



# COLLOQUIUM

The Political Science Journal of Boston College

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To address, ponder, and critique the political issues of past and present.

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## LETTER FROM THE EDITORS



Human and civil rights have long been codified in foundational documents including the *Constitution of the United States* (1789), the *Declaration of the Rights of Man and of the Citizen* (1789), and the *Universal Declaration of Human Rights* (1948). The proclamations made in these writings, espousing a more equitable and humane conduct of our society's affairs, have paved the way for the advancement of people throughout the world. Religious and ethnic minorities, women, and the LGBT community—among the others historically ostracized—have increasingly seen their rights placed at the forefront of national and international considerations.

Though progress has been made, the path to this point has been rugged, and the vision to universally uphold human and civil rights as inalienable remains unfulfilled. In Syria, a brutally repressive regime and bloody civil war have left hundreds of thousands dead and millions displaced; in Venezuela, people starve in the midst of a humanitarian crisis caused by economic mismanagement and lose their political freedoms under deepening authoritarianism; in South Sudan, a conflict-driven famine threatens to claim millions of lives; in Chechnya, gay men are held in modern day concentration camps; and in the West, struggles for gender and racial equality continue. One needs only to read of, listen to, or observe the experiences of people in these places—in addition to those that go un- or underreported—to receive a stark reminder that progress remains incomplete.

To us, it feels the world has arrived at a critical juncture in the movement towards a broader acceptance and protection of rights. While successes have been recorded, growing illiberalism in the West, the traditional promoter and defender of rights, risks leaving our work unfinished and portends an undermining or reversal of what has already been accomplished.

We see the academic pieces to be found in our second issue of *Colloquium* as a product of this volatile and uncertain environment we find ourselves in. Although our Editorial Board has elected to forgo declaring a featured topic, the collective writings of our contributors undoubtedly center on issues of human and civil rights. Thomas Hanley '17, for example, conducts a rigorous assessment of the driving forces behind rising homophobia in Poland and Hungary. Michael Skeen, in the journal's first graduate student selection, draws attention to the dangerous consolidation of authority that can be promoted by the federal judiciary of the United States—an argument first advanced by the Anti-Federalist author, Brutus.





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Our cover art is inspired in part by the works of Rachel Simon '18 and Stephanie Lewis '17. While Simon engages in an in-depth analysis of the varying states of women's rights under Tunisia's successive secular regimes since its independence in 1956, Lewis focuses in on the socioeconomic gains of women in the U.S. due to their greater access to the birth control pill beginning in the 1960s. Beyond these writings, our cover is intended to be representative of the ongoing struggles that women across the world face in achieving equality to men. We consider their hindered progress to be emblematic of the general condition of human and civil rights today; in turn we were motivated to draw attention to their cause, and to those of many others, through illustration.

We have never shied away from our ambitions as captured within our various publications. Thus, let it be our stated aim that through these writings we hope to spur discussion, perhaps even action, concerning where human and civil rights have stood in the past, where they stand today, and where they could stand in the future.

Thank you to our staff, our contributors, and our audience for helping us to achieve a year of truly meaningful political thought and critique. And as always, thank you for picking up this copy of *Colloquium: The Political Science Journal of Boston College*.

Cesar Garcia, *Editor-in-Chief*  
Anna Olcott, *Managing Editor*

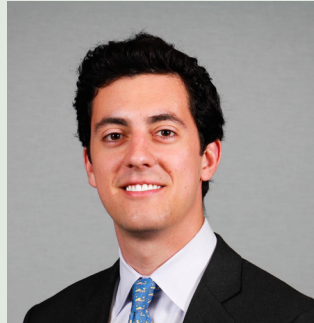
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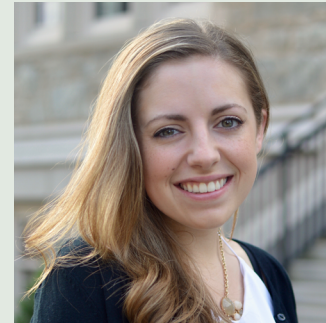
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# FROM PEARL HARBOR TO THE PARIS ATTACKS:



Political-Military Surprises  
and the Conditions  
that Cause Them

BY REBECCA MORETTI

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Although in hindsight the element of surprise in attacks often appears unwarranted, various conditions inherent to intelligence organizations, policy makers, and adversaries make this evidence difficult to spot before the fact. In this essay, I demonstrate how cognitive biases, the nature of the adversary, and bureaucratic deficiencies are all conditions that facilitate surprises. Finally, I conclude that surprise is inevitable in some cases.





## INTRODUCTION

Often, those with the ability to surprise hold a great advantage over their targets. Even a relatively weak actor can maximize its power if it succeeds in surprising its enemy, as ISIS did with its recent attacks in the Sinai, Beirut, and Paris. Although in hindsight the element of surprise in attacks often appears unwarranted, various conditions inherent to intelligence organizations, policy makers, and adversaries make this evidence difficult to spot before the fact. This essay will demonstrate how cognitive biases, the nature of the adversary, and bureaucratic deficiencies are all conditions that facilitate surprises.

## COGNITIVE BIASES OF THE IC AND POLICYMAKERS

It is important to remember that analysts and policymakers are humans, whose preconceptions influence the way they absorb information. Perceptual and cognitive biases of analysts and policymakers often help the deceiver in achieving surprise.<sup>1</sup> A major aspect of these biases is misunderstanding of the enemy's intentions and capabilities, which often manifests itself in the form of underestimation. For instance, a key intelligence failure was the underestimation of Japanese capabilities and intentions before the attack on Pearl Harbor. According to David Kahn, a certain degree of racism led U.S. officials to underrate Japanese capabilities and will.<sup>2</sup> "Before Pearl Harbor was attacked, neither key decision-makers nor senior intelligence officials truly believed that the Japanese Navy was capable of mounting an attack on Hawaii," writes Dahl.<sup>3</sup> Similarly, in both the North Korean invasion of South Korea and the following intervention of the Chinese in the Korean War, American intelligence and policymakers were caught off guard because they underestimated their enemies' intentions and

capabilities. American policymakers thought Chinese warnings to intervene in the Korean War if the U.S. crossed the 38th parallel were a bluff until China's intervention of force. Surprise during the Korean War resulted from underestimation of the Chinese, rather than lack of warning that they would intervene.<sup>4</sup> Analysts in Washington failed to predict these moves because they believed that the Soviets controlled North Korean and Chinese decision-making.<sup>5</sup> Few in Washington challenged the view that Moscow held absolute authority over other communist states.<sup>6</sup> Various CIA reports described the military buildup of DPRK forces, and yet American officials still discounted the possibility of invasion, holding onto the belief that North Korea could not launch a successful attack without Soviet assistance and direction—a prelude to a world war that the Soviets were not willing to undertake.<sup>7</sup> MacArthur and others strongly believed that no Asian troops would dare confront the American military and risk certain defeat. Intelligence analysts' preconceptions so hindered their

*Intelligence analysts'  
preconceptions so hindered their vision  
of reality...*

vision of reality that they developed another explanation to rationalize the initial entry of Chinese forces in Korea, which held that they were protecting hydroelectric plants along the border.<sup>8</sup> Cognitive biases also played a large role in the surprise of the Cuban Missile Crisis. U.S. analysts and policymakers failed to view the situation from the Soviet point of view—a failure of estimative empathy that led them to ignore the strong deterrent motive that the Soviets had for placing missiles in Cuba.<sup>9</sup>

For the intelligence process to be successful, not only does relevant intelligence have to be properly gathered and analyzed, but also appreciated by policymakers and acted upon. The allure of deferring a decision emerges from policymakers' tendency to postpone making significant financial and political sacrifices until warnings are all but overwhelming, often resulting in surprise attacks.<sup>10</sup> Defensive actions can only be undertaken at some—and often very high—cost. Since believing warnings implies high costs, policymakers often prefer not to heed these. Subconsciously, the consumers will pay more attention to reassuring data while challenging the credibility of the source or rationalizing away unwelcome warnings.<sup>11</sup> According to Jervis, once policymakers have decided on a course of action they will be especially unreceptive to contrary evidence. Byman says the cognitive failures of 9/11



Korean War: Members of the 68th Battalion, Division Artillery attached to the 1st ROK Div., fire their 90mm anti-aircraft guns. *Courtesy of Wikimedia Commons.*

were worse among policy makers than among intelligence analysts.<sup>12</sup> “At times, intelligence analysts may correctly identify a problem, but policymakers’ own biases do not change sufficiently for them to address the new problem,” writes Byman.<sup>13</sup> The failure to thwart the 9/11 attacks was not due to lack of strategic warning, but rather to inaction of policymakers in terms of defending against the

threat. “If the political system decides not to undertake costly defensive measures in response to ample but imperfect warning, the failure is at least as much one of policy as of intelligence,” writes Betts.<sup>14</sup> In the case of 9/11, decision makers received many warnings of potential terrorist attacks, which ironically desensitized them to the threat as a result of over-warning. However, this lack of reception is not entirely the policymakers’ fault. Lack of tactical evidence is largely to blame here for widening the “warning-response gap.”<sup>15</sup> Ambiguity makes it easier for policymakers to ignore intelligence, which they already do selectively based on certain preconceptions of the enemy.

Uri Bar-Josef asserts that Israeli intelligence’s familiarity with and penetration into Iran led to its success in predicting the fall of the Shah, as opposed to the U.S. failure, which spawned from fundamental misunderstandings and preconceptions.<sup>16</sup> The CIA overestimated the Shah’s willingness to use force to suppress the opposition, while failing to understand how unpopular he was with locals. Since the Shah was a U.S. ally, motivated biases and wishful thinking colored the lens through which intelligence viewed the situation. Analysts did not think the situation was that bad yet since the Shah had not cracked down. This error was fed by the false assumption that the Shah would crack down if the situation deteriorated to a dangerous point.<sup>17</sup> The U.S. overestimated the Shah’s power while underestimating the role of religion in Iranian society. “Policymakers often base their interpretations on their own theories, expectations, and needs, sometimes ignoring costly signals,” writes Yarhi Milo.<sup>18</sup> In the case of Iran in 1979, policymakers certainly ignored key costly signals due to cognitive biases.

Finally, both policymakers and analysts struggle with imagining alternative or unlikely situations due to pre-existing notions. Since alternative explana-

tions, such as deception, can easily be found, humans tend to favor explanations that fit their preconceptions or the popular hypothesis—a symptom of confirmation bias.<sup>19</sup> Although there were a few clues that could lead to speculation on the location of the attack, Pearl Harbor was a highly improbable target. Similarly, some may not have anticipated ISIS's strikes outside its so-called caliphate, since such behavior is both uncharacteristic of the actor and seemingly irrational in regard to its strategic goals. Failure to identify these unlikely targets exhibits the “very human tendency to pay attention to the signals that support current expectations about enemy behavior,” according to Wohlstetter.<sup>20</sup> Betts argues that this situation is to an extent necessary, since information cannot be interpreted in a void.<sup>21</sup> However, this framework can at times lead to massive intelligence failures. Analysts may prefer information that fits consensus rather than considering alternative or less probable explanations. According to Jervis, empathy is particularly difficult when “the other’s beliefs and behaviors are strange and self-defeating,” as was true in Iraq before the Persian Gulf War. For instance, while the U.S. assumed that Iraq would employ the fastest way to produce fissionable material—“mirror imaging”—Iraq actually chose a slower method to deceive intelligence agencies about their capabilities. This failure led to overcorrection on—and thus overestimation of—Iraqi WMD capabilities in 2002. Here, Saddam’s secrecy towards UN weapons inspectors was viewed as self-defeating, and therefore few analysts, if any, considered other alternatives for this behavior.

#### DECEPTIVE NATURE OF THE ADVERSARY AND INEVITABILITY OF SURPRISE

Deception is the key to surprise, allowing an attacker to misdirect the enemy’s efforts and atten-

tion from where an attack is expected to be.<sup>22</sup> According to Handel, deception helps the weaker party make up for what it is lacking in strength.<sup>23</sup> So, even if the victim has strategic warning, he will be deceived as to the tactical details of the attack, rendering strategic warning useless. For instance, noise level was purposely increased before the attack on Pearl Harbor, leading some to think that the Japanese were planning an attack on Russia. An abundance of irrelevant material—in particular, threats from Europe—made Japanese deception possible, as analysts were unable to sort relevant signals from “noise.”<sup>24</sup> In the days leading up to Pearl Harbor, when commanders in Hawaii received reports that the Japanese in Honolulu were burning their codes, they were not alarmed since they had received similar reports earlier in the year and nothing had happened. Similarly, the North Korean invasion of South Korea was preceded by frequent maneuvers probing the border, creating such a level of noise that “the actual initiation of hostilities was not distinguished from preceding tests and false alarms,” according to Wohlstetter.<sup>25</sup> “The problem of false alarm has been involved in most cases of surprise attack,” writes Betts.<sup>26</sup> The enemy’s deceptive efforts, or the feeding of “noise” into the system often cause false alarm. When the warning is a continuum, truly alarming information is hard to spot. Ironically, an agency effectively gathering intelligence may be even more thrown off by these fake signals. “Simple indecision (or last minute decisions) by the attacker can prevent clear signals from being picked up by the defender because there are no clear signals,” writes Betts.<sup>27</sup> Schedule changes and deferrals—which non-state actors like ISIS are more capable of—feed the defender’s expectation that nothing is likely to happen, and over-warning causes insensitivity that strengthens the “cry wolf” syndrome.<sup>28</sup> Officers will be embarrassed if their

predictions do not pan out, and will therefore be more hesitant to make future predictions.

Deception and denial by the adversary make it extremely hard for agencies to collect tactical intelligence, though they may have plenty of strategic warning. Wohlstetter believes intelligence failed to anticipate Pearl Harbor not for paucity of relevant materials, but due to an abundance of irrelevant ones. Conversely, Dahl asserts that surprise attacks succeed because intelligence analysts do not have enough relevant information to examine. According to Dahl, the main reason for surprise attacks is a lack of tactical intelligence and precise warning. Ultimately, both “noise” and lack of tactical evidence are largely results of deception. The difficulties involved in avoiding deception are great. Additionally, “deception is cheap... neither labor nor capital intensive,” according to Handel.<sup>29</sup> Adversaries constantly and actively seek to counter intelligence gathering by whatever means possible. Japan had been so careful in sealing leaks and limiting knowledge of the Pearl Harbor attack that even the vast amount of intelligence acquired by code breaking did not reveal evidence of the plan.<sup>30</sup> Since tactical-level intelligence is virtually requisite to thwart an attack, decision-makers find this intelligence much more actionable than broad strategic warnings.<sup>31</sup> Tenent’s forceful strategic warning about the threat that al-Qaeda posed “was accompanied by a failure to learn clues about the specifics of the attack on the U.S. homeland,”<sup>32</sup> according to Byman. In addition to deception through “noise” and secrecy, an attacker can also deceive its victim by changing the way in which it operates to defy the victim’s expectations. Adversaries use shifts in tactics and innovations to weaponry to catch their victims by surprise, as evidenced by al Qaeda’s innovative use of airplanes as weapons during 9/11. “Too often, assessments of failure focus on the mistakes

of the victim rather than on the skill of the adversary,” writes Lowenthal.<sup>33</sup> Al Qaeda was and is a particularly skilled and deceptive adversary who makes collection and disruption extremely difficult for its targets. The nature of terrorist organizations makes them particularly good at deception, since they operate at lower—and less conspicuous—levels than nation-states. Due to their “bare-bones” infrastructures, terrorist groups are more adaptable and harder to track.

