

NORTHWESTERN INTERDISCIPLINARY LAW REVIEW
VOLUME 8, NUMBER 1, SPRING 2015

Joseph Eichenbaum
EDITOR IN CHIEF

Maria Beltran
Domonic A. Burke
Hannah Doherty
EXECUTIVE EDITORS

Alexander Beer
Henry Beshar
Greg Booth
Kevin Cheng
Leon Huang
Hal Jin
Britt Jordan
Morgan Markel
Xiwen Wang
ASSOCIATE EDITORS

Weinberg College of Arts and Sciences
Buffett Institute for Global Studies
SPONSORS

NORTHWESTERN INTERDISCIPLINARY LAW REVIEW
1902 SHERIDAN ROAD, EVANSTON, IL, 60208
NILR@U.NORTHWESTERN.EDU
WWW.NILR.ORG

TABLE OF CONTENTS

Table of Contents	i
About the NILR.....	ii
Letter from the Editor-In-Chief.....	iii
THE JURIST AND JURISPRUDENCE IN THE SHADOW OF WAR, INDIVIDUAL HISTORIES AND SOCIETAL TRENDS IN CASE LAW <i>Martin Desjardins, Law Clerk to the Hon. Michael F. Devine Fairfax Circuit Court, 19th Judicial Circuit of Virginia.....</i>	1
THE CUBAN COMMUNIST PARTY AT THE CENTER OF POLITICAL AND ECONOMIC REFORM: CURRENT STATUS AND FUTURE REFORM <i>Larry Catá Backer, Pennsylvania State University.....</i>	71
STATE OF NATURE THEORY IN TRADITIONAL CHINESE POLITICAL AND LEGAL THOUGHT <i>Norman P. Ho, School of Transnational Law, Peking University.....</i>	131
THE COMPREHENSIVE ANTI-APARTHEID ACT OF 1986: SEPARATION OF POWERS, FOREIGN POLICY, AND ECONOMIC SANCTIONS AS A TOOL OF SOCIAL JUSTICE <i>Joshua Michaels, University of Hawai‘i at Mānoa William S. Richardson School of Law.....</i>	153

ABOUT THE NILR

Founded in 2008 by Samuel Kleiner and Benjamin Sadun, the Northwestern Interdisciplinary Law Review features legal scholarship at the nexus of such varied humanistic fields as history, literature, economics, art theory and philosophy, as well as the social sciences. Non-ideological in its outlook and diverse in its scholarly offerings, the NILR strives to foster substantial, high quality dialogue between legal scholars of varying disciplines, stations, and perspectives.

Please direct any inquiries, subscription or otherwise, to *nilr@u.northwestern.edu*.

IF YOU'RE READING THIS IT'S NOT TOO LATE: NILR VOL. VIII

Unlike Playboy, people read the Northwestern Interdisciplinary Law Review for the articles. For seven years NILR has published interdisciplinary scholarship from leading students, scholars, and practitioners. Volume VIII is no different. This year we are proud to present four articles on topics spanning centuries, continents, and philosophies. We would like to thank Northwestern University and the Buffett Center for International and Comparative Studies for their generous support in bringing you the NILR Volume VIII. We would also like to thank our authors for their insight, scholarship, and patience.

If you are reading this note, I am pleasantly surprised. Legal research is not typically read at a publication level. More likely you searched for scholarship about wartime jurisprudence or economic sanctions, and are already nose deep in the work of Martin Desjardins or Joshua Michaels. But if before or after doing so you find yourself here, let me offer a piece of advice about the journal: read one more article than you planned. This journal was founded in the spirit of interdisciplinary study, and in celebration of the fact that we have much to learn from one another. These views are not grounded just in intellectual curiosity. We believe that anyone's studies, research, and practice are concretely improved by research far outside of their field.

If you are a graduate student in Philosophy coming here for Norman P. Ho's account of natural law in Chinese history, I hope you stay for Larry Catá Backer and his analysis of the Cuban Communist Party. If you are an activist curious about the efficacy of economic sanctions against apartheid government, I hope you also examine the quantitative effects of war on judicial opinion. Our highest hope is that you read and learn something new.

The four pieces in this year's journal could not be about more different topics. In years past, we have had several shorter pieces grouped together in rough categories. This year our pieces are longer and have virtually no topical commonalities. We could not be more excited about this. The NILR is thrilled to offer you these four original, thorough, and artfully written pieces of work.

Thank you for your support and curiosity. If you are interested in reading, writing, or working with the NILR, please email us at nilr@u.northwestern.edu.

Joe Eichenbaum,
Editor-In-Chief, Vol. VII

[Intentionally Blank]

THE JURIST AND JURISPRUDENCE IN THE SHADOW OF WAR, INDIVIDUAL HISTORIES AND SOCIETAL TRENDS IN CASE LAW

By Martin Desjardins^{*}

While much attention has been paid to the effect of warfare on society, there have been few analyses of the impact of war on individual jurists. War's effects on individuals can greatly affect them throughout much the remainder of their lives, through traumatic responses such as Posttraumatic Stress Disorder, general reflection, or even as a call to action throughout their lives. This piece analyzes those effects on Justices Oliver Wendell Holmes and Aharon Barak. We first examine the war's societal and sociological impact on individuals, followed by an examination of Holmes' and Barak's lives, including their early life, wartime experiences and judicial careers. Next, the article steps back to examine the broader implications of society's response to the trauma of war and its implications for jurisprudence. We conclude that law, while ideally objective in nature, is affected and often redirected by wartime experiences.

^{*} Law Clerk to the Hon. Michael F. Devine, Fairfax Circuit Court, 19th Judicial Circuit of Virginia. Member of the Virginia Bar. George Mason University School of Law, J.D. *cum laude*, May 2014; Yale School of Drama, M.F.A. 1994; University of North Carolina at Chapel Hill, B.A. with Highest Honors 1991. I would like to thank Justice Aharon Barak, Michael I. Krauss, the Hon. Michael F. Devine, Ronen Perry, Daniel Hopkins, David Budries, George Mason School of Law, Yale Law School, and Emily Desjardins for their assistance, advice, and editorial support in seeing this article to fruition

TABLE OF CONTENTS

I.	INTRODUCTION	4
II.	INDIVIDUAL AND SOCIAL IMPACTS OF WAR	7
A.	PTSD FROM ACUTE RESPONSES TO “SOCIAL DEATH” AND “MORAL INJURY”	7
B.	MEDICAL UNDERSTANDING OF POSTTRAUMATIC GROWTH IN RESPONSE TO TRAUMATIC EXPERIENCE	9
C.	THE IMPORTANCE PERSONAL EXPRESSION AND WRITINGS TO UNDERSTANDING THE EFFECTS OF WARTIME AND TRAUMATIC EXPERIENCES	10
1.	<i>PTSD Seen Through Personal Writings</i>	10
2.	<i>Posttraumatic Growth and the Individual</i>	11
D.	THE IMPACT OF WARTIME TRAUMA ON SOCIETY	12
III.	WARTIME EXPERIENCE AND THE INDIVIDUAL JUDGE 14	
A.	OLIVER WENDELL HOLMES	14
1.	<i>Early Life and Personal History</i>	14
2.	<i>From “Boy” to “Man”: Holmes and the Civil War</i>	15
3.	<i>Holmes’ Return to Society</i>	21
4.	<i>Holmes the Lawyer and Judge, from The Common Law to Buck v. Bell</i>	23
B.	AHARON BARAK	29
1.	<i>Aharon Barak and World War II</i>	29
2.	<i>Aharon Barak’s Career and Arrival at the Israeli Supreme Court</i>	30
3.	<i>War and Aharon Barak’s Views on Judicial Discretion and Judicial Review in a Constitutional Democracy</i>	31
4.	<i>Mizrahi, Human Rights and the Most (In)famous Application of Barak’s Judicial Philosophy</i>	35
5.	<i>Barak’s Interpretive Tools: Purposive Interpretation and Proportionality</i>	37
a.	Purposive Interpretation and Adapting Fundamental Values 37	
b.	Proportionality and the Defense of Democracy	39
c.	Applying Purposive Interpretation and Proportionality and the Controversy Surrounding Barak’s Methodologies	40
6.	<i>Barak’s Application of the Core Values of Society in his Opinions</i>	41
7.	<i>Barak and the Model of Posttraumatic Growth</i>	42
IV.	SOCIETAL CONSEQUENCES OF WARTIME TRAUMA AND AN EMPIRICAL STUDY OF AMERICAN JUDICIAL OPINIONS	44
A.	TOWARDS THE EMPIRICAL ANALYSIS OF AMERICAN JURISPRUDENCE IN TIMES OF WAR	45
B.	EXAMINING JUDICIAL OPINIONS DIRECTLY THROUGH NONPARAMETRIC DATA ANALYSIS	46

- C. AUTOMATED NONPARAMETRIC CONTENT ANALYSIS 46
- D. APPLICATION OF NONPARAMETRIC DATA ANALYSIS 51
 - 1. *Initial filtering of Opinions*..... 51
 - 2. *Hand Coding Methodology*..... 52
 - 3. *Nonparametric Analysis Using Readme*..... 53
- E. DISCUSSION 53
- F. FUTURE ANALYSIS EFFORTS 55
- G. NORMATIVE IMPLICATIONS 56
- V. CONCLUSION 57
- APPENDIX A: HAND CODING METRIC..... 58
- APPENDIX B: README RESULTS..... 60

I. INTRODUCTION

“All society has rested on the death of men.”
– Oliver Wendell Holmes, Jr.¹

The impact of war on society is a frequent topic in sociology, history, literature, and mass media. Fascination with war’s impact on the individual has inspired the study of its effects in psychology and medicine, and has earned war thematic esteem in books, music, film, and the arts. The role of war in the lives of specific individuals has likewise been the subject of biographies, published diaries and letters, inscriptions on walls and monuments, statues, and legend. Given the extent and complexity of war’s resonance in society, it is remarkable how relatively little attention has been paid to war’s impact on the outlook of individual jurists and jurisprudential outcomes.²

Although limited, the subject is not devoid of study. The traditional look at war and jurisprudence is an exploration of how wartime opinions impact individual rights during and after periods of conflict.³ Citing the *Alien and Sedition Acts* of 1798⁴, the internment of Japanese Americans during World War II⁵, or current debates about Guantanamo Bay and the Patriot Act⁶, the overwhelming sense is either that the courts must be vigilant in defense of individual rights during a time of war, or that they too readily sacrifice those rights in defense of security.⁷ What are not widely studied, however, are the broader

¹ Letter to Harold Laski, Dec. 9, 1921. *Oliver Wendell Holmes, the Essential Holmes*, 115 (Richard A. Posner, ed. 1992).

² Most of the scholarship directly addressing wartime and its impact on jurisprudence examine how the U.S. Supreme Court protects (or fails to protect) individual rights in wartime. Notable work done on the subject includes: Lee Epstein, et al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1 (2005); David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565 (2003); Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605 (2003); William J. Brennan, *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crisis* Address at the Law School of Hebrew University (Dec. 22, 1987), available at http://www.hofstra.edu/PDF/law_civil_hafetz_article1.pdf. However, the impact of wartime experience on individual judges or the judiciary in general is rarely given more than passing notice.

³ See generally Mary L. Dudziak, *Law, War, and the History of Time*, 98 CAL. L. REV. 1669 (2010).

⁴ Alien and Sedition Acts (1798), available at <http://www.ourdocuments.gov/doc.php?flash=true&doc=16> (last visited 3/13/2013).

⁵ See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944).

⁶ See, e.g., *Doe v. Mukasey*, 549 F.3d 861 (2nd Cir 2008).

⁷ Mary L. Dudziak, *Law, War, and the History of Time*, 98 POLITICAL SCIENCE CAL. L. REV. 1669, 1672 (2010).

implications and shifts in jurisprudential thinking during war, shifts for which specific decisions in areas such as individual rights are merely an outward and more apparent symptom. To begin to address broader trends, this article will move away from analysis of a handful of decisions, focusing instead on the career output of two influential jurists whose lives were impacted by war, and aggregate shifts in American jurisprudence over time.

At an individual level, people are deeply affected by war through direct and traumatic experiences, resulting in responses ranging from aversive withdrawal to invigorated engagement with the world. The study of Posttraumatic Stress Disorder (“PTSD”) has gone beyond what was already known about war’s lingering effects on the individual, and has shown how PTSD can invade lives decades after the war has passed, leaving its sufferers hampered in their personal lives and stifling or even reversing their moral and social development.⁸ On the other hand, not all individuals are permanently injured by traumatic experience. Many restore themselves after the trauma has passed. Still others take their experiences as a call to action, changing the course of their lives and committing themselves to purposes that help reintegrate their experiences into a morally, personally, and socially complete sense of self.⁹

Society, too, faces a need to rebuild and reintegrate after times of war. Whether or not it is true that trauma can “define a culture,”¹⁰ war has a range of effects on society, including changes in the political and legal climate.¹¹ Impacts include measurable effects on society’s “normative systems,” from its political structures to its social cooperation, cohesion and coherence, its professional and economic institutions, and its culture.¹² In a post-war era, societies typically need to “rebuild civil society” in order to overcome an “invisible legacy” of collective trauma.¹³

This article explores both the individual and societal impacts of war on jurisprudence, expanding on traditional legal analysis by taking a psychological, sociological, historical, and quantitative approach. Medical and sociological research, personal stories, professional works, and literature are used to reveal the extent to which war alters the hearts

⁸ See *infra* Part I.A.

⁹ See *infra* Part I.B.

¹⁰ G.A. Bradshaw et. al., *Concepts: Elephant Breakdown*, 433 NATURE 807 (2005).

¹¹ Monty G. Marshall, *Measuring the Societal Impact of War*, FROM REACTION TO CONFLICT PREVENTION, *4 (Fen Osler Hampson and David Malone, eds. 2002), available at <http://www.systemicpeace.org/IPAmgm.pdf> (last visited Mar. 13, 2013).

¹² *Id.*

¹³ *Id.* See also Matthias Stiefel, *Rebuilding After War: A Summary of the War-Torn Societies Project*, WSP/UNRISD, 12-13 (1998).

of jurists and their views on law and society. The judiciary, particularly at its highest levels, is deeply dependent on the actions of a few individuals. Understanding how war can inform or redefine those individuals can guide and caution both jurists and those who navigate the shifting sands of jurisprudence.

Addressing the individual judge, the wartime experiences of Oliver Wendell Holmes and Aharon Barak are reviewed, and their professional works are examined for ways that war may have influenced their jurisprudential approaches. Oliver Wendell Holmes' experiences during the Civil War, including two nearly fatal woundings at Ball's Bluff and Antietam, recast the young man into the forceful jurist, with consequences to his life and career revealed through both personal papers and professional writings and opinions.¹⁴ Aharon Barak was a survivor of the Kovno ghetto during World War II, fleeing German forces as a young boy with his mother.¹⁵ Like Justice Holmes, Justice Barak was deeply affected by his experience during the war. Unlike Justice Holmes, Justice Barak is both open and assertive about the role those experiences play in his judicial philosophy and his view of the nature and role of discretion as a jurist.¹⁶

Turning to broader effects and inspired by quantitative analyses of Supreme Court precedent,¹⁷ this article also asks whether or not war's effects can be seen in the aggregate, through the results of individual acts as they are expressed in case law. If individuals make up the judiciary, and if societies reflect on larger scales the discord and clamor of war's consequences,¹⁸ it is more than an academic inquiry to see whether war has altered American jurisprudence in subtle but pervasive ways, redirecting the course of the law in the years during or following conflict. To address this question, which necessarily requires a review of thousands of opinions from across the United States, this article applies a new method of analyzing vast bodies of text in search of aggregate effects on the courts over time.¹⁹ The method applied directly analyzes the text of thousands of opinions, searching for broader decisional patterns lurking within the opinions themselves.²⁰

¹⁴ See *infra*, Part II.A.

¹⁵ BARAK, AHARON (1936-) – PERSONAL HISTORY, BIOGRAPHICAL HIGHLIGHTS, <http://encyclopedia.jrank.org/articles/pages/5561/Barak-Aharon-1936.html> (last visited Mar. 14, 2013).

¹⁶ See *infra*, Part II.B.

¹⁷ See Epstein, et al., *supra* note 2.

¹⁸ See *infra* Part I.B.; see also Marshall, *supra* note 11.

¹⁹ For a comparison between the method applied in this article and pre-existing methods, see Daniel J. Hopkins and Gary King, *A Method of Automated Nonparametric Content Analysis for Social Science*, 54 AM. J. POLITICAL SCIENCE 233-35 (2010).

²⁰ See *infra* Part III.B. See also Hopkins & King, *supra* note 19, 233-34.

The case law analysis provides evidence of a shift in jurists' readiness to change the course of the law during wartime.²¹ While the shift may be in service to or cut against individual rights depending upon the case in context, what is consistent is the tendency of the courts, during and in the years following war, to reach more radical conclusions in contravention of standing precedents. The individual narratives and works of Holmes and Barak suggest why we can anticipate these sorts of changes in jurisprudence during wartime. At a practical level, awareness of those shifts is an important tool and cautionary call to jurists, practitioners, and scholars who may be faced with analyzing or practicing before judges whose decisions are being influenced by either personal or societal responses to war.

Part II reviews the medical and sociological impact of wartime trauma, tracing the impact of war on both the individual and society. Part III looks at the lives and careers of Justices Oliver Wendell Holmes, Jr. and Aharon Barak. Part II explores each judge's early life, their wartime experiences, and considers how their own writings and professional lives parallel the experiences of other veterans and survivors who have had to adapt from battlefield to civilian life. Part IV then examines how jurisprudence in the United States may be affected by society's experience of and restoration from wartime traumatic experience, and is followed by a brief conclusion.

II. INDIVIDUAL AND SOCIAL IMPACTS OF WAR

In order to effectively discuss war's effects on jurists and jurisprudence, it is necessary to at least touch upon the body of research into war's consequences upon individuals and societies. The consequences of wartime stress on the individual receive significant attention in news media, as well as in academic and diagnostic literature.²² Societies, too, bear scars from and are changed by war.

A. *PTSD from Acute Responses to "Social Death" and "Moral Injury"*

Victims of extreme psychological trauma are at risk for developing PTSD.²³ While fictional depictions of PTSD tend to focus on

²¹ See *infra* Part III.E-F.

²² Nancy C. Andreason, *Posttraumatic Stress Disorder: A History and a Critique*, 1208 ANNALS N.Y. ACAD. SCI. 67, 67 (2010) (discussing the frequency and depth of attention received).

²³ DSM-IV, *supra* note 22, at 309.81. DSM-IV has been replaced with the "DSM-V," which alters but does not replace or re-characterize the definition of PTSD, changing only the diagnostic metrics to fit the revised diagnostic approach instituted with DSM-V.

out-of-control “flashbacks,” such acute reactions are just one of a series of the disease’s physiological and psychological manifestations.²⁴ Other effects include persistent avoidance of specific environmental stimuli associated with the trauma, a numbing of general intellectual flexibility, a feeling of detachment and estrangement from close relationships, and a restricted range of emotional affect.²⁵ Behaviorally, some victims experience a reduction in or loss of the ability to experience love or empathy.²⁶ Another common response, termed “hyper-arousal,” includes behaviors such as irritability, hyper-vigilance, and “exaggerated startle response.”²⁷ While causation and severity of PTSD is generally seen as a multivariate phenomenon and hard to predict, factors such as family and personal relationships before a traumatic experience, personal predispositions, and the severity of physical injury have all been shown to impact the propensity for developing the disorder.²⁸

Notably for our purposes, the effects of PTSD can be chronic, lasting decades and altering the course of an individual’s career and life.²⁹ Sufferers struggle with paying too much attention to threat-related cues, either perceived or real in nature.³⁰ Similarly, sufferers of PTSD can show an inability to contain and reasonably scale the intensity of their fear responses, unable to manage an emotional process called “fear extinction.”³¹

Professor Jonathan Shay has described a major impact of wartime experience as a kind of “moral injury” with permanent, real-world repercussions for its sufferers, describing the phenomenon as “social death.”³² Finding that traumatic experience can result in

²⁴ See, e.g., *THE BEST YEARS OF OUR LIVES* (Sam Goldwyn Co., 1946); *BORN ON THE FOURTH OF JULY* (Universal Pictures, 1989); *JARHEAD* (Universal Pictures, 2005); *IN THE VALLEY OF ELAH* (Warner Independent Pictures, 2007); *AMERICAN SNIPER* (Warner Brothers, 2014).

²⁵ DSM-IV, *supra* note 22 at 309.81.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Guanghua Chen et al., *A Cross-Sectional Study on Posttraumatic Stress Disorder Among Elderly Qiang Citizens 3 Years After the Wenchuan Earthquake in China*, 57 *CANADIAN J. OF PSYCHIATRY* 547, 550-52 (2012).

²⁹ N. Fani et. al, *Attention Bias Toward Threat is Associated with Exaggerated Fear Expression and Impaired Extinction in PTSD*, 42 *PSYCHOLOGICAL MEDICINE* 533, 533 (2012); Diana Feczer & Pamela Bjorklund, *Forever Changed: Posttraumatic Stress Disorder in Female Military Veterans, A Case Report*, 45 *PERSPECTIVES IN PSYCHIATRIC CARE* 278, 290-91 (2009).

³⁰ See *Fani*.

³¹ See *Fani*, at 539.

³² Jonathan Shay, *From an Unlicensed Philosopher: Reflections on Brain, Mind, Society, Culture—Each Other’s Environments with Equal “Ontologic Standing”*, 821 *ANNALS N.Y. ACAD. SCI.* 36 (2010).

“predictable deformities of character, emotional dysregulation, and liquefaction of identity,” Shay goes on to state, “even the noblest character can be wrecked.”³³ Possible long term personality consequences include: “oscillations between extremes of self-respect, from godlike grandiosity and . . . wrath . . . to inert, almost lifeless collapse . . .”, destructions of the capacity for “social trust,” and an active expectancy of harm, humiliation, and exploitation.³⁴

B. *Medical Understanding of Posttraumatic Growth in Response to Traumatic Experience*

It is important to note that not all traumatic experiences produce socially destructive consequences. Some survivors of trauma take their experiences as a call to duty, and use them as fuel for active engagement in the problems of the world.³⁵ The difficulty in predicting PTSD outcomes for individuals exposed to violence has supported research into “resilience” as a personality trait that can inoculate an individual from developing PTSD.³⁶

The resilience trait is studied through three basic responses to trauma: recovery, resistance, and reconfiguration.³⁷ In recovery, an individual returns to their pre-trauma state, rebounding to their own psychiatric baseline.³⁸ Resistance is a similar defense of the pre-traumatized self, but through a process that preemptively resists internal changes in behavior.³⁹ Reconfiguration, by comparison, accepts the sense that one may be permanently changed by traumatic experience, but also recognizes that in response to that change, individuals can choose how to recast their lives, giving new meaning to experiences that motivate future conduct.⁴⁰ Such a process is sometimes called posttraumatic growth (“PG”).⁴¹

One intriguing aspect of PG is the intense motivation it provides. By connecting traumatic memories to core ethical and moral views of the world, PG has a strong influence on the type of actions a person takes

³³ *Id.*

³⁴ *Id.*

³⁵ See generally Moshe Bensimon, *Elaboration on the Association Between Trauma, PTSD, and Posttraumatic Growth: The Role of Trait Resilience*, 52 PERSONALITY AND INDIVIDUAL DIFFERENCES 782 (2012).

³⁶ *Id.* at 782.

³⁷ *Id.*

³⁸ *Id.* at 783.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Bensimon, *supra* note 35, at 783.

and the level of commitment and zeal with which those actions are pursued.⁴²

C. *The Importance Personal Expression and Writings to Understanding the Effects of Wartime and Traumatic Experiences*

Individual responses to wartime and traumatic experience can be both deeply expressive and readily accessible. Survivors frequently write about lives redirected after wartime trauma.⁴³ Such personal writings in are often studied in narrative theory⁴⁴, where the role of integrating one's own experiences into the narrative understanding of the self takes the form of internal storytelling, or history making.⁴⁵ This kind of personal storytelling has been described as “not optional,” and plays a vital role in how a person conducts himself in work, relationships, and society.⁴⁶

1. PTSD Seen Through Personal Writings

For some PTSD sufferers, their personal narrative is driven by the reality that reminders of war are ever-present on their person. Injuries leave scars and damage that serve as constant, daily reminders of the experience.⁴⁷ The sense of having returned as “damaged goods,” that

⁴² See, e.g., Ann Carol Plummer, et al, *Volunteerism Among Social Work Students During Hurricanes Katrina and Rita: A Report from the Disaster Area*, J. SOCIAL SERVICE RESEARCH 55 (2008) (reporting a higher incidence of exposure to stress and trauma among more active emergency volunteers); P. Alex Linley, *Positive Adaptation to Trauma: Wisdom as Both Output and Process*, 16 J. TRAUMATIC STRESS 601, 603-04, 606 (2003) (“Posttraumatic wisdom transforms tragedy positively through self-understanding and the living of a positive and fulfilling life”). See generally Vicki S. Helgeson, *A Meta-Analytic Review of Benefit and Finding Growth*, 74 J. CONSULTING AND CLINICAL PSYCHOLOGY 797 (2006).

⁴³ See, e.g., Geoff Lowe, *Health-Related Effects of Creative and Expressive Writing*, 106 HEALTH EDUCATION 60, 63-64, 67 (2006); Hannah Adenauer, et al., *Narrative Exposure Therapy for PTSD Increases Top-Down Processing of Aversive Stimuli – Evidence from a Randomized Controlled Treatment Trial*, 12 BMC NEUROSCIENCE 1, 7 (2011).

⁴⁴ See, e.g., Nigel C. Hunt, MEMORY, WAR, AND TRAUMA 122 (2010).

⁴⁵ *Id.* at 115.

⁴⁶ *Id.* See also Robert Atkinson, *The Life Story Interview*, HANDBOOK OF INTERVIEW RESEARCH: CONTEXT AND METHOD 125 (J.F. Gubrium & J.A. Holstein, eds. 2001) (“A life story is the story a person chooses to tell about the life he or she has lived, told as completely and honestly as possible, what is remembered of it, and what the teller wants others to know of it The resulting life story is the narrative essence of what has happened to the person. It can cover the time from birth to the present or before and beyond. It includes the important events, experiences, and feelings of a lifetime.”).

⁴⁷ James D. Johnson, COMBAT TRAUMA: A PERSONAL LOOK AT LONG-TERM CONSEQUENCES 29 (2010) (“To be wounded in combat leaves scars that are forever reminders of the high price some of us pay in serving our country. It also reminds us that

one's life has been "massacred" by combat, sends "deep roots" into the soldier's heart.⁴⁸ This sense of loss is ongoing, and the physical damage seems to correlate directly with a sense that more than the body is injured:

In order to survive, we often had no choice but to just stop feeling . . . any kind of feelings. Even compassion often vacated our souls . . . Our combat trauma was like being burned on the inside, and each time . . . we became more and more vulnerable and fragmented It is with us for the duration of our lives.⁴⁹

Unsurprisingly, the author's words here suggest that the physical injuries most apparent to others are the least of the burdens facing the victim of PTSD. The resulting isolation, a defensive withdrawal from others, is described in writings as leaving some "emotionally numb," and unable to "mourn, be happy, sad, or know how to love."⁵⁰ Feelings of emptiness or disconnection result in sufferers feeling that they are "going through the motions of life without feelings."⁵¹

Whether viewed from a psychological or physiological perspective, personal writings consistently convey a feeling that PTSD leaves its victim separated from society and in a permanent state of disjunction from himself and his fellow man.⁵²

2. Posttraumatic Growth and the Individual

Not all narrative constructs coming from traumatic experiences are negative. As one veteran noted: "any experience can be a good experience, even if it has been a bad experience . . . I can honestly say that I am a much better person because of my entire combat trauma."⁵³ This type of response, viewing trauma as a positive growth opportunity, is generally classified as a "Posttraumatic Growth," or PG, response. By

we came so very close to death . . . our souls were impregnated with the reality that combat is very deadly, and for a very young person to be thrust into this state is to mark him for the rest of his life."⁴⁸

⁴⁸ *Id.* at 34-35.

⁴⁹ *Id.* at 35 (providing a combat veteran's description of how injuries impact the daily lives and outlooks of himself and his comrades).

⁵⁰ *Id.*

⁵¹ *Id.* at 79.

⁵² Hunt, *supra* note 44, at 10-11 ("The traumatized soldier's positive beliefs about the world break down, and with those beliefs can go everything which the soldier considers important – love of family and friends, concern about the future . . . many soldiers experience a total physical, psychological, and emotional breakdown that can have a long-term or permanent effect on their sense of identity.").

⁵³ Johnson, *supra* note 47, at 140-41.

reintegrating their experiences into an existing moral framework, individuals who respond to trauma through PG often find greater meaning and focus in their lives, quite the opposite of the pain and isolation experienced by sufferers of PTSD.⁵⁴ This deep integration of past harms and trauma with the moral self is captured in Nelson Mandela's description of his turn towards the pursuit of democratic equality in South Africa:

I had no epiphany, no singular revelation, no moment of truth, but a steady accumulation of a thousand slights, a thousand indignities and a thousand unremembered moments produced in me an anger, a rebelliousness, a desire to fight the system that imprisoned my people. There was no particular day on which I said, Henceforth I will devote myself to the liberation of my people; instead, I simply found myself doing so, and could not do otherwise.⁵⁵

D. *The Impact of Wartime Trauma on Society*

In addition to the effects on the individual, social scientists have identified a range of impacts on society from exposure to wartime trauma. Much like the influence of narrative on the individual, social discourse and a society's collective memory change as perceptions over past events are presented and altered in books, films, newspapers, or public discussion.⁵⁶ After a time of war, for instance, a society's discourse, institutions, and collective experience can look like and resonate with the distrusting, hypervigilant, and destructive interpersonal effects seen among individual victims of PTSD.⁵⁷ While difficult to gauge in detail, the immediacy and depth of these impacts are directly attributable to the scale of conflict, and countries subject to civil wars are oftentimes the most dramatic examples of societal collapse and failure to recover following armed conflict.⁵⁸

⁵⁴ *Id.* at 141 (“As a counselor/therapist, I can more readily identify with the rape victim, the person stricken with a deadly disease, or one who is crippled by a grinding automobile wreck or has a failed relationship.”).

⁵⁵ Nelson Mandela, *LONG WALK TO FREEDOM* (2002).

⁵⁶ Hunt, *supra* note 44, at 122.

⁵⁷ See, e.g., Marshall, *supra* note 11, at 5 (listing human, population, social, environmental, infrastructural, and quality of life effects on society stemming from war).

⁵⁸ Compare Donald R. Davis & David E. Weinstein, *Bones, Bombs and Break Points: The Geography of Economic Activity*, 92 *AMERICAN ECONOMIC REVIEW* 1269 (2002) (noting the relative speed of recovery in Europe after World War II.) with Hazem Adam Ghojarah, *Civil Wars Kill and Maim – Long After the Shooting Stops*, 97 *AMERICAN POLITICAL SCIENCE REVIEW* 189 (2003) (noting the long term social, health, and

At a very basic level, trauma impacts social cohesion and interaction, and “estrangement becomes the basis for society.”⁵⁹ The impacts on such “social capital” are also scaled to the level of trauma experienced by a culture, one study noting “the greater the human costs, the deeper are the social-psychological barriers to building peace.”⁶⁰ Similarly, researchers studying post-conflict Croatia, Bosnia, and Rwanda have noted significant degradations in trust across society after civil war.

Researchers have noted similar costs to judicial and legal systems, as well as to social and political institutions and in the provision of social services during wartime.⁶¹ In addition to damaging social institutions, war alters a society’s sense of security, leading to costly vigilance in attempting to renormalize its own sense of sovereignty and assure the safety of its people and institutions.⁶² In the worst examples, these social responses to post-war trauma can lead to the legal institutionalizing of racial and ethnic prejudices, as seen in Germany between World War I and II.⁶³

These societal effects of war are of course a function of the actions of individuals. So, and before looking to how war affects jurisprudence in the United States on the aggregate, this article examines how war affected two of history’s most renowned jurists.

economic consequences after civil war.). See also Marshall, *supra* note 11, at 3 (noting the difficulty of quantifying war’s impact because of the many different natures and types of conflict, and the complexity of social and economic consequences.).

⁵⁹ Kai Erikson, *Notes on Trauma and Community*, TRAUMA: EXPLORATIONS IN MEMORY 186 (Cathy Caruth, ed. 2009) (discussing the impact on the Buffalo Creek community in West Virginia after a 1972 dam collapse that destroyed the town).

⁶⁰ Michael W. Doyle & Nicholas Sambanis, *International Peacebuilding: A Theoretical and Quantitative Analysis*, 94 AMERICAN POLITICAL SCIENCE REVIEW 779, 785 (2000).

⁶¹ Elisabeth Jean Wood, *The Social Process of Civil War: The Wartime Transformation of Social Networks*, 11 ANNUAL REVIEW OF POLITICAL SCIENCE 539, 539-40, 558-61 (2008); Robert M. Kunovich & Randy Hodson, *Conflict, Religious Identity, and Ethnic Intolerance in Croatia*, 78 SOCIAL FORCES 643, 660-62 (1999).

⁶² See Kate Schick, *Acting Out and Working Through: Trauma and (In)security*, 37 REV. INT’L STUDIES 1837, 1842-47 (2011) (discussing how societies “act out” as a result of post-war political trauma, looking at Post-World War I Germany and Post-9/11 United States); See also Frank P Harvey, *The Homeland Security Dilemma: Imagination, Failure, and the Escalating Costs of Perfect Security*, 40 CANADIAN J. POLI. SCI. 283, 284, 289-91 (2007) (detailing the increasing costs of homeland security in the United States and Canada, the citizens’ continued expectation of higher security, and the “spiraling” effect on cost and effectiveness).

⁶³ See Schick, *supra* note 62, at 1841.

III. WARTIME EXPERIENCE AND THE INDIVIDUAL JUDGE

Before he was the renowned judge and author of *The Common Law*, Oliver Wendell Holmes, Jr. was a well-known member of Boston society and a twice-injured veteran of the American Civil War. And long before shaping the nature of Israeli jurisprudence from his position as President of the Supreme Court of Israel, Aharon Barak escaped almost certain slaughter at Nazi hands with his Mother in Lithuania. Both men later spoke openly about their wartime experiences, and Barak openly connects his sense of jurisprudence's duty as a protector of democracy to his experiences during World War II. Holmes was more philosophic and nostalgic in his recollections of the Civil War, but seemed to carry a darker burden in the wake of his experience.

A. *Oliver Wendell Holmes*

Standing virtually unchallenged as a titan of American Jurisprudence, Justice Holmes remains a mountain that every disciple of the law must climb. Holmes, well known for the power of his prose and the sheer will of his intellect, embodied both passion for the law and ambition in professional and personal affairs. His earliest work, *The Common Law*, remains one of the most influential and quoted texts in all of American legal literature,⁶⁴ and as any first year law student can attest, Holmes' judicial writings resonate through American jurisprudence like bass notes in a cantata. They are ubiquitous, and impress by the sheer force of their craftsmanship. Consideration of how Holmes may have been affected by the war and how that may have influenced his approach to law and justice is therefore more than an academic exercise.

1. Early Life and Personal History

Oliver Wendell Holmes, Jr. was born into the Bostonian upper class whose name his own father had coined: the "Brahmin" caste of Boston.⁶⁵ Holmes' father, Dr. Oliver Wendell Holmes, would in some ways set the tone for his son's life, and in others serve as a foil to it. The elder Holmes began adulthood rejecting his Calvinist roots,⁶⁶ pursuing

⁶⁴ Catherine Wells Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. U. L. REV. 541, 543 (1988).

⁶⁵ Edmund Wilson, PATRIOTIC GORE: STUDIES IN THE LITERATURE OF THE AMERICAN CIVIL WAR 783 (1962).

⁶⁶ Dr. Holmes' father was Abiel Holmes, minister of the First Church of Cambridge and a member of the Massachusetts Historical Society. See Eleanor M. Tilton, AMIABLE AUTOCRAT: A BIOGRAPHY OF DR. OLIVER WENDELL HOLMES (1947). Abiel Holmes' career was highlighted by his publishing a historical volume *American Annals* in 1805,

first poetry, then law, and ultimately medicine.⁶⁷ In his father's shadow, the younger Holmes basked in the company of William James, Ralph Waldo Emerson, and Henry Wadsworth Longfellow, all friends or collaborators of his father.⁶⁸ Some of these connections would lead to lifelong friendships for young Oliver Wendell, notably with William James' son, Henry.⁶⁹

Holmes and his mother seemed to share a more intimate connection.⁷⁰ An efficient manager of Dr. Holmes' personal and business affairs, Mrs. Holmes' meticulous traits seemed to give way for her love of her son, which she expressed in unqualified terms in letters and actions.⁷¹

2. From "Boy" to "Man": Holmes and the Civil War

From this home rich with intellectual discipline and a mother's embrace, Holmes entered Harvard College in 1857.⁷² Before graduating, and in haste to serve the cause of freedom while preserving the Union, Holmes joined the United States Army.⁷³ He only graduated because he returned after basic training to take his final exams.⁷⁴

and his work reportedly went far beyond the church to include work in the community on matters as diverse as education, poverty, and the founding of libraries. PREFACE, <http://www.harvardsquarelibrary.org/chistory/preface.htm> (last visited 4/22/2013). However, Abiel Holmes ultimately resigned from the ministry amidst a controversy within the church between Calvinism and Arminianism. *Id.*

⁶⁷ G. Edmund White, at 9.

⁶⁸ Edwin Palmer Hoyt, *THE IMPROPER BOSTONIAN: DR. OLIVER WENDELL HOLMES 166-68* (1979).

⁶⁹ See, e.g., Oliver Wendell Holmes, LETTER available at <http://pds.lib.harvard.edu/pds/view/43007063?n=1&imagesize=1200&jp2Res=.25&printThumbnails=no>; Oliver Wendell Holmes, LETTER available at <http://pds.lib.harvard.edu/pds/view/43007065?n=1&imagesize=1200&jp2Res=.25&printThumbnails=no>; Oliver Wendell Holmes, LETTER available at <http://pds.lib.harvard.edu/pds/view/43007071?n=1&imagesize=1200&jp2Res=.25&printThumbnails=no>. (providing samples of personal correspondence between Oliver Wendell Holmes and Henry James).

⁷⁰ White, *supra* note 67, at 17. Compare with Oliver Wendell Holmes, LETTER: JUNE 7, 1864 available at <http://pds.lib.harvard.edu/pds/view/43273350?n=1&imagesize=1200&jp2Res=.25&printThumbnails=no> (writing to his mother) with OLIVER WENDELL HOLMES, LETTER: FEB. 1, 1864 available at <http://pds.lib.harvard.edu/pds/view/43273350?n=1&imagesize=1200&jp2Res=.25&printThumbnails=no> (writing to father) (last visited Nov. 3, 2012).

⁷¹ *Id.*

⁷² White, *supra* note 67, at 25.

⁷³ *Id.*

⁷⁴ *Id.*

Holmes' eager departure from school speaks to the passion with which Holmes viewed the war effort.⁷⁵ The abolitionist movement fueled Holmes' engagement with the war, a movement with much of its intellectual center in Boston and therefore among the elder Holmes and his Brahmin friends.⁷⁶

By enlisting in 1861, young Holmes assured for himself the full range of the war's experiences. He began as a recruiter, while his early combat duty was replete with bad food, long marches, wet camps, and frustrating attempts to seek and meet the enemy.⁷⁷ However, it wasn't long before Holmes found himself in the midst of one of the war's earliest iconic battles, the Battle of Ball's Bluff in October of 1861.⁷⁸ It was Holmes' first action, and he survived only after being shot in the chest.⁷⁹

At Balls Bluff . . . I was hit at 4 1/2 P.M., the heavy firing having begun about an hour before, by the watch – I felt as if a horse had kicked me and sent me over – 1st Sargeant Smith grabbed me and lugged me to the rear a little way and opened my shirt and [indecipherable] the two holes in my breast and the bullet which he gave me – George says he squeezed it from the right opening . . . I remember the sickening feeling of water in my face. I was quite faint – and seeing poor Sargeant Merchant(?) lying near – shot through the head and covered with blood . . . I, meanwhile, hardly able to speak, at least coherently, and shot through the lungs? Let's see – and spit – Yes, the blood was already in my mouth . . .⁸⁰

At the time Holmes thought he would die from his wounds, so much so that he considered killing himself later that night rather than bear the pain before death.⁸¹ A doctor's letter to his parents would later

⁷⁵ Wilson, *supra* note 65, at 747-48.

⁷⁶ White, *supra* note 67, at 32.

⁷⁷ *Id.* at 50-51.

⁷⁸ *Id.* at 52. Ball's Bluff was an early battle of the war, the inadvertent consequence of what was original planned as a reconnaissance mission. Union losses were extraordinarily heavy for the time and, along with the loss of U.S. Senator Edward D. Baker, motivated the creation of the Congressional Joint Committee on the Conduct of the War. See generally Byron Farwell, *BALL'S BLUFF: A SMALL BATTLE AND ITS LONG SHADOW* (EPM Publications 1990)

⁷⁹ White, *supra* note 67, at 52.

⁸⁰ Oliver Wendell Holmes, *CIVIL WAR DIARY*, available at <http://pds.lib.harvard.edu/pds/view/43275751?n=1&imagesize=1200&jp2Res=.25&printThumbnails=no>. It is worth noting that Holmes wrote or rewrote much of his diary after the war, so it is difficult to say how much of this entry accurately portrays the events described, versus how much of it was recast at a later time. In either case, the emotional impact of the events on Holmes is inescapable. See *infra* note 86 and accompanying text.

⁸¹ Wilson, *supra* note 65, at 745.

confirm the severity of his injuries.⁸² Shortly after the incident, Holmes recorded what his thoughts had been as he lay wounded in the care of Army medical personnel.⁸³ In his recounting, Holmes thought about his struggle with faith, and his ultimate decision that God was just a construct and nothing real.⁸⁴ Holmes tested and accepted his conclusion that night without regret or return, short of a brief prayer before falling asleep, asking that “God forgive me if I’m wrong.”⁸⁵

It is interesting to note that many of Holmes’ diary accounts were made years after the incidents, and he self-censored the records of his war service by discarding papers.⁸⁶ Despite this opportunity to recast or mythologize his experiences, to Holmes’ credit the diary entry quoted above is both visceral and confesses in detail the horror, if not the fear, of the moments after being shot. Such a vivid retelling of the shock of an event, but with a kind of emotional distance, is similar to the experience of modern-day PTSD sufferers, who at once experience flashback-like recollections of the events while remaining in an isolated and withdrawn mental and emotional state. Holmes’ experience the evening after the battle, as he lay suffering, in which he first questioned and ultimately forsook God is also familiar to sufferers of PTSD.⁸⁷

Holmes recovered from his wounds at Balls Bluff, a mixed blessing at the time since it secured for him a long tenure in the Civil War. Holmes returned to his unit and experienced many more battles, as described in this letter to his mother:

Dear Mother,

Another infernal, nasty time. Night before last the corps moved from right to left of [illegible]. That night no sleep. All day troops charging position advancing retreating advancing again, usual accompaniment of shooting . . . a brief sleep on the floor of a house with all my harness on. Rose at 3 . . . for an attack wh[ich] was ordered. So far has been nothing but a little picket shooting. The enemy’s going out. Goodbye.

⁸² LETTERS TO DR. AND MRS. HOLMES CONCERNING OWH CONDITION AFTER BALLS BLUFF, *available at* <http://pds.lib.harvard.edu/pds/view/43276148?n=1&imagesize=1200&jp2Res=.25&printThumbnails=no>

⁸³ Wilson, *supra* note 65, at 745.

⁸⁴ *Id.* at 746; *See also* Oliver Wendell Holmes, CIVIL WAR DIARY, *available at* <http://pds.lib.harvard.edu/pds/view/43275674?n=1&imagesize=1200&jp2Res=.25&printThumbnails=no>.

⁸⁵ *Id.*

⁸⁶ White, *supra* note 67, at 50-51 (1993). *See also id.* at 71 (discussing the Ball’s Bluff description quoted above, and that it was written after the war).

⁸⁷ Johnson, *supra* note 47, at 140 (“There was a time in my life when I denied my faith due to the effects of my combat trauma . . . This lasted for years.”).

Your Loving Son, -W-
Rec'd Father's letter⁸⁸

Like other soldiers up through the modern day, the exuberant, idealistic abolitionist was growing more clipped and dark in his letters home.

Holmes continued to serve under the command of General George McClellan, and in May of 1862 he faced seven days of continuous fighting.⁸⁹ After the Battle at Seven Pines he wrote to his parents:

[i]t is singular with what indifference one gets to look on the dead bodies in gray clothes wh[ich] lie all around . . . As you go through the woods you stumble constantly, and if after dark, as last night on picket, perhaps tread on the swollen bodies already fly blown and decaying, of men shot in the head, back or bowels.⁹⁰

In other letters written two and three days later, Holmes related arduous, all night marches, lack of food, and suffering from “the most intense anxiety and everything possible . . . [Y]ou can't conceive the wear and tear.”⁹¹ Less than four months later, the Civil War would deliver the young Holmes to the battlefield at Antietam.

That Battle of Antietam is many things depending upon who is telling the tale. It nevertheless remains summed up in one brutal, bloody statistic: 22,717 dead, wounded, or missing soldiers fell in a single day on the farms outside of Sharpsburg, Maryland.⁹² Today, the National Park on the site has worked to maintain the grounds in similar condition to how they were the day of the battle. One stands outside the museum on a hilltop, in a field so open that you can see clear to the foothills roughly 20 miles to the west. As you look over the fields, for as far as your eye can see, and well past the point where you can discern distance and scale, the land is dotted with monuments to the dead from each state then in the union. One is faced with the clear, unavoidable, and grotesque truth that the dead and dying were everywhere.⁹³ Oliver Wendell Holmes, Jr. was very nearly one of them.

⁸⁸ Oliver Wendell Holmes, CIVIL WAR LETTER TO MOTHER JUNE 23, *available at* <http://pds.lib.harvard.edu/pds/view/43273461?n=1&imagesize=1200&jp2Res=.25&printThumbnails=no>.

⁸⁹ White, *supra* note 67, at 55.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² James M. McPherson, CROSSROADS OF FREEDOM: ANTIETAM, THE BATTLE THAT CHANGED THE COURSE OF THE CIVIL WAR 3 (2002).

⁹³ For an exhaustive treatment of the battle and the experiences of those inside of it, *see generally* John Michael Priest, ANTIETAM: THE SOLDIER'S BATTLE (1989).

Sept. 18, 1862

My Dear Parents,

Once more I am on my back as per hint of yesterday's letter. Usual luck ball entered at the rear passing straight through the central seam of coat and waistcoat collar coming out toward the front on the left hand side yet it don't seem to have smashed my spine or I suppose I should be dead or paralyzed or something. It's more than 24 hours and I have remained pretty cocky, only of course feverish at times and some sharp burning pain in my left shoulder . . .⁹⁴

Holmes had been shot through the neck. Given the severity of his injuries, one has to speculate how much of this letter was meant to mollify his parents, but at the same time it seems that unlike at Ball's Bluff, Holmes had been able to return to a field hospital under his own power. Holmes' friend and brother in arms Norwood P. Hallowell described the injury: "Captain O.W. Holmes, Jr., walked in, the back of his neck clipped by a bullet."⁹⁵ Several days later, Holmes would report that he was doing well and recuperating in Hagerstown, Maryland, although the letter was not written in his hand.⁹⁶ While his convalescence seems to have cheered him based on subsequent letters, it wasn't long before he was back on the march and frustrated by his orders,⁹⁷ soon finding himself in the city of Washington, D.C.⁹⁸

By mid-November Holmes' letters became regularly and increasingly dire, as in one where he reported "I've pretty much made up my mind that the South have achieved their independence and I am almost ready to hope spring will see an end . . . believe me we shall never lick 'em. The army is tired with its hard and terrible experience . . . We shan't do it at least the Army can't."⁹⁹ By December he reported suffering illness, dysentery, and starvation and that his time was spent

⁹⁴ Oliver Wendell Holmes, LETTER TO PARENTS SEPT. 18, 1862, *available at* <http://pds.lib.harvard.edu/pds/view/43273461?n=1&imagesize=1200&jp2Res=.25&printThumbnails=no>. A "waistcoat collar" is a high collar on a vest-like garment worn above a shirt but under an outer garment, in this case Holmes' Union Army jacket.

⁹⁵ Oliver Wendell Holmes, TOUCHED WITH FIRE: CIVIL WAR LETTERS AND DIARY OF OLIVER WENDELL HOLMES, JR. 1861-1864 65 (1946).

⁹⁶ *Id.* at 67 (1946).

⁹⁷ *Id.* ("we started this morning at 11AM and at 4PM arrived at Warrenton . . . only to find that tomorrow we must go back to Catlet[sic] or Catnip . . . Chance of finding reg't rapidly diminishing."). The town's name is "Catlett."

⁹⁸ *Id.* ("the utter lack of comfort is the least fault of that modern Gomorrah").

⁹⁹ Oliver Wendell Holmes, LETTER TO FATHER DEC. 20, 1862, *available at* <http://pds.lib.harvard.edu/pds/view/43245517?n=1&imagesize=1200&jp2Res=.25&printThumbnails=no>.

surrounded by dying men, some from injuries, others from illness, and that his peers were dying in “hard” battles.¹⁰⁰

It was about this time that Holmes’ letters to his father took on a more aggressive tone. In one letter he described his father’s hopes for the Union as “ignorant” and assured his father that he simply did not know what the reality of the war was like, and that he did not “realize the unity or determination of the south.”¹⁰¹ Describing human nature as “diffusive and aggressive,” Holmes discounted the chances of success for civility and progress in a time of war.¹⁰² Holmes’ tone was one of clear frustration. Holmes conceded as much, admitting himself to be “heartily tired and half worn out body and mind by this life.”¹⁰³

Holmes remained in the Army until 1864, suffering further injuries including a wound to his heel in Fredericksburg.¹⁰⁴ By 1864 his letters and diary became, in the words of one historian, “more and more confused and disjointed.”¹⁰⁵ In May of 1864 during the Battle of Spotsylvania he wrote to his parents “you will know how immense the butchers bill has been . . . I have not been and am not likely to be in the mood for writing details . . . these nearly two weeks have contained all of [the] fatigue and horror that war can furnish . . . nearly every Regimental off[icer] I knew or cared for is dead or wounded.”¹⁰⁶ The expectation of his own, imminent death was with him throughout the war, as evidenced by the remains of letters once pinned to his chest for his family should he be killed, a common practice among the soldiers.¹⁰⁷

Toward the end of the war, and having been promoted to captain, Holmes functioned as an assistant to his regiment’s commanding officer.¹⁰⁸ While this may have reduced his exposure to battle, he was often charged with special duties, some of which were risky.¹⁰⁹ One possibly apocryphal story from this time is Holmes’ escorting of and yelling at President Lincoln, whom he was escorting by boat near Fort

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Wilson, *supra* note 65, at 750.

¹⁰⁵ *Id.* at 749-50; *See also supra* note 95, at 121-122 (the same letter in full); *Id.* at 114 (reporting curtly to his mother that the dead are numbering, in his estimate, 3000 per day.).

¹⁰⁶ Wilson, *supra* note 65, at 751.

¹⁰⁷ Wilson, *supra* note 65, at 752.

¹⁰⁸ White, *supra* note 67, at 62.

¹⁰⁹ Alexander Woollcott, ‘Get Down, You Fool!’ THE ATLANTIC MONTHLY, Feb. 1938, at 69.

Stevens.¹¹⁰ In another incident, while facing his “narrowest escape” from an ambush, Holmes reported witnessing a “small boy,” a scout, killed, and much of his correspondence in those final days openly expressed his exhaustion and inability to continue coping with the war.¹¹¹

Over the course of the war, Holmes’ idealism and chivalric expectations had been sapped, leaving him with an impression of war as a struggle of mighty powers in which the purpose of the individual devolved to survival, anticipating the sentiments of veterans from wars yet to come.¹¹² He would tell his mother to keep confidential his fears of having lost the ability, strength, and will to fight.¹¹³ Later, aware of the legacy he would be leaving, he destroyed many of the papers that betrayed his self-perceived guilt and weakness, a lingering feeling eerily echoed in *Red Badge of Courage* and its main character’s struggles.¹¹⁴

The changes in Holmes’ personality were evident to himself even before the war had finished with him. As he grappled with his decision to separate from the Union Army, he asserted “I am not the same man and certainly not so elastic as I was,”¹¹⁵ again echoing the feeling of today’s PTSD sufferers. At the end of the war, Holmes would report to his mother that he gone to war a “boy” and returned a “man.”¹¹⁶

3. Holmes’ Return to Society

Even before reviewing Holmes’ professional writings, evidence of Holmes’ changed disposition can be found in more personal records. After the war, indeed for much of the rest of his life, Holmes would at once disclaim interest in the war, but eagerly recount the anniversaries of battles and days in which he fought or suffered injury.¹¹⁷ The mythmaking, where he tried to reconcile his inability to accept the horrors of war itself with the justice of the “cause” that had drawn him into the war, was to affect him for the rest of his life.¹¹⁸ This narrative attempt at reintegrating his experience with his morality and sense of humanity is startling in its similarity to the struggles of modern day war veterans struggling with PTSD, who on the one hand remain emotionally isolated from their world and their past experiences, but on the other

¹¹⁰ *Id.*

¹¹¹ White, *supra* note 67, at 63.

¹¹² *Id.* at 70.

¹¹³ *Id.* at 69.

¹¹⁴ *Id.* at 70; Wilson, *supra* note 65, at 752.

¹¹⁵ White, *supra* note 67, at 69.

¹¹⁶ *Id.*

¹¹⁷ White, *supra* note 67, at 72-73.

¹¹⁸ *Id.*

remain unable to move past them, recounting and reliving their experiences for decades after their traumatic experience.

One author concluded that Holmes had “brought out of the war a tough character, purposive, disciplined and not a little hard . . . of which his humor and affable manners, his air of being a man of the world . . . could never quite embellish the bleakness.”¹¹⁹ Biographer G. Edward White saw him as driven by an ambition, which “fostered Holmes’ singular competitiveness, his extreme sensitivity to criticism, his thirst for recognition, even the perverse glumness with which he accepted praise and his insatiable desire for an even higher level of accomplishment.”¹²⁰ While White’s view is perhaps unbecoming, it pales in comparison to the description offered by another biographer, Grant Gilmore, who chose not to publish the results of more than fifteen years of work on Holmes’ past:

The real Holmes was savage, harsh, and cruel, a bitter and lifelong pessimist who saw in the course of human life nothing but a continuing struggle in which the rich and powerful impose their will on the weak.¹²¹

How is one to reconcile these rough descriptions with the Holmes of law and legend?¹²² Gilmore suggests that the romantic depiction of a dashing and courageous Holmes is nothing more than a “myth” concocted by Holmes’ friends Harold Laski and Felix Frankfurter.¹²³ As has been stated, Holmes destroyed and revised his papers, and his own ego likely also played a part in the public understanding of the great Justice Holmes.

But perhaps that is too facile an argument. After all, it is hard to reconcile Gilmore’s brutal depiction with the young, enthusiastic, idealistic man of great intellectual curiosity and the apple of his mother’s eye. It is also difficult to imagine such a viscerally terrible human being receiving any attention at all from the likes of Laski and Frankfurter, or being able to display the humor and manners that also seemed to be a part of his adult personality. Perhaps a more nuanced take on Holmes the man is that a bifurcated self-narrative and personality would be completely consistent with PTSD, and with the burdens PTSD imposes on the direct victims of trauma and those who surround them. It may be

¹¹⁹ Wilson, *supra* note 65, at 754-55.

¹²⁰ White, *supra* note 67, at 467.

¹²¹ Albert W. Alschuler, LAW WITHOUT VALUES 31-32 (2000) (quoting Grant Gilmore, AGES IN AMERICAN LAW 47-48 (1977)).

¹²² See, e.g., THE MAGNIFICENT YANKEE (MGM Studios, 1950).

¹²³ *Id.*

that Holmes was neither the hero of Laski's mythology nor the bitter cynic of Gilmore's recasting. It may well be that Holmes was both.

That Holmes' personality became an enigmatic mystery can be seen in the words of those who knew him longest. Both friends and family reported confusion at finding a certain hardness of heart and character in the post-war Holmes. One of Holmes' oldest friends, Henry James, noted in 1869:

The more I live in the world, the more the cold-blooded, conscious egotism and conceit of people afflict me . . . All the noble qualities of Wendell Holmes, for instance, are poisoned by them, and friendly as I want to be towards him, as yet the good he has done me is more in presenting me something to kick away from or react against than to follow and embrace.¹²⁴

In 1876, Henry James would add to his dismayed impression, describing Holmes as "a powerful battery, formed like a planing machine to gouge a deep self-beneficial groove through life"¹²⁵

Perhaps even more moving is the response of Dr. Holmes, who seemed at a loss over what to think of his son. In 1872 the elder Holmes began a sequel to *The Autocrat*, a series in the *Atlantic Monthly* entitled "The Poet at the Breakfast Table."¹²⁶ The series featured a character widely thought to embody his son,¹²⁷ and referred to as the Young Astronomer. The Young Astronomer was described as a "strange unearthly being; lonely, dwelling apart from the thoughts and cares of the planet on which he lives . . . I fear that he is too much given . . . to looking at life as at a solemn show where he is only a spectator . . . His eyes are turned away from all human beings."¹²⁸ A more apt description of PTSD's ability to leave its victim withdrawn and isolated would be hard to find. Holmes, Jr. himself could not avoid this conclusion in the end, eventually describing himself as a "recluse" and identifying most of his true friends as comrades who had died in the Civil War.¹²⁹

4. Holmes the Lawyer and Judge, from *The Common Law* to *Buck v. Bell*

¹²⁴ Wilson, *supra* note 65, at 756-57.

¹²⁵ *Id.* at 757.

¹²⁶ Alschuler, *supra* note 121, at 33.

¹²⁷ *Id.* at 33-34.

¹²⁸ *Id.* at 33. (quoting Oliver Wendell Holmes, Sr. THE POET AT THE BREAKFAST TABLE 69 (1872)).

¹²⁹ *Id.* at 34.

Holmes' experience, with its parallels to modern day experiences of PTSD, begs the question whether his experiences in the Civil War played a role in Holmes' jurisprudential outlook. Given Holmes' influence on American law, the potential reach of that possibility cannot be ignored.

"The life of the law has not been logic: it has been experience."¹³⁰ This, if anything, is American law's "To be, or not to be,"¹³¹ and it is at least as enigmatic. It begs the question of what Holmes meant by "experience," and is arguably a fair expression of the core of his approach to the common law, particularly if one defines experience as the real-world evolution of power.

In his first lecture in *The Common Law*, Holmes defines the dialectic of his "experience" in no uncertain terms: "It is commonly known that the early forms of legal procedure were grounded in vengeance ... Vengeance imports a feeling of blame, and an opinion, however distorted by passion, that a wrong has been done . . . even a dog distinguishes between being stumbled over and being kicked."¹³² While Holmes goes on to note that the legal system has over time adopted less intense forms of "vengeance" than killing, he nevertheless states that he hopes to show that "liability also had its root in the passion of revenge."¹³³ Holmes goes on to trace this evolution of vengeance as the driver of law, and depicts a struggle to contain and exploit what Holmes sees as most fundamental: the expression of raw human power in which "[i]f a man is on a plank in the deep sea which will only float one, and a stranger lays hold of it, he will thrust him off if he can."¹³⁴

This, then, is the core of Holmes' legal realism. It is a view forged on the basis of man as a violent and aggressive creature, locked in a struggle for survival with his fellow man. For the sovereign, then, "rights" as some form of ordained privilege of man is mere nonsense on stilts. Rather, whatever rights are conceded by the state come from victories in war and other deadly intercourse, and the sovereign retains full privilege to establish its authority by violent means, including the suppression of insurrection as Holmes witnessed in the Civil War.¹³⁵

Echoes of the mindset of PTSD sufferers are hard to ignore. For instance, the aggregation of and privilege to use power under Holmes' view is reflected in how he justifies sovereign power:

¹³⁰ Oliver Wendell Holmes, Jr. *THE COMMON LAW* 1 (Dover 1991).

¹³¹ William Shakespeare, *HAMLET*, ACT III, SCENE I.

¹³² *COMMON LAW*, *supra* note 130, at 2-3 (distinguishing by analogy between intentional torts and negligence).

¹³³ *COMMON LAW*, *supra* note 130, at 3-5 (Dover 1991).

¹³⁴ *Id.*

¹³⁵ Wilson, *supra* note 65, at 763.

