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Seriatim

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MISSION

To serve the University of Virginia community by supporting an engaged citizenry, fostering an open mar- ketplace of ideas, and encouraging the productive exchange of political speech.

CONTENT

We are dedicated to publishing the highest quality undergraduate work on American politics. Work is selected for its depth of scholarship, originality, and ability to advance our understanding of the American political tradition. We select pieces with the aim to enrich and diversify the political marketplace of ideas.

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Letter from the Editor

Dear Readers,

It is with great pleasure and excitement that we publish the Spring 2023 edition of the Seriatim Journal of American Politics.

Seriatim was founded with the goal of supporting an engaged citizenry by fostering an open marketplace of ideas and encouraging the productive exchange of political speech. With this issue, we seek to continue this tradition. Seriatim continues to commit itself to providing a platform for undergraduate students to have their work recognized and their voices heard. We seek to actively engage in constructive political discourse to sustain an informed community of lifelong learners at the University of Virginia and beyond.

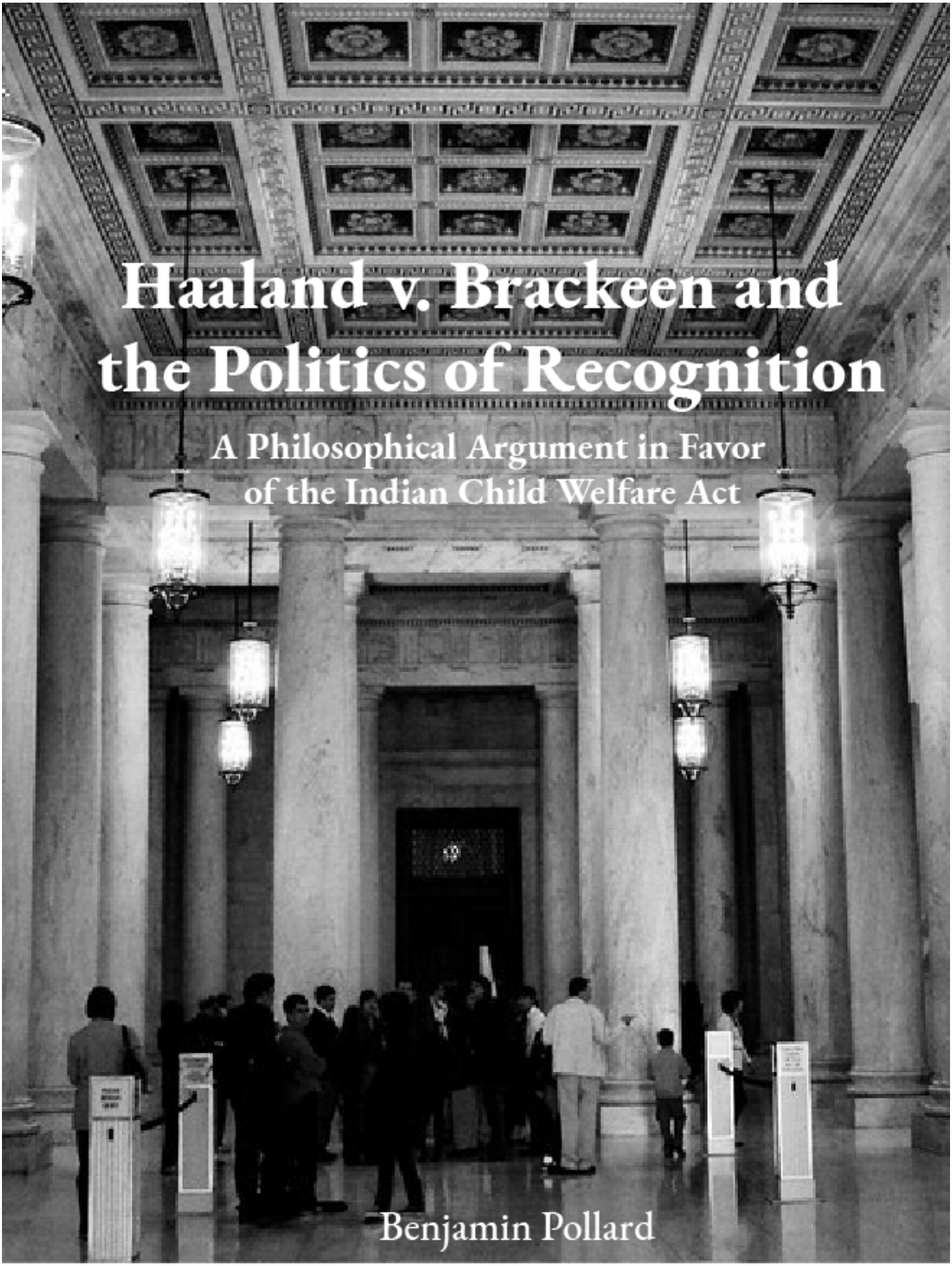
In the pages that follow, you will find pieces written by undergraduate students across the country covering a wide variety of topics. Though centered around American politics or American political thought, each article delves into a unique political, social, or cultural issue facing our country (or the world). On behalf of the entire staff at Seriatim, I would like to thank each of the authors for entrusting us with their work. It has been a pleasure to work with each of you throughout the editing process.

This finished journal would not be possible without the tremendous support, dedication, and commitment of the Seriatim staff. From our graphics and layout team, to our editors, to our Executive Board, each member of Seriatim played an integral role in crafting this final product in front of you today. I am so proud to work alongside each and every member of this organization.

As we continue to grow and expand in future semesters, we invite you to join us on our mission. You can learn more about the publication, read past journal editions, explore op-eds written by our staff, and sign up for our mailing list by visiting our website.

In the meantime, I hope you enjoy reading the Spring 2023 edition of the Seriatim Journal of American Politics.

Harper Jones
Editor-in-Chief



Haaland v. Brackeen and the Politics of Recognition

A Philosophical Argument in Favor of the Indian Child Welfare Act

Benjamin Pollard

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Introduction

On November 9, the United States Supreme Court heard oral arguments in *Haaland v. Brackeen* (*Brackeen*), a case regarding the constitutionality of the Indian Child Welfare Act (ICWA), which concerns adoption placement for Native children.[1] Listening to questions asked by the nine justices, court watchers believe it is likely that ICWA will be struck down or significantly weakened by the end of the term.[2] According to scholars of Indian law and journalists, the court's ruling could undermine the very foundation of indigenous sovereignty, jeopardizing tribal land rights, water rights, gaming licenses, and potentially all treaties between the United States and Native tribes.[3] Harvard Law Professor Joseph William Singer predicted that "depending on what the court does, it could have revolutionary, catastrophic consequences."[4] Another professor, Dan Lewerenz, a member of the Iowa Tribe, said that the court's ruling could be "an earthquake" that would produce "reverberations ... felt in all areas of law."[5] While the "unusually complicated" case presents various legal issues involving several constitutional doctrines, it also touches on questions of political theory, engaging a fundamental philosophical debate over whether governments should recognize differences among disparate groups and model policy accordingly.[6] This paper will focus on the aspects of political theory raised by the case, arguing that *Brackeen* can be understood through the politics of recognition as theorized by philosopher Charles Taylor. Furthermore, this paper will advance an argument in support of ICWA by drawing on Taylor's theory to elucidate how the challenges to the law misrecognize tribal rights, concluding that striking down ICWA could risk engendering recognition harms to Native children and communities.

Section I of this paper introduces the ICWA, the background and history of *Haaland v. Brackeen*, and some of the central arguments the plaintiffs have made against the law. Section II discusses the fundamental concepts underlying recognition theory, advancing Taylor's conception that recognition failures can significantly harm individuals and communities. Section III applies recognition theory to ICWA and the *Brackeen* legal challenge, suggesting that the arguments against the legislation made by the plaintiffs run afoul of the politics of proper recognition in three

1 Adam Liptak, "Supreme Court Closely Divided in Case on Native American Adoptions," The New York Times (November 9, 2022), https://www.nytimes.com/2022/11/09/us/politics/supreme-court-native-american-adoptions.html.

2 Hayley Negrin, "Perspective | Native American Children Are under Threat - Again," The Washington Post (WP Company, November 15, 2022), https://www.washingtonpost.com/made-by-history/2022/11/15/brackeen-haaland-indigenous-tribes/.; Megan Lim, Patrick Jarenwattananon, and Elissa Nadworny, "The Supreme Court Will Decide the Future of the Indian Child Welfare Act," NPR (NPR, November 8, 2022), https://www.npr.org/2022/11/08/1135190325/the-supreme-court-will-decide-the-future-of-the-indian-child-welfare-act.

3 Rebecca Nagle, "The Supreme Court Case That Could Break Native American Sovereignty," The Atlantic (Atlantic Media Company, December 15, 2022), https://www.theatlantic.com/ideas/archive/2022/11/scotus-native-american-sovereignty-brackeen-v-haaland/672038/.

4 Rachel Reed, "Supreme Court Preview: Brackeen v. Haaland," Harvard Law School, November 1, 2022, https://hls.harvard.edu/today/supreme-court-preview-brackeen-v-haaland/.

5 Karin Brulliard, "In Arizona, Small Tribe Watches Warily as Supreme Court Takes up Native Adoption Law," The Washington Post (WP Company, November 8, 2022), https://www.washingtonpost.com/nation/2022/11/07/icwa-supreme-court-arizona/.

