2003).

[91] These considerations raise the related question of what judges should do when their legal views and socio-political views conflict. The socio-political dicta and rhetorical preemption reviewed in this essay are all supplemental to, not contradictory to, the legal arguments. But what should a judge do when their socio-political views will not supplement their legal argument effectively? One option is to exclude all socio-political dicta and focus solely on the law. Another option is to highlight the incongruence between the judge's socio-political and legal views and tell a story about the difference between law and politics. Justice Stewart did precisely that. See Griswold v. Connecticut, 381 U.S. 489, 527 (1965) (Stewart, J., dissenting) ("I think this is an uncommonly silly law...But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do.). See also Roper v. Simmons, 543 U.S. 551, 607 (2005) (O'Connor, J., dissenting) ("[W]ere my office that of a legislator, rather than a judge, then I, too, would be inclined to support legislation setting a minimum age of 18 [for capital punishment]. But...this Court should not substitute its own inevitably subjective judgment on how best to resolve this difficult moral question.") (internal quotation marks omitted).

[92] Justice Scalia often made his rhetorical preemption arguments in the concluding paragraphs of his opinions, bringing out the socio-political dicta when all of his legal arguments were said and done.

socio-political dicta do not violate core norms about the separation of law and politics and actually have benefits, there is no reason to categorically eschew their use.

This does, of course, raise the more complicated question of whether there *should* be a norm against rhetorical preemption. Even if current norms about the judicial role allow judges to engage in it, perhaps a new anti-rhetorical preemption norm ought to be put in place. On that question, I maintain that the benefits of rhetorical preemption outweigh the harms, and that therefore a norm against rhetorical preemption is unnecessary. These kinds of norms, after all, should have something concrete beneath them. The norm that law and politics must be separate in the courts is not just a stylistic preference, it respects the distinct roles of the judiciary and the political branches under the constitutional separation of powers. For the foregoing reasons, rhetorical preemption is an appropriate tool of judicial rhetoric.

IV. Conclusion

Justice Stewart may have warned against judges acting as philosopher-kings, and the overwhelming majority of modern jurists may disclaim non-legal reasoning as the actual basis for their decisions, but the ruminations of philosopher-kings still fill the pages of the U.S. Reports. Hiding in plain sight—in passage after passage, opinion after opinion—judges preempt *legal* arguments on *socio-political* grounds. The examples discussed here are just the tip of the iceberg.

The official story of the law often envisions judges as faceless bureaucrats in black robes who simply read legal materials and mechanically apply them to a set of facts. According to this narrative, there is no room in an American courthouse for philosopher-kings. To be sure, the separation of law and politics is a good thing—it is a central guarantor of this nation's "government of laws and not of men." But, as judicial opinions so often demonstrate, it is not possible to eradicate the philosopher-king instinct entirely. It is not even desirable. Judges need an outlet where they can safely channel their political, philosophical, and social predilections—that place is socio-political dicta. This kind of dicta is thus the purest form of rhetoric that appears in the pages of a judicial opinion. The words in these passages have no legal effect. Socio-political dicta is truly the philosopher-king's microphone. These words cut through the legal jargon and complicated technicalities and neatly serve up the values judges think properly undergird American society. But as we have seen, jurists use this space not to expound their socio-political ideas for their own sake, but to preempt opposing legal positions on philosophical grounds. Rhetorical preemption thus serves as a permanent record of the fundamental philosophical reasons why these judges believed they were in the right and their opposing colleagues in the wrong. Justice Stewart may be dismayed to hear this, but: the philosopher-king lives.

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