There is no mystic over-law to which even the United States must bow . . . we must realize that the authority that makes the law is itself superior to it, and that if it consents to apply to itself the rules that it applies to others the consent is free and may be withheld. The sovereign does not create justice in an ethical sense, to be sure . . . Sovereignty is a question of power, and no human power is unlimited.¹³⁶

The role of power in the state's control over the individual also defined the scope of jurisdiction. For Holmes, the sovereign's right to exercise jurisdiction had a basic, irreducible source:

The foundation of jurisdiction is physical power . . . No doubt there may be some extension of the means of acquiring jurisdiction beyond service or appearance, but the foundation should be borne in mind . . .¹³⁷

This awareness of power, and seeing power as the tool that hones, creates, and defines the law also appears in another of Holmes' works, *Natural Law*:

[W]hile one's experience thus makes certain preferences dogmatic for oneself, recognition of how they came to be so leaves one able to see that others, poor souls, may be equally dogmatic about something else . . . Deep-seated preferences can not be argued about – you can not argue a man into liking a glass of beer – and therefore, when differences are sufficiently far reaching, we try to kill the other man rather than let him have his way. But that is perfectly consistent with admitting that, so far as appears, his grounds are just as good as ours.¹³⁸

Holmes' connection of killing to controlling personal destiny and morality reflects his underlying belief that science and particularly Darwinism, rather than morality, was the path of the future for humanity. Holmes had been influenced not only by Darwin, but also by the positivism of Auguste Comte and the pragmatism of Charles S. Pierce.¹³⁹ Pierce, for instance, rejected the notion of an underlying divine or moral authority in "natural law," seeing natural law and the post hoc definitions of "morality" as products of a raw, Darwinian process in which conflicting values were resolved by conquest and suppression.¹⁴⁰ Returning to our initial inquiry as to Holmes' meaning in using the word

¹³⁶ *The Western Maid*, 257 U.S. 419, 432 (1922) (Holmes, J.).

¹³⁷ *McDonald v. Mabee*, 243 U.S. 90, 91 (1917) (Holmes, J.).

¹³⁸ Oliver Wendell Holmes, Jr., *COLLECTED LEGAL PAPERS* 312 (1920).

¹³⁹ WILSON, *supra* note 65, at 762.

¹⁴⁰ *Id.*

“experience,” his legal realism is the logical consequence of the competitive, power-derived “experience” of humanity.

On the bench, Holmes’ work reflected this central theme of power and the dominance of one group over another in defining the law. Holmes’ record on racial issues is striking in this regard. In *McCabe v. Atchison*¹⁴¹ the Court’s opinion addressed, in the time of *Plessy v. Ferguson*’s separate but equal guidance, a law that allowed railways to offer only seats, rather than sleeping quarters, to African Americans on the basis of economic efficiency.¹⁴² Holmes refused to join the decision disallowing the conduct, stating that the economic justification for the discrimination was “logically exact,” a line of thinking that received the admonishment of his peers.¹⁴³ In contrast, Justice Hughes described the law as a “bald, wholly unjustified discrimination against a passenger solely on account of race.”¹⁴⁴

Subsequent claims by Holmes included the assertion that the states could all but reestablish slavery by establishing indentured servitude for any laborer who refused to perform obligations under a contract.¹⁴⁵ Holmes’ positivist perspective on this issue, reiterated in multiple cases but leaving him in the minority, was that nothing in the Thirteenth Amendment prohibited such a law.¹⁴⁶ In describing Holmes’ jurisprudence in racial equality cases, one author noted that “[t]he lessons of ‘experience’ were, apparently, that if the white South as the ‘de facto dominant power in the community’ wanted to subordinate its black citizens under the thinnest cover of forma-legal equal treatment, there was nothing federal courts could or should do about it.”¹⁴⁷

In contrast to his open jurisprudential support of legal realism, and despite his personal writings and nostalgia for the war, Holmes’ jurisprudence dealt less explicitly with the armed conflict that had so

¹⁴¹ 235 U.S. 151 (1914).

¹⁴² *McCabe v. Atchison, T. & S.F. R. Co.*, 235 U.S. 151, 161-62 (1914). Under *Plessy*’s separate-but-equal logic, many states at the time passed laws seeking to justify racially-biased policies within the economic exceptions arguably permitted by the *Plessy* decision. Here, the attorney general’s argument in support of the law had been that there were insufficient numbers of African American riders to justify the cost of providing accommodations equal to, but separate from, those available to white riders. *Id.*

¹⁴³ Alschuler, *supra* note 121, at 56 (2000).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 57.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 58 (quoting Robert W. Gordon *Law as a Vocation: Holmes on the Lawyer’s Path*, ‘THE PATH OF LAW’ AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR. (Steven J. Burton, ed. 2007)).

marked him.¹⁴⁸ However, in what is perhaps Holmes' most famously shocking assertion, the connection between Holmes' wartime trauma, its impact on his connection to others, and his inability to see past it is laid bare.

By the 1920's, the eugenics movement had many philosophical backers and had begun to see implementation under state laws.¹⁴⁹ In keeping with this trend, Holmes' eager embrace of Darwinism made a short walk of his own support for eugenics:

I believe that the wholesale social regeneration which so many now seem to expect, if it can be helped by conscious, coordinated human effort, cannot be affected by tinkering with the institution of property, but only by taking in hand life and trying to build a race.¹⁵⁰

In 1927, Holmes was presented with an opportunity to apply his faith in eugenics, and his decision is as notable for the context of its holding as for the holding itself. In *Buck v. Bell*¹⁵¹, a Virginia woman

¹⁴⁸ Later in his life Holmes reportedly displayed his uniform at home, celebrated openly on days of remembrance, talked nostalgically about the brotherhood of battle, and attended many ceremonies and dedications related to the Civil War and his regiment. Frances M. Clarke, *WAR STORIES: SUFFERING AND SACRIFICE IN THE CIVIL WAR NORTH* 181 (2012); David Reynolds, *AMERICA, EMPIRE OF LIBERTY: A NEW HISTORY* (2009); see also Oliver Wendell Holmes, *THE FRATERNITY OF ARMS. 20TH REGIMENT ASSOCIATION (SPEECH 1897)*, available at <http://library.law.harvard.edu/suites/owh/item/43208931/29> (last visited Mar. 14, 2013); Oliver Wendell Holmes, *MEMORIAL DAY. AN ADDRESS DELIVERED AT KEENE. N.H. (SPEECH 1884)*, available at <http://library.law.harvard.edu/suites/owh/item/43198535/5> (last visited Mar. 14, 2013).

¹⁴⁹ Deborah Barrett & Charlez Kurzman, *Globalizing Social Movement Theory: The Case of Eugenics*, 33 *THEORY AND SOCIETY* 505 (2004). Between 1907 and 1927 a total of twenty-three states had passed eugenics statutes allowing forced sterilization, several of which were revised multiple times as various versions were struck down in state supreme courts. See Stephen A. Siegel, *Justice Holmes, Buck v. Bell, and the History of Equal Protection*, 90 *MINN. L. REV.* 106, 111 (2006). State laws typically permitted forced sterilization of certain criminals; for "feble-mindedness;" epilepsy; physical disability; and "hereditary degenerates." *Id.* at 114-16. As just one example, the Indiana statute, called the "Indiana Plan" was passed in 1907 and used as a model in other states, and the preamble read "Whereas, Heredity plays a most important part in the transmission of crime, idiocy and imbecility" and allowed inmates to be subjected to sterilization following a medical determination that "procreation is inadvisable. . ." See *FIT TO BREED: EUGENICS IN INDIANA*, <http://www.iupui.edu/%7Efit2brd/> (last visited Apr. 24, 2013). Because of its direct relationship to *Buck v. Bell*, Virginia would ultimately have the highest rate of sterilization in the country under the law upheld by Holmes, which permitted sterilization based upon a hospital board's decision that an individual was "fit for sterilization." See SB 281 Virginia Sterilization Act (1924); See also *VIRGINIA EUGENICS*, <http://www.uvm.edu/~lkaelber/eugenics/VA/VA.html> (last visited Apr. 24, 2013).

¹⁵⁰ Edmund Wilson, *PATRIOTIC GORE: STUDIES IN THE LITERATURE OF THE AMERICAN CIVIL WAR* 768 (1962).

¹⁵¹ 247 U.S. 200 (1927).

challenged a state law permitting forced sterilization of the mentally disabled.¹⁵² The Supreme Court upheld the law, rejecting Fourteenth amendment due process and equal protection claims.¹⁵³ That the Court's holding attracted only a single, unwritten dissent, seems remarkable today.¹⁵⁴ But what is most potent of all are the raw nerves exposed in Justice Holmes' opinion, asserting what seems to have been for Holmes a self-evident truth:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices . . . in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.¹⁵⁵

In this infamous and brief expression are all the elements of Holmes' philosophy, and as near a public confession of his pain as one was likely to observe. Holmes' disdain and disconnect for others; his sense of rights as derived from power; the legitimacy of control through force; and his guilt and anger at the losses suffered by himself and his comrades during the Civil War seem to be brutally present in the form and substance of his opinion in *Buck v. Bell*. While pieces of these sentiments ring throughout his writings during the war, about the law, and as a jurist, it is *Buck v. Bell's* brutal and unavoidable display of disdain and arrogance, mixed with pain and guilt, that shows not only what Holmes had become, but how he got there.

Justice Holmes is almost certainly without parallel in the annals of American law. His influence reverberates to this day in the opinions of his successors on the Supreme Court, and through the rich adoption of his rhetoric by judges, scholars, and historians. Against this backdrop it is easy to forget the man, and in so doing fail to recognize the role that his personality played in forging Holmes' pervasive theories. That some of Holmes' judgments fall short of the values later divined from his more famous rhetorical flairs perhaps says more about society than Holmes himself. However, all of Holmes' opinions, even those more forgotten by time, carried weight in their day. The dark influence of his experiences in

¹⁵² *Id.* at 205.

¹⁵³ *Id.* at 206-07.

¹⁵⁴ *Id.* at 208.

¹⁵⁵ *Id.* at 207.

the Civil War are acute warnings to anyone approaching the law and hoping to objectively serve those it is intended to protect.

B. Aharon Barak

Aharon Barak is the most influential and controversial figure in the history of Israeli jurisprudence. Through his leadership as President of the Israel Supreme Court, Justice Barak reshaped and expanded the role of the court in a decision that has been compared to *Marbury v. Madison*¹⁵⁶ for its assertion of judicial review. The decision is equally significant for having also granted human rights constitutional protection within Israel despite the absence of constitutional declaration of such rights.¹⁵⁷ The Barak Court's decisions continue to garner both high praise and bitter criticism.¹⁵⁸ Throughout, Barak has repeatedly stated that he performed his duties to the best of his ability and in the interests of justice, and has advanced an approach to judicial decision-making that focuses and empowers the court to address human rights and fundamental values.¹⁵⁹

Like Justice Holmes, although in a completely different context and position, Aharon Barak also experienced the horrors and impact of war. In Barak's case, it was as a small child surviving among and ultimately fleeing from Nazi atrocities. Unlike Holmes, however, Barak has been direct and open about how those experiences have guided and justified his work as a jurist. As a result, where with Justice Holmes we needed to proceed by inference and a review of his life, with Justice Barak we need look no further than his written work and how he connects his theory of jurisprudence to his experiences.

1. Aharon Barak and World War II

Aharon Barak was born in Lithuania in 1936, the son of attorney Zvi Barak, and his wife Leah, a teacher.¹⁶⁰ Barak's confrontation with war began when Nazis occupied his home city of Kaunas in 1941.¹⁶¹

¹⁵⁶ 5 U.S. 137 (1803).

¹⁵⁷ Emily Bazelon, *Let There Be Law*, LEGAL AFFAIRS 26 (June, 2002).

¹⁵⁸ See, e.g., Nimer Sultany, *The Legacy of Justice Aharon Barak: A Critical Review*, 48 HARV. INT'L. L.J. 83, 84 (2007) ("My emphasis will be less on what Barak has said and written, but rather on what he has done, the impact of his opinions on the victims he has left behind, and the alternative narratives he has so powerfully destroyed.").

¹⁵⁹ BARAK, AHARON – PERSONAL HISTORY *supra* note 15.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

As with other countries that fell to Nazi occupation, the Lithuanian government was replaced with a provisional civilian administration that implemented exclusionary laws against Jewish citizens.¹⁶² By the end of the war nearly 95% of Lithuanian Jews had been killed, nearly 200,000 people.¹⁶³ The laws paved the way for genocide by establishing auxiliary police forces to execute pogroms on Jewish communities.¹⁶⁴ The pogroms in Kaunas lasted four days starting on June 24, 1941, killing 2,500-3,000 Jews.¹⁶⁵ Assaults continued over the next several weeks, and estimates of the dead by early July range from 5,000-6,000, most of whom were murdered in the streets in public.¹⁶⁶ The roughly 29,000 Kaunas Jews who survived these pogroms, including Barak and his parents, were eventually forced into the Kovno ghetto, a partitioned area enclosed by barbed wire that eventually swelled to 40,000 souls as other Jews were brought in from outlying areas.¹⁶⁷ Then, between October 4 and October 29 of 1941, the bulk of the population of Kovno was slaughtered in what was called the “Great Action.”¹⁶⁸ Those who survived became forced laborers for the German military, and many were ultimately exterminated at Dachau.¹⁶⁹

Young Aharon was five when the Nazis took control of his home city, and lived in the Kovno ghetto with his parents through and well after the Great Action.¹⁷⁰ In 1944, he and his mother finally fled Kovno, spending the last six months of the war in hiding on the outskirts of the city.¹⁷¹ Aharon and his mother were eventually reunited with his father, and the family reached Jerusalem in 1947.¹⁷²

2. Aharon Barak’s Career and Arrival at the Israeli Supreme Court

¹⁶² Andres Kasekamp, *A HISTORY OF THE BALTIC STATES* 131-33 (2010)

¹⁶³ Kasekamp, *supra* note 162 at 134.

¹⁶⁴ Kasekamp, *supra* note 162 at 134; BARAK, AHARON – PERSONAL HISTORY *supra* note 15.

¹⁶⁵ Christoph Diekmann, *Lithuania in Summer 1941 – The German Invasion and the Kaunas Pogrom*, SHARED HISTORY, DIVIDED MEMORY: JEWS AND OTHERS IN SOVIET-OCCUPIED POLAND, 1939-1941 355-57 (Elazar Barkin et. al., eds. 2007).

¹⁶⁶ *Id.* at 360-61.

¹⁶⁷ *Id.*

¹⁶⁸ KAUNAS MASSACRE OF OCTOBER 29, 1941, http://en.wikipedia.org/wiki/Kaunas_massacre_of_October_29,_1941 (last visited Mar. 14, 2013).

¹⁶⁹ *Id.*

¹⁷⁰ BARAK, AHARON – PERSONAL HISTORY *supra* note 15.

¹⁷¹ *Id.*

¹⁷² *Id.*

As an adult, Barak followed in his father's footsteps, earning his law degree in 1958 from the Hebrew University in Jerusalem.¹⁷³ Between 1958 and 1960 Barak fulfilled his Israeli Defense Force ("IDF") requirements, and returned to school to complete his studies.¹⁷⁴ Barak ultimately received his doctorate in law, graduating cum laude and being immediately appointed as a lecturer. Later, at the age of 38, Barak served as the Dean of his former law school.¹⁷⁵

In 1978, at the age of 42, Barak became the youngest member of the Israel Supreme Court.¹⁷⁶ In 1995 he was appointed President of the Supreme Court, a position he would hold until 2006.¹⁷⁷ During that time, Barak continued to lecture, both at Hebrew University and Yale Law School.¹⁷⁸

Part of Barak's stated mission in his work and teaching is to "raise judicial philosophy into the realm of consciousness and subject it to public critique."¹⁷⁹ Barak readily asserts that a "judge's judicial philosophy is closely intertwined with their personal experience. Every judge has a complex life experience that influences his approach to life, and therefore influences his approach to law."¹⁸⁰ Barak's reasons for shedding light, and rendering public the generally guarded process of judicial decision-making are more than academic. By raising awareness of the role of individual judicial philosophy, Barak hopes to lay bare a necessary but often silent component of the judge's process, one that the public is entitled to consider during appointments.¹⁸¹

3. War and Aharon Barak's Views on Judicial Discretion and Judicial Review in a Constitutional Democracy

Unlike Holmes, who in many ways sought to downplay the influence of the Civil War in his work as a judge, Aharon Barak has been very clear about how World War II defines his understanding of the judge's role:

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ BARAK, AHARON – PERSONAL HISTORY *supra* note 15.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Barak, *supra* note 189, at 316-17.

¹⁸⁰ *Id.*

¹⁸¹ Interview, Aharon Barak. Sept. 16, 2013, at 44m38s. (audio on file with author) ("I think that society deserves its judges to be faithful and to tell the truth. And if society doesn't like such kind of judges, it's society that appoints the judges, not the judges that appoint society.")

The assumption that ‘it cannot happen to us’ can no longer be accepted. Anything can happen. If democracy was perverted and destroyed in the Germany of Kant, Beethoven, and Goethe, it can happen anywhere. If we do not protect democracy, democracy will not protect us . . . a lesson of the Holocaust and of World War II is the need to enact democratic constitutions and ensure that they are put into effect by judges whose main task is to protect democracy.¹⁸²

In order to fulfill that obligation, Barak developed a view of the judge’s role that recognizes, rather than obfuscates, the use of judicial discretion. For Barak, the judge operates in a real world situation where “[t]he judicial system . . . is not a frozen body. It is a living organism, and judicial discretion is one of the forces that fertilize its cells.”¹⁸³ Barak recognizes that discretion is not called for in every case and that it appears only in the “hard cases.”¹⁸⁴ However, Barak sees the use of discretion as a key tool in effective judicial decisions, particularly at the supreme court level, as a tool that should be used both knowingly and without hesitation.¹⁸⁵

Perhaps knowing he is treading in dangerous waters, Barak underscores the need for balance in the exercise of discretion.¹⁸⁶ In one instance, he does so by quoting Justice Holmes:

I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say, ‘I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court.’¹⁸⁷

Expanding upon Justice Holmes’ famous turn of phrase, Barak takes the position that “[t]he life of law is not just logic or experience. The life of law is renewal based on experience and logic, which adapt law to new social reality.”¹⁸⁸

As a counterbalance to this decisional freedom, and to provide a gravitational center for his use of discretion, Justice Barak looks to fundamental values in the society,¹⁸⁹ eschewing unconsidered deference to precedent in favor of defending what Barak sees as a more primary source of interpretive meaning:

¹⁸² Aharon Barak, *THE JUDGE IN A DEMOCRACY* 20-21 (2006).

¹⁸³ Aharon Barak, *JUDICIAL DISCRETION* 161 (1989).

¹⁸⁴ *Adalah v. Minister of Interior*, H CJ 7052/03 *98 (2006).

¹⁸⁵ *JUDICIAL DISCRETION*, *supra* note 183, at 161.

¹⁸⁶ *Id.* See also Interview, Aharon Barak. Sept. 16, 2013 (audio on file with author).

¹⁸⁷ *Id.* (quoting *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917)).

¹⁸⁸ *JUDGE IN A DEMOCRACY*, *supra* note 182, at 4.

¹⁸⁹ Aharon Barak, *On Society, Law, and Judging*, 47 *TULSA L. REV.* 297, 310 (2011).

[T]he court is a faithful interpreter of the accepted attitudes of the enlightened public, in whose midst it dwells . . . These are the attitudes in basic values and basic conceptions . . . They are an expression of the national way of life . . . They reflect the nation's vision and its basic credo . . . The judge reflects the values of the State of Israel as a Jewish and democratic State.¹⁹⁰

Despite this faith in the “vision” and “credo” of the nation and its “enlightened public,” it is important to note that Justice Barak does not equate society’s vision with majority rule.¹⁹¹ Indeed, many of his decisions are controversial because they stood against popular views at the time they were rendered. Barak therefore draws a distinction between fundamental values of a society and majority rule:

If the main criteria for democracy is majoritarian rule, a constitution is not a democratic institution. Because what the constitution does is to restrict “We the People” of today, because “We the People” of yesterday decided otherwise. And when a judge says, “This statute is unconstitutional because it violates the values, the deep values, of the constitution, though this statute is the outcome of the superficial values of society, of this week, and therefore the statute is unconstitutional.” This decision is a manifestation, an execution and fulfillment, of the idea of democracy and not a violation of it, as democracy is not just the rule of the majority. If you think that democracy is just the rule of the majority, don’t have judicial review and don’t have a constitution.¹⁹²

Barak likewise asserts that it is the duty of the judge to “educate the people in the democratic spirit” and that judges “must give expression to democracy in its richest sense in their rulings, so that the public will understand it.”¹⁹³

Thus, for Barak the judge’s role is not to function solely as an inheritor of extant law or popular opinion, but rather to be a progenitor of law that reflects the values of society when necessary, at times even before society’s majority sees how to apply its values to a given

¹⁹⁰ Eisenberg v. Minister of Building and Housing, HCJ 6163/92, 265 (1992) (internal quotations omitted).

¹⁹¹ JUDGE IN A DEMOCRACY, *supra* note 182, at 25-26 (“[D]emocracy is not only majority rule. Democracy is also the rule of basic values and human rights . . . Democracy is a delicate balance between majority rule and society’s basic values.”).

¹⁹² Interview, Aharon Barak. Sept. 16, 2013, at 30m51s. (audio on file with author).

¹⁹³ *Id.* at 23. *But see* JUDICIAL DISCRETION, *supra* note 183, at 152 (discussing how judicial discretion must also provide coherence to the law, and a reasonable justification for any change being made through judicial acts).

context.¹⁹⁴ In so doing, Barak's judge fulfills what he sees as most dear to his work as a judge: the constitutional obligation to protect the substantive core of democracy.¹⁹⁵

With his skepticism about simple majority rule, in the end Barak asserts that when a judge's work enters the realm of discretion, the purpose of discretion is to allow a judge to place faith in his or her own understanding of the society's fundamental values and how they apply to a given case.¹⁹⁶ Finally, while relying upon judicial independence to secure discretion, Barak expects public accountability, in the form of a judge's personal sense of accountability, to ultimately limit discretion.¹⁹⁷

For Barak control over discretionary scope is not found only in structural or substantive aspects of the law, but also in the public's awareness that discretion exists, and the judge's awareness that acts of discretion must be made with full cognizance of the need for judicial objectivity.¹⁹⁸ In examining this balance between individual experience and the objectivity of the judge's role, Barak reference Justice Cardozo in emphasizing balance and awareness, rather than vague and unreasonable assurances that individual experience does not exist within nor influence the judge:

[Personal experience and conscience] comes into play because it is a part of me. Cardozo said so. When we look, we should look upon ourselves from the outside, in other words to try to erase the subjectivity. But then he adds, "but we do it with our own eyes." So two judges using the same methodology may come to different conclusions. And it's fine. I wouldn't say that their conclusion is not legitimate. For reasons A, B, C I don't accept it, but it's no different from any other question. Because if there would not be the subjectivity of the judge, the computer could do the job, or flipping a coin could do the job But it's very important that a judge is sensitive that he has his own personal experience That he will look on himself on the outside, and he will be sensible to the fact that he has his own peculiarities, and he should try to do his or her best to objectify that. Because he's there not to represent his views, but to represent the way he views the values of society. This is the subjective side.¹⁹⁹

¹⁹⁴ JUDICIAL DISCRETION, *supra* note 183, at 159.

¹⁹⁵ Pub. Comm. Against Torture in Israel v. Gov't of Israel, 53(4) P.D. 817, 845 (1994) (asserting, in rejecting the use of torture for interrogation, that defending core human rights concerns within a democratic regime strengthens democracy in the long term).

¹⁹⁶ Barak, *supra* note 183, at 141.

¹⁹⁷ JUDICIAL DISCRETION, *supra* note 183, at 165.

¹⁹⁸ Barak, *supra* note 182, at 301-02.

¹⁹⁹ Interview, Aharon Barak. Sept. 16, 2013, at 38m30s (audio on file with author).

By ensuring that both the judge and the public know who is “creating its law and within what boundaries they are acting,” Barak relies on the judge’s utilization of personal experience to understand the values of society to restrict the range of discretionary action, and erects a boundary against imposing personal experiences not grounded in the values of society.²⁰⁰

4. *Mizrahi*, Human Rights and the Most (In)famous Application of Barak’s Judicial Philosophy

Justice Barak’s presidency of Israel’s Supreme Court has been deeply controversial. Under Barak, the Court became known, and critiqued, for its “judicial activism,” particularly after the Knesset’s passing of the *Basic Laws: Human Dignity and Freedom* statute.²⁰¹ On the basis of that statute, the Barak court “upended Israel’s longtime practice of placing security and community above individual rights” in a series of decisions that condemned or reversed longstanding practices of Israeli security and defense forces.²⁰² The Barak Court expansively interpreted the Basic Laws based on its own determination that the law bound the Knesset and all other branches of government, and granted the human rights articulated therein supreme, constitutional status.²⁰³ In other words, the decision seemed to convert a legislative statute into a foundational, constitutional document. In an interview with Justice Barak, he explained that this conclusion was technical in nature, based upon the Knesset’s position in the society as both a “regular” legislative body and a “supra-legislative” body with the power to make a constitution.²⁰⁴ Nevertheless, this interpretation marked a radical departure from the previous notion of the Knesset’s legislative supremacy.²⁰⁵ The Barak Court announced its determination in an opinion penned by Justice Barak, *United Mizrahi Bank v. Migdal Cooperative Village*²⁰⁶:

With the legislation of [the Basic Laws] a substantial change occurred in the status of human rights in Israel. They have turned into constitutional rights. They have been given supra-

²⁰⁰ *Id.*

²⁰¹ Bazelon, *supra* note 157, at 26 (June, 2002).

²⁰² *Id.*

²⁰³ *Id.* at 27.

²⁰⁴ Interview, Aharon Barak. Sept. 16, 2013, at 14m20s; 19m25s (audio on file with author). See also *United Mizrahi Bank v. Migdal Cooperative Village*, (4) P.D. 221 (1995) (English summary available at JUSTICE, vol. 10, Sept. 1996, p22).

²⁰⁵ *Id.*

²⁰⁶ 49(4) P.D. 221 (1995).

legal constitutional status. A “regular” law of the Knesset cannot change them. Regular legislation cannot infringe a protected human right unless the demands set out in the Basic Laws are met. Nonobservance of the constitutional demands turns the regular statute into an unconstitutional statute . . . The court can declare its invalidity.²⁰⁷

The *Mizrahi* decision is frequently compared to *Marbury v. Madison*²⁰⁸ because in addition to raising the Basic Laws to constitutional status and recognizing a constitutional supra-legislative authority for the Knesset, the decision simultaneously asserted the Israel Supreme Court’s power to conduct judicial review of Knesset statutes.²⁰⁹ *Mizrahi* set in motion a “revolution” within Israeli law, with Barak as its guiding force.²¹⁰ However, the Basic Laws as passed by the Knesset carried no clear indication of such constitutional import, and had been passed by no more than one fourth of the full assembly.²¹¹ As a result, Justice Barak and the court he led faced blistering criticism from within and beyond Israel, and had to fend off direct assaults on the Court’s asserted authority, including a Knesset attempt to establish a separate “special” court to handle constitutional claims.²¹² But in the end, the decision has held, the Barak Court survived, and both the constitutional import of the Basic Law and the judiciary’s judicial review powers remain.

The *Mizrahi* decision is an example of Barak’s theory at work, although Justice Barak views it as a far more technical decision.²¹³ In *Mizrahi*, Justice Barak’s Court provided both the starting point and ongoing jurisdiction needed to review legislative action for its viability under the human rights values given expression in the Basic Law. While the means may have been technical in Barak’s view, the purpose, or at least the major consequence, of the decision was to empower a Court informed in part by Barak’s strong views on human rights after World War II to enforce what the decision characterized as values society embraced in the Basic Law against the will of passing fancy that could defy those values.

²⁰⁷ *Mizrahi*, 49(4) P.D. at 352.

²⁰⁸ 5 U.S. 137 (1803).

²⁰⁹ Bazelon, *supra* note 157, at 27.

²¹⁰ *Id.* See also Richard A. Posner, *Enlightened Despot*, THE NEW REPUBLIC (Apr. 23, 2007), available at <http://www.newrepublic.com/article/enlightened-despot#> (last visited Mar. 14, 2013).

²¹¹ Posner, *supra* note 210.

²¹² Bazelon, *supra* note 157, at 26.

²¹³ Interview, Aharon Barak. Sept. 16, 2013, at 30m51s (audio on file with author).

5. Barak's Interpretive Tools: Purposive Interpretation and Proportionality

Barak's philosophy of the judge's role is only one reflection of the connection he forges between his personal past and his role as a jurist. In order to use and limit discretion, Barak has developed and applied methodologies that help a jurist identify when discretion is appropriate, and how to utilize it. Barak's methodology employs two primary interpretive tools, purposive interpretation and proportionality, the former to guide discretion in the application fundamental values and the latter to defend democracy as embodied in constitutional rights from long-term erosion of values stemming from specific pressures or needs.

a. Purposive Interpretation and Adapting Fundamental Values

Barak protects society's fundamental values through what he has termed purposive interpretation.²¹⁴ Purposive interpretation consciously applies fundamental values to a given problem by resolving what those values require under the circumstances, and doing so without necessarily depending upon guidance from the history of the constitutional text under consideration:

The interpreter seeks 'society's long-term covenants.' He or she should 'uncover what is basic and value-laden, rejecting what is fleeting.' Modern generations use constitutional interpretation to give expression to their fundamental views, even if those differ from those of the constitutional founders or of previous generations.²¹⁵

Barak asserts that judges should be duty bound to rely upon the fundamental values of society when interpreting a given constitutional provision, but without mandatory adherence to the past so long as a change in direction can be reasonably justified.²¹⁶ Barak takes this logic one step further by insisting that fundamental values and basic human rights are omnipresent, even in situations where they go unstated.²¹⁷ This,

²¹⁴ Aharon Barak, PURPOSIVE INTERPRETATION IN LAW 382 (2005) (quoting Justice Barak's opinion in *Efrat v. Director of Population Registration at the Interior Ministry*, 47(1) P.D. 749, 764 (1991)).

²¹⁵ *Id.*

²¹⁶ PURPOSIVE, *supra* note 214, at 381 ("[W]hether or not they receive explicit mention in the constitution, fundamental values should be interpreted according to their meaning at the time of interpretation. They reflect contemporary needs. The question is not how the founders of the constitution understood liberty, but rather what it means in our modern understanding.").

²¹⁷ JUDICIAL DISCRETION, *supra* note 183, at 154 ("Even when the text itself does not adopt the language of values, these always serve as standards for interpreting text.").

for Barak, is the “purpose” of purposive interpretation: to interpret constitutional text for the current time in order to protect democracy by connecting the constitution’s historical text to the application of a society’s fundamental values in the present.

Barak identifies such principles by delineating them from more passing social fancies. In determining whether an idea has obtained mature status, Barak does not shy away from the importance of his own experiences as a member of society:

You read history, you read what’s going on in the country. A judge cannot be isolated . . . you have to live your country, its history, its problems, to drive a bus, to read the newspapers, to know the songs. Then you can realize if an idea . . . is something that is new, something that is dead, or something that is a vital thing, a living tree.

But that is not enough . . . you have to ask yourself if it is part of the constitution . . . if later, by using interpretive tools, you come to the conclusion that it’s part of the constitution, then I think a judge is not reflecting his own subjective ideas, but is reflecting . . . how he sees the values of the society in which he lives So I, for example, wrote a judgment in the ‘80s that human dignity is one of our values. I wrote that it is even a right. A common law right. So it is a value that became converted, and became a right.²¹⁸

For Barak, identifying rights and striking down laws as unconstitutional on the basis of purposive interpretation upholds democracy through the use of fundamental values in defense of democratic principles, rather than seeing such work as undermining democracy by running counter to majoritarian rule.²¹⁹ In all cases, by focusing interpretation through fundamental values Barak sees purposive interpretation as defending the very heart and existence of democracy. For Barak, “[t]here is no (real) democracy without recognition of values and principles such as morality and justice.”²²⁰

Barak emphasizes that such interpretive acts should only incorporate fundamental values that can be recognized within a given

²¹⁸ Interview, Aharon Barak. Sept. 16, 2013, at 3m35s (audio on file with author).

²¹⁹ DEMOCRACY, *supra* note 182, at 93 (quoting his opinion from *United Mizrahi Bank Ltd. v. Migdal Corp.* Vill., 49(4) P.D. 221, 423-24 (1993)) (“[W]hen judges interpret provisions of the Constitution and void harmful laws, they give expression to the fundamental values of society Thus they protect constitutional democracy . . .”).

²²⁰ Barak, *supra* note 183, at 127.

constitutional text, and that the constitution is not an “empty frame to be filled with every new value.”²²¹

. . . there is a built in limitation on what the judge can do. I signed many judgments which I didn't like the result at all, but I did not have another option. I didn't have tools to create another option. It's not enough that you know on which roof you want to land. You need a ladder to be there, and the ladder means a methodology. So in all of [my] judgments and all of my writings, I am very, very methodological, and methodology does not mean formalism if I see that too much subjectivity is needed, I leave it aside. And if I see, yes, I would like very much a value to be part of my constitution, but it is not there, I would say no. But if it is there, I would say yes it is there, even if the majority of the people of today think it is not there.²²²

In other words, the rights contemplated either explicitly or implicitly within the text determine when the use of purposive interpretation is permitted, and by extension when a judge may leverage his personal experience through an exercise of discretion.

b. Proportionality and the Defense of Democracy

Proportionality lies at the heart of Barak's approach to fulfilling his role of protecting democracy, and he has tied his use of both purposive interpretation and proportionality to lessons learned during World War II. It is a commitment in which Barak has asserted that “[a]t the center of development of the concept of proportionality stood the need for and the will to protect human rights from the powers of the state.”²²³

My own experience during the Second World War and the Holocaust – The Holocaust in which six million of my people, including most of my family, were brutally murdered . . . impressed upon me the crucial need to safeguard human dignity for all.²²⁴

Barak takes as his starting point the works of German scholar Robert Alexy.²²⁵ Barak and Alexy both view proportionality as a balancing system in which the scope of individual rights are

²²¹ PURPOSIVE, *supra* note 214, at 382.

²²² Interview, Aharon Barak. Sept. 16, 2013, at 44m38s (audio on file with author).

²²³ DEMOCRACY, *supra* note 182, at 177.

²²⁴ *Id.*

²²⁵ *Id.* at 5-6.

determined.²²⁶ However, Barak explicitly departs from Alexy on the key point of constitutional rights as *prima facie* rights.²²⁷ Barak views constitutional rights as fully empowered in their written form, and the subsequent legislative restrictions on those rights as taking place only at the “sub-constitutional” level.²²⁸

For Alexy, all the rights, which are principles – like dignity, property, Basic Law, the Bill of Rights – are “*prima facie* rights.” Why are they *prima facie* rights? Because always they may exist, because they represent principles, and the principle is an ideal that tends to be maximized subject to proportionality. So if this ideal is affected by a sub-constitutional statute, and the statute is proportional, then the right doesn’t apply. [Thus] you cannot talk about the scope of the right before you decide if the limitation on the right is proportional or not proportional. If [the limitation is] proportional it’s not part of the right. I think it’s a mistake. I make a distinction. I think all the rights are not *prima facie*, [but rather are] permanent, rights. . . . Lets say in American terms, if the limitation passes the relevant level of scrutiny, my theory is that this statute, which is constitutional, does not affect the scope of the right.²²⁹

The primary consequence of Barak’s divergence from Alexy is that a right, once established, cannot be reduced in scope except by either constitutional amendment or a wholly new constitution.²³⁰ This effectively adds a layer of protection between a right and all subsequent legislative activity, such that rights retain their full strength and meaning over history.²³¹ Barak’s view, as compared to Alexy’s, therefore offers a much stronger fortress for any rights deemed “constitutional rights” by providing a level of defense commensurate with Barak’s views on the primacy and importance of human rights, fundamental values in a democratic system, and the defense of those rights and values by the judiciary.

c. Applying Purposive Interpretation and Proportionality and the Controversy Surrounding Barak’s Methodologies

²²⁶ *Id.* at 6.

²²⁷ *Id.*

²²⁸ *Id.* at 7, 22-23.

²²⁹ Interview, Aharon Barak. Sept. 16, 2013, at 15m30s (audio on file with author).

²³⁰ DEMOCRACY, *supra note* 182, at 23-24.

²³¹ *Id.*

In the context of security, and when the rights in question are the fundamental human rights of Israel's Basic Laws, the discretion of Barak's Court was a point of tension between the judiciary, the Knesset and executive government, and the citizens of Israel.²³² In one case regarding IDF detention practices, Justice Barak criticized detention procedures that fulfilled the letter of the Basic Law but failed to meet what the court deemed minimum reasonable standards of human dignity:

Prisoners should not be crammed like animals into inadequate spaces. Even those suspected of terrorist activity of the worst kind are entitled to conditions of detention which satisfy minimal standards of humane treatment and ensure basic human necessities. How could we consider ourselves civilized if we did not guarantee civilized standards to those in our custody?²³³

Here we see Barak applying his discretion. The discretion, however, is not reflecting his own purely personal values, but rather his understanding of the society in which he lives and how its basic values, as embodied in the Basic Law, apply under the circumstances. Thus, while the conduct may have accorded with the letter of Israeli law, Barak concludes the broader aspects of Israeli society required broader protections than were explicitly stated under the Basic Law. Barak's assertions in cases like *Center for the Defense of the Individual v. Commander of the IDF Forces* are, through the use of his discretion, an integration of his past experiences in understanding the fundamental values of Israeli society, the purposive interpretation of those fundamental values as articulated by the Basic Law, and, ultimately, the Basic Law's proportional application in determining the validity of legislative and IDF action.

6. Barak's Application of the Core Values of Society in his Opinions

In *Adalah v. Ministry of the Interior*,²³⁴ the Israel Supreme Court struck down a politically popular antiterrorism law denying immigration to Israel for all Arabs.²³⁵ The court's opinion, with Barak as lead author,

²³² *Adalah v. Minister of Interior*, HCJ 7052/03 *33 (2006) ("I cannot accept this argument. The Basic Laws do not recognize two sets of laws, *one* that applies in times of peace and the *other* that applies in times of war. They do not contain provisions according to which constitutional human rights recede in times of war."); *see also id* at *78 ("There is no alternative – in a freedom and security seeking democracy – to balancing liberty and dignity against security. Human rights must not become a tool for denying public and national security. We require a balance . . .").

²³³ *Center*, HCJ 3278/02 at *14.

²³⁴ 2 IsrLR 443 (2006).

²³⁵ *Id.*

rejected the law's broad stroke approach and stated that instead Israel "should protect our security by means of individual scrutiny measures even if this imposes on us an additional burden."²³⁶ Several of the judges provided insights into the Court's rationale, all of whom expressed concern about the unbalanced handling of fundamental rights in favor of security.²³⁷

In *Adalah v. Ministry of Defense*,²³⁸ the Court struck down a law as unconstitutional for shielding IDF from all tort liability arising out of military actions.²³⁹ Barak's opinion unabashedly described the IDF presence in disputed territories as a "belligerent occupation" that imposed "on the state special duties under international humanitarian law" and asserted that exemption from tort liability was inconsistent with Israel's responsibilities not only under the Basic Laws, but also as a democratic nation.²⁴⁰

Each of these decisions applied fashioned applications of fundamental rights, rights now protected under the post-*Mizrahi* view of the Basic Laws as constitutional provisions, and imposed on the society a duty to protect the individual despite strong popular preference against such protections. That willingness to stand in defiance of society and to do what is right is the sort of character trait that typifies PG responses to trauma, where a person's convictions are strengthened and traumatic experiences deeply influence the course and commitment of a person's life. In Barak's case, the protection of human rights, the fundamental lesson he carried—and feels that democratic society carried—out of the Nazi atrocities of World War II, set the stage for decisions like *Mizrahi* and the *Adalah* cases.²⁴¹

7. Barak and the Model of Posttraumatic Growth

²³⁶ *Id.* at ¶ 26 (Procaccia, J.).

²³⁷ *See id.* at ¶¶ 9, 20, 21 (opinions of Procaccia, J., Naor, J., Rivlin, J. and Levy, J.).

²³⁸ 2 IsrLR 352 (2006).

²³⁹ *Id.* at 382; *see also* *Commitment to Peace and Social Justice v. Minister of Finance*, HCJ 366/03, 121 (2005) (asserting that the Basic Laws impose both prohibitions and duties upon the state). The *Commitment to Peace* decision is also interesting as it provides an example of how *Mizrahi* allowed the Court to both establish the scope of authority for and directly enforce the Basic Laws. *Id.*

²⁴⁰ *Adalah*, 2 IsrLR at 382.

²⁴¹ Aharon Barak, *THE JUDGE IN A DEMOCRACY* 7 (2006) ("Characteristic of these examples and many others is the change that has taken place in the law without any change occurring in the language of the legislation. Such a change is made possible by the change in the court's interpretation. It is made possible by the court's recognition of its role to bridge the gap created between the old statute and the new social reality.")

The strength and intensity of Barak's assertions, and the tenacity with which he defends and promotes his judicial theories, fit the type of integrated commitment to purpose seen in people who respond to traumatic experience through Posttraumatic Growth ("PG").²⁴² Unlike Holmes, Barak has not isolated his past from who he has become as a judge. Instead, Barak has consciously, conspicuously, and vigorously integrated his experiences during World War II with who he is as a judge, and sees his judicial career as driven by core lessons learned from the traumatic experiences he faced. Indeed, Barak argues that he is more open about a subject that many judges avoid:

I think most of the judges recognize it, but they don't want to talk about it. . . . I think most of the judges, if you ask the judge, 'Do you have discretion?' A judge will tell you, "Not in all cases, but the tough cases are cases in which I have discretion." "Do you flip a coin?" "No, I don't flip a coin." "If you don't flip a coin, what do you do?" And he will tell you that he is doing what I wrote. But many of them don't want to talk about it because they are afraid it will affect the legitimacy of the institution.²⁴³

Like the veteran who reached a greater understanding of his work as a therapist because of his wartime experiences²⁴⁴, Barak has developed what is at times a startling sense of purpose and commitment to his judicial career because of his experiences in World War II. Barak takes this integration even further, stepping beyond the fundamental values of his society, and burdening the judge with an even broader responsibility that suggests a deeper synergy between Barak's career and his past:

We are experiencing a human rights revolution as a result of World War II and the Holocaust. [A] central element of modern democracy is the protection of constitutional, statutory, and common law human rights. Without these rights, we cannot have democracy. Take human rights out of democracy and democracy loses its soul; it becomes an empty shell. It is the task of the judge to protect and uphold human rights.²⁴⁵

As with those who experience PG following exposure to trauma, the moral lessons Barak absorbed from his childhood have not called into question his core beliefs, but rather seem to have pulled his morality into

²⁴² See *supra* Part I.B.

²⁴³ Interview, Aharon Barak. Sept. 16, 2013, at 44m38s. (audio on file with author).

²⁴⁴ See *supra* note 54 and accompanying text.

²⁴⁵ DEMOCRACY, *supra* note 182, at 81.

such relief that the past has become the lens through which Barak understands the not only his role and purpose, but also the role of all judges, and the purpose of democracy itself.²⁴⁶ Barak's perspective, and his recognition that all judges are, in the end, a product of their own experience, is a stronger, or at least more practical, form of realism than the one so forcefully propounded by Holmes, and one that can better inform how we understand the acts of individual judges:

You know, when I talk to my first class, first year students, I said "Look, when you come in [as first year students], you are innocent. You think that law solves all the problems, or that you can find in the law a clear solution to every problem. And then after several months in law school . . . suddenly you realize that different judges have different views, and you become cynical. And you think every judge decides with his stomach. The realism. Well, the truth of the matter is don't be neither naïve nor cynical. Be realist . . . Judges are human beings. Someone who is appointed a judge is not changing his abilities. If he was stupid he will remain stupid, and if he is clever he will remain clever. . . . His personality is always there, but he knows very well that he has to reflect not his personality, but the views of society as embodied in the documents in society To talk about it is not to gossip about it."²⁴⁷

IV. SOCIETAL CONSEQUENCES OF WARTIME TRAUMA AND AN EMPIRICAL STUDY OF AMERICAN JUDICIAL OPINIONS

The effects of traumatic experience are not limited to the soldier or survivor. Social science has shown that both members of society and the society itself are deeply impacted by wartime events, and the consequences of wartime trauma ripple through communities and countries. The impacts are felt in social institutions as diverse as a nation's economy, its arts and culture, the values of the society, and its government. In addition to the detailed examination of individual judges and their work on the bench, it is therefore important to consider whether jurisprudential trends and the direction of the law are also altered whenever society grapples with and recovers from war.²⁴⁸

²⁴⁶ *Id.* at 21, 22-23.

²⁴⁷ Interview, Aharon Barak. Sept. 16, 2013, at 44m38s. (audio on file with author).

²⁴⁸ See generally John Modell and Timothy Haggerty, *The Social Impact of War*, 17 ANNUAL R. SOCIOLOGY 205 (1991) (noting changes in both individuals and U.S. society after the Vietnam War); Marshall, *supra* note 11.

A. *Towards the Empirical Analysis of American Jurisprudence in Times of War*

In 2004, Professors Lee, Daniel Ho, Gary King, and Jeffrey Segal first presented their analysis in the unpublished *The Effect of War on the U.S. Supreme Court*.²⁴⁹ Their paper employed an empirical approach to a longstanding debate over the nature of Supreme Court decisions, specifically whether or not the Supreme Court infringed on individual rights during a time of war.²⁵⁰ Standing scholarship on that question was divided, with each side choosing different lines of cases in defense of their proposition.²⁵¹ Epstein and his co-authors sought to resolve that discrepancy. But rather than analyzing a limited number of Supreme Court cases by hand, the authors employed a method developed by co-author Gary King, a professor of social science research at Harvard University, to review and compare more than 200 Supreme Court opinions.²⁵²

King conducted a statistical analysis using Harold Spaeth's U.S. Supreme Court Database, which tracks roughly two hundred attributes in the decisions of the Supreme Court.²⁵³ The database allowed King to examine all Supreme Court cases between 1941-2001, but because the study did not analyze the cases directly, the authors needed to correct their analysis for historical events,²⁵⁴ selection biases based on the cases for which the Court granted cert,²⁵⁵ political composition of the court,²⁵⁶ and other "confounding factors."²⁵⁷

The results seemed to explain why both proponents and opponents of the wartime bias theory found support for their positions. The analysis showed that while the Court did not become more suppressive of individual rights in cases directly related to the war, the Court was much more willing to erode individual rights in cases not

²⁴⁹ Lee Epstein, et al., *The Effect of War on the Supreme Court*, available at <http://dho.stanford.edu/research/WarCQ.pdf>. This is an article providing a summary of and additional commentary on Epstein's NYU Law Review article. See Lee Epstein, et al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. Rev. 1 (2005).

²⁵⁰ *Id.* at *6.

²⁵¹ *Id.*

²⁵² *Id.* at *13-14.

²⁵³ *Id.* at *29-30.

²⁵⁴ Epstein, *supra* note 249, at *31-33.

²⁵⁵ *Id.* at *34-36.

²⁵⁶ *Id.* at *37.

²⁵⁷ *Id.* at *40.

directly related to the war effort.²⁵⁸ While there are notable exceptions, such as *Korematsu v. United States*²⁵⁹, Epstein's work seemed to show that the Court's bias played out consistently regardless of political composition, selection bias, or the other potentially confounding influences.²⁶⁰ Intriguing as the implications may be, the authors noted that their reliance on extant databases and the relatively small pool of cases made the results susceptible to uncertainty and criticism.²⁶¹

B. *Examining Judicial Opinions Directly through Nonparametric Data Analysis*

This article takes the approach presented in Epstein's work a step further. Using recently developed tools for analyzing the content of large bodies of text, this article examines the degree to which individual wartime experience yields collective, correlative shifts in jurisprudence. By analyzing the content of 7,622 judicial opinions from state and federal courts between 1913 and 1967, the analysis reveals shifts at different periods in history where judicial opinions showed greater readiness on the part of the judiciary to depart from contemporary precedent in service to, or suppression of, individual rights. By correlating these time periods with periods of war, the analysis provides insights into whether, when, and to what degree judicial opinion is altered by society's experience of and recovery from war.

C. *Automated Nonparametric Content Analysis*

In 2010 King coauthored another paper, this time an article with Professor Daniel J. Hopkins, in which they presented a new method for empirically analyzing the content of the written word.²⁶² The method allows for examination of large quantities of digitized text without the laborious hand-coding process that had hindered such efforts in the past.²⁶³ Hopkins and King indicate several types of text for which the method is well suited, including web pages, blog posts, congressional speeches, newspaper articles, and emails.²⁶⁴

²⁵⁸ Epstein, *supra* note 249, at *48-49.

²⁵⁹ 323 U.S. 214 (1944). The *Korematsu* decision deemed constitutional the internment of Japanese citizens in camps under the auspices of national security. *See generally id.*

²⁶⁰ Epstein, *supra* note 249, at *48-49.

²⁶¹ *Id.* at *56

²⁶² Hopkins & King, *supra* note 19, at 229.

²⁶³ *Id.* at 229.

²⁶⁴ *Id.* at 240.

Their method provides for automated analysis of “nonparametric” data. Many forms of statistical analysis rely upon parameterized data sets, which is to say raw information reduced to a set of more manageable but inherently limited numerical parameters. Nonparametric data is, by comparison, the raw information that has not been reduced or structured into particularized values. A rough comparison would be learning about a river by referencing information as to the depth, direction, and current of its waters on the one hand, versus stepping knee deep into the river itself on the other. Hopkins and King have developed a method focused on predicting likely categories for documents by examining the documents themselves, rather than relying on pre-existing data sets such as the database used in the Epstein study.²⁶⁵

While the use of parameterized data readily provides variables for analysis, that analysis is typically directed at deriving categorical relationships for individual data points, or documents, as was the case in Epstein’s study. However, as Hopkins and King note, social scientists are not usually concerned with the categorical status of individual documents, but rather “are commonly interested in characterizing the haystack.”²⁶⁶ Rather than determining, for instance, if Document A fits into Category 1, 2, 3, 4, or 5, social science is typically interested in knowing whether all documents from a given range are Category 1, 2, 3, 4, or 5. Their method is therefore focused on the “haystack.” The method statistically analyzes a large collection of documents and provides categorization probabilities for the entire collection, or of more interest typically subsets of that collection. Because the process is entirely algorithmic, the method can examine large troves of raw data significantly faster than both human coding and previous brute-force, computer-based methods.²⁶⁷ Thus, and as is done here, rather than reviewing a few hundred documents, studies can examine thousands of documents or more, improving statistical accuracy along the way.

That said, and despite promises of more direct empiricism by direct examination of the raw documents or data, it would be inaccurate to say that nonparametric analysis is devoid of potential bias. In representing “unstructured” text as statistically operable data, Hopkins and King’s method relies on a small, hand-coded “labeled set,” which is a subset of the full data set, to define the categories by which all of the data, or the “inferential set,” will be measured.²⁶⁸ Bias in the developing of the labeled set can be reflected in the final analysis and must be

²⁶⁵ *Id.* at 230.

²⁶⁶ *Id.*

²⁶⁷ Hopkins & King, *supra* note 19, at 243-44.

²⁶⁸ *Id.* at 232-33.

minimized. One means of avoiding the injection of bias is to establish clear metrics for the hand coding process. This ensures that each document is examined for the same features, and “scored” on the same basis. Another means of filtering bias is to provide as many analysis points for hand coding that are not reliant on subjective interpretation. A third protection against bias is intercoder reliability testing.²⁶⁹ Intercoder reliability is really a test of the hand coding process itself, where a group of individuals hand-code a very small test set, say around 20 documents, and the results are compared for variance.²⁷⁰ The degree of variance can either suggest ways to improve hand coding, or at least offer insight into how deeply bias is influencing a study’s final results.²⁷¹

In terms of accuracy of categorization for the inferential set compared to the labeled set, Hopkins’ and King’s method is highly accurate, even when using a modest set of hand-coded documents.²⁷² By hand coding 100 documents for the labeled set, the error rate for the full analysis will be a little above 3%, dropping to below 2% with a hand coding pool of 500 documents.²⁷³ Much above that, however, and the error rate only declines slightly. With 1,000 hand-coded documents, for instance, the error rate remains at roughly 1.5%.²⁷⁴

Regardless of the number of hand-coded documents, what is critical is that the labeled set provides exhaustive categories.²⁷⁵ The categories can represent anything chosen by the study, but must encompass all categorical options. In the example provided by Hopkins and King, the authors examined political sentiment about different candidates in the 2008 U.S. Presidential election based on analyzing roughly 10,000 blog posts.²⁷⁶ The categories for hand coding were “extremely negative,” “negative,” “neutral,” “positive,” “extremely positive,” “no opinion,” and “not a blog.”²⁷⁷ As can be seen, the categories are not very many or terribly specific, but that is not important. What is important is that they cover the range of options sufficiently that each document can be placed in one category or another in a way that gives meaningful results to the study’s designers.²⁷⁸ The

²⁶⁹ *Id.* at 244-46.

²⁷⁰ *Id.* at 244.

²⁷¹ *Id.*

²⁷² *Id.* at 241.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 231, 233.

²⁷⁶ Hopkins & King, *supra* note 19, at 230-31.

²⁷⁷ *Id.* at 231.

²⁷⁸ *Id.* at 233.

authors also point out that they chose “sentiment categorization” because it is both more challenging to analyze and more useful in terms of the type of information one might want to glean when examining a corpus of text.²⁷⁹ For instance, the example analysis revealed whether or not John Kerry’s botched Iraq joke during his run for President had an impact on the sentiments expressed about him on the web.²⁸⁰ Hopkins’ and King’s method was able to recognize that such a slip would, predictably, result in more negative comments about Kerry appearing after the statement was made, proving itself able to discern between different blogs sentiments rather than their factual content.²⁸¹

The method begins with an initial filtering of documents falling outside the scope of the analysis, conducted by the designer of the study and in advance of hand-coding of the labeled set of documents or any computer analysis of the inferential, or full, set of documents.²⁸² In the example given the analysis looked at blog posts, so as an initial matter all non-English-language blogs and spam blogs were removed from the data pool.²⁸³

The next step is the hand coding of the labeled set. It is not necessary that the guidance require or promote “pure objectivity,” particularly if the study is pursuing something subjective like “sentiment.” That said, it is important to design more bounded metrics for hand coders by directing the individual coder to subjectively address narrower questions of interpretation and meaning.²⁸⁴ The specific nature of the guidance depends on the text being analyzed, and it is up to the study’s designer to determine the best approach under the circumstances.

The rest of the process is performed on the inferential set using automated analysis, and Hopkins and King have developed a software tool within the widely adopted R Project analysis environment to handle the processing required.²⁸⁵ The first computational step conducted by the authors’ software involves removing all punctuation and capitalization, and removing all word stems from each document in the labeled and

²⁷⁹ *Id.* at 231.

²⁸⁰ *Id.* Kerry’s slip had been his quip that “You know, education – if you make the most of it . . . you can do well. If you don’t, you get stuck in Iraq.” *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ Daniel Hopkins, et al., README: SOFTWARE FOR AUTOMATED CONTENT ANALYSIS *8 (2012), available at <http://gking.harvard.edu/readme> [hereinafter README] (last visited Apr. 24, 2013). This is the manual for the Readme software, and describes in detail the usage, process, and output of the software.

²⁸⁵ The R Project is an open-source project and standard tool in statistical analysis, available online. THE R PROJECT FOR STATISTICAL COMPUTING, <http://www.r-project.org> (last visited Apr. 24, 2013).

inferential sets.²⁸⁶ The method then creates counts of individual words, word pairs, and word triplets.²⁸⁷ The resulting data set is very large. In the election blog example 10,771 posts regarding President Bush and Senator Clinton resulted in more than 8 million entries in the table of uni-, bi- and trigrams.²⁸⁸ This results in what Hopkins and King refer to as a “bag of words” that proves to be highly useful in subsequent analysis because of the degree to which language repeats itself and contains redundant information as written.²⁸⁹

The text of a document’s “bag” is then analyzed and tabulated resulting in analysis values, which provide a “model” of the particular document’s text.²⁹⁰ The model for each document is then compared to the models derived from the documents in the labeled set, and each document is assigned to the category indicated by the results of the hand coding process.²⁹¹ In other words, by calculating the aggregated probability of each hand-coded document’s placement in each of the categories, the method generates an analysis that places each document in the full inferential set within a given category.²⁹²

So far, the work is largely a computerized, “brute-force” approach to doing that which would be impractical if done entirely by hand. But categorization of every document is not the final step of Hopkins’ and King’s analysis method. Under their approach, the final analysis goes further, providing the probability that a predefined portion, or subset, of inferential set’s documents will fall within each category, and then using error correction to refine the probabilities of each subset.²⁹³ The size of the subsets is defined by the study’s designer, and represent a group of test documents.²⁹⁴ For instance, if the user asks the software to analyze 10,000 documents as 250 subsets, the first subset will contain documents 1 through 40 in the inferential set, the second subset will contain documents 41 through 80, and so on.²⁹⁵ As the authors have noted, this probability of category groupings for each subset is what is most commonly needed in the social sciences, where researchers are less interested in the category of each individual document and are more

²⁸⁶ *Id.* Word stems are alternative endings so that, for instance, “consisted,” “consisting,” and “consists” all become “consist.”

²⁸⁷ *Id.* Such combinations are called unigrams, bigrams, and trigrams.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ Hopkins & King, *supra* note 19, at 233.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.* at 235-36. *See also* README *supra* note 284, at *6-7.

²⁹⁴ *Id.* at 235.

²⁹⁵ *Id.* at 235.

concerned with the probable categorization of sets of documents.²⁹⁶ For example, from a social science perspective, it is usually not very useful to know that Document Number 7,322 is more negative than Document Number 5,893. Indeed, someone could determine that by reading each document in short order (especially if the documents are blog posts). What becomes valuable for purposes of social science is when it can be empirically determined that, for instance, Documents 6,000 to 8,000, written within a certain period of time, are more negative than the documents that preceded or followed that time period. Such conclusions are exactly what Hopkins' and King's nonparametric analysis method provides.

More generally, Hopkins' and King's nonparametric analysis method is part of the rapidly developing field of automated content analysis. As such, it represents a new approach to social science and as yet untried approach to legal scholarship.²⁹⁷ The remainder of this article applies their methodology to analyze more than 7,000 opinions from state supreme courts and United States Courts of Appeals, asking whether there are discernable patterns that correlate with different time periods

D. *Application of Nonparametric Data Analysis*

The study conducted in this article was designed using the explanations in Hopkins' and King's article, the extensive software documentation for their "Readme" software, and generous guidance from Professor Hopkins himself, although he in no way participated in conducting the study. The analysis seeks to determine whether there are shifts over time in the degree to which judicial opinions represent radical departures from contemporary precedent on individual rights, either in support or suppression of those rights, under the United States Constitution.

1. Initial filtering of Opinions

In starting this analysis, a standard legal research database was used to compile 7,622 cases from state supreme courts and U.S. Courts of Appeals in which the Fourth, Fifth, Sixth, or Eighth Amendment were discussed. The cases cover the vast majority of the decisions available from that database between 1913-1968. In the early years, the search resulted in as few as 50 cases being found for a given year. By 1968, the search was producing more than 600 per year. The case opinions were

²⁹⁶ Hopkins & King, *supra* note 19, at 230.

²⁹⁷ *Id.*

downloaded year by year as individual Microsoft Word files. Each opinion was then converted to a plain text file for analysis and ordered chronologically by year, although within a given year the dates are not chronological.

2. Hand Coding Methodology

Roughly 125 opinions were hand-coded into one of 8 categories: “Very limiting” (-3), “limiting” (-2), “mildly limiting” (-1), “neutral” (0), “mildly protective” (1), “protective” (2), “very protective” (3), and “not discussed” (4). In keeping with the requirements of Hopkins’ and King’s method, these were a comprehensive set of categories into which each hand-coded opinion could be placed.²⁹⁸ The hand coding method provides a bounded approach to analysis, and categorization is based on moving towards or away from greater protection of individual rights.²⁹⁹ The categorization was established through a scoring matrix which provided an array of factors to be considered by the coder. The factors and their impact on scoring appears in Appendix A.³⁰⁰ The factors were meant to cover more than mere outcome, including considerations such as standard of review and the degree to which it was used to further protect or deny individual rights. For instance, if a decision upheld a longstanding right, and did so by unremarkable means, such as finding a law constitutional under rational basis review, then it was to be categorized as a modest effort at protecting individual rights (by being credited with a raw score of +1). If, however, under rational basis review, the court found a law unconstitutional under the same test and in so doing yielded a result more protective of individual rights, the opinion was to be scored as a stronger, or more radical, opinion (scoring at +3). Decisions that deny, rather than protect, rights were scored similarly by degree of departure, but with negative numbers down to -3. The method is inherently subjective, as is intended, but the matrix provides more boundaries and guidance than just asking a coder to decide if the decision is a “radical decision in favor of/against individual rights.” Using the guidance in the scoring matrix, the hand coding methodology encouraged an approach to hand coding that examined the nature and normative

²⁹⁸ README *supra* note 284, at *8-9.

²⁹⁹ The hand coding analysis requires some subjectivity in the interpretation of language and meaning within the context of a given decision, but the nonparametric analysis method is intended for this kind of textual and the interpretive analysis. See Hopkins & King, *supra* note 19, at 231-32; README *supra* note 284, at *8-9.

³⁰⁰ This hand coding method is comparable to the “codebook” methods used by Hopkins and King in their own studies. See Hopkins & King, *supra* note 19, at 231 (describing the method applied to the election blogging example) ; README *supra* note 284, at *8-9 (describing the “codebook” method).

result of any burden of proof employed (e.g. - a strict liability rule versus a preponderance standard); the standard of review applied; whether or not there were any presumptions granted or created; and several other considerations relevant to the strength of supportive or limiting action within the decision.