6 "SCOTUS Cert Recap: The Indian Child Welfare Act," The National Law Review, March 2, 2022, https://www.natlawreview.com/article/scotus-cert-recap-indian-child-welfare-act.

ways. First, those opposing the law replicate the same misrecognition failures of Native culture and family structures that prompted Congress to instill legal guardrails in the form of ICWA. Second, anti-ICWA stances are founded in the nonrecognition of indigenous sovereignty that falsely equates racial and political classifications to bring forth an equal protection challenge, which engages a deeper philosophical discourse between difference-blind liberalism and difference-aware communitarianism. And third, the plaintiff's claim that the court should endorse a difference-blind approach would likely jeopardize the survival of tribal nations. The concluding section discusses how *Brackeen* reveals the limits of recognition theory for Native communities, drawing on the work of indigenous political theorist Glen Coulthard, and briefly considers the possible paths forward for tribes in the event of a disfavorable ruling.[7]

I: The Indian Child Welfare Act and *Haaland v. Brackeen*

Congress passed ICWA in 1978 in response to disproportionately high rates of Native children being separated from their families and placed in non-Native homes by state welfare agencies.[8] ICWA grants special legal rights to indigenous families and Native tribes in adoption cases involving children who are tribal members or are eligible for membership.[9] The law instituted placement preferences for Native children, with first priority going to the child's extended family, then to members of the same tribe, and finally to families from other Indian tribes.[10] ICWA ensures that tribes are included in the process, requiring state courts to notify tribal leaders when a Native child is up for adoption and providing the tribe time to find a suitable indigenous family willing to adopt.[11] State social workers are also obligated to make "active efforts" at family reunification, which includes offering therapy and drug rehabilitation for parents of children in the system.[12] Furthermore, state courts cannot dispose of records that show they have complied with ICWA and a judge may only reject a Native family offered as guardians in the event of "clear and convincing" reasons to do so.[13] The "high bar" for judicial intervention and the implementation of placement preferences does not guarantee that children are given to Native families, nor does it preclude their adoption by non-Native households.[14] ICWA does, however, provide "guardrails" that limit the ability of state government officials to "reflexively (remove) Indian children" from indigenous homes.[15]

ICWA received unanimous support in Congress when it was enacted, but it has recently come under increased scrutiny.[16] Over the past ten years, the law has faced almost as many legal challenges as the Affordable Care Act.[17] The current lawsuit began with a young boy, born to a Navajo mother and a Cherokee father, who was being fostered by a non-Native family, the Brackeens, after being taken from his mother by state authorities.[18] The Brackeens were told that his placement with them was temporary, but they grew attached to the boy after a year and wanted to adopt him.[19] The child's birth mother, who had struggled with drugs and had six previous children taken away by the state, supported the Brackeens' adoption of her son.[20] However, tribal social workers objected — they had found a non-relative tribal family in another state, covered under ICWA's third preference, who wanted to adopt the child.[21] A state judge ruled in favor of the tribal family, given ICWA's provisions.[22] After the Brackeens received pro-bono representation from the prominent litigation firm Gibson Dunn,

7 I use the terms Indian, Native American, Native, and indigenous to describe the indigenous peoples of the United States. While these terms are distinct, they are generally accepted and used interchangeably, according to the National Museum of the American Indian. For further reading see "The Impact of Words and Tips for Using Appropriate Terminology: Am I Using the Right Word?," National Museum of the American Indian. Smithsonian Institution, https://americanindian.si.edu/nk360/informational/impact-words-tips.

8 Harmeet Kaur, "Should Native Americans Get Preference over White People in Adopting Native Children? The Supreme Court May Decide," CNN (Cable News Network, November 13, 2022), https://www.cnn.com/2022/11/13/us/supreme-court-icwa-native-adoptions-cec/index.html.

9 Ibid.

10 Jan Hoffman, "Who Can Adopt a Native American Child? A Texas Couple vs. 573 Tribes." The New York Times. (June 5, 2019), https://www.nytimes.com/2019/06/05/health/navajo-children-custody-fight.html.

11 Carolyn Click and Ruihao Lin, "Haaland v. Brackeen," Legal Information Institute (November 10, 2022), https://www.law.cornell.edu/supct/cert/21-376.

12 Hoffman, "Who Can Adopt a Native American Child?"

13 Click and Lin, "Haaland v. Brackeen."; Hoffman, "Who Can Adopt a Native American Child?"

14 Hoffman, "Who Can Adopt a Native American Child?"

15 Ibid.

16 Brulliard, "Supreme Court Takes up Native Adoption Law."

17 Nagle, "Break Native American Sovereignty."

18 Hoffman, "Who Can Adopt a Native American Child?"

19 Ibid.

20 Ibid.

21 Ibid.

22 Ibid.

the tribe backed down and the Brackeens were eventually successful in adopting the boy.[23] The Brackeens, who are currently facing similar obstacles in their fight to adopt the boy's biological sister, wanted to challenge the law's constitutionality.[24] As a result, they agreed to join a lawsuit against ICWA brought by the states of Texas, Indiana, and Louisiana as plaintiffs suing the federal government, the Department of Interior, and a number of federal officials, among them, Secretary of the Interior Deb Haaland.[25] Several tribes "intervened as defendants," supporting the government's position.[26]

The lawsuit was met with a confusing and contradictory set of rulings that put ICWA on a course for review by the Supreme Court. The Brackeens were successful in the District Court for the Northern District of Texas, which ruled that ICWA was unconstitutional.[27] The United States Court of Appeals for the Fifth Circuit reversed the earlier decision; then it held an en banc rehearing, issuing a divided 325-page opinion that said that certain parts of ICWA were constitutional while others aspects were not.[28] Unsatisfied with the appeals ruling, the Brackeens, the states challenging ICWA, the Native tribes, and the involved federal agencies all filed cert petitions, which were consolidated under *Haaland v. Brackeen* when the Supreme Court granted certiorari on February 28.[29] The four cert petitions raise around a dozen questions collectively, involving "constitutional doctrines, including ... standing, anticommandeering, and nondelegation."[30] However, the central issue in the case is whether ICWA discriminates on the basis of race in violation of the Equal Protection Clause in the Fourteenth Amendment.[31] The Brackeens and their supporters argue that ICWA creates a "race-based system" that privileges Native families while disadvantaging non-Natives in the adoption process because of "the color of their skin."[32] For the Brackeens, their financial resources, which exceeded those of the families put forward as potential adoptees by the tribes, and their willingness to provide a home for Native children should be the primary factors of consideration.[33] Tribes and the federal government reject this stance, asserting that Native Americans are not members of a racial group, but a political group with recognized sovereignty claims.[34] Furthermore, they contend that arguments about the wealth and stable familial structures of non-Native families rely on negative conclusions about indigenous communities which fail to recognize the competency of Native families and the cultural and political best interest of raising Indian children within their tribes. Apart from these legal issues, the case raises questions of political theory, in particular those related to the politics of recognition.

II. The Politics of Recognition in the Thought of Charles Taylor

Before illuminating how the arguments against ICWA in *Brackeen* fail to adequately engage a proper politics of recognition, producing recognition failures, it is important to first define a theory of recognition — detailing its logic, origins, and scope. While many political thinkers have explored the role of recognition in society, modern articulations of the theory can be found clearly in Charles Taylor's seminal work, *Multiculturalism and "The Politics of Recognition."* Taylor starts his theoretical account of recognition with an observation that contemporary political movements are often driven by the "need, sometimes the demand, for recognition."[35] Recognition is a fundamental force in the conception of identity, Taylor posits, as is misrecognition, or the process by which individuals are reflected "back" a "demeaning or contemptible picture of themselves" by others.[36] This is particularly salient for marginalized communities, or what he terms "subaltern groups," who often demand proper forms of recognition in opposition to nonrecognition or misrecognition, which can produce "real damage, real distortion, ... imprisoning

23 Harmeet, "Should Native Americans Get Preference."

24 Hoffman, "Who Can Adopt a Native American Child?"

25 Click and Lin, "Haaland v. Brackeen."

26 Ibid.

27 The National Law Review, "SCOTUS Cert Recap."

28 The National Law Review, "SCOTUS Cert Recap."; Click and Lin, "Haaland v. Brackeen."

29 The National Law Review, "SCOTUS Cert Recap."

30 Ibid.

31 Ibid.

32 Adam Liptak, "Supreme Court to Hear Challenge to Law on Adopting Native American Children," The New York Times (The New York Times, February 28, 2022), https://www.nytimes.com/2022/02/28/us/supreme-court-native-american-children.html.; Timothy Sander, Ilya Shapiro, and Walter Olson, "Haaland v. Brackeen," Cato.org, October 21, 2021, https://www.cato.org/legal-briefs/haaland-v-brackeen.

33 Hoffman, "Who Can Adopt a Native American Child?"

34 Ibid.

35 Charles Taylor, *Multiculturalism: Examining the Politics of Recognition* (Princeton, NJ: Princeton University Press, 1994), 25.

36 Ibid.

someone in a false, distorted, and reduced mode of being."[37] In these interactions identity is at stake, as is its individualized form — "authenticity."[38] It is from authenticity that Taylor explicates his theory of recognition and how it operates intersubjectively.

Taylor locates the philosophical origins of a concept of authenticity in the work of Jean-Jacques Rousseau, which asserts that morality comes from a "voice of nature" within persons.[39] From this, Johann Gottlob Herder developed the idea of "measure" — an individualized sense of morality, defined by unique experience and self-knowledge.[40] Taylor maintains that it is through the articulation of individuality, a process of self-identification and formation, that one can cultivate a sense of authenticity.[41] However, communication of self does not happen solitarily, but in conversation with others.[42] "We define our identity always in dialogue with, sometimes in struggle against" others, Taylor writes, employing a line of thought advanced by Georg Wilhelm Friedrich Hegel in his battle of consciousnesses theory represented in the master-slave dialectic.[43] This intersubjective and occasionally conflicting relationship, through which recognition can "form" or "malform" identity, occurs on the "intimate plane" and the "social plane," according to Taylor.[44] Personal relationships of emotional care and dependency, such as those rooted within culturally supportive communities, can reveal aspects of ourselves, such as our aspirations and preferences, which only become clear when they are shared with loved ones.[45] As such, it follows that a person who lacks meaningful love connections suffers from insufficient self-knowledge and a partial identity as they are unable to discover the aspects of themselves that can only be identified in a close, private relationship with another.

In the social plane, indications of equal recognition that confer esteem can be empowering to the self. This principle is exemplified in the use of "'Mr.,' 'Mrs.,' or 'Miss,'" to indicate respect independent of class, an approach in opposition to the ancient use of "'Lord' or 'Lady'" that established hierarchies based on status and wealth.[46] Variations in recognition, such as those clearly displayed in feudal titles, esteemed some while withholding respect to others. This process of "refusal can inflict damage," Taylor submits, recalling his earlier concepts of nonrecognition and misrecognition.[47] While the latter is expounded in Taylor's writing, the former receives little treatment beyond its mention. To fill this gap we can turn briefly to literature. The opening passage of Ralph Ellison's *Invisible Man* elucidates the process and harm of nonrecognition:

> I am an invisible man. ... I am invisible, understand, simply because people refuse to see me. Like the bodiless heads you see sometimes in circus sideshows, it is as though I have been surrounded by mirrors of hard, distorting glass. When they approach me they see only my surroundings, themselves, or figments of their imagination — indeed, everything and anything except me.[48]

While the narrator in Ellison's novel, a Black man made invisible by the anti-Black racism of American society, admits that "it is sometimes advantageous to be unseen," he concludes that "most of the time" it leads one to "doubt if (they) really exist," causing pain and a desire to be seen.[49] However, as the narrator explains in recounting an altercation with a man a paragraph later, being visible also comes with risks. For when he loses his invisibility, a state of nonrecognition, Ellison's narrator is "called ... an insulting name," becoming subject to the other form of deleterious recognition identified by Taylor — misrecognition.[50] In the moment of contact between the narrator and the man, the narrator is not acknowledged as an equal individual worthy of recognition. Instead, he is presented with

37 Ibid.

38 Ibid, 28.

39 Ibid, 29.

40 Ibid, 30-31.

41 Ibid, 31.

42 Ibid, 32.

43 Ibid, 32-33. Taylor only mentions what he describes as the "famous" master-slave dialectic in passing on page 26. He again references the work of the German philosopher on page 36 briefly — "the topic of recognition is given its most influential treatment in Hegel," citing *The Phenomenology of Spirit*. However, the intersubjective nature of Taylor's approach is of a kind with Hegel's. The Hegelian origins of recognition theory is given greater attention in Honneth's work, which will be discussed below. For the master-slave dialectic, see Georg Wilhelm Friedrich Hegel, *The Phenomenology of Spirit*, paragraphs 178-196.