#### LIMITS OF BUREAUCRACIES

Limits to perception and communication are inherent to any large bureaucratic organization. In such environments, it is easy for intelligence to get ignored, distorted, or lost.<sup>34</sup> For instance, accord-



Pearl Harbor: Burning ships at Pearl Harbor. *Courtesy of Wikimedia Commons.*

ing to Wohlstetter, a lack of relevant information was not a factor behind the Pearl Harbor surprise.<sup>35</sup> Wohlstetter posits that the problem was that the signals lay scattered in various different agencies, and no person or agency was able to unite all the signals in the vast information network.<sup>36</sup> In addition to the difficult task of accurately perceiving a signal as a warning, analysts must also get the warning heard and acted upon—perhaps an even more arduous task.<sup>37</sup> Even if a significant warning is acknowledged, it may already be too late to prepare

for a strike, due to the pace at which bureaucracies operate.<sup>38</sup> Bureaucracies have a hard time changing their approaches to problem solving, even if it is recognized that their approach is inadequate.<sup>39</sup> “At times, responsibility may be too diffuse; everyone has some share of the overall problem, so no particular person considers it his or her job to act,” writes Byman.<sup>40</sup> High-level officials, who have the requisite clearances to see the big intelligence picture, often don’t have time to analyze it, while lower level officials, who have more time, cannot see the full picture. Furthermore, getting different government agencies to share information that is required to fulfill their basic functions is surprisingly difficult, accentuating the “connect the dots” problem. For instance, if the CIA and FBI had shared information better in the years preceding the 9/11 attacks, they could have gotten more leads in terms of tactical evidence. “Bureaucracies push behavior towards the rational and non-emotional ends of the spectrum,” while often lacking in the practice of imagination, according to Knorr.<sup>41</sup>



unlike their usual targeting of the “near enemy.” Such changes in strategy take advantage of existing preconceptions, aiding in deception. However, CIA director John Brennan said in a recent interview: “It’s not a surprise that this attack was carried out, from the standpoint that we did have strategic warning about an attack in Europe.”<sup>42</sup> Ultimately, though, strategic warning is almost useless without concrete tactical evidence, especially in regards to a flexible group such as ISIS. Although the attack may not have surprised Brennan, it certainly surprised the rest of the world.

## CONCLUSION

In a way, all the reasons for failure in predicting surprise attacks are linked. Ultimately, we must accept that some surprise attacks are inevitable, and be prepared to have a cushion for when they do happen. The deceptive nature of ISIS as an organization is the factor that probably helped it the most in achieving surprise with its recent attacks. When the enemy is a constantly moving, changing target such as ISIS, the problem of estimating its capabilities and intentions is magnified. Terrorist groups like ISIS are more capable of deception than are state actors with a bigger infrastructure and visibility, making it harder for tactical evidence to be collected. The main factor of surprise in the recent ISIS attacks is that they targeted the “far enemy,”

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# THE DEVELOPMENT OF WOMEN'S RIGHTS UNDER SECULAR REGIMES: TUNISIA

BY RACHEL SIMON

With increasing tensions in the Middle East, the rights of Middle Eastern women have become a contentious topic in Western political and cultural discourse. Spurred by the seeming success of secular women's rights movements in the West, many Westerners are pushing for the secularization of Middle Eastern governments. This paper analyzes the effectiveness of this theory by evaluating the development of women's rights in Tunisia, a country in the Middle East, which has in fact taken on predominantly secular approaches to government. Tunisia has long led the movement towards gender equality in the Middle East, and remains at the forefront of women's rights in the Arab world today, providing support for this Western ideology. However, Tunisia's secular governments have significantly hindered the progression of women's rights as well. Tunisia's secular regimes, often authoritarian, have appropriated "state feminism" to gain popular support without authentically empowering Tunisian women, leaving women's rights in peril if the regimes fall. Moreover, these secular regimes have augmented Islamic extremism, which not only endangers the lives of Tunisian women, but has also created a precarious divide between Tunisian women. Thus, the Western prescription of secularism is not an all-encompassing solution to inequality in the Middle East.



## INTRODUCTION

Women's rights in the Middle East have become a considerably contentious topic in current political and cultural discourse. In the wake of a dramatic rise in Islamic extremism, terrorist attacks, genocide, and civil war, many Westerners have expressed concern over the rights of women in the Arab World. While this concern is pure at heart, it is often followed by uneducated assumptions and generalizations about the political environment of many Arab countries. The rise of women's rights in the West, driven primarily by a secular feminist movement, has led many Westerners to believe that secularization is a foolproof path to women's empowerment. This research paper will go beyond these Western assumptions by analyzing the development of women's rights in one country in the Middle East that has in fact taken on predominantly secular approaches to politics yet has continued to struggle with women's rights: Tunisia.

The country of Tunisia has long been at the forefront of women's rights in the Arab world. Many politicians and human rights activists look to Tunisia and its budding democracy as a beacon of hope in the midst of the turmoil overtaking the Middle East. However, in order to truly understand the status and future of women's rights in Tunisia, the history of women's empowerment in the country must be examined. This paper will analyze the progression of women's rights and empowerment since Tunisia gained its independence from France in 1956 up until the present.

## INTELLECTUAL BEGINNINGS—CRUCIAL SUPPORT FOR WOMEN'S EDUCATION

Prior to Tunisian independence in 1956, tribal family laws dictated society under the French regime and oppressed women in both the public and private spheres in the name of Shari'a law. In the

private sphere, women could not divorce their husbands, had no say in whether their husband took additional wives, could not secure custody of their children, and were frequent victims of domestic abuse, among many other things. In the public sphere, women were incredibly uneducated, with only 2% of women obtaining higher education and only 4% gaining literacy by 1956.<sup>1</sup> Silenced in the private sphere and without access to education, women were powerless in the fight for equality.

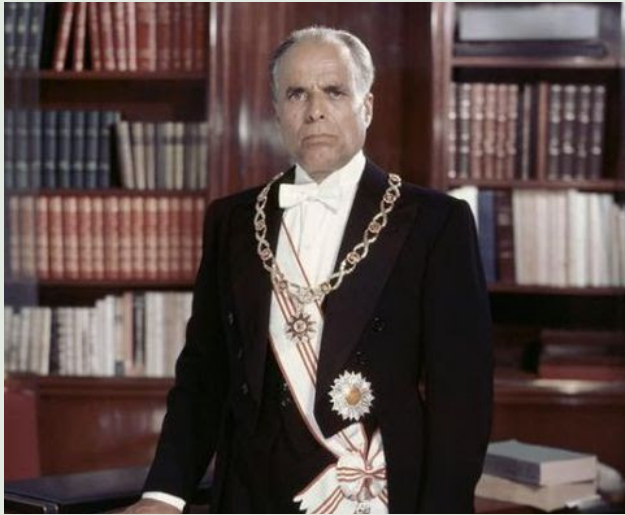
Surprisingly, despite these oppressive conditions, a movement for women's rights did slowly emerge, although not through the mobilization of women. In the midst of this oppression, Tahar Haddad, a leading intellectual in Tunisian society in the 1920s and 1930s, spoke up for women's rights and helped them advance throughout the following decades. As a citizen under French-colonized Tunisia, Haddad had been exposed to Western ideology first hand, and, in response to this, developed a striking reformist ideology. He, in contrast to the more conservative intellectuals around him, be-

*The country of Tunisia has long been at the forefront of women's rights in the Arab world.*

lieved that Islam was not inherently incompatible with the ideas of the West and modernity. Rather, he argued that through the reformation of Islam and the adoption of some European values, Tunisia could finally claim independence and become an imperialistic power of its own. One of the main tenets of Haddad's ideology was that Tunisia needed to educate its women in the way that France had. He believed that women acted as the backbone to French society's success, as they were the ones primarily responsible for raising their sons to be future

leaders and innovators.<sup>2</sup> Haddad, in order to spread his ideology, published a controversial book entitled *Our Woman in the Shari'a and Society*, in which he called on the Tunisian government to educate and liberate women. He wrote, "We need the European woman's knowledge and capacity to bear and raise children, capable of not only engaging in the battle of life, but also of winning the battle, and benefiting from the world's resources and peoples."<sup>3</sup>

While Haddad's ideology was centered on the patriarchal understanding of women's role in society as mothers, his call for their education created a large shift in Tunisian society's perception



Portrait of Tunisian President Habib Bourguiba (1903-2000).  
Courtesy of Wikimedia Commons.

of women and granted women a multitude of new opportunities for education and public engagement. In doing so, Haddad's early ideology laid crucial groundwork for the cultural and legal empowerment of women after Tunisia's independence from France in 1956 under the guidance of Bourguiba. The cultural shift Haddad sparked allowed the women of Tunisia to advocate for themselves through the crucial process of establishing an initial Tunisian government. Moreover, in the wake

of this cultural reformation, Bourguiba, the first elected President of Tunisia, made women's empowerment one of the central tenets of his legacy.

#### BOURGUIBA REGIME (1956-1987): WOMEN'S RIGHTS ESTABLISHED, BUT THROUGH STATE FEMINISM

Upon Tunisia's independence from France in 1956, Habib Bourguiba was elected the first president of the new republic. Tasked with transforming this budding republic into an established power, Bourguiba set out to distance the new nation from its earlier tribal law system, and took many steps towards countering its impacts by creating an authoritarian, secular government. Part of Bourguiba's strategy in moving Tunisia away from its past of strict tribal law and into a future of modernity was to strengthen and protect women's rights. While there are differing opinions on the motives behind Bourguiba's actions for women, there is no doubt that many of the steps he took as the first President of Tunisia laid the groundwork for a future of women's empowerment in the country.

Upon ascending to the presidency in 1956, one of Bourguiba's first acts was to give a speech directed at the women of the country, thanking them for their participation in the struggle for independence and acknowledging the oppression they had faced. Immediately following his inauguration, Bourguiba gave women the civic rights to vote and to run for elected office. Additionally, he established the groundbreaking Code of Personal Status (CPS), a legal policy that granted women unprecedented rights within the private and public spheres. The CPS abolished the traditional practice of polygamy, gave men and women more equal rights in divorce proceedings, eliminated the role of matrimonial guardians with authority over women, raised the minimum age of marriage for girls to 17, and in-

creased custodial rights of women over their children.<sup>4</sup> Also, the CPS guaranteed access to education for all girls, and gave adult women increased opportunities for employment outside of their homes.<sup>5</sup> As well as guaranteeing women these revolutionary rights, the CPS banned several oppressive practices that had been allowed for much of the country's

*Tunisia's first official constitution, ratified in 1959, marked a crucial turning point in the status of women in Tunisia.*

early history. For example, the CPS abolished Dar Joued—"a reformatory system where 'disobedient and rebellious' women used to be secluded until they learned how to behave themselves"—a vestige of colonial Tunisia that reinforced that women were the property of their male counterparts.<sup>6</sup>

While the CPS has stood as the cornerstone for women's rights in Tunisia, several other steps taken under the Bourguiba regime helped to increase women's empowerment in the country as well. Tunisia's first official constitution, ratified in 1959, marked a crucial turning point in the status of women in Tunisia. The text itself stated that "all citizens have equal rights and obligations and they are equal before the law," officially elevating women to the same status as men, at least in the de jure sense, for the first time in the country's history.<sup>7</sup> Furthermore, the Labor Law of 1966 "guaranteed women and men equal rights to employment," resulting in increased employment for women.<sup>8</sup> Additionally, Bourguiba took steps towards ensuring the empowerment and rights of Tunisian women by expanding their access to reproductive healthcare. In 1963 Bourguiba legalized the solicitation of free contraceptive pills and reproductive coun-

sel throughout the country.<sup>9</sup> Moreover, throughout the 1960s and 1970s, under Bourguiba's rule, Tunisia began to liberalize its perspective and laws on abortion. By 1973 all forms of abortion were fully legalized, and have remained so ever since, making Tunisia the most liberal country in the Middle East in regard to this issue.<sup>10</sup>

Although Bourguiba enacted many laws that helped advance the de jure rights of women in Tunisia, the authoritarian secularism he implemented in the country also led to many problems for women's rights. As president, Bourguiba promulgated notions of national unity and secular ideology in an attempt to strengthen the Tunisian republic against the tribal factions. As this desire for national unity grew, Bourguiba began implementing more oppressive mandates in Tunisian society, which harmed the rights of many minorities, including women. A key example of this authoritarianism was when Bourguiba silenced non-governmental organizations (NGOs) in the country such as the Democratic Association of Women and the Association of Tunisian Women for Research and Development to minimize opposition and conflict among factions.<sup>11</sup> By silencing these organizations, Bourguiba suppressed the feminist movement at the grassroots level, leaving women's rights advocacy up to the government. In silencing the voices of the masses and implementing top-down legal mandates, Bourguiba created a system of "state feminism," which left many women marginalized and voiceless.

Bourguiba's "state feminism" system protected only those women who fit into a certain socioeconomic and religious mold. Urban, secular women were rewarded and gained crucial rights throughout his revolutionary period as President. However, many conservative religious women, as well as rural women, were left behind in his movement.

The liberation that Bourguiba's legislation was expected to bring did not reach many women living outside of the city because they lacked the systems of community activism and support to spread information and empowerment. In fact, "based on a 1981 survey conducted by the Union Nationale des Femmes de Tunisie, 51% of women in Tunisia were unaware of the country's progressive family code," due to factors such as the lack of education in rural areas.<sup>12</sup> This lack of awareness made it difficult for the full empowerment of Tunisian women to take place, for without being aware of one's rights, it is impossible to uphold them.

In addition to neglecting rural women, Bourguiba's incessant drive to achieve nationalism and secularism isolated many conservative religious women in the Tunisian community, resulting in the rise of radical ideological factions. While Bourguiba never instituted any blatantly anti-religious policy, he

*Ben Ali inherited a complex set of challenges and success from Bourguiba's era.*

silenced many religious groups in the country and consistently condemned the conservative factions by publicly denouncing their beliefs. In one of his many speeches, Bourguiba shamed the Tunisian religious community by calling the hijab an "odious rag" that did little more than demean women and hinder Tunisian society from progressing.<sup>13</sup> While very few Tunisian women chose to wear the hijab at this time, this kind of polarizing secular rhetoric not only oppressed women by limiting their freedom of expression and religion, but also, on a broader scale, stimulated a growing form of Islamic extremism that would become extremely problematic in later decades for women's rights and the

feminist movements in Tunisia.

Towards the end of Bourguiba's presidency, the Tunisian economy began to suffer greatly, and bread riots and labor movements began to evolve. Bourguiba's commitment to nationalism had led him to implement intense regulations on the Tunisian economy, stifling its growth. Economic hardship made it difficult for women to maintain their freedom in the public sphere. Thus, despite the fact that Bourguiba had given women new economic opportunities through the CPS, women, along with men, were harmed financially by Bourguiba's later economic failings. Without economic stability, it became increasingly difficult to ensure women's rights and equality.

Finally, in 1987, Bourguiba was ousted in a non-violent coup by Zine al-Abidine Ben Ali, who became prime minister, and then president in 1989. Ben Ali inherited a complex set of challenges and success from Bourguiba's era. While urban women's rights had progressed drastically under the CPS and other state-led policies, rural women had been neglected, and conservative religious women were alienated. Furthermore, Bourguiba's oppression of freedom of speech and religion had led to a rise of Islamic extremism in the country. Most importantly, the positive advancements of women's rights under Bourguiba had occurred under the flawed system of "state feminism," which left the masses powerless and detached from the fight for women's rights. All of this, along with economic distress, set the scene for the regime of Ben Ali.

**BEN ALI REGIME (1987-2011): CONTINUED STATE FEMINISM AND THE GROWING DIVIDE AMONG WOMEN**

When Zine al Abidine Ben Ali took control of Tunisia in 1987, many Tunisians were optimistic about his plans for the country. He preached a new

era of Tunisian democracy, and promised national reconciliation and progress. With these promises, many Tunisians believed Ben Ali would usher in a new era of emancipation and empowerment for the women of the country without Bourguiba's failing model of "state feminism." However, while Ben Ali's first few years of rule seemed to be steps in the right direction, away from Bourguiba's nationalistic oppression, things quickly took a turn for the worse. Under pressure from rising Islamic extremism, Ben Ali enacted wildly oppressive secular legislation and returned to the system of state feminism, reinforcing the challenges of the Bourguiba regime and creating new ones for Tunisian women.

At first, Ben Ali took drastic steps to reverse some of the damage done by Bourguiba. He legalized the existence of additional political parties and lifted the bans on many of the NGOs Bourguiba had silenced.<sup>14</sup> In doing so, he opened the political arena to pluralism and grassroots activism for the first time in years. Furthermore, Ben Ali spent many of his early years in power pushing to increase the literacy and education opportunities for young women.<sup>15</sup> All of these efforts seemed to represent a movement away from oppression and state-sponsored feminism and towards the education and empowerment of the masses to create their own feminist rhetoric.

However, despite the appearance of these surface-level advancements, in reality, "Ben Ali's government tightly restricted free expression and political parties" and continued to enforce the secular authoritarian system of governance that Bourguiba had previously championed.<sup>16</sup> He doubled back, beginning to oppress grassroots mobilization by restricting NGOs, other political parties, and individual rights, while simultaneously enforcing women's rights legislation from the executive level, thus perpetuating the system of "state feminism." Mean-

while, Ben Ali was also desperately trying to force Tunisia into an era of secular modernization, and used women to reinforce modernization. However, his image of the 'ideal Tunisian woman' was "offensive to Muslim-oriented women because it marginalized their religious identification," creating



Portrait of Tunisian President Zine El Abidine Ben Ali (1936-).  
*Courtesy of Wikimedia Commons.*

further tension between the secular government and traditional Tunisians.<sup>17</sup>

In opposition to Ben Ali's use of "state feminism" and his attempts to force Tunisia into modernization, the Islamist movement that emerged under Bourguiba began to grow, "taking the secular Tunisian population by surprise."<sup>18</sup> With it came the Islamic feminist movement in which "women, after tossing away their veils to the cactuses started to appear in public wearing headscarves," standing in direct contrast to the secular feminist movement in the country.<sup>19</sup> With this religious resurgence, a deep divide in women's rights rhetoric in the country emerged between the secular and Islamic feminists.