3. Nonparametric Analysis Using Readme

Hopkins' and King's nonparametric analysis method is not yet available through commercial software, so Hopkins and King wrote the "Readme" software package within the R Project environment to implement their method and make it available to a wide range of researchers.³⁰¹ The Readme software was able to directly import the hand-coded documents, along with their categorization data, and then conduct the automated analysis on the complete inferential data set of 7,622 case opinions. The analysis was run with subgroups of roughly twenty-five cases, so for the earliest years there are only one or two probabilities reported. As time "moves forward," the number of subsets for each year expands as the number of cases per year increases.³⁰²

For the purposes of graphing the results, years with more than one subset are reported as single numbers giving the averaged probability for each year.³⁰³ Also for the purposes of graphing, all results were converted to their absolute value, focusing the graph on the relative "strength" of sentiment and rulemaking within the opinions for a given year, rather than on whether the opinions were "supportive" or "suppressive" of individual rights. Again, the baseline question being asked is whether wartime produces courts more willing to take radical steps, either in support of or in denial of individual rights.

Given the number of hand-coded documents, the expected error rate on the reported probabilities is roughly 3%.³⁰⁴ The probabilities for each of the 300 subgroups as calculated by Readme are provided in Appendix B. Appendix B also shows which subgroups relate to a given year, and also what the final, averaged result was for each year being studied.

E. Discussion

³⁰¹ The software version of the Hopkins and Kings method is also available online as a package for R online, although any interested user must also download several other packages in order for the Readme software to function. See README: SOFTWARE FOR AUTOMATED CONTENT ANALYSIS, <http://gking.harvard.edu/readme> (last visited Apr. 24, 2013).

³⁰² See *infra* Appendix B.

³⁰³ *Id.*

³⁰⁴ *Id.*

In reviewing the results, and noting that like the Marshall study of economic impact there is nothing establishing causation as a result of this study, the data shows a drift towards more limitation of individual rights in the years immediately following World War I³⁰⁵, World War II³⁰⁶, and the Korean War.³⁰⁷ While the shifts are not the strongest drifts in jurisprudence seen between 1913-1968, they do represent the longest spans of time, generally two or three years as opposed to an individual year's diversion from the median trend.³⁰⁸ Because of practical limitations in working with the legal research database, the data stops in 1968 during the Vietnam War so it is not possible to see if the data shows similar trends as a result of that conflict. However, the results for other major conflicts of the Twentieth Century show a subtle but consistent shift in jurisprudence in the years following a war.

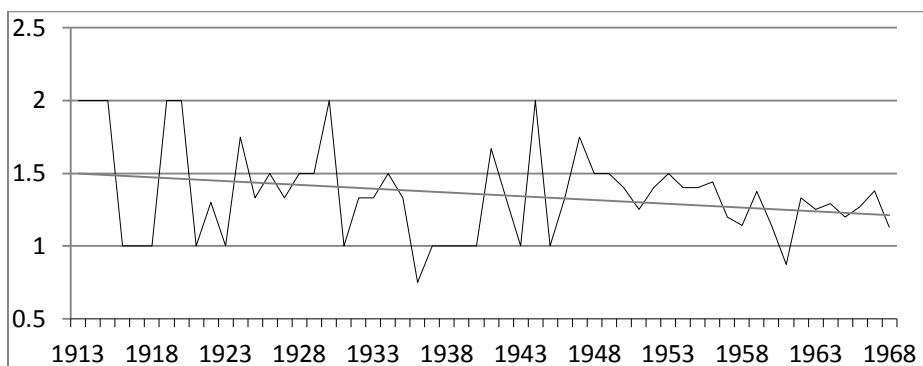


Figure 1: Shift of Judicial Opinion, 1913-1967

Figure 1 shows the results of the analysis. The vertical axis represent, on an arbitrary scale of 0-3, the “strength” of the opinions for a given year in terms of the rules, guidance, or precedents they established and how strongly they embraced or rejected precedent in protecting or denying protections to individual rights. The higher the number, the more assertive the opinions for that year.³⁰⁹ The horizontal axis begins in 1913 and progresses forward in time to 1968. The graph also provides a simple linear regression trend line indicating the median over time and suggesting a long-term trend towards moderation in opinion strength,

³⁰⁵ See Figure 1, 1919-1920.

³⁰⁶ See Figure 1, 1946-1947.

³⁰⁷ See Figure 1, 1954-1956.

³⁰⁸ See Figure 1. The trendline is a simple linear second order regression, indicated in gray.

³⁰⁹ For a more detailed understanding of how an opinion would merit a “3” versus a “2” or “1” on “strength,” please see the earlier discussion on hand coding and the scoring matrix. See *supra*, Part III.D.2; *infra* Appendix A.

although in reality the varying number of opinions by subset likely moderated averages moving forward in time.

The results shown, where each major conflict is followed by two or more years of more aggressively positioned opinions, are consistent with Modell and Haggerty's assertions that war and trauma result in "life course" changes for a society, and that correcting from those changes can take years.³¹⁰ It is also in keeping with Marshall's recognition that war can have delayed and lingering effects.³¹¹

F. *Future Analysis Efforts*

This study represents an early attempt to employ recent developments in automated text analysis to legal scholarship. As such, any subsequent presentation of this study should be made only after certain improvements to the overall process and the clarity of the results have been made.

First, the initial filtering created a problem with Fifth Amendment takings clause cases. Because takings issues appear in so many contexts, many of which involve contractual relationships between multiple private entities and the government, the initial analysis counted takings as not discussing individual rights, and the individual cases were categorized accordingly. However, this proved to be a mistake because takings cases are so common. The result of placing all takings cases in the "not discussed" category was that an inordinate number of subgroups analyzed as falling into the "not discussed" category. In revising the hand coding, takings cases were considered within the scaled categories, but once left to the automated part of the analysis, it is unclear whether or not these results are a fair representation of changes in individual rights cases. Unfortunately, going back and removing all takings cases from the analysis entirely was not possible within the context of the current study.

Another part of the process that should be performed differently is the hand coding. In this instance the hand coding was performed entirely by one person, opening the study to potential personal bias. A more rigorous execution of this study must employ a group of hand coders.³¹² Using methods provided by Hopkins and King, the output of a small group of coders should then be corrected for "intercoder reliability" to further ensure unbiased results.³¹³ Using a group of hand coders would also make feasible an increase in the number of hand-coded documents. By reaching the more ideal range of 400-500 hand-

³¹⁰ See *supra* note 248.

³¹¹ See *supra* note 11, 248.

³¹² Hopkins & King, *supra* note 19, at 244.

³¹³ *Id.*

coded documents, confidence in the results of the study would be strengthened.

The timeframe examined should also be altered. The limited number of cases available before World War II makes the results between 1913-1935 more suspect. Bringing the data up or close to the current day would also capture more recent events such as September 11 and the wars in Iraq and Afghanistan, as well as completing the data around the Vietnam War.

G. *Normative Implications*

Looking more specifically at the overall jurisprudential landscape, it follows from Epstein *et al*'s work on the effect of war on the Supreme Court that any Supreme Court decisions restricting rights during wartime are likely to become manifest in subsequent years in lower courts.³¹⁴ A delayed and extended effect of Supreme Court decisions in the lower courts is a reasonable consequence of the trends found in Epstein's work, and in that regard this study builds on that paper's results.

Lingering negative impacts also lend support to Justice Barak's concerns about changes in the baseline of individual rights during times of conflict, and that "a mistake by the judiciary in a time of emergency is more serious than a mistake of the legislature and the executive . . . the mistake of the judiciary will accompany democracy even when the threat of terror is passed, and it will remain in the case law of the court as a magnet for new and problematic rulings."³¹⁵

In addition to being part of his reason for departing from Alexsy on the nature of fundamental rights in Barak's theory of proportionality, avoiding jurisprudential bias is a key concern underlying Justice Barak's belief in the importance of self-awareness for judges. As he noted in his interview, "The only thing more dangerous than a judge with a judicial philosophy, is one who thinks he doesn't have one."³¹⁶ Looking at the work and life of Justice Holmes, the hazards of disconnecting oneself from one's role on the bench become even more apparent. Barak's awareness and openness about the role of individual experience in the work of a judge is therefore also supported by the foregoing empirical analysis. The results add a second layer of insight to Epstein's conclusions that in times of war, judges not only react, but react more strongly, both in the name of and in denial of individual rights

³¹⁴ See *supra* note 249 and accompanying text.

³¹⁵ Adalah v. Minister of Interior, HCJ 7052/03 *34 (2006).

³¹⁶ Interview, Aharon Barak. Sept. 16, 2013 (audio on file with author).

protections, and it is in the interest of justice that the bench be aware of this most human of responses to trauma in wartime.

It is important to bear in mind that the results of this study are in no way conclusive as to causation. However, and despite the limitations discussed above, this study's results do reveal a correlation between times of war and shifts in jurisprudential thinking about individual rights. Insofar as that correlation parallels the results of other empirical studies on the impact of war, the study poses challenges to legal theorists and practitioners seeking to create a consistent body of law that promotes unbiased decision-making and the rule of law.

V. CONCLUSION

Wartime trauma has troubled the veterans and victims of war throughout the history of human conflict. Over the centuries the effects of exposure to wartime trauma have been characterized in different ways, but throughout there has been a consistent recognition of lasting and sometimes permanent changes in a person after having directly experienced the consequences of war. More recently, social scientists have begun to recognize how aggregated individual effects and war's direct socioeconomic effects impact society as a whole.

In the jurisprudential sphere, there is a faith that the "logic and experience" of the law will steer a course through a society's times of trial, but such faith must be examined more critically when the individuals charged with upholding the law are themselves altered by personal experiences as veterans and survivors of conflict. Similarly, with war's ability to reach into society and change the course of a culture, shifts in jurisprudence indicate that law itself is redirected by war.

No one approach can establish the clean causation one may yearn for to justify a call for greater scrutiny. However, by examining the words and works of influential jurists, and by analyzing the trends in jurisprudential decisions over time, this article provides a preliminary frame through which we can begin to see how law, war, jurisprudence, and society affect and are affected by one another. The result may at least be a cautionary tale, allowing practitioners to incorporate greater self awareness into achieving the goal of a uniform treatment of rights under the law, and avoiding what Barak cautions against, which is that "[w]here there is no rule by judge, there is no rule of law. Law is replaced by power."³¹⁷

³¹⁷ Barak, *supra* note 182, at 314.

Appendix A: Hand Coding Metric

Fundamental Questions: Does the decision reflect a strong or “full-throated” protection (or denial) of individual rights? Also, does it reach its decision by upholding standing precedent, slightly adjusting precedent, or radically altering/reversing precedent?

General Description on Outcomes: If a decision upholds a longstanding right, and does so by unremarkable means, such as finding a law constitutional under rational basis review, then it is, at most, a modest effort at protecting individual rights (and probably scoring in the 0 to +1.5 range). If, however, under the same rational basis review, the court finds a law unconstitutional and in so doing yields a result more protective of individual rights, the opinion is a stronger, or more radical, opinion (scoring in the +1.5-3.0 range)

Range: -3 to +3, in integer steps.
-3 is most strongly limiting of rights. +3 is most protective of rights.
4 = Not Discussed

Influencing Factors and Calculation Values:

All factors shift “toward” or “away” from the protection of individual rights by the amount prescribed. Add by integer values only (no “half points”).

Standard of Proof:

Civil

Preponderance: 1 if going toward, 3 if going against

Clear and Convincing: 2

Strict Liability: 3 if going toward, 1 if going against

Criminal

Reasonable doubt: 3 if going toward, 1 if going against

Substantial evidence: 2

Standard of Review:

Arbitrary and Capricious: 3 if going toward, 1 if going against

Clearly Erroneous/abuse of discretion: 2

Plain Error: 1

De novo: 1 if going toward, 2 if going against

Judicial Review:

Strict Scrutiny: 1 if going against, 3 if going toward

Intermediate Scrutiny: 3

Rational Basis: 3 if going against, 1 if going toward

Presumptions:

Rebuttable: 1

Prima facie: 2

Conclusory: 2

Interpretive Scope:

Plain Meaning: 0

Narrow: 1

Broad: 3

Outcome

In favor either way, close to established meaning/on basis of stare decisis: 1

In favor either way, extension/alteration of established meaning: 2

Claims without merit: 0

Note on Dissents:

Dissents are not used in calculating the opinions score.

Appendix B: Readme Results

Subset Group	-3	-2	-1	0	1	2	3	4	Max Value	Probability Result	Year
1	0.060	0.159	0.187	0.151	0.145	0.144	0.108	0.045	0.187	1	Test
2	0.038	0.217	0.142	0.156	0.089	0.143	0.122	0.093	0.217	2	Test
3	0.043	0.400	0.141	0.093	0.098	0.110	0.004	0.111	0.400	2	Test
4	0.030	0.193	0.118	0.063	0.143	0.099	0.158	0.197	0.197	4	Test
5	0.022	0.267	0.129	0.102	0.155	0.117	0.152	0.057	0.267	2	1913
6	0.014	0.228	0.119	0.117	0.121	0.137	0.141	0.122	0.228	2	1913
7	0.040	0.178	0.172	0.115	0.161	0.108	0.108	0.117	0.178	2	1914
8	0.060	0.226	0.117	0.091	0.130	0.172	0.099	0.105	0.226	2	1915
9	0.078	0.139	0.210	0.174	0.082	0.107	0.076	0.134	0.210	1	1916
10	0.074	0.107	0.230	0.148	0.135	0.092	0.097	0.118	0.230	1	1917
11	0.057	0.175	0.233	0.168	0.164	0.043	0.112	0.048	0.233	1	1918
12	0.067	0.228	0.169	0.110	0.119	0.160	0.087	0.058	0.228	2	1919
13	0.076	0.153	0.155	0.018	0.115	0.209	0.132	0.141	0.209	2	1920
14	0.066	0.148	0.256	0.127	0.132	0.150	0.033	0.088	0.256	1	1921
15	0.013	0.118	0.232	0.156	0.159	0.152	0.104	0.065	0.232	1	1921
16	0.041	0.158	0.127	0.169	0.113	0.153	0.104	0.135	0.169	0	1922
17	0.056	0.235	0.213	0.108	0.110	0.110	0.109	0.058	0.235	2	1922
18	0.034	0.294	0.237	0.135	0.106	0.081	0.094	0.019	0.294	2	1922
19	0.015	0.155	0.210	0.083	0.142	0.091	0.173	0.130	0.210	1	1923
20	0.054	0.183	0.226	0.141	0.153	0.132	0.112	0.000	0.226	1	1923
21	0.077	0.262	0.212	0.014	0.135	0.077	0.161	0.063	0.262	2	1924
22	0.038	0.179	0.212	0.118	0.105	0.123	0.180	0.046	0.212	1	1924
23	0.045	0.212	0.155	0.140	0.160	0.067	0.085	0.135	0.212	2	1924
24	0.015	0.238	0.154	0.114	0.114	0.179	0.089	0.096	0.238	2	1924
25	0.090	0.181	0.148	0.181	0.066	0.139	0.057	0.139	0.181	2	1925
26	0.072	0.214	0.194	0.060	0.091	0.245	0.062	0.061	0.245	2	1925
27	0.097	0.134	0.210	0.166	0.109	0.150	0.084	0.050	0.210	1	1925
28	0.003	0.164	0.196	0.127	0.199	0.144	0.049	0.118	0.199	1	1926
29	0.029	0.199	0.168	0.139	0.125	0.161	0.085	0.095	0.199	2	1926
30	0.086	0.070	0.312	0.130	0.133	0.112	0.108	0.049	0.312	1	1926
31	0.075	0.243	0.131	0.156	0.147	0.146	0.060	0.042	0.243	2	1926
32	0.064	0.074	0.293	0.119	0.207	0.145	0.060	0.037	0.293	1	1927
33	0.050	0.269	0.214	0.073	0.128	0.092	0.070	0.102	0.269	2	1927

Subset Group	-3	-2	-1	0	1	2	3	4	Max Value	Probability Result	Year
34	0.070	0.132	0.177	0.059	0.164	0.173	0.114	0.111	0.177	1	1927
35	0.040	0.309	0.190	0.090	0.122	0.115	0.073	0.062	0.309	2	1928
36	0.042	0.177	0.225	0.101	0.159	0.126	0.080	0.091	0.225	1	1928
37	0.081	0.242	0.264	0.082	0.106	0.104	0.067	0.054	0.264	1	1929
38	0.087	0.191	0.190	0.130	0.073	0.174	0.076	0.078	0.191	2	1929
39	0.057	0.204	0.130	0.156	0.173	0.097	0.051	0.131	0.204	2	1930
40	0.053	0.160	0.203	0.067	0.146	0.075	0.218	0.078	0.218	3	1930
41	0.049	0.169	0.183	0.105	0.149	0.173	0.103	0.067	0.183	1	1930
42	0.060	0.170	0.174	0.120	0.155	0.106	0.139	0.077	0.174	1	1931
43	0.084	0.097	0.234	0.136	0.121	0.116	0.103	0.109	0.234	1	1931
44	0.071	0.172	0.258	0.144	0.100	0.107	0.107	0.042	0.258	1	1931
45	0.071	0.277	0.276	0.108	0.074	0.089	0.065	0.040	0.277	2	1932
46	0.067	0.186	0.198	0.144	0.093	0.123	0.085	0.104	0.198	1	1932
47	0.040	0.109	0.251	0.190	0.127	0.132	0.072	0.079	0.251	1	1932
48	0.066	0.184	0.214	0.082	0.046	0.228	0.098	0.081	0.228	2	1933
49	0.068	0.169	0.332	0.049	0.130	0.073	0.091	0.087	0.332	1	1933
50	0.081	0.160	0.238	0.108	0.091	0.146	0.093	0.083	0.238	1	1933
51	0.069	0.207	0.194	0.053	0.125	0.110	0.124	0.117	0.207	2	1934
52	0.076	0.167	0.167	0.152	0.110	0.124	0.112	0.091	0.167	1	1934
53	0.045	0.231	0.194	0.036	0.171	0.019	0.181	0.124	0.231	2	1935
54	0.036	0.173	0.219	0.124	0.151	0.122	0.015	0.161	0.219	1	1935
55	0.036	0.229	0.243	0.088	0.133	0.225	0.028	0.017	0.243	1	1935
56	0.097	0.085	0.164	0.209	0.156	0.086	0.102	0.102	0.209	0	1936
57	0.041	0.185	0.235	0.126	0.163	0.166	0.065	0.019	0.235	1	1936
58	0.038	0.126	0.254	0.098	0.107	0.185	0.064	0.128	0.254	1	1936
59	0.191	0.129	0.235	0.085	0.137	0.108	0.060	0.055	0.235	1	1936
60	0.055	0.164	0.295	0.062	0.176	0.085	0.101	0.061	0.295	1	1937
61	0.053	0.184	0.211	0.175	0.109	0.087	0.123	0.057	0.211	1	1937
62	0.024	0.194	0.218	0.139	0.086	0.157	0.097	0.085	0.218	1	1937
63	0.076	0.132	0.334	0.090	0.122	0.118	0.064	0.063	0.334	1	1938
64	0.066	0.188	0.242	0.086	0.105	0.172	0.095	0.046	0.242	1	1938
65	0.074	0.105	0.257	0.120	0.130	0.132	0.111	0.071	0.257	1	1938
66	0.018	0.189	0.261	0.065	0.159	0.146	0.072	0.090	0.261	1	1939
67	0.053	0.124	0.209	0.192	0.111	0.154	0.104	0.052	0.209	1	1939
68	0.057	0.182	0.227	0.085	0.145	0.132	0.087	0.084	0.227	1	1939

Subset Group	-3	-2	-1	0	1	2	3	4	Max Value	Probability Result	Year
69	0.048	0.255	0.246	0.060	0.088	0.109	0.130	0.065	0.255	2	1939
70	0.055	0.191	0.337	0.029	0.081	0.098	0.077	0.132	0.337	1	1940
71	0.047	0.167	0.234	0.102	0.106	0.140	0.103	0.101	0.234	1	1940
72	0.031	0.150	0.240	0.120	0.128	0.174	0.080	0.077	0.240	1	1940
73	0.057	0.132	0.355	0.050	0.226	0.075	0.025	0.079	0.355	1	1940
74	0.105	0.147	0.248	0.074	0.164	0.083	0.107	0.072	0.248	1	1941
75	0.048	0.185	0.149	0.115	0.116	0.167	0.077	0.143	0.185	2	1941
76	0.159	0.153	0.088	0.094	0.131	0.236	0.072	0.068	0.236	2	1941
77	0.057	0.212	0.175	0.176	0.118	0.197	0.053	0.012	0.212	2	1942
78	0.066	0.165	0.278	0.079	0.108	0.126	0.107	0.071	0.278	1	1942
79	0.039	0.150	0.127	0.173	0.187	0.172	0.087	0.066	0.187	1	1942
80	0.070	0.157	0.238	0.074	0.098	0.060	0.109	0.194	0.238	1	1943
81	0.029	0.209	0.225	0.071	0.170	0.071	0.121	0.103	0.225	1	1943
82	0.023	0.156	0.232	0.150	0.149	0.216	0.046	0.027	0.232	1	1943
83	0.049	0.207	0.355	0.086	0.067	0.107	0.080	0.049	0.355	1	1943
84	0.059	0.340	0.216	0.119	0.092	0.090	0.060	0.025	0.340	2	1944
85	0.055	0.206	0.184	0.084	0.109	0.132	0.111	0.119	0.206	2	1944
86	0.083	0.229	0.175	0.133	0.121	0.154	0.090	0.015	0.229	2	1944
87	0.126	0.211	0.149	0.101	0.131	0.145	0.069	0.066	0.211	2	1944
88	0.083	0.194	0.209	0.145	0.097	0.170	0.075	0.028	0.209	1	1945
89	0.061	0.049	0.140	0.047	0.273	0.087	0.209	0.135	0.273	1	1945
90	0.072	0.201	0.219	0.127	0.116	0.060	0.142	0.062	0.219	1	1945
91	0.034	0.246	0.250	0.080	0.147	0.051	0.132	0.060	0.250	1	1945
92	0.018	0.241	0.272	0.078	0.111	0.100	0.099	0.081	0.272	1	1946
93	0.059	0.138	0.262	0.047	0.136	0.210	0.084	0.064	0.262	1	1946
94	0.025	0.239	0.128	0.067	0.113	0.170	0.095	0.161	0.239	2	1946
95	0.052	0.203	0.193	0.124	0.073	0.192	0.118	0.046	0.203	2	1947
96	0.058	0.216	0.193	0.142	0.077	0.126	0.150	0.039	0.216	2	1947
97	0.122	0.123	0.132	0.113	0.156	0.174	0.069	0.110	0.174	2	1947
98	0.078	0.188	0.212	0.128	0.094	0.146	0.068	0.085	0.212	1	1947
99	0.033	0.165	0.297	0.093	0.101	0.160	0.082	0.068	0.297	1	1948
100	0.053	0.136	0.196	0.145	0.164	0.159	0.025	0.121	0.196	1	1948
101	0.056	0.221	0.203	0.148	0.111	0.140	0.077	0.044	0.221	2	1948
102	0.064	0.362	0.142	0.126	0.129	0.086	0.075	0.017	0.362	2	1948
103	0.056	0.192	0.168	0.154	0.156	0.000	0.089	0.184	0.192	2	1949

Subset Group	-3	-2	-1	0	1	2	3	4	Max Value	Probability Result	Year
104	0.066	0.078	0.296	0.105	0.164	0.013	0.167	0.112	0.296	1	1949
105	0.042	0.241	0.213	0.044	0.111	0.190	0.076	0.083	0.241	2	1949
106	0.120	0.082	0.208	0.151	0.132	0.145	0.068	0.093	0.208	1	1949
107	0.114	0.168	0.327	0.049	0.092	0.041	0.136	0.072	0.327	1	1950
108	0.079	0.201	0.141	0.117	0.102	0.159	0.155	0.046	0.201	2	1950
109	0.053	0.120	0.270	0.189	0.158	0.116	0.035	0.060	0.270	1	1950
110	0.052	0.180	0.204	0.194	0.138	0.095	0.060	0.076	0.204	1	1950
111	0.049	0.222	0.217	0.124	0.092	0.113	0.117	0.064	0.222	2	1950
112	0.083	0.172	0.199	0.094	0.176	0.167	0.059	0.050	0.199	1	1951
113	0.098	0.168	0.315	0.084	0.086	0.088	0.117	0.043	0.315	1	1951
114	0.073	0.186	0.169	0.164	0.071	0.190	0.059	0.088	0.190	2	1951
115	0.043	0.172	0.266	0.137	0.090	0.185	0.066	0.040	0.266	1	1951
116	0.063	0.113	0.168	0.154	0.124	0.198	0.122	0.058	0.198	2	1952
117	0.060	0.090	0.240	0.135	0.072	0.148	0.153	0.102	0.240	1	1952
118	0.051	0.192	0.220	0.138	0.123	0.161	0.088	0.027	0.220	1	1952
119	0.032	0.240	0.176	0.099	0.100	0.157	0.112	0.084	0.240	2	1952
120	0.066	0.130	0.168	0.136	0.184	0.151	0.080	0.085	0.184	1	1952
121	0.144	0.144	0.132	0.129	0.139	0.193	0.072	0.047	0.193	2	1953
122	0.010	0.183	0.338	0.139	0.095	0.064	0.118	0.052	0.338	1	1953
123	0.071	0.264	0.205	0.144	0.090	0.106	0.070	0.050	0.264	2	1953
124	0.077	0.134	0.193	0.151	0.165	0.141	0.096	0.044	0.193	1	1953
125	0.079	0.117	0.227	0.153	0.163	0.127	0.087	0.047	0.227	1	1954
126	0.051	0.142	0.258	0.173	0.090	0.104	0.094	0.089	0.258	1	1954
127	0.041	0.253	0.125	0.128	0.094	0.218	0.052	0.090	0.253	2	1954
128	0.056	0.200	0.190	0.142	0.163	0.160	0.056	0.032	0.200	2	1954
129	0.091	0.073	0.262	0.121	0.144	0.142	0.104	0.063	0.262	1	1954
130	0.021	0.170	0.213	0.197	0.107	0.173	0.075	0.044	0.213	1	1955
131	0.060	0.169	0.229	0.131	0.108	0.123	0.100	0.080	0.229	1	1955
132	0.030	0.256	0.265	0.072	0.066	0.204	0.088	0.019	0.265	1	1955
133	0.247	0.207	0.071	0.092	0.112	0.112	0.118	0.042	0.247	3	1955
134	0.081	0.174	0.185	0.121	0.115	0.166	0.072	0.087	0.185	1	1955
135	0.043	0.181	0.228	0.176	0.076	0.142	0.125	0.029	0.228	1	1955
136	0.049	0.236	0.000	0.108	0.110	0.195	0.182	0.119	0.236	2	1956
137	0.021	0.213	0.268	0.105	0.116	0.068	0.090	0.120	0.268	1	1956
138	0.057	0.224	0.222	0.170	0.076	0.135	0.059	0.057	0.224	2	1956

Subset Group	-3	-2	-1	0	1	2	3	4	Max Value	Probability Result	Year
139	0.074	0.196	0.354	0.055	0.069	0.070	0.078	0.103	0.354	1	1956
140	0.060	0.283	0.146	0.022	0.088	0.124	0.121	0.157	0.283	2	1956
141	0.088	0.206	0.152	0.135	0.107	0.089	0.109	0.115	0.206	2	1956
142	0.067	0.174	0.185	0.127	0.100	0.126	0.143	0.078	0.185	1	1956
143	0.061	0.194	0.196	0.063	0.098	0.173	0.123	0.091	0.196	1	1956
144	0.036	0.178	0.201	0.150	0.111	0.168	0.096	0.060	0.201	1	1956
145	0.063	0.123	0.249	0.097	0.145	0.178	0.062	0.083	0.249	1	1957
146	0.032	0.134	0.250	0.131	0.164	0.094	0.109	0.086	0.250	1	1957
147	0.022	0.175	0.306	0.091	0.101	0.115	0.109	0.082	0.306	1	1957
148	0.045	0.193	0.202	0.132	0.118	0.128	0.086	0.098	0.202	1	1957
149	0.051	0.187	0.174	0.151	0.166	0.146	0.055	0.068	0.187	2	1957
150	0.051	0.114	0.219	0.150	0.116	0.148	0.129	0.074	0.219	1	1957
151	0.023	0.135	0.231	0.145	0.205	0.141	0.083	0.038	0.231	1	1958
152	0.056	0.176	0.215	0.080	0.148	0.126	0.076	0.123	0.215	1	1958
153	0.051	0.162	0.198	0.096	0.165	0.122	0.076	0.130	0.198	1	1958
154	0.081	0.188	0.273	0.092	0.162	0.043	0.049	0.112	0.273	1	1958
155	0.078	0.149	0.328	0.115	0.094	0.062	0.166	0.008	0.328	1	1958
156	0.009	0.186	0.214	0.125	0.074	0.226	0.084	0.083	0.226	2	1958
157	0.108	0.100	0.254	0.170	0.119	0.034	0.096	0.119	0.254	1	1958
158	0.084	0.062	0.225	0.180	0.155	0.152	0.098	0.045	0.225	1	1959
159	0.076	0.197	0.195	0.152	0.119	0.144	0.067	0.050	0.197	2	1959
160	0.059	0.221	0.178	0.106	0.156	0.081	0.085	0.114	0.221	2	1959
161	0.075	0.211	0.218	0.070	0.111	0.134	0.126	0.055	0.218	1	1959
162	0.063	0.177	0.144	0.180	0.130	0.139	0.050	0.116	0.180	0	1959
163	0.043	0.162	0.191	0.121	0.145	0.192	0.060	0.086	0.192	2	1959
164	0.033	0.157	0.281	0.075	0.119	0.131	0.089	0.115	0.281	1	1959
165	0.050	0.212	0.174	0.104	0.133	0.117	0.122	0.089	0.212	2	1959
166	0.059	0.131	0.205	0.104	0.117	0.148	0.136	0.099	0.205	1	1960
167	0.068	0.205	0.267	0.080	0.147	0.067	0.107	0.058	0.267	1	1960
168	0.045	0.087	0.225	0.152	0.126	0.160	0.151	0.055	0.225	1	1960
169	0.076	0.150	0.133	0.128	0.137	0.233	0.130	0.013	0.233	2	1960
170	0.054	0.178	0.187	0.143	0.099	0.156	0.118	0.066	0.187	1	1960
171	0.090	0.162	0.234	0.083	0.128	0.148	0.056	0.099	0.234	1	1960
172	0.054	0.134	0.254	0.096	0.156	0.149	0.115	0.042	0.254	1	1960
173	0.087	0.113	0.224	0.082	0.107	0.179	0.092	0.117	0.224	1	1961

Subset Group	-3	-2	-1	0	1	2	3	4	Max Value	Probability Result	Year
174	0.048	0.104	0.281	0.146	0.161	0.097	0.123	0.040	0.281	1	1961
175	0.066	0.188	0.209	0.065	0.173	0.103	0.121	0.075	0.209	1	1961
176	0.087	0.178	0.198	0.069	0.156	0.140	0.130	0.042	0.198	1	1961
177	0.058	0.141	0.226	0.143	0.184	0.171	0.048	0.028	0.226	1	1961
178	0.029	0.175	0.184	0.216	0.145	0.142	0.053	0.056	0.216	0	1961
179	0.066	0.165	0.178	0.136	0.086	0.152	0.049	0.168	0.178	1	1961
180	0.124	0.158	0.239	0.118	0.089	0.072	0.108	0.093	0.239	1	1961
181	0.036	0.215	0.109	0.197	0.158	0.120	0.082	0.083	0.215	2	1962
182	0.058	0.145	0.264	0.066	0.157	0.078	0.140	0.093	0.264	1	1962
183	0.009	0.164	0.177	0.134	0.170	0.166	0.087	0.092	0.177	1	1962
184	0.060	0.172	0.185	0.153	0.118	0.153	0.094	0.066	0.185	1	1962
185	0.064	0.196	0.188	0.130	0.130	0.110	0.102	0.080	0.196	2	1962
186	0.054	0.235	0.224	0.112	0.144	0.120	0.033	0.078	0.235	2	1962
187	0.061	0.212	0.255	0.119	0.089	0.136	0.054	0.074	0.255	1	1962
188	0.025	0.126	0.018	0.222	0.232	0.207	0.059	0.111	0.232	1	1962
189	0.067	0.163	0.198	0.126	0.118	0.191	0.075	0.061	0.198	1	1962
190	0.000	0.224	0.182	0.144	0.116	0.199	0.017	0.117	0.224	2	1962
191	0.011	0.197	0.200	0.076	0.115	0.127	0.190	0.082	0.200	1	1962
192	0.091	0.167	0.169	0.130	0.131	0.160	0.076	0.075	0.169	1	1962
193	0.072	0.220	0.160	0.087	0.112	0.187	0.119	0.044	0.220	2	1963
194	0.088	0.190	0.271	0.117	0.110	0.098	0.062	0.064	0.271	1	1963
195	0.044	0.205	0.231	0.024	0.196	0.032	0.092	0.176	0.231	1	1963
196	0.068	0.231	0.194	0.146	0.080	0.152	0.075	0.053	0.231	2	1963
197	0.046	0.244	0.210	0.089	0.137	0.103	0.039	0.132	0.244	2	1963
198	0.033	0.166	0.321	0.097	0.157	0.000	0.111	0.116	0.321	1	1963
199	0.063	0.160	0.198	0.103	0.148	0.190	0.095	0.044	0.198	1	1963
200	0.063	0.147	0.173	0.190	0.161	0.153	0.071	0.042	0.190	0	1963
201	0.046	0.129	0.325	0.076	0.163	0.104	0.100	0.058	0.325	1	1963
202	0.132	0.165	0.231	0.058	0.117	0.107	0.124	0.065	0.231	1	1963
203	0.076	0.190	0.142	0.093	0.132	0.225	0.065	0.077	0.225	2	1963
204	0.057	0.134	0.283	0.156	0.116	0.124	0.078	0.051	0.283	1	1963
205	0.068	0.183	0.196	0.117	0.098	0.099	0.126	0.112	0.196	1	1963
206	0.046	0.244	0.148	0.123	0.156	0.235	0.000	0.049	0.244	2	1964
207	0.052	0.199	0.219	0.076	0.105	0.126	0.141	0.081	0.219	1	1964
208	0.074	0.166	0.145	0.130	0.155	0.140	0.087	0.103	0.166	2	1964

Subset Group	-3	-2	-1	0	1	2	3	4	Max Value	Probability Result	Year
209	0.092	0.165	0.227	0.076	0.097	0.108	0.136	0.099	0.227	1	1964
210	0.095	0.112	0.227	0.090	0.165	0.152	0.114	0.046	0.227	1	1964
211	0.035	0.230	0.310	0.077	0.095	0.000	0.130	0.123	0.310	1	1964
212	0.063	0.146	0.245	0.160	0.020	0.149	0.068	0.150	0.245	1	1964
213	0.025	0.141	0.243	0.125	0.117	0.186	0.092	0.071	0.243	1	1964
214	0.078	0.165	0.203	0.111	0.096	0.146	0.079	0.122	0.203	1	1964
215	0.105	0.203	0.241	0.096	0.092	0.054	0.126	0.083	0.241	1	1964
216	0.014	0.154	0.242	0.118	0.148	0.158	0.094	0.072	0.242	1	1964
217	0.063	0.211	0.205	0.129	0.110	0.161	0.083	0.039	0.211	2	1964
218	0.058	0.223	0.291	0.099	0.150	0.048	0.062	0.068	0.291	1	1964
219	0.095	0.212	0.187	0.114	0.102	0.157	0.072	0.060	0.212	2	1964
220	0.037	0.141	0.242	0.117	0.149	0.159	0.074	0.080	0.242	1	1965
221	0.015	0.160	0.273	0.107	0.163	0.154	0.098	0.029	0.273	1	1965
222	0.049	0.228	0.214	0.117	0.114	0.153	0.068	0.057	0.228	2	1965
223	0.068	0.091	0.214	0.137	0.183	0.115	0.118	0.074	0.214	1	1965
224	0.052	0.191	0.211	0.074	0.110	0.136	0.148	0.079	0.211	1	1965
225	0.081	0.190	0.159	0.121	0.104	0.150	0.087	0.107	0.190	2	1965
226	0.003	0.198	0.313	0.109	0.117	0.106	0.028	0.127	0.313	1	1965
227	0.060	0.201	0.230	0.100	0.150	0.120	0.088	0.052	0.230	1	1965
228	0.068	0.131	0.206	0.081	0.186	0.154	0.153	0.020	0.206	1	1965
229	0.065	0.100	0.282	0.141	0.108	0.124	0.109	0.072	0.282	1	1965
230	0.045	0.131	0.303	0.072	0.129	0.161	0.077	0.082	0.303	1	1965
231	0.077	0.201	0.242	0.059	0.121	0.084	0.148	0.067	0.242	1	1965
232	0.093	0.141	0.248	0.100	0.106	0.102	0.125	0.084	0.248	1	1965
233	0.077	0.158	0.195	0.091	0.119	0.122	0.117	0.121	0.195	1	1965
234	0.044	0.206	0.218	0.098	0.116	0.179	0.069	0.070	0.218	1	1965
235	0.046	0.195	0.128	0.100	0.167	0.146	0.116	0.101	0.195	2	1965
236	0.012	0.238	0.163	0.087	0.089	0.231	0.106	0.073	0.238	2	1965
237	0.033	0.166	0.237	0.130	0.174	0.139	0.073	0.048	0.237	1	1965
238	0.118	0.103	0.207	0.085	0.198	0.144	0.075	0.070	0.207	1	1965
239	0.073	0.188	0.223	0.092	0.168	0.091	0.106	0.059	0.223	1	1965
240	0.111	0.223	0.118	0.154	0.141	0.106	0.090	0.057	0.223	2	1966
241	0.024	0.230	0.150	0.168	0.087	0.183	0.034	0.124	0.230	2	1966
242	0.030	0.194	0.155	0.016	0.128	0.283	0.101	0.091	0.283	2	1966
243	0.040	0.194	0.203	0.131	0.132	0.139	0.095	0.067	0.203	1	1966

Subset Group	-3	-2	-1	0	1	2	3	4	Max Value	Probability Result	Year
244	0.052	0.306	0.138	0.163	0.105	0.066	0.087	0.083	0.306	2	1966
245	0.033	0.161	0.182	0.133	0.139	0.162	0.085	0.106	0.182	1	1966
246	0.106	0.077	0.219	0.117	0.218	0.092	0.079	0.092	0.219	1	1966
247	0.062	0.153	0.265	0.147	0.160	0.055	0.120	0.037	0.265	1	1966
248	0.036	0.210	0.162	0.145	0.110	0.170	0.105	0.062	0.210	2	1966
249	0.135	0.126	0.307	0.062	0.086	0.151	0.036	0.096	0.307	1	1966
250	0.021	0.192	0.265	0.092	0.136	0.043	0.144	0.107	0.265	1	1966
251	0.074	0.138	0.184	0.109	0.150	0.183	0.079	0.082	0.184	1	1966
252	0.054	0.145	0.236	0.162	0.071	0.166	0.072	0.094	0.236	1	1966
253	0.055	0.175	0.238	0.132	0.137	0.100	0.103	0.060	0.238	1	1966
254	0.047	0.151	0.209	0.063	0.188	0.116	0.114	0.112	0.209	1	1966
255	0.067	0.093	0.269	0.039	0.119	0.210	0.129	0.074	0.269	1	1966
256	0.039	0.203	0.264	0.162	0.078	0.109	0.119	0.027	0.264	1	1966
257	0.089	0.166	0.221	0.131	0.099	0.124	0.089	0.082	0.221	1	1966
258	0.056	0.097	0.254	0.082	0.094	0.210	0.086	0.121	0.254	1	1966
259	0.062	0.220	0.158	0.140	0.119	0.123	0.121	0.057	0.220	2	1966
260	0.032	0.197	0.215	0.057	0.166	0.107	0.100	0.126	0.215	1	1966
261	0.033	0.149	0.268	0.120	0.084	0.115	0.127	0.103	0.268	1	1966
262	0.056	0.175	0.259	0.130	0.124	0.162	0.041	0.052	0.259	1	1967
263	0.054	0.217	0.256	0.076	0.105	0.121	0.102	0.068	0.256	1	1967
264	0.092	0.095	0.233	0.063	0.133	0.160	0.174	0.051	0.233	1	1967
265	0.042	0.185	0.143	0.091	0.230	0.149	0.105	0.054	0.230	1	1967
266	0.036	0.145	0.346	0.044	0.116	0.123	0.123	0.065	0.346	1	1967
267	0.047	0.156	0.145	0.144	0.126	0.211	0.126	0.045	0.211	2	1967
268	0.059	0.161	0.219	0.147	0.063	0.165	0.093	0.093	0.219	1	1967
269	0.122	0.142	0.141	0.116	0.160	0.187	0.062	0.070	0.187	2	1967
270	0.041	0.122	0.175	0.114	0.185	0.127	0.132	0.105	0.185	1	1967
271	0.096	0.195	0.172	0.126	0.146	0.178	0.064	0.022	0.195	2	1967
272	0.066	0.250	0.250	0.094	0.128	0.092	0.074	0.044	0.250	1	1967
273	0.117	0.137	0.159	0.135	0.092	0.182	0.080	0.097	0.182	2	1967
274	0.036	0.146	0.263	0.110	0.132	0.158	0.108	0.049	0.263	1	1967
275	0.064	0.137	0.146	0.090	0.140	0.250	0.075	0.096	0.250	2	1967
276	0.057	0.148	0.206	0.115	0.158	0.219	0.022	0.075	0.219	2	1967
277	0.055	0.149	0.174	0.128	0.109	0.201	0.124	0.061	0.201	2	1967
278	0.025	0.284	0.150	0.151	0.182	0.056	0.151	0.000	0.284	2	1967

Subset Group	-3	-2	-1	0	1	2	3	4	Max Value	Probability Result	Year
279	0.029	0.201	0.280	0.082	0.131	0.077	0.140	0.061	0.280	1	1967
280	0.046	0.110	0.231	0.206	0.103	0.160	0.043	0.100	0.231	1	1967
281	0.074	0.172	0.242	0.069	0.111	0.157	0.093	0.082	0.242	1	1967
282	0.031	0.124	0.221	0.181	0.165	0.203	0.074	0.000	0.221	1	1967
283	0.090	0.199	0.195	0.080	0.158	0.115	0.027	0.136	0.199	2	1967
284	0.072	0.157	0.185	0.077	0.114	0.153	0.118	0.123	0.185	1	1967
285	0.056	0.194	0.234	0.087	0.198	0.056	0.123	0.053	0.234	1	1967
286	0.056	0.141	0.216	0.107	0.169	0.129	0.108	0.074	0.216	1	1968
287	0.035	0.067	0.106	0.162	0.190	0.167	0.115	0.159	0.190	1	1968
288	0.037	0.105	0.240	0.166	0.071	0.200	0.044	0.138	0.240	1	1968
289	0.046	0.170	0.213	0.144	0.102	0.157	0.115	0.053	0.213	1	1968
290	0.074	0.196	0.206	0.115	0.110	0.112	0.109	0.078	0.206	1	1968
291	0.020	0.138	0.222	0.091	0.143	0.068	0.201	0.118	0.222	1	1968
292	0.028	0.250	0.208	0.147	0.135	0.119	0.036	0.077	0.250	2	1968
293	0.051	0.197	0.288	0.118	0.127	0.078	0.060	0.081	0.288	1	1968
294	0.082	0.168	0.169	0.138	0.076	0.149	0.136	0.081	0.169	1	1968
295	0.035	0.165	0.239	0.085	0.154	0.150	0.126	0.045	0.239	1	1968
296	0.026	0.163	0.242	0.113	0.111	0.181	0.049	0.114	0.242	1	1968
297	0.042	0.232	0.241	0.110	0.094	0.089	0.120	0.071	0.241	1	1968
298	0.010	0.179	0.222	0.107	0.106	0.108	0.076	0.191	0.222	1	1968
299	0.068	0.197	0.188	0.196	0.116	0.097	0.109	0.031	0.197	2	1968
300	0.044	0.091	0.298	0.107	0.162	0.131	0.102	0.064	0.298	1	1968

Probability Averages for Graphing

Year	Probability Average
1913	2.000
1914	2.000
1915	2.000
1916	1.000
1917	1.000
1918	1.000
1919	2.000
1920	2.000
1921	1.000
1922	1.300

Year	Probability Average
1923	1.000
1924	1.750
1925	1.330
1926	1.500
1927	1.330
1928	1.500
1929	1.500
1930	2.000
1931	1.000
1932	1.330
1933	1.330
1934	1.500
1935	1.330
1936	0.750
1937	1.000
1938	1.000
1939	1.000
1940	1.000
1941	1.670
1942	1.330
1943	1.000
1944	2.000
1945	1.000
1946	1.330
1947	1.750
1948	1.500
1949	1.500
1950	1.400
1951	1.250
1952	1.400
1953	1.500
1954	1.400
1955	1.400
1956	1.440
1957	1.200
1958	1.140
1959	1.375

Year	Probability Average
1960	1.140
1961	0.875
1962	1.330
1963	1.250
1964	1.290
1965	1.200
1966	1.270
1967	1.380
1968	1.130

THE CUBAN COMMUNIST PARTY AT THE CENTER OF POLITICAL AND ECONOMIC REFORM: CURRENT STATUS AND FUTURE REFORM

By Larry Catá Backer*

Under the leadership of Raúl Castro, Cuba has embarked on a series of perplexing changes that have focused on internal institutional reforms and their impact on the Cuban economy. No consideration of these reforms can be complete without a study of the Cuban Communist Party (PCC), especially in comparative perspective. The thesis of this essay is that ideology is decisively important in any discussion of “reform” in Cuba. Western analysts have sought to subsume ideological issues within “transition” arguments—that ideological issues will evaporate once Cuba makes the jump from a Marxist-Leninist planned economy model to a Western oriented free market democracy. This essay argues that the inverse provides a more useful basis of analysis: that transition arguments are necessarily subsumed within ideological arguments. The ideological basis of state organization provides the key to understanding the likelihood of the success and direction of reforms to any of the sectors of state policy. The PCC’s now quite mature ideological framework has helped shape and constrain the organization and operation of the Party. That ideological framework also shapes and constrains all efforts to “reform” or develop Cuba’s economic, social or political model. Yet the tensions created by these contradictions between PCC ideology and the conditions of Cuba need not lead invariably to a choice between Marxist-Leninist and Western style democratic state organization. After the Introduction, Section II, considers the centrality of ideology to the ‘problem’ of Cuba. In Section

*W. Richard and Mary Eshelman Faculty Scholar & Professor of Law, Professor of International Affairs, Pennsylvania State University. The author may be contacted at lcb911@gmail.com. I thank my research assistants, Shaoming Zhu (Penn State University SJD expected) and Shan Gao (Penn State University SJD expected) for their excellent work on this essay. The paper was first presented at the Plenary Panel: “Cuba’s Reforms: Status and Prospects,” Association for the Study of the Cuban Economy 24th Annual Meeting, “Cuba’s Perplexing Changes”, Miami Florida, July 31, 2014. My thanks to the conference organizers for the opportunity to present this work, to Archibald Ritter (Distinguished Research Professor, Department of Economics, Carlton University (Canada)) for his perceptive and challenging comments and to the conference participants whose deep engagement contributed significantly to my thinking and hopefully improved this work.

III, the essay examines the consequences for Cuba of the choice, made by its vanguard party, to follow a distinct path toward the articulation and application of Marxism-Leninism in the organization and exercise of power. Section IV then connects the ideological path of Cuban Marxism-Leninism to state practice. With a focus on the possibilities and constraints of the reform efforts since Raúl Castro assumed power. Section V then focuses on the alternative to ideology and economic reform offered through Chinese Party and state practice. Section VI then unpacks the consequences of ideological possibilities by considering Cuban approaches in the shadow of the Chinese alternative. Lastly, Section VII weighs the consequences of the quality of the transition that is coming to Cuba, one that need not lead Cuba away from Marxist-Leninism and a Party-State system. Each is considered in turn in light of the essay's thesis: Variations in Marxist ideology matter (no monolithic communist ideology), sustainable economic reform is possible within a Marxist Leninist State-Party system, and that ideological systemic ossification in Cuba, as in the United States, can lead to crisis and paralysis. It is in that context that one considers the questions: does the Chinese model provide a framework for Cuba? Is it too late for reform of the Cuba CP? If reform is possible, what should be its objectives and strategies?

TABLE OF CONTENTS

I. INTRODUCTION..... 74

II. THE CENTRALITY OF IDEOLOGY AND ITS PATH WITHIN CUBAN MARXISM..... 82

 A. IDEOLOGY WITHIN MARXIST-LENINIST PARTY-STATE SYSTEMS. 82

 B. THE CHARACTER OF IDEOLOGY WITHIN CUBAN PARTY-STATE MARXISM..... 84

III. THE CUBAN IDEOLOGICAL PATH—FROM REVOLUTION TO LINEAMIENTOS..... 87

IV. FROM IDEOLOGICAL PATH TO STATE PRACTICE; THE CONSEQUENCES OF CUBAN IDEOLOGY ON ECONOMIC REFORM: OCCUPATIONAL LICENSING, COOPERATIVES AND LEY 118..... 94

V. CHINA AND ALTERNATIVE PATHS TO MARXIST-LENINISM..... 100

VI. UNPACKING THE CONSEQUENCES OF IDEOLOGICAL POSSIBILITIES—CUBAN APPROACHES IN THE SHADOW OF THE CHINESE PATH..... 105

VII. IDEOLOGY AND TRANSITION—CUBA AT A CROSSROADS..... 119

 A. THE IDEOLOGICAL CHALLENGE FOR CUBA..... 119

 B. IDEOLOGY AND THE CUBAN AND CHINESE PATHS TO SOCIALIST MODERNIZATION..... 123

VIII. CONCLUSION..... 125

I. INTRODUCTION.

In the Spring of 2014 the Cuban State announced the adoption, by the Cuban legislature, the *Asamblea Nacional del Poder Popular de Cuba* (ANPP), of a new foreign direct investment law.¹ Many of the details implementing the new regulatory regime were published almost contemporaneously with the adoption of Ley 118, something unusual suggesting the importance of the measure and the intent of the state in seeing it implemented.² The new investment law is in many respects substantially the same as the one it replaces, Ley 77/95.³ Ley 118 provides guarantees for investors in the enjoyment of their investments and protection against expropriation without compensation.⁴ It prohibits the extraterritorial application of law by other states to such investments within Cuba.⁵ It provides for repatriation of profits and other funds,⁶ and special tax regimes for foreign investment.⁷ It retains its character of vesting substantial discretion in national authorities for the review and approval of joint ventures and of the investment by foreigners within Cuba.⁸ Investment is open in all economic sectors other than health,

¹ Ley No. 118 (Ley de la Inversión Extranjera, April 2014, published in Granma, *Tabloide Especial*, April 2014 (hereafter “Ley 118”), officially published in the *Gaceta Oficial*, *Gaceta Oficial No. 20 Extraordinaria de 16 de Abril de 2014*, pp. 177-189, available at http://www.cubadebate.cu/wp-content/uploads/2014/04/GO_X_20_2014_gaceta-ley-de-inversion-extranjera.pdf

² Ley 118 provided that detailed regulations would be published within 90 days. The Cuban state has tended to treat these deadlines as guidelines. Yet in this case and underlining the importance of this measure, a substantial part of the regulations were in fact published with the law in the *Gaceta Oficial* in which Ley 118 itself appeared. See Consejo de Ministros, Decreto No. 325, Reglamento de la Ley de la Inversión Extranjera, *Gaceta Oficial*, *Gaceta Oficial No. 20 Extraordinaria de 16 de Abril de 2014*, pp. 189-202, available at http://www.cubadebate.cu/wp-content/uploads/2014/04/GO_X_20_2014_gaceta-ley-de-inversion-extranjera.pdf; Banco Central de Cuba Resolución No. 46/2014, *Gaceta Oficial*, supra, pp. 202-204; Banco Central de Cuba, Resolución 47/2014, *Gaceta Oficial* supra, pp. 204; Comercio Exterior y la Inversión Extranjera, Resolución 128 de 2014, *Gaceta Oficial*, supra, pp. 204-240. *English language version available at* http://www.granma.cu/file/sp/cartera-de-inversion-14/datos/documentos/marco_regulatorio/Ley%20No.%20118_ENG.pdf.

³ See, José Manuel Pallí, Analysis: Cuba’s Foreign Investment Law: ‘New? Indeed, but Barely, *Cuba Standard.com* (April 19, 2014), available at <https://www.cubastandard.com/?p=10471>.

⁴ *Id.*, arts. 3-4.

⁵ *Id.*, art. 5. This would create some problems for investors whose home states extend national anti-corruption and bribery laws outward. See, e.g., U.S. Foreign Corruption Practices Act of 1977 (FCPA) (15 U.S.C. § 78dd-1, et seq.).

⁶ *Id.*, art. 9.1.

⁷ *Id.*, art. 10.

⁸ *Id.*, arts. 6.1., 11.1, and Chapter VIII.

education or the non-business activities of the armed forces.⁹ Investments may be made in the form of joint ventures with Cuban state entities, through economic association agreements or directly by a foreign enterprise.¹⁰ For the first time, investments in private residences are permitted.¹¹ The operation of the foreign investment law reflects the ideology of state control that was common in developing states in the 1970s and 1980s.¹² The state has created a set of multi-level review and approval hurdles for any foreign investment in whatever form proffered. These include review and approvals by the Council of State, the Council of Ministers and the head of the relevant State Central Administration entity.¹³ These approvals are required in addition to negotiations and approvals required to be obtained by the foreign investors and its investment partners.¹⁴ The Cuban state continues to act as labor broker and determines hiring and labor conditions subject to some exceptions.¹⁵ Foreign investors may import their own goods to meet their needs but only where domestic markets do not provide equivalent goods and services.¹⁶ Special tax rules are made available.¹⁷ Some of these tax preferences are discretionary and will vary from investment to investment at the instance of the Ministry of Finance and Prices.¹⁸ A system of monitoring and reporting is also developed with respect to operations and financial reporting as developed by the Ministry of Finance and Prices.¹⁹ Approvals are also conditioned on terms of technology transfer and environmental assessment.²⁰ These require additional review and approval by the Ministry of Science, Technology and the Environment.²¹ Dispute resolution is vested first in Cuban

⁹ *Id.*, Ch. IV.

¹⁰ *Id.*, art. 13. Investment through economic association agreements is targeted for the natural resources, construction, services management and agricultural and tourist sectors. *Id.* The characteristics of such ventures is defined *id.*, art. 15.

¹¹ *Id.*, art. 17.

¹²

¹³ See, Ley 118, *supra*, Chapter VIII. The constraints on approval discretion are quite general but differ among the State Council (art. 21.1(2)), the Council of Ministers (*Id.*, art. 21.1(3)-(4)). Modifications require the same set of approvals and essentially permit *de novo* review.

¹⁴ See, e.g., Art. 19.1.

¹⁵ *Id.*, Chapter XI.

¹⁶ *Id.* Chapter X.

¹⁷ *Id.*, Chapter XII (offering discounts on local rates or exemptions from local taxes identified).

¹⁸ *Id.*, art. 47.

¹⁹ *Id.*, Chapter XIV.

²⁰ *Id.*, Chapter XV.

²¹ See, *id.*, art. 56.

national courts,²² though there is discretion to submit claims to arbitration under some circumstances.²³

The return to the project of facilitating foreign investment came on the heels of a fear of the collapse of the project of socialist regionalism that was founded on Venezuelan oil and regional solidarity by states that sought to develop an integrated state based economy.²⁴ It was reported in the blogs originating in Cuba²⁵ that there might well have been an element of necessity at the instance of one of Cuba's new protector states—Brazil.²⁶ And there is fear from other side, that as Cuba's economic desperation grows, its willingness to prostitute its labor force to foreign enterprise will grow with it—to the profit of the Cuban state—even as it continues to refuse to open the non-state sector to Cuban citizens.²⁷ News of Ley 118 was greeted with guarded praise, and some skepticism,²⁸ much of which was centered on the approach to

²² *Id.*, Chapter XVII

²³ *Id.*, art. 61

²⁴ Discussed in Larry Catá Backer and Augusto Molina, Cuba and the Construction of Alternative Global Trade Systems: ALBA and Free Trade in the Americas, *University of Pennsylvania Journal of International Economic Law* 31(3):679-752 (2010), *available at SSRN*: <http://ssrn.com/abstract=1407705>.

²⁵ On the importance of these sources in Stalinist states, see, Slavoj Žižek, *Stalinism*, Lacan.com (1997/2007), *available at* <http://www.lacan.com/zizstalin.htm>. (“Critics of such hearsay-scholarship had a point. But what few people seem to realize, even now, is that the salient issue might not be the reliability in Stalin's Soviet Union of word of mouth and political divination, but its pervasiveness. Kremlinology arose not at Harvard, but in and around the Kremlin. . . and it was what everyone in the Soviet Union did to a degree, the more so the higher up.”)

²⁶ It was reported in Cubanet that:

It is rumored that the recent visit of José Ignacio Lula Da Silva to Cuba , concerned about the risk of elevated investments from Brazil and the delay of the government of the Island in updating the Foreign Investment Law, was the definitive touch that made the Cuban cupola decide to push its approval, postponed several times. There are also unofficial rumors about the freezing the Brazilian investments in the Mariel Special Development Zone, and the approval of new credit to the Cuban side, until there are adequate legal safeguards. The agreements are no longer based in solidarity, but rather on purely capitalist financial and commercial relations.

Miriam Celaya, Cuba for Foreigners, *Translating Cuba: English Translations of Cuban Bloggers*, Havana, March 31, 2014, *available at* <http://translatingcuba.com/cuba-for-foreigners-miriam-celaya/> (originally published in the blog Sin Evación, through Cubanet, March 28, 2014, and available at <http://www.cubanet.org/destacados/cuba-para-los-extranjeros/>).

²⁷ *Ibid.*

²⁸ See, e.g., Richard Feinberg, Cuba's New Investment Law: Open for Business, *Brookings*, April 1, 2014, *available at* <http://www.brookings.edu/blogs/up-front/posts/2014/04/01-cuba-foreign-direct-investment-feinberg>.

implementation.²⁹ “Will the government establish an investment climate that attracts foreign investments, and a truly transparent bureaucratic process that vets proposals in a prompt timeframe competitive with international standards?”³⁰

If history is our guide, the answer will not be wholly positive. Administrative discretion may essentially gut any rule of law aspects of Ley 118, focusing all attention on the discretionary requirements of multiple levels of approval. The vagaries of state policy and its genesis in the somewhat opaque relations between the Cuban Communist Party (PCC)³¹ and the state apparatus may substantially affect the application of Ley 118. Beyond application of Ley 118, the substantial discretionary authority vested in a number of state ministries may reduce the certainty even of any efforts at uniform interpretation of Ley 118. The inability of the non-state sector to participate in this influx of capital may substantially weaken efforts to wean the population from dependence on state sector employment. Yet the old central planning template may find a way of re-emerging in the form of oversight rules for the activities of foreign capital.

Blame for these anticipated failings will be placed on the usual suspects—inept and corrupt administration, a *nomenklatura*³² jealous of its privileges and power, and the failures of rule of law systems to be respected by a state grounded on the allocation of personal power through fiefdoms, a sort of socialist feudal state where allegiance is personal rather than institutional.³³ Some suggest structural deficiencies.³⁴ Sympathetic critics may be tempted to argue that if only

²⁹ Ibid (The proof will be in the pudding, and investors will be watching closing for the fine print in the new regulations and, most importantly, for the implementation of the approval process.”)

³⁰ Ibid.

³¹ The Cuban Communist Party (Partido Comunista de Cuba or PCC) was formed after the victory of the forces of Fidel Castro acquired control of the state in January 1959. The first PCC Central Committee was constituted on Oct. 3, 1965. PCC, Historia del Partido COMunista de Cuba, available at http://www.pcc.cu/i_historia.php.

³² A reference to the group of senior and middle level administrators entrenched within a bureaucracy bent on preserving its power. See, e.g., T.H. Rigby, *Staffing USSR Incorporated: The Origins of the Nomenklatura System*, 40(4) SOVIET STUDIES 523-537 (1988). The lower ranks of the bureaucracy were filled in late European soviet states with what were colloquially and disparagingly referred to as apparatchiks—full time professional functionaries usually with little or no training in their areas of responsibilities.

³³ Among the interesting analyses is that of Javier Corrales, The Gatekeeper State: Limited Economic Reforms and Regime Survival in Cuba, 1989-2002, *Latin American Research Review* 39(2):35-65 (2004), who argues that the Cuban government and Party apparatus survives by restricting and instrumentally using access to capitalist rewards.