44 Ibid, 36.

45 Taylor, *Politics of Recognition*, 33.

46 Ibid, 27.

47 Ibid, 36.

48 Ralph Ellison, *Invisible Man* (London etc.: Penguin Books, 2014), 3.

49 Ibid, 3-4.

50 Ibid, 4.

an "inferior or demeaning image" of himself by the man.[51] The passage thus illustrates that misrecognition "can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being."[52] This is especially the case when such depictions are "internalized," leading a person to become an active participant in their oppression as they have adopted the view of their own inferiority.[53] Being seen or recognized, therefore, is not a good within itself. Recognition carries with it the danger of being rejected as an equal; being shown images which are degrading and promote "crippling self-hatred."[54] As such, proper recognition — the process of being acknowledged as a person with equal status that corresponds with one's self-image — is "not just a courtesy that we owe people. It is a vital human need."[55] Without proper recognition, as was the case in pre-ICWA family separation, communities can experience significant harm.

III. Recognition Failures in Anti-ICWA Arguments

III. A. Pre-ICWA Misrecognition and Native Child Separation

While Taylor deftly illustrates the personal harms of misrecognition, the realities of pre-ICWA family separation in Native communities reveal that misrecognition, when it is done by the state and its agents, can destroy families and communities. Furthermore, it engenders self-hatred and a lost sense of identity among indigenous youth. Research done on state child welfare systems at the time ICWA was passed found that Indian children were almost never separated from their birth families due to abuse.[56] Instead, indigenous youth were primarily being taken by social workers because of two factors: Native poverty and perceived "parental abandonment."[57] Both of these conclusions, however, were steeped in misrecognition and incorrect evaluations of indigenous child care based on Western cultural standards.

Poverty in indigenous families, which was consistently perceived by state workers as a sign of neglect and used as a justification for separation, is difficult to grasp using measures of parental income.[58] Various forms of Native American economic relations and subsistence, such as hunting and fishing, are non-market activities and thus not included in government estimates of poverty.[59] Tribal social safety nets, like the sharing of resources within communities, also often elude outsiders who are unfamiliar with Native American customs and practices.[60] Without knowledge of this cultural context, pre-ICWA social workers were incorrectly surmising that Indian parents could not provide for their children, when in fact they could. This misrecognition of the forms of survival practiced among Native Americans resulted in unnecessary separations. In this sense, state employees were not merely personally misrecognizing Natives, but they were also reflecting a demeaning and warped image of Native families back to Natives themselves, producing self-hatred. This harmful and incorrect image of American Indian culture, when combined with the power of the state, transformed beyond its individually felt harms, as elucidated by Taylor, and was used as the basis for a greater injustice: child separation.[61]

Similar examples of misrecognition occurred in social workers' estimations of parental involvement in child rearing within indigenous communities. When assessing the fitness of Native parents to care for their children before ICWA, state representatives would apply a "Western approach to family" care, which "privileges a nuclear two-parent model."[62] When assessed through this model, Native parents were often found failing because American Indians "have always raised" their children "within extensive kinship networks."[63] Children in Native communities are frequently left with grandparents and other relatives for prolonged periods of time as parents engage in seasonal work far away.[64] During these stretches, "children's needs (are still) commonly met," according to Chris Newell, a member of the Passamaquoddy tribe and the director of a

51 Ibid, 36.
52 Ibid, 25.
53 Ibid, 25-26.
54 Ibid, 26.
55 Ibid.
56 Brulliard, "Supreme Court Takes up Native Adoption Law."
57 Ibid.
58 Randall Akee, "How Does Measuring Poverty and Welfare Affect American Indian Children?," Brookings, March 9, 2022, https://www.brookings.edu/blog/up-front/2019/03/12/how-does-measuring-poverty-and-welfare-affect-american-indian-children/.
59 Ibid.
60 Ibid.
61 Hoffman, "Who Can Adopt a Native American Child?"
62 Negrin, "Native American Children Are under Threat."
63 Ibid.
64 Akee, "Measuring Poverty and Welfare."

Native educational consultancy firm.[65] Often, when social workers recorded seeing childcare performed by a non-parental family member, this was not a sign of parental abandonment, but rather "a feature of (Native) family life and culture" unknown to them.[66] As such, they were "forcing" indigenous parents into a "homogenous mold" reflective of a dominant Western culture that was "untrue to them." Social workers then concluded that these parents were negligent when they did not conform to this mold, punishing them for their differences.[67]

The lack of cultural understanding among those working for welfare agencies during the pre-ICWA period affected far more than a handful of Native families. One study conducted before ICWA was passed estimated that around 25 to 35% of indigenous youth were being taken from their birth families and given to non-Native families.[68] Congress created ICWA in response to these instances of misrecognition and separation, institutionalizing the presence of Native advocates in the process so they could speak to cultural realities which were previously imperceivable by social workers.[69] By including and centering the "judgment and decisions" of tribal leaders in the adoption process of Native children, legislators intentionally sought to prevent these unnecessary separations prompted by social worker misrecognition.[70] Since its passage, ICWA has come to be labeled as the "gold standard" by many in the child welfare field because of its recognition of cultural difference and incorporation of Native voices with the most knowledge of local realities.[71]

As the Brackeens and their supporters have crafted arguments against ICWA, they have relied on arguments about Native poverty and neglect that resuscitate the logic of misrecognition social workers used to separate families before the law was passed. In a hearing to adopt the sister of their now-adopted indigenous son, Chad Brackeen emphasized his family's wealth relative to the baby's great-aunt who had agreed to provide a home for the child. Chad Brackeen, who lives in large house that has pool, zipline, greenhouse, and a spacious kitchen, said that he was concerned about the girl's future, "not as an infant living in a room with a great-aunt but maybe as an adolescent in smaller, confined homes."[72] He repeated his worries that the girl's Native American great-aunt would have "limited financial resources possible to care for (the) child, should an emergency come up."[73] Chad Brackeen's argument, like its historical antecedents, equates affluence with fitness and a lack of material resources with negligence. Statements of this sort have been deployed frequently by organizations supporting the Brackeens, which maintain that ICWA "prevent(s) many abused or neglected children from finding safe and loving permanent homes."[74]

Anti-ICWA arguments additionally miss that forced separation and the raising of children in a culture that does not conform with their identity can also produce opportunities for misrecognition. As the American Medical Association (AMA), which filed an amicus brief in support of ICWA, asserts, the act's prioritization of family and tribal placements promotes improved mental health as these homes are more likely to provide children a "sense of ... identity and belonging."[75] The AMA continues, more explicitly drawing a connection to recognition, saying, "the almost complete lack of recognition of culture as a determinant of health" that these children would experience in non-Native homes "results in alienating and disheartening experience(s),"[76] In sum, the AMA is warning of the dangers of misrecognition in its statement. A friend of the Brackeens, Corey Jones, who had also fostered Native children and whom the Brackeens turned to when they began the process, realized these dangers himself. In telling another person that his relative wealth made him a more fit parent than an indigenous guardian, Jones received the retort, "being poor doesn't make a bad parent," which "rattled through (his) bones" and made him question his previous convictions.[77] He concluded that the "opportunities" provided to his foster children such as "a good school

65 "Chris Newell," NEFA, https://www.nefa.org/chris-newell.

66 Reed, "Supreme Court Preview."

67 Taylor, *Politics of Recognition*, 43.

68 Ibid.

69 Akee, "Measuring Poverty and Welfare."

70 Ibid.

71 Brulliard, "Supreme Court Takes up Native Adoption Law."

72 Hoffman, "Who Can Adopt a Native American Child?"

73 Ibid.

74 Sander, Shapiro, and Olson, "Haaland v. Brackeen."

75 Tanya Albert Henry, "How Tribal Placements Benefit Native Foster Children's Health," American Medical Association, September 21, 2022, https://www.ama-assn.org/delivering-care/population-care/how-tribal-placements-benefit-native-foster-children-s-health.

76 Ibid.

77 "1. Solomon's Sword." Produced by Rebecca Nagle. "This Land," August 23, 2021. Podcast, 30:00-30:59.

or a safe neighborhood" did not matter "if the kid doesn't feel at home" or feels "like their identity is connected with that place."[78] As Jones' anecdote illustrates, arguments that stress indigenous poverty and non-Native wealth fail to acknowledge and undermine the benefits of a culturally affirming upbringing and the harms of its absence for Indian children.

III. B. Race, Equal Protection Claims, and the Difference-blind vs. Difference-aware Debate

The central constitutional challenge brought by the Brackeens — that ICWA is racially discriminatory — is itself a form of improper recognition as it rests on a denial, or nonrecognition, of indigenous sovereignty. The attack on Native sovereignty flows from arguments over the proper classification for Native American communities. The plaintiffs argue that Native Americans are a racial group and that ICWA's preference regime "play(s) favorites based on race," benefiting Indian families to the disadvantage of non-Indian families, violating the Equal Protection Clause of the United States Constitution.[79] For tribes, this is a specious and highly dangerous position, as Native Americans are and always have been treated as a political group under federal law, not a racial group.[80] Different laws and protections apply to Native Americans not because they are members of a special racial class, but because they are citizens of indigenous nations which have their own membership requirements that intersect but are not fully defined by heritage.[81] These laws emanate from treaties, going back to the founding of the United States, which were agreed to by indigenous nations and the United States government as two separate sovereigns acknowledging each other's sovereign rights.[82] The classification of Native Americans as a political group is also the basis of a multitude of laws which treat indigenous communities differently than other groups, from gaming to water and land rights.[83] As Rebecca Nagle, a journalist and a citizen of Cherokee Nation, has pointed out, "if we're just a racial group, what racial group in the United States has its own courts, its own police force, its own land base, its own water rights, its own government, its own elections?"[84] Such logic, "completely erases tribal sovereignty," willfully mischaracterizing American Indians under federal law to bring a spurious equal protection claim.[85]