The growing Islamist movement in Tunisia created a space in which religious Tunisian women could formulate their own understanding of feminism and equality without the antagonistic pressures of the secular feminist movement. Secular feminists in Tunisia at the time had long criticized conservative religious women, claiming that they were not feminist and were oppressed by their faith. They did not believe religious women could truly “reconcile their faith and identity with a struggle for gender equality,” and that in order to truly embody feminist ideals, women had to reject their previous attachments to the Muslim faith.<sup>20</sup> Moreover, secular feminists were skeptical of Islamic feminists, claiming that while they preached equality, they “actually aimed at returning women to the home, excluding women from the workforce and enforcing Islamist dress.”<sup>21</sup> This kind of oppression made it difficult for religious women to enter the women’s rights discourse until the Islamist movement opened up a new space for discussion.

Islamic feminists rejected the claims of the secularists, urging that they too maintained the goal of establishing women’s political, economic and social rights, and had for many years. Islamic feminists argued that their religiosity was not inherently at odds with feminist discourse. Rather, through proper interpretation of the Quran and the Sunnah, it would become clear that “women and men are equal in the eyes of God (Allah),” and are thus granted equal rights within Islam.<sup>22</sup> Moreover, Islamic feminists believed that the values for human rights and equality that drove secular feminist movements could be found at the core of the Quran. Therefore, Islam should be used as a tool to encourage and mobilize feminist movements, rather than as an opposing force in the way secular feminists used it. While Islamic feminism is a complex social movement that could certainly merit its own research paper, at its

core it remains a gender discourse that holds the same goals as the secular feminist movement, but derives its meaning and legitimacy from Islamic texts and language.<sup>23</sup>

As a response to growing Islamism, including Islamic feminism, Ben Ali began increasing levels of oppression in Tunisia. In 1991, he banned the Ennahda party—the main Islamist party at the time.<sup>24</sup> He continued to increase restrictions on

*Islamic feminists argued that their religiosity was not inherently at odds with feminist discourse.*

freedoms of speech and religion gradually over the coming decades, culminating in his decision to ban the hijab in 2006.<sup>25</sup> Simultaneously, he filled the government with corrupt practices and dug Tunisia into a state of economic turmoil, with dwindling employment and stagnant growth. All of these actions did nothing but impede the progress of women’s rights and freedoms, causing only further turmoil. When citizens did speak up, Ben Ali would perform mass arrests and imprison demonstrators indefinitely.<sup>26</sup> In the wake of these abuses, Tunisians, both men and women alike revolted against Ben Ali’s regime in the Jasmine Revolution from December 17, 2010, through January 14, 2011, and beyond.

#### JASMINE REVOLUTION (DECEMBER 2010 –JANUARY 2011): A BRIEF MOMENT OF EQUALITY

Despite their divided views on religion and feminism, it has been well documented that all women, along with men, came together on common ground to overthrow Ben Ali. They put aside their differences to focus on liberating their collective

society from their oppressor. Women on both sides of the feminist divide came to the consensus that, although “women suffered more under the dictatorship than men [in that they] had their daily lives completely disrupted, they were not allowed to work, they could not properly care for their children, they were under constant surveillance,” their desire to fight was for collective freedom, not just women’s rights.<sup>27</sup> Moreover, both rural and urban Tunisian women participated in this revolution. Yet again, while rural women had been neglected in the advancement of their rights, they understood that throughout history, women’s rights had been intrinsically connected to rights of society as a whole and the economic fruition of the country, and thus all groups needed to work together. Tunisian women from all backgrounds consistently “emphasized their common, collective goals beyond particularistic gender identities,” to liberate society as a whole from Ben Ali’s oppression.<sup>28</sup>

It has also been acknowledged that women were incredibly active in the revolution both physically and technologically. Women flooded out of their homes and places of work and “stood side by side with their male counterparts in the streets” for weeks on end.<sup>29</sup> Many women also capitalized on their positions in the home by using blogs to call international attention to the human rights abuses occurring under Ben Ali’s regime and the revolution itself.<sup>30</sup> Furthermore, Tunisian women from all schools of thought shared in the suffering and bloodletting of the revolution. They lost children and husbands, financial stability, and were violently imprisoned under Ben Ali’s regime. The prisons were a particularly dangerous aspect of the revolution for women, as many of the basic rights they had gained in the Bourguiba and Ben Ali regime were stripped away in the prisons. They experienced sexual assault, public humiliation, religious

intolerance and torture in the prisons.<sup>31</sup> Several women reported being raped, assaulted, and forced to remove their hijabs and expose their bare legs in the prisons; violations of their humanity and of their faith.

The revolution represented a unique moment in which Tunisians from various backgrounds bridged their differences to fight for collective freedom, with no societal limits. As Korany El-Mahdi states, “the social actors/participants in [the] symbolic space/time [of revolutions] are suspended between structures as they separate from one social order but are yet to become part of another.”<sup>32</sup> However, as the revolution came to a close, the period of equality did as well.

#### POST-REVOLUTION TUNISIA: WOMEN’S RIGHTS TODAY—PRESERVED, BUT SHAKEN

After the fall of Ben Ali’s secular authoritarian regime in January 2011, the Islamist Ennahda party rose to power under the leadership of Rached Ghannouchi. While many Tunisians welcomed the outsider perspective of the Ennahda party and its democratic principles as a positive change, the rise of an Islamist power concerned many secular feminists about the future of women’s rights in Tunisia, deepening the divide among women in the country. While staples such as the CPS and high levels of women’s participation in parliament remained consistent under the Ennahda regime, the new constitution and rise in extremism posed potential threats to women’s rights.

Under the new republic, the government was tasked with recreating the country’s constitution. A lofty task in many ways, the drafting of this constitution became a highly contentious issue in regard to women’s rights. While the original constitution had specifically enumerated men and women as equals,

the draft of the new constitution did not. Article 28 in the draft defined women as “complementary” to men, rather than equal.<sup>33</sup> Secular feminists viewed this change as a massive step backwards, and were concerned about “the possibility of future conservative interpretation of women’s rights given that women’s status in the article was presented as contingent upon their relation to men.”<sup>34</sup> In opposition to this, many Islamic feminists viewed the change as beneficial to women. Ghannouchi himself defended the change by claiming “complementation is an authentic concept, meaning that there would be no man without a woman and no woman without a man.”<sup>35</sup> Under this logic, the Islamic feminist movement viewed “complementary” as an improvement from “equal” and supported the change.

In the midst of this legislative debate, the Salafi extremist group began to perform a large number of attacks and assassinations, some of which were in response to cultural events in which women were presented in a modern, liberal image.<sup>36</sup> As a result of this rising extremism, parliament was forced into a deadlock. In order to break this stalemate, the Ennahda party “willingly stepped down and handed over power to a neutral, technocratic government,” in the hands of the Nidda Tounes party.<sup>37</sup> Through this, the Tunisian government returned to more secular roots, which allowed secular feminists to succeed in opposing Article 28’s use of “complementary.” When Tunisia’s new constitution was ratified in 2014, it referred to women and men as equals once again.

Currently, under the Nidda Tounes party, women’s rights have remained in fairly good shape. The CPS has been maintained and continues to evolve as Tunisian culture becomes more liberal, and the constitution continues to enshrine women with equal rights. However, while women continue to hold 24% of seats in parliament, they are of-

ten forced to the bottom of the ticket, and have very little actual power. Luckily, the new government has reinstated the freedom of many NGOs, allowing for a greater mobilization of grassroots movement, and the proliferation of education and freedom into rural and impoverished areas.

While the new government has thus far preserved the freedom of religion and freedom of expression that the previous regimes oppressed, many Islamic feminists fear a return of religious oppression and the banning of the veil. Additionally, the rise of another secular government has seemingly spurred more religious extremism and radical groups, which pose a threat to women’s rights in Tunisia, as well as many other countries in the Middle East.

Overall, Tunisia’s history has been full of positive advancements in women’s rights. However, much of its history has been driven by authoritarianism and state-driven secular feminism, which has marginalized many, particularly conservative Muslims and the rural poor. While women have actively participated in the revolution, they still continue to face challenges such as lack of power in government, rising extremism, and a deep divide in notions of feminism among them. It is unclear what the future of women’s rights in Tunisia will be, but many are confident that the budding democracy will continue to protect and enshrine women’s rights, allowing Tunisia to continue its role as a leader in the Middle East.



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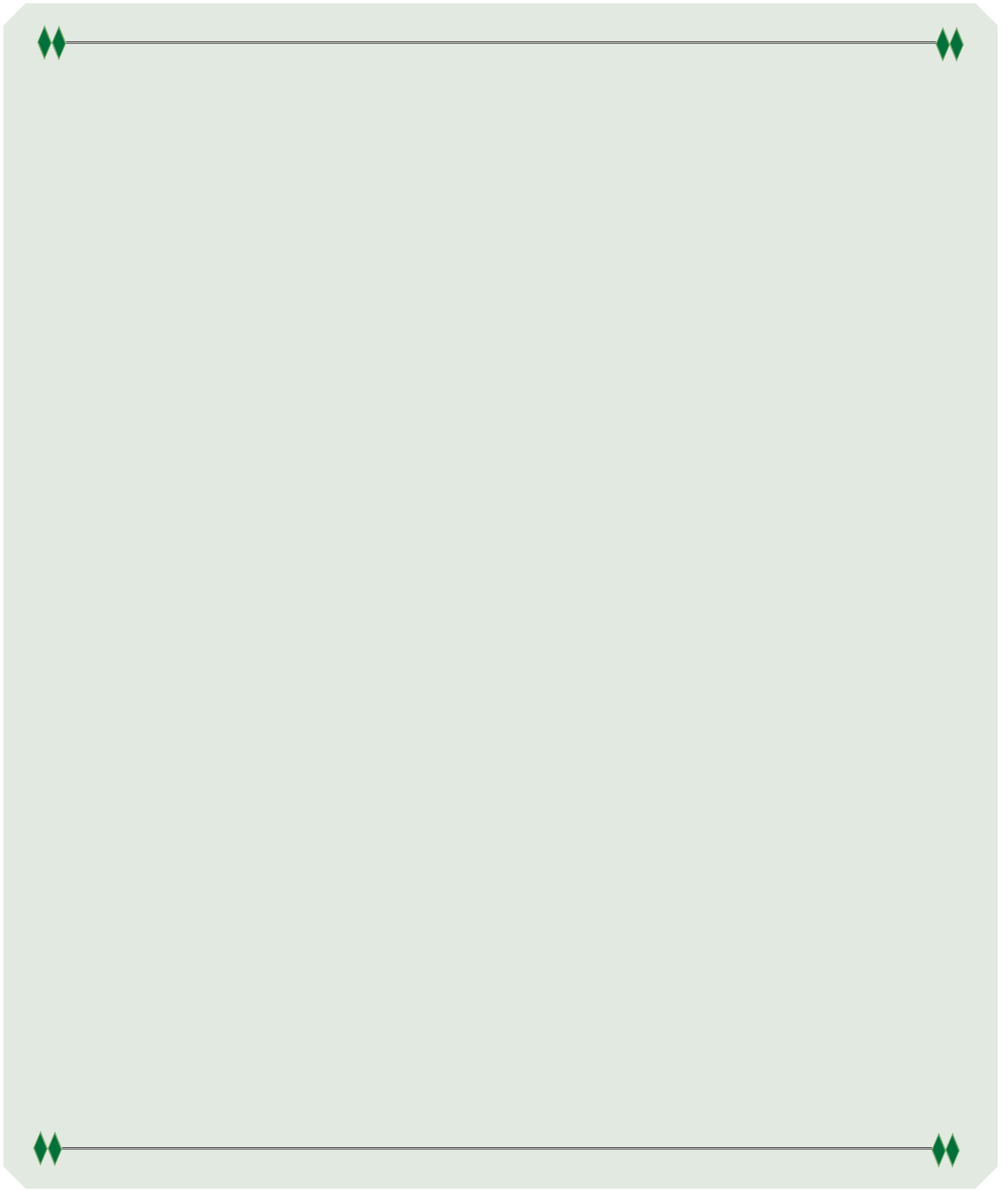
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# HOMOPHOBIA IN POLAND AND HUNGARY:

## Assessing its Political Motives and Influences

BY THOMAS HANLEY

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Since World War II, Europe has historically been recognized as a pillar of social liberality. Yet recently, Hungary and Poland have elected governments and enacted policies that are fiercely homophobic. This paper will look to understand the political motives and influences behind the recent turn to homophobia in both countries. First, the paper will explain Hungary and Poland's unique position between the socially liberal European Union and a socially conservative Russia. Both parties compete for influence in domestic Hungarian and Polish politics, with the European Union hoping to solidify its ideological border against Russia and the Kremlin hoping to create centers of influence within the EU. The second portion of the paper will argue that both Polish and Hungarian homophobia is a rejection of the European Union – used as a political tool to reestablish national control from Brussels. And lastly, the paper will explore the role of Vladimir Putin's Russia in that rejection – arguing that Putin holds significant influence in Hungarian homophobia, as Viktor Orbán's government is closely tied with the Kremlin. Yet, the paper concludes that the situation is quite different in Poland – where relations with Russia are not nearly as cordial, arguing that the Polish Catholic Church is much more responsible for the socially conservative policy.



## I. INTRODUCTION

Both Poland and Hungary have taken hard stances against homosexuality in recent years. In accounting for Polish and Hungarian homophobia, there is a clear discrepancy between each country's position on homosexuality before 2004, and policy in the ensuing years. As Agnieszka Graff notes in the context of Poland, "[a]n astounding shift in public discourse about homosexuality occurred in the space of a mere two or three years – from complete silence at the turn of the twenty-first century to almost daily headlines in the news by later 2005 and early 2006."<sup>1</sup> Hadley Renkin spoke with Hungarian LGBT activists and found the same sort of post-2004 change to have taken place in Hungary.<sup>2</sup> In attempting to account for this change, 2004 is a hallmark year because it is the year both Hungary and Poland joined the European Union. Understanding the Polish and Hungarian position within the European Union will be central in answering this paper's main question: mainly, what has accounted for the rise in Polish and Hungarian homophobic rhetoric and policy since 2004?

In order to understand homophobia in Poland and Hungary, it is imperative to understand geography's important role. Part I will begin by explaining that Poland and Hungary—two former Soviet states, and current members of the European Union—are uniquely positioned within Europe. Both find themselves between a socially liberal West, represented by the European Union, and a socially conservative Russia. Each party competes for influence over Poland and Hungary, the European Union attempting to push its European norms while Russia looks to align each country's ideology with its own to create "agents of influence" within the EU.<sup>3</sup>

Setting these two competing ideologies as the foundation for the analysis, the paper then moves

into part II, evaluating the rise of homophobia in first Poland, and then Hungary. Understanding the domestic considerations in the context of this international ideological struggle will advance the work, showing the rise of homophobia running parallel to the success of far right, nationalist governments. Since 2004, both Poland and Hungary have elected far right governments, which have politicized homosexuality as a means to reestablish national control from the far-reaching European Union. The analysis will explain that heteronormativity and the traditional family are closely associated with each state's national identity.

Part III will conclude the paper, following a simple premise: if Polish and Hungarian homophobia is a rejection of the European Union, then what influence does Vladimir Putin's Russia have in that rejection? In other words, is homophobia an indicator that Poland and Hungary have become Russian agents of influence within the European Union? The answer will represent a critical divergence between Poland and Hungary. While the Hungarian

*... is homophobia an indicator that Poland and Hungary have become Russian agents of influence within the European Union?*

government admires Russia, the Polish authority does not trust the Kremlin—making it clear that the influence may be an important factor in Hungary, but not one in Poland. Therefore, this paper will look to prove that Polish and Hungarian homophobia is first and foremost a rejection of the European Union's attempt to impose its norms on each state's national identity. Yet only Hungary offers credible evidence of Putin's Russia influencing that rejection.