³⁴ See, e.g., Carmelo Mesa Lago, *Models of Development, Social Policy and Reform in Latin America*, United Nations Research Institute for Social Development 2002. “Until

this or that reform were instituted in the structuring of the state apparatus and its operational habits, there would be real progress.³⁵ This approach suggests that the basic tension lies somewhere in failures of administration. Less sympathetic critics will point to the ideological structures of state organization—its Marxist-Leninist foundation—and argue that the failures of Ley 118, like those of its several predecessor attempts at extracting investment from foreigners, are evidence of the bankruptcy of the Cuban political system. Those failures might only be corrected by the abandonment of the Marxist-Leninist organization of the Cuban state and its embrace of democracy and a variation of free markets ideology currently palatable to the global community.³⁶

Both camps would be right—and wrong. The limitations and likely deficiencies of Ley 118 as applied are substantial evidence of systemic failure, failure at the most basic ideological level. This failure reflects the contradictions and tensions inherent in an ideological theory that has now become so disconnected from facts that it cannot produce positive objectives even in the face of crucial need. The system, in effect, is consuming itself. Yet, those ideological failures do not in any way require the abandonment of the Marxist-Leninist foundations of the Cuban state, or the embrace of principles of Western style democratic state organization, much as we in the United States might find this desirable for our own purposes. The problem that the potential failures of Ley 118 highlight are not necessarily the failure of Marxist-Leninist theory or of a legitimate and democratic (in accordance with its own terms) Party-State system in which political authority remains vested in a “party in power”. It is not a paean for transition to some variation of

Fidel dies, Raúl probably will not implement any significant economic policy changes, because of risk of the Maximum Leader’s criticism (via his reflexiones to the news media) against deviations from his failed economic legacy.” Carmelo Mesa Lago, The Cuban Economy in 2007-2007, in *Papers and Proceedings of the Twenty-Third Annual Meeting, Association for the Study of the Cuban Economy (ASCE): Cuba in Transition* 17:1-20, 18 (2007).

³⁵ See, e.g., Lenier González-Mederos, Cuba Challenges for the 21st Century, *Havana Times*, August 5, 2014. Available Carmelo Mesa Lago, Panorama de las Reformas Económicas-sociales y sus efectos en Cuba, *Papers and Proceedings of the Twenty-Third Annual Meeting Association for the Study of the Cuban Economy (ASCE): Cuba in Transition* 23:1-15 (2013).

³⁶ See, e.g., Antonio Rodiles and Alexis Jardines, Notes for the Cuban Transition, *Papers and Proceedings of the Twenty-Third Annual Meeting Association for the Study of the Cuban Economy (ASCE): Cuba in Transition* 23:323-325 (2013). For a more sympathetic account, see, Vegard Bye, Possible Political Transformation in Cuba in the Light of Theoretically and Empirically Comparative Elements, *Papers and Proceedings of the Twenty-Third Annual Meeting Association for the Study of the Cuban Economy (ASCE): Cuba in Transition* 23:50-62 (2013).

western style democracy and private market systems.³⁷ Rather they are the problems of a Marxist-Leninist organization has, in its own way, failed to mature and to develop a Marxist-Leninist theory appropriate to its circumstances. A single-minded focus on the Revolutionary moment, and a tendency to fix theory on the ideals of that moment, has tended to produce a tendency to preserve rather than to develop. That, in turn, has created disincentives to move theory beyond the revolutionary moment and the society from which it sprang, producing something that feels like the theoretical ossification of Cuban Marxism-Leninism, even with the addition of a half-century of Castro Theory.³⁸ As is explored more fully below, Cuban ideology and its constitutional approaches have embraced conservative values and originalism similar to that of the United States.³⁹

No consideration of what might appear to be Cuba's perplexing changes, its focus on internal reforms and impact on the Cuban economy, then, can be complete without a study of the PCC, especially in comparative perspective. The thesis of this essay is that ideology is decisively important in any discussion of "reform" in Cuba. Western analysts have sought to subsume ideological issues within "transition" arguments—that ideological issues will evaporate once Cuba makes the jump from a Marxist-Leninist planned economy model to a Western oriented free market democracy.⁴⁰ This essay argues that the inverse provides a more useful way of understanding the situation in Cuba and the choices that it faces. The ideological basis of state organization provides the key to understanding the likelihood of the success of reforms to any of the sectors of state policy. The PCC's now quite mature ideological framework has helped shape, and constrain, both its approach to the construction and operation of its Party and state

³⁷ But see, Diego Rosette, Jose Azel discusses Cuba's transition; life after the Castro brothers, VOXXI, July 2, 2014, *available at* <http://voxxi.com/2014/07/02/jose-azel-economic-transition-cuba/>.

³⁸ As used in this paper, Castro Theory refers to the ideological work of Fidel Castro Ruz, and its incorporation into the ruling ideology of the PCC. That Theory would be understood as supplementing Marxist-Leninist Theory as adopted and practiced by Cuba's mentor state—the Soviet Union. It is thus to be understood as a contextually manifested form of Marxist-Leninist Stalinism, which is the way that it is likely that Castro understood the grounding ideology of the state. Cf., e.g., Larry Catá Backer, Fidel Castro on Deng Xiaoping and Erich Honecker--Understanding the Foundations of Cuban Political and Economic Policy, *Law at the End of the Day*, Aug. 19, 2012, *available at* <http://lbackerblog.blogspot.com/2012/08/fidel-castro-on-deng-xiaoping-and-erich.html>.

³⁹ See discussion, *infra* at Section II.A.

⁴⁰ Cf. Katherine Verdery, *Theorizing Socialism: A Prologue to the "Transition"*, *American Ethnologist* 18(3):419-439 (1991).

apparatus, but also all of its efforts to “reform” or develop its economic, social or political model.⁴¹

Yet the tensions created by these contradictions between PCC ideology and the conditions of Cuba⁴² need not lead invariably to a choice between Marxist-Leninist and Western style democratic state organization.⁴³ The Chinese have provided another model, one that is grounded in a distinct approach to Marxist-Leninist ideology that has served the national context well enough to produce a state as stable as most.⁴⁴ The Chinese Communist Party (CCP) has attempted modernization along ideological lines to some extent substantially different from the European Marxist approach of the PCC.⁴⁵ Chinese socialist modernization posits an approach to the organization of economic life and its relation to the vanguard Communist Party quite distinct from that of the Soviet system which had been grounded on notions of central planning.⁴⁶ The essay suggests that while it makes no

⁴¹ For a perceptive early analysis, see, Jorge I. Dominguez, *Cuba: Order and Revolution* (Harvard University Press, 1978); Jorge Dominguez, *Why The Cuban Regime Has Not Fallen*, in *Cuban Communism* 533-540 (Irving Louis Horowitz and Jaime Suchlicki, eds., 10th ed., Transaction Publishers, 2001).

⁴² See, e.g., Marifeli Pérez-Stable, *Caught in a Contradiction: Cuban Socialism Between Mobilization and Normalization*, *Comparative Politics* 32(1):63-82 (1999).

⁴³ Cf., Anthony Oberschall, *The Great Transition: China, Hungary, and Sociology Exit Socialism into the Market*, *American Journal of Sociology* 101(4):1028-41 (1996).

⁴⁴ See generally, Hu Angang, *China in 2020: A New Type of Superpower* (Brookings, 2011). But see, Ken Moriyasu, *China 2020 -- Strong, Rich and Unhappy*, *Nikkei Asian Review*, Dec. 5, 2013, available at http://asia.nikkei.com/magazine/20131205-Rebalancing-act/Cover-Story/China-2020-Strong-rich-and-unhappy?n_cid=NARAN121.

⁴⁵ Discussed in Larry Catá Backer, *Cuban Corporate Governance at the Crossroads: Cuban Marxism, Private Economic Collectives, and Free Market Globalism*, 14:2 *TRANSNATIONAL LAW & CONTEMPORARY PROBLEMS* 337-418 (2004); Larry Catá Backer, *Party, People, Government, and State: On Constitutional Values and the Legitimacy of the Chinese State-Party Rule of Law System*, 30(1) *BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL* 331-408 (2012). The CCP has followed the path of what it terms “socialist modernization” since the late 1970s.

⁴⁶ The best expression of the foundation of that line was made in 1984 by Deng Xiaoping, *Build Socialism With Chinese Characteristics* (June 30, 1984) available <http://academics.wellesley.edu/Polisci/wj/China/Deng/Building.htm>. The political objective of the CCP is to build ultimately a communist society. That project requires the development of socialism. But socialism is understood not in its static and European sense, but as a dynamic process characterized by economic development that is meant to distribute the fruits of rising prosperity to all sectors of the Chinese population. Indeed, socialism is understood as the process through which so much wealth is produced and available that the Communist ideal is then achievable (in the future). Given this foundation, it follows that the primary objective of the CCP and thus of state policy, is economic prosperity and development. The principal objective, then, of all of the social, institutions, public and private, must be bent toward the great project of creating prosperity. Everything else assumes a secondary role. Unless an objective or policy can be tied to this long-term project of socialism—the elimination of poverty for everyone—

sense for the PCC to blindly copy the CCP model in Cuba, it does make sense for the PCC to consider the Chinese path to Marxist-Leninist state organization and policy as a means of providing a coherent structure to its own reforms compatible with Cuban conditions. For Cuba, that means adopting a quite distinct form of Marxist-Leninist ideology than that which has been the mainstay of the PCC since the 1960s.

After this Introduction, Sections II through VII consider the critical role of Marxist Leninist ideology on the formation of Cuban and Chinese Party-State systems and of its importance in constraining the analytical framework within which reform or development is possible. Together, these sections make six principle points about ideology, its role in the organization of the Cuban PCC and state, the effects of that relationship on economic reform and the possibilities of alternatives offered by the Chinese path toward communist party and state organization. The focus of the analysis will be on the way in which each Communist Party organization, and its relationship to the state apparatus is affected by the development of distinct foundational theories of state organization and of the role of the communist party that has marked the distinctive development of Chinese and Cuban communism.

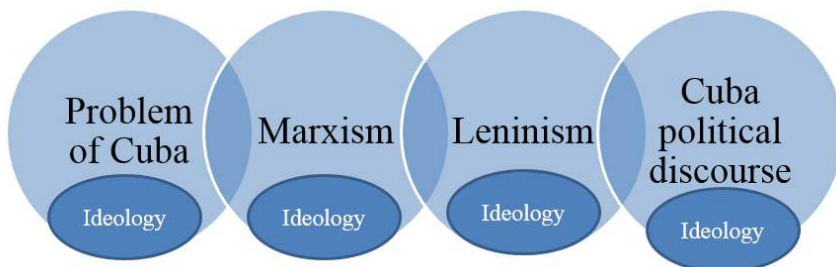
Section II considers the centrality of ideology to the ‘problem’ of Cuba. It starts with a general consideration of ideology in Marxist-Leninist states and then focuses on the character of ideology in Cuba. In Section III, the essay examines the consequences for Cuba of the choice, made by its vanguard party, to follow a distinct path toward the articulation and application of Marxism-Leninism in the organization and exercise of power. Section IV then connects the ideological path of Cuban Marxism-Leninism to state practice. With a focus on the possibilities and constraints of the reform efforts since Raúl Castro assumed power. Section V then focuses on the alternative to ideology and economic reform offered through Chinese Party and state practice. It argues that Marxist-Leninist ideology, like Western style democracy and markets oriented economic ideology, offers more than one path, and considers more directly, the alternatives offered by the Chinese path. Section VI then unpacks the consequences of ideological possibilities by considering Cuban approaches in the shadow of the Chinese alternative. Lastly, Section VII weighs the consequences of the quality of the

it does not support socialist modernization. It follows that such objectives would be of lesser interests to officials in enterprises, especially officials in state owned enterprises. These foundational ideological premises find modern expression in the notion of China's dream. See Larry Catá Backer and Wang, Keren, 'What is China's Dream?' Hu Angang Imagines China in 2020 as the First Internationally Embedded Superpower (February 23, 2013). Consortium for Peace & Ethics Working Paper No. 2013-2) available at <http://ssrn.com/abstract=2223279>.

transition that is coming to Cuba, one that need not lead Cuba away from Marxist-Leninism and a Party-State system.

Each section is considered in turn in light of the essay's thesis: Variations in Marxist ideology matter (no monolithic communist ideology), sustainable economic reform is possible within a Marxist Leninist State-Party system, and that ideological systemic ossification in Cuba, as in the United States, can lead to crisis and paralysis. It is in that context that one considers the questions: does the Chinese model provide a framework for Cuba? Is it too late for reform of the Cuba CP? If reform is possible, what should be its objectives and strategies? These question point to a plausible conclusion—Cuba will be undergoing transition—but that transition need not be toward Western style democratic free markets state organization. Instead, Cuba might more easily transition to a more dynamic Marxist-Leninist socialist Markets framework. Either transition will be hard, but the later will be least disruptive.

II. THE CENTRALITY OF IDEOLOGY AND ITS PATH WITHIN CUBAN MARXISM.



A. *Ideology Within Marxist-Leninist Party-State Systems.*

In his influential work on institutions and institutional change, Douglas North reminded us “ideas and ideologies matter, and institutions play a major role in determining just how much they matter. Ideas and ideologies shape the subjective mental constructs that individuals use to interpret the world around them and make choices.”⁴⁷ Ideology is central to the ‘problem’ of reforming Cuba, whether under the banner of Marxism or that of Western free market democracy. But ideology is not understood in its Western sense. Rather, ideology is better explained as

⁴⁷ Douglas C. North, *Institutions, Institutional Change and Economic Performance* 111 (Cambridge University Press, 1990).

the articulation of the fundamental tenets of the political, social and economic culture of the state,⁴⁸ the way one understands the political premises underlying the U.S. Constitution and the premises of its “Bill of Rights.”⁴⁹ These premises may not be the formal instruments by which power is recognized, organized and exercised, but it serves to channel and constrain its articulation, organization and exercise.

Ideology is central to Marxism, at least in the sense that it may represent the elaboration of the core, substantive notions of Marxism within the context for which it is to be applied. Here Marxism, in its substantive elements, represents a font of natural rights relating to the nature of human dignity and its relational aspects—that is of human dignity in the context of social, moral, economic and political organization. Its content and context has been contested since the late 19th century. In Western democratic societies the sources of relational human dignity also remain highly contested in its details, and there are a number of sources and descriptions for these rights, each of which together constitutes a core ideology from which political, economic and social institutions are built and disciplined. These include natural law, the common constitutional traditions of civilized states, religion, and custom and tradition. In advanced democracies it has acquired a substantial political dimension—grounded in constitutionalism, and increasingly in international structures of human rights.⁵⁰ And thus it should come as no surprise that ideology has also progressed beyond its Marxist roots and has also acquired an important constitutional dimension in advanced Marxist Leninist States.⁵¹

Ideology is also central to Leninism, as a means of disciplining a revolutionary party and preserving its vanguard role. It thus serves as the core element for which the vanguard party acquires legitimacy, while simultaneously serving itself as the object to which the vanguard party must devote itself for the advancement of the substantive goals of Marxism. Leninism thus posits, as a basic matter, the inseparability of the development of ideas, along with its transmission and instrumental use to come closer to the objectives for which revolution is mounted.

⁴⁸ In the Chinese context, see discussion in Larry Catá Backer, *The Rule of Law, the Chinese Communist Party, and Ideological Campaigns: Sange Daibiao (the Three Represents), Socialist Rule of Law, and Modern Chinese Constitutionalism*. *Journal of Transnational Law and Contemporary Problems*, 16(1):29-102 (2006).

⁴⁹ Cf. Joack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Vintage Books, 1997).

⁵⁰ Cf. Charles Howard McIlwain, *Constitutionalism Ancient and Modern* (Ithaca NY: Cornell University Press, 1947).

⁵¹ Discussed more fully in Larry Catá Backer, *The Rule of Law, The Chinese Communist Party, and Ideological Campaigns: Sange Daibiao (the “Three Represents”), Socialist Rule of Law, and Modern Chinese Constitutionalism*, *supra*.

Here again, Leninism might be said to borrow and elaborate a variant on an old Western notion that posits the union of substantive rules within institutions that reflect their values. In Western democracies it has acquired a long revolutionary pedigree as well: consider the now ancient template of the U.S. Declaration of Independence⁵² and that of representative democracy, now at the core of all states organized as democratic republics. There is, ironically, a Leninist cast to the core ideology of Western democracies as expressed in the formula of the Declaration of Independence—one starts with ideology (self-evident truths, which are secured through the institution of government, which themselves may be overturned when they become destructive of those rights). Perhaps better put, there is in Leninism, an adherence in the fundamental premise of the ordering of governance institutions—the premise that all legitimate government reflect and are instituted to advance the normative order that is itself an aggregation of basic truths about the organization of society and the role of individuals within it.⁵³

B. *The Character of Ideology Within Cuban Party-State Marxism.*

Ideology is basic to political discourse in Cuba,⁵⁴ as it has been on other Marxist-Leninist States.⁵⁵ Liss nicely describes the relationship between ideology and the structures of the state: “Fidel and Che felt that by developing ideology and social and political consciousness before the material base, the transitional stage from capitalism to communism could be omitted. Thus Che and Fidel have departed from conventional Leninism, which declares that life is not determined by ideology, but ideology by life.”⁵⁶ The ideological battles have been both incarnated

⁵² See Declaration of Independence, available. For a discussion along these lines, see Paul Eidelberg, *On the Silence of the Declaration of Independence* (Amherst: University of Massachusetts Press, 1976).

⁵³ It is not for nothing that Fidel Castro refers quite specifically to these notions embedded in the Declaration of Independence in his “History will Absolve Me.” See Fidel Castro Ruz, *History Will Absolve Me* Chp. XXXIX (New York: Lyle Stuart 1961)

⁵⁴ For an early account, Richard R. Fagen, *The Transformation of Political Culture in Cuba 1-19* (Stanford University Press, 1969).

⁵⁵ Jiang Zemin stated: “The Chinese Communist Party attaches great importance to the guiding role of theory.” Jiang Zemin, Report at the Fifteenth National Congress of the Communist Party of China, Hold High the Great Banner of Deng Xiaoping Theory for an All-Round Advancement of the Cause of Building Socialism With Chinese Characteristics Into the Twenty-First Century, (Sept. 12, 1997), <http://www.china.org.cn/english/features/45607.htm>.

⁵⁶ Liss, *supra.*, 54.

within the body of Mr. Castro,⁵⁷ and formed the basis of national and international campaigns.⁵⁸

But ideology has acquired an *originalist* cast in Cuba, in ways that parallel the rise of *originalism* in the United States.⁵⁹ As a mechanic of interpretation (and application of policy and structure for the exercise of discretion), originalism has at its core a preservationist cast.⁶⁰ That is, originalism serves as a self-imposed set of interpretive and policy constraints that are grounded in the belief that, absent another act of state, rules must be applied in fidelity to the framework at the time of the adoption of constitutional rule or principle. Such an understanding, of course, tends to keep judges and academics faithful to this creed quite busy in the United States.⁶¹ But it has an additional meta-meaning that is often overlooked: that theory stopped at the moment of the consummation of the acts necessary to make law or constitution authoritative. Development of the text or the underlying ideology is viewed with suspicion and as inauthentic—the product of a usurpation of the sovereign authority of the people or legislature when attempted by judges. Living constitutionalism,⁶² very much a part of German jurisprudence⁶³ and transnational constitutionalism,⁶⁴ for example, is

⁵⁷ Fidel Castro Ruz, *Las Ideas No Se Matan, Reflexiones del Comandante en Jefe*, May 28, 2007, available at <http://www.granma.cu/granmad/secciones/reflexiones/esp-013.html>.

⁵⁸ See, e.g., John M. Kirk and Michael Erisman, *Cuban Medical Internationalism: Origins, Evolution, Goals* (Palgrave MacMillan, 2007); Maxwell A. Cameron, *Latin America's Left Turns: Beyond Good and Bad*, in *Third World Quarterly* 30(2):331-348 (2009).

⁵⁹ See, e.g., Robert H. Bork, *The Tempting of America* 146 (1990); Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. Cinn. L. Rev.* 849 (1988-1989). Originalism does not just manifest itself as a mechanics for the interpretation of text. See, Caleb Nelson, *Originalism and Interpretive Conventions*, *University of Chicago Law Review* 70(2):519 (2003). More importantly it is the expression of a specific ideology that is meant to preserve a particular moment in time as itself constituted into the act of creating the structures of state. See, e.g., Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, *Harvard Law Review* 115:2085 (2002) (interaction of text and interpretive regime; *ibid.*, 2142).

⁶⁰ Criticized quite famously in Paul Brest, *The Misconceived Quest for Original Understanding*, *Boston University Law Review* 10:204 (1980).

⁶¹ See, e.g., Edward A. Purcell, Jr., *Originalism, Federalism, and the American Constitutional Enterprise: A Historical Inquiry* (Yale University Press, 2007); Bernadette Meyler, *Towards a Common Law Originalism*, *Stanford Law Review* 59:551 (2006-2007).

⁶² See, e.g., Bruce Ackerman, *The Living Constitution*, *Harvard Law Review* 120(7):1737 (2006); Vicki C. Jackson, *Constitutions as 'Living Trees'?: Comparative Constitutional Law and Interpretive Metaphors*, *Fordham Law Review* 75:921 (2006-07).

⁶³ See, e.g., Winifried Brugger, *Legal Interpretation, Schools of Jurisprudence, and Anthropology: Some Remarks From a German Perspective*, *American Journal of Comparative Law* 42:395, 396-416 (1994).

derided in the United States by influential members of the judiciary itself.⁶⁵ As a consequence, originalism has a substantial political effect—creating rigid boundaries that constrain efforts to develop underlying ideology to suit the times. The result, ossification,⁶⁶ is viewed as a positive and reassuring consequence.⁶⁷ The Cuban PCC seems to share this view of the value of originalism with Justice Scalia.

Grounded in this originalism constructed around the moment of revolutionary triumph in 1959, Cuba through its vanguard Party, the PCC, has chosen a particular path toward the articulation and application of Marxism-Leninism in the organization and exercise of power. Cuba's PCC has chosen to adhere to the European and Soviet approach to Marxist-Leninism, that has proven to be a failure, mostly because of its inability to reconcile the contradictions between its ideological verities and the realities on the ground. That form of Marxist-Leninist-Stalinism tends to freeze the idea at the moment of the Revolution's triumph and to attempt to make eternal that moment. *Preserving the Revolution* becomes the paramount ideological stance.⁶⁸ The objective, preserving revolutionary ideals, becomes the engine of ideological development. It has been the central element of Fidel's construction of the foundations for Cuban state ideology, not just with internal application, but as a basis for the organization of regional trade blocs and for Cuba's great influence in global institutions.⁶⁹ These consequences are considered next.

⁶⁴ See, e.g., Peer Zumbansen, Comparative, Global and Transnational Constitutionalism: The Emergence of a Transnational Legal-Plural Order, *Global Constitutionalism* 1(1):16-52 (2012).

⁶⁵ Famously, see, e.g., William H. Rehnquist, The Notion of a Living Constitution, *Texas Law Review* 54(4):693 (1976).

⁶⁶ "Supreme Court Justice Antonin Scalia once remarked that the theory of an evolving, "living" Constitution effectively rendered the Constitution useless." He wanted a "dead Constitution," he joked, arguing it must be interpreted as the framers originally understood." Davis A. Strauss, *The Living Constitution* (Oxford University Press 2010).

⁶⁷ See, Antonin Scalia,

⁶⁸ Sympathetic outsiders sometimes note this unconsciously in small details that are revealing: in describing Fidel Castro, for example, Sheldon Liss notes that "he almost always wears battle dress as a reminder of the ongoing revolution." Sheldon B. Liss, *Castro: Castro's Political and Social Thought* 3 (Westview Press, 1994).

⁶⁹ It has been powerful enough to affect even the forms of the discussion of the regulatory context of business and human rights. See, e.g., Larry Catá Backer, The Guiding Principles of Business and Human Rights at a Crossroads: The State, the Enterprise, and the Spectre of a Treaty to Bind them All (July 5, 2014), available at SSRN: <http://ssrn.com/abstract=2462844>.

III. THE CUBAN IDEOLOGICAL PATH—FROM REVOLUTION TO LINEAMIENTOS.



This originalism in Cuban Marxism-Leninism has had substantial consequences for the ability of Cuba to develop its approach to governance and the structures within which reform is possible. The principal effect, of course, is something like a common understanding that in Cuba the PCC does not engage in theory.⁷⁰ Though it is meant to suggest that theory is no longer important, it actually suggests something quite different. For Cuban Marxism-Leninism, it appears to lead to the notions that theory is too important to be left solely to the PCC apparatus, and it reinforces a policy that favors application of an immobile theory over its development (producing changes in practice that are not mirrored in official ideology). Each is discussed in turn.

First, Cuban ideological originalism intimates that theory is too important to be left to the PCC, and profoundly the product of the act of revolutionary triumph. The PCC, in turn, is constructed within this ideological framework as oriented toward implementation of theory and thus as a political ministerial role. That in turn produces an environment that encourages the fragility of PCC organization, especially for ideological work. The PCC lacks the organizational muscle to carry on this work, and an operational premise of constituting theory in Cuba. The PCC has tended to defer to its leaders.⁷¹ Yet a look at the product of the sporadic Party Congresses held since the mid-1970s suggests the scope of PCC involvement with theory, its trajectory and effect on the

⁷⁰ Oral Commentary of Vegard Bye, Scantaram Norway, made at the Association for the Study of the Cuban Economy 24th Annual Meeting, "Cuba's Perplexing Changes," panel on "Cuba's Reforms: Status and Prospects," Miami Florida, July 31, 2014.

⁷¹ The latter, producing a tendency toward cult of personality and away from institutional and collective governance, is discussed below, *infra* text and notes ---.

constitutional language within which government operation is understood. The 1st Party Congress (17-22 December 1975) provided a framework for the work of the PCC, grounded in orthodox Soviet internationalism and class struggle and the triumph of Cuban national aspirations.⁷² Ironically, the First Congress also embraced a scientific notion of its Marxist-Leninist ideology that rejected notions that Cuban ideology was static or no more than a socialist catechism.⁷³ But that study quickly became intertwined with its articulation by Fidel Castro and, consequently, with the diversion of the PCC's ideological work from the institution of the Party to its leadership. Thus, by the 2nd PCC Congress (17–22 December 1980) the emphasis shifted to the need to defend the purity of Marxism-Leninism in the forms articulated in the First Congress,⁷⁴ and to nationalism and revolutionary struggle.⁷⁵ The

⁷² The First Congress focused on the necessity of the study of Marxism-Leninism as fundamental to the political order, one grounded in class struggle and internationalism, Congreso del PCC: Tesis y Resoluciones sobre los estudios del marxismo-leninismo en nuestro país (Fuente: Rojas, Ernesto A. Tesis y Resoluciones. Primer Congreso del Partido Comunista de Cuba. Ciudad de La Habana: Editorial Ciencias Sociales, 1978. p. 261-293), available at <http://congresopcc.cip.cu/wp-content/uploads/2011/02/I-Congreso.-Tesis-y-Resoluciones-sobre-los-estudios-del-marxismo-leninismo-en-nuestro-pa%C3%ADs.pdf>. The First Congress' Platform declared:

Frente a esa situación del sistema capitalista, los países socialistas, basados en la comunidad de su régimen económico-social, de su ideología y de sus principales objetivos, constituyen un sistema mundial en cuyo seno no se producen crisis económicas y en el cual se desarrolla un nuevo tipo de relaciones internacionales, basadas en la completa igualdad de derechos de todos sus integrantes, el respeto a la soberanía, la independencia y los intereses de cada país; la ayuda mutua y la colaboración fraternal y recíproca, donde ningún país tiene, ni puede tener, derechos a privilegios especiales.

I Congreso del PCC: Tesis y Resoluciones, Sobre la Plataforma Programática del Partido, Tesis, Part II (Fuente: Plataforma Programática del Partido Comunista de Cuba. Tesis y Resoluciones. Ciudad de La Habana: Editorial de Ciencias Sociales, 1978. p. 3-126) available at <http://congresopcc.cip.cu/wp-content/uploads/2011/03/I-Congreso-PCC.-Tesis-y-Resoluciones-sobre-la-Plataforma-Program%C3%A1tica-del-Partido.pdf>.

⁷³ Congreso del PCC: Tesis y Resoluciones sobre los estudios del marxismo-leninismo en nuestro país, available at <http://congresopcc.cip.cu/wp-content/uploads/2011/02/I-Congreso.-Tesis-y-Resoluciones-sobre-los-estudios-del-marxismo-leninismo-en-nuestro-pa%C3%ADs.pdf> (“Se requiere comprender, señalaba Fidel «qué el marxismo-leninismo no es una doctrina muerta, que no es catecismo, que no es un esquema que llega y se le pone a cualquier problema... es un, método, una guía, es un instrumento, que precisamente

tiene que usarlo el revolucionario en la solución concreta de los problemas que se le presentan, es una doctrina viva que al individuo lo arma, lo prepara, lo capacita, lo lleva a resolver adecuadamente los problemas.»”).

⁷⁴ II Congreso del PCC: Resoluciones, Sobre la Lucha Ideológica (Fuente: Resoluciones aprobadas por el II Congreso, p. 392-405), available at <http://congresopcc.cip.cu/wp-content/uploads/2011/03/II-Congreso-PCC.-Resoluciones-sobre-la-Lucha-Ideol%C3%B3gica.pdf>. The ideological emphasis is firmly tied to Marxism-Leninism and

3rd Party Congress (4–7 February 1986) focused on the business of Soviet central planning, with a steady emphasis on an unchanged ideology centered on nationalism and an internationalist struggle against capitalism.⁷⁶ The 4th Congress (10–14 October 1991) focused on the need to preserve the revolutionary ideology of struggle and socialism; it was a time of begrudging reform and it also opened PCC membership to Catholics and other people professing a religious affiliation.⁷⁷ The 5th Congress (8–10 October 1997) also focused on preserving the revolutionary ideological framework through greater effort to maintain a centrally planned economy.⁷⁸ It is only with the 6th Congress (16–19 April 2011) that the PCC engaged in a more robust engagement with its

to the thought of Fidel Castro (“Los cuadros y activistas del frente ideológico deben conceder primordial importancia a la necesidad de incrementar el estudio y difusión del marxismo-leninismo en las masas y muy especialmente entre los trabajadores, a la consolidación de sus convicciones revolucionarias, al estudio y dominio de la política del Partido, expresada en sus documentos, resoluciones Y en las intervenciones del compañero Fidel Castro y otros dirigentes del Partido y el Estado.”).

⁷⁵ II Congreso del Partido Comunista de Cuba (Informe Central) (from Informe Central. I, II y III Congreso

del Partido Comunista de Cuba, Editora Política, La Habana, 1980 (pp. 247-406)) *available at* <http://congresopcc.cip.cu/wp-content/uploads/2011/01/documentos/informe-central-ii-congreso-del-pcc.pdf> (the main strength of a small country like Cuba is not military, not economic, is the moral spirited of pursuing independence; a real communists: heroism, self-sacrifice, the spirit of solidarity, delivery, denial and decision lay down his life for his cause, an unprecedented selfless commitment).

⁷⁶ Like the 6th Party Congress in 2011, this one also emphasized the importance of worker input into the guidelines (Lineamientos) the for 1986-1990 five year plan. Convocatoria al Tercer Congreso del Partido Comunista de Cuba (From Granma, 2 de enero de 1985, p. 1) *available at* <http://congresopcc.cip.cu/wp-content/uploads/2011/03/Convocatoria-al-Tercer-Congreso-del-Partido-Comunista-de-Cuba.pdf>. Cuban internationalism remained firmly anchored in the Soviet block and revolutionary internationalism. III Congreso del PCC: Resoluciones sobre la política internacional (From Resoluciones aprobadas por el Tercer Congreso del Partido Comunista de Cuba. Editora Política, 1986. p. 61-74), *available at* <http://congresopcc.cip.cu/wp-content/uploads/2011/02/III-Congreso-PCC.-Resoluciones-sobre-la-pol%C3%ADtica-internacional.pdf>.

⁷⁷ Described in Discurso Pronunciado Por El Comandante En Jefe Fidel Castro Ruz, Primer Secretario Del Comité Central Del Partido Comunista De Cuba Y Presidente De Los Consejos De Estado Y De Ministros, En La Inauguración Del IV Congreso Del Partido Comunista De Cuba, Efectuada En El Teatro "Heredia", Santiago De Cuba, El Día 10 De Octubre De 1991, *available at* <http://congresopcc.cip.cu/wp-content/uploads/2011/02/Discurso-de-Fidel-inauguracion-del-IVcongreso.pdf>.

⁷⁸ The central idea of the congress ratified: “de nuestra gloriosa historia brotaron y brotan los principios emancipadores por cuya victoria han luchado sucesivas generaciones.” V Congreso del Partido Comunista de Cuba: El Partido De La Unidad, La Democracia Y Los Derechos Humanos Que Defendemos La Revolución es una sola (from Partido Comunista de Cuba. Sitio Oficial. [en línea] Disponible en: http://www.pcc.cu/congresos_asamblea/cong5.php), *available at* <http://congresopcc.cip.cu/wp-content/uploads/2011/03/Partido-Unidad-Democracia-V-Congreso.pdf>.

ideological structures, though still deferential to PCC leaders.⁷⁹ Taken together, this suggests both the binding nature of ideology as a sort of constitutive baseline for action, and the role of the PCC as a preserving agent, one which is at variance with the original idea of an evolving element of ideological development.

Second, it reinforces the idea the ideology is not an object for development. Here is the version of Cuban *originalism* bound up with the revolutionary moment in the way that the constitutional moments of governmental organization are decisive for originalists in the United States.⁸⁰ There is no discussion of theory—the fundamental way in which the constitution and operation of the Cuban state is organized and its ends—because a fundamental premise of theory is that it is complete and unalterable. That premise produces an approach to Marxist-Leninist organization that is quite distinctive and that may be understood as the reason that so much effort produces so much reform that results in so little change. The PCC’s work suggests the way in which the PCC may be used to amplify but not develop Cuban Marxist-Leninism. The PCC has a role in applying the normative principles of Marxism-Leninism, as amplified by the theories of Fidel Castro (emphasizing class struggle, revolutionary internationalism and solidarity, a suspicion of markets, and central planning).

A key feature of PCC ideology is grounded in theory and history. First the history. It has been well accepted (whatever its validity) that the “revolution in Cuba is a working class revolution; the workers in cities, in the sugar centrals, and in the countryside are its social base. . . . The workers’ active and armed support of the Revolutionary Government has been decisive in the consolidation and defense of its power.”⁸¹ Second, the theory, the premise of class struggle, has been the cornerstone of the PCC’s normative ideology, from which much of the rest of its framework is developed.

Class struggle as foundational is augmented by an external element—nationalism born of a long history of anti-colonial struggle. Anti-colonialist nationalism is grounded in two principle sources. The first are the writings of José Martí, who is claimed as the spiritual source of virtually all Cuban ideological camps.⁸² Martí’s writings are still

⁷⁹ See discussion, *infra* at text and notes --.

⁸⁰ Criticized in Thomas Grey, Do We Have an Unwritten Constitution?, *Stanford Law Review* 27:703 (1975), and complicated in H. Jefferson Powell, The Original Understanding of Original Intent, *Harvard Law Review* 98:885 (1985).

⁸¹ Maurice Zeitlin, *Revolutionary Politics and the Cuban Working Class* 277 (Princeton: Princeton University Press, 1967).

⁸² See, e.g., Lillian Guerra, *The Myth of José Martí* (University of North Carolina Press, 2005).

foundational for Cuban political theory,⁸³ and especially in its role of constituting Cuban nationhood and cultivating nationalism.⁸⁴ He was also an early example of the difficulty of the relationship between Cuba and the United States, the latter of which had served both as refuge and ideal,⁸⁵ and as a very dangerous neighbor.⁸⁶ The second principal source was Fidel Castro. In Castro, Martí's nationalism was transformed,⁸⁷ through a fusion with Castro's vision of the role of the state and his mistrust of private and uncontrolled markets, into theories of regional state planning,⁸⁸ solidarity and internationalism,⁸⁹ and criticisms of globalization and sovereign finance as arms of an ideological and national war against small and poor states.⁹⁰ This nationalist and anti-imperialist internationalism was deeply embedded.

These basic normative foundations are packed into the complex of ideology usually shorthanded as the "Revolution" in Cuba. Fidel Castro summed this up nicely in 2013: "Revolution [...] is fighting with courage, intelligence and realism; is never lying or violating ethical principles; is a profound conviction that there is no force in the world capable of crushing the strength of truth and ideas. Revolution is unity, it is independence, is fighting for our dreams of justice for Cuba and for the world, which is the foundation of our patriotism, our socialism and our

⁸³See, especially, José Martí, *Nuestra América* available http://www.ciudadseva.com/textos/otros/nuestra_america.htm (originally published *La Revista Ilustrada de Nueva York* - 10 January 1891).

⁸⁴ See, e.g., essays in Mauricio A. Font and Alfonso W. Quiroz, et al., eds., *The Cuban Republic and José Martí: Reception and Use of a National Symbol* (New York: Lexington Books, 2005). See also, Larry Catá Backer, *From Hatuey to Che: Indigenous Cuba Without Indians and the U.N. Declaration on the Rights of Indigenous Peoples*, 33(1) *American Indian Law Review* 201-238 (2008-2009).

⁸⁵ Martí, for example had spent much time in the United States and wrote much about his experiences here, recasting these as lessons for a to-be-emerging Cuban state. See, e.g., John M. Kirk, José Martí and the United States: A Further Interpretation, *Journal of Latin American Studies* 9(2):275-290 (1977).

⁸⁶ See, Martí, *Nuestra América*, supra.

⁸⁷ See, e.g., Richard B. Grey, José Martí and Social Revolution in Cuba, *Journal of Inter-American Studies* 5(2):249-56 (1963).

⁸⁸ For an example, see, Fidel Castro Ruz, *On Imperialist Globalization* (Zed Books 1999); See also, Larry Catá Backer and Augusto Molina, Cuba And The Construction Of Alternative Global Trade Systems: ALBA And Free Trade In The Americas, 31(3) *University of Pennsylvania Journal of International Law* 679-752 (2010).

⁸⁹ These were most in evidence in the support of Cuba to Angolan, Nicaraguan and other "liberation" movements through the 1980s. See, Fidel Castro Ruz, *On Behalf of the Movement of Nonaligned Countries* (Address to the United Nations General Assembly, New York, Oct. 12, 1979), in *Fidel Castro Reader* (Ocean Press, 2008).

⁹⁰ Discussed in Larry Catá Backer, *Ideologies of Globalization and Sovereign Debt: Cuba and the IMF*, 24 *Penn State International Law Review* 497-561 (2006).

internationalism.”⁹¹ And indeed, at the base of the Revolutionary element of Cuban Marxist-Leninism is the Thought of Fidel Castro. Theodore Draper’s classic construction of that ideological application to Cuban socialism is still relevant, though it ought to be read shorn of the contempt with which it was made at the time: “Castroism gave Communism total power in Cuba, and Communism gave Castroism an ideology of total power”,⁹² one that did not initially derive from the Soviet leadership, though it adopted many of its forms, that came into communism after rather than as a means of revolution, that seeks to develop itself as regionally relevant to Latin America,⁹³

One can unpack these briefly as flows: At the core of Cuban communism are nationalism and Latin American solidarity, concepts self-consciously grounded in the thought of José Martí who retains a position of great respect within the pantheon of Cuban ideological parents. The PCC Constitution adds a number of norms grounded in class struggle and the moral imperatives of creating a classless society. These include fighting to ensure social morals, advancing collectivism, deepening the ideology of the Revolution and continuing to combat the exaltation of bourgeois ideology and related ideological errors, advancing social justice and equality, modesty, honor, overcoming racism and a lack of faith in Socialism, and fighting corruption.⁹⁴

⁹¹ Fidel Castro Ruz, *Revolución Cubana: ‘Las Ideas no Se Matan,’* July 26, 2013, Reflexiones del Compañero Fidel, in *Contralínea*, available at <http://contralinea.info/archivo-revista/index.php/2013/07/29/revolucion-cubana-las-ideas-se-matan/>. Translated from the original: “Revolución [...] es luchar con audacia, inteligencia y realismo; es no mentir jamás ni violar principios éticos; es convicción profunda de que no existe fuerza en el mundo capaz de aplastar la fuerza de la verdad y las ideas. Revolución es unidad, es independencia, es luchar por nuestros sueños de justicia para Cuba y para el mundo, que es la base de nuestro patriotismo, nuestro socialismo y nuestro internacionalismo.”

⁹² Theodore Draper, *Castro and Castroism*, in *Fidel Castro’s Personal Revolution in Cuba: 1959-1973* 33-40, 35 (James Nelson Goodsell, ed., New York: Alfred Knopf 1975).

⁹³ *Ibid.*, 35-39

⁹⁴ PCC Constitution Cap. I (“lucha por consolidar una moral en la sociedad cubana, cimentada en la ideología de la Revolución, el patriotismo, el colectivismo, la solidaridad, la igualdad de derechos y oportunidades, la justicia social, la confianza mutua, la disciplina consciente, la modestia, la honradez, el espíritu crítico y autocrítico, la seguridad en el porvenir socialista; en consecuencia, combate resueltamente la exaltación de la ideología burguesa, el individualismo, la supervivencia de prejuicios raciales y discriminatorios de cualquier índole, el escepticismo, la falta de fe en el socialismo, las tendencias liberaloides, el derrotismo, el populismo, el oportunismo, el nepotismo, el hipercriticismo, la simulación y la doble moral, el paternalismo, el igualitarismo, la indisciplina, la corrupción, las ilegalidades y toda forma de conducta delictiva y antisocial.”).

With the 6th Party Conference, the PCC has begun to move toward a different approach to the ideology of Marxist-Leninism, although it still adheres substantially to its traditional forms. The Lineamientos start with the core ideological premise of economic reform—that the system of socialist state planning shall remain the principal means used for the direction of the national economy.⁹⁵ Reform is meant to occur at the margins and to the extent it opens up to permit non-state sector activity, the state planning model ought to influence its operation.⁹⁶ Within this model the state owned enterprise retains pride of place, with a recognition of the utility of a variety of alternatives as tolerated by law—foreign investment, cooperatives and the like.⁹⁷ Yet non-state sector enterprises that are not foreign are to be kept on a short leash—they are not permitted to organize in corporate form or own capital.⁹⁸ State planning mechanisms will retain oversight of non-state sector activities,⁹⁹ and non-state sector activities will be introduced in a measured and orderly way.¹⁰⁰ Even the forms of efficiency and cooperation among enterprises will be overseen by the state,¹⁰¹ though now subject to considerations of efficiency and economics.¹⁰² Foreign investment continues to be viewed as a necessary evil, a complement to internal investment strategies,¹⁰³ and a means of attaining national objectives¹⁰⁴ in specified sectors.¹⁰⁵ As a necessary evil, they ought to be culled when no longer serving the national interest.¹⁰⁶

The difficulty here, of course, is that the ideological reforms of the Lineamientos keeps to the ideological foundations of the great period of flux post 1989, effectively constraining the PCC to its basic line as it existed before 1989.¹⁰⁷ All efforts to adjust that line in the face of the

⁹⁵ Lineamientos, *supra*, ¶ 1.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*, ¶ 2.

⁹⁸ *Ibid.*, ¶ 3.

⁹⁹ *Ibid.*, ¶ 5.

¹⁰⁰ *Ibid.*, ¶¶ 4, 6.

¹⁰¹ *Ibid.*, 7.

¹⁰² *Ibid.*, ¶¶ 11-12.

¹⁰³ *Ibid.*, ¶ 96.

¹⁰⁴ *Ibid.*, ¶ 104.

¹⁰⁵ *Ibid.*, 97.

¹⁰⁶ *Ibid.*, ¶ 99.

¹⁰⁷ This is an echo of the political style well echoed in the Cuban state constitution. It provides, for example, in article 3, that “Socialism and the social revolutionary political system instituted in this Constitution, proven by years of heroic resistance against all kinds of aggression and the economic war engaged by the government of the mightiest imperialistic power that has ever existed, and having demonstrated its ability to transform

conditions of Cuba are understood to be temporary and must be elaborated with an eye toward preservation of the orthodox ideological positions developed before the collapse of the Soviet Union. This is particularly apparent in the context of the new social politics, which is grounded on continuing to preserve the advances of the Revolution,¹⁰⁸ continuing the path of cultural work,¹⁰⁹ or to address the central planning elements of industrial and energy policy.¹¹⁰ This is not to suggest that the Lineamientos did not usher in a period of potentially profound change to the ideological base of Cuban Marxism; it is just that those profound changes have started quite modestly and are grounded on an adherence to those ideological premises on which it may conflict in fact.

The Leninist repercussions of this approaches are also clear—a tendency to favor administrative discretion in rule making, the use of taxation to extract “surplus” from non-state sector activities, licensing of virtually all activities as a means of controlling their actualization, and the overarching assumption that any deviation from the classic state planned economic model is temporary and might be undone by the state at any time.

IV. FROM IDEOLOGICAL PATH TO STATE PRACTICE; THE CONSEQUENCES OF CUBAN IDEOLOGY ON ECONOMIC REFORM: OCCUPATIONAL LICENSING, COOPERATIVES AND LEY 118.

Ideology, then, has an important consequential effect on the shape and scope of reforms, and with it for the construction of a Socialist rule of law state. This is particularly evident in the way in which central planning and control is translated into a policy of vesting substantial discretion in functionaries, and on requiring all non-state activity to go through a series of discretionary licensing, review and approval processes. The cumulative effect is to empty rule and law making of any substance and privilege the personal element in governance. The resulting potential for arbitrariness, corruption uncertainty and unpredictability can derail even the most otherwise substantial effort at reform. This ideological framework of Cuba explains the limits of current efforts at economic reform. Such reform can only be understood within the constructs of ideological taboos. These help explain the

the country and create an entirely new and just society, shall be irrevocable, and Cuba shall never return to capitalism.” See also arts. 12, 14, 16, 17-19. These provisions provide the cadre within which only a Soviet style planned economy is possible. But it also represents the ideological baseline for PCC discourse and policy.

¹⁰⁸ Lineamientos, *supra*, ¶ 140.

¹⁰⁹ *Ibid.*, ¶¶ 163-164

¹¹⁰ *Ibid.*, 215 et seq.

reasons such reforms may ultimately present inescapable contradiction (opening markets within a culture of central planning and administrative discretion for all market operations). It is ideology that drives a central planning ideal and the resistance to change. I have suggested earlier that:

Since the collapse of the global Marxist Socialist state network after 1989, Cuba has reluctantly permitted a limited intercourse based on tight control and containment.¹¹¹ The model embraced, however, follows a pre-1989 Eastern European model in general and the Soviet Stalinist statist variant of Marxist-Leninism in particular.¹¹² The operative focus of that model is limit change as to the minimum necessary to permit an influx of capital or technology or trade. As a consequence, change is targeted only to ‘foreign’ rather than domestic investment,’ contact between foreign capital interests and the domestic labor market is kept to a minimum, physical segregation is attempted to the greatest extent practicable, The idea is to limit the contagion of foreign capitalist elements to the bare minimum necessary for the exploitation of foreign capital within the Marxist-Leninist state.¹¹³

This remains very much true in contemporary Cuba, though it has shown slow and carefully orchestrated signs of change starting with the 6th Party Congress and the production of the Lineamientos. But the preservationist resistance of the old ideology remains a drag on change—even change that is strong Marxist. The ALBA model applied inward is the best example of this point, especially in the context of the new Foreign Investment Law, to the recent regulation of cooperatives and to the framework for the limited opening of the non-state sector.¹¹⁴ It is

¹¹¹ For a summary, see, e.g., Omar Everleny Pérez Villanueva, *Cuba's Economic Reforms: An Overview*, published in PERSPECTIVES ON CUBAN ECONOMIC REFORMS, (Center for Latin American Studies Press, Arizona State University, ed. Jorge F. Pérez-López and Matías F. Travieso-Díaz, 1998).

¹¹² For a discussion of the importance of Stalinism in Cuba's approach to and resistance of globalization, see, *infra* at Part II.C.

¹¹³ Larry Catá Backer, Cuban Corporate Governance at the Crossroads: Cuban Marxism, Private Economic Collectives, and Free Market Globalism, *Transnational Law & Contemporary Problems* 14(2):337-418 (2004).

¹¹⁴ Larry Catá Backer and Augusto Molina, *Cuba And The Construction Of Alternative Global Trade Systems: ALBA And Free Trade In The Americas*, 31(3) UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL LAW 679-752 (2010) (“The ALBA (Alternativa Bolivariana para los Pueblos de Nuestra América) (Bolivarian Alternative for The People of Our America), the command economy alternative to the free trade model of globalization, is one of the greatest and least understood contributions of Cuba to th

ideology, then, that drives an opening of a non/state sector grounded in the need to solicit approval for licenses to practice any of about 200 specific occupations, or that requires multiple levels of approval for the establishment of cooperatives or for foreign direct investment.

The legal system that permits the pursuit of private occupations has been constrained by the operation of PCC ideology in its structuring and operation. It is grounded on a premise that private sector occupations are exceptional and require specific identification. In the absence of identification, the occupation remains state based. Each occupation requires a separate license, and each license requires submission to an application process that vests substantial discretion in government functionaries. These functionaries may exert not merely formal authority but may also condition the license in ways that tend to vest power of direction in the state and its functionaries to a great degree. As discretion of this sort increases at the lowest and least monitored levels of administration, so do the temptations of corruption. And because the PCC has not built a systematic approach to corruption eradication unlike their CCP counterparts, the possibilities of corruption also has a detrimental effect on the construction of even this constricted non-state sector. Ideology here makes it impossible to consider a system that is the reverse of the one adopted—permitting all occupations other than those prohibited, and developing a system of self-reporting and monitoring to maintain discipline. Moreover, even with a license, ideology has made it impossible to detach wholesale markets from the ambit of state control, and more detrimentally still, of central planning. As a consequence, incentives toward the unregulated market also grow. To make matters worse, the state might not merely turn a blind eye to these markets, but also seek to exploit them. A recent effort to tax the unofficial importation of goods from abroad, to get around supply chain bottlenecks within Cuba has produced a backlash that may threaten the even limited opening of the non-state sector.¹¹⁵ Thus, lawlessness is

e current conversation about globalization and economic harmonization. . . . ALBA is grounded in the notion that globalization cannot be left to the private sector but must be overseen by the state in order to maximize the welfare of its citizens”)

¹¹⁵ See Victoria Burnett, Cuba Hits the Wall in a 2-Year Push to Expand the Private Sector, *The New York Times*, July 16, 2012. Available <http://www.nytimes.com/2012/07/17/world/americas/economists-question-cubas-commitment-to-privatizing-businesses.html?pagewanted=all> (“Those awaiting measures to create even more opportunity for private business got the opposite last week, when news spread of a little-advertised government decision to charge steep customs duties on the informal imports, from Miami and elsewhere, that are the lifeblood of many young businesses. “This could have a huge impact,” said Emilio Morales, president of the Miami-based Havana Consulting Group, who said state-owned shops in Cuba were losing business to street vendors. “It shows the state isn’t ready to compete with the private sector.””).

encouraged in both state officials and in the population it is meant to serve.

These problems were exacerbated by the structures adopted when the state sought to operationalize the Lineamientos recommendation to permit a limited range of private activity through cooperatives and similar arrangements.¹¹⁶ Cooperatives grew out of the reform efforts of the Lineamientos and represent an effort to populate the small space created within the non-state sector for retail level operations in a tightly controlled range of activities. They produced a complex set of regulations that provided the appearance of a tightly developed rule of law governance context, but one that was riddled with layers of discretionary approvals by state functionaries at a number of different levels.¹¹⁷ Thus, though not controlled directly by the state, cooperatives remain well within its shadow and the discretionary authority of state officials—that range from approval of the forms of cooperatives to their economic plans, reproduce the model of centralized state planning but not privatized within these cooperatives. But the discretion to issue approvals also appears to extend to the power to shut these enterprises down—again grounded in discretion that may be exercised without any appreciable mechanisms for checking abuse.¹¹⁸ Cubans interested in business ventures have now apparently built these risks into their business plans, looking for quick returns. Richard Feinberg reported recently that “Working within an uncertain business climate, these newly

¹¹⁶ Discussed in Larry Catá Backer, *The Cooperative as a Proletarian Corporation: The Global Dimensions of Property Rights and the Organization of Economic Activity in Cuba*, *Northwestern Journal of International Law and Business* 33:527-618 (2013).

¹¹⁷ See Consejo de Estado Decreto-Ley Número 305 [Council of State Decree-Law Number 305] (GACETA OFICIAL EXTRAORDINARIA No. 53, Dec. 11, 2012, at 249) (Cuba) [hereinafter Decreto-Ley No. 305]; Consejo de Estado Decreto-Ley Número 306 [Council of State Decree-Law Number 306] (GACETA OFICIAL EXTRAORDINARIA No. 53, Dec. 11, 2012, at 254) (Cuba) [hereinafter Decreto-Ley No. 306]; Consejo de Ministros Decreto No. 309 [Council of Ministers Decree No. 309] (GACETA OFICIAL EXTRAORDINARIA No. 53, Dec. 11, 2012, at 260) (Cuba) [hereinafter Decreto No. 309]; Ministerio de Económica y Planificación Resolución No. 570/12 [Minister of Economics and Planning Resolution No. 570/12] (GACETA OFICIAL EXTRAORDINARIA No. 53, Dec. 11, 2012, at 270) (Cuba) [hereinafter Ministerio de Económica y Planificación Resolución No. 570/12]; Ministerio de Finanzas y Precios Resolución No. 427/12 [Minister of Finances and Pricing Resolution No. 427/12] (GACETA OFICIAL EXTRAORDINARIA No. 53, Dec. 11, 2012, at 273) (Cuba) [hereinafter Ministerio de Finanzas y Precios Resolución No. 427/12]. For a discussion of the above regulations, see O. Fonticoba Gener, *Cambio a la actualización del modelo económico [Updating Changes to the Economic Model]*, GRANMA (Dec. 11, 2012) (Cuba), <http://www.granma.cubaweb.cu/2012/12/11/nacional/artic01.html>

¹¹⁸ The case of the Cabildo nightclub provided a case in point. See, Marc Frank, *In Cuba an Opera Singer Builds an Empire*, REUTERS (July 11, 2012, 5:08 PM), <http://www.reuters.com/article/2012/07/11/us-cuba-theater-reform-idUSBRE86A1B620120711>.

minted Cuban entrepreneurs often seek to recoup their capital in 12-24 months, a potentially feasible goal due to low costs of labor, rent, and utilities, and often interest-free financing.”¹¹⁹ Short-time horizon planning is exacerbated by ideology—an ideology that embedded in the implementing legislation the premise that the cooperative was itself experimental in character and might be terminated at any time. That only added a layer to the ideologically coherent reliance on discretion and on a view the exceptional character of the non-state sector. That exceptionalism could only be disciplined by the application of core state ideology—central planning, and taxation, to capture was thought to have been lost to the state through the concession from its ideal, made necessary by (perhaps temporary) circumstances. All of that was in turn exacerbated by the indirect control of these enterprises through the management of wholesale markets, a control that also affected sole proprietors operating under occupational licensing, and thereafter the exploitation of the informal markets that grew up to avoid the inefficiencies of centrally planned wholesale markets.¹²⁰ And again, discretion also produces the conditions necessary for corruption as well.

It is the same sort of ideological constraints that now bind Ley 118. Beyond the usual issues relating to the compatibility of Cuban Marxist Leninist ideology with international norms,¹²¹ Ley 118 raises

¹¹⁹ Richard Feinberg, *Havana Bars: The Next Wave of Private Innovation*, Cuba Standard May 7, 2014. Available <http://www.cubastandard.com/2014/05/07/havana-bars-the-next-wave-of-private-innovation/>.

¹²⁰ Victoria Burnett, *Cuba Hits the Wall in a 2-Year Push to Expand the Private Sector*, The New York Times, July 16, 2012. Available <http://www.nytimes.com/2012/07/17/world/americas/economists-question-cubas-commitment-to-privatizing-businesses.html?pagewanted=all> (“As the private sector has grown, so has the deluge of goods brought to Cuba each day in suitcases and duffel bags, principally from Panama, Ecuador, the United States and Spain. With no access to a wholesale market, Cubans turn to friends, relatives and so-called mules for everything from food to trinkets to iPhones. This parallel trade has ballooned to more than \$1 billion per year, Mr. Morales estimates, since the Obama administration began loosening of restrictions on travel and remittances in 2009. Yunilka Barrios, who sells sunglasses, hairbands, nail polish and glittery bra straps from a grimy, narrow doorway, was alarmed by the prospect of a 100 percent tax on informal imports that the government indicated would go into effect in September. “Things seem to be tightening up,” she said.”)

¹²¹ See, José Álvarez, *Foreign Investment in Socialist Cuba: Uncertain Real Profits for Foreign Capital and Continued Exploitation of the Labor Force*, The Foundation for Human Rights in Cuba, May 1, 2014. Available http://www.fhrcuba.org/wp-content/uploads/2014/05/FHRC-final-Foreign-Investment-Report-5_09_14.pdf.

Discussed in Juan O. Tamayo, *Report Says Cuba’s new foreign investment law violates international labor agreements*, *The Miami Herald*, May 9, 2014. Available <http://www.miamiherald.com/2014/05/09/4108310/report-says-cubas-new-foreign.html> (“The professor said the foreign investment law approved by the country’s parliament earlier this year violates at least seven international labor agreements and declarations approved by the United Nations and the International Labor Organization.”).

issues that run parallel to those that affect both the Cooperatives regulations and the occupational licensing scheme. Indeed, one of the more interesting things about Ley 118 is the way it represents an organic elaboration and modification of, rather than a break with, the structures of foreign direct investment in place in Cuba from the mid-1990s.¹²² However, there is a suggestion of a greater commitment to what the CCP has called “opening up”. That includes the declaration (not legally binding but relevant to shifts in ideological base lines) that foreign direct investment is integral to Cuban development. That moves FDI out of the margins of ideology. Ley 118 also accepts the possibility of majority foreign owned enterprises, and probably more as hope than as mandate, looks to streamlining the approval process. Yet the review and approval process remains at the center of the program, with all of its ideological baggage (a back door into privatized state central planning, abuse of discretion, corruption, etc.). Lastly Ley 118 opens the door, however slightly, toward differentials in the Cuban wage labor markets. That has the potential to be quite transformative—or it may, under the structures of contemporary Cuban ideology, be shut down within the approval and monitoring process. It is far too early to tell.¹²³ More interesting is that the state appears to have modified its ideological position that because FDI is a deviation from the ideal, it ought to be taxed to recoup the entirety of the surpluses it generates.¹²⁴

But substantial constraints remain, constraints that are ideologically driven. FDI remains a province of the state and its enterprises. FDI is unavailable to cooperatives or through individual licensed proprietors. This retains the substantial connection between the planned economy and foreign contributions to it in the form of carefully targeted investment. It also drives a greater wedge between the state, which assumes a privileged position (one central, for example, to the construction of its other regional trade frameworks, like those of ALBA) and the non-state sector carefully checked. And the backlash has already begun to be felt by those who feel that this approach amounts to a two track socialism where individuals are constrained in their ability to mobilize productive forces, while the state and its foreign partners are

¹²² See Richard Feinberg, *Cuba's New Investment Law: Open for Business?*, Brookings, UpFront, April 1, 2014. Available <http://www.brookings.edu/blogs/up-front/posts/2014/04/01-cuba-foreign-direct-investment-feinberg>.

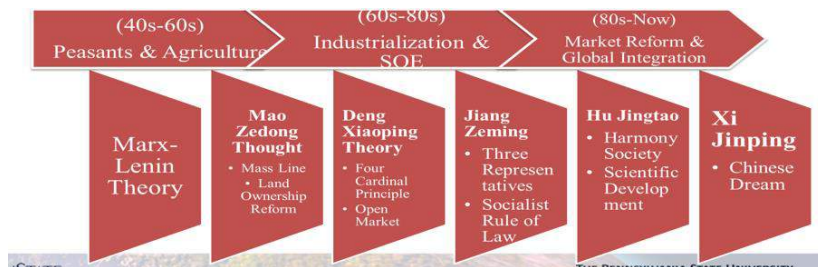
¹²³ *Ibid.* (“The proof will be in the pudding, and investors will be watching closing for the fine print in the new regulations and, most importantly, for the implementation of the approval process.”).

¹²⁴ Tax rates have been substantially cut. See Factbox: *What's Changed in Cuba's New Foreign Investment Law*, Reuters, March 29, 2014. Available <http://news.yahoo.com/factbox-whats-changed-cubas-foreign-investment-law-195310494--sector.html>.

treated to a different regime.¹²⁵ And again, the eyes are on China, though the state has not been able to convey the nature of the Chinese path with any clarity to the masses (much less I would surmise, its own cadres).¹²⁶ If Raúl Castro manages to use the Ley 118 as a means of moving Cuban ideology out of its half century box, that, more than anything else, will mark this endeavor as extraordinary.

Yet that movement requires a baseline outside of the current terrain of originalist ideology that permeates Cuban Marxism-Leninism-(Castroism). That baseline might be provided by considering the distinct paths taken by other states organized along Party-State lines with a grounding ideology in Marxism-Leninism. Of these, of course, the Chinese path might prove the most instructive and influential. It is that comparative element that is considered next.