The arguments by plaintiffs' lawyers that Native Americans are a race may seem at first blush an instance of misrecognition, as it presents a malformed and dishonest representation of indigenous communities. Despite the presence of a historical record supporting tribal claims of their status as political groups, they are nevertheless met with assertions otherwise by those with little or no connection to the communities. However, these claims are representative of a deeper nonrecognition of tribal nations, as they totally and purposefully treat the fundamental aspect of Native political power — sovereignty — as nonexistent. If *Brackeen* successfully undermines Native sovereignty by ruling that ICWA is unconstitutional on the basis of racial discrimination, it could create a domino effect that topples all indigenous protections in federal law, allowing for the "exploitation of Native resources, including tribal lands — a potentially rich source of oil, and profit for extractive resources," according to history professor Hayley Negrin.[86] As such, Native children are potentially being used for more nefarious purposes than striking down ICWA. They may be the "tip of the spear" that is used to puncture tribal sovereignty.[87]

Stripping away the nonrecognition of Native Americans sovereignty in the misapplication of legal classifications reveals a deeper philosophical debate identified by Justice Brett Kavanaugh in *Brackeen* oral arguments. Kavanaugh summarized the case as a dispute between two different "values."[88] One, "the great respect for tribal self-government, for the success of Indian tribes with Indian peoples with recognition of the history of oppression and discrimination against tribes and people," he said. The other, "the fundamental principle (that) we don't treat people differ-

78 Ibid.

79 Liptak, "Supreme Court to Hear Challenge."

80 Nagle, "Break Native American Sovereignty."

81 Click and Lin, "Haaland v. Brackeen."

82 Reed, "Supreme Court Preview."

83 Nagle, "Break Native American Sovereignty."

84 Lim, Patrick Jarenwattananon, and Nadworny, "The Supreme Court Will Decide," NPR.

85 Ella Creamer, "The Fight over American Indian Children." POLITICO, May 31, 2022. https://www.politico.com/newsletters/the-recast/2022/05/31/fight-over-american-indian-children-00036096.

86 Negrin, "Perspective | Native American Children."

87 Nagle, "Break Native American Sovereignty."

88 Greg Stohr, "Native American Adoption Law Splits High Court Conservatives (1)," Bloomberg Law, November 9, 2022, https://news.bloomberglaw.com/us-law-week/native-american-adoption-law-splits-supreme-court-conservatives.

ently on account of their race or ethnicity or ancestry, equal justice under law."[89] In his analysis, Kavanaugh is speaking to a fundamental discourse in the politics of recognition as discussed by Taylor, that between difference-blind liberalism and difference-aware communitarianism.

In his theory, Taylor notes that difference-blind liberalism and difference-aware communitarianism both lay claim to the politics of equal recognition, although the latter is its truest application. Difference-blind liberalism, also known as the "politics of universalism," stresses individuals' "equal dignity" and focuses on the standardization of protections and rights.[90] On the other hand, difference-aware communitarianism, or the "politics of difference" and equal dignity, emphasizes the particularity and "unique identity" of individuals and communities from others.[91] This does not mean the politics of difference rejects a universalist approach to equality; rather, it declares that equality can only be achieved through acknowledging differences and differing treatment in accordance with the specific realities experienced by distinct individuals and groups.[92] The politics of universalism rejects this approach in favor of a difference-blind method, which sees the distinctions created by difference-aware policies as discriminatory and inherently oppositional to equality.[93]

Taylor returns to Rousseau to locate the origins of difference-blind liberalism. Building on his previous study, Taylor argues that a Rousseauian view requires the uniform application of rights and privileges to political subjects due to its belief that differentiation is antithetical to a societal common purpose represented in the general will.[94] However, Rosseauian logic in practice has resulted in a "homogenizing tyranny" throughout history, from the Jacobins of the 18th century to the fascist regimes of the 20th century.[95] According to Taylor, equal dignity measures in difference-blind liberalism are "in fact a reflection of one hegemonic culture" that forces marginalized communities to conform to universal principles and adopt an "alien form," which is in itself discriminatory.[96] Under this view, universalism demands an assimilation at odds with the conception of authenticity at the heart of recognition.[97] This process was at work when social workers applied Western ideals to evaluate indigenous parental fitness before ICWA. The difference-blind pre-ICWA system, which applied universal metrics to determine neglect, failed to "recognize" the "particularity" of Native communities.[98] Instead, state welfare agencies applied a non-neutral lens of evaluation that was "itself highly discriminatory" because it demanded "minority or suppressed cultures" to comply with the values of the dominant culture, and penalized them when they came up short.[99] ICWA's legal guardrails, which gave tribal leaders a seat at the table when deciding Native adoption cases, thus corrected the system's homogenizing approach by incorporating an alternative voice that could speak to the community's cultural specificity, granting Native cultures legitimacy and preventing misrecognition in the child welfare process.

However, Kavanaugh's comment about the principle of equal treatment in American law draws less on the Rousseauian view of difference-blind liberalism and its assimilationist results than on its more contemporary and well-regarded application in modern liberalism by American thinkers such as John Rawls and Ronald Dworkin. The difference-blind approach, utilized by the plaintiffs in their equal protection claim, evokes Dworkin's assertion that government policies should be based on "procedural commitments" that ensure everyone "deal(s) fairly and equally with each other," as opposed to laws which advance "substantive" views that endorse normative conceptions of "what constitutes a good life," potentially privileging certain individuals or groups over others.[100] It was this concern with nondiscrimination that worried Kavanaugh in oral arguments, particularly as it related to the third preference within ICWA that says states should make an effort to place children with a family in another tribe before they consider placement with a non-Native family. Kavanaugh remarked that the court would reject a law from Congress "say(ing) that white parents should get a preference for white children in adoption or that Latino parents should get a preference for Latino children in adoption proceed-

89 Ibid.
90 Taylor, *Politics of Recognition*, 37.
91 Ibid, 38.
92 Ibid, 39.
93 Ibid, 43.
94 Ibid, 50-51.
95 Ibid, 51.
96 Ibid, 43.
97 Ibid.
98 Ibid.
99 Ibid.
100 Ibid, 56-57.

ings."[101] While this position, as discussed earlier, suffers from an incorrect classification of Native Americans as a racial group, the concern is understandable in a country that has become a "procedural republic," with a legal system predicated on a difference-blind approach.[102] Nevertheless, the plaintiff's assertion, seemingly endorsed by Kavanaugh, that the court should confirm a difference-blind approach would likely result in great injury to Native Americans by invalidating the legal protections that tribal nations rely on to ensure their survival.

III. C. Difference-Blind Approach and the Risk to Indigenous Cultural Survival

A difference-blind approach to the politics of recognition fails to acknowledge the reliance of minority communities on the special legal protections that safeguard their existence.[103] The liberal emphasis on universal "individual rights" must always trump "collective goals" under a difference-blind system, Taylor contends, leaving governments with limited tools to protect the cultural survival of "subaltern" communities which may require particular support and unique protections because of their marginalized status.[104] Therefore, while difference-blind liberalism touts principles of equal dignity and nondiscrimination, it in fact provides an opening for a kind of cultural extermination in the worst case or slow cultural death in the best. The harms of this thinking is illustrated by the "tragic" history of Native boarding schools and termination policies in America, which relied on claims of universal equality.[105]

At the turn of the 20th century, the American government forcibly relocated Native children from their family homes to boarding schools intended to "civilize" them.[106] Many Indian children were subjected to physical and sexual abuse at these schools, and a recent investigation from the U.S. Department of the Interior found burial sites at 53 of these institutions.[107] Despite these horrific revelations, the language used by the school's proponents at the time stressed that they would help Native children reach "equality" in American society by assisting in their assimilation.[108] The boarding schools were part of a larger policy of termination that was pursued by Congress during this period, which "wrote more than 100 indigenous nations out of legal existence."[109] A proponent of the policy, Senator Arthur Vivian Watkins, couched his support in difference-blind rhetoric, asserting that the removal of legal protections for tribes would grant Native Americans "full freedom" and "equality before the law" by treating them no differently than the rest of society.[110] Tribes and others correctly pointed out that this was a thinly veiled attempt at "cultural genocide."[111] What the authors of these policies understood was "that a tribe without children doesn't have a future."[112]

ICWA seeks to right these wrongs, repudiating the difference-blind approach and the harms it produced. As such, the law recognizes that the cultural survival of Native American tribes as a societal "good" that should be granted special protections, and that children form the basis of tribal continuance.[113] Justice Ketanji Brown Jackson said as much during oral arguments in *Brackeen*: "Congress said things like, there's no resource that is more vital to the continued existence and integrity of Indian tribes than their children." As Jackson indicates, this is well within Congress' right as a sovereign interacting with a political group that is also sovereign, as the federal government "constantly cast(s) regulations regarding children, Indian children, as a matter of tribal integrity, self-governance, existence."[114] A decision ruling that ICWA is unconstitutional on equal protection grounds would thus strip tribes of a fundamental tool that helps them ensure their cultural survival, jeopardizing the future of Native American communities.

101 Liptak, "Supreme Court Closely Divided."

102 Taylor, *Politics of Recognition*, 58.

103 Ibid, 52.

104 Ibid, 52 & 56.

105 Brulliard, "Supreme Court Takes up Native Adoption Law."

106 Nagle, "Break Native American Sovereignty."

107 Ibid.; "Department of the Interior Releases Investigative Report, Outlines next Steps in Federal Indian Boarding School Initiative," U.S. Department of the Interior, May 11, 2022, https://www.doi.gov/pressreleases/department-interior-releases-investigative-report-outlines-next-steps-federal-indian.

108 Nagle, "Break Native American Sovereignty."

109 Ibid.

110 Ibid.

111 Cecilia Nowell, "For Decades, Welfare Laws Kept Native American Families Together. Will the Supreme Court End Them?," The Guardian (Guardian News and Media, November 7, 2022), https://www.theguardian.com/us-news/2022/nov/07/supreme-court-native-american-families-indian-child-welfare-act.

112 Nagle, "Break Native American Sovereignty."

113 Taylor, *Politics of Recognition*, 58.

114 Liptak, "Supreme Court Closely Divided."

IV. Conclusion: The Limits of Recognition and Indigenous Action After Brackeen

The legal battle in Haaland v. Brackeen presents a series of issues within political theory. At its heart, the case is a conflict between two sets of contrasting values identified by Charles Taylor in his theory of the politics of recognition — difference-blind liberalism and difference-aware communitarianism. While the Supreme Court deliberates on the merits of the equal protection and nondiscrimination arguments brought by the plaintiffs, deciding whether Native Americans should be understood within American law as a racial or political group, they will fundamentally be engaging with philosophical questions over the permissibility of Congress to acknowledge the unique qualities and claims of a marginalized group and model policy based on these conclusions. After examining the arguments presented in Brackeen through the philosophical framework of the politics of recognition, it is clear that the anti-ICWA position relies on the misrecognition of wealth and family structures of Native communities and a nonrecognition of tribal sovereignty. Furthermore, the assertion of the plaintiffs that the court should endorse a difference-blind approach would likely dismantle the proper regimes and protections of Native recognition created by ICWA. All this would be to the detriment of children, who may experience misrecognition in non-Native households, and the cultural survival of tribes, which have long been undermined by policies which have rested on similar claims of liberal equality. As the successes of ICWA and Taylor's recognition theory both indicate, minority groups such as Native American tribal nations often need specific protections to insulate them from recognition harms and ensure their continued existence.