## II: COMPETING IDEOLOGIES RUSSIAN INFLUENCE

Russia has had a clear strategy when it comes to Central and Eastern Europe (CEE). Russia does not view the CEE countries as “subjects of international relations but as objects of a competition between great powers.”<sup>4</sup> Vladimir Putin’s Russia seeks to be an influential centre of a multipolar world equal to the USA, China, or the EU.<sup>5</sup> Central and Eastern Europe are particularly important in this context as the area lies between the pillars of that multipolar world that Russia seeks to exploit—specifically, the liberal West and the Russian state. Putin himself appears committed to creating an alternative model to the EU and the West that would revive the multipolar world that has evaded Russia since the fall of Communism.<sup>6</sup> This logic has been backed by key policy initiatives like the creation of Russia’s alternative to the European Union, the Eurasian Economic Union.<sup>7</sup> Yet the European Union has dominated Europe, leading Russia to change strategy—instead of directly challenging the EU, Russia now looks to undermine it. The Russian goal is to transform the CEE states into Russian “agents of influence” within the European Union.<sup>8</sup>

It is in gaining significant influence that Russia can enact its goal “to subvert European unity, and ultimately Euro-Atlantic unity.”<sup>9</sup> In executing this strategy, one of the more interesting ways in which Russia has been proven to become involved in Central and Eastern Europe has been through its support of far right parties. First and foremost, Putin’s Russia has financed far right parties across the European continent.<sup>10</sup> Russia also created the Russian National Forum, a group with close ties to Vladimir Putin, that works to bring together far right, conservative groups in order to “formulat[e] a framework for close cooperation between ‘na-

tionalist forces.”<sup>11</sup> While these groups come from a variety of backgrounds, they all tend to share two commonalities: a strong dislike for the European Union, and a disdain of U.S. hegemony.<sup>12</sup> European far right political parties are particularly important

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in this context, and the Kremlin goes even further in organizing conferences exclusively for the EU’s far right parties. These conferences are held in Russia and focus on political and ideological issues that create close bonds between the Kremlin and Europe’s far right.<sup>13</sup>

Interestingly, “the protection of traditional values and the family against ‘homosexual propaganda’ is first among these issues.”<sup>14</sup> As Vladimir Putin outlined in his 2013 State of the Federation speech, Russia’s position on homosexuality is part of a broader strategy to “be the leader of a new political and cultural model that offers an alternative to both the EU and ‘the West.’”<sup>15</sup> This ideology has been politicized with discriminatory legislation like Russia’s infamous article 6.13, which bans the “distributing [of] ‘propaganda’ or ‘nontraditional sexual relations’ to minors.”<sup>16</sup> Homosexuality is central to this political and cultural model, as “Putin has repeatedly referred to the need to counter ‘homosexual propaganda’, which threatens to undermine the foundation of a society based on heterosexual families.”<sup>17</sup> Thus, the European Union’s liberalism is “perceived as a social and national threat.”<sup>18</sup> In this sense, if Putin can get countries like Poland

and Hungary to buy into the fundamental principles of this new political and cultural model, like the rejection of homosexuality, then Poland and Hungary would be so ideologically opposed to traditional Western European values that their place in the European Union would cause the European project's cause to run stagnant.

#### EUROPEAN UNION INFLUENCE

The other side in this ideological clash in Poland and Hungary is the West, specifically the European Union. When Poland and Hungary formally joined the European Union in 2004, Russia recognized the move as “a definite success of the West and Russia’s strategic defeat.”<sup>19</sup> The European Union’s success was part of its strategy for an integrated Europe, “[b]y pursuing integration, the European Union can influence other states by the power of its ideas and norms and ensure democratic member states that share European normative values.”<sup>20</sup> The Copenhagen Criteria, agreed upon in 1993, serves as the model for European shared norms. It outlines three criteria related to human rights and the common market, specifically citing the “protection of minorities.”<sup>21</sup> The criteria promote Western liberalism, granting equal rights to all its citizens regardless of sexual orientation, religion, or other preferences.<sup>22</sup>

European acceptance for homosexuality has been codified in European law as well. Article 13 of the Amsterdam treaty forbids any sort of “discrimination based upon sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation,” and the European Charter of Fundamental Rights explicitly prohibits discrimination based upon sexual orientation.<sup>23</sup> Additionally, the European Parliament was clear in 1998 that the EU would not allow membership to any country violating the human rights of lesbians and gay men

through its legislation and policies.<sup>24</sup>

The normative values outlined in the Copenhagen Criteria, EU legislation, and poignant Parliamentary rhetoric are critical for countries wanting to join the European Union, as they have to be willing to ascribe to these norms. Yet, states like Hungary and Poland saw the financial benefit, free movement, and security gains to be worth adopting the shared norms of the European Union, even if the countries did not agree with each one.<sup>25</sup> The process of joining the European Union, called accession, is particularly interesting in the context of this discussion. With shared norms at the heart of European unity, getting applicants to ascribe to these liberal Western norms is relatively easy during the accession process. The EU gets unparalleled access to affect domestic politics in applicant states, as each state is mandated to do whatever it is asked in order to align with European Union standards.<sup>26</sup> Ascribing to liberal EU norms proved to be relatively easy in Poland and Hungary, as both countries had center liberal governments upon entering the EU.<sup>27 28</sup> And despite a short unsuccessful center right government from 1998-2002 in Hungary, neither country has had anything that could resemble a right wing government from the fall of Communism to their joining the European Union.<sup>29</sup>

The problem with the EU, as the case of Hungary and Poland demonstrates, is its enforcement after accession. The European Union is limited to two insufficient options in attempting to promote Western liberal values in member states. The first is public shaming, as the European Parliament attempted to do with two separate resolutions against homophobia either alluding to or explicitly calling out Polish domestic policy.<sup>30</sup> Yet, politicians across Poland agreed that the EP’s resolutions were entirely “ineffectual” on domestic legislation.<sup>31</sup> The second is to revoke the membership of a member

state, which is a dangerous precedent to set and would only ever be used as a last resort.<sup>32</sup> Substantial LGBT rights legislation comes about when states fear the cost of external pressures, and the European Union has been structurally limited in being able to create that pressure.<sup>33</sup> As Cas Mudde and Erin Jenne sum it up: the EU is “dogged by structural weaknesses that impede [its] ability to bring about a substantive reversion to democracy.”<sup>34</sup> This weakness limits the EU’s ability to regulate its member states.

## II: THE FAR RIGHT AND THE INTRODUCTION OF HOMOPHOBIA

These structural weaknesses make Putin’s continued interest in creating agents of influence within the European Union critically dangerous. And it is exactly why the rise of far right governments in Poland and Hungary is so alarming, particularly within the context of this ideological battle. As research has shown, “the disapproval of homosexuality is often associated with right-wing authoritarianism in psychological research...even stronger as compared to conservatism, social dominance orientation, and dogmatism.”<sup>35</sup> Nationalism is equally critical to this psychological perspective, as it sees “...the proper member of the Nation [as] both heterosexual and reproductive. Seen as neither, LGBT people come to represent the Nation’s Other. In this analysis, to be gay is to deny the Nation and its needs, and so to align oneself with its transnational enemies.”<sup>36</sup> This is particularly frightening as strong authoritarianism and nationalism are readily associated with Europe’s far right.<sup>37</sup> The rise of the far right in Poland and Hungary would prove this theoretical base correct, codifying this type of thinking into law and public discourse.

## POLAND

Poland’s Law and Justice Party (PiS) originally came to power in 2005; one year after Poland’s joining the European Union.<sup>38</sup> Considered to be a center right conservative party at the time, certain policy positions mirrored Europe’s far right. One of the best examples was its attack on homosexuality. The party’s 2005 campaign made their ideological position regarding homosexuality quite clear: as a 2005 TV spot stated, “Rather than provocative parades of homosexuals, we want state help for Polish families.”<sup>39</sup> The country’s new Prime Minister (PiS) would openly declare, “homosexuality is contrary to nature.”<sup>40</sup> The new President was to be Lech Kaczyński, who had previously banned the 2004 and 2005 gay rights marches in Warsaw



Protests against a 2007 Gay Pride March in Warsaw, Poland. *Courtesy of Wikimedia Commons.*

during his time as mayor.<sup>41</sup> As he argued during his presidency, “Gay people may protest as citizens but not as homosexuals.”<sup>42</sup> This sort of rhetoric led to the two European Parliament resolutions meant to combat homophobia. But as Polish parliamentary speaker Marek Jurek (PiS) responded, the resolutions were another means of Europe attempting to



harm Poland by “promoting an ideology of homosexual communities,” leading the Polish parliament to pass a resolution disputing the European Parliament’s claims.<sup>43</sup>

With the election of the Law and Justice Party, homophobia found its way to all facets of Polish governing. The Polish Education minister from 2005 to 2007, Roman Giertych, fired the national director of teacher training for distributing a Council of Europe handbook on tolerance, which included several paragraphs on homosexuality. He would replace the director with a hardened anti-gay proponent, going so far as to propose the firing, fining, and imprisonment of any teacher caught “promoting homosexuality” in Polish classrooms.<sup>44</sup> Lambda Warszawa’s 2005-2006 survey of 1,023 Polish gays, lesbians, and bisexuals found discrimination on the account of sexual orientation to be rampant in employment, housing, education, medical care, and in dealing with public authorities.<sup>45</sup>

The Law and Justice Party would lose power following a corruption scandal in 2007, but would still maintain a prominent role in opposition. During its opposition period, any proposed bill suggesting the legal recognition of same-sex civil unions was continually shot down.<sup>46</sup> The party returned to power in 2015, attaining enough votes to govern without any coalition partners.<sup>47</sup> This newfound independence has exacerbated homophobia in Poland. The 2015 election victory has seen Polish policies and rhetoric move to a position “that only a year [prior] was the exclusive domain of the far right.”<sup>48</sup> This has solidified the party as a threatening far right party poised for significantly more aggressive attacks targeting the “homosexual lobby.”<sup>49</sup>

## HUNGARY

While a Socialist government brought Hungary into the European Union, it would be a nationalist,

far right government that would give the country international attention.<sup>50</sup> In 2010, Viktor Orbán’s Fidesz Party, a conservative nationalist party, won more than two-thirds of the parliamentary seats in the Hungarian national election. This left many in the international community wondering whether Hungary could slide back into the authoritarianism of its communist past, becoming the first EU members state to do so.<sup>51</sup> The party has proven to be both aggressively nationalistic and morally conservative, posing a dangerous threat to the West.<sup>52</sup>

As opposed to Poland, it is important to note that there does exist a prominent party further right on the Hungarian political spectrum, called Jobbik. Meaning “The Better” in Hungarian, Jobbik has become the third biggest party in domestic Hungarian politics.<sup>53</sup> Fidesz has had a role in this success as it is seen as a nationalist conservative success story, “legitimizing the beliefs of Jobbik supporters.”<sup>54</sup> Most important in the context of this argument, Jobbik has forced Fidesz to keep shifting its ideology further right in order to poach votes. In this sense, Fidesz has normalized the far right narrative in Hungary as Viktor Orbán’s party has taken “to co-opt[ing] many of Jobbik’s views and policies [in recent years].”<sup>55</sup>

The rise of Fidesz has been particularly interesting, as Hungary had shown signs of accepting European norms regarding homosexuality following the accession process. For instance, the country had already legalized same-sex civil partnerships in 2007<sup>56</sup> and the Hungarian Constitutional Court had already ruled that the approved legislation was constitutionally legal as the country’s constitution considered “same sex relationships legally protectable.”<sup>57</sup> Additionally, the Constitutional Court had ruled that the constitution explicitly prohibited discrimination on the grounds of sexual orientation.<sup>58</sup> This sort of policy was significantly more progres-

sive than in Poland, where both civil unions and marriage between same-sex couples were and still are illegal.<sup>59</sup> The election of Orbán's Fidesz Party would challenge this liberal precedent.

Since Orbán's election, Hungarian homophobia has been on the rise both on the streets and in the country's legislation. Hungary has seen a rise in far right counter demonstrations at Pride events throughout the country.<sup>60</sup> Right wing politicians throughout the country have come to label members of the LGBT community as "deviants" who "spread sickness throughout the Hungarian Nation."<sup>61</sup> Prominent Hungarian politicians argue that Pride Marches need to be met with equally public counterdemonstrations, "in order to protect our children, and in the interest of assuring the healthy development of our community."<sup>62</sup> This sort of rhetoric has become legitimized through Viktor Orbán's biggest move as Prime Minister: destroying the 1989 Hungarian Constitution, and replacing it with a brand new 2011 constitution called Hungary's Fundamental Law.<sup>63</sup>

The ideological reasoning behind the new constitution is carefully laid out in the constitution's preamble, calling attention "to the moral defeats of the twentieth century" and to Hungary's "need for spiritual and intellectual renewal..."<sup>64</sup> While the new constitution did not outlaw the previously legalized same-sex civil unions, it did explicitly define marriage as a union between a man and a woman,<sup>65</sup> making it impossible for future Hungarian legislatures to make same-sex marriage legal.<sup>66</sup> Beyond that, the new constitution lacked any mention of prohibiting discrimination on grounds of sexual orientation – a noticeable admission, as both EU law and previous rulings from the Hungarian Constitutional Court had protected Hungarians against such discrimination.<sup>67</sup> Additionally, by recognizing marriage as the union of a man and a woman, the

constitution only granted state protection to heterosexual relationships because the traditional family was seen as the base upon which Hungarian society was built.<sup>68</sup> Interestingly, one of the only other countries in the world to defend the new Hungarian constitution was Poland, where the chairman of the Law and Justice Party publicly declared that Hungary had "restored democracy and elementary order."<sup>69</sup>

#### HOMOPHOBIA AS A REJECTION OF THE EUROPEAN UNION

Polish support for the new Hungarian Constitution is indicative of the similarities in each country, specifically in advancing homophobic rhetoric and policy. Both Polish and Hungarian homophobia is a reaction to the EU imposition of Western liberalism on each state's domestic agenda. Graff contends that the right to be a homophobe became a question of sovereignty following EU accession, and homophobia is now seen as a form of patriotism – standing up to the European Union which seeks to violate traditional domestic cultures.<sup>70</sup> This is why, as previously noted, the same sort of homophobia was not present in Hungary and Poland before EU accession. As soon as the European Union was able to influence domestic policy, an argument for the infringement of each state's national identity and domestic culture became valid. This created the necessary political opportunity for the far right to rise up in both places – claiming to stand up for Polish and Hungarian national values against a Europe that looked to replace those values with broader, European ones.

In this sense, homosexuality has become associated with the transnational Other, specifically Europe and the West.<sup>71</sup> The homophobic logic in Poland and Hungary is that homosexuals are looking to undermine the traditional family with a careful

plan – to bring confusion to the aesthetic, moral, and political order throughout Europe.<sup>72</sup> The homophobic rhetoric and action is seen as a necessary defensive reaction to the European Union’s forcing of a “sexual democracy” upon each country.<sup>73</sup> The rise of the far right was that defensive reaction. Hungary’s Fidesz Party and its new constitution was declared as a response “to the moral defeats of the twentieth century,”<sup>74</sup> while Poland’s Law and Justice Party saw their ascendance into power as being called to bring about a “moral revolution” to Polish society.<sup>75</sup>

Homosexuality is therefore politicized as a representation of the European Union attempting to subvert Polish and Hungarian national identity and domestic culture. Renkin notes that criticism and discrimination of the LGBT community in Hungary are “merely pretexts for other political meanings” following the economic decline since its 2004 entry into the European Union. She describes the LGBT community as “scapegoats” for Hungarian anger directed at the European Union.<sup>76</sup> And in Poland, Graff points out that homophobia “can only be understood in its historical and political context – at the intersection of hopes and anxieties concerning Poland’s place in the European Union.”<sup>77</sup> Thus,

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homosexuality seems to be the most powerful place to stand up against European policy, as each country associates it with a moral right. For example, in 2015 both countries worked together to stop a European Union ministerial agreement that would

have forced all EU member states to honor same-sex marriages wherever they were contracted in the European Union.<sup>78</sup> (Gennarini 2015).

### III: EVALUATING THE RUSSIAN INFLUENCE IN EU NORM REJECTION INTRODUCTION

The Polish and Hungarian response to European policy and norm diffusion regarding homosexuality seems likened to what Putin’s Russia had hoped for from EU member states—mainly, an ideological dispute set to bring about European policy stagnation and friction within the European community of states. Both countries argue the imposition of homosexuality is in contradiction with their national identities. As homophobia clearly aligns ideologically with the Kremlin, it makes sense to evaluate what influence Russia plays in the Hungarian and Polish position on homosexuality.