V. CHINA AND ALTERNATIVE PATHS TO MARXIST-LENINISM.



Marxist-Leninist ideology, like Western style democracy and markets oriented economic ideology, offers more than one path. Beyond variations of European Stalinism (and its Trotsky Theory alternative), the Chinese have developed a different path since the death of Mao Zedong. That path has been grounded on a view of Marxist-Leninism as a dynamic and incomplete process that must be further developed (scientific development) toward the substantive goals of Marxism, for which Leninism provides the foundation for organizational approaches,

¹²⁵ For a criticism of Ley 118 from what appears to be the Cuban left, see Eddy Carbajal Rodriguez, More Dirt of Cuba’s Foreign Investment Law, Havana Times, May 12, 2014. Available <http://www.havanatimes.org/?p=103572> (“The socialism allegedly being built in Cuba will continue to be called socialism, even though these companies will be privately owned, in whole or in part, by a small group of people. We will continue to be socialists because that small group of people is made up of foreigners and not Cubans.”). For contra, see William M. LeoGrande, Cuba’s New Foreign Investment Law is a Bet on the Future, *World Politics Review*, April 2, 2014. Available <http://www.worldpoliticsreview.com/articles/13671/cuba-s-new-foreign-investment-law-is-a-bet-on-the-future>.

¹²⁶ *Ibid.* (“We should not forget that economic growth is not synonymous with social growth.”).

though not their ultimate and enduring forms (socialist modernization).¹²⁷ Harmonious development toward the goal of achieving a communist state, rather than egalitarianism and class struggle as a basis for further development that will augment a communist reality, tends to guide Chinese ideology. Most importantly, the emphasis of understanding Marxism as in development and necessarily subject to refinement under national conditions and in line with the times changes the institutional role of the vanguard Party from a guardian of past victories to something more akin to a magisterium, through which the entire wisdom of the Party may be applied to the development of what in the language of the Constitution of the Constitution of the CCP is references as “important guiding principle for China's economic and social development and a major strategic thought that must be upheld and applied in developing socialism with Chinese characteristics.”¹²⁸

Until the end of the Cultural Revolution, the ideological structures of the CCP were not unlike those of its European and Latin American counterparts. Each was essentially Leninist in orientation, grounded in the concept of class struggle as the basis for the organization of political power, as the legitimating basis of the party in power and as a means of determining who would be privileged to exercise political leadership through party membership. Like them, all focused on the convergence of law, politics and economics, and all tended to be pragmatic and messy in the way in which boundaries between state and party were drawn or observed in practice. But the trajectory of Chinese ideological development was punctuated by the ideological choices made during the period that started with the Great Leap Forward and ended with the passing of Mao Zedong and the Great Proletarian Cultural Revolution, the fall of the so-called Gang of Four and the return of the last great leader of the founding generation—Deng Xiaoping.

Under Deng's leadership, China embarked on a different set of ideological choices for the elaboration of Marxism in China. Rather than repudiate the ideological choices of the past, Deng chose to acknowledge them all and embrace that which made sense going forward and acknowledge mistakes. It has only been recently that the PCC has adopted a similar practice.¹²⁹ Under Deng's leadership the CCP, after

¹²⁷

¹²⁸ Constitution Chinese Communist Party General Program, *available at* http://news.xinhuanet.com/english/2007-10/25/content_6944738.htm.

¹²⁹ “We Cuban revolutionaries have committed errors, and we will continue making them. But we will never make the mistake of being traitors,” said Castro, 84, in an article published in the state-controlled press.” Revolutionary standard-bearer Fidel Castro admitted Thursday that Cuba's leaders had made mistakes over the years but insisted they had never betrayed their communist ideals, *Times Live (South Africa)*, Jan. 20, 2011,

vigorous debate, determined to make substantial changes to its ideological line and adopted the framework that serves as the basis of contemporary CCP political theory, one embedded in the constitutions of the state and the CCP. The CCP adopted a traditionalist base line—the four cardinal principles—one the built on existing ideology and then developed it to suit current conditions.¹³⁰ But the central line of the four cardinal principles was strongly refocused on socialist modernization and the central task of economic development.¹³¹ Indeed, the 1980s produced the widely embraced line of "one central task and two basic points" that emphasized the relationship between socialist modernization of the vanguard obligations of the CCP.¹³² Deng also dismissed the ideology of the Cultural revolution as "the phoney, ultra-Left socialism pushed by the Gang of Four, which boils down to universal poverty,"¹³³ and Marxism-Leninism and Mao Zedong-Thought as an "integral, scientific system."¹³⁴ But what liberated Chinese ideology from its past was the notion of progress inherent in the scientific nature of Marxism-Leninism-Mao Zedong-Thought.¹³⁵

The characterization of CCP ideology as the results of a scientific system grounded in Marxism-Leninism, had the effect of freeing CCP ideology from a preservationist posture and permitting

available at <http://www.timeslive.co.za/world/2011/01/20/castro-admits-mistakes-were-made>.

¹³⁰ See Deng Xiaoping, *Uphold the Four Cardinal Principles*, March 30, 1979, available at <http://english.peopledaily.com.cn/dengxp/vol2/text/b1290.html> ("keep to the socialist road; uphold the dictatorship of the proletariat; uphold the leadership of the Communist Party; and uphold Marxism-Leninism and Mao Zedong Thought.").

¹³¹ This is reflected in the development of the current basic line of the CCP: "to lead the people of all ethnic groups in a concerted, self-reliant and pioneering effort to turn China into a prosperous, strong, democratic, culturally advanced and harmonious modern socialist country by making economic development the central task while upholding the Four Cardinal Principles *and the reform and opening up policy*." Constitution of the Chinese Communist Party, *supra*, General Program (emphasis added).

¹³² *1987: One central task and two basic points*, China.org.cn, (Sept. 16, 2009), available at http://www.china.org.cn/features/60years/2009-09/16/content_18535066.htm ("According to this view, economic development is the central task of the government, while holding to two basic points, which were the four cardinal principles (the socialist road, the people's democratic dictatorship, the leading role of the Party, and Marxism-Leninism-Mao Zedong thought), and the policy of reform and opening up.").

¹³³ See, Deng Xiaoping, *Uphold the Four Cardinal Principles*, *supra*.

¹³⁴ *Ibid*.

¹³⁵ "What we consistently take as our guide to action are the basic tenets of Marxism-Leninism and Mao Zedong Thought or, to put it another way, the scientific system formed by these tenets. When it comes to individual theses, neither Marx and Lenin nor Comrade Mao could be immune from misjudgements of one sort or another. But these do not belong to the scientific system formed by the basic tenets of Marxism-Leninism and Mao Zedong Thought." *Ibid*.

ideology to evolve to meet the conditions of China consist with the core objectives of the substantive principles of Marxism, and the organizational principles of Leninism. From the scientific application of the substantive premises of Marxism and Mao Zedong-Thought, the CCP, over the next forty or so years developed a number of ideological lines, the most important of which were the de-centering of class struggle as the fundamental focus of ideological work and the substitution of opening up and the mobilization of productive forces for socialist modernization (opening the non-state sector broadly to achieve the ultimate aims of Marxism),¹³⁶ the principles of harmonious society and the framework for the scientific development. From the scientific application of Leninist principles, the CCP has been developing an ideology of Socialist Democracy grounded in intra-Party and intra-governmental democracy and accountability and is increasingly institutional rather than personal, collective rather than individual. It has used the principles of the Three Represents (Sange Daibiao) to open party membership beyond the core group of workers and peasants. Cuba, of course, retains its fundamental embrace of class struggle based, and the Leninist view of the operation of the vanguard party, modified only by the nationalism and internationalism of Fidelismo.

As a consequence, from the late 1970s, Chinese political ideology was, like that of progressive Western democracies, subject to layering and elaboration of its fundamental political premises, all of which retained their fidelity to the traditional political line but now interpreted in the context of modern times. Currently, the CCP takes Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory, the important thought of Three Represents and the Scientific Outlook on Development that represents the crystallized, collective wisdom of the Communist Party of China. Socialist transformation continues now with the development of Xi Jinping's "Chinese Dream" line. "The Chinese Dream," he said, is "the great rejuvenation of the Chinese nation."¹³⁷

¹³⁶ The importance of this change cannot be underestimated. As late as 1969, it was clear that what was to emerge as the theory of the mobilization of productive forces for socialist modernization was viewed as incompatible with the class struggle based ideological posture of the CCP line. See Hung Hsueh-ping, *Revolutionary Mass Criticism: The Essence of "Theory of Productive Forces" Is to Oppose Proletarian Revolution*, Beijing Review 12(38):5-8 (1969), available at <http://marxistphilosophy.org/ProdForDet.pdf>.

¹³⁷ Robert Lawrence Kuhn, *Xi Jinping's Chinese Dream*, The New York Times (June 4, 2014), available at <http://www.nytimes.com/2013/06/05/opinion/global/xi-jinpings-chinese-dream.html?pagewanted=all> ("Xi's Chinese Dream is described as achieving the "Two 100s": the material goal of China becoming a "moderately well-off society" by about 2020, the 100th anniversary of the Chinese Communist Party, and the modernization goal of China becoming a fully developed nation by about 2049, the 100th anniversary of the People's Republic. The Chinese Dream has four parts: Strong China (economically, politically, diplomatically, scientifically, militarily); Civilized China

The language of the ideological line is strikingly different from that of the PCC, not merely in detail but also in fundamental approach to the role of the Party and the state.

One must be clear here—the comparison with China is not meant to suggest that only by copying the details of the Chinese approach might Cuba embrace a more viable Marxist-Leninist solution to the contradictions of its current economic, social and political situation. Nothing of the sort is intended. The Cuban path, should it choose to develop its Marxist Leninist ideological structures, is unique to it. The specifics of the framework they adopt are less material than the need to adopt an ideologically dynamic framework (the great insight of Chinese Marxist-Leninism) and follow through. What the PCC might learn most from the CCP is the need to embrace the instinct and insight—new theory—of looking forward and then matching their theory to their objectives and to the legal projects built thereon. If the efforts that produced the Lineamientos suggest anything, it is that the PCC is inverting this insight; they are doing little to align objectives (even those that arise from necessity) and theory and instead engage in a deeply unhelpful process of compromise. That compromise—of theory and objectives—produced the incoherence of the Lineamientos and permitted the PCC to do that most un-Leninist of things, to effectively abandon democratic centralism in favor of disguised factional accommodation. It is in this that the essay anchors its suggestion that the core problem of the PCC is not that it is too attached to its Marxism, but rather that it is not attached enough to Marxist-Leninist principles and to the forward looking discipline that this requires. The latter is the Chinese path.

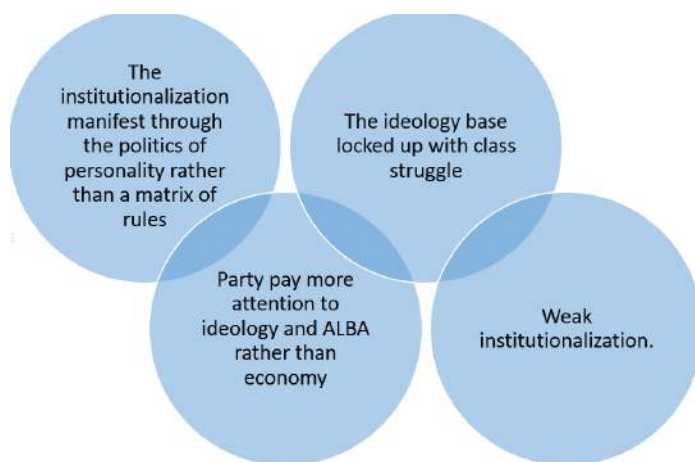
Ironically, perhaps, it appears that Raúl Castro has evidenced the greatest willingness to move Cuba forward towards a more Marxist path, one that frees Cuba from its ancient Russian and European Marxist-Leninist tutelage of the last century and substitutes Cuban for European and Russian priorities in the way in which Marxism is embraced and structured more finely tuned to the conditions of Cuba.¹³⁸ But the conservatism of the Lineamientos, in its final form, suggests that the power and hegemonic error of European Marxism made worse when wedded to an ideology that by its terms posits that it has attained its highest level of development in a state that is far from achieving that same objective. China also had to learn the lessons of the errors of hegemony in its own relationships with the Soviet Union in the 1950s

(equity and fairness, rich culture, high morals); Harmonious China (amity among social classes); Beautiful China (healthy environment, low pollution).” *Ibid.*)

¹³⁸ Discussed in Larry Catá Backer, *The Cooperative as Proletarian Corporation: Property Rights Between Corporation, Cooperatives And Globalization In Cuba*, *Northwestern Journal of International Law and Business* 33:527-618 (2013).

and 1960s. In both cases, Soviet tutelage tended to compromise local priorities which were invariably subsumed within those of their Soviet patron. But the lesson that was learned in China in the 1960s, and realized only with the development of Deng Xiaoping theory in the 1980s, has only now and grudgingly been even able to be discretely acknowledged within PCC circles. Until that lesson is learned, PCC ideological approaches—and thus its constraints on its political, administrative and governance frameworks—will continue to be subverted by an ideology out of tune with the actual conditions of Cuba. That incoherence is itself a fundamental error of Marxism.

VI. UNPACKING THE CONSEQUENCES OF IDEOLOGICAL POSSIBILITIES—CUBAN APPROACHES IN THE SHADOW OF THE CHINESE PATH.



The specific manifestation of PCC ideology has a direct effect on the structures of the Cuban Party and state. Organizational culture is incoherent in the absence of its ideological framework. In the case of Cuba especially, it has been foundational in the way in which both state and Party have been organized and function. It has also been the foundation of Cuban regionalism. For Cuba that has meant a substantial intermeshing of Party in the functioning of the state and of the state apparatus subsumed within Party structures. It has also reduced the importance of law as a basis for administration and a substantial reliance on administrative discretion as a substitute for systems of rules. It is ideology that has reduced incentives to deepen the institutionalization of the PCC, including institutions for reducing corruption of PCC and state officials. But most importantly, it has transformed a revolutionary party into the chief priest of the cult of the revolutionary moment, guarding that transformative instant from deviation or change. Only recently has

the PCC indicated a vague willingness to “share the experience of governance” with China, for example.¹³⁹

Contrast the General Program of the CCP.¹⁴⁰

The Communist Party of China leads the people in developing an advanced socialist culture. It promotes socialist cultural and ethical progress, combines the rule of law and the rule of virtue in running the country and works to raise the ideological and moral standards and scientific and educational levels of the entire nation so as to provide a powerful ideological guarantee, motivation and intellectual support for reform, opening up and socialist modernization, and develop a strong socialist culture in China.¹⁴¹

Indeed the concept of socialist modernization,¹⁴² key to the scientific development of CCP political lines,¹⁴³ is noticeably absent from PCC

¹³⁹ Chinese Premier Meets Cuba’s First Vice President, Xinhua (June 19, 2013), available at <http://english.cpc.people.com.cn/206972/206976/8290188.html>. Miguez Diaz-Canel, Cuban First Vice President, in Beijing for a meeting with Chinese Premier Li Keqiang, acknowledged the importance of bilateral ties between the two countries, and the relationship with China. He related that “the Cuban side is ready to increase high-level interactions, share the experience of governance and deepen practical cooperation with China in areas including trade, technology, infrastructure, telecommunication, education and tourism.” Ibid.

¹⁴⁰ The General Program of the Chinese Communist Party Constitution provides in part:

Reform and opening up are the path to a stronger China. Only reform and opening up can enable China, socialism and Marxism to develop themselves. The Party must carry out fundamental reform of the economic structure that hampers the development of the productive forces, and keep to and improve the socialist market economy; it must also carry out corresponding political restructuring and reform in other fields.

¹⁴¹ Ibid.

¹⁴² On my sense of socialist modernization, see discussion in Larry Catá Backer, Socialist Modernization and China’s Regional Development Policies--The “Go West” (西部大开发) Policy as Template, Law at the End of the Day (July 14, 2014), available at <http://lbackerblog.blogspot.com/2014/07/socialist-modernization-and-chinas.html>.

¹⁴³ The concept of scientific development (科学发展观) was introduced at the Sixteenth National Party Congress. It was specifically formulated as the “Scientific Outlook on Development, which puts people first and calls for comprehensive, balanced and sustainable development. The outlook is a scientific theory that is in the same line as Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of Three Represents and keeps up with the times. It is an important guiding principle for China’s economic and social development and a major strategic thought that must be upheld and applied in developing socialism with Chinese characteristics.” Constitution of the Chinese Communist Party General Program, supra. In his Report to the 18th Chinese Communist Party Congress in 2012, Hu Jintao explained the concept more broadly than one merely tied to a working style of economic development. He explained that the concept

discussion. And it is absent precisely because the ideological center of Cuban Marxism remains rooted in state planning. That is the cornerstone of both its internal and external economic model. Its opening up, then, remains mediated by its own approach to economic organization, one that makes it more difficult to achieve compatibility with the global system rules with which it interacts. But that is also an important element of resistance that has been a cornerstone of Castorism as it has elaborated the relationship between Cuban Communism and globalization.¹⁴⁴

The difference could not be clearer. The basic principles of PCC reflect the focus on the revolution and revolutionary values that are meant to take on a transformative and trans Revolutionary character—a static dynamism that is meant to capture and hold steady the moment of revolutionary triumph.¹⁴⁵ The PCC centers its revolutionary ideology around the following points: First, absolute loyalty to the interests of the working class and other working people; Second, unwavering opposition to the capitalist system and any other systems with exploitation; Third, creatively applying Marxist-Leninist theory to the specific conditions in Cuba and experience it according to their own experiences and other fraternal parties' experiences; Fourth, loyal to proletarian internationalism and oppose manifestations of nationalism and chauvinism, fighting alongside with all other communists and opposition forces of reactionaries and imperialism, and support the struggle against the capitalist exploitation of the working people of other countries; Fifth, close ties with people.

fully embodies the Marxist worldview on and methodology for development. This theory provides new scientific answers to the major questions of what kind of development China should achieve in a new environment and how the country should achieve it. It represents a new level of our understanding of the laws of socialism with Chinese characteristics and reaches a new realm in the development of Marxism in contemporary China.

Hu Jintao, Report to the 18th Party Congress, (Nov. 19, 2012), *available at* <http://en.people.cn/102774/8024779.html>.

¹⁴⁴ Discussed in Larry Catá Backer, *Odious Debt Wears Two Faces: Systemic Illegitimacy, Problems and Opportunities in Traditional Odious Debt Conceptions in Globalized Economic Regimes*, *Duke Journal of Law & Contemporary Problems* 70:1-46 (2007); Larry Catá Backer, *Ideologies of Globalization and Sovereign Debt: Cuba and the IMF*, *Penn State International Law Review* 24:497-561 (2006).

¹⁴⁵ Contrast the foundation of the General Program of the CCP as set out in its Party Constitution: “China is in the primary stage of socialism and will remain so for a long time to come. This is a historical stage which cannot be skipped in socialist modernization in China which is backward economically and culturally. It will last for over a hundred years. In socialist construction the Party must proceed from China's specific conditions and take the path of socialism with Chinese characteristics.” Constitution of the Communist Party of China, General Program, *available at* http://news.xinhuanet.com/english/2007-10/25/content_6944738.htm.

The key to the long-term success of any state organized along Party-State lines is the organization and operation of the vanguard (Communist) Party. That is the essential insights of the Leninist part of Marxist Leninist theory—if Marxism provides the baseline political ideology and objectives of the state, Leninism provides the foundations of its organizational principles.¹⁴⁶ But baseline principles do not necessarily suggest an end to ideological development, much less an engagement with the implementation of foundational principles within the specific context of a particular state. Indeed, the fear of theoretical ossification has dogged Leninism (and its Marxist foundations) almost from the beginning of post Marxist theoretical work.¹⁴⁷

Cuba's organization remains deeply Leninist. Fidel Castro for decades continued to refer to himself as a professional revolutionary-- which was interpreted by some to refer to his antipathy for injustice,¹⁴⁸ though it was more accurately a direct reference to the Leninist notion of professional revolutionary as a necessary ingredient in Communist revolution.¹⁴⁹ The irony, of course, is that this reference to the essential character of the Communist as a professional revolutionary was never successfully transposed into a post-revolutionary Leninism, except through notions of the communist international, a concept to which the PCC and Castro continue to embrace, though now without the European mechanisms for its institutionalization and in the form of an internationalized class struggle ideology grounded in the imperatives of proletarian revolution.¹⁵⁰

Though both the PCC and CCP are Leninist parties, there is a substantial distinction in their institutionalization. That distinction arises in part from differences in their respective interpretation of the core objectives of their role as a Leninist vanguard party. The CCP has sought to progress beyond the revolutionary party organizational focus of Leninism to what is increasingly referenced as Socialist democracy.

¹⁴⁶ Discussed more fully in Larry Catá Backer, *Crafting a Theory of Socialist Democracy for China in the 21st Century: Considering Hu Angang's Theory of Collective Presidency in the Context of the Emerging Chinese Constitutional State*, 16(1) *Asian-Pacific Law And Policy Journal* 16(1) (forthcoming 2014).

¹⁴⁷ Indeed Lenin began one of his most influential Works by confronting the issue of theoretical ossification in Marxism—in 1901! See, Vladimir I. Lenin, *What is to Be Done?: Burning Questions of our Movement* (New York: International Publishers, 1929, 1943) (in the context of freedom of criticism, pp. 12-25).

¹⁴⁸ Sheldon B. Liss, *Castro!: Castro's Political and Social Thought*, *supra* 4.

¹⁴⁹ Vladimir I. Lenin, *What is to Be Done?: Burning Questions of our Movement* 116 (New York: International Publishers, 1929, 1943)

¹⁵⁰ See, e.g., H. Michael Erisman, *Cuba's International Relations: The Anatomy of a Nationalistic Foreign Policy* 8 (Boulder: Westview Press, 1985).

China indeed appears to be working towards the development of Communist Party organization away from a set of rigid and uncontextualized Leninist principles toward a Chinese form of democracy that may well be compatible with emerging notions of democratic principles of global constitutionalism. In one of his earliest speeches as Communist Party General Secretary, Xi Jinping has suggested the continued importance of moving forward from an old style European Leninism to chart a course forward for the Chinese Communist Party as the party in power with Chinese characteristics. That movement necessarily focused efforts at democratization within the vanguard elements of the polity—represented by the Communist Party, and its own efforts at internal mass democracy, producing a stable political order that is better able to meet its core political objectives—increasing popular welfare through the application of the structural political and economic premises on which the state is organized. This is a substantially distinct view of democracy, one in which the *internalization* of democracy as an operative principle *within* the structures of government and politics displaces the traditional Western approach to *externalizing* democratic principles to the selection of its representatives within the structures of government and politics.¹⁵¹

In the process, the CCP seeks to realign its Leninism to produce a greater focus on the substantive values of Marxism. It incorporates the idea described by Deng Xiaoping, that a successful Communist Party ought to act more as a ruling party and less as a revolutionary party.¹⁵² In the case of China, those normative elements of Marxism have been refined within the notions of socialist modernization:¹⁵³ the motive power of the reform of Chinese Communist Party is further developing the productive force and improving the construction of the Party by consolidating the foundation of economy.

In contrast, the PCC remains very much a revolutionary party. The revolutionary moment remains a palpable concept—it has been detached from history and governs over all aspects of the operation of

¹⁵¹ Larry Catá Backer, *Crafting a Theory of Socialist Democracy for China in the 21st Century*, *supra*.

¹⁵² Joseph Fewsmith, *Studying the Three Represents*, China Leadership Monitor No. 8 Hoover Institute, *available at* http://media.hoover.org/sites/default/files/documents/clm8_jf.pdf; citing Jiang Zemin, *Speech Given on the 80th Anniversary of the Founding of the Chinese Communist Party*, (July 1, 2001), *available at* <http://news.xinhuanet.com/english/20010726/433646.htm>.

¹⁵³ Jiang Zemin, *Build a Well Off Society in an All Around Way and Create a New Situation in Building Socialism with Chinese Characteristics*, Report to the 16th Party Congress of the CCP (2002), *available at* http://english.peopledaily.com.cn/200211/18/eng20021118_106983.shtml.

governance—political or administrative within Cuba. Perhaps this single minded focus on organization grounded in the spirit of the moment of revolutionary triumph is made necessary by the constant opposition of the United States; perhaps not. But it remains at the bedrock of the organization of state and Party in ways that substantially limit the ability of the PCC to organize itself as other than a vanguard party at the moment of its accession to power, rather than as the vanguard party tasked with the governance of a state that is tasked to eventually reach a level of development that makes the communist ideal attainable. And indeed, connected with the a-historicity of the revolutionary moment for PCC organization, is the idea that at that moment of triumph the communist ideal was also within reach. This is a substantially different premise than that embraced by the CCP and accounts for a significant difference in both the PCC's organization, and aims. The CCP *looks forward* to attainment of a communist society; the PCC assumes that its role is to *preserve* the communist society it achieved at the moment of revolutionary triumph. That distinction will have significant effects on the way in which the PCC approaches its relationships with outsiders and its internal governance. Preservation requires a single-minded focus on the consolidation of PCC power, though effectuated through the personalities of its leaders rather than through strong institutional structures.¹⁵⁴ This leads to some differences of the institutional construction of the two Parties and their operational cultures.

But the PCC is also Stalinist in the sense of the driving force of personality over institution.¹⁵⁵ Institutions are essential instruments for the implementation of collective will, but that will is manifested through the politics of personality rather than situated within a matrix of rules that reflect collective application of ideological frameworks on individual issues. That suggests the relationship between, for example, the ideology of Castroism (as the collective thought of Fidel Castro) and the PCC. Outsiders have described the contradiction between the force of the Party and the importance of the leader in driving the Party through the force of his genius. Referring to Fidel Castro's leadership, Liss, a

¹⁵⁴ See, e.g., Eusebio Mujal-Léon and Joshua W. Busby, *Much Ado About Something?: Regime Change in Cuba, in Cuban Communism, 1959-2003*, pp. 491-512 (Irving Louis Horowitz and Jaime Suchlicki, eds., Transaction Publishers, 2003).

¹⁵⁵ But not without some questioning coming very recently, and quite tentatively. See e.g., W.T. Whitney, Jr., *Cuba, Culture and the Battle of Ideas*, *People's World*, (April 25, 2014), available at <http://peoplesworld.org/cuba-culture-and-the-battle-of-ideas/> ("For [philosophy professor Fernando Martinez] Heredia, 'economic subjugation to the USSR' led to a 'profound bureaucratization of Cuba's revolutionary institutions and organizations that persisted even after the Rectification Campaign' of the late 1980's. The Soviet bloc fell and Cuba entered the Special Period, yet 'no ideological struggle developed to confront the worldwide discrediting of socialism and defend Cuban socialism.'").

sympathetic outsider, explained: “He mixes Latin America’s revolutionary tradition with Marxist ideology to produce ‘Fidelismo’ or ‘Castroism’. *Fidelismo* reflects his personal mysticism, not the impersonal aura of the Communist party. His followers, or *fidelistas*, deviate from traditional Communist adherence to a narrow and inflexible party. Instead they represent broad national interests.”¹⁵⁶ This succinctly describes the structural repercussions of the Latinized European Soviet style of Leninism and its reflections on the institution of the Communist Party after the moment of revolutionary triumph. That tension may be reflected, as well in the irregularity of the holding of Communist Party Congresses in Cuba.¹⁵⁷

The characteristics of the construction of the Cuban Communist Party include that: it pays more attention to ideology rather than economy; and, it pays more attention to the international communist movement. The PCC is also actively internationalist in forging Party-State regional arrangements with like-minded states. ALBA is a clear indication of the way that ideology has driven internationalism in the age of globalization—the construction of a socialist regional trade association that is geared to implementing the ideology of Cuban Marxism within the international commercial relations of states and beyond private markets. This reflects the persistence of the old Communist International notions from Soviet times,¹⁵⁸ though now in much altered form. Third, the institutional construction of the PCC retains its focus on class struggle.¹⁵⁹ This significantly restricts both the scope of recruiting and makes it much more difficult to build loyalty to the system from potential cadres in the non-state sector. This division has been avoided by the CCP through the elaboration of the *Sange Daibiao* (三个代表) principles that effectively opened Communist Party membership to entrepreneurs.¹⁶⁰ Fourth, the attitude of reform and opening up on institutional construction is relatively conservative.

¹⁵⁶ Sheldon B. Liss, *Castro: Castro’s Political and Social Thought*, *supra* 3.

¹⁵⁷ The PCC has held six Party Congresses at irregular intervals since 1959. See, Partido Comunista de Cuba, *Congresos del Partido Comunista de Cuba*, available at http://www.pcc.cu/cong_asamb.php. In contrast, the CCP has held party congresses at regular four-year intervals almost since the founding of the People’s Republic in 1949. News of the Communist Party of China, *Party Congress Review*, available at <http://english.cpc.people.com.cn/206972/207190/index.html>.

¹⁵⁸ “El Partido Comunista de Cuba es fiel a los principios del internacionalismo, el antiimperialismo, la solidaridad y la fraternidad entre pueblos.” PCC Constitution, Cap. I.

¹⁵⁹ Contrast the CCP Communist Party Constitution General Program which acknowledges the importance of class struggle, but which contextualizes class struggle within the broader objectives of socialist modernization.

¹⁶⁰ As set out in the official website of the Chinese Communist Party:

But there are certain unique conditions to the PCC that also affect its character and structure, and the nature of the hold of revolutionary ideology in its operation. The PCC is the rare example of a communist party established after a successful communist revolution.¹⁶¹ The task of building a communist party, then, became bound up in the work of building a socialist state after the attainment of power. The real institutional glue during this process was the military—a condition that continues to mark the relations among the military and bureaucratic establishment and which produces a distinct mediating role for through the party that sets it apart from that of the CCP, for example. Institutionalization came late and was relatively weak. The first PCC Party Congress was not held until 1975.¹⁶² At the time Fidel Castro in his address to the participants emphasized the value of institutionalization of the Party evidenced by the Congress for the purpose of stability, though noting that the ideological work for the Congress ought to be focused on implementation.¹⁶³ Yet behind the

Comrade Jiang Zemin first propounded the important thought of Three Represents during his inspection tour of Guangdong Province in February 2000. He emphatically pointed out, "An important conclusion can be reached from reviewing our Party's history over the past 70-odd years; that is, the reason our Party enjoys the people's support is that throughout the historical periods of revolution, construction and reform, it has always represented the development trend of China's advanced productive forces, the orientation of China's advanced culture, and the fundamental interests of the overwhelming majority of the Chinese people. With the formulation of the correct line, principles and policies, the Party has untiringly worked for the fundamental interests of the country and the people. Under the new conditions of historic significance, how our Party can better translate the Three Represents into action constitutes a major issue that all Party members, especially senior officials, must ponder deeply ." Communist Party of China, Three Represents (June 23, 2006), *available at* <http://english.cpc.people.com.cn/66739/4521344.html>.

See, also, Jia Hepeng, *The Three Represents Campaign: Reform the Party or Indoctrinate the Capitalists?*, *Cato Journal* 24(3):261-275 (2004), *available at* <http://object.cato.org/sites/cato.org/files/serials/files/cato-journal/2004/11/cj24n3-5.pdf>.

¹⁶¹ See, e.g., William M. LeoGrande, *The Cuban Communist Party and Electoral Politics: Adaptation, Succession, and Transition 3* (Institute for Cuban and Cuban-American Studies, 2002).

¹⁶² See *I Congreso del Partido Comiunista de Cuba*, *available at* <http://www.pcc.cu/cong1.php>.

¹⁶³ Fidel Castro Ruz, *Discurso pronunciado por el Comandante en Jefe Fidel Castro Ruz, primer secretario del Comité Central del Partido Comunista de Cuba y primer ministro del gobierno revolucionario, en el acto en que le fueran entregados los compromisos del pueblo en saludo al Primer Congreso del Partido por parte de los dirigentes de las organizaciones de masas, en el Palacio de la Revolución, (el 29 de mayo de 1975)*, *available at* <http://congresopcc.cip.cu/wp-content/uploads/2011/02/DISCURSO-DE-FIDEL-EN-EL-ACTO-EN-QUE-LE-FUERAN-ENTREGADOS-LOS-COMPROMISOS-DEL-PUEBLO-EN-SALUDO-AL-PRIMER-CONGRESO-DEL-PARTIDO.pdf> (“estamos seguros de que después de nuestro Congreso eso ya será

institutionalization, the force of personality remained vigorous. While China began moving toward a depersonalized CCP apparatus, Cuba would reinforce the personal element in party organization—the essential role of the Leninist professional revolutionaries in post-revolutionary Cuba is as the glue to keep the structures of state and party stable. Most of the Party Congresses after the collapse of the Soviet Union, in contrast, have been called to deal with the issue of preservation and adjustment. The idea in Cuba is that prior to 1989, Cuba had its internal ideological house in order—and that the function of the state and of the party apparatus was to resist change, for any change would signal a retreat from the revolutionary ideal. That factor has also shaped the organization of the PCC and its internal ruling style.

And, indeed, a key to Party institutionalization is to move away from leadership grounded in individual personality (within Marxist Leninist theory something that ought to be considered a critical error of bourgeois democracy) to a style of institutionalized collective leadership that guards against personal aggrandizement at the expense of Party unity. Indeed, all Marxist Leninist vanguard parties have shown their most substantial weakness institutionally when they served a paramount and powerful personality, rather than when talented cadres served the institution of the party.

The cult of personality issue is still a very delicate subject in Cuba, in part because unlike China, where such discussion could occur after the passing of the revolutionary generation, that is still difficult in Cuba. While the official position of the state and Party disfavors personality cults, at least in its most blatant Soviet Stalinist forms, the reverence with which the founding generation are held, at least in official circles, suggests a tension between official reality and facts on the ground.¹⁶⁴ Only recently Raúl Castro spoke in general terms for the succession of leadership within the PCC.¹⁶⁵ But that speech itself

todavía más sólido, más seguro, y que los principios más puros del marxismo-leninismo, los principios más profundos de nuestra Revolución se aplicarán de manera consecuente, que esta generación revolucionaria habrá dejado las bases, y que permitirá a los jóvenes y a los niños del futuro seguir, como herederos de esta Revolución, la marcha victoriosa de nuestra patria hacia el futuro.”).

¹⁶⁴ See, e.g., The Castro Cult: Fidel’s Fanclub, *The Economist*, (April 26, 2011), available at http://www.economist.com/blogs/americasview/2011/04/castro_cult.

¹⁶⁵ See, Marc Frank, Cuba’s Raúl Castro Promises Succession Has Started, *Reuters*, (July 26, 2013), available at <http://www.reuters.com/article/2013/07/26/us-cuba-castro-anniversary-idUSBRE96P0UD20130726> (“There is a slow and orderly transfer of the leadership of the revolution to the new generations,” he said, stating the changes were “based on the demonstrated preparation and capacity to maintain high the flags of the revolution and socialism.” Castro has criticized his own generation for not preparing a succession, called for term limits and has made development of new leaders a priority since taking over for his brother, who ruled the country for nearly 50 years.” Ibid.).

suggested a lack of effort to institutionalize leadership changes, and a continuation of the focus on personality and its bourgeois democratic implications. Still, the role of Fidel Castro Ruz, who led the state and Party apparatus for half a century not only looms large over administrative cultures and Party ideology, “[e]ven with the institutionalization of the late 1970s and early 1980s, there was little doubt that PCC cadres served at the pleasure of the maximum leader. He was not constrained by its routines or bureaucracy, and he answered to no one else in the Party leadership.”¹⁶⁶ it has served, in a way that perversely enough makes it harder for those who follow, to incarnate the legitimacy of the state in his person in the way that medieval monarchs were understood to incarnate the state. Fidel, in some ways, saved state and Party by serving as its incarnation,¹⁶⁷ but that service might well cost both much when that incarnation inevitably comes to an end without a deep and strong, externally well recognized institutionalized collective leadership to take the state forward and carry the burdens of vanguard party politics.¹⁶⁸ In place of the charisma of the founders, Raúl Castro is faced with the difficult task of creating institutional mechanisms for succession and a Marxist-Leninist-Castroist ideology that can be developed to suit the specific context of Cuba in the second generation of its leadership—a leadership that, applying useful insights from the Chinese Marxist Leninist experience,¹⁶⁹ ought to be less personality and more dedicated to the state and Party they are supposed to serve. These institutional mechanisms, and the routinization of authority within rule structures are critical to the development of a rule of law society, even a socialist rule of law society.

Since the passing of Mao Zedong and the leadership of Deng Xiaoping, China has become particularly sensitive to issue of cult of

¹⁶⁶ Eusebio Mujal-Léon and Joshua W. Busby, *Much Ado About Something?: Regime Change in Cuba*, in *Cuban Communism, 1959-2003*, *supra.*, 494-495. “Castro’s continuing presence and his constant exhortations to revolutionary struggle and ideology place strict, if formally undefined, limits on how far government and Party functionaries can deviate from the official canon of nationalism, anti-capitalism, and anti-Americanism.” *Ibid.*, 500

¹⁶⁷ *See*, Eusebio Mujal-Léon and Joshua W. Busby, *Much Ado About Something?: Regime Change in Cuba*, in *Cuban Communism, 1959-2003*, pp. 491-512 (Irving Louis Horowitz and Jaime Suchlicki, eds., Transaction Publishers, 2003) (“Fidel Castro’s charismatic authority and leadership skills have enabled the regime to retain its capacity for mobilization and to forestall a complete loss of ideological vigor.” *Id.*, 505).

¹⁶⁸ *See*, e.g., Antoni Kapcia, *Planning for Succession in Cuba: The Long ‘Anti-Transition’*, *Whitehead J. Diplomacy & International Relations* 9:43 (2008); Brain Latrell, *The Cuban Military and Transition Dynamic*, *Institute for Cuban and Cuban-American Studies* (2002), available at http://pdf.usaid.gov/pdf_docs/Pnac231.pdf.

¹⁶⁹ *See* HU ANGANG, *CHINA’S COLLECTIVE PRESIDENCY* (Dordrecht, Neth., Springer 2014).

personality, and its implications for the development of a socialist rule of law state.¹⁷⁰ The CCP has thought to theorize the leadership of Mao Zedong for the lessons it provided a dynamic Leninist element in party organization. At the recent commemoration of the birth of Mao Zedong, Xi Jinping expressed the current approach:

Xi described Mao as a "great proletarian revolutionary, strategist and theorist" and underlined the need to have a correct historical view to appraise a historical figure. "Revolutionary leaders are not gods, but human beings," Xi was quoted as saying by the official Xinhua news agency. "(We) cannot worship them like gods or refuse to allow people to point out and correct their errors just because they are great; neither can we totally repudiate them and erase their historical feats just because they made mistakes," Xi said.¹⁷¹

Much current theorizing about the bureaucratization and institutionalization of political power within the CCP and the democratization of its exercise internally is guided by the need to ensure that Mao style cults do not reappear.¹⁷² It also underlies, to some extent, the Chinese embrace of law—and rule of law concepts—as part of their administrative operations, especially within the state apparatus. This insight does not shape only the succession within the vanguard party, but also provides a measure of stability between periodic and stable changes within the Party's leadership. It also permits a greater focus toward anti-corruption efforts, and perhaps the institutionalization of a large and

¹⁷⁰ Indeed this has been a subject of importance in China and an important part of the CCP's ideological line as it moves away from personality as the driver of politics and focuses on the dynamics of collective action through rules. See, e.g., Mo Zhang, *The Socialist Legal System with Chinese Characteristics: China's Discourse for the Rule of Law and a Bitter Experience*, Temple International & Comparative Law Journal 24:1 (2010). As the discussion at the 18th CCP Party Congress suggests, the efforts to develop Socialist Rule of Law remains very much a work in progress.

¹⁷¹ Mao Zedong made 'mistakes,' says Chinese President Xi Jinping, Press Trust of India, (Dec. 26, 2013), *available at* <http://www.ndtv.com/article/world/mao-zedong-made-mistakes-says-chinese-president-xi-jinping-463497>. See 1980: Deng Xiaoping comments on Mao Zedong Thought, 17th National Congress of the Communist Party of China (Oct. 25, 2007), *available at* <http://www.china.org.cn/english/congress/229773.htm>.

¹⁷² Hu Angang, *Collective Presidency in China* (Beijing, Tsinghua Institute for Contemporary China Studies, 2013), criticizing Mao Zedong's personal leadership style after the Great Leap Forward, "As a result, the Standing Committee of the Political Bureau of the Central Committee of the CPC was downgraded to an institution that simply implemented the personal instructions of Mao Zedong. The membership of the Standing committee underwent frequent changes in a non-institutionalized manner; the collective leadership of the CPC was seriously impaired, and existed in name only." *Ibid.*, 26.

increasingly effective intra-Party mechanism for anti-corruption efforts, though one that itself is subject to criticism.¹⁷³

After the leadership of Deng Xiaoping, term limits were effectively imposed for top leadership positions in China of no more than two five-year terms. After the Sixth National Congress, there are similar rules on this issue in Cuba. But there is obvious disadvantage for the power transition between relatives, which leads to conservatism and does little to contribute to the appearance of the internal democratic character of the PCC. Cuba has yet to face its first real transition from the founding generation. Moreover, unlike China at the time, Cuba is quite vulnerable to outside forces. That makes any experimentation more risky as any number of actors may be tempted to interfere. Unlike China that has had almost a generation of actual practice in strong institutional transition through rules cultures, the PCC has yet to experience its first power transition. Indeed, most telling is that the CCP's institutional order was strengthened by the practice of paramount leaders stepping down from the time of Deng Xiaoping, the last great leader of the revolutionary generation, in favor of a successor team. The same has yet to occur in Cuba.

However, Raúl Castro has been moving toward embracing a Chinese path to institutional succession. In February 2013, Raúl Castro announced plans to begin to modify succession and its institutionalization in Cuba.¹⁷⁴ Most important, perhaps, was the announcement, in the style of Deng Xiaoping, of his retirement, projected to occur in 2018. "And yet, on an island where a Castro has been in charge since 1959, he also seemed intent on changing how his successors will rule. In an announcement more surprising than his retirement plan, Mr. Castro said he hoped to establish term limits and age caps for political offices, including the presidency. Some broad constitutional changes, he said, will even require a referendum."¹⁷⁵ But even here Castro was careful to ensure the selection of successors who could mediate the interests of the state and Party apparatus against those of the military.¹⁷⁶

¹⁷³ Discussed in Larry Catá Backer and Keren Wang, *The Emerging Structures of Socialist Constitutionalism With Chinese Characteristics: Extra-Judicial Detention (Laojiao and Shuanggui) and the Chinese Constitutional Order*, *Pacific Rim Law & Policy Journal* 23(2):251-341 (2014)

¹⁷⁴ See Damien Cave, *Raúl Castro Says his New 5-Year Term as Cuba's President Will be His Last*, *The New York Times*, (Feb. 24, 2013), available at http://www.nytimes.com/2013/02/25/world/americas/raul-castro-to-step-down-as-cubas-president-in-2018.html?_r=0.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.* ("He was a senior Communist Party official for Villa Clara and Holguin provinces, where there were important openings with foreign investment in tourism," said Mr. López Levy. He added that Mr. Díaz-Canel often worked as an intermediary between

A section on the party and state would be incomplete without mention of the distinctive approaches to corruption that follows from the ideological paths chosen by the PCC and the CCP. The CCP uses the way of “Anti-corruption in accordance with rules” while PCC uses the way of “Anti-corruption in accordance with movements”. There are legal process and “Shuanggui process” to deal with corruption in China. In addition, Chinese Communist Party enacted a lot of statues about anti-corruption, such as “Supplementary Provisions on the Army’s Implementation of the Regulation of the Communist Party of China on Disciplinary Actions” “Some Rules on Uncorrupted Service of Communists Leading Cadres” “The Inner Supervise Regulations the Communist Party of China (Probationary)” and some other important inner party statues. In contrast, the Cuban Communist Party emphasizes the role of self-discipline and morals and ad hoc investigation and disciplining of its cadres. The action of anti-corruption in Cuba remains more rhetorical and there is little deep institutionalization of anti-corruption mechanisms. The anti-corruption movement may have little real impact now because it remains more policy and gesture. Until it is institutionalized and routinized within a bureaucratic structure it will remain a difficult problem, and one that may be more useful as a political tool than as a good governance mechanism.¹⁷⁷ And indeed, it has been as effectively used against foreigners as it has against cadres.¹⁷⁸

Lastly, Cuba, like China, has been challenged with the elaboration of post-Leninist approaches to the refinement of their respective Party-State systems. More specifically, both states have been facing the problem of the management and allocation of power between the Party and the State. Cuba has adhered formally at least to the old Leninist line that the state and Party functions ought to be kept separate except at the highest levels of authority where the two merge.¹⁷⁹ As early

the central government and the military, which has taken an expanded role in tourism under Raúl Castro. “In that sense,” Mr. López Levy said, “he will face the challenge and opportunity to prepare a smooth landing for a new type of civil-military relationship in the future.””).

¹⁷⁷ Discussed in Larry Catá Backer, *Corruption in Cuba--The Cuban Communist Party Signals Public Recognition and Party Obligation, Law at the End of the Day*, (July 16, 2011), available at <http://lbackerblog.blogspot.com/2011/07/corruption-in-cuba-cuban-communist.html>; Larry Catá Backer, *Juan Tamayo on the Quickening Pace of Publicly Confronting Corruption in Cuba Law at the End of the Day*, (Aug. 15, 2011), available at <http://lbackerblog.blogspot.com/2011/08/juan-tamayo-on-quickening-pace-of.html>.

¹⁷⁸ See, e.g., *Cuba Prosecutes Canadian After He Denounced Corruption—Company*, *Stabroek News* via Reuters, (July 22, 2014), available at <http://www.stabroeknews.com/2014/news/regional/07/22/cuba-prosecutes-canadian-denounced-corruption-company-2/>.

¹⁷⁹ See Constitution of Cuba, Art. 5 (“The Communist Party of Cuba, Martian and of Marxist-Leninist, the organized vanguard of the Cuban nation, is the superior leading

as 1973, Raúl Castro was signaling the identification of this issue and the need to adhere to the Soviet line.¹⁸⁰ He noted: “In reference to this, Lenin said in one of his speeches to the Tenth Congress of the Bolshevik Party, held March 1921: “Being the ruling party, we had inevitably to merge the Party and government leadership—they are merged and will remain so.””¹⁸¹ The reality has been somewhat messier at the levels below the leadership levels. The connection between state and Party is diffuse and it has been unclear what the division of authority may be. The resulting difficulties are ameliorated to the extent that the equivalent offices of State and Party are filled by the same set of individuals. Yet that mediating effect also substantially erodes the institutional autonomy of both organizations in ways that make it hard for the PCC to focus on its role as the vanguard Party, leaving to the state the more technical task of administration.

The focus of the reform of Chinese political system is the division of Party power and administrative power. This represents a fundamental shift in the application of Marxist-Leninist theory to the problem of governing the state and its relation to the vanguard party. In China, there has been a move toward a separation of powers grounded in a split between political power—which rests with the vanguard Party and exists above the Constitution, and the administrative power, which is exercised through the State organs and subject to the constraints of the national constitution. The object is to ensure that the political work of the Party as an institution is distinct from the work of the state as the apparatus through which such political work is implemented. That provides a basis for separating political issues, open only to Party members and the intra-party mechanisms of democratic centralism, from administrative issues, for which popular participation may be encouraged as an instrument for ensuring administrative efficiency. The national constitution is understood as the supreme law over the administrative apparatus, but it is also the application of the party line and is understood as the substantive principles of the party’s political in be which, as

force of the society and the State, organizing and guiding the common efforts aimed at the highest goals of the construction of socialism and advancement toward the communist society.”), available at <http://www.constitutionnet.org/files/Cuba%20Constitution.pdf>.

¹⁸⁰ See Raúl Castro Ruz, *Democratic Centralism in the Communist Party of Cuba*, Speech given to cadres of Central Committee of the Communist Party of Cuba, (May 4, 1973), available at http://www2.pslweb.org/site/News2?page=NewsArticle&id=6395&news_iv_ctrl=1222.

¹⁸¹ *Ibid.* (“Fidel expressed the same position during an August 1970 meeting: “The only place where absolute subordination occurs is at the highest level, because it must obligatorily occur there according to the principle that the Party has maximum responsibility in administration.”” *Ibid.*).

principle but not law is applicable to the CCP.¹⁸² More importantly is the move toward what the Chinese call Socialist Democracy—an effort to routinize and institutionalize intra-Party democracy in collective decision-making and the development of a theory that makes this effort compatible with basic principles of Marxist-Leninism.¹⁸³

VII. IDEOLOGY AND TRANSITION—CUBA AT A CROSSROADS.

In advancing his notion of the role of the Communist Party as a revolutionary vanguard, Lenin warned, “Surely, it is not sufficient to call ourselves the ‘vanguard’, it is necessary to act like one; we must act in such a way that all of the other unites of the army shall see us, and be obliged to admit that we are the vanguard.”¹⁸⁴ Yet the half century of control of that ideology by one of the great founders of the Cuban Revolution has produced a set of contradictions that may be difficult to overcome. It has set Cuba on a Marxist course that is neither inevitable nor necessarily one that incorporates progress and development. Born of a sense of revolutionary fulfillment in 1959, it has rejected the idea of post-revolutionary development and a transition to a ruling party, and has provided an ideology grounded in preservation of a state of economic development that has not been attained.¹⁸⁵ This is a variation of Marxist-Leninist ideological development quite inconsistent with that of China.

A. *The Ideological Challenge for Cuba.*

Transition is coming to Cuba. Everyone from the PCC to the most traditionalist factions in the United States and its government understand that change is coming to Cuba. It is the nature of the changes and their ultimate goals over which there is disagreement. Many in the

¹⁸² Discussed in Larry Catá Backer and Keren Wang, *The Emerging Structures of Socialist Constitutionalism With Chinese Characteristics: Extra-Judicial Detention (Laojiao and Shuanggui) and the Chinese Constitutional Order*, *Pacific Rim Law & Policy Journal* 23(2):251-341 (2014).

¹⁸³ See, Hu Angang, *Collective Presidency in China* (Beijing: Tsinghua Institute for Contemporary China Studies, 2013).

¹⁸⁴ *Ibid.*, 80.

¹⁸⁵ “Why has reform—economic, political, and social—been so half-hearted in contemporary Cuba? Why has Cuba not followed the example of China or Vietnam in enacting more thoroughgoing market reforms that could galvanize its economy? The enduring vitality of ideology provides an important part of the answer. . . . Castro has consistently developed rhetorical strategies for both domestic and international consumption with an eye toward defending the ideals and accomplishments of the national project.” Eusebio Mujal-Léon and Joshua W. Busby, *Much Ado About Something?: Regime Change in Cuba*, in *Cuban Communism, 1959-2003*, *supra.*, 499-500.

West see the ‘transition’ as inevitably moving toward western style democracy and markets based economy.¹⁸⁶ Many in the PCC see the ‘transition’ as a gradual opening, as narrow as possible, to solve present crises without effectuating substantial changes in the basic character of the Cuban state—Stalinist, centrally planned, with a vestigial non-state sector and a robust set of state to state relations as the basis of its global engagement. Both of these factions, one based in Miami for the most part, and the other in Havana, are living on the ethers of dreams grounded in the phantasmagorical effect of January 1, 1959 and as incarnated, its living presence in policy and ideology. Both mistake mythology for reality and the hard work of a vanguard party for the cathartic effect of the instant of revolutionary victory.

In 1975, at the start of the First Congress of the Cuban Communist Party, Fidel Castro noted: “When we analyze other revolutionary processes we became anxious because they were not consolidated, because they were not institutionalized, because they provide no guarantee for the future.”¹⁸⁷ Yet by 2014, it has become clear that Mr. Castro might well have been speaking about the course of his own revolution. Any consideration of “Cuba's Perplexing Changes,” then, must take into account the ideological foundations of PCC and state. To dismiss either is to fail to understand both the essence of the direction of reform in Cuba and its limitations, limitations made inevitable by the constraints and taboos built into the ruling ideological system. This is not unique to Cuba—the American discussion of health care reform suggests the power of ideology to substantially constrain and shape debate in the United States. Ironically, it is in this sense that the United States has finally caught up to Fidel Castro and his still quite

¹⁸⁶ See, e.g., Edward Gonzalez, *After Castro: Alternative Regimes and U.S. Policy*, Institute for Cuban and Cuban-American Studies (2002).

¹⁸⁷ Fidel Castro Ruz, Discurso pronunciado por el Comandante en Jefe Fidel Castro Ruz, primer secretario del Comité Central del Partido Comunista de Cuba y primer ministro del gobierno revolucionario, en el acto en que le fueran entregados los compromisos del pueblo en saludo al Primer Congreso del Partido por parte de los dirigentes de las organizaciones de masas, en el Palacio de la Revolución, el 29 de mayo de 1975,” [Speech by Commander in Chief Fidel Castro Ruz, first secretary of the Central Committee of the Communist Party of Cuba and prime minister of the revolutionary government, in the proceedings in which the leaders of the organizations of the masses conveyed the undertakings of the nation in salutation to the First Party Congress in the Palace of the Revolution] AÑO DEL PRIMER CONGRESO, available at <http://congresopcc.cip.cu/wp-content/uploads/2011/02/DISCURSO-DE-FIDEL-EN-EL-ACTO-EN-QUE-LE-FUERAN-ENTREGADOS-LOS-COMPROMISOS-DEL-PUEBLO-EN-SALUDO-AL-PRIMER-CONGRESO-DEL-PARTIDO.pdf> (in the original: “Cuando nosotros analizamos otros procesos revolucionarios, nos angustiamos porque no se consolidan, porque no se institucionalizan, porque no implican garantía del futuro.”).

powerful insight, that the “battle of ideas” is the foundation of all efforts to confront the conditions of any state.¹⁸⁸

Today the PCC stands at a great crossroads—one that will determine its future and the future character of the operational ideology of the Cuban state. The internal self-contradictions of European Marxism was brought to full flower within the unsustainable ideology of Stalinism, which itself was sustained only by an excess of bureaucracy and cult of personality. These self-contradictions, embraced by the PCC,¹⁸⁹ combined with the ossification of Cuban Marxism-Castroism—an almost obsessive reflex to use the entire resources of the nation to stop time on January 1, 1959 (an obsession mirrored perversely by their adversaries within certain elements of the Cuban exile community), threaten the viability of the PCC more than any threat by the Americans and the Cuban exile community, both of which have remained substantially impotent, ideologically and in terms of power politics, to affect facts on the ground in Cuba to come close to their own objectives. The failures and ideological gaps in the moves toward economic reform of the last 5 years suggest the problem.

As is suggested by an analysis of the new Foreign Investment Law, the problem is not with Marxism and its compatibility with global trends, or with the Party-State system as a general matter. The problem is ideological and structural and centers on the PCC itself. Unable to escape the logic and tensions of the ideological stasis grounded in an unchanging approach to an understanding of Marxist Leninist theory, and even of the Castroism that sought to apply its logic to the context of Cuba, any effort to structure deep economic reform will necessarily founder with its inability to conform to the realities of the Cuban situation being irreconcilable with an ideological base that appears to be unchanging and indifferent to the scientific development inherent in the founding ideology itself. The problem of economic reform in Cuba, then, is not that the Cuban state is too Marxist—the problem might well be that *the PCC is not Marxist enough*.

¹⁸⁸ See, e.g., Mauricio A. Font, *Cuba and Castro: Beyond the ‘Battle of Ideas’*, in *A Changing Cuba in a Changing World* 43-72 (Mauricio A. Font, ed., New York: Bildner Center for Western Hemisphere Studies, 2008), available at http://www.gc.cuny.edu/CUNY_GC/media/CUNY-Graduate-Center/PDF/Centers/Bildner%20Center%20for%20Western%20Hemisphere%20Studies/CubaBOOK2008-frombackup.pdf#page=57.

¹⁸⁹ And indeed, a hint of its early genesis was clear within a few years of the coming to power of the revolutionary government. Ernesto “Che” Guevara, *Against Bureaucratism*, (February, 1963) in *THE CHE READER: WRITINGS ON POLITICS AND REVOLUTION* 178-183 (David Deutschmann, ed., Ocean Press, 2005), available at <https://www.marxists.org/archive/guevara/1963/02/against-bureaucratism.htm>. There is a further irony here, the bureaucratism of post-revolutionary Cuba may well have preceded its formal embrace of a Stalinist Party-State apparatus.

These problems of the PCC are of their own making.¹⁹⁰ The ossification of theory, the failure to dismantle the structures of cult of personality, the tendency toward personal politics within the upper levels of the PCC, the corruption born of the Stalinist structures of *nomenclatura* have all contributed to the malaise,¹⁹¹ to the drive toward irrelevance toward which the PCC had been rushing through 2011. But the problem is not with Marxism-Leninism, or with the theoretical viability of a Party-State system. The dynamic relationship between Party, Marxist ideology, state structures, and modernization in China suggests that the Cuban path toward the achievement of a communist state is not necessarily the only one. It has certainly proven not be particularly successful. Some within the PCC have begun to understand that, and the 6th Party Congress has suggested, some tentative moves away from the old stasis are necessary.

And indeed, the pace of transition, and the pressures that it will put on the PCC in the coming years increased dramatically after 2014, when the governments of Cuba and the United States announced agreement on talks designed to bring an end to the current state of relations' between them. The goal of normalized relations may be difficult to attain, but small and important steps are already working. Yet if the process produces even partial successes that will eliminate a substantial leg of the revolutionary project—the sacrifices necessary to guard against the United States—and leave the PCC (along with the state apparatus it administers) exposed to direct criticisms where its rigidity produces little by way of economic or societal development, in whatever direction it is to be taken.

The PCC has the power to move beyond these processes. That requires, beyond the institutionalization of the PCC itself (a vast and complex task in its own right), the de-personification of the structures of Party rule, and the institution of rule of law cultures within the Party, in the PCC's relationship with the state apparatus, and in the behaviors of the state apparatus itself. While the PCC as a vanguard Party is expected to set policy and the objectives to which the state ought to attain, Cuban

¹⁹⁰ See, e.g., Arturo Lopez-Levy, *Communist Party Must Do More to Spur Cuba Reforms*, Fox News Latino, (Nov. 19, 2011), available at <http://latino.foxnews.com/latino/politics/2011/11/19/scholar-communist-party-must-do-more-to-spur-cuba-reforms/> ("But, according to Lopez-Levy, the type of change insinuated by President Raul Castro's reform plan requires a party that not only "wears the mantle of the revolution, of the historical path (the island has taken since 1959), but which is focused on the political task of promoting that reform." . . . "That involves more significant political changes that do not mean the (end of the one-party system) or anything of the sort, but do imply a more dynamic role for the party as a vehicle of change, reform and institutionalization," the expert said.").

¹⁹¹ Cf., Slavoj Zizek, *Stalinism*, Lacan.com (1997/2007), available at <http://www.lacan.com/zizstalin.htm>.

Marxism fails by continuing the unsustainable policies of a half century ago that suggested that law and politics converge, the Party must govern as well as direct, and that there ought not to be a separation between administration and governance. The Chinese and the Vietnamese have shown, however much these systems still must develop and evolve, that it is possible to develop a Marxist system compatible with markets, without overweening state control of economic activity (though of policy), one that separates the Party from the administrative organs of state, and that eventually provide a space for popular engagement with state administration, while opening political participation more generally to all levels of Party members. But that will be the choice of the PCC. Until then, it is unlikely that economic reform will be possible beyond what we have seen in the form of the cooperatives regulation, a miserly state opening of a small and anemic non-state sector, and an invitation to foreign investors viewed not as a means of generating economic wealth through joint enterprise, but of seeking capital through investment.¹⁹²

B. *Ideology and the Cuban and Chinese Paths to Socialist Modernization.*

On a state visit to Cuba by Chinese President Xi Jinping, he expressed a view about the ideological linkages between China and Cuba. “China and Cuba, as fellow socialist countries, are closely linked by the same visions, ideals and goals,...China is full of confidence about the future development of relations between our country and Cuba, and that we will forever be good friends, comrades and brothers of Cuba,” he added after private talks with Castro.” Yet the state visit did more to point out the differences between Chinese and Cuban approaches to the organization of a Marxist Leninist state, and to the constraints of ideology on the ability of their respective Communist Parties to meet economic challenges. One might have expected a greater affinity among the Cubans and Chinese. The communist party serves as the vanguard party in each respective state, and in that role each embodies the political authority of the state and the source of political policy. Grounded in similar foundational political theories, both might have been expected to follow the same political path. Yet, as has become quite clear, these have not.

The particular and distinct construction and operation of the Chinese Communist Party and Cuban Communist Party within their states, then, have has a great impact on the development of the states and

¹⁹² And thus the caution expressed in Miriam Celaya, Telaraña para atrapar inversionistas: Resta ver cuántos empresarios incautos caerán en las turbias redes de la nueva Ley de la Inversión extranjera, *CubaNet*, (viernes, abril 4, 2014), available at <http://www.cubanet.org/opiniones/telarana-para-atrapar-inversionistas/>.

on the operation of their governments. Those differences suggest important insights that are fundamental to an understanding of the contradictions within Cuban Marxism and the operation of the PCC.

First, the PCC has not advanced the institutionalization of the Party and its structures as compared to those of the CCP. This is particularly noticeable in the differences with respect to the development of socialist rule of law frameworks in China and the continued emphasis on individuals and individual discretion in Cuba. Moreover Cuba remains substantially governed by members of the founding generation, and with it tended toward cult of personality and the subordination of collective Party leadership, which was at its most pronounced before the ascendancy of Raúl Castro.

Second, and most important, the PCC engagement with its founding ideology has become ossified, its internal contradictions exposed through that ossification has created substantial tensions between the objectives of socialist modernization, economic reform, and the ultimate goals of crafting a communist society. These have substantially inhibited a robust dialogue for developing Marxism along lines compatible with the particular conditions of Cuba. The process of fashioning the *Lineamientos de la Política Económica y Social* for the 6th Party Congress in 2011 suggest the potential and limits of party ideology in this respect. The CCP has, in contrast, incorporated premises of ideological dynamism and contextualism within its governing ideology, making it possible to build on Marxist-Leninist theory to better conform ideology, the ultimate objectives of the CCP in its vanguard role, and Chinese conditions.