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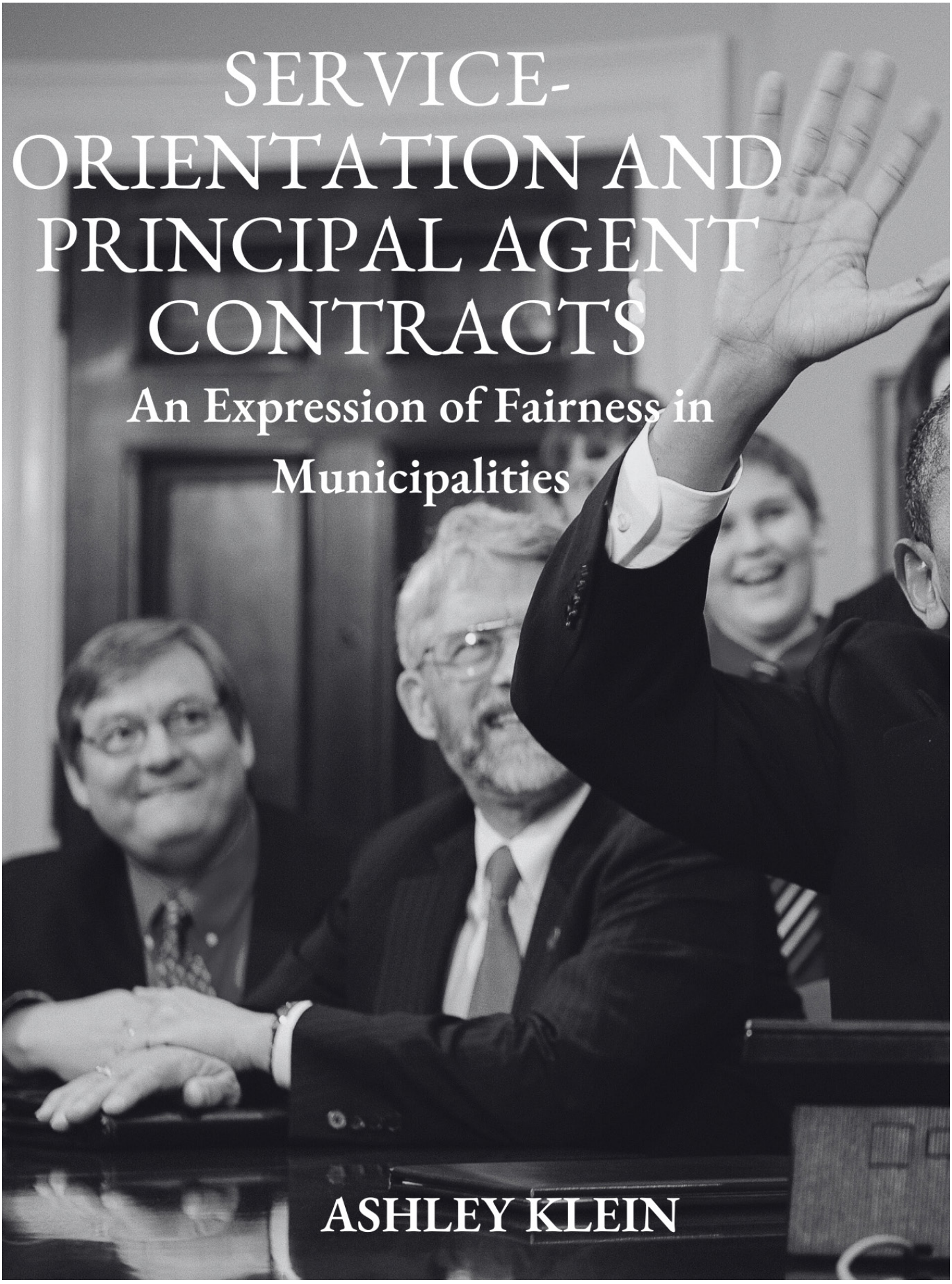

SERVICE-ORIENTATION AND PRINCIPAL AGENT CONTRACTS

An Expression of Fairness in Municipalities

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Service-Orientation and Principal-Agent Contracts

An Expression of Fairness in Municipalities

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Introduction

The study of political science originates with the intention of making the world a better place. By exploring how certain political mechanisms influence social conditions, we build tools to optimize our actions in the political sphere. This article attempts to isolate and understand an altruistically-fueled phenomenon in the realm of ex-ante principal-agent contract negotiation, the effect of which helps explain the presence of fair principal-agent contracts and synergistic interactions within municipal governments. It is my hope that a deeper understanding of the mechanisms behind it may be positively utilized to enhance current and future work environments at various levels of government, municipal and beyond.

The predictors and effects of a service-oriented drive in the public sector are often neglected in the scope of political research. In the context of the risk-shifting theory[1] and the case study of College Station's City Manager Bryan Woods, I argue that service orientation has a clear, positive effect on the development and adoption of mutually favorable contracts and productive interactions in the public sphere. This effect is explored independently from pre-existing environmental conditions in a municipality and their influence on contract negotiation, looking instead at personal variables as predicting factors. Specifically, I posit that service-oriented city managers are inclined to engage in what I label risk-matching behavior, a minimalist approach that values fairness and service to a greater extent than risk-shifting alone might predict. To test this, I conducted interviews with the city manager, the mayor, and a current councilmember of College Station, Texas. Their responses provide support for the interaction-optimizing aspect of service-orientation: while the mutual displacement of risk remains a priority in the process of the city manager's contract negotiation, a strong emphasis on the equally fair treatment of both parties is found.

City Manager Contracts: Purpose, Structure, and Negotiation

U.S. communities run on local bureaucratic action. From infrastructure maintenance to healthcare provision to the distribution of natural resources, the operational undercurrent of cities depends upon a wide network of bureaucrats consistently fulfilling their respective duties. Like symphony conductors, city managers are responsible for maintaining harmony in municipalities. Every city manager brings with them a personal set of experiences and values; how they are able to manifest these depends greatly on the employment contracts they sign at the outset. When a potential city manager negotiates their initial employment contract terms with the council, a principal-agent contract negotiation is taking place. These contracts lay out the terms for an agent (the city manager) to act on behalf of the principal (the council). Once hired, a city manager executes tasks by direction of the council; the will of the council is thus enacted by the city manager. These contracts have the power to set the tone of their term. According to Mayor John Nichols of College Station, "The contract is important because it determines the incentives and disincentives in terms of evaluation,"[2] thus steering the subsequent actions of all parties involved. Via

1 Connolly, Jennifer M, 2016, "The Impact of Local Politics on the Principal-Agent Relationship Between Council and Manager in Municipal Government," Journal of Public Administration Research and Theory 27, no. 2 (September): 253–268, https://doi.org/10.1093/jopart/muw051.

2 Nichols, John. 2023. In discussion with the author.

the discretion given and security provided, good contracts undergird good government, and both depend on quality ex-ante contract negotiation. Thus, careful attention ought to be directed towards the motivations and influences involved in this initial bargaining phase and the general nature of principal-agent contracts.

While each city manager employment contract is inherently unique to the individual actors and locations involved,[3] some basic elements are common across municipalities. Following models provided by the International City Management Association, most include a contract recital which lays out the context and intent of the contract followed by the employment terms outlining the roles and responsibilities of the agent to the council, as well as compensation clauses, evaluation guidelines, and termination and severance procedures.[4] These areas clearly communicate what the city manager will receive in return for fulfilling their obligations to the council; here, additional compensation and protection clauses can be negotiated.

The negotiation process is a confidential interaction between the prospective manager and council, but sources such as former City Manager James Bourey's article series "Negotiating City/County Manager Employment Contracts" offer insight into what happens behind closed doors. According to Bourey, councils often keep a premade base contract on hand influenced by CMA models and former city manager agreements from that particular city[5]. After a candidate has been accepted, they are likely to be presented with such a contract, whereupon the prospective city manager may consult with the council regarding alterations. This is their opportunity to personalize and secure terms important to them within the bounds of acceptability to the council. City managers may seek to maximize salary, benefits, and security in the form of severance protection and contract duration, though their prioritization of these varies. According to Councilwoman Elizabeth Cuhna, "The City Managers in general like to have pretty long contracts . . . they like some stability for both the programs that they're rolling out and their personal families."[6]

In addition to minimizing regular compensation, the council typically seeks to minimize severance payment terms. Such provisions reduce the risk to themselves and the city by preserving the council's termination power. "For the City Council, what we want is the ability to change if we need to – that's our big leverage point – is that we hire and fire the City Manager."[7]. Ms. Cunha refers to severance payment terms as the "bridge" between the need for City Manager security and council flexibility. When asked a similar question, Mayor Nichols (a member of the Council at the time of Mr. Woods' hire), agreed that it is important to "build in protection for them [City Managers]" in order to provide assurance that they will not be fired, for example, on a whim after a new council election[8]. Additionally, the council may wish to maximize evaluation criteria upon which a city manager's employment is contingent; such terms are used to strike a balance between security assurance and performance demands. During this time, a careful balance must be maintained between the interests of the city manager and the council. Because their interactions continue through the duration of their term, it is important to consider how their demands could influence the dynamics of the principal-agent relationship. When iteration is involved, individuals have incentive to make reasonable sacrifices if they perceive this as a means of keeping the peace and improving the value of future interactions. Thus, one limiting factor to the incentive of acquiring more formal benefits is the maintenance of positive perception among the opposite party. For instance, it could be prudent for the incoming city manager to "leave a few dollars on the table if it mean[s] maintaining the good will achieved with the council during the interview process."[9]

The Nature of Contracts: Definition, Focus, and Function

Instead of focusing on particular contractual terms within municipal contracts such as severance and political protection and budgetary discretion, which may vary based

3 Wong, Andrew S. 2022. "Contract recitals: What's in a whereas clause?" Daily Journal. https://www.dailyjournal.com/articles/366899-contract-recitals-what-s-in-a-whereas-clause.

4 "ICMA Model Employment Agreement." 2013. icma.org. https://icma.org/sites/default/files/306199_ICMA-Model-Employment-Agreement.docx.

5 Bourey, James. 2022. "Negotiating City/County Manager Employment Contracts, Part One - PA TIMES Online | PA TIMES Online." PA Times. https://patimes.org/negotiating-city-county-manager-employment-contracts-part-one/.