### HUNGARY

For Hungary, there does seem to be a legitimate connection between the Kremlin and Viktor Orbán’s Hungarian government. Putin and Orbán have developed a close relationship, as Orbán believes “Europe’s ‘prevailing ideological winds’ are ‘blowing from the East’ and sees in Russia an ideal political model for an ‘illiberal state,’ which he admires.”<sup>79</sup> It has led Orbán to embrace what some have called a process of “Putinization,” which combines authoritarian politics and state-supervised economics.<sup>80</sup> While Putin and Orbán have crafted an important alliance, the new alliance between Moscow and Budapest has a lot to do with the Hungarian extreme right Jobbik party. Jobbik, the party Orbán has been reliant upon poaching policies from, is in favor of leaving the European Union for Russia’s Eurasian Economic Union.<sup>81</sup> The head of Jobbik, Gabor Vona, has openly praised Putin

as a leader standing up for “traditional family values, Christian morality and our common Eurasian heritage.”<sup>82</sup> Additionally, members of Jobbik have been invited, and have traveled to and from Russia to meet with leaders in the Russian Duma and with



Russian President Vladimir Putin giving a press conference. *Courtesy of Wikimedia Commons.*

prominent Russian academics.<sup>83</sup> Therefore, there is significant evidence that Hungary has become an agent of influence for Putin. The Hungarian state has certainly come to accept Putin’s alternative political and cultural model to the European model – a dangerous precedent for European unity.

## POLAND

The case of Poland is vastly different. First and foremost, there are no close connections between the Kremlin and Polish political parties like there are in Hungary. Additionally, the dynamic of the ruling Law and Justice Party provides a lot of insight into the relationship between Poland and Russia. The party chairman, Jarosław Kaczyński, dominates Polish politics. Formerly the prime minister, today Kaczyński is neither the president nor prime minister, although Mr. Kaczyński handpicked both and is considered “arguably the most powerful [person]” in Polish politics.<sup>84</sup> Kaczyński’s twin brother,

Lech Kaczyński, was President of Poland until his sudden death in 2010 following a plane crash in Smolensk, Russia.<sup>85</sup> Some in Poland claimed that the Russians were responsible for the crash, and some of these “conspiracy theorists” found their way into prominent government positions like current Defence Minister Antoni Macierewicz.<sup>86</sup> The official report following a Russian-led investigation placed the blame on “inebriated Polish commanders who pressured their pilots to attempt a landing, while omitting plausible evidence from the Polish side that Russian air traffic controllers gave incorrect flight paths and altitudes.”<sup>87</sup> Jarosław Kaczyński was quick to call the report a “mockery of Poland,”<sup>88</sup> and the incident reinforced Kaczyński’s “deep distrust of Russia.”<sup>89</sup> This has exacerbated tensions between the two governments, and represents the difficulty in characterizing Poland as Putin’s agent of influence within the European Union.

The biggest impact upon Poland in its resistance to the EU’s sexual democracy has not been Russia, but the Catholic Church. After the fall of Communism, it was the Polish Catholic Church that successfully lobbied against the inclusion of provisions to protect LGBT rights in the new constitution, long before the rise of the Law and Justice Party.<sup>90</sup> As Poland’s chief nationalist ideologue argued during the interwar period, “Catholicism is not an appendage to Polishness ... it is embedded in its essence, and in a large measure it is its essence.”<sup>91</sup> Since the fall of Communism, the Catholic Church has had political influence that is unrivaled anywhere else in Europe, with 95% of Poles identifying as Catholic<sup>92</sup> compared to only 39% of Hungarians.<sup>93</sup> Therefore, the Catholic Church has tremendous influence in Poland and is a primary reason as to why homosexuality has become such a politicized issue. The EU’s position on homosexu-

ality is considered to be in direct contradiction with Catholic doctrine, and therefore the Polish Catholic Church works vigorously to encourage the government to reject European liberalism as it pertains to homosexuality.

#### IV: CONCLUSIONS

Ultimately, both Poland and Hungary continue to find themselves positioned geographically and ideologically between a liberalizing West and a continually authoritarian Russia. The European Union had appeared to be winning this ideological battle, as both countries joined and were forced to adopt European standards during accession. Yet recent Polish and Hungarian homophobia in spite of European norms on homosexuality seems to suggest a new ideological aligning with Vladimir Putin's Russia. In evaluating Putin's influence in this European rejection, there is a connection in Hungary as both Prime Minister Orbán and Hungarian political parties, like Jobbik, have developed close relationships with the Kremlin. On the other hand, Polish-Russian relations are particularly tense, as the leader of Poland's ruling party has made it clear that he does not trust the Russian state. The country's ideological alignment has more to do with Poland's relationship with the Catholic Church than the Kremlin.

Today, heteronormativity and the traditional family represent a Hungarian and Polish national identity that both countries believe the European Union is looking to erode in order to bring uniform liberal policy to the European continent. As such, recent years have seen a rise in Polish and Hungarian homophobic rhetoric and policies from the ruling far right – which is considerably dangerous in light of history, where “...only twenty-five years ago, U.S. leadership and Western Europe's resolve helped bring democratic institutions, liber-

al values, and economic prosperity to Central and Eastern Europe.”<sup>94</sup> The West may have prevailed over the Soviet Union twenty-five years ago, but today, this is different as the “authoritarian challenges” presented in Poland and Hungary are far more complex and demanding, particularly in recognizing Hungary's place in the European Union and its close relationship with Russia.<sup>95</sup> How the EU responds to Polish and Hungarian homophobia will be indicative of how it plans to respond to these newfound authoritarian challenges. The European Union needs a political answer – something more effective than public shaming, but certainly less than member expulsion.

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# “THAT WHICH IS ADMINISTERED IS BEST”:

## The Federalists and Anti-Federalists on Form



BY JORDAN PINO

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In this short thought-piece, I suggest a particular way of understanding the nature of the debate between the Federalists and the Anti-Federalists with respect to the form of the United States’ government. Namely, I contend that this debate is best understood as a division between first and second principles, a disagreement about the validity of Alexander Pope’s maxim: “that which is best administered is best.” Through this lens, Federalist concern to promote a particular end of government overtakes concern to retain the federal structure of government under the Articles of Confederation, the latter a secondary characteristic to men such as John Adams and Alexander Hamilton. On the opposite side, Anti-Federalists prized the league of separate and sovereign republics with a primary attachment, due in part to the localism thesis that individuals such as The Federal Farmer endorsed: government that is nearly can be controlled. I argue that the Federalists comprehended the revolutionary moment as one in which a great nation could be formed; the Anti-Federalists were more attuned to protecting the various liberties of the people. These primary attachments led to diverging secondary considerations about the form of the national authority.

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## INTRODUCTION

Alexander Pope's maxim—"That which is best administered is best"—appears in John Adams' "Thoughts on Government" (April 1776) as well as in the first letter of *The Federal Farmer* (October 1787), and it was referenced ad nauseum during the debates on the Constitution's ratification.<sup>1</sup> In the former, Adams criticizes Pope's words as flattery for tyrants and because they consider the form before the end of government, which he claims is liberty and the happiness of society. For Adams, an idiosyncratic puritan, the collective happiness of a people is enabled by the exercise of the various virtues, which contingently forms the foundation of the good republic: "an Empire of Laws, and not of men," informed by principle and virtue. In his perspective, the republican structure that is "best contrived to secure an impartial and exact execution of the laws" is best.<sup>2</sup> While written over ten years before the debates occurred between the Federalists and Anti-Federalists over the new Constitution, "Thoughts on Government" remains a foreshadowing work that details Federalist predilections. For instance, Adams sketches a structure for a powerful representative assembly with sufficient checks and limitations to secure it against the timeless flaw of ambitiousness among its membership. He claims, though, that his motivation is the promotion of a particular end of government throughout the union, for which form and administration are only secondary characteristics. I would suggest that this division of concern may help to account for the differences between the Federalists and the Anti-Federalists. The matter becomes more revealing when contrasted with the latter instantiation of Pope's maxim.

The Observations of the *Federal Farmer* – considered one of the "ablest Anti-Federalist pieces"<sup>3</sup> – expresses the concerns of that faction to main-

tain the federal form of the contemporary order, in which the various states retained their enormous powers without intervening challenge from the national authority. In the first letter, *The Federal Farmer* writes that he is convinced of the truth of Pope's maxim and that, therefore, a federal government of some sort is necessary.<sup>4</sup> The fundamental question is why? Federalists, to varying extents, supported consolidation, in which the states would cede authority to the national government in order to advance common security and protect liberty, especially since they believed the separate sovereignties of the states would lead to conflict and war, and thereby, liberty's usurpation.<sup>5</sup> Some Federalists seemed to hold the states in little regard and argued that "We must forget our local habits and attachments" in order to achieve these agreed-upon ends.<sup>6</sup> The Anti-Federalists not only disagreed with the Federalists on the matter that localism inhibits the aims of unity, peace, and prosperity (they resented figures like James Monroe who seemed to suggest that the state legislatures jarred the welfare of Americans by fomenting "discordant principles"), but they also claimed that strong state governments contributed to the well-functioning administration of the union.<sup>7</sup> In this way, *The Federal Farmer* and other Anti-Federalists believed that a confederation of the states was best at its root because it reflected the importance of republican principles – participatory government, local practices and customs, and the development of a virtuous citizenry, among others.

At some level, this is the efficiency argument that both Anti-Federalists and Federalists developed in different ways, to either support the Articles of Confederation or detract from them. *The Federal Farmer*, for instance, noted in letter VI that the federal system permits the efficient operation of a division of powers, whereby "national concerns

may be transacted in the centre [sic]” and “local affairs in state or district governments.”<sup>8</sup> What is advantageous about such a division is that liberty is guarded closely because the government is “mild and free,” and the consent of the people given continuously in close proximity to their representatives.<sup>9</sup> This is the idea that small republics are best able to look after their own liberties and interests, and make laws, free from the dangers of over-powerful central authorities. Publius would,




Fifty-five delegates met in Philadelphia in 1787 to take part in a convention to improve the Articles of Confederation. After a raucous summer, they emerged from the ‘Great Debate’ with a constitution that endorsed a much stronger central government. The two camps – the Federalists and the Anti-Federalists – disagreed on first-principles about the importance of strong state governments to secure the liberties of the people. Signing of the United States Constitution by Junius Brutus Stearns, oil on canvas, 1856. *Courtesy of Wikimedia Commons.*

of course, answer this contention in Federalist No. 10 by claiming larger districts are less amenable to the “mischief” of factions or “little demagogues,” as James Wilson called local politicians and organizations.<sup>10</sup> Ambitious men and diverse interests pitted against each other create a balance of power that protects the people. Additionally, Federalist

No. 24 would criticize the notion that the contemporary order under the Articles could be considered well-functioning (and, therefore, best) given the transgressions of Shay’s rebellion and the insufficient acts of the national government to quell it by force. Nevertheless, the point I suggest is that the Anti-Federalists saw an inherent value in the existing system of small republics and collective friendship – a value that the Federalists regarded as second-order.

The Anti-Federalists supported the Articles of Confederation and therefore opposed the Constitution that emanated from the Convention of 1787, because they deemed the former a manifestation of the revolutionary principles for which the various colonies warred with England to become sovereign states, proclaiming Democratic-Republicanism.<sup>11</sup> In this way, good government was gradually improved from the framework in which it began and, in the case of the thirteen former colonies, radically reconstituting the bounds of the union posed a danger to the Law itself and the “preservation of life, liberty, and property.”<sup>12</sup> The Anti-Federalists would have been given pause by the great enthusiasm of many Federalists who saw the founding decade as an opportunity to forge an American Empire built up by commerce and innovation, as Federalist No. 11 advocates. Also, they would have been suspicious of Adams’ enthusiasm in “Thoughts on Government,” where he noted excitedly to his correspondent that men of antiquity would have wished to live in their moment, since Adams and his compatriots had the opportunity to establish a “great” government out of their own deliberations.<sup>13</sup> While the Anti-Federalists shared in a desire for American welfare and the construction of a virtuous republic of the world’s attention, they grew concerned over Federalist understandings of formation of government. For



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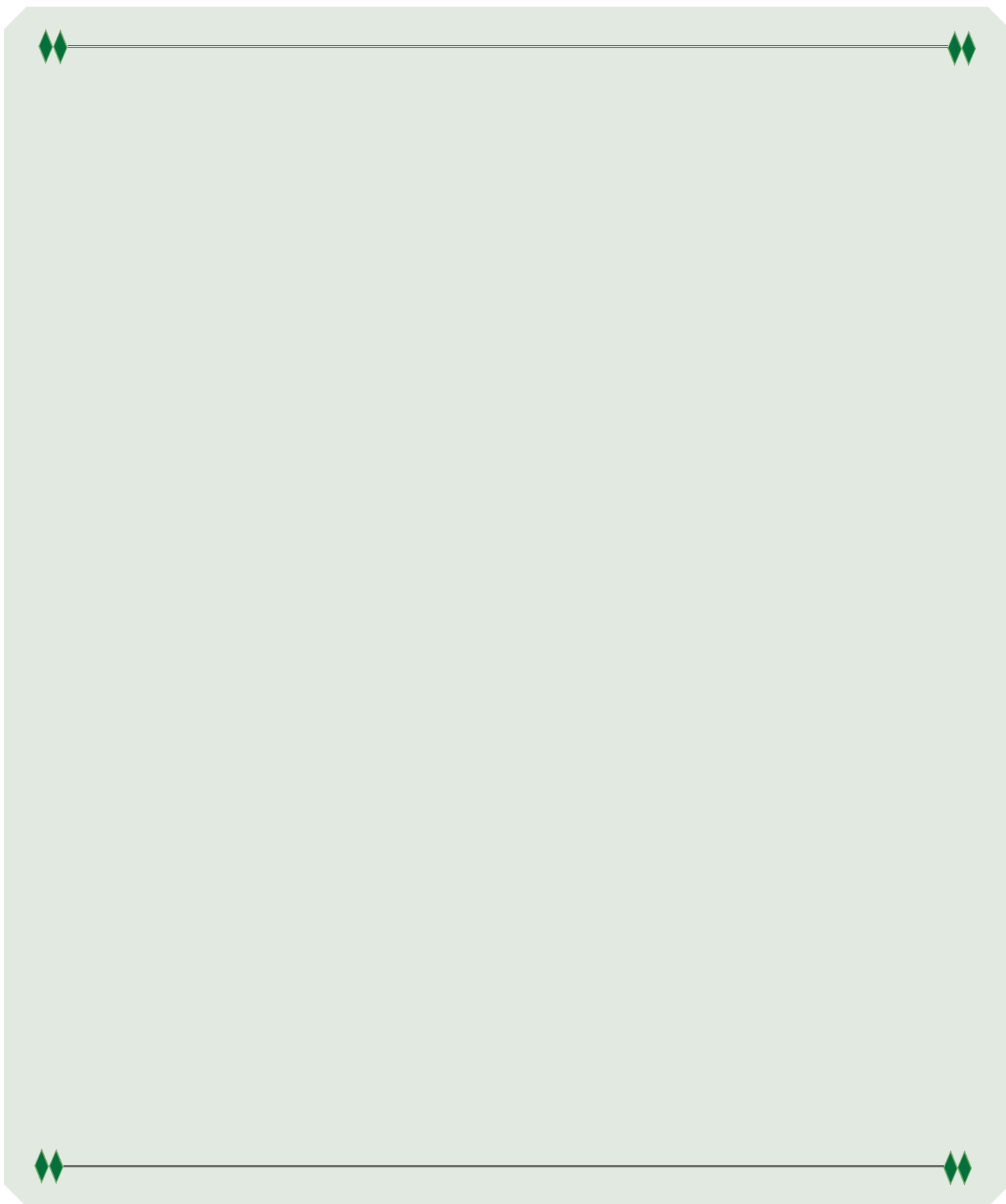
the Anti-Federalists, they would have remembered fondly the excitement of a decade earlier—the ratification of their state constitutions. Seventeen Seventy-Six brought with it the Declaration but also separate, various expressions of free and popular government.<sup>14</sup> As McWilliams notes, the Federalists were influenced by a belief in the principle of representation as a finely-honed concept, matured in America; the Anti-Federalists were much more enamored of self-government, representatives being a necessary evil for matters transcending local concern.<sup>15</sup> While the Federalists comprehended the moment to establish a great nation, it is not too far to suggest that the Anti-Federalists were more attuned to the nation’s liberty—as both of these objects are in natural tension. The Federalists were less attached to state sovereignty because their consideration of the form of government followed assessment of its proper ends – the Anti-Federalists, while committed to many of the same principles, included republicanism as first-order.