Third, the PCC and state apparatus remain conjoined in ways that foster incoherence in governance. Convergence of authority suggest the conjoining of law and politics—of the political work of the party and the administrative work of the state that was a hallmark of European states within the Soviet orbit. A significant repercussion of this ideological organizing premise touched on the ability of a Marxist-Leninist state to create rule-based institutionalization through administrative mechanisms that produce coherent and predictable governance. In Cuba now, as in the old Soviet world, rules are gateways to the exercise of discretion, or signals of which sectors of the Cuban bureaucracy seeks to assert control over the activity. The new Foreign Investment Law is a case in point. The earlier Cooperatives legislation also serves as a model of this ideology applied to the business of government. In contrast, the CCP has increasingly distinguished between the work of the CCP, focusing on its Leninist vanguard role and democratizing its internal decision making structures. It has more deeply embedded the separation of powers between the political work of the CCP and the administrative obligations of the state apparatus, and in this way has been able to foster the beginnings of a rule of law culture

(within state and Party apparatus) without constraining the vanguard political role of the CCP.

As a consequence, socialist modernization is substantially inhibited in Cuba by the ideological stasis of the PCC, only now just tentatively showing signs of awakening from its long slumber, the lack of institutional discipline within the PCC, and the sloppiness of function convergence between state and PCC. Because the PCC has failed to grow and develop as conditions in Cuba have changed, because its focus remains centered on its revolutionary moment of triumph, its antagonism with the United States, and reluctance to move from a people centered to rule centered form of institutionalization of power, it has made reform virtually impossible that is not compatible with these premises. China took a very different path, from the late 1970s, one that retained the foundations of Marxist-Leninism but developed it to suit the context in which the nation found itself and modified to ensure that theory better aligned with facts.

The considerations that help usefully frame some of the ways in which the PCC's ideological choices (compared with those of the CCP) deeply affected and constrained the organization and operation of the communist parties of each state and the approaches to and function of the state apparatus have produced substantial differences in approaches to state organization and economic policy. These differences are ideologically driven. Chinese Marxism is dynamic and expressly bound up in the formation of policy and its transposition to state action. Cuban Marxism is originalist and detached from the making of policy, a process that has become more about implementation in the shadow of the past than exercises in robust policy making by the vanguard party. China used a scientifically developed theory of Marxist Leninism that incorporated additional layers onto the core theory that reflected China's conditions in light of its objectives, to produce an elaborate and complex governance system that reflected these theories. Cuba continues to struggle to adapt its ideology, built on the essential transformative and now timeless insights of the moment of revolutionary triumph, into a more flexible governance structures that can be adapted to the times and conditions of the state. The consequences are now easier to see.

VIII. CONCLUSION.

This essay has sought to make six principle points. First, ideology is central to the 'problem' of Cuba. But ideology is not understood in its Western sense. Rather, ideology is better explained as the articulation of the fundamental tenets of the political, social and

economic culture of the state,¹⁹³ the way one understands the political premises underlying the U.S. Constitution and the premises of its “Bill of Rights.” These premises may not be the formal instruments by which power is recognized, organized and exercised, but it serves to channel and constrain its articulation, organization and exercise.

Second, Cuba through its vanguard Party, the PCC, has chosen a particular path toward the articulation and application of Marxism-Leninism in the organization and exercise of power. Cuba’s PCC has chosen to adhere to the European and Soviet approach to Marxist-Leninism, that has proven to be a failure, mostly because of its inability to reconcile the contradictions between its ideological verities and the realities on the ground. That form of Marxist-Leninist-Stalinism tends to freeze the idea at the moment of the Revolution’s triumph and to attempt to make eternal that moment. *Preserving* the Revolution becomes the paramount ideological stance. The objective of preservation of revolutionary ideals becomes the engine of ideological development. It has been the central element of Fidel’s construction of the foundations for Cuban state ideology, not just with internal application, but also as a basis for the organization of regional trade blocs and for Cuba’s great influence in global institutions.¹⁹⁴

Third, the specific manifestation of PCC ideology has a direct effect on the structures of the Cuban Party and state. Organizational culture is incoherent in the absence of its ideological framework. In the case of Cuba especially, it has been foundational in the way in which both state and Party have been organized and function. It has also been the foundation of Cuban regionalism. For Cuba that has meant a substantial intermeshing of Party in the functioning of the state and of the state apparatus subsumed within Party structures. It has also reduced the importance of law as a basis for administration and a substantial reliance on administrative discretion as a substitute for systems of rules. It is ideology that has reduced incentives to deepen the institutionalization of the PCC, including institutions for reducing corruption of PCC and state officials. But most importantly, it has transformed a revolutionary party into the chief priest of the cult of the revolutionary moment, guarding

¹⁹³ In the Chinese context, see discussion in Larry Catá Backer, *The Rule of Law, the Chinese Communist Party, and Ideological Campaigns: Sange Daibiao (the Three Represents), Socialist Rule of Law, and Modern Chinese Constitutionalism*. *Journal of Transnational Law and Contemporary Problems*, Vol. 16, No. 1, 2006, *available at* SSRN: <http://ssrn.com/abstract=929636>.

¹⁹⁴ It has been powerful enough to affect even the forms of the discussion of the regulatory context of business and human rights. See, e.g., Larry Catá Backer, *The Guiding Principles of Business and Human Rights at a Crossroads: The State, the Enterprise, and the Spectre of a Treaty to Bind them All* (July 5, 2014), *available at* SSRN: <http://ssrn.com/abstract=2462844>.

that transformative instant from deviation or change. Only recently has the PCC indicated a vague willingness to “share the experience of governance” with China, for example.¹⁹⁵

Fourth, ideology has an important consequential effect on the shape and scope of reforms. The ideological framework of Cuba explains the limits of current efforts at economic reform. Such reform can only be understood within the constructs of ideological taboos. These help explain the reasons such reforms may ultimately present inescapable contradiction (opening markets within a culture of central planning and administrative discretion for all market operations). It is ideology that drives a central planning ideal. That, in turn reinforces the policy of framing all economic regulation of activity that is not directly controlled not in terms of compliance with structuring rules but as a maze of discretionary approvals and monitoring designed effectively to substitute administrative discretion for a rules based system. While the Chinese are slowly moving toward something like a socialist rule of law construct, the PCC’s ideological base makes that harder to adopt in practice. The ALBA model applied inward is the best example of this point, especially in the context of the new Foreign Investment Law, to the recent regulation of cooperatives and to the framework for the limited opening of the non-state sector. It is ideology, then, that drives an opening of a non/state sector grounded in the need to solicit approval for licenses to practice any of about 200 specific occupations, or that requires multiple levels of approval for the establishment of cooperatives or for foreign direct investment.

Fifth, Marxist-Leninist ideology, like Western style democracy and markets oriented economic ideology, offers more than one path. Beyond variations of European Stalinism (and its Trotsky Theory alternative), the Chinese have developed a different path since the death of Mao Zedong. That path has been grounded on a view of Marxist-Leninism as a dynamic and incomplete process that must be further developed (scientific development) toward the substantive goals of Marxism, for which Leninism provides the foundation for organization approaches, though not their ultimate and enduring forms (socialist modernization).¹⁹⁶ Harmonious development toward the goal of

¹⁹⁵ Chinese Premier Meets Cuba’s First Vice President, Xinhua, (June 19, 2013), available at <http://english.cpc.people.com.cn/206972/206976/8290188.html>. Miguez Diaz-Canel, Cuban First Vice President, in Beijing for a meeting with Chinese Premier Li Keqiang, acknowledged the importance of bilateral ties between the two countries, and the relationship with China. He related that “the Cuban side is ready to increase high-level interactions, share the experience of governance and deepen practical cooperation with China in areas including trade, technology, infrastructure, telecommunication, education and tourism.” Ibid.

¹⁹⁶ “The question is being asked, what is the relationship between this continuing class struggle in China which Premier Hua’s speech affirmed, and the campaign to carry out

achieving a communist state, rather than egalitarianism and class struggle as a basis for further development that will augment a communist reality, tends to guide Chinese ideology. Most importantly, the emphasis of understanding Marxism as in development and necessarily subject to refinement under national conditions and in line with the times changes the institutional role of the vanguard Party from a guardian of past victories to something more akin to a magisterium, through which the entire wisdom of the Party may be applied to the development of what in the language of the Constitution of the CCP is references as “important guiding principle for China's economic and social development and a major strategic thought that must be upheld and applied in developing socialism with Chinese characteristics.”¹⁹⁷ This is not to suggest that Cuba ought to mimic China, the way it was once suggested it mimic European Stalinism. Rather, it suggests that the ossification of Cuban Marxist ideology is not inevitable.

Sixth, transition is coming to Cuba. Everyone from the PCC to the most traditionalist factions in the United States and its government understand that change is coming to Cuba. It is the nature of the changes and their ultimate goals over which there is disagreement. Most in the West see the ‘transition’ as inevitably moving toward western style democracy and markets based economy. Many in the PCC see the ‘transition’ as a gradual opening, as narrow as possible, to solve present crises without effectuating substantial changes in the basic character of the Cuban state—Stalinist, centrally planned, with a vestigial non-state sector and a robust set of state to state relations as the basis of its global engagement. Both of these factions, one based in Miami for the most part, and the other in Havana, are living on the ethers of dreams grounded in the phantasmagorical effect of January 1, 1959 and as incarnated, its living presence in policy and ideology. Both mistake mythology for reality, and the hard work of a vanguard party for the cathartic effect of the instant of revolutionary victory.

A revolution may be consummated in an orgasmic moment, but a vanguard party must base its legitimacy—its right to continue to lead the political community that emerges from revolution—on its ability to

the four modernizations? Hua brought out the two controversial points dealing with this subject. First he said that “class struggle is no longer the principal contradiction in our society.” Secondly he called for an end to “large scale, turbulent class struggle” in the future.” Michael Klonsky, Commentary by CPML Chairman: Socialist modernization and the class struggle in China today, *The Call* 8(32) (1979), available at <http://www.marxists.org/history/erol/ncm-5/klonsky-china-2.htm>. (“Whether here in the U.S. or in China, there can be no substitute for concrete analysis of concrete conditions. This is the heart and soul of Marxism-Leninism.”).

¹⁹⁷ Constitution Chinese Communist Party General Program, available at http://news.xinhuanet.com/english/2007-10/25/content_6944738.htm.

develop truth from facts. As Alfredo Guevara noted as long ago as 2010 in discussing the future of Cuban Marxism, “As the State and as the revolutionary vanguard—if that’s what we continue to be— we have to choose another path, one road or another, but it will take some time.”¹⁹⁸ Still, as this essay has suggested, the time to make that choice, for good or ill, is now. That requires courage, an absence of ego, the abandonment of cults of personality, the institutionalization of power and a renewed focus on ultimate objectives. China has shown one path toward a Marxist-Leninist system that is forward looking. Cuba must find its own if it is to overcome the constraints and contradictions of the ideological dead ends it continues to embrace and retain, after the founding generation passes, its Socialist character and develop a Cuban variant of Chinese Socialist Democracy. That path must draw on Cuba’s own indigenous roots and be consonant with the political cultures of Latin America, within which its governance style remains situated. That requires a very different approach to the theoretical foundations of the Cuban Party and State, an approach to seeks to do more than preserve and apply. Only that approach to reform will produce the conceptual language which is a necessary precursor to economic reform that will work and not be sabotaged by its tension with the Party’s current ruling style. In the absence of such ideological reform, economic reform will not be possible. In the absence of that sort of reform, something more radical and disruptive is more likely.

¹⁹⁸ Fernando Ravensberg, Cuba’s Battle of Ideas, *Havana Times*, (July 2010), available at <http://www.havanatimes.org/?p=25770>.

STATE OF NATURE THEORY IN TRADITIONAL CHINESE POLITICAL AND LEGAL THOUGHT

By Norman P. Ho*

State of nature theory has served as an important theoretical foundation for various political theories. It is usually used to justify the development and existence of certain political institutions and/or to explain why and how a government could come into being from a state of nature. While numerous studies have examined the role of state of nature theory in Western political thought—most notably, in the political thought of Thomas Hobbes and John Locke—very few studies have examined state of nature theory in Chinese political thought. This Article argues that certain traditional Chinese thinkers did in fact explicitly set forth state of nature arguments as theoretical foundations and justifications for their political thought. It describes and analyzes the state of nature theories of three important traditional Chinese thinkers: Mozi (c. 480-390 B.C.), Xunzi (c. 4th to 3rd century B.C.), and Liu Zongyuan. It also compares their respective state of nature theories with one another, as well as with those of Hobbes and Locke. It concludes with a discussion of the implications of its findings on Chinese political and legal theory more broadly.

* Assistant Professor of Law, Peking University School of Transnational Law.

TABLE OF CONTENTS

I. INTRODUCTION 133

II. STATE OF NATURE THEORIES OF MOZI, XUNZI, AND LIU ZONGYUAN 136

 A. MOZI 136

 B. XUNZI 141

 C. LIU ZONGYUAN 146

 D. GENERAL REMARKS: COMPARISONS AMONG MOZI, XUNZI, AND LIU ZONGYUAN 149

III. IMPLICATIONS AND CONCLUSION 149

I. INTRODUCTION

State of nature theory has served as an important foundation for various political theories, most notably in the political thought of Western political philosophers such as Thomas Hobbes and John Locke. It also lies at the theoretical base of social contract theory. To summarize, state of nature theories take as their starting position a pre-government and pre-political world of independent persons living together without political institutions or social hierarchies.¹ Furthermore, state of nature theories attempt to show that persons in such a world would rather choose to organize together or accept certain political institutions and try to justify certain political institutions by demonstrating that such institutions are compatible with people's interests or rights.² Therefore, state of nature arguments help to explain why and how a government can arise from this pre-government and pre-political world and why persons would decide to establish, or be beholden to, a government authority.

Because of the significance of state of nature theory in Western political thought, namely in the political and legal thought of key thinkers such as Thomas Hobbes and John Locke, there has been a vast scholarly literature on state of nature theory in Western political philosophy. Such literature has focused on a wide range of topics, including scholarship seeking to explain, interpret, and compare Hobbes's and Locke's state of nature theory.³ However, hardly any scholarly literature exists (in either English or Chinese languages) examining state of nature arguments in traditional Chinese political and legal thought.⁴ A few articles exist comparing the political and legal

¹ Robert Grafstein, *The Significance of Modern State of Nature Theory*, 19 POLITY 529, 529 (Summer 1987).

² *Id.*

³ The scholarly literature on Hobbes's and Locke's political philosophy is too large to mention here. For a good list of representative works on Hobbes and Locke, many of which discuss their state of nature theories, see the bibliography lists in Sharon A. Lloyd & Susanne Sreedhar, *Hobbes's Moral and Political Philosophy*, THE STAN. ENCYCLOPEDIA OF PHIL. (Edward N. Zalta ed., Spring 2014), available at <http://plato.stanford.edu/archives/spr2014/entries/hobbes-moral/> and also Alex Tuckness, *Locke's Political Philosophy*, THE STAN. ENCYCLOPEDIA OF PHIL. (Edward N. Zalta ed., Winter 2012), available at <http://plato.stanford.edu/archives/win2012/entries/locke-political/>.

⁴ By "traditional Chinese political and legal thought," I refer generally to Chinese political and legal thought in dynastic China (i.e., from Chinese antiquity up to and including the last imperial Chinese dynasty, the Qing dynasty (1644-1911)). As examples of important works on Chinese philosophy which do not really discuss state of nature theories of Chinese thinkers, see, e.g., A.C. Graham, *DISPUTERS OF THE TAO* (1989), Feng Yu-lan, *A SHORT HISTORY OF CHINESE PHILOSOPHY* (1948); BEIJING DAXUE ZHIXUE XI ZHONGGUO ZHIXUE JIAOYAN SHI 北京大学哲学系中国哲学教研室 [PEKING

thought of certain traditional Chinese philosophers with Western thinkers such as Hobbes and Machiavelli, but they do not really discuss state of nature theories.⁵ Some works do mention the state of nature theories of individual traditional Chinese thinkers, but do not analyze them in depth or compare state of nature theories across different traditional Chinese thinkers.⁶ To my knowledge, there is no one single article which explains and compares state of nature theories advanced by different traditional Chinese thinkers and which also compares such theories with state of nature theories advanced by Western political theorists such as Hobbes and Locke.

At its broadest level, this Article argues that certain traditional Chinese thinkers did in fact explicitly set forth state of nature arguments as theoretical foundations and justifications for their political thought. It describes and analyzes the state of nature theories of three important traditional Chinese thinkers: Mozi 墨子 (c. 480-390 B.C.), Xunzi 荀子 (c. 4th to 3rd century B.C.), and Liu Zongyuan 柳宗元 (773 – 819). It will also compare state of nature theories among these thinkers and also with the state of nature theories of Hobbes and Locke, arguably the two most famous Western political theorists who each constructed their political thought on an explicit state of nature theory. The reasons for focusing on the above three Chinese thinkers are simple: first, and most

UNIVERSITY DEPARTMENT OF PHILOSOPHY (CHINESE PHILOSOPHY RESEARCH AND TEACHING DEPARTMENT)], ZHONGGUO ZHIXUE SHI 中国哲学史 [HISTORY OF CHINESE PHILOSOPHY] (2d. ed., 2003).

⁵ See, e.g., A.P. Martinich, *The Sovereign in the Political Thought of Hanfeizi and Thomas Hobbes*, 38 J. OF CHINESE PHIL. 64, 64-72 (Feb. 2011); Markus Fischer, *The Book of Lord Shang Compared with Machiavelli and Hobbes*, 11 DAO 201, 201-221 (June 2012).

⁶ See, e.g., Karyn L. Lai, AN INTRODUCTION TO CHINESE PHILOSOPHY 63-64 (2008) (briefly mentioning Mozi's state of nature theory); Chris Fraser, *The Mohist School*, in HISTORY OF CHINESE PHILOSOPHY 137, 144-145 (Bo Mou ed., 2009) (briefly discussing Mozi's state of nature theory and comparing it in passing with Hobbes, but without sustained discussion or comparison with other Chinese thinkers' state of nature arguments); Bryan W. Van Norden, INTRODUCTION TO CLASSICAL CHINESE PHILOSOPHY 58-59, 166-167 (2011) (briefly discussing and comparing Mozi's and Xunzi's state of nature theories, but without real comparison with Western theorists); A.S. Cua, *The Quasi-Empirical Aspect of Hsün-Tzu's Philosophy of Human Nature*, 28 PHIL. EAST AND WEST 3, 3-19 (Jan. 1978) (briefly comparing Hobbes's and Xunzi's state of nature theories); Philip J. Ivanhoe, *Happy Symmetry: Xunzi's Ethical Thought*, 59 J. AM. ACAD. RELIGION 309, 309-322 (Summer 1991) (briefly comparing Hobbes's and Xunzi's state of nature theories); Wang Ming 王铭 & Chun Fang 春芳, *Xunzi zhengzhi sixiang zhong de 'qi yue lun' se cai 荀子政治思想中的“契约论”色彩* [Elements of Social Contract Theory in Xunzi's Political Thought], 30 SHAANXI SHIFAN DAXUE XUEBAO (ZHIXUE SHEHUI KEXUE BAN) 陕西师范大学学报 (哲学社会科学版) [J. SHAANXI NORMAL U. (SOC. SCI.)] 207, 207-209 (May 2001) (briefly comparing Xunzi's state of nature theory to Western social contract theory).

importantly, they each explicitly and clearly set forth state of nature arguments (as opposed to other Chinese thinkers, such as Confucius, who did not clearly explicate a state of nature theory in a sustained manner). Second, such clear explication of a state of nature theory by each of these three thinkers offers an opportunity for internal comparison of their state of nature arguments. Such comparison is instructive, as each thinker comes from a different philosophical school or philosophical pedigree—Mozi as a founder and representative of the Mohist school, Xunzi as a successor of Confucius and a member of the Confucian school (but whose brand of Confucianism failed to become the orthodox line of Confucian thought in traditional China), and Liu Zongyuan as a “seminal”⁷ Confucian thinker active in the mid-Tang Confucian revival movement who received his intellectual pedigree and heritage from what became the more orthodox line of Confucian thought as set forth by Mencius, another of Confucius’s successors. Third, unlike Daoist thinkers such as Laozi and Zhuangzi (who also employed state of nature arguments but who did not see much value for political institutions in their versions of an ideal society), Mozi, Xunzi, and Liu Zongyuan all saw a need for political institutions given their views on the state of nature. Fourth, such clear explication by each of these three thinkers and their use of state of nature theory to justify government institutions also offers an opportunity for comparison of the state of nature arguments with those in the Western tradition—namely, the state of nature arguments advanced by Hobbes and Locke, arguably the two most famous Western political theorists who constructed their political thought on explicit state of nature arguments. Following these comparative analyses, this Article will also argue that we can see similarities and differences among the state of nature arguments advanced by Mozi, Xunzi, and Liu Zongyuan. It will also argue that Mozi’s, Xunzi’s, and Liu Zongyuan’s state of nature theories share similarities and differences with Locke’s and Hobbes’s. The Article will then conclude and also discuss some more far-reaching implications of its findings on Chinese political and legal thought.

⁷ JO-SHUI CHEN, LIU TSUNG-YÜAN AND INTELLECTUAL CHANGE IN T’ANG CHINA, 773-819, at 5 (1992).

II. STATE OF NATURE THEORIES OF MOZI, XUNZI, AND LIU ZONGYUAN

A. *Mozi*

Before we delve into Mozi's state of nature theory, it is important to understand the historical context in which Mozi lived and also his general philosophical positions. Mozi was a philosopher during the Warring States period (475-221 B.C.), a time of political turmoil. Various states were engaged in aggressive warfare, usurpations, aggressions, acts of regicide, and other coercive seizures of power on a frequent and large scale. Mozi witnessed such disorder personally, and "must have been profoundly conscious of the bitter suffering and disastrous calamities" as a result of such turmoil.⁸ As such, like many of his contemporaries, he was trying to present a political, moral, and social philosophy which would solve the ills of his day. He was one of the first critics of Confucius, condemning the Confucian emphasis on ritual (*li* 礼), hierarchy, and family-based ethics. Instead of emphasizing the morals central to Confucian thought (such as benevolence, or *ren* 仁), Mozi built his philosophical system on a largely utilitarian, consequentialist base, urging the state to maximize wealth, order, and population. He also urged people to follow the standards of Heaven by practicing universal love (*jian ai* 兼爱) so that each person would care for others impartially, thereby maximizing social utility.⁹ In addition, with respect to philosophical style, Mozi was one of the first Chinese thinkers to present his arguments in a more logically sophisticated way. His teachings were compiled in a text called the *Mozi*.

Having introduced Mozi's background and his general philosophical positions, we can proceed to Mozi's state of nature argument (set forth in Chapter 11.1 of the *Mozi*) which serves as the foundation of his political theory:

Ancient times, when people first came into being, were times when there were as yet no laws or government, so it was said

⁸ KUNG-CHUAN HSIAO, A HISTORY OF CHINESE POLITICAL THOUGHT, VOLUME ONE: FROM THE BEGINNINGS TO THE SIXTH CENTURY A.D. 227 (F.W. Mote trans., Princeton U. Press 1979).

⁹ Philip J. Ivanhoe, *Mozi: Introduction and Translation*, in READINGS IN CLASSICAL CHINESE PHILOSOPHY 59, 60 (Philip J. Ivanhoe & Bryan W. Van Norden eds., 2d ed. 2001). It is outside the scope of this Article to provide a detailed explanation of Mozi's background and philosophy as a whole. A large body of scholarship on Mozi exists. For representative works, see, e.g., Philip J. Ivanhoe, *Mohist Philosophy*, in 6 THE ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY 451, 451-455 (Edward Craig ed., 1998); A.C. GRAHAM, LATER MOHIST LOGIC, ETHICS, AND SCIENCE (1978); SCOTT LOWE, MO TZU'S RELIGIOUS BLUEPRINT FOR A CHINESE UTOPIA (1992).

that people had differing principles. This meant that, if there was one person, there was one principle; if there were two people, there were two principles; and if there were ten people, there were ten principles. The more people there were, the more things there were that were spoken of as principles. This was a case of people affirming their own principles and condemning those of other people. The consequence of this was mutual condemnation. In this way, within a household, fathers and sons, and older and younger brothers were resentful and hostile, separated and dispersed, and unable to reach agreement and accord with each other. Throughout the world, people all used water and fire, and poisons and potions to injure and harm one another. As a result, those with strength to spare did not use it to help each other in their work, surplus goods rotted and decayed and were not used for mutual distribution, and good doctrines were hidden and obscured and not used for mutual teaching. So the world was in a state of disorder comparable to that amongst birds and beasts.¹⁰

Mozi's state of nature is a state of disorder caused initially by a diversity of norms and principles. In other words, there is no uniform norm or standard that can govern and lead society; each and every person is his or her own judge and executioner. The human beings in Mozi's state of nature are not without cognitive function—after all, they have the mental ability and intellect to identify principles, choose the principle they wish to follow, “affirm” and defend their principles, and “condemn” and debase the principles of others. As population grows, there are more and more competing norms in society, which will lead to “mutual condemnation” and growing conflicts. Furthermore, by acknowledging the existence of families and “households” as areas where conflicts can occur, Mozi seemed to assume that persons are, by nature, social beings. Eventually, conflicts will not only grow more numerous, but also more intense—mutual condemnation (which would likely be verbal at first) devolves into violent condemnation, with people looking to “injure and harm one another.” In other words, the problems in Mozi's state of nature are caused by what we might call uncontrolled, rampant, and perhaps narcissistic, individualism.

The end result of conflicts brought about by lack of uniformity in societal norms is economic and social disorder. Because individuals are in conflict, there is a lack of human cooperation in society, which wastes important resources and the distribution of such resources. Furthermore, the multiplicity of norms obscures “good doctrines,” which could be

¹⁰ THE MOZI: A COMPLETE TRANSLATION 91 (Ian Johnston trans., Chinese U. Hong Kong Press, 2010).

used for guiding and teaching the populace. Here, we see that Mozi assumed even in the state of nature that there did exist a single, desirable, uniform norm in society that lay at the base of these “good doctrines.” And, although not explicit in Mozi’s remarks above, we can assume that there are certain persons in society who already ascribe to the good norm present in the “good doctrines”—it is just that the norm they follow has been obscured and hidden by the wide diversity of other competing norms in the state of nature.

We might pause here to critique Mozi’s state of nature theory. Mozi assumed that a world populated by individuals with a multiplicity of norms would definitely lead to “mutual condemnation” and disorder. However, why couldn’t such individuals live in harmony? Also, Mozi did not appear to consider issues such as hierarchy of norms—there may be some norms that are more important than others and have a bigger effect on society. For example, individuals in Mozi’s state of nature could all possibly agree with the norm that fair and efficient allocation of resources should be promoted, but they might disagree on less significant, lower-level norms (to use a modern example, some of Mozi’s persons may believe the speed-limit should be set at 55 miles per hour, while others believe the speed-limit should be set at 60 miles per hour). Multiplicity in less significant, lower-level norms may not necessarily lead to the frequent, violent, and fatal disorder that Mozi warned against.

What, therefore, is the solution to get out of this undesirable state of nature? Chapter 11.2 of the *Mozi* explains that “it is quite clear that what is taken as disorder in the world arises from lack of effective rule. Therefore the one who was the most worthy and able in the world was selected and established as being the Son of Heaven.”¹¹ In other words, the solution is to select a benevolent, intelligent person to be the Son of Heaven (i.e., the emperor), who will decide and set a uniform, universal norm of what is right and wrong and to select worthy individuals to assist in his rule.¹² It is not clear exactly how this selection is to take place. Nor is it clear who selects the Son of Heaven—there is, for example, no language suggesting that persons in Mozi’s state of nature enter into some compact or covenant (e.g., a social contract) with the selected ruler. In this way, the quarrelling and contending people in Mozi’s state of nature seem to be relegated to a passive role in the transition from state of nature to a governed world, but at the same time, Mozi did have some optimism and faith in individuals in that they could be taught and transformed to embrace the “good doctrines” and the foundational universal norm as set by the Son of Heaven. Despite the authoritarian tones of this transition in Mozi’s political thought, it is important to note

¹¹ *Id.*

¹² Van Norden, *supra* note 6, at 59.

that Mozi believed that the Son of Heaven does himself have a standard that he and his government must follow. He must follow the standards of Heaven. Chapter 26.3 of the *Mozi* sets forth that, “. . . the Son of Heaven does not follow his own wishes in bringing about correctness; [t]here is Heaven to rectify him.”¹³ Furthermore, Heaven takes as its standards the values of life, wealth, and order: “So then, Heaven desires its (the world’s) ‘life’ and abhors its ‘death.’ It desires its wealth and abhors its poverty. It desires its order and abhors its disorder.”¹⁴ It therefore follows that the ruler should select norms and rule with such norms and implement policies that maximize life (e.g., increasing the population), wealth, and order. This emphasis on societal utility is not surprising given the consequentialist bent of Mozi’s philosophy as a whole. Mozi therefore assumed that the Son of Heaven would have the intellectual ability to be able to identify and choose such a uniform norm with which to rule. In some respects, we can see similarities between Mozi’s emphasis on a uniform norm and Kelsen’s theory of the basic norm (*Grundnorm*). As Kelsen argued, the basic norm is the ultimate norm on which all other norms rest. For Kelsen, selection of the basic norm is not arbitrary, but rather must be selected by the legal scientist (who perhaps can be analogized to the Son of Heaven in Mozi’s thought), who must choose one based on principles of efficacy, i.e., that most people would in fact behave and conduct their affairs in accordance with the basic norm.¹⁵ Likewise, Mozi believed that the chosen, foundational norm with which to rule the people should be a norm that maximizes life, wealth, and order. It follows logically that Mozi would have likely also agreed that a norm that maximizes such values would be more likely to be obeyed than a norm that did not – i.e., using Kelsenian language, it would be an efficacious norm.

Therefore, in sum, Mozi believed that government could solve the problems associated with the state of nature by deciding on and promulgating a unified norm that all individuals have to follow. Such a norm cannot be totally arbitrary, however; it must follow Heaven’s standards by ensuring order, wealth, and the people’s livelihood.

Mozi’s state of nature theory shares similarities with that of Locke’s. Locke’s state of nature theory is largely set forth in Chapter 2 (“Of the State of Nature”) in his *Second Treatise of Government* (hereafter referred to as the *Second Treatise*), which was published anonymously in 1689. In the *Second Treatise*, Locke tried to explain the

¹³ THE MOZI: A COMPLETE TRANSLATION, *supra* note 10, at 235, 237.

¹⁴ *Id.* at 235.

¹⁵ See generally M.D.A. FREEMAN, LLOYD’S INTRODUCTION TO JURISPRUDENCE 308-310 (8th ed., 2008) (summarizes and provides overview of Kelsen’s theory of the *Grundnorm*).

true foundation of government, and he began with a discussion of the state of nature in which men find themselves prior to government.¹⁶ Locke's state of nature is not a Hobbesian state of war—men in Locke's state of nature are perfectly free and perfectly equal, and they have rights to life, liberty, and property. They are also naturally social beings. Even though they are in a "state of liberty," there are not in a "state of license"¹⁷—in other words, Locke believed that men in the state of nature were bound by natural law and had the ability to recognize and respect other people's natural rights.¹⁸ However, the key problem in the state of nature for Locke was that every individual would interpret their own laws—in other words, each person would be his/her own interpreter, judge, and law enforcer.¹⁹ Indeed, Locke defined the state of nature as "[m]en living together according to reason, without a common superior on earth with authority to judge between them"²⁰ For Locke, men become "judges in their own cases" and "everyone has the executive power of the law of nature."²¹ As a result, Locke believed this could lead to "confusion and disorder," as self-love would make men "partial to themselves and their friends" and "ill-nature, passion, and revenge" would cause men to punish others too severely.²² As long as resources in the state of nature are plentiful, this situation of each man as his own interpreter, judge, and enforcer might not be a problem, but resources are scarce, and society will become more complex and competitive, which will lead to more conflicts.²³ What, therefore, could help resolve these problems associated with the state of nature? Locke's answer is that "civil government is the proper remedy for the inconveniences of the state of nature"²⁴ Locke believed that people in the state of nature would enter a covenant with the sovereign, conceding supreme authority to the sovereign to protect liberty, life, and estate, but whereby the sovereign is included in civil society and thereby constrained according to the covenant.²⁵

¹⁶ Robert A. Goldwin, *John Locke*, in HISTORY OF POLITICAL PHILOSOPHY 476, 477 (Leo Strauss & Joseph Cropsey eds., 3rd ed., 1987).

¹⁷ JOHN LOCKE, *The Second Treatise of Government*, in POLITICAL WRITINGS 261, 263 (David Wootton ed., Hackett Publishing Co., Inc. 2003) (1689).

¹⁸ J.S. McCLELLAND, A HISTORY OF WESTERN POLITICAL THOUGHT 222 (1996).

¹⁹ SURI RATNAPALA, JURISPRUDENCE 150 (2009).

²⁰ LOCKE, *supra* note 17, at 270.

²¹ *Id.* at 267.

²² *Id.*

²³ RATNAPALA, *supra* note 19, at 150.

²⁴ LOCKE, *supra* note 17, at 267.

²⁵ RATNAPALA, *supra* note 19, at 150; McCLELLAND, *supra* note 18, at 222.

We can therefore see similarities between Locke's and Mozi's state of nature theories. Most significantly, Locke and Mozi traced the roots of disorder in their respective states of nature to the problem of a multiplicity of individual norms—for Locke, the problem was that each man would serve as his own interpreter, judge, and enforcer, and for Mozi, the problem was similarly that each person would have his own “principle” and therefore condemn others with different principles, just as the Lockean man would condemn others when judging his own case. Both Locke and Mozi also arguably assumed that man was by nature a social being (e.g., Mozi's assumption of pre-existing family structures), as opposed to Hobbes, who denied that man is naturally social and political.²⁶ Of course, there are some key differences that cannot be ignored—Locke's governmental solution was to be constrained by the social contract (indeed, Locke was pushing for limited government in the *Second Treatise*) and had to serve the people's natural rights, such as liberty and property. There is no comparable language or ideas in Mozi's state of nature theory—Mozi's government solution, represented by the Son of Heaven and his selected officials, had more latitude to choose a governing norm not based on any idea of natural rights, but rather on the maximization of wealth, life, and order. As such, I would argue that Locke was more optimistic toward the individual ability of men in the state of nature and therefore ascribed to them more active powers of agency (e.g., the ability to enter into, and negotiate, a covenant with the sovereign), whereby the man in Mozi's state of nature requires guidance from a higher authority as to the identification of basic norms to follow in daily living. However, despite the arguably more authoritarian nature of Mozi's philosophy, it is important to remember that Mozi's Son of Heaven was not without constraints—similar to Locke's civil government, which was to be constrained by the terms of the covenant with the people and obligated to protect life, liberty, and estate, Mozi's Son of Heaven had to also fulfill his obligation of maintaining the well-being of his people.

B. *Xunzi*

Like Mozi, Xunzi was also a philosopher during the chaotic and tumultuous Warring States period. Xunzi was an ardent defender of Confucianism and opponent of Mozi (among others); whereas Mozi criticized the Confucian emphasis on ritual and music, Xunzi argued that ritual, self-cultivation, and education were all critical in helping to morally transform individuals. He differed from the Confucian

²⁶ See Lawrence Berns, *Thomas Hobbes*, in *HISTORY OF POLITICAL PHILOSOPHY* 396, 399 (Leo Strauss & Joseph Cropsey eds., 3rd ed., 1987).

philosopher Mencius in the interpretation of human nature, arguing that human nature is bad and self-interested. Mencius, in contrast, argued that human nature was fundamentally good. Mencius's interpretations on human nature eventually became the Confucian orthodoxy, and Xunzi's thought was neglected for many centuries in traditional China. However, his status as a key philosopher in the Confucian tradition who employed clear, logical, expository essays to explain his thought is not under dispute.²⁷ Today, Xunzi's thought is contained within the *Xunzi* text, a collection of essays on different subjects.²⁸

Having introduced Xunzi's background and his general philosophical positions, we can proceed to Xunzi's state of nature argument (from Book 19.1a of the *Xunzi*), which he uses to justify the importance of ritual and government:

How did ritual principles arise? I say that men are born with desires which, if not satisfied, cannot but lead men to seek to satisfy them. If in seeking to satisfy their desires men observe no measure and apportion things without limits, then it would be impossible for them not to contend over the means to satisfy their desires. Such contention leads to disorder. Disorder leads to poverty. The Ancient Kings abhorred such disorder; so they established the regulations contained within ritual and moral principles in order to apportion things, to nurture the desires of men, and to supply the means for their satisfaction. They so fashioned their regulations that desires should not want for the things which satisfy them and goods would not be exhausted by the desires. In this way, the two of them, desires and goods, sustained each other over the course of time. This is the origin of ritual principles.²⁹

Xunzi's state of nature is also one of chaos and disorder. But unlike Mozi, who traced disorder in the state of nature to the uncontrollable, narcissistic multiplicity of individual norms, Xunzi set the blame on the innate desires of man, coupled with man's desire to satisfy those desires at the expense of others amidst a world of limited resources. For Xunzi, desires of men were characterized by profit-

²⁷ Eric L. Hutton, *Xunzi: Introduction and Translation*, in READINGS IN CLASSICAL CHINESE PHILOSOPHY 255, 255-256 (Philip J. Ivanhoe & Bryan W. Van Norden eds., 2d ed. 2001).

²⁸ It is outside the scope of this Article to provide a detailed overview of Xunzi and his thought. For representative scholarly works on Xunzi, refer to PAUL R. GOLDIN, RITUALS OF THE WAY: THE PHILOSOPHY OF XUNZI (1999), VIRTUE, NATURE, AND MORAL AGENCY IN THE XUNZI (T.C. Kline III & Philip J. Ivanhoe eds., 2000), and D.C. Lau, *Theories of Human Nature in Mencius and Shyuntzzy*, 15 BULL. SCH. ORIENTAL AND AFR. STUD. 541, 541-565 (1953).

²⁹ XUNZI: A TRANSLATION AND STUDY OF THE COMPLETE WORKS, VOLUME III 55 (John Knoblock trans., Stan. U. Press, 1994).

seeking self-interest. As Xunzi argued, “[a] love of profit and the desire to obtain it belong to man’s essential and inborn nature.”³⁰ Furthermore, for Xunzi, not even the powers of family love—such as fraternal bonds—could mitigate this desire for profit and self-interest: “. . . [s]uppose that younger and elder brothers have valuable goods that are supposed to be apportioned among them, and further suppose that they follow the true feelings of their inborn nature—namely, a love of profit and the desire to obtain it—then younger and elder brothers will fall into fighting among themselves and robbing each other.”³¹ In another passage, Xunzi was even more unambiguous regarding the nature of man’s desires:

Now, the nature of man is such that he is born with a love of profit. Following this nature will cause its aggressiveness and greedy tendencies to grow and courtesy and deference to disappear. Humans are born with feelings of envy and hatred. Indulging these feelings causes violence and crime to develop and loyalty and trustworthiness to perish. Man is born possessing the desires of the eyes and ears (which are found of sounds and colors). Indulging these desires causes dissolute and wanton behavior to result and ritual and moral principles, precepts of good form, and the natural order of reason to perish.³²

Man’s innate nature is bad, and Xunzi’s state of nature theory assumes that men originally know no limits when it comes to satisfying their own desires. Mutual contention for resources or other things (to satisfy desires of self-profit) will lead eventually to poverty, presumably due to scarcity of resources. What, therefore, is the solution out of this undesirable state of nature? The Ancient Kings—sagely rulers—had to establish ritual and standards to solve this chaos. They came up rules for the economy and for allocation of resources; ritual, for example could provide such rules.³³ They also came up with rules and standards to “nurture” the people and make them satisfied in order to balance “goods” and “desires.” This fix, in Xunzi’s view, was not a quick one, but one which would require some time. Yet, like Mozi, Xunzi did have faith and optimism in people; Xunzi assumed that their desires *could* be

³⁰ *Id.* at 154. This passage is from Book 23.2a of the *Xunzi*.

³¹ *Id.* This passage is also from Book 23.2a of the *Xunzi*.

³² *Id.* at 151. This passage is from Book 23.1a of the *Xunzi*.

³³ For example, ritual provides that an eldest brother inherits his father’s land and that elders are served the best foods first (while the younger diners wait). Besides rules for allocation of resources, ritual, in Xunzi’s view, transform people by remolding people’s motivations – as a specific example, Xunzi used the example of the ritual of music as transformative – certain types of music can help us express our feelings of happiness and encourage us to live in harmony with others. See Van Norden, *supra* note 6, at 167-168.

nurtured and that they *could* be satisfied. Indeed, Xunzi believed that despite man's innately bad nature, each and every person could be transformed through ritual and cultivation to become a morally perfect person.

Similarly to Mozi, Xunzi also put a lot of faith in a central ruler and authority. Mozi's faith was in the Son of Heaven to select and rule with the correct norm, whereas Xunzi placed his faith in the Ancient Kings (and by extension, rulers who emulated the Ancient Kings) in being able to lead man out of the state of nature through ritual. In addition, given Xunzi's example of the failure of fraternal love to control and restrain man's innate desires, we can argue that Xunzi also, similar to Mozi, assumed that it is in people's human natures to associate with others. In other words, through Xunzi's fraternal love argument, we can see that he assumed fraternal bonds were naturally pre-existing, and therefore, that people by nature associate with others. This assumption of man as a social animal in the state of nature is one Xunzi's state of nature theory shares with Locke. Indeed, Xunzi remarked that "[g]rasses and trees grow together with their own type; birds and beasts live together in their own groups; each thing follows after its own kind."³⁴ In other words, it is human nature to follow after other humans, just as birds and beasts live with their own species. Xunzi also argued that "[a]s a general principle, all creatures that live between Heaven and Earth and have blood and breath are certain to possess awareness. Having awareness, each of them loves its own kind."³⁵ Thus, man by nature associates and socializes with other men. In this regard, Xunzi's assumptions on human sociality are similar with Locke's.

Some scholars have briefly compared Xunzi with Hobbes, but have not done so in a very sustained manner.³⁶ Indeed, there are numerous points of similarity between Xunzi's and Hobbes's state of nature theories. First, both Xunzi and Hobbes were both influenced by times of political crisis. Xunzi was a philosopher during the chaotic Warring States period, and Hobbes had lived through a period of political turmoil and the English Civil War. In his seminal work, *Leviathan*, Hobbes sought to "discover rational principles for the construction of a civil polity that would not be subject to destruction from within."³⁷ The destructive nature of the English Civil War had lasting effects on

³⁴ XUNZI: A TRANSLATION AND STUDY OF THE COMPLETE WORKS, VOLUME I 138 (John Knoblock trans., Stan. U. Press, 1994). This passage is from Book 1.5a of the *Xunzi*.

³⁵ XUNZI: A TRANSLATION AND STUDY OF THE COMPLETE WORKS, VOLUME III, *supra* note 29, at 6. This passage is from Book 19.9b of the *Xunzi*.

³⁶ For a discussion of such scholarship, *see supra* note 6.

³⁷ Sharon A. Lloyd & Susanne Sreedhar, *Hobbes's Moral and Political Philosophy*, STAN. ENCYCLOPEDIA PHIL. (Edward N. Zalta ed., Spring 2014), available at <http://plato.stanford.edu/archives/spr2014/entries/hobbes-moral/>.

Hobbes, who believed than any kind of government—even an oppressive government—is preferable to civil war.³⁸ Xunzi, similarly, was trying to articulate a philosophy that would bring about order and improvement in society.

Second, both Xunzi and Hobbes envisioned a state of nature characterized by the state of war, largely caused by selfishness of human nature for the chaos in a state of nature (in contrast with Mozi and Locke, who both emphasized the problems of a multiplicity of individual norms and standards). For Hobbes, human nature is characterized by self-interest; indeed, as he argued in *Leviathan*, “of the voluntary actions of every man, the object is some good to himself.”³⁹ As for benevolence in human actions, he wrote: “[D]isinterested benevolence and action for the sake of duty are uncommon enough that political theory should not take much account of them.”⁴⁰ In the Hobbesian state of nature, men are equal in strength and in intellectual ability, and they all have the equal ability to kill each other. Their most important concern is self-preservation, and this equality “leads to equality of hopes and to competition among men, among all who desires the same things.”⁴¹ Because there is no government, there are no notions of justice or injustice, since such notions can only arise with the presence of law and government, both of which are non-existent in a state of nature. As such, this competition leads to conflict and a state of war, and everybody’s life would be “solitary, poor, nasty, brutish, and short.”⁴² However, as Hobbes argued, people by nature do not like conflict and will seek peace out of passion and reason; they will enter into a covenant whereby they surrender their autonomy to a sovereign power capable of dispensing justice and protecting their rights.⁴³ The sovereign’s power will be terminated when he/she, or it, is unable to provide this protection.⁴⁴ Therefore, a third point of similarity between Xunzi’s and Hobbes’s state of nature theories is their belief in the absolute power of a governing leader to bring people out of the state of nature. For Xunzi, it was to be a ruler in the likeness of the “Ancient Kings.” For Hobbes’s theory, the ideal sovereign would be an absolute monarch, but could also be an institution like parliament.

³⁸ *Id.*

³⁹ THOMAS HOBBS, *LEVIATHAN* 82 (Edwin Curley ed., Hackett Publishing Co., Inc. 1994) (1651).

⁴⁰ *Id.*

⁴¹ Berns, *supra* note 26, at 399.

⁴² HOBBS, *supra* note 39, at 76.

⁴³ RATNAPALA, *supra* note 19, at 148.

⁴⁴ *Id.* at 149.

There are important differences as well in Xunzi's and Hobbes's state of nature theories. As Philip J. Ivanhoe has pointed out, Xunzi did not propose a social contract theory and sought to restrain man's human nature through ritual.⁴⁵ Furthermore, although both believed in a strong ruler as a way out of the state of nature, Hobbes imagined people surrendering their autonomy to a sovereign power; there is no comparable act of surrender in Xunzi's state of nature theory. Rather, Xunzi seemed to suggest that people will follow their rulers through the act of self-cultivation by ritual. In other words, Xunzi was arguably more optimistic than Hobbes regarding the capacities of the man in the state of nature—Xunzi believed that man could, through ritual and guidance from rulers like the “Ancient Kings,” be nurtured and leave the state of disorder.

C. *Liu Zongyuan*

Liu Zongyuan was a noted Tang dynasty writer and official, as well as a respected Confucian thinker, who also explicated clear, written views on the state of nature.⁴⁶ As mentioned in the beginning of the Article, Liu Zongyuan also serves as an interesting point of comparison with Xunzi, because Liu Zongyuan received his intellectual pedigree and heritage from what became the more orthodox line of Confucian thought as set forth by Mencius. Liu Zongyuan set forth his state of nature theory in his *Essay on Enfeoffment* (*Feng jian lun* 封建论). At the time, the Tang court debated whether to support a policy of decentralization of government through emulation and adoption of a classic enfeoffment system utilized in the Zhou dynasty (i.e., yielding authority to provincial warlords and border commandaries) or to reassert and reestablish central authority.⁴⁷ Liu Zongyuan supported central authority, and he wrote *Essay on Enfeoffment* to defend his positions. The *Essay on Enfeoffment* begins with Liu Zongyuan's state of nature theory:

In the beginning, men lived among the myriad other creatures. Brush and trees grew in thickets; wild deer and boar roamed in herds over the land. Men could use neither their hands nor their teeth for fighting, nor had they hair or feathers, and so they were unable to nourish and protect themselves. To use a

⁴⁵ Ivanhoe, *A Happy Symmetry*, *supra* note 6, at 309.

⁴⁶ It is outside the scope of this Article to provide a detailed overview of Liu Zongyuan's life and career. The two key works in the English language on Liu Zongyuan are WILLIAM H. NEINHAUSER ET AL., *LIU TSUNG-YÜAN* (1973); CHEN, *supra* note 7.

⁴⁷ Liu Zongyuan, *Essay on Enfeoffment*, in *SOURCES OF CHINESE TRADITION, VOLUME 1: FROM EARLIEST TIMES TO 1600*, at 559 (Wm. Theodore de Bary & Irene Bloom comp. and ed., J. Mason Gentaler trans., Colum. U. Press 1999). I use Gentaler's translation of the title *Essay on Enfeoffment*.

phrase of Xun Qing's, [i.e., Xunzi's] "it was necessary to depend on other things put to artificial use."⁴⁸

In contrast to Mozi and Xunzi, Liu Zongyuan's state of nature seems to go back even further in time to an even more prehistoric, primeval period. He presented man as simply one of the "myriad other creatures," deficient, weak, and defenseless, surrounded by thick vegetation and other roaming beasts. Interestingly, Liu Zongyuan quoted from Xunzi ("it was necessary to depend on other things put to artificial use"). In reality, the full passage to which Liu Zongyuan refers to in the *Xunzi* says: "[a] man who borrows a horse and carriage does not improve his feet, but he can extend his travels 1,000 *li*.⁴⁹ A man who borrows a boat and paddles does not gain any new ability in water, but he can cut across rivers and seas. The gentleman by birth is not different from other men; he is just good at 'borrowing' the use of external things."⁵⁰ Therefore, Liu Zongyuan argued that in the state of nature, all men were basically equal (similar to Mozi, Xunzi, Locke, and Hobbes). Furthermore, man's reliance on external assistance and his status "just" as a borrower of "external things" further emphasize his own weaknesses and deficiencies in the state of nature. Liu Zongyuan continued:

Quarrels were bound to arise over these other things. Unable to put a stop to these quarrels, men had to seek out someone who was able to differentiate between right and wrong, and follow his commands. Large numbers were certain to go and do obeisance to an intelligent and enlightened person. If they failed to change after he had told them the right way, he had to inflict pain on them so that they would understand fear. Through this process, princes and chiefs, as well as punishments and laws, came into being. Thus, everyone in a locality would gather together and form a group. But, since there were other, separate groups, the quarrels between them naturally became greater than before, and when they became greater, men with weapons and men with moral authority appeared. When this happened, the heads of local groups went to a man of greater moral authority and followed his commands, so that their subordinates might have peace. And so there arose the order of the feudal lords. But then the quarrels became greater still, and so the feudal lords went and followed the commands of those whose moral authority was greater, so that their fiefs might have peace. And so there appeared regional chiefs and leaders. But then the quarrels

⁴⁸ *Id.* at 559-560.

⁴⁹ *Li* 里 is an ancient Chinese unit of measurement for distance.

⁵⁰ XUNZI: A TRANSLATION AND STUDY OF THE COMPLETE WORKS, VOLUME I, *supra* note 34, at 136. This passage is from Book 1.3 of the *Xunzi*.

became greater still, and the regional chiefs and leaders went and followed the commands of one whose moral authority was greater yet, so that the people might have peace. And so it was that all-under-Heaven came together and was unified.⁵¹

Above, Liu continued his state of nature theory, arguing that conflicts and quarrels were “bound to arise” over the external things man had to use. One weakness with Liu’s argument here is that he was not explicit on why precisely conflicts and quarrels would necessarily occur; similar to Mozi, he simply asserted that quarrels were “bound to arise.” Although he was ambiguous on this question of *why*, the reason is probably because such external things are in limited supply (e.g., limited boats, limited resources). Furthermore, Liu Zongyuan believed that most human actions were motivated by self-interest.⁵² Hence, self-interest combined with limited external things will lead to conflicts and disorder.

How does one escape the state of nature? Here, Liu Zongyuan assigned more power of agency to the people in the state of nature than Mozi and Xunzi did. Liu asserted that men would seek out (and follow) an “intelligent and enlightened” person as a ruler in order to find peace and end the disorder. Here, Liu Zongyuan’s man in the state of nature plays a more active role than the passive man in Mozi’s and Xunzi’s state of nature. In this respect, Liu Zongyuan’s state of nature theory is similar to Locke and Hobbes, who also assign a more active role to men in the state of nature who actively enter into a social contract with the sovereign. Liu Zongyuan’s state of nature theory also seems to assume that man has an impulse and cognitive ability to be able to recognize enlightenment and intelligence in a person. In this respect, he shared Mozi’s and Xunzi’s optimism in man to recognize a good ruler.

Why was Liu Zongyuan’s state of nature theory optimistic with respect to people’s ability to recognize good criteria for moral authority? Although he did not leave behind any formal writings specifically focusing on human nature, we can infer that Liu Zongyuan believed that human nature was fundamentally good, following the Confucian-Mencian tradition.⁵³ As such, if humans are naturally good, they have the innate capacity to be good and to recognize good in others, such as leaders. Leaders, in turn, gained their authority on their abilities to guarantee peace and prosperity.⁵⁴ This method of judging rulers is similar to the state of nature theories of Xunzi and Mozi—Mozi’s consequentialism emphasized that the ruler must follow the standards of Heaven to maximize wealth, life, and order, while Xunzi argued that the

⁵¹ Liu Zongyuan, *supra* note 47, at 560.

⁵² CHEN, *supra* note 7, at 91.

⁵³ NEINHAUSER ET AL., *supra* note 46, at 50, 53.

⁵⁴ *Id.* at 55.

ruler, like the “Ancient Kings” must be able to supply the means to satisfy the people. This major emphasis on a ruler’s ability to preserve peace and prosperity is more similar to Hobbes’s than Locke’s state of nature theory—Locke, for example, emphasized the sovereign’s need to provide peace but also to protect the natural rights of individuals in the state of nature.

D. *General Remarks: Comparisons Among Mozi, Xunzi, and Liu Zongyuan*

Having discussed and compared the state of nature theories of Mozi, Xunzi, and Liu Zongyuan along with Hobbes and Locke, it is helpful at this point to step back and summarize some of the main points of the discussions above. First, we can see that all of these thinkers were operating in similar historical contexts—they were impacted by periods of political disorder or uncertainty and therefore were seeking to use state of nature theory to justify the need for government and political institutions in society. Second, the state of nature theories of Mozi, Xunzi, and Liu Zongyuan lacked the social contract concepts present in Locke’s and Hobbes’s state of nature theories, and therefore, men were assigned a more passive role in Mozi’s, Xunzi’s, and Liu Zongyuan’s state of nature. Third, we can see similarities among Mozi’s, Xunzi’s, and Liu Zongyuan’s state of nature theories, despite their coming from different philosophical schools—all generally justified government based on the need for peace and prosperity, not on the protection of natural rights. All three also shared some optimism in the ability of men in the state of nature to recognize, follow, and judge a good ruler. Fourth, the basis of Mozi’s state of nature theory—namely, the cause of the problems in the state of nature, i.e., the multiplicity of norms—are arguably closer to Locke than Hobbes. Fifth, Xunzi, Mozi, and Liu Zongyuan also shared an assumption more in common with Locke than Hobbes—that is, that man in the state of nature is naturally social.

III. IMPLICATIONS AND CONCLUSION

In this concluding section, I would like to discuss some possible implications of the above analyses to political and legal theory more generally. First, numerous scholars of Chinese political theory and history, and modern commentators, have stressed the authoritarian nature of Chinese government and emphasized its historical roots.⁵⁵ Indeed, a

⁵⁵ See, e.g., HSIAO, *supra* note 8, at 25-26 (arguing that China lacked throughout its history characteristics such as national self-determination, the respect of law and political institutions, and wider popular participation in political power).

still commonly-heard explanation for rigidity, conservatism, and authoritarianism in China today is that China has had an unchanging, historical political system marked by autocracy.⁵⁶ Other explanations emphasize China's uniqueness and unsuitability as a host for Western democracy and values. These explanations have not come only from non-Chinese scholars, but the current Chinese leadership itself—Xi Jinping, for example, has warned against the influx of Western values such as liberal democracy and constitutional government, instead urging the authorities to discover what is perceived as uniquely Chinese governing values derived from the Chinese past and Confucian tradition.⁵⁷ As another example, in January 2015, China's education minister urged universities to shun Western values.⁵⁸

However, given the similarities between traditional Chinese thinkers and key Western liberal theorists such as Locke in state of nature theory—the very basic building blocks of their political theories—one wonders how uniquely “Chinese” these traditional Chinese thinkers were. Second, analysis of the state of nature theories of traditional Chinese thinkers such as Mozi, Xunzi, and Liu Zongyuan may challenge the common descriptions of traditional Chinese political theory as authoritarian or autocratic. Indeed, I would argue that the relationships between people seeking to exit the state of nature and the ruler in Mozi's, Xunzi's, and Liu Zongyuan's state of nature theories can perhaps be better described as a more *cooperative* relationship. In other words, the Chinese tradition emphasized a more *cooperative* relationship between the ruled and the ruler—for Mozi, the goal was a cooperative relationship between ruler and ruled to maximize social utility through the maximization of values of life, order, and wealth; for Xunzi, the cooperative relationship between ruler and ruled also emphasized mutual education and self-cultivation through ritual; and for Liu Zongyuan, it was important for the ruled to seek out a ruler who could “differentiate between right and wrong” and ensure prosperity and peace. Furthermore, this cooperation on the part of the ruled also was to occur on both an individual and collective level—for example, in Mozi's state

⁵⁶ Such views are discussed and heavily critiqued in ALAN T. WOOD, LIMITS TO AUTOCRACY: FROM SUNG NEO-CONFUCIANISM TO A DOCTRINE OF POLITICAL RIGHTS ix-x, 9-10 (1995).

⁵⁷ See, e.g., Chris Buckley, *China Takes Aim at Western Ideas*, N.Y. TIMES, Aug. 19, 2013, available at http://www.nytimes.com/2013/08/20/world/asia/chinas-new-leadership-takes-hard-line-in-secret-memo.html?_r=0; Chris Buckley, *Leader Taps Into Chinese Classics in Seeking to Cement Power*, N.Y. TIMES, Oct. 11, 2014, available at <http://www.nytimes.com/2014/10/12/world/leader-taps-into-chinese-classics-in-seeking-to-cement-power.html>.

⁵⁸ *China universities 'must shun Western values'*, BBC NEWS, Jan. 30, 2015, available at <http://www.bbc.com/news/world-asia-china-31052682>.

of nature theory, each individual would have to recognize the inefficacy of his own individual norms and then come together with others to follow the unified norm of a “Son of Heaven.” Indeed, this is arguably a more *personal* relationship than the contractual relationship characterized by contractual obligations in Locke’s and Hobbes’s state of nature theories. This, in turn, leads to the third implication of this Article—that is, traditional Chinese state of nature theories as reflected in Mozi’s, Xunzi’s, and Liu Zongyuan’s thought also have the potential to contribute to scholarship on modern state of nature theory more generally. As Robert Grafstein has shown, modern state of nature theory has been “widely criticized” by numerous commentators, but such commentators, in Grafstein’s view, miss the “humanizing significance” of the state of nature theory.⁵⁹ The emphasis on individual and collective cooperation between ruled and ruler in traditional Chinese state of nature also strengthens Grafstein’s argument by offering more examples from a non-Western state of nature theoretical tradition. Finally, this Article does recognize that Mozi’s, Xunzi’s, and Liu Zongyuan’s state of nature theories and their underlying assumptions can be used to justify authoritarianism and autocracy—that is, some commentators might argue that such assumptions show that there was never a concept of natural rights or a Lockean social contract binding the sovereign in Chinese traditional political and legal thought. However, it is hoped that this Article has showed that other interpretations are also possible.

⁵⁹ Grafstein, *supra* note 1, at 550.

THE COMPREHENSIVE ANTI-APARTHEID ACT OF 1986:
SEPARATION OF POWERS, FOREIGN POLICY, AND
ECONOMIC SANCTIONS AS A TOOL OF SOCIAL JUSTICE

By Joshua Michaels*

This essay analyzes the passage of the Comprehensive Anti-Apartheid Act of 1986, an important piece of legislation that gave American support to Nelson Mandela's opposition to Apartheid. The act imposed robust sanctions on the Apartheid regime, stripping it of financial and political capital and leading to its downfall just several years later. This essay discusses resistance to the legislation from the Reagan administration, which wanted to "constructively engage" the Apartheid regime instead. In a clear example of checks and balances, Congress overrode President Reagan's veto of the CAAA. Michaels evaluates the future implications of this case, exploring Mandela's legacy on the American political process.

* J.D., University of Hawai'i at Mānoa William S. Richardson School of Law. The author would like to thank Dean Aviam Soifer for his help and guidance throughout the writing process; Antoinette Lilley and Carolyn Michaels for their constant love and support; Stephanie Lee for reviewing an earlier draft; and the Asian-Pacific Law & Policy Journal for their unlimited free printing and snacks. Any errors are the author's alone.