6 Cunha, Elizabeth. 2023. In discussion with the author.

7 Ibid.

8 Nichols, 2023.

9 Bourey, James. 2022. "Negotiating City/County Manager Employment Contracts, Part Two." PA Times. https://patimes.org/negotiating-city-county-manager-employment-contracts-part-two/.

on local conditions, this article examines the nature of negotiated principal-agent contracts in general and isolates personal variables that may promote synergy-seeking behavior.[10]
Here, nature is defined as the "real constitution of a thing as it is realized from beginning to end with all of its properities [sic]."[11]. Thus, when referring to contracts, this term covers both the process of a contract coming into being (negotiation), and the resulting contract with all of its properties; the nature of contracts serves as an umbrella term that encompasses all variables which affect and define a negotiation and final contract's characteristics – including the personal influences of the agent – as a single unit. This article acknowledges the tremendous scope of possible natural influences and attempts only to explore a number of those demonstrating a positive relationship with equilibrium prioritization.

I believe this approach is worthwhile for two reasons. First, it provides a paradigm for understanding the inclusion or exclusion of certain terms on a more generalizable level, and second, it provides a platform for improvement regardless of the environmental conditions. This holistic view identifies the individual as a source of influence, whose experience also explains the nature of their contracts. Certain key factors, once identified and understood, may be replicated to optimize the contracts and interactions that follow negotiations.

Literature Review: Risk-Shifting, Rational Actor Theory, and Contract Negotiation

According to Connolly's theory of risk-shifting within principal-agent contract negotiations, each actor seeks to shift as much risk as possible away from themselves and onto the other party.[12] This understanding is inspired by business literature covering ex-ante contract negotiation in private sector organizations, which holds that contracts are formed based on current conditions and predictions of how difficult or hazardous the job is estimated to be.[13] In response to objectively trying conditions, potential employees are more likely to require compensatory terms, and employers are more likely to comply.[14]

The concept of risk-shifting is in accordance with rational actor theory, which commonly defines rational actors as those who utilize all resources at hand to maximize personal gain. This paradigm emerged within the social sciences with Thomas Hobbes' declaration of human self-interest as a primary force in their decision making processes and Adam Smith's emphasis upon the pursuit of self-interest as the backbone of a free market and healthy economic system.[15] In his work Leviathan, Hobbes explains that in the state of nature, rational individuals are engaged in a constant "war of every man against every man."[16] These sentiments are echoed in Smith's work The Wealth of Nations, where he dismisses the influence of benevolence in social transactions, stating instead that in dealing with others, "We address ourselves not to their humanity but to their self-love."[17] While it provides a means of understanding why a rational agent would seek to avoid accepting personal risk while extracting the greatest compensatory provisions possible, it is less useful when examining the nuance of altruistic actions. Together, risk-shifting theory and rational actor theory provide an intuitive lens through which municipal contract negotiation can be analyzed. They both account for the instinct of self-preservation inherent in human interactions and help explain the agreed-upon terms in contracts formed involving traditionally self-interested actors. Regarding city managers, Connolly suggests their primary goal is "to maximize the amount of employment protection in the contract, such that if the council terminates the manager, he or she will have financial protection from the subsequent reputational harm and immediate loss of earnings."[18] Following such a perspective, it would be expected that a rational city manager would spend the majority of the negotiation process prioritizing and pushing for higher pay and greater benefits and securities. This perspective, however, does not seem to fully account for the influence of altruism in ex-ante contract negotiations.

10 Connolly, 2016"; Stiglitz, Joseph. 1987. "The Design of Labor Contracts: The Economics of Incentives and Risk Sharing." In Incentives, Cooperations, and Risk sharing, edited by H. Nalbantian, 47–68. Totowa, NJ: Rowman & Littlefield.

11 Naddaf, Gerard. 2006. The Greek Concept of Nature. N.p.: State University of New York Press.

12 Connolly, 2016.

13 Ibid.

14 Rau, Raghavendra, and Jin Xu. 2013. "How Do Ex Ante Severance Pay Contracts Fit into Optimal Executive Incentive Schemes?" Journal of Accounting Research 51, no. 3 (June): 631-671. 10.1111/joar.12001.

15 Monroe, Kristen R., and Kristen H. Maher. 1995. "Psychology and Rational Actor Theory." Political Psychology 16, no. 1 (March): 1-21. https://doi.org/10.2307/3791447.

16 Hobbes, Thomas. 2003. *Leviathan*. Edited by C. MacPherson. N.p.: Penguin Books Limited.

17 Smith, Adam. 2014. The Wealth of Nations. N.p.: CreateSpace Independent Publishing Platform.

18 Connolly, 2016.

Rational Risk-Shifting and Altruism

What happens when an actor does not engage in Hobbes' "war of every man against every man"?[19] Where does non-extractionary behavior fit into the framework of rational risk-shifting theory? Instances of altruism are observed and recorded in the realm of municipal government, but the mechanism behind it is largely unexplored. Connolly, for instance, discusses the decision of city managers to keep their positions after the 2008 collapse despite the substantial uptick in risk associated with their positions; she finds that " ... some senior managers who value quality service provision and community quality of life were willing to take on challenging positions in financially struggling municipalities as a way of performing a public service."[20] This seems to indicate that some city managers are behaving outside the expectations of risk-shifting theory, but does not explore the mechanism driving their decision, nor its potential rational implementation.

A possible explanation for this behavior is the influence of altruistic tendencies displayed by the city manager. This influence would take the spotlight off of the agent and principal as separate operators and instead encourage an agreement that benefits both parties as a joined force. If an actor is actively aiming for the best possible outcome for both parties, it may limit the incentive to extract more for themselves than strictly necessary.

I suggest a complementary mechanism for contract negotiation: risk-matching. The difference between risk-shifting and the subtype risk-matching lies in the nature of the negotiations. While expected risk-shifting behavior seeks to drive the maximum amount of risk away from themself and onto the other party (regardless of pre-existing municipal conditions), risk-matching strictly sets out to achieve a fair deal. Instead of pursuing contract terms that take advantage of the agent or principal, this synergy-based approach lends to the formation of a mutually beneficial contract.

Predicting Risk-Shifting

The actions of individual city managers are based on a personal mosaic of past experiences. It follows that a city manager's prior education and employment influence the outcome of their work during their term[21]. I argue that this carries into their contract negotiations as well. A history of service-oriented education and employment may increase the likelihood that a candidate will engage in risk-matching negotiation. The completion of courses or exposure to literature that emphasize service and collaboration are examples of service-oriented education. Military service, involvement in public works, and occupying positions in charitable organizations are examples of service-oriented employment. A resume containing such experience signals that an individual has aligned themselves with a mindset that seeks to benefit the greater good: both the experience itself and the fact that they initially sought it out serve as potential indicators of an altruistic personality.

Case Study

In order to test and explore my argument, I examine the case study of the city manager of College Station, Texas. I draw both from publicly available resources and interviews I conducted in November 2022, and February 2023. The background and location of this case are particularly valuable to this area of study because City Manager Woods' personal history of service makes this case ideal for exploring the motivations and influences of service-oriented contract negotiation. The article attempts to isolate an altruistically-fueled mechanism in order to examine it and its contributing factors, and his set of pre-existing influences establishes a likely environment to accomplish this.

Additionally, this case study provides new context to the discussion of ex-ante municipal contract negotiations: While the current data pool involving risk-shifting is strongly based in California, this article examines a case in Texas. While the role of a city manager (to manage a city's operations and execute the will of the council) remains relatively similar across states, the context under which they are expected to fulfill their obligations varies greatly. By using a case study from a different state, the scope of exploration is not limited to municipalities possibly demonstrating state-based local trends. This article intends to assert and expand the generalizability and available information within this realm of literature.

Educational History

Mr. Woods graduated from the University of Southern

19 Hobbes, Thomas. 2003. *Leviathan*. Edited by C. MacPherson. N.p.: Penguin Books Limited.

20 Connolly, 2016.

21 Teodoro, Manuel P. 2014. "When Professionals Lead: Executive Management, Normative Isomorphism, and Policy Implementation." Journal of Public Administration Research and Theory 24, no. 4 (October): 983–1004. https://doi.org/10.1093/jopart/muu039.

Mississippi with a Bachelor of Science in Construction Engineering Technology and later graduated from the University of Missouri-Columbia with a master's degree in Public Affairs.[22] Public Affairs programs are specifically designed to train an individual for civil service; according to the informational banner of the University of Missouri-Columbia, this degree is a "career stepping stone for those who believe that society benefits the most from effective collaboration among public, private and nonprofit sectors."[23] This strongly indicates a service-oriented formal education. With regards to his sources of informal education, it is worth noting that during the 2022 interview, while discussing helpful materials for those aspiring to become City Managers, Mr. Woods recommended the book "Turn the Ship Around!" by L. David Marquet, which focuses especially on efficiency and meaningful collaboration. Though its use as a proxy for informal education is limited, this recommendation may offer insight into the materials he has been exposed to outside of formal education. While these examples are by no means definitive measures of his formal and informal educational influences, they do seem to suggest an internal prioritization of service and altruism.

Employment History

Though he did not initially seek out a governmental position, Mr. Woods' success in the private sector paved the way for his growth and service in the public sector. Before becoming the City Manager of College Station, Mr. Woods worked for seven years as a Director of Engineering and Project Manager with Coyle-SDA, Inc.[24] He then began work as a Capital Programs Manager in 2014 with the city of New Braunfels, TX, where he had "successfully overseen the design, right of way acquisition and construction for all of [New Braunfels'] capital improvement projects."[25] In 2017, he took on the position of Assistant City Manager. He also joined the Navy Reserve the same year. He currently holds the title of Officer in the Civil Corps of Engineers. In 2018, he became the City Manager of College Station. Despite being later engaged in a year-long deployment in the Middle East, he continued to serve College Station from afar with the support of a strong and well-coordinated team. Considering his history of city-centric work and military service, Mr. Woods' prior employment history also indicates high levels of service orientation.