Hamilton and Madison in *The Federalist Papers* would, of course, disagree with the suggestion that the Constitution departed from this republican heritage. Federalist No. 39 argues that the form of the new government under the Constitution would be of both federal form and national form, and would therefore commit itself to republican principles, while guaranteeing a legitimate executive authority and an essential role for the states. The Anti-Federalists, however, perhaps correctly appraised the compromised position of dual sovereignty – that the division of authority would tend in one direction and serve to vastly diminish state powers over and against the national government.<sup>16</sup> It is true also that Federalist No. 85 allayed the anxieties of many Anti-Federalists about government traversing “life, liberty, and property” by Federalists’ intention to amend the Constitution later.

Traditionally, the Federalist v. Anti-Federalist debate has been seen in the context of a mere dispute over instrumentality<sup>17</sup> or a disagreement about the ends of government or even a much more fundamental clash of political philosophy. None of these perspectives seems to me to capture the interaction of these two groups, but the preceding has made no claim directly about any of these. Instead, I have endeavored to draw attention to Pope’s maxim – “That which is best administered is best” – to suggest that the conservative Anti-Federalists were more enchanted by their experiences in self-government as sovereign republics, which led them to a first-order attachment to such a principle in unification deliberations. This was not so for the Federalists, who were much less committed to the form of confederation, as a second-order consideration.

## ENDNOTES

- 1 Alexander Pope, *Essay on Man*, epistle 3, lines 303-4; see: Herbert J. Storing, *The Anti-Federalist: Writings by the Opponents of the Constitution*, ed. by Murray Dry, (University of Chicago, 1985), p. 33, footnote 3.
- 2 John Adams, “Thoughts On Government” (Boston, 1776), p. 2.
- 3 Storing, *The Anti-Federalist*, p. 23.
- 4 Note that Storing’s analysis in *What the Anti-Federalists Were For* on page 9 can be put to good use here: the term ‘federal’ is used in the strict interpretation, which signifies a relationship between the “general” authority and the state governments, specifically where the states are “primary,” “equal,” and “they possess the main weight of political power.”
- 5 See: Alexander Hamilton, John Jay, and James Madison (1788), *The Federalist: A Commentary on the Constitution of the United States*, ed. by Robert Scigliano (New York: The Modern Library, 2001), Nos. 6, 7, 8.
- 6 See: Herbert J. Storing, *What the Anti-Federalists Were For* (University of Chicago, 1981), p. 10.
- 7 *Ibid.*, p. 11.
- 8 Storing, *The Anti-Federalist*, p. 69.
- 9 *Ibid.*
- 10 See: Wilson Carey McWilliams, “The Anti-Federalists, Representation, and Party,” *Northwestern University Law Review* Vol. 84, No. 1 (1989), pp. 17-8.
- 11 Storing, *What the Anti-Federalists Were For*, p. 8.
- 12 Storing, *The Anti-Federalist*, p. 69.
- 13 See: Adams, “Thoughts on Government,” p. 6.
- 14 See: [Anonymous], “The People the Best Governors: Or a Plan of Government Founded on the Just Principles of Natural Freedom” (New Hampshire, 1776), p. 1.
- 15 McWilliams, “The Anti-Federalists,” p. 12.
- 16 Storing, *What the Anti-Federalists Were For*, p. 12.
- 17 That is to say, a disagreement over the structural means of achieving a free, democratic government that aims at securing certain liberties. See: Jennifer Nedelsky, “Review: Confining Democratic Politics: Anti-Federalists, Federalists, and the Constitution Reviewed Work(s): *The Complete Anti-Federalist* by Herbert J. Storing; *The Oliver Wendell Holmes Devise, History of the Supreme Court of the United States, Volume II, Foundations of Power: John Marshall, 1801-15* by George Lee Haskins and Herbert A. Johnson,” *Harvard Law Review*, Vol. 96, No. 1 (Nov., 1982).





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# THE EFFECT OF BIRTH CONTROL ON WOMEN'S CAREER PATHS AND WAGES

BY STEPHANIE LEWIS

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Throughout the last 50 years, women have experienced increased human capital attainment and earnings. In addition to these increases, birth control utilization has also risen. The purpose of this issue brief is to explore the impact of the birth control pill on women's career paths and wages. To do so, I analyze existing literature to illustrate the direct effects of early legal access to the pill and its relationship to human capital attainment and future career choices. After evaluating the literature, I examine trends in women's wages and birth control pill utilization from 1962-2002, utilizing data from the U.S. Census Bureau and the Centers for Disease Control and Prevention. The results indicate that birth control has contributed to an increase in human capital attainment and wages, due to the notion that delayed contraception provides certainty that lowers the cost of long-term career investment decisions. Thus, it is imperative that we consider the vast social and political implications of these results as the U.S. continues to evolve.





## INTRODUCTION

Over the past several decades, birth control utilization and earnings have increased for women in the United States. According to the Centers for Disease Control and Prevention, birth control is one of the top 10 public health achievements of the century. In the past 50 years, the pill has altered women's life-cycle wages and ultimately contributed to the gender wage gap convergence more than other contraceptive methods. Most importantly, birth control is one of the main contributors to women's economic stability and future career choices, as it has allowed women to invest in long-term careers and increased their earnings.

After the FDA approved the first birth control pill in 1960, oral contraceptive use dramatically increased. By 1962, 1.2 million women were taking the pill. By 1965, 6.5 million women were taking the pill, making it the most popular form of birth control in the U.S.<sup>1</sup> According to the CDC, the pill was the first medication approved for long-term use by healthy people and the first 99% effective way to prevent conception. By preventing conception, the pill delayed motherhood and consequently affected women's human capital investments and earnings.

The *brief* discusses the following topics as outlined here. The first section describes the effects of early access to the pill, specifically delayed motherhood, which is the foundation for understanding the economic trends to follow. The second section explains increased human capital attainment as a result of delayed motherhood, namely lowering the costs of long-term career investment and educational opportunities. Lastly, the third section illustrates the trend in women's wages and birth control pill utilization from 1962-2002, which resulted in both higher wages and utilization rates. Additionally, the third section discusses women's earnings as a percentage of men's earnings, resulting in a

converging gender wage gap. The final section concludes that birth control, among other factors, results in increased wages and increased certainty regarding the future of women in the United States.

## EARLY ACCESS TO THE PILL

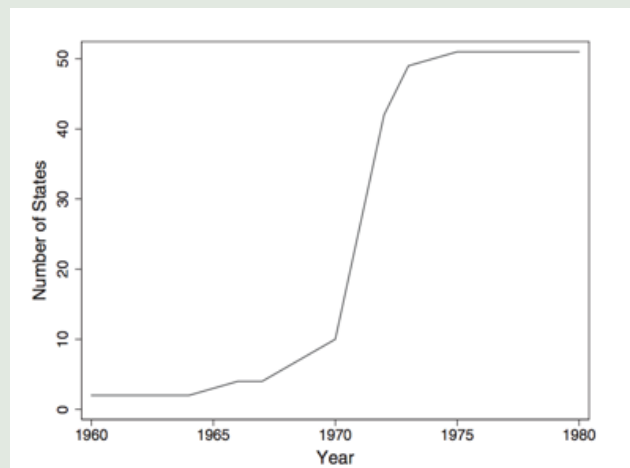
The FDA approved the first legal birth control pill, *Enovid*, in 1960. However, this prescription was not immediately available to all young women because some state laws prohibited access to birth control and also banned minors from receiving medical care without the consent of their parents. The Comstock Act of 1873 prohibited the sale of contraceptives, declaring them "obscene and illicit."<sup>2</sup> Some states removed these laws as a result of the Supreme Court's decision in *Griswold v. Connecticut*, which overturned the Connecticut law that prohibited the use of contraceptives by married females. Even though some states removed state laws that banned the pill, others did not and access continued to be a problem.

Despite variation in state laws concerning access to the pill, the age at which women had independent legal access to medical care also varied by state. In 1960, the legal age of most states was 21, which limited access to the pill for young single women. However, some states instituted mature minor doctrines that expanded legal rights for minors and allowed doctors to provide medical care to minors without parental consent.<sup>3</sup> As a result, young women below age 21 were able to access birth control in these states. In the states that did not expand legal medical rights, they changed the legal age to 18 for various political and economic reasons. Consequently, young women were able to obtain access to birth control at age 18 in these states. Evident in Figure 1, all women in the United States had legal access to birth control by age 18.<sup>4</sup> Figure 1 explains adopted ELA (early legal access)

to oral contraceptives for women by age 18 from 1960 to 1980. By definition, ELA allowed unmarried women age 20 and younger to legally purchase birth control in their state, without the consent of their parents.

Early access to birth control directly affected women by reducing the probability of conception

**Figure 1:** *States with Early Access to Birth Control, by Year*



Source: *The Effects of Contraception on Female Poverty*, Browne (2014)

at a young age. Access to the pill before age 21 resulted in a 1.0 to 1.2 percentage point reduction in the probability that a woman gives birth between 18 and 21, and decreased the likelihood of becoming a mother before age 22 by 14% to 18%.<sup>5</sup> Furthermore, between 1970 and 1980, ELA reduced birthrates among white women ages 15 to 21 by 8.5%.<sup>6</sup>

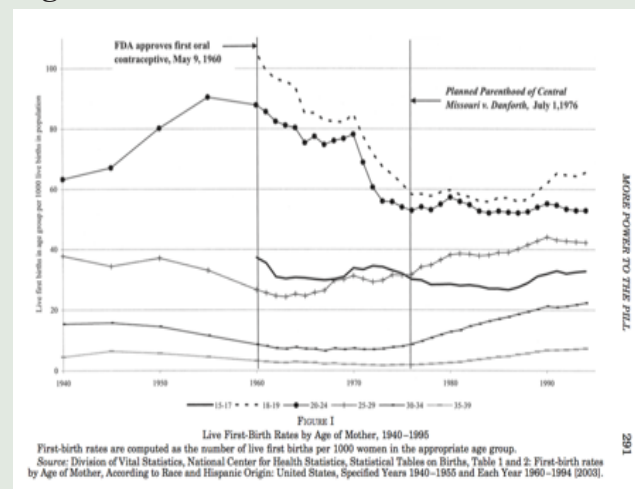
Adapted from *More Power to the Pill*,<sup>7</sup> Figure 2 explains trends in first birth rates by specific age category from 1940-1995. After the FDA approved the pill in 1960, first birth rates decreased for all categories until 1976, the year when *Planned Parenthood of Central Missouri v. Danforth* granted all unmarried

minors access to contraceptives.

Additionally, Figure 3 illustrates that fertility rates have been declining, on average, since 1980. As defined by the National Vital Statistics Report, fertility rates are births per 100,000 women. These specific data points are births per 100,000 women ages 15-44, all races.

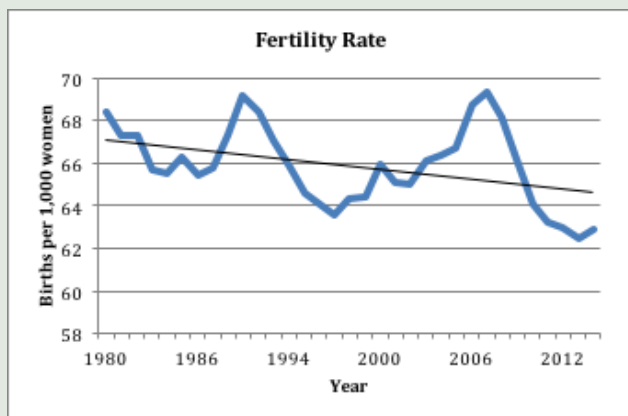
Delayed motherhood influences a woman's career choices, because it alters the timing of her decisions. When women have children, they typically take time off to care for their children and remove themselves from the workforce for a given period of time. These interruptions depreciate human capital and thus, women are less likely to obtain the necessary human capital investments to pursue long-term careers. However, the pill allows women to have control over these interruptions. The analysis proceeds to describe the long-run positive economic effects of the pill's ability to delay motherhood, such as decreasing the costs of long-term career investment and increasing women's wages as a result.

**Figure 2:** *Trends in First Birth Rates*



Source: *More Power to the Pill*, Bailey (2006)

**Figure 3:** Trends in Fertility Rates, 1980-2014, all women ages 15-44



Source: National Vital Statistics Report, Hamilton (2015)

### HUMAN CAPITAL INVESTMENT

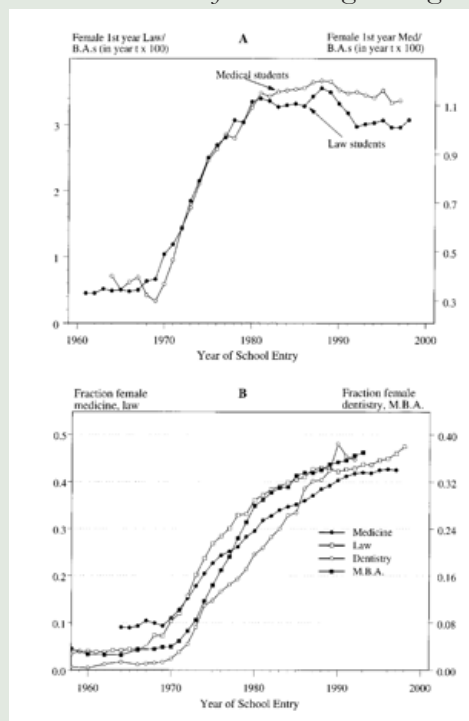
The advent of the birth control pill increased women's human capital attainment, as it decreased the costs of long-term career investment and increased the age of first marriage.<sup>8</sup> In their study, Goldin and Katz followed a cohort of female college graduates born around 1950. Due to the fact that the pill gave women greater certainty concerning the pregnancy consequences of sex, more women were able to obtain professional or managerial degrees.<sup>9</sup> Before the pill, women were not able to pursue intensive careers because of child-care responsibilities that interrupted them from acquiring the education level necessary to pursue a high wage growth career opportunity. Thus, the pill lowered long-term career investment costs by effectively eliminating the risk of pregnancy.

Additionally, the pill indirectly reduced marriage market costs for those women who delayed marriage to pursue additional human capital investment. Before the pill, women who delayed marriage were typically met with less qualified matches and thus, faced much larger costs to delayed marriage.

With the advent of the pill, women were able to obtain better careers and become more attractive marriage partners as a result.<sup>10</sup>

Adapted from *The Power of the Pill*, Figure 4 (A) explains professional school enrollments of women as a portion of women receiving a bachelor of arts in the same year. Figure 4 (B) explains professional school enrollments of women as a portion of total first-year enrollments in professional schools. Both graphs illustrate a sharp increase in enrollment beginning in 1970 for medical and law students, but graph B shows an increase in the fraction of women in medical, law, dentistry, and business professional schools. It is interesting to note that the increase in professional career investments was not a result of admitting more women, but rather an increase in female applications.<sup>11</sup>

**Figure 4:** Women in Professional Degree Programs



Source: Goldin & Katz (2002)

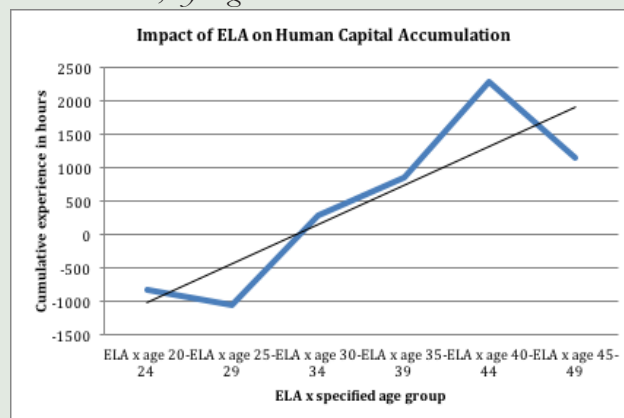
Similar to Goldin and Katz, Bailey also found that early access to the pill reduced the costs and increased the returns to pursuing careers. According to Bailey, “Young women could stay in the labor market, invest in careers (through formal schooling or training or on-the-job experience), and be sexually active (or marry) without the risk of pregnancy.”<sup>12</sup> This is due to the previously mentioned career interruptions that women face when deciding whether or not to have children. Expected career interruptions reduce pre-interruption career investments.<sup>13</sup> Therefore, when women have certainty over the pregnancy consequences of sex and they can adequately prepare for conception, they are less likely to interrupt long-term career investments.

Figure 5 describes the effect of early legal access on women’s labor force participation. Using data from Bailey (2012), the results indicate that women with early access to contraception participated less in the workforce in their early twenties and more in their thirties and early forties than women without early access. The y-axis, cumulative experience in hours, is defined as weeks worked multiplied by usual weekly hours and summed across survey wages.<sup>14</sup> Evident in Figure 5, women worked 846 less hours than their counterparts without early access by their late twenties, but worked 2,282 more hours by their forties. This is consistent with the pill’s ability to decrease long-term career investment costs, as described above. Women are working less in their early twenties, as they are obtaining the necessary education and experience to benefit them in their thirties and forties. Thus, women are reaping the benefits of human capital accumulation later in their lives.