TABLE OF CONTENTS

I. INTRODUCTION 155

II. BACKGROUND: APARTHEID, COMMUNISM, AND DIPLOMACY 157

III. AMERICA’S RESPONSE TO APARTHEID: REAGAN AND CONGRESS BRING TWO DIFFERENT APPROACHES 159

 A. RONALD REAGAN: “CONSTRUCTIVE ENGAGEMENT” 159

 B. CONGRESS TAKES A DIFFERENT APPROACH: THE COMPREHENSIVE ANTI-APARTHEID ACT OF 1986 165

IV. WAS THE CAAA CONSTITUTIONAL? SEPARATION OF POWERS AND U.S. FOREIGN POLICY 171

 A. WHAT IS THE CONSTITUTIONAL BASIS FOR THIS BILL? 171

 B. WHERE IS THE DISPUTE WITH THE EXECUTIVE BRANCH? 172

 C. FINDING “ONE VOICE”: EXECUTIVE POWER, CONGRESSIONAL ACTS, AND FOREIGN AFFAIRS 175

V. THE THIRD BRANCH WEIGHS IN ON SOUTH AFRICA: SUBSEQUENT CAAA LITIGATION 181

 A. SOUTH AFRICAN AIRWAYS V. DOLE 181

 B. HELMS V. SECRETARY OF THE TREASURY 183

VI. SANCTIONS TIGHTEN, APARTHEID UNWINDS, HISTORY UNFOLDS 186

VII. CONCLUSION: WAS THE CAAA SUCCESSFUL? WHAT DID WE LEARN? WHY DOES THIS MATTER? 195

 A. WAS THE CAAA SUCCESSFUL? 195

 B. WHAT HAVE WE LEARNED? 196

 C. WHY DOES THIS MATTER? 199

I. INTRODUCTION

December 5, 2013 – the day that nearly every South African, black, white, and otherwise, had been dreading for months. At 8:50 PM local time, Nelson Rolihlahla Mandela passed away in Johannesburg, South Africa.¹ A few months later, on April 27, 2014, the world marked the twentieth anniversary of Mandela’s election as South Africa’s first black president.² As South Africa transitions into a world without “Madiba,”³ it seems particularly appropriate to reflect on how his country emerged from decades of totalitarian minority rule and the desolation of Apartheid to become the “Rainbow Nation”⁴ that inspired the world. Particularly in the United States, where Mandela was respected and even adored by millions of people, it behooves us to probe America’s role in the international response to Apartheid.

Though Mandela enjoyed great popular support from the American public, he remained skeptical of America’s powerful world influence. He once said of the U.S., “If there is a country that has committed unspeakable atrocities in the world, it is the United States of America. They don’t care for human beings.”⁵ For most of his stay in prison, Mandela had few friends or admirers in the United States government. Whatever American objections to Apartheid there may have been were subsumed within the larger Cold War struggle that enveloped the globe.⁶ South Africa’s white minority government, which enshrined Apartheid as law in 1948, was seen as a reliable bulwark

¹ Bill Keller, *Nelson Mandela, South Africa’s Liberator as Prisoner and President, Dies at 95*, N.Y. Times, Dec. 5, 2013, http://www.nytimes.com/2013/12/06/world/africa/nelson-mandela_obit.html?_r=0; David Smith, *Nelson Mandela, South Africa’s first black president, dies aged 95*, THE GUARDIAN, Dec. 6, 2013, at www.theguardian.com/world/2013/dec/05/nelson-mandela-dies-aged-95-south-africa.

² See generally NELSON MANDELA, *LONG WALK TO FREEDOM: THE AUTOBIOGRAPHY OF NELSON MANDELA* (Back Bay Books, 1995); see also FRANK WELSH, *A HISTORY OF SOUTH AFRICA* (HarperCollins, 2000).

³ Mandela’s “clan name”; it was also used as a term of endearment among South Africans. See Keller, *supra* note 1.

⁴ The nickname for post-Apartheid South Africa, coined by Archbishop Desmond Tutu. See BBC Africa, *Archbishop Tutu: In his own words*, BBC WORLD NEWS, July 22, 2010 at <http://www.bbc.co.uk/news/world-africa-10734471>.

⁵ Simon Hooper, *Mandela’s radicalism often ignored by western admirers*, Al Jazeera America, Dec. 6, 2013, <http://america.aljazeera.com/articles/2013/12/6/mandela-the-radical.html>.

⁶ See generally JOHN LEWIS GADDIS, *THE COLD WAR: A NEW HISTORY* (Penguin Books, 2006).

against communism.⁷ Mandela's African National Congress ("ANC"), on the other hand, was regarded by the White House and the State Department as a violent communist organization.⁸

When Ronald Reagan took office in 1981, he, like his predecessors, was certain that the Apartheid government continued to be a vital anti-communist ally.⁹ South Africa was a pariah state by this point, only supported by Reagan and Margaret Thatcher in Britain.¹⁰ By the middle of the decade, Reagan's Administration found itself unable to suppress the widespread outcry against Apartheid arising from Congress and the American public. Defying the President's urging, Congress passed the Comprehensive Anti-Apartheid Act of 1986 ("CAAA").¹¹ The CAAA was landmark legislation, hitting South Africa with bans on loans and investment, on sales to its military and police, and on banking and imports.¹² On the advice of his conservative aides, Reagan vetoed the bill.¹³ Responding to the challenge, Congress overwhelmingly overrode the veto, comfortably exceeding the two-thirds vote needed in each chamber.¹⁴

The sanctions worked – South Africa lost the support of its chief ally and international bankroller, putting an unworkable strain on the country's finances and international political capital. By 1990, South African President F.W. de Klerk had released Mandela and called for negotiations on ending the Apartheid system.¹⁵ In 1993, the sanctions

⁷ Sam Kleiner, *Apartheid Amnesia: How the GOP conveniently forgot about its role in propping up a white supremacist regime*, FOREIGN POLICY, July 19, 2013, http://www.foreignpolicy.com/articles/2013/07/18/Apartheid_amnesia_gop_nelson_mandela.

⁸ See Caitlin Dewey, *Why Nelson Mandela was on a terrorism watch list in 2008*, WASH. POST, Dec. 7, 2013, at <http://www.washingtonpost.com/blogs/the-fix/wp/2013/12/07/why-nelson-mandela-was-on-a-terrorism-watch-list-in-2008/>.

⁹ Kleiner, *supra* note 7.

¹⁰ *Id.*

¹¹ Comprehensive Anti-Apartheid Act ("CAAA") of 1986, Pub. L. 99-440, 22 U.S.C. §§5001-5116 (repealed 1993).

¹² 22 U.S.C. §5001.

¹³ Sagar Jethani, *The Surprising Republican Civil War that Erupted Over Nelson Mandela and Apartheid*, POLICYMIC, Dec. 5, 2013, <http://www.policymic.com/articles/52029/the-surprising-republican-civil-war-that-erupted-over-nelson-mandela-and-Apartheid>.

¹⁴ *Id.*

¹⁵ See Keller, *supra* note 1 & Mandela, *supra* note 2; see also Christopher S. Wren, *South Africa Moves to Scrap Apartheid*, N.Y. TIMES, Feb. 2, 1991, available at <http://www.nytimes.com/1991/02/02/world/south-africa-moves-to-scrap-Apartheid.html?pagewanted=3&src=pm>.

were lifted.¹⁶ In 1994, Nelson Mandela was elected President of South Africa.¹⁷

This paper examines the historical and legal context of the Comprehensive Anti-Apartheid Act. It uses constitutional analysis of the CAAA as well as subsequent litigation to discuss the doctrine of federal separation of powers and the “political question” doctrine.¹⁸ It discusses our system of checks and balances, particularly the veto and the veto override.¹⁹ It measures some of the significant ways in which constitutional law has had an impact on our foreign policy beyond the context of war and violent conflict. It also discusses the effectiveness of sanctions, and considers the use of sanction and divestment legislation in foreign countries where injustice is prevalent. Legal scholarship on the CAAA mostly dates to 1990 or earlier; this paper will serve as an update that improves understanding of the events of that decade with the benefit of context and hindsight.

II. BACKGROUND: APARTHEID, COMMUNISM, AND DIPLOMACY

In 1948, the South African National Party (“NP”) came to power and enshrined *Apartheid*²⁰ in the nation’s law.²¹ Racial discrimination and white minority rule had existed in South Africa since the arrival of Dutch colonists, but this was the first time it was legally codified as an institution.²² Parliament passed sweeping racial legislation: mandatory racial classifications, exclusions, and forced evictions, all designed to homogenize South African cities and towns.²³ Black Africans bore the worst brunt of Apartheid, and they were supposed to be completely separated from whites politically, socially, and economically. Blacks were required to carry identification at all times and needed passes to

¹⁶ Alex Thompson, *A More Effective Constructive Engagement: US Policy Towards South Africa after the Comprehensive Anti-Apartheid Act of 1986*, POLITIKON: S. AFR. J. OF POLITICAL STUD. 39: 371–389 (2012).

¹⁷ See Keller, *supra* note 1 & Mandela, *supra* note 2.

¹⁸ Even though the President is the Chief Executive and the nation’s foremost diplomat, he or she must also faithfully execute laws passed by Congress. In theory, the President cannot unilaterally command our foreign policy. Given Congress’ authority to regulate commerce with foreign nations, the CAAA clearly constituted a proper use of legislative power. See U.S. Const., art. II.

¹⁹ See generally KATHIANN M. KOWALSKI, CHECKS AND BALANCES: A LOOK AT THE POWERS OF GOVERNMENT (Lerner Publications, 2012).

²⁰ Literally “separateness” in Afrikaans. See Welsh, *supra* note 2.

²¹ Welsh, *supra* note 2, at 414.

²² P. ERIC LOUW, THE RISE, FALL, AND LEGACY OF APARTHEID 56 (Greenwood Publishing Group, 2004).

²³ *Id.* at 82.

travel.²⁴ They could not vote, own property, go on strike, or live in the same towns as whites.²⁵

That same year in the United States, Harry Truman began his second term as President, and his Administration joined with America's Western European allies²⁶ to ratify the North Atlantic Treaty and create NATO.²⁷ That August, the USSR successfully tested its first atomic bomb.²⁸ The Cold War had begun. For the next four decades, the primary foreign affairs concern for both the President and Congress – militarily, diplomatically, and economically – would be to keep communism from expanding.

As the Cold War ramped up, Nelson Mandela became increasingly involved in the struggle against Apartheid. The white government quickly began targeting Mandela and his African National Congress, labeling them “terrorists” and “communists.”²⁹ In 1961, the Union of South Africa declared its independence from Great Britain and became a Republic.³⁰ In 1964, Nelson Mandela was convicted of treason for his actions as a member of the African National Congress and was imprisoned on Robben Island.³¹ Mandela was the world's most famous political prisoner until his release in 1990.³²

²⁴ *Id.* at 109.

²⁵ *Id.*

²⁶ See PETER DUIGNAN, *NATO: ITS PAST, PRESENT, AND FUTURE* 2-4 (Hoover Press, 2000).

²⁷ *Id.* at 4.

²⁸ *Id.* at 6.

²⁹ See Jethani, *supra* note 13. To summarize the years between 1949 and 1961: South Africa cemented its anti-communist credentials by supporting the United Nations war effort in Korea from 1950 through 1953. Hendrik Verwoerd, nicknamed the “Architect of Apartheid,” became Prime Minister in 1958, and white South Africans voted for independence from Britain in a 1960 referendum. In 1950, Mandela became part of the African National Congress’ Executive Board. In 1953, he moved to Johannesburg and opened the only African-run law firm in the city. Mandela radicalized during the 1950s, as he came to the realization that Africans “had no alternative to armed and violent resistance.” See Keller, *supra* note 1 & Welsh, *supra* note 2; see also ANNIE COOMBES, *HISTORY AFTER APARTHEID: VISUAL CULTURE AND PUBLIC MEMORY IN A DEMOCRATIC SOUTH AFRICA* 22 (Duke University Press, 2003); Y.G.M LULAT, *UNITED STATES RELATIONS WITH SOUTH AFRICA: A CRITICAL OVERVIEW FROM THE COLONIAL PERIOD TO THE PRESENT* 145 (Peter Lang, 2008).

³⁰ Though it was still technically part of the British Commonwealth, South Africa had been essentially self-governing since British Parliament passed the “Status of the Union” Act in 1934. See Welsh, *supra* note 2 at 275, 414.

³¹ In 1964, Mandela was sentenced to life in prison for sabotage and conspiracy for his role as head of the ANC’s military wing, *Umkhonto we Sizwe*, or “Spear of the Nation.” See Keller, *supra* note 1.

³² *Id.*

III. AMERICA'S RESPONSE TO APARTHEID: REAGAN AND CONGRESS BRING TWO DIFFERENT APPROACHES

A. Ronald Reagan: "Constructive Engagement"

Even as the international community began to turn South Africa into a pariah state through divestment campaigns,³³ academic³⁴ and athletic boycotts,³⁵ and the United Nations Arms Embargo of 1977, American Presidents kept their foreign policy agendas focused on stopping communism through unilateral executive action. From the 1953 coup in Iran, to the Bay of Pigs, to sending advisors to Vietnam, to the installation of Pinochet in Chile, the President and his advisers -- whether Democratic or Republican -- were the primary foreign policy actors on the world stage.³⁶

South Africa's struggle against Apartheid never became an urgent issue in the White House during the Cold War. In the Cold War mindset, the world was essentially divided into two spheres: capitalism and democracy aligned against communism and totalitarianism. Whatever moral or ethical concerns there might have been about supporting South Africa's government, the South African National Party was always reliably and rabidly anti-Communist. When the Soviets began to increase their influence in Africa, President Richard Nixon and Secretary of State Henry Kissinger³⁷ instituted a policy of "increased

³³ The foremost model guiding socially responsible divestment was the famous "Sullivan Principles", which were promulgated by African-American Reverend Leon Sullivan, who sat on the board of General Motors Company. The Principles were a pledge of corporate social responsibility, through which companies would vow to only do business with corporations and states who respected equality and human rights. See Leon Sullivan, *The Global Sullivan Principles*, <http://www1.umn.edu/humanrts/links/sullivanprinciples.html> (on file with Univ. of Minn. Human Rights Lib.).

³⁴ "By the end of 1982, more than thirty United States colleges and universities had divested themselves of more than \$100 million from banks and corporations operating in South Africa. Notably, Columbia University, Amherst College, Smith College, the University of Wisconsin, Tufts University, and Harvard University divested themselves of some or all of their holdings in companies doing business in South Africa." See Lynn Berat, *Undoing and Redoing Business in South Africa: The Lifting of the Comprehensive Anti-Apartheid Act of 1986 and the Continuing Validity of State and Local Anti-Apartheid Legislation*, 6 CONN. J. INT'L L. 7, 10 (1990).

³⁵ During the height of the anti-Apartheid movement, the Supreme Court (Justice Stevens writing for the majority) decided a very interesting case, holding that the First Amendment protected the right to boycott. See *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

³⁶ See generally STEPHEN KINZER, *OVERTHROW: AMERICA'S CENTURY OF REGIME CHANGE FROM HAWAII TO IRAQ* (MacMillan, 2007).

³⁷ To Kissinger's credit [a phrase not often used with respect to international human rights], he later visited Africa in 1976 and gave a speech in Zambia where he called for

communication” and relaxed criticism of white minority governments in South Africa and Rhodesia.³⁸ In a shameful attempt at racist humor, the State Department nicknamed this strategy “Operation Tar Baby.”³⁹

As nearby Rhodesia, Angola, and Mozambique⁴⁰ erupted into civil war in the late 1970s, South Africa dispatched tens of thousands of soldiers to fight alongside nationalist forces against “Marxist” guerillas.⁴¹ Now known as the South African Border Wars, the conflicts across Southern Africa were some of the bloodiest of the many proxy wars during the Cold War Era.⁴² The U.S. and South Africa supported nationalist belligerents, while the U.S.S.R. and Cuba supported belligerents who claimed to be Marxist or Socialist.⁴³

American support of racial equality in Southern Africa as “an imperative of our own moral heritage.” He was subsequently lambasted by members of his own party, who feared his actions would put Gerald Ford’s 1976 reelection campaign in danger by isolating Southern whites. See Joe Conason, *Conservative Whitewash: Dick Cheney is relying on our cultural amnesia to wipe away his record on South Africa*, SALON, Jul. 31, 2000, http://www.salon.com/2000/08/01/south_africa_3/.

³⁸ See generally ANTHONY LAKE, *THE TAR BABY OPTION: AMERICAN POLICY TOWARD SOUTHERN RHODESIA* (Colum. Univ. Press, 1973).

³⁹ *Id.*

⁴⁰ In Rhodesia (later Zimbabwe), South Africa supported first a white minority government and then black moderates against Robert Mugabe’s Zimbabwe African National Union (“ZANU”), which eventually took power in 1980. In Angola and Mozambique, South Africa supported nationalist guerillas against the People’s Movement for the Liberation of Angola (“MPLA”) and the Mozambique Liberation Front (“FRELIMO”), which had come to power in their respective countries following independence from Portugal in 1975. The conflict with Angola was heavily intertwined with an insurgency in Namibia, which was under South Africa’s control until 1988. The uprising in Namibia (then “South-West Africa”) lasted from 1966 until 1990. See generally W. Martin James III, *A POLITICAL HISTORY OF THE CIVIL WAR IN ANGOLA: 1974-1990* (Transaction Publishers, 2011); WILLEM STEENKAMP, *SOUTH AFRICA’S BORDER WARS* (African Books Collective, 1992).

⁴¹ During Apartheid, South Africa had mandatory conscription for all whites. Nonwhites were still allowed to enlist, but the military was heavily segregated. In these conflicts, white South Africans frequently fought alongside black Africans – which the Pretoria government tried to use to rebut its racist image on the world stage. See generally DAVID WILLIAMS, *ON THE BORDER: THE WHITE SOUTH AFRICAN MILITARY EXPERIENCE* (NB Publishers, 2010).

⁴² See generally STEENKAMP, *supra* note 39; WILLIAMS, *supra* note 40; PETER POLACK, *THE LAST HOT BATTLE OF THE COLD WAR: SOUTH AFRICA VS. CUBA IN THE ANGOLAN CIVIL WAR* (Casemate, 2013).

⁴³ See generally Scott L. Bills: *The World Deployed : US and Soviet Military Intervention and Proxy Wars in the Third World since 1945* in *EAST WEST RIVALRY IN THE THIRD WORLD* (Robert W. Clawson & Alireza Alavi eds., 1986).

Jimmy Carter tried to make Apartheid an issue when he first took office in 1976,⁴⁴ but his foreign policy agenda was soon overrun by peace negotiations between Israel and Egypt, the Iran Hostage Crisis, and the Soviet invasion of Afghanistan.⁴⁵ Once again, Apartheid was put on the political backburner. President Carter's successor in 1980, Ronald Reagan, promoted a foreign policy in which the Commander-in-Chief's power was absolute and the core objective was the total defeat of communism.⁴⁶

The early 1980s showcased some of the worst violence in South Africa, as black protests were repeatedly and violently crushed by government forces. While the rest of the world was horrified at the images of South African oppression, President Reagan and his friend Prime Minister Margaret Thatcher embraced a policy called "constructive engagement."⁴⁷ Chester Crocker, Assistant Secretary of State for African Affairs and the architect of constructive engagement, was a firm believer in free trade.⁴⁸ He maintained that capitalism would open up opportunities for South African blacks, and that it would eventually become too expensive to discriminate against them.⁴⁹ His theory, endorsed by Reagan's Cabinet, was that by encouraging free trade and "constructively engaging" with moderate white South Africans, the U.S. could coax South Africa away from the Apartheid system and toward equality.⁵⁰

In whatever ways the administration might have justified "constructive engagement," it undoubtedly also helped that South Africa was a major trading partner⁵¹ of the U.S. as well as a reliable ally against

⁴⁴ See Office of the Historian, *A Short History of the Department of State: Carter's Foreign Policy*, U.S. DEPT. OF STATE, available at <http://history.state.gov/departmenthistory/short-history/carter>.

⁴⁵ *Id.*

⁴⁶ The Reagan administration's actions in Central America and the Iran-Contra Affair would fully bring some of the nastier truths of this policy to the surface. See Ryan J. Barilleaux and Christopher Kelley, *Ronald Reagan, Iran-Contra, and Presidential Power*, in *THE REAGAN PRESIDENCY: ASSESSING THE MAN AND HIS LEGACY* 115-131 (Paul Kengor & Peter Schweitzer, eds., 2005).

⁴⁷ See generally J.E. DAVIES, *CONSTRUCTIVE ENGAGEMENT? CHESTER CROCKER & AMERICAN POLICY IN SOUTH AFRICA, NAMIBIA & ANGOLA, 1981-8*. (James Currey/Ohio University Press, 2007).

⁴⁸ *Id.*; see also Chester Crocker, *South Africa: Eight Years Later*, *FOREIGN AFF.*, Fall 1989, at 323-51 (1989).

⁴⁹ Davies, *supra* note 47.

⁵⁰ Davies, *supra* note 47; Crocker, *supra* note 48.

⁵¹ U.S. companies supplied 15% of all South Africa's imports, including 45% of oil and 70% of computer equipment. South Africa supplied 75% of American chromium and 66% of its platinum. In 1984, Americans also purchased 485m in Krugerrands and 140m in diamonds. Gregory F. Treverton & Pamela Varle, *The United States and South Africa*:

African communism.⁵² It also mattered that, in Reagan's words, South Africa possessed "vital minerals - vanadium, manganese, chromium, platinum - for which the West [had] no other secure source of supply."⁵³ Critics of constructive engagement asserted that Reagan and Thatcher coddled the Apartheid regime, effectively keeping the pariah state afloat. Whenever an anti-Apartheid or anti-South African resolution came before the U.N. Security Council, the U.S. and Britain tried to weaken it or employed the veto.⁵⁴ The Director of the Central Intelligence Agency, William Casey, even secretly visited Pretoria to train, advise, and equip South Africa's notorious intelligence service, the Bureau of State Security.⁵⁵

As disconcerting as the Reagan administration's lenience toward the Apartheid government proved to be in hindsight, its open hostility toward black political groups such as the African National Congress was even more troubling. As far as America and Britain were concerned, the ANC was full of communists and terrorists.⁵⁶ When a letter from ANC Secretary General Alfred Nzo to the Soviet Communist Party Congress surfaced in 1986, Reagan responded in a policy speech, saying that South Africa had no obligation to negotiate with a group bent on "creating a communist state."⁵⁷ In 1987, Thatcher dismissed the ANC as a "typical terrorist organization" and she allegedly once referred to Mandela as "that grubby little terrorist."⁵⁸ The Reagan administration ultimately put

the 1985 Sanctions Debate, PRINCETON UNIV. INST. FOR THE STUDY OF DIPLOMACY, Case 443 at page 4 (1992).

⁵² In an early interview with CBS newsmen Walter Cronkite, Reagan called South Africa a 'friendly nation' whose reliable anticommunism and wealth of strategic minerals justified stronger ties between Washington and Pretoria." See Conason, *supra* note 37.

⁵³ Lars-Erik Nelson, *The Voice Was Ron's But the Words were Pat Buchanan's*, PHIL. ENQUIRER, Jul. 30, 1986.

⁵⁴ Conason, *supra* note 37.

⁵⁵ *Id.*

⁵⁶ See Kleiner, *supra* notes 7; Dewey, *supra* note 8; and Conason, *supra* note 37.

⁵⁷ Dewey, *supra* note 8

⁵⁸ Thatcher elaborated, "Anyone who thinks [the ANC] is going to run the government in South Africa is living in cloud-cuckoo land." Other members of the Thatcher government expressed similar views. Conservative MP Teddy Taylor said, "Nelson Mandela should be shot." Conservative MP Terry Dicks asked, "How long is the Prime Minister going to continue to allow herself to be kicked in the face by this black terrorist?" Conservative MPs also tried to prove a connection between the ANC and the Irish Republican Army's activities in Northern Ireland. See Anthony Bevins, *Nelson Mandela: From 'terrorist' to tea with the Queen*, THE INDEPENDENT, July 9, 1996, available at <http://www.independent.co.uk/news/world/from-terrorist-to-tea-with-the-queen-1327902.html>.

Mandela and the ANC on its terrorist watch list.⁵⁹ In his memoirs, Canadian Prime Minister Brian Mulroney wrote about his failed attempts to get Reagan and Thatcher to see beyond the Cold War dynamic, to recognize the actual humanitarian crisis of Apartheid:

When we spoke on the telephone the night before I left for London, however, it became clear that Ronald Reagan saw the whole South African issue strictly in East-West Cold War terms. Over the years, he and Margaret continually raised with me their fears that Nelson Mandela and other anti-Apartheid leaders were communists. My answer was always the same. 'How can you or anyone else know that?' I'd ask again and again. 'He's been in prison for 20 years and nobody knows that, for the simple reason no one has talked to him -- including you.'⁶⁰

Winnie Mandela, Nelson's wife, was one of the most direct critics of constructive engagement. After her home was firebombed by pro-government operatives, the Reagan administration offered her \$10,000 to make repairs. She refused, saying, "This [offer] is why our people are angry at the Reagan and Thatcher administrations in particular. They continue to condone the activities of the South African government. If they had any feeling for the downtrodden and oppressed majority of our country they would end their policy of gentle persuasion. It appears their interests in this country far outweigh their so-called abhorrence of Apartheid."⁶¹

Irrespective of how it felt about the ANC and other left-leaning anti-Apartheid activists, the United States did virtually nothing to help ordinary South Africans on the ground. Though the Administration framed its opposition to sanctions in terms of concern for the ordinary black laborers who would suffer, it actively discouraged black South Africans from joining the political movement against Apartheid, saying change could only come from within the Apartheid government.⁶² Speaking off the record, one U.S. diplomat conceded, "There's admittedly not a whole hell of a lot this Administration has to say to

⁵⁹ Dewey, *supra* note 8; See also Jonathan Landy, *In Ronald Reagan era, Mandela was branded a terrorist*, MCCLATCHY WASH. BUREAU, Dec. 6, 2013, available at <http://www.newsobserver.com/2013/12/06/3439378/in-ronald-reagan-era-mandela-was.html#storylink=cpy>.

⁶⁰ See BRIAN MULRONEY, *MEMOIRS, Chapter 4: The Apartheid Wars Continue* (McLelland & Stewart Ltd., 2007).

⁶¹ Dewey, *supra* note 8.

⁶² Reagan did, however, promote the Sullivan principles and frame his opposition to sanctions with supposed concern for ordinary black South Africans. See Justin Elliot, *Reagan's Embrace of Apartheid South Africa*, Salon, Feb 5, 2011 at http://www.salon.com/2011/02/05/ronald_reagan_Apartheid_south_africa/.

black South Africa. Essentially we've opted for a policy that may yield benefits in 20 or 25 years. That's pretty thin gruel."⁶³

Reagan also consistently used his bully pulpit to speak out against possible sanctions against South Africa.⁶⁴ Through his speechwriter and advisor, the arch-conservative Pat Buchanan,⁶⁵ Reagan blasted economic sanctions. In a 1986 speech, he condemned sanctions – sanctions, and not the Apartheid system itself – as “immoral and utterly repugnant.”⁶⁶ In another speech written by Buchanan, Reagan said, “I urge the Congress and the Western countries to resist this emotional clamor for punitive sanctions.”⁶⁷ In an address to the World

⁶³ Sheila Hopkins, *An Analysis of U.S.- South African Relations in the 1980s: Has Engagement Been Constructive?* 89 J. OF COMP. BUS. AND CAPITAL MKT. L. 103 (1985).

⁶⁴ Note that for all of Reagan’s worries about sanctions hurting innocent civilians and being anathema to capitalism, he had no problem unilaterally instituting sanctions against [longtime ANC ally] Libya for Muammar Gaddafi’s support of terrorism, or instituting sanctions against Poland after its Soviet-backed military declared martial law in 1981. See John F. Cooke, *The United States’ 1986 Emergency Economic Sanctions Against Libya - Have They Worked?*, 14 MD. J. OF INT’L L. 195 (2007); see also ANDREAS LOWENFELD, *INTERNATIONAL ECONOMIC LAW* 912-914 (Oxford University Press, 2008).

⁶⁵ Buchanan was just one of several conservative icons [other than elected officials] with ties to Apartheid South Africa. The Heritage Foundation and the National College Republicans both sought to counter the widespread pro-Mandela, anti-Apartheid public sentiment (which conservatives in America and South Africa blamed on a “very effective KGB disinformation campaign”). See NINA J. EASTON, *GANG OF FIVE: LEADERS AT THE CENTER OF THE CONSERVATIVE CRUSADE* 168-169 (Simon & Schuster, 2001).

Televangelists Jimmy Falwell, Pat Robertson, and Jimmy Swaggart were all deeply supportive of the Apartheid government for its anti-communist and socially conservative Christian and anti-abortion stances. Lobbyist Jack Abramoff, who eventually served time in federal prison for fraud and tax evasion, got his start as President of the International Freedom Fund, a lobbying group funded by the South African military that sought to discredit Nelson Mandela. Before Grover Norquist became President of Americans for Tax Reform, he traveled to South Africa to support Joseph Savimbi, leader of the nationalist guerilla movement in Angola. Norquist frequently criticized anti-Apartheid activists on college campuses, saying Apartheid was “the one foreign policy debate that the Left can get involved in and feel that they have the moral high ground.” Jeff Flake, now a U.S. Senator from Arizona, became a lobbyist for South African mining interests after returning from his Mormon mission to the country. Kleiner, *supra* note 7; see also Brian Tashman, *Remembering the Religious Right’s Attacks on Mandela*, RIGHT WING WATCH, Dec. 5, 2013, <http://www.rightwingwatch.org/content/remembering-religious-rights-attacks-nelson-mandela>.

Interestingly, in a Twitter conversation with the author, Mr. Norquist vehemently disavowed reports of his involvement with Apartheid South Africa, calling them “not true” and stupid.” See Twitter conversation between Grover Norquist and Joshua Michaels (April 12, 2014, 12:41 PM), <https://twitter.com/GroverNorquist/status/455113556770705408>.

⁶⁶ Nelson, *supra* note 53.

⁶⁷ Buchanan, in his classically offensive Pat Buchanan style, would hold firm to this position, calling Nelson Mandela a “train bomber” and arguing for leniency toward white

Affairs Council, Reagan described his refusal to implement sanctions as essentially “Christ-like,” saying, “I am totally opposed to disinvestment...It is primarily for a moral reason. Those who will pay most grievously for disinvestment will be the black workers of South Africa. I take very seriously the teachings of the gospels. In particular, the parables about giving drink to the thirsty and food to the hungry. I will not help to cause any such suffering to any black person.”⁶⁸ In the same remarks, Reagan also said that sanctions would devastate all of southern Africa. “Southern Africa is like a zebra. If the white parts are injured, the black parts will die too.”⁶⁹

B. *Congress takes a different approach: The Comprehensive Anti-Apartheid Act of 1986*

Although the Executive branch clearly had different priorities, some Members of Congress had been trying to confront Apartheid since the early 1970s. Led by members of the Congressional Black Caucus and by liberal Democrats, the House of Representatives attempted a first sanctions bill in 1972.⁷⁰ This effort was unsuccessful, but it served as a catalyst for other countries to institute sanctions of their own. The United Nations Security Council instituted a mandatory arms embargo against South Africa in 1977.⁷¹ The European Community, precursor to the European Union, initiated economic sanctions in 1985.⁷²

In 1984, Archbishop Desmond Tutu, winner of the Nobel Peace prize for his anti-Apartheid efforts, visited Washington, D.C., where he delivered a vehement rebuke against Congressional Republicans and Ronald Reagan’s policy of “Constructive Engagement.” Tutu called the

South Africans who were part of the “Christian West.” Kleiner, *supra* note 7; Nelson, *supra* note 53.

⁶⁸ President Ronald Reagan, *Remarks to Members of the World Affairs Council and the Foreign Policy Association*, Jul 22, 1986 at <http://www.reagan.utexas.edu/archives/speeches/1986/072286e.htm> (On file with Ronald Reagan Presidential Lib. and Museum).

⁶⁹ *Id.*

⁷⁰ ROBERT SINGH, *THE CONGRESSIONAL BLACK CAUCUS: RACIAL POLITICS IN THE U.S. CONGRESS* 65 (Sage Publications, 1998); RONALD V. DELLUMS AND H. LEE HALTERMAN, *LYING DOWN WITH THE LIONS: A PUBLIC LIFE FROM THE STREETS OF OAKLAND TO THE HALLS OF POWER* 121-125 (Beacon Press, 2000).

⁷¹ Winston P. Nagan, *Economic Sanctions, U.S. Foreign Policy, International Law and the Anti-Apartheid Act of 1986*, 4 FLA. INT’L L.J. 85, 134 (1988); *See also* International Convention on the Suppression and Punishment of the Crime of Apartheid, *adopted* Nov. 30, 1973, art.1, 28 GAOR Supp. (No. 30) 75, U.N. Doc. A/9030 (1973).

⁷² Joakim Kreutz, *Hard Measures by a Soft Power? Sanctions Policy of the European Union 1981-2004*, 45 BONN INT’L CTR. FOR CONVERSION 24-25 (2005) at http://www.bicc.de/uploads/tx_bicctools/paper45.pdf.

policy an “abomination” and stated that the Reagan administration's support of and collaboration with the South African government was “equally immoral, evil, and totally un-Christian.”⁷³

The situation in South Africa drastically worsened during the year of Tutu’s visit. Starting in 1984 and continuing until 1987, there were mass uprisings in black townships across the country.⁷⁴ South African Police killed nearly 3,000 blacks and imprisoned 30,000 more.⁷⁵ On August 15, 1985, President P.W. Botha gave his infamous “Rubicon” speech in Durban.⁷⁶ Botha, head of the National Party and former South African Defence Minister, was the global face of Apartheid.⁷⁷ Leading up to his speech, it was widely expected that he would call for major reforms.⁷⁸ Against the urging of his party, and to the shock of the nearly 200 million people around the world who watched the speech, Botha remained adamant that he would never share power with blacks.⁷⁹ He wagged his finger at the camera several times and thundered, “We are not prepared to accept the antiquated, simplistic, and racist approach that South Africa consists of a White minority and a Black majority.”⁸⁰

⁷³ During the 1984 Presidential campaign, Reagan’s opponent, Walter Mondale, pressed this point in their televised debate: “What happens in South Africa, where, for example, the Nobel Prize winner, 2 days ago, said this administration is seen as working with the oppressive government of South Africa. That hurts this nation. We need to stand for human rights. We need to make it clear we're for human liberty. National security and human rights must go together. But this administration time and time again has lost its way in this field.” *Transcript of Debate Between the President and Former Vice President Walter F. Mondale in Kansas City, Missouri*, Oct. 21, 1984. Available at <http://www.reagan.utexas.edu/archives/speeches/1984/102184b.htm> (On file with Ronald Reagan Presidential Lib. and Museum).

⁷⁴ ALEX THOMPSON, U.S. FOREIGN POLICY TOWARD APARTHEID SOUTH AFRICA 129 (Palgrave Macmillan, 2008).

⁷⁵ *Id.* at 129.

⁷⁶ *Id.* at 140-141.

⁷⁷ Botha, whose Afrikaans nickname was *De Groot Krokodil* (literally, “the big crocodile”), was hardly a sympathetic character. Beyond being the last prominent defender of Apartheid, he was also a Nazi sympathizer in his youth, never apologized for his actions while in government, and was formally charged before his death for refusing to comply with South Africa’s Truth and Reconciliation Commission. See Joseph R. Gregory, *P.W. Botha, Defender of Apartheid, is Dead at 90*, N.Y. TIMES, Nov. 1, 2006, available at <http://www.nytimes.com/2006/11/01/world/africa/01botha.html>.

⁷⁸ Hermann Giliomee, *The Day Apartheid Started Dying*, MAIL & GUARDIAN, Oct. 26, 2012, <http://mg.co.za/article/2012-10-26-00-the-day-Apartheid-started-dying>.

⁷⁹ *Id.*

⁸⁰ See Address by President P.W. Botha at the opening of the National Party Natal Congress in Durban, South Africa, Aug. 15, 1985 [The “Rubicon Speech”] at <http://www.nelsonmandela.org/omalley/index.php/site/q/031v01538/041v01600/051v01638/061v01639.htm>.

The Rubicon speech pushed South Africa further into isolation.⁸¹ Chase Manhattan and other banks announced they would no longer roll over their loans to South Africa.⁸² South Africa was forced to default and declare a moratorium on its foreign debt.⁸³ The next year, as the uprisings continued, Botha declared a state of emergency.⁸⁴ The South African military launched attacks on domestic ANC targets, and Botha ordered air strikes on suspected “ANC compounds” in Angola, Botswana, Zambia, and Zimbabwe.⁸⁵

Botha’s “Rubicon” speech coincided with the introduction of another sanctions bill by Congressional Democrats, which managed to pass the House of Representatives. A slightly weaker version of the bill began to work its way through the Senate. Most Republican Senators were starting to re-think their positions on Apartheid.⁸⁶ With the strategy of “constructive engagement” in tatters and public opinion turning against him, Reagan tried to mollify Democrats and moderate Republicans by proposing a sanctions plan of his own. Using his emergency sanctions powers, he signed two Executive Orders toward the end of 1985: one blocking U.S. financial institutions from giving loans or credit to the South African government as well as prohibiting the export of sensitive computer technology and nuclear material,⁸⁷ and the other banning the importation of South African currency, the *Krugerrand*.⁸⁸ But Congress was not satisfied, and Reagan had failed to convince the nation. By the time the CAAA became law the following year, 19 states and 62 cities and counties had already enacted anti-Apartheid measures themselves that mandated some form of divestment—getting rid of one’s

⁸¹ The Chair of South Africa’s Reserve Bank, Gerhard de Kock, joked that the speech cost the country billions—losing “a few million Rand per word.” See Giliomee, *supra* note 78.

⁸² Giliomee, *supra* note 78.

⁸³ *Id.*

⁸⁴ Gregory, *supra* note 77.

⁸⁵ MARTIN MEREDITH, *MANDELA: A BIOGRAPHY* 361-364 (Public Affairs, 2011).

⁸⁶ Majority Leader Bob Dole, who made the switch, originally attacked Democratic supporters of the bill, saying, “Maybe after a few days of president bashing we can go back to the real world.” *Senate Drive for Sanctions May be Blocked*. ASSOC. PRESS, Sept. 11, 1985, at A1 [on file with author]. Interestingly, in the Senate version of the bill which eventually became the CAAA, the sponsor and all cosponsors were Republicans. See Bill Summary and Status: S.1881 (113th Congress), LIB. OF CONG., www.thomas.loc.gov.

⁸⁷ Exec. Order No. 12532, “Prohibiting Trade and Certain Other Transactions Involving South Africa,” 50 Fed. Reg. 36861 (Sept. 9, 1985).

⁸⁸ Exec. Order No. 12535, “Prohibition of the Importation of the South African Krugerrand,” 50 Fed. Reg. 40325 (Oct. 1, 1985).

economic holdings --from South African commerce and financial markets.⁸⁹

On May 21, 1986, Representative William H. Gray,⁹⁰ a Democrat from Philadelphia, Pennsylvania, introduced H.R. 4868, The Comprehensive Anti-Apartheid Act of 1986.⁹¹ The bill's stated purpose was to provide a "framework to guide the United States in helping to bring an end to Apartheid in South Africa."⁹² It sought to do this through a mixture of punitive sanctions, embargoes, diplomatic demands, and fiscal appropriations. Subchapter II of the CAAA used positive measures to promote black reconstruction.⁹³ Congress negotiated \$40 million annually for economic aid to disadvantaged South Africans, as well as money for scholarships and for a human rights fund for political prisoners and detainees.⁹⁴ Subchapter III contained a broad list of "negative sanctions" that had been demanded by the international community: a ban on the importation of Krugerrands, ammunition, uranium, coal, food, iron, steel, and sugar; a ban on the export of computers, munitions, crude oil, and petroleum; a ban on air transportation with South Africa or promotion of U.S. tourism there; a ban on nuclear trade, new investment, or any kind of U.S. government assistance with trade; and a complete ban on cooperation with the South African armed forces.⁹⁵

The bill set forth five requirements that the South African government had to meet before sanctions would be eased. First, Pretoria had to release all political prisoners, including Mandela. Next, it had to repeal the "state of emergency" it used to justify its violent crackdown on black dissent and political activity. It had to repeal the Population Registration Act and end legal racial classifications. Finally, it had to un-ban all outlawed political parties – most notably the African National

⁸⁹ Kevin P. Lewis, *Dealing with South Africa: The Constitutionality of State and Local Divestment Legislation*, 61 TUL. L. REV. 469, 510 (1987).

⁹⁰ Rep. Gray was Chair of the House Budget Committee. Before serving in Congress, he was a Baptist Minister in North Philadelphia. He served as President of the United Negro College Fund after his retirement. See William Yardley, *William H. Gray III, Pastor and Lawmaker, Dies at 71*, N.Y. TIMES, July 2, 2013, available at http://www.nytimes.com/2013/07/03/us/william-h-gray-iii-pastor-and-lawmaker-dies-at-71.html?_r=0.

⁹¹ For a comprehensive legislative report, including timeline, record, text, and other information, see Library of Congress Official Report for H.R. 4868 at <http://beta.congress.gov/>.

⁹² Comprehensive Anti-Apartheid Act ("CAAA") of 1986, Pub. L. 99-440, 22 U.S.C. §5002 (repealed 1993).

⁹³ Nagan, *supra* note 71, at 186.

⁹⁴ *Id.* at 183-186; 100 Stat. 1086, 1094-99 (1986).

⁹⁵ Nagan, *supra* note 71, at 187.

Congress – and to enter into “good faith” negotiations with black South African leaders.⁹⁶

The bill passed the House on June 18 and passed the Senate less than two months later.⁹⁷ It reached President Reagan’s desk on September 15,⁹⁸ but he vetoed it.⁹⁹ In his veto statement, Reagan claimed that Congress was usurping his Executive Authority to conduct foreign policy.¹⁰⁰ He also argued that the sanctions would not be effective – again arguing that only vulnerable black South Africans would be harmed.¹⁰¹ He asserted that the National Party would subject blacks to even worse repression as a kind of retribution against the United States.¹⁰² Finally, Reagan added that American farmers would suffer when South Africa stopped buying U.S. wheat.¹⁰³ South Africa’s

⁹⁶ 22 U.S.C. 5061; *See* Nagan, *supra* note 71, at 185.

⁹⁷ Passed House (Amended) by Voice Vote; Passed Senate in lieu of S. 2701 with an amendment by Yea-Nay Vote. 84-14. Record Vote No: 252. *See* Bill Summary and Status: S.1881 (113th Congress), LIB. OF CONG., www.thomas.loc.gov. Notably, four members of the House of Representatives who voted against the CAAA at some point in their careers are still members as of this writing: Joe Barton and Ralph Hall of Texas, Howard Coble of North Carolina, and Appropriations Chairman Hal Rogers of Kentucky. Former Vice President Dick Cheney also voted against the CAAA and against a resolution calling for the release of Nelson Mandela while he was a Wyoming Congressman.

⁹⁸ Resolving differences -- House actions: House Agreed to Senate Amendments by Yea-Nay Vote: 308 - 77 (Record Vote No: 381). *See* Bill Summary and Status: S.1881 (113th Congress), LIB. OF CONG., www.thomas.loc.gov.

⁹⁹ *See* Bill Summary and Status: S.1881 (113th Congress), LIB. OF CONG., www.thomas.loc.gov. The President can veto legislation and prevent it from becoming law, it requires a two-thirds vote from both the House of Representatives and the Senate to override a veto. *See* U.S. Const., art. I, § 7.

¹⁰⁰ “I am also vetoing the bill because it contains provisions that infringe on the President’s constitutional prerogative to articulate the foreign policy of the United States.” *See* President Ronald Reagan, *Message to the House of Representatives Returning Without Approval a Bill Concerning Apartheid in South Africa*, Sept. 26, 1986, available at <http://www.reagan.utexas.edu/archives/speeches/1986/092686h.htm> (On file with Ronald Reagan Presidential Library and Museum).

¹⁰¹ “Black workers -- the first victims of Apartheid -- would become the first victims of American sanctions. Banning the import of sugar, for example, would threaten the livelihood of 23,000 black farmers. Banning the import of natural resources is a sanction targeted directly at the mining industries of South Africa, upon which more than half a million black laborers depend for their livelihood.” *See id.*

¹⁰² *See* Reagan, *supra* note 100.

¹⁰³ “By prohibiting the importation of food and agricultural products, the measure would invite retaliation by South Africa, which since June has purchased over 160,000 tons of wheat from the United States. Denying basic foodstuffs to South Africa -- much of which go to feed the black population -- will only lead to privation, unrest, and violence. It will not advance the goals of peaceful change.” *See* Reagan, *supra* note 100.

Foreign Minister, R.F. “Pik” Botha¹⁰⁴ pressed this point by calling several Senators from farm states before the override vote.¹⁰⁵

Congress – and the country – was not convinced. Within a week, both chambers overrode the bill with well over two-thirds support.¹⁰⁶ The CAAA became law on October 2, 1986. During the Senate’s override debate, speakers on the Senate floor condemned both the evils of Apartheid and the failed policies of Ronald Reagan. For example, Richard Lugar, longtime Chair of the Senate Foreign Relations Committee and one of the first Republicans to break with Reagan on sanctions, said, “We are against tyranny, and tyranny is in South Africa. We are not destroying that government, it is self-destructing.”¹⁰⁷ Senate Majority Leader Bob Dole, who formerly had opposed sanctions, now called the bill a “litmus test” on whether lawmakers supported civil rights.¹⁰⁸ Mitch McConnell, then in his first term in the Senate, said he was casting his first vote against President Reagan with “great reluctance,” but he condemned the administration’s lack of action and said, “I think he is ill-advised. I think he is wrong. We have waited long enough for him to come on board.”¹⁰⁹ Connecticut Republican Senator Lowell Weicker said, “For this moment, at least, the President has become an irrelevancy to the ideals, heartfelt and spoken, of America.”¹¹⁰

After the vote, civil rights leader Jesse Jackson proclaimed, “Reagan put mineral rights above human rights, and constructive engagement has failed.”¹¹¹ Coretta Scott King, widow of Dr. Martin Luther King, was the Senate’s guest of honor and was seated in the gallery during the vote.¹¹²

After the override, Reagan released a statement expressing his disappointment, saying:

¹⁰⁴ No relation to President P.W. Botha.

¹⁰⁵ THESE CALLS BACKFIRED, AS MANY SENATORS FELT THAT THE REAGAN ADMINISTRATION WAS WORKING WITH THE SOUTH AFRICAN GOVERNMENT IN AN ATTEMPT TO BLACKMAIL THEM. *SEE* STEVEN V. ROBERTS, *SENATE, 78 TO 21, OVERRIDES REAGAN’S VETO AND IMPOSES SANCTIONS ON SOUTH AFRICA*, N.Y. TIMES, OCT. 3, 1986, AVAILABLE AT [HTTP://WWW.NYTIMES.COM/1986/10/03/POLITICS/03REAG.HTML](http://www.nytimes.com/1986/10/03/politics/03REAG.html).

¹⁰⁶ Passed House Over Veto by Yea-Nay Vote: 313 - 83 (Record Vote No: 425); Passed Senate over veto by Yea-Nay Vote. 78-21. Record Vote No: 311. *See* Bill Summary and Status: S.1881 (113th Congress), LIB. OF CONG., www.thomas.loc.gov.

¹⁰⁷ *See* Roberts, *supra* note 105.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Apartheid foes praise sanctions vote*, UTD. PRESS INT’L, Oct. 3, 1986, at A1 [On file with author].

¹¹² *Id.*

I deeply regret that Congress has seen fit to override my veto of the Comprehensive Anti-Apartheid Act of 1986. Punitive sanctions, I believe, are not the best course of action; they hurt the very people they are intended to help. My hope is that these punitive sanctions do not lead to more violence and more repression. Our administration will, nevertheless, implement the law. It must be recognized, however, that this will not solve the serious problems that plague that country. The United States must also move forward with positive measures to encourage peaceful change and advance the cause of democracy in South Africa.¹¹³

The CAAA was not the end of Congress' involvement with the movement for justice in South Africa. Later in 1986, Congress passed a resolution calling for the immediate release of Nelson Mandela and for recognition of the African National Congress.¹¹⁴ Reagan vetoed that resolution as well, but the subsequent override attempt was unsuccessful.¹¹⁵ Much to the eventual embarrassment of the United States, Nelson Mandela remained on the terrorist "watch list" until 2008.¹¹⁶

IV. WAS THE CAAA CONSTITUTIONAL? SEPARATION OF POWERS AND U.S. FOREIGN POLICY

Critics of the Act, including the President, asserted that the bill was not merely bad policy and misguided politics, but that it was also an unconstitutional abridgement of Executive power. In order to examine and refute this argument, it is necessary to understand how the Constitution guides the legislative process as well as to explore the separation of federal powers between the legislative, executive, and judicial branches.

A. *What is the constitutional basis for this bill?*

In weighing the constitutionality of the Act, we must first look at the scope of Congress' powers. Article I of the Constitution details the

¹¹³ President Ronald Reagan's statement on the Comprehensive Anti-Apartheid Act of 1986. Oct. 2, 1986. Available at <http://www.reagan.utexas.edu/archives/speeches/1986/100286d.htm> (On file with Ronald Reagan Presidential Lib. and Museum).

¹¹⁴ See Nick Wing, *Dick Cheney Didn't Regret His Vote against Freeing Nelson Mandela, Maintained He Was A 'Terrorist'*, HUFFINGTON POST, Dec. 6, 2013 at http://www.huffingtonpost.com/2013/12/05/dick-cheney-nelson-mandela-terrorist_n_4394071.html.

¹¹⁵ *Id.*

¹¹⁶ *Id.*; see also Dewey, *supra* note 8.

framework for Congress and the federal legislative process.¹¹⁷ Congress has the power to regulate commerce with foreign nations.¹¹⁸ Congress also has the power to make all laws that are “necessary and proper” to help execute not only its constitutional powers, but also the powers of any “Department or Officer” of the United States government.¹¹⁹ Because the Comprehensive Anti-Apartheid Act dealt with the regulation of foreign commerce, and Congress believed it “necessary and proper” for Congress to regulate America’s commerce with the Republic of South Africa in a way that its Members and their constituents saw fitting with American interests and global human rights, the law fell well within the scope of Congress’ authority under Article I.

B. *Where is the dispute with the Executive branch?*

The Reagan Administration alleged that even if Congress had the power to pass the CAAA, it overstepped its role by operating in the political and diplomatic realm usually reserved for the President and the Executive branch.¹²⁰ The “separation of powers” can become particularly contentious in the realm of foreign affairs. As the late Senator Arthur Vandenberg said in response, “Politics stops at the water’s edge,” meaning that the federal government should be as unified as possible on the world stage.¹²¹ In times of war or international crisis, Congress, the President, and the Judiciary often are conscious of “the need to speak with one voice.”¹²² Passage of the CAAA was the first time Congress had overridden the President on a major foreign policy issue since the passage of the War Powers Act in 1973.¹²³ President Reagan mentioned the “one voice” philosophy when he signed his 1985 Executive Order regarding sanctions, saying, “In order for this Nation successfully to influence events in South Africa, it is necessary for the

¹¹⁷ U.S. Const. art. I.

¹¹⁸ U.S. Const. art. I, §8, cl. 3.

¹¹⁹ U.S. Const. art. I, §8, cl. 18.

¹²⁰ See Reagan, *supra* note 99.

¹²¹ *Arthur Vandenberg: A Featured Biography*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/generic/Featured_Bio_Vandenberg.htm.

¹²² Courts must consider “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” *Baker v. Carr*, 369 U.S. 186, 217 (1962). See also Lee Hamilton, *Why the President Needs the Help of Congress to Make Foreign Policy*, UNIV. OF IND. CTR. ON CONG., <http://www.indiana.edu/~congress/outreach/opeds/oped32.htm>.

¹²³ Treverton, *supra* note 51 at page 1; See also RALPH G. CARTER, CHOOSING TO LEAD: UNDERSTANDING CONGRESSIONAL FOREIGN POLICY ENTREPRENEURS (Duke Univ. Press, 2009).

United States to *speak with one voice* and to demonstrate our opposition to Apartheid by taking certain actions directed specifically at key Apartheid policies and agencies.”¹²⁴

Article II of the Constitution outlines some of the key obligations and duties of the President and the Executive branch: the cabinet, administration, departments, and agencies.¹²⁵ The President is not merely the Commander-in-Chief; he is the Chief Executive and the nation’s foremost diplomat.¹²⁶ Reagan was a major proponent of robust executive authority, particularly in matters of foreign policy.¹²⁷ But Article II also states that the President must “faithfully execute” the laws of the United States.¹²⁸ He has veto power, but his veto was overridden. The President cannot make laws. This separation of powers, and the “checks and balances” (like the veto and the veto override), at least theoretically maintain the balance among the three branches of government. Presidents fear having their vetoes overridden.¹²⁹ Overrides make them look weak and out of touch -- especially because overrides usually require strong bipartisan consensus.¹³⁰ The fear of an override prompted Reagan to try to mollify Congress with his Executive Orders, and this fear was evident in his messages to Congress and his veto statement in the fall of 1986.¹³¹ Presidents also fear having Executive power curtailed on their watch. Reagan admitted as much in his veto statement: “I am also vetoing the bill because it contains provisions that infringe on the President’s constitutional prerogative to articulate the foreign policy of the United States.”¹³²

Usually, particularly during times of war and international crisis, it is the President who initiates economic sanctions against foreign nations. Even though Congress has the constitutional authority to regulate commerce with foreign nations, it has notably delegated some of this power¹³³ to the Executive branch when it passed the International

¹²⁴ Peter J. Spiro, *State and Local Anti-South Africa Action As an Intrusion Upon the Federal Power in Foreign Affairs*, 72 VA. L. REV. 813, 830-31 (1986) [italics added by author].

¹²⁵ See U.S. Const. art. II.

¹²⁶ *Id.*

¹²⁷ See Barilleaux & Kelley, *supra* note 46.

¹²⁸ See U.S. Const. art. II, § 3.

¹²⁹ See generally HAROLD J. KRENT, *PRESIDENTIAL POWERS* (New York University Press, 2005).

¹³⁰ *Id.*; see also ROBERT J. SPITZER, *THE PRESIDENTIAL VETO 97-98* (SUNY Press, 1988).

¹³¹ See Reagan, *supra* note 100.

¹³² *Id.*

¹³³ This was by no means the first time that Congress had “delegated” some of its authority by giving the President a wide berth in the realm of foreign affairs. “Practically every volume of the United States Statutes contains one or more acts or joint resolutions

Emergency Economic Powers Act (“IEEPA”) in 1977.¹³⁴ This Act gives the President power to institute sanctions through his departments and agencies in order “to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.”¹³⁵ Upon declaring a state of national emergency pursuant to the National Emergencies Act (“NEA”),¹³⁶ the President can regulate or prohibit any transactions, sales, or payments involving the “interest of a foreign country or a foreign national,” can block monetary payments or the importation of money, and can regulate or prohibit the acquisition, use, importation, or exportation of any property or the exercise of any property rights belonging to a foreign country or a foreign national.¹³⁷ Through Executive Orders 12532 and 12535, Reagan blocked loans to South Africa, the exportation of nuclear material and computer technology, and the importation of South African currency. He directed his Secretaries of Treasury, Commerce, and State to promulgate the necessary rules and regulations to implement this policy.¹³⁸

Congress did not find Reagan’s executive actions sufficient, however, and thus it passed the CAAA. Despite his vehement opposition, President Reagan directed his administration to implement

of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs... The result of holding that the joint resolution here under attack [allowing the President to prohibit the sale of arms if he finds that doing so “may contribute to the reestablishment of peace”] is void and unenforceable as constituting an unlawful delegation of legislative power would be to stamp this multitude of comparable acts and resolutions as likewise invalid.” *United States v. Curtiss-Wright Exp. Corp.*, 229 U.S. 304, 324-328 (1936).

¹³⁴ “International Emergency Economic Powers Act,” Pub. L. 95-223; 50 U.S.C. 1701-1707 (1977). The IEEPA was passed to help clarify the boundaries of executive authority and establish a necessary relationship between an international “threat” and subsequent executive action. Questions over Executive power in economics had existed since the “Trading With the Enemy” Act (“TWEA”) was passed in 1917, at the height of World War I. 12 U.S.C. § 95a et seq. The legislative history of the IEEPA reveals Congress’ concern with unchecked Executive power: “[the TWEA] has become essentially an unlimited grant of authority for the President to exercise, at his discretion, broad powers in both the domestic and international economic arena, without congressional review.” H. Rep. No. 95-459, at 7 (1977).

¹³⁵ “International Emergency Economic Powers Act,” Pub. L. 95-223; 50 U.S.C. §§ 1701-1707 (1977).

¹³⁶ “National Emergencies Act,” Pub. L. 94-412; 50 U.S.C. § 1601 et. seq (1976).

¹³⁷ 50 U.S.C. §§ 1701-1707.

¹³⁸ Exec. Order No. 12532, 50 Fed. Reg. 36861, (Sept. 9, 1985); Exec. Order No. 12535, 50 Fed. Reg. 40325, (Oct. 1, 1985).

the CAAA fully through Executive Order 12571.¹³⁹ Why is this significant? This was one of the rare and most notable instances during the Reagan Administration -- or during the Cold War, for that matter -- when Congress successfully reined in the Executive on the global stage.¹⁴⁰

C. *Finding "One Voice": Executive Power, Congressional Acts, and Foreign Affairs*

The showdown between Reagan and Congress in the fall of 1986 was by no means a one-off. The debate over federal power goes back to the founding of our democracy. Congress has often wrestled with the President over the balance of power, and continues to do so today.¹⁴¹ The Executive branch often needs to be "reined in," not only by Congress, but by the third branch of the federal government as well. To help understand the legal limits of Executive authority, one needs examine a landmark Supreme Court decision on the subject: *Youngstown Sheet & Tube Co. v. Sawyer*.¹⁴² While *Youngstown* has become best known (and studied by generations of law students) for Justice Jackson's concurrence, in which he set forth his famous test of when Presidential power is at its highest and its lowest in relation to congressional authorization, other parts of that decision are similarly instructive in assessing the separation of powers issues behind the CAAA.

In 1952, with the nation mired in the Korean War and with a strike threatened in the U.S. steel industry, President Truman seized the nation's steel mills through executive order.¹⁴³ The Supreme Court declared this move to be outside the constitutional limits of executive authority. In the opinion for the Court, Justice Black explained:

The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. . . . In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the

¹³⁹ Exec. Order No. 12571, 51 Fed. Reg. 875 (Jan. 9, 1986).

¹⁴⁰ See Gaddis, *supra* note 6; Kinzer, *supra* note 36; & Barilleaux, *supra* note 46.

¹⁴¹ See generally PRESIDENTIAL POWER STORIES (Christopher Schroeder & Curtis Bradley, eds., 2009).

¹⁴² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

¹⁴³ For a complete history and thorough analysis of *Youngstown*, see Patricia L. Bellia, *Story of the Steel Seizure Case*, in PRESIDENTIAL POWER STORIES 233-285 (Christopher Schroeder & Curtis Bradley, eds., 2009).

Constitution is neither silent nor equivocal about who shall make the laws which the President is to execute.¹⁴⁴

Though *Youngstown* addressed only domestic matters, it foreshadowed a similar debate in the realm of foreign policy. Even if the President is our “chief diplomat,” he cannot create his own power on the world stage. Even though we sometimes need to “speak with one voice,” the President’s voice is coequal to Congress’ and is bound by the Constitution. A reading of Justice Frankfurter’s¹⁴⁵ blunt concurrence in *Youngstown* helps clarify this thought:

Apart from his vast share of responsibility for the conduct of our foreign relations, the embracing function of the President is that ‘he shall take Care that the Laws be faithfully executed.’ The nature of that authority has for me been comprehensively indicated by Mr. Justice Holmes. ‘The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.’¹⁴⁶ The powers of the President are not as particularized as are those of Congress. But *unenumerated powers do not mean undefined powers*.¹⁴⁷ The separation of powers built into our Constitution gives essential content to undefined provisions in the frame of our government.¹⁴⁸

Even though the President’s Constitutional powers are not as specifically enumerated as those of Congress, they are not unlimited in the realm of foreign affairs,¹⁴⁹ and he or she remains bound to “faithfully execute” the laws of the United States.¹⁵⁰ Whatever regulatory authority Reagan had over South African commerce through the IEEPA was properly superseded by Congress’ passing of the CAAA because federal law trumps executive regulation and executive action – even if it is a kind of executive action given wide deference by another federal law.

¹⁴⁴ *Youngstown*, 343 U.S. 579 at 585-588.

¹⁴⁵ At first, Justice Frankfurter’s willingness to defer to the “gloss” of life created by a longstanding systematic “executive practice, long pursued to the knowledge of Congress and never before questioned” appears to support President Reagan’s position. However, unlike the “appropriate presumption” of Congress’ acquiescence which was present in *Dames & Moore*, no such presumption would be appropriate with respect to the CAAA because Congress passed the law over Reagan’s veto and long after his own implementation of IEEPA regulations. *Youngstown*, 343 U.S. 579 at 610-11; *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981).

¹⁴⁶ Quoting Justice Holmes in *Myers v. United States*, 272 U.S. 52 (1926).

¹⁴⁷ Italics added by author.

¹⁴⁸ *Youngstown*, 343 U.S. 579 at 610 (Frankfurter, J., concurring).

¹⁴⁹ U.S. Const. art. II.

¹⁵⁰ “He shall take care that laws be faithfully executed...” U.S. Const. art. II, § 3.