Risk-Matching in Action

When discussing initial impressions, Mayor Nichols expressed that Mr. Woods' "personal narrative" and obvious drive to serve the greater good of society enhanced the Council's confidence in selecting him as their agent. It was clear that Mr. Woods' primary focus was service, though it was naturally important to all parties that his salary be within the fair competitive range: "He's always made it pretty clear that he's not in it for the money – on the other hand, we knew he was valuable": this led to the Council's decision to offer Woods competitive pay[26]. He also recognized that Mr. Woods places great value on stability, which is strongly reflected in the current contract. "A group of human beings wants to minimize risk," and College Station's current city manager contract reflects a balanced recognition of this need to take only what is necessary to preserve and promote "trust, transparency, honesty, and communication."[27]

Upon being asked about his priorities regarding employment contracts, Mr. Woods emphasized fairness and stability above all else. Instead of salary, severance and political protection appear to be his strongest considerations in contract negotiation. His focus is on fairness and extended cooperation, not capitalization on the principal[28]. According to Mr. Woods, a good contract must satisfy all parties, principal and agent alike. In such a negotiation, equilibrium is the goal. He explained the importance of mutual acceptance of risk and responsibility, explaining that "I think what would be reasonable to me, if I was on the other side of it, would be to say 'hey we're going to be investing in you, we also want to feel like you're not just going to leave for the next job.'[29] While he acknowledged it would be difficult to outline exact terms for this, and that trying to "artificially" keep someone who intended to leave would not be ideal, he replied that "for me, it would not be a problem, because I'm genuinely invested in want-

22 "Bryan C. Woods - City Manager - The City of College Station, TX." n.d. LinkedIn. Accessed February 8, 2023. https://www.linkedin.com/in/bryan-c-woods-89339280.

23 "Public Affairs." n.d. Missouri Online. Accessed January 8, 2023. https://online.missouri.edu/degrees-programs/mu/government-and-public-affairs/public-affairs/mpa.

24 "Bryan C. Woods," 2023.

25 Quote by former New Braunfels City Manager Robert Camino in *City of New Braunfels Official Bulletin*. 2017. "Bryan Woods Named Assistant City Manager." July 11, 2017. https://www.nbtexas.org/Archive/ViewFile/Item/4717.

26 Nichols, 2023

27 Ibid.

28 Woods, Bryan C. 2022.

29 Woods, 2023.

ing to stay here and do this job."[30]

He found it important that neither party felt unfairly shifted upon. This contrasts with the extractionary negotiation style that might be assumed by rational actor theory. A strictly self-interested approach would predict that an actor would direct their focus towards shifting risk away from themselves and onto the Council; it would present achieving unequal terms favoring the agent as an incentive for that agent.

In this case, however, the agent (Mr. Woods) expresses a high level of willingness to shift in favor of the principal (the Council) to reduce risk for all parties. Here, fairness, not self-serving interest, took precedence. This kind of balance-seeking behavior can be both predicted and explained as an act of risk-matching. Including risk-matching in our toolkit as a means of analyzing altruism helps us better understand cases like these. It gives us an opportunity to bring them to the light and learn from them, rather than dismiss them as anomalies outside the realm of reason.

Conclusion and Further Discussion

As evidenced by the findings of the case study in College Station, service-oriented individuals appear to be inclined to take a minimalistic approach to risk-shifting in contract negotiations. This contrasts with the typical expectations under rational choice theory and conventional risk-shifting. Instead of directing their focus towards extractionary risk pushing and salary pulling, an actor may prioritize their ability to serve and match risk, only shifting it onto the other party insofar as it helps them serve their community to the best of their ability. Educational history, patterns of work experience, and personal ethics all may be linked to a general drive of service-orientation, which in turn may be expressed in the form of negotiating fair contracts.

While the scope of this article is limited to a single case study, it is intended to serve as a stepping stone towards developing a more sophisticated understanding of altruistic behavior in contract relationships. By identifying an altruistic subtype of risk-shifting and exploring its predictors, this article provides another lens with which to evaluate negotiating actors and governmental employment contracts. There is great value in studying that which we strive to achieve: by studying instances of fairness and exemplary dedication to service, we can learn under what conditions they emerge, and potentially how to replicate them. Political science literature overflows with studies outlining means of preventing practices that ought to be avoided; it is my hope that someday our pool of knowledge surrounding that which is admirable may be equally extensive.

30 Ibid.

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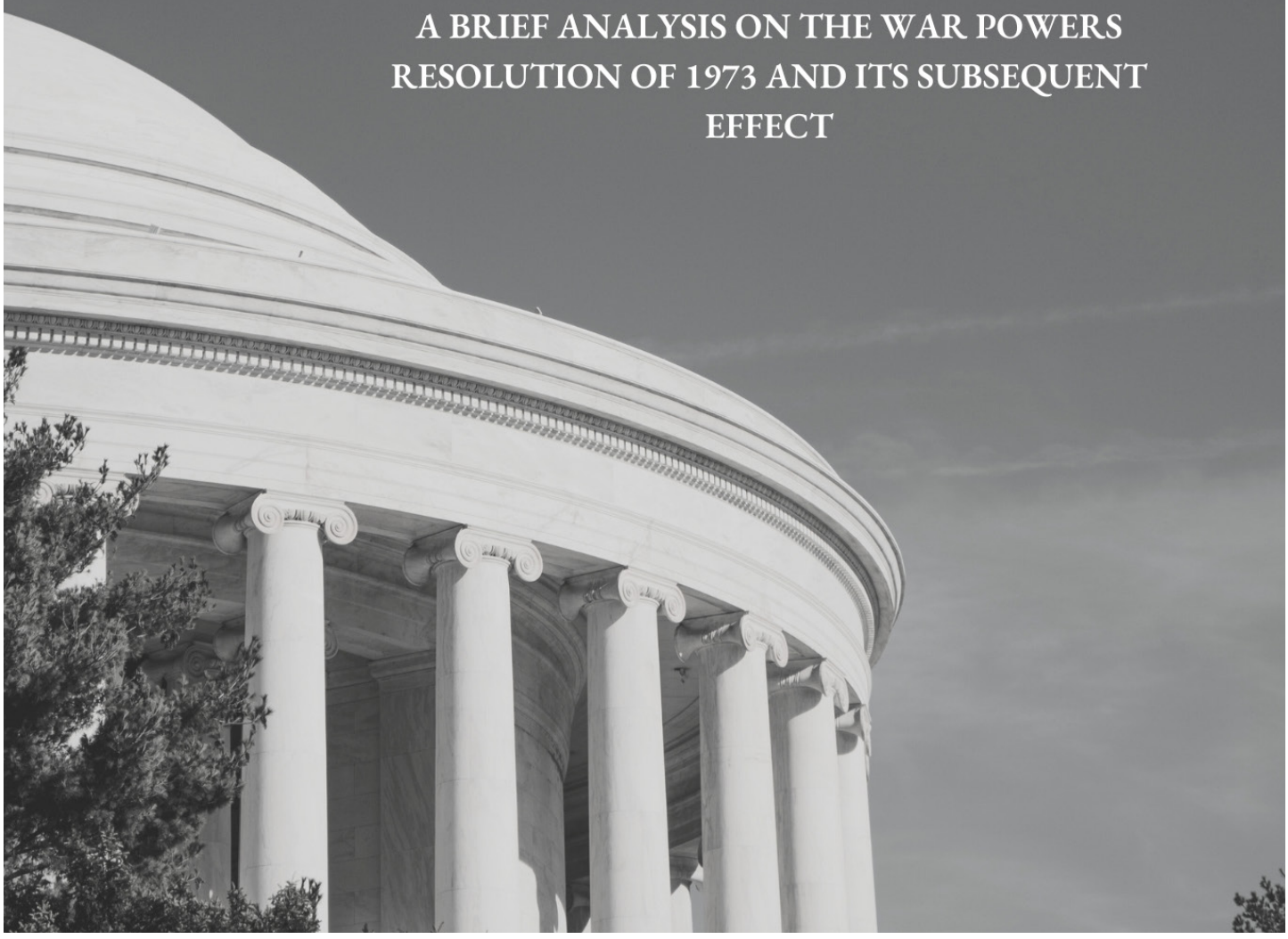
Where exactly does the regulation on presidential war power go wrong?

A BRIEF ANALYSIS ON THE WAR POWERS RESOLUTION OF 1973 AND ITS SUBSEQUENT EFFECT



Where exactly does the regulation on presidential war power go wrong?

A brief analysis on the War Powers Resolution of 1973 and its subsequent effect

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Introduction

Despite calling itself a constitutional democracy, the United States managed to send more than 500,000 troops to Vietnam without a declaration of war, leaving far-reaching consequences for the United States. Besides its severe damage to the national economy and public's trust of the government, the Vietnam War also inspired the U.S. Congress to attack the imperial presidency through the War Powers Resolution of 1973, which restricted the president's power to send U.S. armed forces into combat without explicit Congressional approval.[1] Fueled by the national anti-war movement and President Nixon's reckless decision to bomb the Viet Cong in neutral Cambodia,[2] the resolution gained a strong popular base—after President Nixon vetoed the resolution, both the House and the Senate soon overrode the veto with more than two-thirds of the vote and passed it into law. Subsequent presidents seldom abated in their abuse of military actions—in the next four decades following the resolution becoming law, Yugoslavia, Grenada, Kosovo, Iraq and other areas continued to witness U.S. military actions without appropriate compliance to, or Congressional invocation of, the War Powers Resolution (WPR).[3] Looking back at the devastation these conflicts have inflicted, one cannot help but ask: has the WPR managed to constrain the president's power and preference to initiate military actions? If not, where exactly did it go wrong?

This paper considers three possible explanations to how the WPR went wrong: 1) Congress insufficiently implemented the WPR and enforced disciplinary measures, 2) the resolution contained structural flaws that enabled the president to circumvent Congress when going to war, and 3) unanticipated circumstances assisted in the unregulated expansion of presidential war power. To address these puzzles, I will firstly discuss the constitutional debate over the presidential war power with examples from the Great Debate, introduce the passage, implementation, and violations of the WPR, and conclude with evaluations on the three proposed explanations and a discussion of the future development of the WPR.

Background and adoption of the War Powers Resolution (WPR)

The discussion over presidential war power has been initiated by the debate over executive power since the founding of the United States, firstly between Federalists and Anti-Federalists. Anti-Federalists argued for a relatively limited form of executive branch power, believing that "the Executive magistracy (should simply be) nothing more than an institution for carrying the will of the legislature into effect,"[4] as opposed to Alexander Hamilton's proposal of a powerful executive branch in the Federalist Papers.[5] While the Federalists gained success on major issues in the Great Debate—such as the ratification of the Constitution—a strong standing army was not one of them. In the Civil War, for instance, 97% of the Union Army was made up of state militias and volunteer regiments organized by the

1 Koenig, Louis W, "Reassessing the 'Imperial Presidency," *Proceedings of the Academy of Political Science* 34, no. 2 (1981): 31–44. https://doi.org/10.2307/1173789.

2 Arnold Isaacs, Gordon Hardy, MacAlister Brown, et al., *Pawns of War*. Boston: Boston Publishing Company, 1987, 83.

3Malone, Julia, "Congress Puts War Powers Resolution to the Test for First Time." The Christian Science Monitor. The Christian Science Monitor, November 2, 1983. https://www.csmonitor.com/1983/1102/110233.html.