Due to the fact that women are able to obtain greater human capital investment with regards to education and professional opportunities, the pill increases women’s wages and lifetime earnings, as

discussed in the following section.

**Figure 5:** *Impact of ELA on Human Capital Accumulation, by Age*



Source: Bailey (2012)

#### INCREASE IN WOMEN’S EARNINGS

As more women began to change their career paths and invest in high wage growth jobs, labor-force participation increased by 8% among women ages 26-30, as these women worked roughly 68 more annual hours than those without access to the pill. This translates to a 15% increase in annual hours worked for those women.<sup>15</sup>

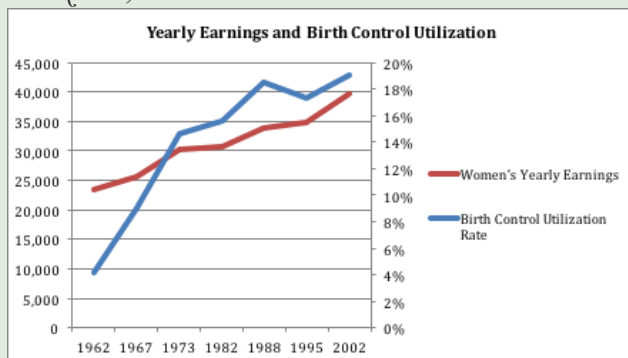
This section uses data from the U.S. Census Bureau and the Centers for Disease Control and Prevention to illustrate the relationship between pill utilization and women’s earnings.

Figure 6 illustrates that both women’s earnings and birth control utilization have increased over the past 50 years. Women’s earnings are defined as yearly earnings in 2014 CPI-adjusted dollars, for full-time workers. As women’s earnings have steadily increased, so has birth control utilization. Birth control utilization has increased from 4% in 1962 to 19% in 2002 for women ages 15-44. Birth control utilization is defined by the percentage of people who used the pill during the month of the National Survey of Family Growth interview. Even

though there are other forms of contraceptives, the data in this issue brief focuses solely on pill usage.

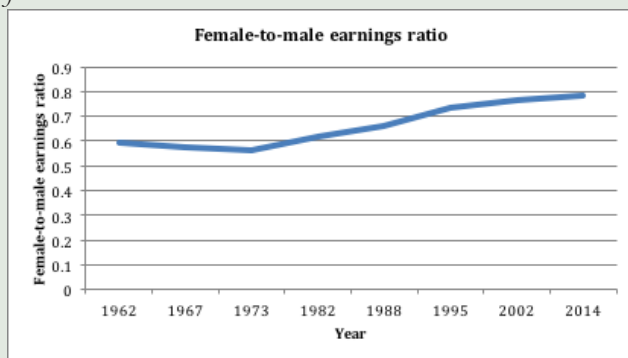
Additionally, Figure 7 explains women's earn-

**Figure 6:** Trends in Yearly Earnings and Birth Control Utilization, 1962-2002



Source: U.S. Census Bureau, Centers for Disease Control and Prevention, National Survey of Family Growth

**Figure 7:** Female-to-male earnings ratio, 1962-2014, full-time workers



Source: U.S. Census (2014)

ings relative to men's from 1962-2014. As women's earnings and labor-force participation began to increase in the 1960s, the gender wage gap began to narrow. This is consistent with the idea that the pill has allowed women to invest in long-term careers with high wage growth potential, such as managerial or professional occupations.

From the data above, it is evident that birth control utilization (defined by the pill) and earnings both increased from 1962 to 2002. How much

of the increase in earnings can be attributed to the pill? Bailey (2012) uses a counterfactual hourly wage distribution from the population census by removing age-specific estimates of early legal access to the pill from the earnings of cohorts born after 1940 and computes the actual hourly wage distribution for both genders. The results indicate that both the actual gender gap and the simulated gender gap closed and thus, 10% of the converging gap in the 1980s is due to the pill compared to 31% in the 1990s.<sup>16</sup> Bailey concludes that the pill most noticeably affected women in the middle IQ distribution with some college education; these women experienced the most wage gains in their lifetimes. Furthermore, one third of the total wage gains can be attributed to the pill, whereas educational attainment and increasing labor market experience accounts for the other two thirds of the wage increase.

Moreover, early access laws doubled the percentage of women ages 18 to 20 using the pill in states with these laws. These women who had early access to the pill at age 18 earned approximately 8% more each year by the 1980s than those in states without access to the pill.<sup>17</sup> According to Miller, early access to the pill accounts for roughly 27-37% of annual wage gains among women born in the late 1940s, while 33-46% of the hourly wage gains can be attributed to early access.<sup>18</sup>

Lastly, early legal access to the pill has reduced female poverty by 0.5 percentage points.<sup>19</sup> Even though this effect may not seem large, it is important because of the pill's feasibility and efficiency. Unlike other methods to reduce poverty, the pill is extremely easy to distribute to large numbers without adverse side effects or high cost.



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## CONCLUSION

This issue brief discusses the effect of the birth control pill in two major ways: an increase in human capital attainment with regards to long-term career investment decisions and an increase in earnings. Due to the pill's ability to effectively delay conception, the pill transformed women's certainty regarding their futures and contributed to the convergence of the gender wage gap.

In terms of future research, it is interesting to think about this issue in the context of policy. According to the findings in this brief, it is clear that access to the pill increases women's economic stability and narrows the gender wage gap. When thinking about policy concerning ease of accessibility to the pill, it is important to remember its positive continued effects on women's futures. The pill has arguably reduced inequality in outcomes by allowing women greater certainty over both their career and life paths.



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## ENDNOTES

- 1 “Contraceptive Use.” Centers for Disease Control and Prevention. U.S. Department of Health & Human Services, 15 July 2016. Web.
- 2 “Comstock Act.” Encyclopedia Britannica Online. Encyclopedia Britannica, 1 Dec. 1999. Web.
- 3 Browne, Stephanie P., & LaLumia, Sara (2014). The Effects of Contraception on Female Poverty Journal of Policy Analysis and Management, Vol. 33, No. 3, 602-622.
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- 5 Bailey, M. J. (2006). More Power to the Pill: The impact of contraceptive freedom on women’s life cycle labor supply. Quarterly Journal of Economics.
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- 15 Bailey, M. J. (2006). More Power to the Pill: The impact of contraceptive freedom on women’s life cycle labor supply. Quarterly Journal of Economics.
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- 17 Bailey, M. J. (2006). More Power to the Pill: The impact of contraceptive freedom on women’s life cycle labor supply. Quarterly Journal of Economics.
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# BEHOLD THE LESSONS OF BRUTUS:



## The Federal Judiciary and the Specter of Consolidation

BY MICHAEL SKEEN

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It has often been noted that the lasting legacy of the Anti-Federalists is the Bill of Rights. What is less known are the Anti-Federalists' fears about the federal judiciary—most specifically about the role of the Supreme Court in the new constitutional regime. In this essay, we will explore a line of reasoning advanced by an Anti-Federalist author by the pen name Brutus. Brutus was deeply worried about the judicial branch employing judicial review to consolidate the various state governments into a single, national authority. Of course, the states have not disappeared; consolidation has not been an open-ended and consistent development. However, in many instances, the lessons of Brutus have certainly proven themselves to be prescient.





For good and bad, the Constitution of the United States is not quite the same document that was ratified circa 1789. Beyond the relatively few amendments adopted via the formal processes of Article V, the federal judiciary, with the High Court at the helm, has transformed the Constitution in a variety of ways. Among the most important of these is the tendency of the federal judiciary to augment national power at the expense of state power. Granting this subsequent judicially inspired transformation, some historically interesting questions begin to emerge. For example, were the Anti-Federalists, who predicted such a transformation, correct in their assessment? Did they see more honestly into human nature and the practical limits of republican politics than did their better-remembered rivals, the Federalists? To answer these questions, we will turn to the writings of Anti-Federalist pamphleteers such as Brutus and The Federal Farmer and their prescient observations concerning the judicial power of the United States—specifically to the interplay between the federal judiciary, the doctrine of judicial review and the specter of consolidated government.

As Herbert Storing notes, the most fundamental Anti-Federalist objection to the Constitution was its perceived “consolidating tendency.”<sup>1</sup> In large part, the demurral was because the Anti-Federalists tended to favor the Classical view, most prominently espoused by Montesquieu, that republican government can safely operate only within the confines of a small or ‘contracted territory’ whose inhabitants basically share the same customs and interests—but it manifestly cannot work within an expanse as large and diverse as that of the Union. Therefore, in opposition to the political (and commercial) aspirations of the Federalists, Ralph Ketchum writes,<sup>2</sup>

{ [t]he Anti-Federalists looked to the Classical idealization of the small, pastoral republic, where virtuous, self-reliant citizens managed their own affairs and shunned the power and glory of empire. To them, the victory in the American Revolution meant not so much the big chance to become a wealthy world power, but rather the opportunity to achieve a genuinely republican polity, far from the greed, lust for power, and tyranny that had generally characterized human society. }

To the Anti-Federalists, this meant—as much as possible—retaining the vitality of the state governments where rulers and the ruled are best able to know and understand each other. Under the new constitutional regime, the fear was that the state governments, which the Anti-Federalists saw as necessary to the preservation of individual liberty, would eventually be absorbed into a distant national authority. This authority would be so far removed (in both location and spirit) from the everyday lives of the people—their ‘habits and attachments’—that the longstanding Puritan-inspired tradition of local self-government, in any meaningful sense, would eventually disappear. In its place, would emerge a subtle form of despotism that Alexis de Tocqueville, many years later, would refer to as ‘administrative centralization,’ that is to say, a centralized political power that seeks to regulate the sundry activities of citizens via uniform rules and blanket provisions that tend to ignore reasonable communitarian claims to local self-determination.<sup>3</sup> At its core, this fear draws upon the axiom that an *imperium in imperio* (i.e., a state within a state) is a serious error in political thinking. Two sovereign authorities, it was believed, could not co-exist within a single polity; one or the other must be

supreme; and because power is dynamic, the loser in the struggle for supremacy must ultimately expect its authority to wane—in this case, the authority of the state governments.

For the Anti-Federalists, the garden path to national consolidation was paved in two directions: (1) the new Constitution created powers that were not necessary to the Union; and (2) it failed to adequately regulate and restrain those powers that, in fact, were necessary. Either way, both of these avenues display a hallmark of early American political thought, namely, the Puritanical belief that the innate human craving for power will exploit any opportunity to exercise dominion. Under the Federalists' proposed constitutional regime, the branch of government that ultimately would be responsible for articulating the scope of these powers—and thus limiting the sway of Old Man Adam—would be the federal judiciary, and most specifically the United States Supreme Court. For Anti-Federalists such as Brutus, however, this presented more of a problem, than a solution.

At the outset, it should be noted that Brutus did not question the federal judiciary's authority to practice judicial review:<sup>4</sup>

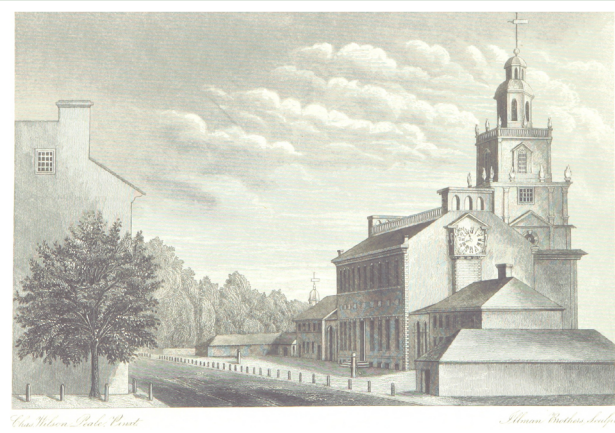
*...if the legislature pass laws, which, in the judgment of the court, they are not authorized to do by the constitution, the court will not take notice of them; for it will not be denied, that the constitution is the highest or supreme law. And the courts are vested with the supreme and uncontrollable power, to determine, in all cases that come before them, what the constitution means; they cannot, therefore, execute a law, which, in their judgment, opposes the constitution, unless we can suppose they can make a superior law give way to an inferior.*

In recognizing that judicial review is within the purview of the federal judiciary, Brutus draws an important conclusion, namely, that “the judgment of the judicial [branch], on the constitution, will become the rule to guide the legislature in their construction of their powers [because] the legislature... will not go over the limits by which the courts may adjudge they are confined.”<sup>5</sup> What alarmed Brutus was the ease with which the judicial branch could apply its power of judicial review to circumvent the Constitution's separation of powers in the service of national consolidation. Indeed, Brutus feared that this skirting could threaten the continued independence of the states.

As Brutus read Article III, the federal judiciary would be the final arbiter in interpreting the meaning of the Constitution, and since its jurisdiction extended to cases “in equity,” it would also enjoy a rather wide “latitude of construction.”<sup>6</sup> Discounting Alexander Hamilton's assertion in Federalist 78 that the judiciary was the “least dangerous” branch of the national government because it lacked “either the sword or the purse,”<sup>7</sup> Brutus argued that the federal courts “will not confine themselves to any fixed or established rules.” Instead, they will adopt “certain principles, which being received by the legislature, will enlarge the sphere of [legislative] power beyond all bounds.”<sup>8</sup> No matter how carefully the delegates to the Philadelphia Convention had tried to fix the limits of the national legislative power, the federal judiciary would have enough interpretive discretion that it could easily undermine those efforts. Thus, as the Federal Farmer admonished: “We are more in danger of sowing the seeds of arbitrary government in this department of government than in any other.”<sup>9</sup>

So far, we see that Brutus largely treated the doctrine of judicial review as an aspect of the ‘horizontal’ separation of powers, but he soon indicated

that its real force would be felt along the ‘vertical’ axis of federalism, where it would “operate to effect, in the most certain, but yet silent and imperceptible manner, what is evidently the tendency of the constitution: —I mean, an entire subversion of the legislative, executive and judicial powers of the individual states.” The “equivocal” and “ambiguous” language of key passages of text as well as the broad purposes proclaimed in the preamble, would allow the judiciary to adopt “an equitable construction” of the Constitution consistent with the document’s “spirit, intent and design...as well as the words in their common acceptation.” Futhermore, just as the federal judiciary would have a stake in



The State House in Philadelphia, 1778. Courtesy of Wikimedia Commons.

“using this latitude of interpretation” to expand the powers of the legislature because, in turn, that would serve to “enlarge the sphere of their own authority,” so judicial determinations would call the legislature’s attention to the “bounds” to which its power could aspire, the reach to which it may grasp.<sup>10</sup>

In a telling example, Brutus seized upon the open-textured language of the Constitution’s preamble to demonstrate just how far an equitable interpretation of the Constitution might be carried. Brutus asked, what did it mean to “form a more perfect union” of the American people? “Now to make a union of this kind perfect,” he answered, “it is necessary to abolish all inferior governments, and to give the general one complete legislative, executive and judicial powers to every purpose.” Such a result, however, would not be accomplished with reckless alacrity, but only with “as much celerity, as those who have the administration of [the general government] will think prudent,” as the federal judiciary strikes down state laws that interfere with the exclusive jurisdiction of the national legislature or even in areas of “concurrent jurisdiction.”<sup>11</sup>

In conclusion, if one were to search American legal history for evidence to support Brutus’ contention that the Constitution’s language is as malleable or enticing as he supposes it to be, one would not have to look far into the future. Beyond the preamble, according to Brutus, the provision in the proposed Constitution that seemed most likely to be subject to such an egregious interpretation was the Necessary and Proper Clause.<sup>3</sup> Indeed, the open-ended language of the clause threatened to justify the unwarranted expansion of national power “to almost everything about which any legislative power can be employed...[N]othing can stand before it.” The aim of the clause was to vest the legislature with enough authority to undertake measures that are justifiably “for the carrying into Execution” of its enumerated powers.<sup>12</sup> In other words, relying on the literal language of the clause, the legislature may adopt measures that are designed to assist or facilitate the national government in executing its constitutionally enumerated powers. In actual practice, however, the legislative branch does not rely

on the limitations of literal language, but on a judicially favored interpretation of the text that affords wide-ranging and expansive powers to the national government.