Finally, we must look at President Reagan's actions through the lens of Justice Jackson's test. Jackson's concurring opinion set forth a triad of Presidential authority, saying that:

Presidential Powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate...
2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers...In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.¹⁵¹

When Congress passed the CAAA over Reagan's veto, it made its position on the matter very clear. If Reagan were to take action incompatible with the "expressed will" of Congress at this point, his power would have been at its lowest ebb, using only his constitutional powers minus whatever constitutional authority Congress had over the matter. Congress' specifically enumerated power to make laws regulating commerce with foreign nations would trump any of the President's nonspecific power over foreign affairs.¹⁵² Specifically the CAAA, a federal law, would trump the regulations promulgated by the President under the IEEPA.¹⁵³ If, as Justice Black posits, Presidential

¹⁵¹ *Youngstown*, 343 U.S. 579 at 635-638 (Jackson, J., concurring).

¹⁵² U.S. Const. art. VI, cl. 2. "It was intimated that the President might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress." *Youngstown*, 343 U.S. 579 at 637 (Jackson, J., concurring).

¹⁵³ U.S. Const. art. VI, cl. 2. The seminal case on differing executive and legislative powers in internal versus external affairs, *United States v. Curtiss-Wright Export Corp.*, is particularly instructive in examining how the CAAA superseded President Regan's authority to manage America's relationship with South Africa. As Justice Sutherland explained, "the broad statement that the federal government can exercise no such powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs." *Curtiss-Wright*, 299 U.S. 304 at 311. Because "external affairs" can be much more complex, delicate, and problematic, "the President alone has the power to speak or listen as a representative of the nation. The President is

power can only stem from the Constitution or an Act of Congress, then it is hard to imagine which presidential powers Reagan could have used to impose his will on America's relationship with South Africa.¹⁵⁴ Congress passed the CAAA in large part because it was not satisfied by Reagan's use of weak IEEPA sanctions against South Africa. Without it, the only applicable provision of Article II would have been President Reagan's duty to faithfully execute the laws, which he did through Executive Order 12571. The strongest arguments in favor of broad Executive power in foreign affairs support the President's ability to quickly and decisively respond to foreign crises, usually as Commander in Chief of the armed forces.¹⁵⁵ But Reagan clearly was not quickly and decisively responding to the international humanitarian crisis of Apartheid. Congress intervened by passing the CAAA and overriding Reagan's veto because it considered Reagan's actions insufficient – a view heavily supported by public opinion. If anything, Congress needed to fill the void left by the Executive branch.

Congress actually had passed the National Emergencies Act in 1976 and the International Emergency Economic Powers Act in 1977 to clarify some of the questions over Executive Power that remained in the

the sole organ of the nation in its external relations, and its sole representative with foreign nations." According to the Court, when the President acts as this "sole organ," he acquires exclusive "plenary" powers not easily defined and not dependent on legislative authorization. *Id.* at 318. The often delicate and precarious nature of international negotiations, combined with the frequent need for secrecy, "discloses the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed." *Id.* at 321-22.

If the Court had stopped there, then the CAAA might have been an unlawful abridgment of the President's plenary power in foreign affairs. However, Justice Sutherland went on to state that even though the plenary power does not need to be based on an act of Congress, it, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." *Curtiss-Wright*, 299 U.S. 304 at 320. As Sutherland explained, Congress remains the only source of law, and federal law remains supreme in both internal and external affairs. Even when a law only acquires "teeth" once the President decides to act, the executive's action or lack thereof does not make it any more or less lawful. "Prior to the first proclamation, the Joint Resolution was an existing law, but dormant, awaiting the creation of a particular situation to render it active. No action or lack of action on the part of the President could destroy its potentiality. Congress alone could do that." *Id.* at 332. Even if the CAAA curtailed Reagan's "plenary" powers, it did so lawfully and within the bounds of the constitution.

¹⁵⁴ "Finally, when the President acts in contravention of the will of Congress, 'his power is at its lowest ebb,' and the Court can sustain his actions 'only by disabling the Congress from acting upon the subject.'" *Dames & Moore*, 453 U.S. 654 at 669 [quoting J. Jackson's concurrence in *Youngstown*] [italics added by author].

¹⁵⁵ U.S. Const. art. II; See Gaddis, *supra* note 6; Kinzer, *supra* note 36; & Barilleaux, *supra* note 46.

aftermath of the *Youngstown* decision.¹⁵⁶ During the Iranian hostage crisis, President Jimmy Carter invoked his statutory powers under NEA and IEEPA by declaring a state of emergency with respect to Iran, allowing him to block Iranian assets.¹⁵⁷ After the hostages were freed, the Reagan administration released those blocked funds and suspended all claims by American nationals against Iran through executive agreement.¹⁵⁸ *Dames & Moore v. Regan* soon made its way to the Supreme Court.¹⁵⁹ The Court, relying heavily on *Youngstown*, upheld this executive action because it was linked to statutory authority. Writing for the Court, then-Justice Rehnquist warned, however, of oversimplifying Justice Jackson's formula:

Although we have in the past found and do today find Justice Jackson's classification of executive actions into three general categories analytically useful, we should be mindful of Justice Holmes' admonition, quoted by Justice Frankfurter in *Youngstown*¹⁶⁰...that "the great ordinances of the Constitution do not establish and divide fields of black and white."¹⁶¹

Justice Holmes's cautionary words, and the Court's citation of them in *Dames & Moore*, serve as an important reminder. Because the Constitution does not divide our three branches of government into "black and white," care should be taken not to assign an entire area of political responsibility interest entirely to either the President or Congress¹⁶² -- for example, leaving foreign policy entirely in the

¹⁵⁶ See Charles J. Cooper, *What the Constitution Means by Executive Power*, 43 U. MIAMI L. REV. 165, 210 (1988).

¹⁵⁷ See Harold H. Bruff, *The Story of Dames & Moore: Resolution of an International Crisis by Executive Agreement*, in PRESIDENTIAL POWER STORIES 369-400 (Christopher Schroeder & Curtis Bradley, eds., 2009).

¹⁵⁸ An executive agreement is a "non-treaty agreement between the United States and another nation." See *id.*

¹⁵⁹ *Dames & Moore*, 453 U.S. at 654.

¹⁶⁰ *Youngstown*, 343 U.S. 579 at 597 (Frankfurter, J., concurring).

¹⁶¹ *Dames & Moore*, 453 U.S. 654 at 669 [quoting *Springer v. Philippine Islands*, 277 U.S. 189, 209 (1928) (dissenting opinion)]. Interestingly, William Rehnquist started as a law clerk for Justice Jackson in 1952, the year *Youngstown* was decided. See from clerked for Justice Jackson after he graduated from law school. See Joan Biskupic, *Rehnquist left Supreme Court with conservative legacy*, USA TODAY, Sept. 4, 2005, at http://usatoday30.usatoday.com/news/washington/judicial/supremecourtjustices/2005-09-04-rehnquist-legacy_x.htm.

¹⁶² Judicial purists would argue that only the Legislative and Executive branches should have this "sharing" of influence over policy and politics. The federal judiciary should remain independent and politically uninvolved. "A Judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government." *United States v. Will*, 449 U.S. 200 (1980). There is a longstanding Anglo-American tradition of an

portfolio of the Executive.¹⁶³ No matter his or her level of authority, or the need to speak with one voice, the other branches have an important part to play with their checks and balances. Law Professor Michael Tigar offered a startlingly frank assessment of the Reagan

independent Judiciary. *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982). The public has an interest in a competent and independent Judiciary. *U. S. v. Will*, 449 U.S. 200 at 217. (and political q. in *Baker v. Carr*)

The Court applies the often-debated and disputed *political question* doctrine when it encounters potentially precarious political issues. If a dispute between the two other branches turns on a “political question,” it is nonjusticiable. “Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” *Baker*, 369 U.S. at 217. As Justice Powell explained, “[d]ifferences between the President and the Congress are commonplace under our system. The differences should, and almost invariably do, turn on political rather than legal considerations. The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse.” *Goldwater v. Carter*, 444 U.S. 996, 100 S. Ct. 533 (1979) (Powell, J., concurring).

The Court has also held that its independence from the other two branches and its lack of accountability to voters makes it an inappropriate venue for weighty policy decisions – particularly with respect to foreign policy. “Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude... nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.” *Chicago & S. Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 111 (1948).

For a fascinating argument in favor of judicial independence by a former Supreme Court Justice, see Sandra Day O’Connor, *Judicial Accountability Must Safeguard, Not Threaten, Judicial Independence: An Introduction*, 86 DENV. U. L. REV. 1 (2008).

¹⁶³ The coequal nature of the Executive and Legislative branches raises an interesting question of when the President can withhold information from Congress or the Judiciary. Although “executive privilege” is not mentioned in the Constitution, the Supreme Court has confirmed it exists as part of the structure of separated powers. *U.S. v. Nixon*, 418 U.S. 683 (1984). Asserting privilege requires a “claim of need to protect military, diplomatic, or sensitive national security secrets. *Nixon*, 418 U.S. at 684. However, the doctrine of executive privilege serves only to protect certain materials from being disclosed and cannot shield entire policy areas from judicial or legislative examination. As Chief Justice Burger explained, “any absolute executive privilege under Art. II of the Constitution would plainly conflict with the function of the courts under the Constitution. *Id.* at 685.

administration's actions with respect to South Africa, Central America, Iran-Contra, and elsewhere:

Agreement or disagreement with the policies of a particular President cannot blind us to the duties of the legislative and the judicial branches to play their important parts. It is no answer to say, 'The President is elected to make these decisions.' The members of Congress are elected for this purpose as well. And, as the very structure of the Constitution makes clear, the non-elected judges are put in place precisely to enforce constitutionally based principles of supremacy of law, even when those principles are rooted in countermajoritarian values...That is why we must pay renewed attention to the law and its enforcement. That is why the Reagan administration has failed America.¹⁶⁴

V. THE THIRD BRANCH WEIGHS IN ON SOUTH AFRICA: SUBSEQUENT CAAA LITIGATION

While Congress makes the laws and the President executes them, the Third Branch of government has the power of judicial review.¹⁶⁵ In the words of Chief Justice John Marshall, "*It is emphatically the province and duty of the judicial department to say what the law is.*"¹⁶⁶ Two noteworthy federal cases emerged as a result of the CAAA; both are instructive as to how the Executive Branch applies laws that might have far-reaching international implications, how the Judicial branch navigates the contentious arenas of politics and foreign policy, and how the federal courts try to sort out disputes between the other two branches of government.

A. *South African Airways v. Dole*¹⁶⁷

South African Airways demonstrates how our elected representatives only control the outer periphery of our federal government. Even though politicians make the news and get the credit, nothing would or could happen without the vast army of federal civil servants tasked with keeping the government running. In the words of noted constitutional law expert John Hart Ely, "Much of the law is...effectively left to be made by the legions of unelected administrators

¹⁶⁴ Charles J. Cooper, *What the Constitution Means by Executive Power*, 43 U. MIAMI L. REV. 165, 177-88 (1988).

¹⁶⁵ U.S. Const. art. III; *Marbury v. Madison*, 5 U.S. 137 (1803).

¹⁶⁶ *Marbury*, 5 U.S. at 177.

¹⁶⁷ *S. Afr. Airways v. Dole*, 817 F.2d 119 (D.C. Cir. 1987).

whose duty it becomes to give operative meaning to the broad delegations the statutes contain.”¹⁶⁸

Section 306(a) of the CAAA banned air travel between the U.S. and South Africa. It directed the President to revoke the permit of any designee of the South African government (South African Airways) that provided air service to the United States. Pursuant to Executive Order 12571, Transportation Secretary Elizabeth Dole issued an order to immediately revoke South African Airways (“SAA”)’s permit with the Federal Aviation Administration (“FAA”). The airline sued Secretary Dole, and the case made its way to the D.C. Circuit Court of Appeals.¹⁶⁹

SAA alleged that Secretary Dole’s actions were not required by the CAAA and also that they were a violation of the Executive Agreement between the U.S. and South Africa.¹⁷⁰ The Court of Appeals rejected every element of SAA’s petition.¹⁷¹

First, Judge James Buckley held that the CAAA was a valid exercise of Congress’ power to regulate commerce with foreign nations.¹⁷² Second, he held that President Reagan properly issued Executive Order 12571 because the Chief Executive is required to faithfully execute the laws of the United States, and he was merely fulfilling his statutory duties under the CAAA by instructing his Cabinet to comply. Third, even though the U.S. had an executive agreement for air service with the then-Union of South Africa dating back to 1947, the CAAA is federal law and thus trumps that agreement as well as any FAA regulations that support the enforcement of non-treaty foreign agreements.¹⁷³ The Court also held that Secretary Dole was right to act quickly in revoking the permit.¹⁷⁴

SAA unsuccessfully tried to argue that Dole illegally violated the executive agreement between the U.S. and South Africa. The Court held that Congress was not bound by executive agreements that were not ratified by the Senate, because they could not rise to the same level of

¹⁶⁸ JOHN HART ELY, *DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW* 131 (Harvard Univ Pr, 1980).

¹⁶⁹ *S. Afr. Airways*, 817 F.2d 119 at 121.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 126.

¹⁷⁴ “When a law is clear in its provisions, its validity cannot be assailed before the courts for a want of conformity to stipulations of a previous treaty not already executed... The duty of the courts is to construe and give effect to the latest expression of the sovereign will.” *Id.* at 125 [quoting *Cf. Whitney v. Robertson*, 124 U.S. 190, 195 (1888)].

authority as treaties.¹⁷⁵ Finally, Judge Buckley rejected SAA's argument that this was a non-justiciable political question. Ruling on the legality of canceling the air travel agreement did not require a policy determination beyond the expertise of the judiciary,¹⁷⁶ nor was there a risk of embarrassing another branch on a sensitive matter of foreign policy.¹⁷⁷ For the first time, international unilateral sanctions had been upheld not based on the amorphous foreign powers of the Presidency, but by Congress' powers to make law – showing separation of powers in action as the bedrock of our democracy.

B. *Helms v. Secretary of the Treasury*¹⁷⁸

In another fascinating case, a group of Congressmen and businessmen, led by Senator Jesse Helms,¹⁷⁹ sued the Department of State and the Department of Treasury. They alleged that State and Treasury's CAAA implementation regulations, which included Namibia¹⁸⁰ as a target of sanctions, were unconstitutional and also violated the UN Charter, several US treaty obligations, and common law. The Congressmen also alleged personal injury, claiming they had been denied their right to vote on Namibia's inclusion in the sanctions. The D.C. District Court rejected each of their claims, delicately navigating the intricacies of Congressional Member suits and the political question doctrine before quickly disposing of Plaintiffs' attempts to invoke international law.

Courts use the political question doctrine to decide if a case is justiciable. If the issue involves something the Constitution has

¹⁷⁵ “Under our constitutional scheme, Congress can denounce treaties if it sees fit to do so, and there is nothing the other branches of government can do about it.” *Id.* at 126 [quoting *Diggs v. Shultz*, 470 F.2d 461, 466 (D.C. Cir. 1972)].

¹⁷⁶ It goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts.” *Id.* at 123 [quoting *Japan Whaling Ass'n v. American Cetacean Soc'y*, 106 S.Ct. 2860, 2866 (1986)].

¹⁷⁷ “It is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.” *Id.* [quoting *Baker*, 369 U.S. 186 at 211].

¹⁷⁸ *Helms v. Sec'y of Treasury*, 721 F. Supp. 1354 (D.D.C. 1989).

¹⁷⁹ Note that Senator Helms (R-NC), who was an ardent segregationist, was the Senator who filibustered Congress' 1985 attempt at the CAAA. After Reagan's veto of the CAAA was overridden in 1986, he remarked, “The thrust of this legislation is to bring about violent, revolutionary change, and after that, tyranny.” He also turned his back on Nelson Mandela during Nelson Mandela's address of Congress. See James Hannaham, *Let us now praise Jesse Helms: Yes, he was hellspawn, but the left owes a great debt to the late, unlamented (homophobic, racist) Senator*, SALON, Jul. 11, 2008 at http://www.salon.com/2008/07/11/helms_hannaham/.

¹⁸⁰ Namibia, then “South-West Africa,” was occupied by South Africa until 1988. Welsh, *supra* note 2, at 467-68.

committed to one of the other two branches of government, or if a resolution would require the Court to move beyond areas of judicial expertise into more sophisticated policy determinations, prudential considerations counsel against judicial intervention.¹⁸¹ At first glance, *Helms* seems to have a strong argument for judicial abstention. The crux of plaintiffs' argument was that Namibia was improperly included in the CAAA and within its regulatory coverage. Namibia's inclusion, however, was valid both within the CAAA and in its subsequent regulations, and saying otherwise would have required a policy determination and an expertise in foreign affairs well beyond judicial expertise and the scope of judicial authority.¹⁸² Ordinarily, because the political question doctrine "forecloses inquiry into the propriety and wisdom of political decisions based on executive discretion," the complaint would have been dismissed.¹⁸³

Nonetheless, suits by Members of Congress pose their own unique challenges.¹⁸⁴ For one thing, they are often politically motivated, with publicity and political traction often a more important goal than any specific judicial relief. They are also usually in response to some perceived wrongdoing by the Executive branch (almost always from the opposite political party, which makes *Helms* an interesting exception).¹⁸⁵ Second, Members of Congress have usually had a chance to vote on an issue related to the cause of action, adding a new wrinkle to the political question. To deal with some of these complex issues, the Federal District Court in the District of Columbia has developed its own special doctrine in response to Congressional suits: *Equitable Discretion*.¹⁸⁶

In applying *Equitable Discretion*, a court simply chooses not to hear a case, believing that a proper resolution of the controversy lies within the legislative process. The court does not even need to discuss standing or justiciability -- Congressmen should not be able to sue just

¹⁸¹ *Helms*, 721 F. Supp. at 1358 [quoting *Goldwater*, 444 U.S. 996 at 998 (Powell, J., concurring)].

¹⁸² *Id.* Interestingly, the text of the CAAA only mentions Namibia in one sentence, declaring that the United States will "encourage democratic forms of government, full respect for human rights, an end to cross-border terrorism, political independence, and economic development" by "helping to secure the independence of Namibia and the establishment of Namibia as a nonracial democracy in accordance with appropriate United Nations Security Council resolutions." Comprehensive Anti-Apartheid Act ("CAAA") of 1986, Pub. L. 99-440, 22 U.S.C. §5014 (repealed 1993).

¹⁸³ *Helms*, 721 F. Supp. at 1358 [quoting *Marbury*, 5 U.S. at 165-66].

¹⁸⁴ For an in-depth analysis of the issues posed by Congressional suits, see Carlin Meyer, *Imbalance of Powers: Can Congressional Lawsuits Serve As Counterweight?* 54 U. PITT. L. REV. 63, 65-69 (1992).

¹⁸⁵ *Helms*, 721 F. Supp. at 1358.

¹⁸⁶ *Id.*

because a law “passed over [their] objecting vote.”¹⁸⁷ The Court essentially told Senator Helms, “If you don’t like it, pass another law.”¹⁸⁸ It would have been an abuse of discretion to rule that the Congressional plaintiffs had been denied their right to vote.¹⁸⁹

The Court also held that both sets of Plaintiffs had failed to state any cause of action with respect to the government’s alleged violations of international treaties and customary international law. One of Plaintiffs’ claims was that the CAAA and the various regulations it spawned were all violations of rights derived from various articles of the UN charter and international law.¹⁹⁰ The Court did not examine these claims in any real depth, but briefly dismissed them all, as “none of these alleged ‘violations’ [were] legally cognizable.”¹⁹¹

Even though a treaty made under the authority of the United States is the “supreme law of the land,”¹⁹² treaties must confer rights on individuals before an individual can assert a claim “arising under them.”¹⁹³ The Court held that even though it is “equally true of both customary and international law” that “where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of nations,”¹⁹⁴ it is also true that “no enactment of Congress can be challenged on the ground that it violates customary international law.”¹⁹⁵ Even though the use of sanctions remains a complex and divisive political issue, *Helms* likely foreclosed any challenge to the CAAA exclusively grounded in international law. If sanctions are imposed unilaterally by the U.S. through an Act of Congress, it would appear to be impossible to halt them by using international law in an American court.

¹⁸⁷ *Id.* “The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse. Otherwise, we would encourage small groups or even individual Members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict.” *Goldwater*, 444 U.S. at 996.

¹⁸⁸ “Although plaintiffs assert a number of grounds ...none of the executive’s actions with respect to Namibia precludes the Congressional plaintiffs from amending or repealing the CAAA...that these plaintiffs have the relief they seek through the exercise of their own legislative power is amply demonstrated by the fact that plaintiff Senator Helms recently introduced legislation to repeal the CAAA.” *Helms*, 721 F. Supp. at 1359.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² U.S. Const. art. VI, cl. 2; *Helms*, 721 F. Supp. at 1359 [quoting *United States v. Belmont*, 301 U.S. 324 (1937)].

¹⁹³ *Helms*, 721 F. Supp. at 1359 [quoting *Committee of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 937 (D.C.Cir. 1988)].

¹⁹⁴ *Id.* [quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)].

¹⁹⁵ *United States v. Belmont*, 301 U.S. 324 (1937).

VI. SANCTIONS TIGHTEN, APARTHEID UNWINDS, HISTORY UNFOLDS

Once the sanctions took effect, reactions were immediate in the U.S., South Africa, and around the world. Desmond Tutu and others who had been calling for sanctions were overjoyed. Tutu said, “This was not an anti-South African action, it was anti-Apartheid and anti-injustice.”¹⁹⁶ Albertina Sisulu, a black anti-Apartheid leader, said blacks would “welcome the vote as a wonderful show of American support.”¹⁹⁷ Foreign Minister Pik Botha, who failed in his last-minute attempts to sway U.S. Senators, said in an interview on South African state television, “We are powerless to stop such an emotional current.”¹⁹⁸ President P.W. Botha remained as defiant as ever. Faced with the first major American sanctions, final abandonment by the Reagan administration, and an uprising at home, he pledged to not yield: “This uprising will bring out the beast in us.”¹⁹⁹

Some anti-Apartheid South African MPs and other activists opposed sanctions, echoing President Reagan’s concerns that such measures would hurt the people they were intended to help.²⁰⁰ Economists remain divided – often apparently anchored in their respective political philosophies -- over the precise effect that sanctions had on financial markets.²⁰¹ But even if sanctions and divestment did not have a major negative effect on South Africa’s financial markets, they were still “effective in raising the public moral standards or public awareness of South African repression.”²⁰² Months after his veto was overridden, Reagan remained adamant that the economic effect on South

¹⁹⁶ *S. Africa shows mixed reactions to vote*, THE COURIER, Oct. 3, 1986 at 6a [on file with author].

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ This quote was the inspiration for Nigerian Afrobeat star Fela Kuti’s 1989 album, “Beasts of No Nation,” which depicted the quote and photos of Botha, Reagan, and Thatcher on the cover. FELA KUTI, BEASTS OF NO NATION (MCA, 1989) [Photo on file with author].

²⁰⁰ *S. Africa*, *supra* note 196.

²⁰¹ See George Gedda, *Analysts Differ on Sanctions Tie to Apartheid*, ASSOC. PRESS, July 11 1991, at A1 [On file with author]; Christopher S. Wren, *Pretoria Banker Discounts Sanctions*, N.Y. TIMES, Feb. 7, 1989, available at <http://www.nytimes.com/1989/02/07/business/pretoria-banker-discounts-sanctions.html>.

²⁰² See Siew Hong Teoh et. al., *The Effect of Socially Activist Investment Policies on the Financial Markets: Evidence from the South African Boycott*, 72 J. OF BUS. 35-90 (1999).

Africa was negligible,²⁰³ yet it also became clear that his administration had left critical gaps in enforcement.²⁰⁴

In 1987, Congress tightened its grip on South Africa with an amendment to that year's Budget Reconciliation Act.²⁰⁵ This amendment, introduced by Harlem Congressman Charles Rangel, blocked the Internal Revenue Service from reimbursing U.S. companies doing business in South Africa. The effect was a kind of "double taxation," increasing the tax on South African profits from 58 to 72 percent.²⁰⁶ Mobil Corporation, the largest U.S. investor in South Africa, withdrew from the country entirely as a result of this higher tax.²⁰⁷ In 1988, an even stricter sanctions bill could only pass the House.²⁰⁸

There was not much political movement on either side while Ronald Reagan and his South African counterpart, P.W. Botha, stayed in power. Botha's state of emergency remained in place. And though it was the Reagan administration's official position to denounce Apartheid, and though the battle over sanctions had consumed so much of his foreign affairs agenda, Reagan seemed still unconvinced that Apartheid was *that* much of a problem. In a 1988 interview, ABC's Sam Donaldson asked why Reagan was such a supporter of "freedom fighters" around the globe but so "tepid" toward those fighting for freedom in South Africa.²⁰⁹

²⁰³ "In the economic area, the report points out that sanctions have had minimal impact on interrupting South Africa's external trade because of that country's ability to find substitute markets for its products outside the United States." President Ronald Reagan, *Letter to the Speaker of the House of Representatives and the Chairman of the Senate Foreign Relations Committee Transmitting a Report on Apartheid in South Africa*, Oct. 1, 1987, available at <http://www.reagan.utexas.edu/archives/speeches/1987/100187j.htm> (On file with Ronald Reagan Presidential Lib. and Museum).

²⁰⁴ "A report issued by the General Accounting Office ("GAO") in October 1987 suggests that the Reagan Administration was less than fully committed to enforcement of the Act's provisions." Laurel Fletcher, Luke Cole, and Alison McMorran, *South Africa: United States Economic Sanctions and the Impact on Apartheid*, 1 HARV.HUM. RTS. Y. B. 236-247 (1988) [citing U.S. GENERAL ACCOUNTING OFFICE, SOUTH AFRICA: STATUS REPORT ON IMPLEMENTATION OF THE COMPREHENSIVE ANTI-APARTHEID ACT, GAO/NSIAD-88-44, at 3 (October 1987)].

²⁰⁵ This effort was also spearheaded by Congressman Gray, who had jurisdiction as Chair of the Budget Committee. See Yardley, *supra* note 90.

²⁰⁶ Charlie Rangel, the author of the so-called "Rangel Amendment," talks proudly of this story in his autobiography. He writes, "The Rangel Amendment didn't get much press when it passed in December 1987, but by the spring of 1989 it had the masters of Apartheid in South Africa howling and lashing out in pain...Even Nelson Mandela commented on it, noting that in South Africa it was not just known as the "Rangel Amendment" but "the bloody Rangel Amendment." CHARLES B. RANGEL, ...AND I HAVEN'T HAD A BAD DAY SINCE (Thomas Dunne Books, 2007) at 233.

²⁰⁷ *Id.* at 233.

²⁰⁸ Yardley, *supra* note 90.

²⁰⁹ Kleiner, *supra* note 7.

Reagan replied, "Well, the difference is that we don't have an armed insurrection going, as we have in some other countries, and we have a great division even among the people who are being oppressed. *It is a tribal policy more than it is a racial policy,*²¹⁰ and that is one of the most difficult parts here."²¹¹

In 1988, George H.W. Bush, Reagan's Vice President, was elected President. Although Bush originally adopted his predecessor's approach to South Africa and held to an anti-Communist and pro-security worldview, honed as Director of the Central Intelligence Agency, he adjusted his position and became fully committed to ending Apartheid.

In August 1989, Frederik Willem ("F.W.") de Klerk ascended to the South African Presidency. Like Bush Sr., de Klerk had long had a conservative reputation in the National Party. And like his counterpart in Washington, de Klerk and his government in Pretoria began a marked shift toward peace. De Klerk's first speech, an address to South African Parliament, was remarkable. Almost as if he was "ticking the boxes" of Congress' demands in the CAAA, he called for the release of Nelson Mandela, the legalization and unbanning of all political groups (including the African National Congress and the South African Communist Party), the freeing of all nonviolent political prisoners, an end to the "state of emergency," the removal of "emergency restrictions on the media," universal suffrage,²¹² racial equality, and peace negotiations both with South Africa's neighbors and at home with black leaders.²¹³

It is time for us to break out of the cycle of violence and break through to peace and reconciliation. Among other things, those aims include a new, democratic constitution; universal franchise; no domination; equality before an independent judiciary; the protection of minorities as well as of individual rights... better education, health services, housing and social conditions for all.

In this connection Mr. Nelson Mandela could play an important part. I wish to put it plainly that the Government

²¹⁰ Italics added by author.

²¹¹ Howard Means, *Reagan's Napping on South Africa Will Come Back to Haunt U.S.*, ORLANDO SENTINEL, Mar. 17, 1988, http://articles.orlandosentinel.com/1988-03-17/news/0020390282_1_south-africa-Apartheid-in-south-ronald-reagan.

²¹² Ironically, de Klerk's conservative National Party colleagues demanded a "whites-only" referendum to gauge support for these proposed changes. *De Klerk dismantles Apartheid in South Africa. On this Day: February 2, 1990*, BBC NEWS, http://news.bbc.co.uk/onthisday/hi/dates/stories/february/2/newsid_2524000/2524997.stm.

²¹³ *Id.*

has taken a firm decision to release Mr. Mandela unconditionally...The time for negotiation has arrived.²¹⁴

The world was understandably awed. Desmond Tutu said of De Klerk, “He has taken my breath away.”²¹⁵ President Bush applauded the speech, but stated that America would remain firm with its sanctions until words became actions.²¹⁶

Nelson Mandela was released on February 11, 1990.²¹⁷ As the world watched him leave Victor Verster Prison and ride to Cape Town City Hall, he gave his first speech to an impromptu ANC rally that had gathered to celebrate him and his freedom.²¹⁸ Toward the end of his speech, he remarked, “We call on the international community to continue the campaign to isolate the Apartheid regime. To lift sanctions now would be to run the risk of aborting the process towards the complete eradication of Apartheid.”²¹⁹ His support for – and urging of – continuing sanctions did not go unnoticed by the international community, and lends credence to the assertion that sanctions were critical both in showcasing support for black South Africans and in forcing the National Party to come to the negotiating table.

Shortly after his release, Mandela embarked on a world tour, first stopping in the United Kingdom and then the United States.²²⁰ On June 25, President Bush welcomed Nelson Mandela to the White House.²²¹

²¹⁴ See F. W. de Klerk's speech at the opening of Parliament, 2 February 1990 [abridged by author], at <http://www.anc.org.za/show.php?id=3976> (Published by the African National Congress).

²¹⁵ BBC NEWS, *supra* note 212.

²¹⁶ *Id.*

²¹⁷ Keller, *supra* note 1.

²¹⁸ See *Nelson Mandela's Address to Rally in Cape Town on his Release From Prison*, Feb. 11, 1990 at <https://web.archive.org/web/20080728021713/http://www.anc.org.za/ancdocs/history/mandela/1990/release.html> (Published by the African National Congress).

²¹⁹ *Id.*

²²⁰ Though the ANC blocked Mandela from meeting with Thatcher on his first trip to the UK [diplomatic cables revealed he was “furious” that his advisers had taken the meeting off his schedule], he persisted and eventually met with her in July of that year. *Nelson Mandela and Margaret Thatcher: the meeting that never was*, THE GUARDIAN, Nov. 28, 2010, <http://www.theguardian.com/world/2010/nov/28/nelson-mandela-margaret-thatcher-meeting>.

²²¹ Bush also invited F.W. de Klerk to the White House that summer. “Initially, both leaders accepted invitations to visit the White House separately. De Klerk was tentatively scheduled to come to Washington on June 18, the first-ever state visit by a South African leader. Mandela was scheduled to visit second, a week later, which to some seemed to be a slight. But on May 30, de Klerk announced that he was postponing his visit because of the controversy.” See Patrick Kiger, *Nelson Mandela's First Visit to Washington*, WETA TELEVISION, Dec. 13, 2013, at <http://blogs.weta.org/boundarystones/2013/12/13/nelson-mandelas-first-visit-washington>.

After a brief ceremony on the South Lawn, where Bush described Mandela as a leader who “embodied the hopes of millions” and invoked the spirit of Dr. Martin Luther King, the two adjourned to the West Wing for discussions with Secretary of State James Baker and other members of the administration.²²² During these “tense” discussions, Mandela pressed Bush and Baker to keep enforcing anti-Apartheid sanctions, and asked for \$10 million to help fund South Africa’s democratic development.²²³

The next day, Nelson Mandela addressed a joint session of Congress – only the third private citizen ever to do so.²²⁴ For the hundreds of Representatives and Senators who supported the CAAA and called for Mandela’s release, it was a moment rich in meaning and symbolism. Mandela spoke directly to them, saying:

We must contend still with the reality that South Africa is a country in the grip of the Apartheid crime against humanity...Therefore, we say we still have a struggle on our hands; our common and noble efforts to abolish the system of white minority domination must continue. We are encouraged and strengthened by the fact of the agreement between ourselves and this Congress, as well as [between] President Bush and his administration, that sanctions will remain in place. Sanctions should remain in place because the purpose for which they were imposed has not yet been achieved.

We would like to take this opportunity to thank you all for the principled struggle you waged which resulted in the adoption of the historic *Comprehensive Anti-Apartheid Act*²²⁵ which made such a decisive contribution to the process of moving our country forward toward negotiations. We request that you go further and assist us with the material resources which will enable us to promote the peace process, and meet other needs which arise from the changing situation you have helped to bring about.²²⁶

Mandela’s remarks should be instructive in the ongoing debate on the efficacy of international sanctions. Those who deny that sanctions had any effect on the ending of Apartheid in South Africa should pay

²²² Martin Weil, *Nelson Mandela in DC: Ovations and adorations on his visits*, WASH. POST LOCAL, Dec. 5, 2013.

²²³ Kiger, *supra* note 221.

²²⁴ *Nelson Mandela Address*, C-SPAN, June 26 1990. Video available at <http://www.c-span.org/video/?14219-1/Nelson>.

²²⁵ Italics added by author.

²²⁶ *Nelson Mandela Address*, C-SPAN, June 26 1990. Video available at <http://www.c-span.org/video/?14219-1/Nelson>.

attention to Mandela's description of the CAAA as a "decisive contribution to the process of moving our country forward."

On July 10, 1991, President Bush signed Executive Order 12769.²²⁷ "Having concluded that the Government of South Africa has taken all of the steps specified" to start meeting conditions for sanctions to be lifted, Bush ordered the Executive branch to begin terminating all sanctions imposed by title III and sections 501(c) and 504(b) of the CAAA.²²⁸ The rest of the Act remained in force while the Inter-Agency Coordinating Committee monitored the termination process. The order also revoked President Reagan's Executive Orders from 1985, the "watered-down" sanctions that were a catalyst for passage of the CAAA in the first place.²²⁹

Bush was defeated in his reelection bid, and Bill Clinton took office in January 1993. On September 23, 1993, the white-run South African Parliament passed legislation creating a "Transitional Executive Council of all races" to help supervise and prepare the country for its first-ever full democratic elections, scheduled to take place in April 1994.²³⁰ The next day, Mandela spoke to the United Nations Special Committee on Apartheid.²³¹ In appealing to the world to end the economic isolation of South Africa, he said, "In response to the historic advances toward democracy that have been achieved . . . and to help create the necessary conditions for stability and social progress, we believe the time has come when the international community should lift all economic sanctions against South Africa."²³²

Shortly after Mandela's appeal to the UN, President Clinton released a statement of support. He also cautioned, "Removing sanctions will not be enough...Americans who have been so active in breaking

²²⁷ Exec. Order No. 12769, "Implementation of Section 311(a) of the Comprehensive Anti-Apartheid Act," 56 Fed Reg. 31855 (July 10, 1991).

²²⁸ Title III dealt largely with the prohibition on trade, including imports and exports of military items, computers, nuclear trade, iron, steel, crude oil, sugar, a prohibition on loans, a prohibition on air transport, a prohibition on investment, and a prohibition on the promotion of tourism, while sections 501c and 504b had to do with Executive monitoring on a prohibition of strategic minerals like "chromium, cobalt, manganese, and "other strategic and critical materials." Comprehensive Anti-Apartheid Act ("CAAA") of 1986, 22 U.S.C. §5051 (repealed 1993).

²²⁹ *Id.*

²³⁰ Bob Dogin, *Multiracial Council Begins S. Africa Oversight Role*, L.A. TIMES, Dec. 8, 1993, available at http://articles.latimes.com/1993-12-08/news/mn-65100_1_council-members.

²³¹ Stanley Meisler, *Mandela Calls for End of S. African Sanctions: Commerce: Leader of ANC cites democratic advances, says lifting curbs will aid stability, progress. Clinton urges swift action. Arms embargo would remain for now*, L.A. TIMES, Sept. 25, 1993.

²³² Terry Atlas, *A Green Light on S. Africa: Trade Bans Fall After Mandela Plea*, CHICAGO TRIBUNE, Sept. 25, 1993.

down the pillars of Apartheid must remain committed to helping build the non-racial market democracy that comes in its wake."²³³ He called on the original American divestors – universities, labor unions, and state and local governments--to now open up to South Africa to help support the democratic transition.²³⁴ He also appointed Commerce Secretary Ron Brown to lead a delegation to South Africa to explore business opportunities, particularly in black communities.²³⁵ Finally, he pledged that the U.S. would no longer block lending from the International Monetary Fund to South Africa, in addition to a new plan to begin sending Peace Corps volunteers to the country.²³⁶

Two months later, in November 1993, Congress passed the South African Democratic Transition Support Act of 1993 (“Support Act”).²³⁷ The Support Act repealed the CAAA in its entirety and ended all sanctions. In the legislative findings, the Act cited both South Africa’s successful negotiations and Mandela’s declaration that “the time has come” as among the reasons for passage. The Act also set forth the U.S. government’s full support for the Transitional Executive Council and for a successful transition to a “nonracial democracy.” It encouraged U.S. investors to develop a relationship with South African churches and trade unions to promote “responsible codes of corporate conduct and other measures to address the historical inequities created under Apartheid.” In December, 1993, Nelson Mandela and F.W. de Klerk shared the Nobel Peace Prize.²³⁸

On April 27, 1994, Nelson Mandela was elected President in South Africa’s first full and free election. Though he was a worldwide icon, his political relationship with the U.S. remained complex throughout his presidency. For instance, he clashed with Presidents Bill Clinton and George W. Bush on matters of foreign policy.²³⁹ One contentious issue was Mandela’s support of the Castro regime in Cuba and the Gaddafi regime in Libya. Mandela cited Cuba and Libya’s longtime support of the ANC as the basis for his loyalty.²⁴⁰ Mandela

²³³ *Id.*

²³⁴ Meisler, *supra* note 231.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ South African Democratic Transition Support Act of 1993, 22 U.S.C. §5001 (1993).

²³⁸ See The Nobel Peace Prize Award Ceremony 1993 [video clip] at http://www.nobelprize.org/ceremonies/archive/video/ceremony_oslo/1993/index.html.

²³⁹ Steven Mufson, *In Life, Nelson Mandela Often Irritated U.S.*, WASH. POST, Dec. 10, 2013, available at http://www.washingtonpost.com/world/africa/in-life-nelson-mandela-often-irritated-us/2013/12/10/2b7b6368-6192-11e3-bf45-61f69f54fc5f_story.html.

²⁴⁰ According to John Campbell, senior fellow for Africa policy studies at the Council on Foreign Relations, “Mandela was profoundly loyal to those who supported the liberation

would ask of the State Department, “How can they have the arrogance to dictate to us who our friends should be?”²⁴¹ Mandela was also a chief critic of U.S. interventionism, especially during the second Iraq War. When the Bush Administration defied the United Nations and invaded Iraq, Mandela delivered a scathing critique:

Bush is now undermining the United Nations. He is acting outside of it... Is it because this Secretary General of the United Nations is now a black man? They never did that when secretary generals were white.

If there is a country that has committed unspeakable atrocities in the world, it is the United States of America. What I'm condemning is that one power with a president who has no foresight, who cannot think properly, is now wanting to plunge the world into a holocaust. All that he wants is Iraqi oil because Iraq produces 64 percent of oil in the world, What Bush wants is to get hold of that oil.²⁴²

President Mandela's relationship with his U.S. counterparts, however, was not defined entirely by his criticism. Even though they occasionally butted heads, Nelson Mandela and President Clinton supported each other and remained good friends. And despite Mandela's excoriating of George W. Bush, the U.S. and South Africa were able to collaborate on several important African issues: the AIDS crisis in sub-Saharan Africa, development in Southern Africa, and peace negotiations in the Democratic Republic of the Congo and Burundi.²⁴³

In 2008, the United States elected its first black president: Barack Obama, who first met Nelson Mandela while Obama was a Senator from Illinois. Obama cites Mandela as one of his greatest inspirations. He also cites the anti-Apartheid movement as the beginning of his political inclinations and the first inspiration for his career.²⁴⁴ Mandela and Obama met in Washington in 2005, when the then-Junior Senator paid a courtesy call to Mandela in his hotel room.²⁴⁵ The next year, Obama went to South Africa as part of a Congressional delegation.²⁴⁶ A photo of

struggle, even if it was in their narrow self-interest to do so and when it had little or nothing to do with nonracial democracy.” *See id.*

²⁴¹ *Id.*

²⁴² Luke Johnson, *Nelson Mandela Delivered one of the Most Scathing Critiques of Invading Iraq*, HUFF. POST, Dec. 6, 2013 at http://www.huffingtonpost.com/2013/12/06/nelson-mandela-iraq_n_4399015.html.

²⁴³ *See Mufson, supra* note 239.

²⁴⁴ Kathleen Hennessey, *The Obama-Mandela Dynamic, Reflected in a Photo*, L.A. TIMES, June 25, 2013.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

the Senator standing in Mandela's Robben Island prison cell quickly went viral, and was shown extensively during news reports on Mandela's passing.

In 2008, the year Obama was elected President, Nelson Mandela and the African National Congress finally were removed from the terrorist watch list.²⁴⁷ The fact that Mandela was still on the list was viewed partly as an embarrassing oversight and partly as ludicrous historical irony. Until the restrictions were officially lifted, however, Nelson Mandela and several other notable South Africans needed special permission to travel to the United States.²⁴⁸ Secretary of State Condoleezza Rice testified about the restriction: "This is a country with which we now have excellent relations, South Africa, but it's frankly a rather embarrassing matter that I still have to waive in my own counterpart, the foreign minister of South Africa, not to mention the great leader Nelson Mandela."²⁴⁹ Republican Senator Judd Gregg called it a "bureaucratic snafu."²⁵⁰ Homeland Security Secretary Michael Chertoff said that the controversy "raises a troubling and difficult debate about what groups are considered terrorists and which are not."²⁵¹

On December 5, 2013, Nelson Mandela died.²⁵² Every living U.S. President attended his funeral at Soccer City Stadium in Johannesburg, except for George H.W. Bush, who was in frail health.²⁵³ Twenty-three Members of Congress also attended, including two Republicans.²⁵⁴ The lone Senator to attend was Ted Cruz, though the Texas conservative was a somewhat unexpected participant.²⁵⁵ In his

²⁴⁷ Mimi Hall, *US Has Mandela on Terrorist List*, USA TODAY, Apr. 30, 2008 at http://usatoday30.usatoday.com/news/world/2008-04-30-watchlist_N.htm.

²⁴⁸ "When ANC members apply for visas to the USA, they are flagged for questioning and need a waiver to be allowed in the country. In 2002, former ANC chairman Tokyo Sexwale was denied a visa. In 2007, Barbara Masekela, South Africa's ambassador to the United States from 2002 to 2006, was denied a visa to visit her ailing cousin and didn't get a waiver until after the cousin had died." *See id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² Keller, *supra* note 1.

²⁵³ *US presidents travel together to Mandela funeral*, THE GUARDIAN, Dec. 10, 2013, <http://www.theguardian.com/world/2013/dec/10/us-presidents-travel-together-mandela-funeral-air-force-one>.

²⁵⁴ Attendance was dominated by members of the Congressional Black Caucus, including Marcia Fudge, the Chairman; Charles Rangel, who authored what Mandela called the "Bloody Rangel Amendment;" and John Lewis, hero of the U.S. Civil Rights Movement. Ed O'Keefe, *23 Members of Congress attending Mandela funeral service in South Africa*, WASH. POST, Dec. 9, 2013.

²⁵⁵ *Id.* Media coverage of Cruz's attendance was a mixture of both surprise and a hint of cynicism, as many speculated this was a calculated move to boost foreign policy

eulogy at Mandela's funeral, President Obama called Mandela "the last great liberator of the Twentieth Century" and intertwined Mandela's biography with America's political history and democratic legacy:

He would endure a brutal imprisonment that began in the time of Kennedy and Khrushchev, and reached the final days of the Cold War. Emerging from prison, without the force of arms, he would -- like Abraham Lincoln -- hold his country together when it threatened to break apart. And like America's Founding Fathers, he would erect a constitutional order to preserve freedom for future generations -- a commitment to democracy and rule of law ratified not only by his election, but by his willingness to step down from power after only one term.²⁵⁶

VII. CONCLUSION: WAS THE CAAA SUCCESSFUL? WHAT DID WE LEARN? WHY DOES THIS MATTER?

A. *Was the CAAA successful?*

Ultimately, the answer must be yes. Economists continue to disagree over whether the economic impact of sanctions and divestment on South Africa was as significant as the proponents of the CAAA declared.²⁵⁷ Politicians, policymakers, and scholars continue to disagree over whether sanctions are an effective tool of foreign policy.²⁵⁸ The timeline for sanctions to work is long, and sanctions certainly cannot be "successful overnight."²⁵⁹ But the history behind the CAAA ought not to be ignored.

credentials and appeal prior to a 2016 Presidential run. Shockingly, Cruz received harsh criticism from several of his constituents for his tribute to Mandela, as they took to his Facebook page to denounce the late Mandela as a "communist," "terrorist," and "racist." The incident became something as a media spectacle, as such anti-Mandela sentiment had not been part of the public discourse since well before the fall of Apartheid. See Annetta Konstantinides, *Ted Cruz Criticized for Praising Nelson Mandela*, ABC NEWS, Dec. 6, 2013 at <http://abcnews.go.com/blogs/politics/2013/12/ted-cruz-criticized-for-praising-nelson-mandela/>.

²⁵⁶ *Transcript: President Obama speaks at Nelson Mandela memorial*, CNN, Dec. 10, 2013, available at <http://edition.cnn.com/TRANSCRIPTS/1312/10/nday.02.html>.

²⁵⁷ See Teoh, *supra* note 202; See also Eric Hendey, *Does Divestment Work?*, HARVARD POL. REV., Oct. 2, 2012, at <http://harvardpolitics.com/harvard/does-divestment-work/>.

²⁵⁸ See George Tsebelis, *Are Sanctions Effective? A Game-Theoretic Analysis*, J. OF CONFLICT RES., 1990; Ella Shagabudinova & Jeffrey Berejikian, *Deploying Sanctions While Protecting Human Rights: are Humanitarian "Smart Sanctions" Effective?*, J. OF HUMAN RIGHTS, Feb. 2007, Vol. 6.

²⁵⁹ Glenn Kessler, *The Fact Checker: How effective are sanctions in 'changing behavior'?*, WASH. POST, Apr. 27, 2011, at <http://www.washingtonpost.com/blogs/fact->

Before Congress took action, the South African National Party remained firmly entrenched in its pro-Apartheid worldview. Only four years after the CAAA was passed, F.W. de Klerk brought white South Africans in government to the negotiating table.²⁶⁰ His landmark speech to Parliament was no coincidence – the drastic plans he outlined bore a striking similarity to the conditions mandated by Congress in the CAAA. In his first speech upon being released, Nelson Mandela called on the international community not to let up the pressure on the government, to keep sanctions in place.²⁶¹ During their meeting at the White House, Mandela looked President Bush in the eye and told him the same thing.²⁶² While the Apartheid system eventually would have collapsed under the weight of its own corrosive oppression, the CAAA was vital in expediting that process. If “constructive engagement” had remained the norm, the status quo in Pretoria would have taken many more years to change.

B. *What have we learned?*

The passage of the CAAA was certainly not the last time the U.S. government used sanctions in response to an international conflict or crisis. Most U.S. “sanctions” still originate from the Executive, pursuant to the President’s power under the International Emergency Economic Powers Act.²⁶³ Since the CAAA was implemented in 1986, a number of other countries have had IEEPA restrictions placed on their commerce with the U.S. through Executive Order: Belarus, Burma, Iraq, Ivory Coast, the Democratic Republic of the Congo, Lebanon, Libya, Somalia, Sudan, Syria, Yemen, and Zimbabwe, to name a handful.²⁶⁴ Only a few of those Executive “sanctions” have been supplemented with corresponding Congressional legislation.²⁶⁵

checker/post/how-effective-are-sanctions-in-changing-behavior/2011/04/26/AFCwRktE_blog.html.

²⁶⁰ BBC NEWS, *supra* note 212.

²⁶¹ *Nelson Mandela’s Address to Rally in Cape Town on his Release From Prison*, Feb. 11, 1990, at <https://web.archive.org/web/20080728021713/http://www.anc.org.za/ancdocs/history/mandela/1990/release.html> (Published by the African National Congress).

²⁶² Weil, *supra* note 222.

²⁶³ United States Department of the Treasury, Resource Center: *Sanctions Programs and Country Information*, available at <http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx>.

²⁶⁴ *Id.*

²⁶⁵ For example, Congress passed the Burma Freedom and Democracy Act of 2003, [Pub. L. 108-61] and the JADE (Junta’s Anti-Democratic Efforts) Act Of 2008, [Pub. L. 110-286] in addition to the six Executive Orders restricting Burmese commerce which have been promulgated since 1997. See U.S. Department of the Treasury, Resource Center:

The Executive and Legislative branches also have had several additional confrontations over the President's veto and subsequent overrides, though none has reached the level of great consequence in foreign affairs or in human rights.²⁶⁶ The President and Congress still continue to fight over foreign policy, particularly in times of divided government when one (or both) chambers of Congress are controlled by the party opposed to the White House. From Congressional Democrats passing a non-binding resolution in opposition to President Bush's proposed "Surge" during the Iraq War in 2007²⁶⁷ to House Republicans publishing their own website detailing a supposed administration "cover-up" surrounding the 2012 terrorist attack on the U.S. Consulate in Benghazi,²⁶⁸ the debate over the separation of powers and accountability in foreign affairs goes on.

There is a very strong parallel between the events surrounding South Africa in 1986 and America's current relationship with Iran. In November 2013, the Obama administration, led by Secretary of State John Kerry, concluded a historic interim agreement with Iran in Geneva regulating against nuclear weapons.²⁶⁹ While the agreement paves the way for future negotiations, it also calls for ratcheting down international sanctions and easing economic pressure on Iran in exchange for Tehran halting its pursuit of advanced nuclear technology and reining in its nuclear program.²⁷⁰ Despite this landmark success, many members of Congress (in both parties) keep threatening to pass additional, harsher sanctions on Iran. Senator Bob Menendez, a New Jersey Democrat and Chair of the Foreign Relations Committee, has introduced the "Nuclear

Burma Sanctions at <http://www.treasury.gov/resource-center/sanctions/Programs/pages/burma.aspx>.

²⁶⁶ While there have certainly been several successful veto overrides since Reagan's CAAA veto, rarely has the Executive branch ever been so clearly judged to be on the wrong side of history. In fact, not since Andrew Johnson's infamously racist vetoing has Congress been so strongly allied with public opinion against the President's actions. See Aviam Soifer, *Federal Protection, Paternalism, and the Virtually Forgotten Prohibition of Voluntary Peonage*, 112 COLUM. L. REV. 1607 (2012).

²⁶⁷ See Suzanne Goldberg, *By 246 votes to 182, Congress sends rebuke to Bush over Iraq troop surge*, THE GUARDIAN, Feb. 16, 2007, available at <http://www.theguardian.com/world/2007/feb/17/usa.iraq>.

²⁶⁸ See Wesley Lowery, *Boehner Launches Benghazi Web site*, WASH. POST, Feb 5, 2014, available at <http://www.washingtonpost.com/blogs/post-politics/wp/2014/02/05/republicans-accuse-obama-of-stonewalling-on-benghazi/>.

²⁶⁹ David Blair, *Iran nuclear deal agreed at Geneva talks*, THE TELEGRAPH, Nov. 24, 2013, available at <http://www.telegraph.co.uk/news/worldnews/middleeast/iran/10470716/Iran-nuclear-deal-agreed-at-Geneva-talks.html>.

²⁷⁰ *Id.*

Weapon Free Iran Act of 2013.”²⁷¹ The bill has fifty-eight co-sponsors, making it already nearly filibuster-proof. And the bill is bipartisan, with both “Red State” conservative Democrats and more “progressive” Northeast Democrats signing on alongside Republicans.²⁷² The bill mirrors legislation that has already passed the Republican-controlled House of Representatives.²⁷³ The Obama administration has implored Congress to give the negotiations a chance to work.²⁷⁴ President Obama has also promised to veto the bill if it arrives at his desk, reiterating this position in his recent State of the Union address.²⁷⁵ In addition, the Iranian government has indicated that any additional sanctions would be

²⁷¹ See Bill Summary and Status: S.1881 (113th Congress), LIB. OF CONG., www.thomas.loc.gov.

²⁷² *Id.*

²⁷³ Timothy Homan, *House Passes Bill to Strengthen U.S. Sanctions on Iran*, Bloomberg Politics, Aug. 1, 2013, at <http://www.bloomberg.com/news/2013-07-31/house-passes-bill-to-strengthen-u-s-sanctions-against-iran.html>.

On November 24, 2013, Iran and the P5+1 reached a tentative agreement, called the “Joint Plan of Action,” that would begin the easing of some sanctions when Iran met certain benchmarks, and also authorized stringent weapons inspections in the country. President Obama called the deal “an important first step.” Anne Gearan & Joby Warrick, *World powers reach nuclear deal with Iran to freeze its nuclear program*, WASH. POST, Nov. 24, 2013, at www.washingtonpost.com/world/national-security/kerry-in-geneva-raising-hopes-for-historic-nuclear-deal-with-iran/2013/11/23/53e7bfe6-5430-11e3-9fe0-fd2ca728e67c_story.html.

In response, 47 Republican Senators, led by Tom Cotton from Arkansas, signed an open letter to Iranian leaders, including Supreme Leader Ayatollah Ali Khamenei, that stated that Congress was ready to undo any “Executive Agreement” reached between Iran and the U.S. The letter proved controversial, and there was intense partisan backlash. Vice President Joe Biden said, “In 36 years in the United States Senate, I cannot recall another instance in which Senators wrote directly to advise another country — much less a longtime foreign adversary — that the President does not have the constitutional authority to reach a meaningful understanding with them.” Greg Jaffe & Sean Sullivan, *Republican letter to Iran intensifies dispute with White House*, WASH. POST, March 9, 2015, at www.washingtonpost.com/politics/gop-senators-letter-to-iran-intensifies-dispute-with-white-house/2015/03/09/c873d354-c68a-11e4-a199-6cb5e63819d2_story.html.

Last month, President Obama signed a “compromise bill,” passed unanimously in the House and Senate, that would allow Congress to have “review” of any agreement that was ultimately reached. Jonathan Weisman & Peter Baker, *Obama Yields, Allowing Congress Say on Iran Nuclear Deal*, N.Y. TIMES, April 14, 2015, at www.nytimes.com/2015/04/15/us/senators-reach-deal-on-iran-nuclear-talks.html?_r=0.

²⁷⁴ Manu Raju and Burgess Everett, *Bill Clinton, AIPAC, urge delay on Iran sanctions*, POLITICO, Feb. 6, 2014, at <http://www.politico.com/story/2014/02/bill-clinton-iran-sanctions-103219.html>.

²⁷⁵ *Full Transcript: Obama’s 2014 State of the Union Address*, WASH. POST, Jan. 28, 2014, available at http://www.washingtonpost.com/politics/full-text-of-obamas-2014-state-of-the-union-address/2014/01/28/e0c93358-887f-11e3-a5bd-844629433ba3_story.html.

a deal-breaker for the Geneva agreement.²⁷⁶ Public opinion is also divided – support was originally high, but Americans are becoming more and more skeptical of the deal.²⁷⁷ Because implementation of the agreement began on January 20, and because this is an election year, the next few months will be critical to the success or failure of the deal with Iran. President Obama has pledged to reinstate sanctions at any sign that Iran is waffling or refusing to cooperate – but that may not be enough to placate Congress.²⁷⁸ Even though it is unclear whether the bill could garner the two-thirds needed to override a veto, a number of Members of Congress may care more about appearing “tough on Iran” and “standing up to the President” in order to win primary races and to rake in fundraising dollars from special interest groups that oppose the agreement.²⁷⁹

C. *Why does this matter?*

Studying the events surrounding the CAAA helps inform some of our trickiest constitutional questions, but it also has real-world applications. Studying the CAAA and its successes truly speaks to America’s capability to help affect global change without using military force or putting “boots on the ground.”²⁸⁰ In our present world, in which geopolitics seems as precarious as ever and the American public is war-

²⁷⁶ Raju & Everett, *supra* note 274.

²⁷⁷ Herb Keinon, *Polls show shift as US public opinion now disapproves of Iran deal*, JERUSALEM POST, Dec. 10, 2013, available at <http://www.jpost.com/Iranian-Threat/News/Poll-shows-shift-as-US-public-opinion-now-disapprove-of-Iran-deal-334593>.

²⁷⁸ Press Briefing by White House Press Secretary Jay Carney, Jan. 23, 2014, available at <http://www.whitehouse.gov/the-press-office/2014/01/23/press-briefing-press-secretary-jay-carney-1232014>.

²⁷⁹ David W. Kearn, *The Folly of New Iran Sanctions*, HUFF. POST, Jan. 19, 2014, at http://www.huffingtonpost.com/david-w-kearn/the-folly-of-new-iran-san_b_4619522.html.

²⁸⁰ Even though the United States has recently deployed military force in the form of airstrikes against Islamist militants in Iraq and Syria, President Obama’s has continuously pledged that there will be “no boots on the ground.” See Rosa Brooks, *Why Obama’s assurance of “no boots on the ground” isn’t so reassuring*, WASH. POST, Sept. 26, 2014, available at http://www.washingtonpost.com/opinions/why-obamas-assurance-of-no-boots-on-the-ground-isnt-so-reassuring/2014/09/26/c56d859e-44bf-11e4-9a15-137aa0153527_story.html. Moreover, President Obama’s authorization of air strikes without Congressional approval has re-ignited debate over separation of powers between the Executive Branch and some Members of Congress. See Jake Miller, *John Boehner “happy” to have Congress vote on anti-ISIS mission*, CBS NEWS, Sept. 28, 2014, at <http://www.cbsnews.com/news/john-boehner-happy-to-have-congress-vote-on-anti-isis-mission/>.

weary and appears to favor isolationism,²⁸¹ harnessing our capacity to bring about such change with legal and political tools, and not brute force, is crucial.²⁸²

South Africa is particularly interesting in this respect. In contrast to the triggers for sanctions and embargoes already in place against countries like North Korea, Cuba, and Iran, South Africa had never used force or violence against Americans.²⁸³ When Congress passed the Comprehensive Anti-Apartheid Act, it was a momentous proclamation. America, as part of the international community, spoke up against the horrors of Apartheid. For the first time, it used the full power and gravitas of federal legislation to do so.

Why does this matter? Americans must carry the burden of our own history, both good and bad. Given our own problematic history of racial oppression, slavery, and segregation, as well as our legacy of inspirational leaders such as Dr. Martin Luther King (who often spoke about South Africa and whom Mandela often cited²⁸⁴), we have an abiding duty to champion equality and freedom for subjugated peoples everywhere – especially when they are targeted because of the colors of their skin, their beliefs, or their relative place in society. By learning from our past and championing the cause of equality and freedom around

²⁸¹ See Max Fisher, *American Isolationism just hit a 50-year high. Why that matters.*, WASH. POST, Dec. 4, 2013, at <http://www.washingtonpost.com/blogs/worldviews/wp/2013/12/04/american-isolationism-just-hit-a-50-year-high-why-that-matters/>.

²⁸² Sanctions continue to be the preferred weapon against opponents where military action is impracticable or impossible – most recently against the Assad regime in Syria and Vladimir Putin’s government in Russia. See Steven Lee Meyers & Anthony Shadid, *U.S. Imposes Sanctions on Syrian Leader and 6 Aides*, N.Y. TIMES, May 18, 2011, at http://www.nytimes.com/2011/05/19/world/middleeast/19syria.html?pagewanted=all&_r=0; and David Jackson & Oren Dorell, *Obama team unveils new Russia sanctions*, USA TODAY, Sept. 12, 2014, at <http://www.usatoday.com/story/news/nation/2014/09/12/obama-russia-sanctions-vladimir-putin/15502067/>.

²⁸³ See Keller, *supra* note 1 & Welsh, *supra* note 2.

²⁸⁴ In a 1965 speech, King labeled Apartheid leaders "spectacular savages and brutes," and called for a boycott of South Africa: "In South Africa today, all opposition to white supremacy is condemned as communism, and in its name, due process is destroyed," King also said. "A medieval segregation is organized with 20th century efficiency and drive. A sophisticated form of slavery is imposed by a minority upon a majority which is kept in grinding poverty. The dignity of human personality is defiled; and world opinion is arrogantly defied." In his address to Congress, Mandela quoted Dr. King’s "I have a dream" speech: "Free at last, free at last, thank God Almighty, we are free at last." Mandela also often spoke of the "unbreakable umbilical cord" between black Americans and black South Africans. Jason Strazuiso, *Nelson Mandela, Martin Luther King Fought the Same Battle in Different Continents*, HUFF. POST, Aug. 20, 2013, at http://www.huffingtonpost.com/2013/08/20/nelson-mandela-martin-luther-king_n_3786107.html.

the world, we can help honor both our American ideals and Nelson Mandela's legacy.