For example, in the High Court’s landmark decision, *McCulloch v. Maryland*, 4 Wheat. 316 (1819), Chief Justice John Marshall, an ardent Federalist, upheld the constitutionality of the Bank of the United States with a broad reading of legislative power and a devout nationalist interpretation of our federal system of divided government. In his classic formulation, Marshall writes:<sup>13</sup>

{ *Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.* }

Moreover, the Chief Justice interestingly construed the word “necessary” to mean the much more helpful “convenient” or “useful” and rejected the narrow reading of “indispensable.”<sup>14</sup> So even though the authority to establish a national banking system (the Federal Reserve) is not among the enumerated powers of the legislative branch, it can do so because establishing such a system is a ‘necessary and proper’ (i.e. convenient) way of executing its power to lay and collect taxes, to borrow and collect money, regulate interstate commerce, and the such. When the word ‘necessary’ is judicially construed to mean ‘convenient,’ perhaps we should behold the lessons of Brutus.



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## ENDNOTES

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- 10 Ibid.
- 11 Ibid.
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- 14 Ibid.



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# HOW THE SUPREME COURT MADE THE FREEDOM OF SPEECH MORE FREE

BY MONICA COSCIA

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This paper argues that the United States Constitution's First Amendment guarantee of free speech is imperative to maintaining a free society, even if some members of that society find certain speech disagreeable or offensive. It contends that federal and state laws must obey the First Amendment's guarantee of content neutrality, or acceptance of all viewpoints, in order to be considered constitutional. By delineating the progression of Supreme Court precedent regarding controversial speech through four landmark cases, this paper argues that the Court's jurisprudence over the past half-century justly moved in a constitutional direction, because modern legal interpretation of the First Amendment has made free speech even freer than it was at the time of the First Amendment's ratification. Finally, this discussion asserts that while the modern view of free speech may not align with the Founders' opinions, it achieves their ultimate vision of an adaptable Constitution and a tolerant, open society.



“If there is a bedrock principle underlying the First Amendment,” Justice Brennan declared in *Texas v. Johnson*, “it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>1</sup> This succinctly captures the rationale behind the freedom of speech that the United States Constitution cherishes, and is consistent with the Bill of Rights’ purpose to secure certain fundamental liberties from government infringement. Free speech is central to a tolerant, free society, in that it promotes the unfettered circulation of ideas, opinions, and ideologies. As Justice Holmes asserted in his *Abrams v. United States* dissent, the First Amendment’s protection of free speech necessitates a free marketplace of ideas, through which the “competition of the market” filters opinions based on their truth value.<sup>2</sup>

Since the government has a constitutional responsibility to refrain from interfering with one’s individual right to express his or her beliefs, it cannot pick and choose the opinions that are prohibited and those that are allowed. The liberty to speak one’s mind without governmental intervention relies on the principle that “no official, high or petty, can prescribe what shall be orthodox in...matters of opinion,” as Justice Jackson held in *West Virginia v. Barnette*.<sup>3</sup> The deliberate selection of acceptable and prohibited opinions makes for an intolerant, oppressive society in which those who disagree with the government are not allowed to use their voices. In his seminal work *On Liberty*, liberal philosopher John Stuart Mill argued that such censorship is tyrannical, because it presumes that the government is the infallible judge of what is right and acceptable. In their decisive break with tyranny, the Framers of the Constitution channeled Mill’s doctrine, purposefully protecting the freedom of speech from “the vicissitudes of political controversy.”<sup>4</sup>

Over the last half-century, the Supreme Court of the United States has adopted a broader standard of what speech is protected under the First Amendment in cases such as *Brandenburg v. Ohio*, *Texas v. Johnson*, *R.A.V. v. St. Paul*, and *Snyder v. Phelps*. In these four landmark rulings, the Court held that various instances of controversial political and religious speech—and expressive conduct—receive First Amendment protection. Although the Supreme Court has ruled innumerable times on the freedom of speech, these cases are particularly groundbreaking in that they represent the Supreme Court’s authorization of four major categories of speech: political speech, symbolic speech, religious speech, and protest speech. In a remarkable instance of judicial incrementalism, the Court gradually expanded the scope of the First Amendment by striking down laws that limited speech based on its content, delivery, and intent. Because a decrease in restrictions translates to an increase in freedom, the Supreme Court effectively moved judicial doctrine toward the First Amendment’s unqualified guarantee of free speech. An analysis of these four cases will ultimately prove that the high court employed just and prudent reasoning in its decisions, as they advanced the freedom of speech.

The dissenting justices in these cases opined that the Supreme Court has gone off the deep-end in protecting speech that is, in their view, “highly damaging,” through deciding these four cases. However, in each of these cases, those arguing for the government’s prohibition of the speech in question did not prove that the speech directly and immediately caused legitimate harm to another individual or group. If the freedom of speech is truly free, the government cannot prohibit it—except in rare occasions in which “...the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion,” as

Justice Brandeis argued in *Whitney v. California*.<sup>5</sup>

Of course, in order to fulfill its duty to protect the general welfare, the government must maintain a right to prohibit those instances of speech that will almost surely bring about legitimate damage—such as Justice Holmes’ notorious example of yelling “Fire!” in a crowded theater.<sup>6</sup> The government’s adoption of a standard other than the protection of public safety in limiting the freedom of speech, however, is a violation of the First Amendment’s requirement that laws are content-neutral, or accepting of all viewpoints. It follows that the government cannot outlaw speech just because it offends another individual, as doing so would create a right to be free from offense—a highly subjective standard that would prohibit a great deal of controversial speech.

Practically speaking, the protection of free speech ultimately advances public safety. There is much greater potential for danger if the government prohibits radical speech instead of allowing it, because suppressing thought and opinion “breeds repression; that repression breeds hate; that hate menaces stable government.”<sup>7</sup> In other words, the freedom of speech often precludes the need for violent extremism and rioting, destruction that is objectively more harmful to society than peaceful protest. The free expression of even the most prejudiced and controversial opinions serve the social purpose of avoiding violence: “It lets off steam; it allows natural tensions to express themselves incrementally; it can siphon off conflict through words, rather than actions.”<sup>8</sup> As Justice Jackson articulated, governments that eliminate dissent must face the danger with which angry, suppressed dissenters retaliate.<sup>9</sup>

Now that we have established the fundamental logic behind free speech in the United States, we can understand why the Supreme Court justly applied the principle to protect controversial speech

in four epochal cases from the last few decades. The first case is *Brandenburg v. Ohio* (1969), which overturned the conviction of a Ku Klux Klan leader for allegedly advocating violence in a rally speech, during which he suggested that his organization might need to take action if the government continued to deny white supremacy through the enactment of civil rights laws. The Supreme Court correctly recognized the fact that Brandenburg’s advocative speech did not directly spawn “imminent lawless action,” nor was it “likely to incite or produce such action.”<sup>10</sup> This case declared unconstitutional an Ohio law that prohibited the advocacy, teaching, and publishing of material that encourages violence. Because such advocacy—like that of Brandenburg—in no way directly or tangibly threatens public safety, the Supreme Court rightly decided that this speech was protected under the First Amendment.

Although the lower court sustained the conviction and the law on the grounds that advocacy alone has the potential to threaten violence, the Supreme Court drew the line between protected advocative speech and unprotected speech that actually incites violence. The Court in effect recognized that anti-advocacy laws, such as the one in Ohio, unconstitutionally elevate the advocacy of a crime to commitment of the crime itself. The Ohio law punished speech for effects that it did not produce, nor that it was likely to produce. Justice Douglas articulated that the only prosecutable speech is that which is “inseparable” from “the acts actually caused.” Except for those rare instances, it is unconstitutional for the government “to invade that sanctuary of belief and conscience.”<sup>11</sup>

Another Supreme Court case that expanded protected speech under the First Amendment was *Texas v. Johnson* (1989), which overturned a conviction for burning the American flag as a form of public



protest. It may not seem evident why the Court would consider the action of burning a flag as an issue of free speech. However, as Justice Brennan



Gregory Lee Johnson with his lawyer William Kuntsler during the *Texas v. Johnson* trial. Courtesy of Wikimedia Commons.

explains, certain expressive conduct falls under the protection of the First Amendment. Conduct that contains “intent to convey a particularized message” and great “likelihood...that the message would be understood by those who viewed it” is speech for the purpose of the First Amendment because of its communicative value.<sup>12</sup> The Court held that burning the American flag was expressive conduct because it clearly conveyed a political statement. On the grounds that burning the flag was expressive conduct protected under the First Amendment and did not create legitimate harm to other individuals, the Supreme Court justly decided *Texas v. Johnson*. The Court fairly deemed the law prohibiting desecration of the American flag unconstitutional: the law’s establishment of an ortho-

dox belief and compulsory reverence of a national symbol are the very contradiction of the content neutrality guaranteed by the First Amendment.

The dissent in *Texas* argued that it was a legitimate exercise of state police power to declare the protection of a symbol of national unity and that Johnson’s burning of the American flag “had a tendency to incite a breach of the peace.”<sup>13</sup> However, the flag burning produced no disturbance of the peace, no threats to disturb the peace, and no direct insult to a particular individual. The Court justly recognized that it is unconstitutional to criminalize the potentially violent effects of free speech if there is absolutely no indication that the speech will provoke violence. The dissent also asserted that allowing flag burning symbolizes the tarnishing of American values. However, Justice Brennan points out that one of the principles that the American flag represents is the freedom of speech itself, so the *Texas v. Johnson* decision actually strengthened the flag’s cherished place in American society.<sup>14</sup>

Four years later, the Supreme Court declared unconstitutional a Minneapolis law prohibiting the erection of symbols that spawn anger “on the basis of race, color, creed, religion, or gender” on public or private property in *R.A.V. v. St. Paul* (1992).<sup>15</sup> This case overturned the conviction of white teenagers who burned a cross on the front lawn of the only African American family in their neighborhood. Justice Scalia argued that a law barring the use of certain “fighting words” was unconstitutional because it “prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.”<sup>16</sup> In other words, the law in question selectively forbade speech motivated by racial, religious, or gender discrimination solely on the basis of its content. This is a blatant violation of the First Amendment’s guarantee of content neutrality, as it infringes upon distinguishable categories

of speech, so the Court justly decided *R.A.V. v. St. Paul*. Justice Scalia clarifies that the government may prohibit speech “because of the action it entails, but not because of the ideas it expresses.”<sup>17</sup> In practice, this means that the government can ban defamation because it directly and tangibly harms another individual, but the government cannot ban certain speech topics without discriminating against certain viewpoints and thus violating the First Amendment. This law unconstitutionally allowed the expression of hostility “on the basis of political affiliation, union membership, or homosexuality,” but not race, religion, or gender, which is clearly an arbitrary distinction.<sup>18</sup>

The dissent counters that the law’s purpose was to protect certain minority groups from injuries caused by offensive symbols, and that it was within Minneapolis’ police powers to protect minority groups from risks, harms, and fear. In other words, the law declares that particular classes of individuals have a right to be free from threats, and this right trumps one’s explicit constitutional right to free speech. Justice Scalia maintains that the only thing



Westboro Baptist Church protestors. Courtesy of Wikimedia Commons.

distinguishing the injury produced by “prohibited fighting words” from “allowed fighting words” was the content of the particular ideas behind them. The First Amendment protects all ideas, not just the ones that the government deems acceptable.

The final case in this discussion is *Snyder v. Phelps* (2011), in which the Supreme Court upheld the right of the Westboro Baptist Church to protest near the funeral of a soldier who was killed in Iraq. The picketers held placards arguing that soldiers’ deaths in the war were God’s punishment for immoral American society, that homosexuality was a sin, and that Catholicism was sacrilegious. Although the Church expressed controversial ideas that many people, including the Snyder family, found painfully offensive, Justice Roberts argued that their speech was protected by the First Amendment because the Westboro Baptist Church’s speech concerned public affairs and was expressed in the public forum of a sidewalk. He pointed out that the Church’s audience was the general public and that its members did not intend to offend particular private individuals. Although the speech may be disturbing to some, if not most, members of society, the Supreme Court rightly concluded that the public discussion of public affairs is “more than self-expression; it is the essence of self-government.”<sup>19</sup>

If the Supreme Court had ruled in favor of Snyder, it would have sanctioned the prohibition of speech based on its content, which is contrary to the First Amendment’s guarantee of content neutrality. The opinion states that “Westboro’s picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself.”<sup>20</sup> Because the picketers were peaceful, protested a considerable distance away from the funeral, and refrained from “shouting, profanity, and violence,” their speech was rightly protected under the First Amendment. Justice


Roberts cites the practical concern for allowing even “outrageous” speech “breathing room,” recognizing the reality that forcing contentious speech underground would likely radicalize it and spawn legitimate violence.<sup>21</sup> Justice Alito’s dissent, on the other hand, holds that the First Amendment does not protect the intentional infliction of emotional distress, especially at a time of emotional sensitivity. But this argument creates a right to be free from offense that trumps the First Amendment guarantee of free speech, which is patently unconstitutional. Additionally, as the opinion points out, no evidence in the record proved that the Westboro Baptist Church intentionally or specifically aimed their protest at the Snyder family. Although the picketing was admittedly jarring, the Supreme Court appropriately decided that even strikingly controversial speech—as long as it does not directly incite violence—is protected under the First Amendment.

Because the Founders enshrined the freedom of speech in the absolute first amendment to the United States Constitution, we know that they highly valued the protection of expression from the arbitrariness of governmental authorities. The fundamental purpose of the Bill of Rights was to protect the citizens of the newborn United States from the abuses they had endured under the monarchy from which they had just declared independence. The freedom of speech signaled the Founders’ decisive break with Great Britain’s use of “prior restraint,” or restriction of opinions before they were spoken or published. Although the Founders made a point to protect the freedom of speech, they generally believed that this right was not absolute. For example, John Adams believed that false speech should not receive protection under the First Amendment. Benjamin Franklin stated that speech that defames or affronts another individual should be unprotected, and that he would exchange his “Liberty


of Abusing others for the Privilege of not being abused myself”—in other words, claiming a right to be free from offense.<sup>23</sup> During the Founding Era, the First Amendment only applied to responsible and truthful speech.

Although it is impossible to determine whether the Founders would have approved of modern Supreme Court decisions, and although the Founders split over the issue of free speech themselves, they most likely would have disagreed with the outcome of these cases. In light of the Founders’ support of prohibitions on seditious libel (publishing information that brings the government into contempt), blasphemy (speech that insults religion), and speech that had a “bad tendency” (speech that supports illegal activity), they probably would have disapproved of speech that might hold the government or religion in contempt—such as advocating for violence against the government, burning the American flag, burning a cross, or protesting the United States’ involvement in war.<sup>24</sup>

Several former and current justices on the Supreme Court and many American civilians believe that judges should always consider the original intent of the Founders when interpreting the Constitution. Justice Meese argued that the Founders deliberately chose every word of the Constitution, so “Any true approach to constitutional interpretation must respect the document in all its parts.”<sup>25</sup> He held that since we know so much about the Founders’ opinions, justices must use them to resolve the Constitution’s textual ambiguities. However, James Madison—a Founder himself—felt that judges should not limit themselves to the Constitution’s original intent, but rather consider the popular understanding of the Constitution, to make decisions.<sup>26</sup> The fact that the Founders themselves were divided over how their posterity should interpret the Constitution and over constitution-



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al provisions makes exact original intent virtually impossible to follow. But this does not mean that the Founders' opinions do not matter. We should still aim to espouse the spirit of the Constitution to secure individual liberties and maintain a limited government—which expanding the protection of free speech achieves—but adopting the exact beliefs of the Founders fails to take modern reality into account.

As evidenced by the amendment provision and the intent that the Constitution would serve the nation for centuries to come, the Founders intended the Constitution to adapt to modern standards. Justice Brennan argues that justices should consider the transformative purpose of the Constitution and interpret the text in light of modern circumstances, while still paying homage to the spirit of the Founders' beliefs: "The Framers discerned fundamental principles through struggles against particular malefactions of the Crown; the struggle shapes the particular contours of the articulated principles. But our acceptance of the fundamental principles has not and should not bind us to those precise, at times anachronistic, contours."<sup>27</sup> Because the protection of the freedom of speech was among those fundamental principles, the Supreme Court's broadening of free speech over the last half-century achieves the Founders' ultimate mission, despite that they may have opposed the impacts of these four decisions. Since the Founding Era, the Supreme Court has progressed from prohibiting speech carrying a "bad tendency," to banning speech that creates a "clear and present danger," to only banning speech if it "incites imminent lawless action." Because the modern interpretation of free speech has fewer restrictions than that of the Founding Era, the Supreme Court's current outlook on free speech aligns more closely with the text of the First Amendment than the Founders'

own opinions did. Simply put, the Supreme Court's recent expansion of protected expression has made the First Amendment's guarantee of freedom of speech more free.



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- 10 *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
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