4 Milkis and Nelson, 8-11.

5 Milkis and Nelson, 13-16.

states[6]. In addition, the Constitution only mentioned that the president holds the power as the Commander in Chief of the U.S. Military and mobilized militia, while Congress holds the power of declaring the war and maintaining the military; this vague distribution of war power set the stage for future disputes over the actual power of decision-making over military operations.[7] In the absence of a federally-controlled standing army before World War II, however, the president of the United States did not have the ability to command a large armed force in peacetime, making debate and concerns about presidential war powers virtually extinct during this period.

Perhaps the framers of the Constitution could hardly imagine that the U.S. military, initially cobbled together only in wartime from militias, would one day become the most powerful military force in the world, able to operate independently without state-level support. The unprecedented scale of operations in World War II set the stage for the expansion of the U.S. military and led to the emergence of a large national standing army; the sheer size of the military had made it an unavoidable topic in American politics again. Coupled with the gradual expansion of presidential power since President Franklin D. Roosevelt's New Deal, the shadow of imperial presidency began to loom over the war power of the United States shortly after the end of World War II.

After World War II, the United States was heavily involved in two full-scale wars with Korea and Vietnam. While the pain of the Korean War could still be masked by the pretext of defending of the free world,[8] the pain of the Vietnam War was unmitigated. Following the Gulf of Tonkin incident in 1964, the U.S. Congress passed the Gulf of Tonkin Resolution to grant President Lyndon B. Johnson broad authority to increase U.S. military presence in Vietnam without a formal declaration of war.[9] Between sending military advisors to Vietnam in 1959 and the formal withdrawal of American troops in 1973, approximately 2,700,000 American men and women served in Vietnam, resulting in a total death of 58,220.[10] Tragic casualties forced Americans to reflect on why they had been involved in situations of intense conflict for many years, even without a declaration of war. Quite a few Congress members also grew concerned with the erosion of Congressional authority to decide whether the United States should enter into a war or employ military force that would lead to one. Disturbed by revelations about the seemingly-endless Vietnam War—including news that Nixon had been conducting a secret bombing campaign in neutral Cambodia—the House and Senate drafted the War Powers Resolution to reclaim Congressional control over oversea warfare. Their efforts led to the introduction of the War Powers Resolution in May 1973, shortly after U.S. troops withdrew from Vietnam, and its passage by the House and Senate in July 1973. Even though the resolution was vetoed by President Nixon, the Congress managed to override the veto and enacted the joint resolution into law on November 7, 1973 by a two-thirds vote in each chamber.[11] The resolution prohibits U.S. military troops from remaining for more than 60 days without Congressional authorization for the use of military force (AUMF) or a declaration of war by the nation and requires the president to inform the Congress within 48 hours of committing the armed forces to each military action. Although the resolution was ultimately passed, President Nixon's initial veto reaction reflected the executive branch's reluctance to comply with the restraints over president's war powers, setting the stage for disputes in the resolution's implementation.

Violation After Passage: Presidents' Limited Compliance to the WPR

The resolution's effectiveness in restraining presidents from initiating a war is remarkable—in the 49 years since the resolution became law, American presidents have never started a full-scale war like those in Korea and Vietnam. As a result of the WPR, presidents have filed 130 reports to Congress; and in response, Congress supported the presidents by authorizing the Marines to remain in Lebanon for 18 months during 1982 and 1983 (Multinational Force in Lebanon Act invoking the WPR), the U.S. combat operations against Iraqi forces during the 1991 Gulf War (AUMF Against Iraq Resolution of 1991 invoking specific statutory authorization in the WPR), and the use of force

6 "Civil War Facts," American Battlefield Trust. August 16, 2011.

7 Pious, Richard M., "Inherent War and Executive Powers and Prerogative Politics," *Presidential Studies Quarterly* 37, no. 1 (2007): 66–84, http://www.jstor.org/stable/20619295.

8 Tootle, Stephen, "Truman Intervenes in Korea," Bill of Rights Institute, Bill of Rights Institute, 2017. https://billofrightsinstitute.org/essays/truman-intervenes-in-korea.

9 Digital History, "U.S. Troop Levels in Vietnam," Digital History, 2021, https://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=11&psid=3844.

10 Office of Academic Affiliations, "Vietnam War," Vietnam: U.S. Department of Veterans Affairs Military Service history pocketcard, U.S. DEPARTMENT OF VETERANS AFFAIRS, 2021, https://www.va.gov/oaa/pocketcard/m-vietnam.asp.; Electronic Records, Reference Services, "Vietnam War U.S. Military Fatal Casualty Statistics," National Archives and Records Administration, January 2018, https://www.archives.gov/research/military/vietnam-war/casualty-statistics.

11 Wood, Matt, "When Congress Last Used Its Powers to Declare War," National Constitution Center, November 29, 2019, https://constitutioncenter.org/amp/blog/when-congress-once-used-its-powers-to-declare-war.

to obtain Iraqi compliance with United Nations resolutions after the Gulf war, particularly through enforcement of Iraqi no-fly zones (AUMF Against Iraq Resolution of 2002).[12]

Nonetheless, overseas military engagements in violation of the resolution have continued unabated since the resolution became law. Military operations that complete the authorization process before they begin, as required by the resolution, are a minority among all of the military operations. Under President Clinton, the use of war powers in the former Yugoslavia, Bosnia, Kosovo, Iraq, and Haiti was either conducted without notifying the Congress in advance, or extended beyond the 60-day window period, not to mention that few of them received the AUMF from the Congress. Take President Clinton's 1999 bombing campaign in Kosovo as an example: the U.S. military continued the bombing campaign in Kosovo for more than two weeks after the 60-day window had elapsed. Clinton's action in Kosovo resulted in legal disputes; in the case Campbell v. Clinton, members of Congress argued that President Clinton's conduct in Kosovo violated the WPR.

Clinton is not the only president that was reluctant to comply with the WPR. After the September 11 Attacks, President George W. Bush promoted Congress's passage of the Authorization for Use of Military Force (AUMF) of 2001, granting the President the authority to use all necessary force against those whom "planned, authorized, committed or aided" the September 11 Attacks, targeting al Qaeda and the Taliban in Afghanistan. Since 2001, however, President George W. Bush construed his power under the 2001 AUMF to cover a wide range of additional countries and regions in addition to al Qaeda and the Taliban in Afghanistan. Further, the whole list of actors that the U.S. military is currently engaged with or thinks it has permission to engage in combat under the 2001 AUMF is still a secret unknown to the American people.[13] Barbara Lee, the only representative to vote against the 2001 AUMF, has consistently criticized it for being a blank check giving the president unlimited powers to wage war without debate. After Donald Trump became president, the Office of the President further interpreted the 2001 AUMF as providing Congressional authorization for the use of force against other militant groups besides al-Qaeda. The WPR has not met the Congress's expectations on teaching the president how to conduct military actions appropriately.

Issues Related to Implementing WPR: Irresponsible Implementation, Structural Flaws, and Homeland Security Concerns

After reviewing the long-lasting debate over presidential war powers, this article has found that the War Powers Resolutions (WPR) did restrain the presidents from starting wars and keep the United States out of massive ground conflicts. Unfortunately, presidents continue to initiate smaller-scale military campaigns and expand presidential influence over warfare by reinterpreting the authorizations (AUMFs) granted by the Congress. This section will discuss the three proposed reasons to explain this failure of WPR implementation.

Firstly, Congress and the Supreme Court failed to adequately clarify the specific functions and constitutional power of the president in war, resulting in a large gray area within presidential war powers; this phenomenon can be attributed to a combination of party politics and a reluctance to take responsibility. Party politics often influence lawmakers' stances on war powers, with partisan interests shaping their decisions rather than a principled examination of constitutional boundaries. Additionally, the reluctance to take responsibility for making decisive decisions on war powers has allowed this gray area to persist. As a result, presidents have often exploited this ambiguity, exercising expansive war powers without clear checks and balances. During the vote for AUMF Against Iraq Resolution of 2002, Hillary Clinton voted for the authorization to use military force, but then regretted her vote when recognizing the unpopularity of the 2003 Invasion of Iraq. When explaining her "wrong" decision, Clinton even argued that she voted for the 2002 AUMF only in support of president's power of using the US military "to defend the national security of the United States against the continuing threat posed by Iraq,"[14] not to agree with President G.W. Bush's decisions that were made using such power.[15] Such irresponsibility has also occurred in the Supreme Court— in the D.C. Circuit case Campbell v. Clinton, a number of congress members led by Congressman Thomas Camp-

12 "Text - H.J.Res.77 - 102nd Congress (1991-1992): Authorization for Use of Military Force Against Iraq Resolution," January 14 1991, https://www.congress.gov/bill/102nd-congress/house-joint-resolution/77/text; "Text - H.J.Res.114 - 107th Congress (2001-2002): Authorization for Use of Military Force Against Iraq Resolution of 2002," October 16, 2002, https://www.congress.gov/bill/107th-congress/house-joint-resolution/114/text.

13 Finucane, Brian, "Putting AUMF Repeal into Context." Crisis Group, July 29, 2022, https://www.crisisgroup.org/united-states/putting-aumf-repeal-context.

14 107th Congress, "AUTHORIZATION FOR USE OF MILITARY FORCE AGAINST IRAQ RESOLUTION OF 2002," GovInfo, October 16, 2002. https://www.govinfo.gov/content/pkg/PLAW-107publ243/html/PLAW-107publ243.htm.

15 Kranish, Michael, "Hillary Clinton Regrets Her Iraq Vote. but Opting for Intervention Was a Pattern," The Washington Post, September 15, 2016, https://www.washingtonpost.com/politics/hillary-clinton-regrets-her-iraq-vote-but-opting-for-intervention-was-a-pattern/2016/09/15/760c23d0-6645-11e6-96c0-37533479f3f5_story.html.

bell filed suit claiming that the President violated the WPR and the War Powers Clause of the Constitution by directing U.S. military's participation in the NATO campaign in Yugoslavia. Clinton's legal team argued that Clinton had successfully complied with the legislation by leaving the area 12 days before the statutory 90-day limit and insisted that the operation's activities were legitimate under the WPR since Congress had already passed a bill funding it, which they claimed represented an implied permission. This argument was controversial because the WPR clearly states that such funding does not constitute authorization. However, the court responded that appellants had ample legislative authority it could have exercised to stop appellee's war making decisions, thus appellants lacked the power to challenge such executive action in court, determining that the matter was a non-justiciable political dispute and dismissing the appeal. As the most important executor and supervisor of public law, respectively, the inaction of Congress and the Supreme Court in implementing the WPR reduced the cost of presidential refusal to comply with the WPR; the president did not need to worry too much about the constraints from the WPR when carrying out military actions.

Secondly, there were two structural flaws that the WPR could not or did not resolve: president's control over the military as the Commander-in-Chief, and possibilities of international sources of authorization. According to U.S. Constitution Article II, Section 2, the president "shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States,"[16] enabling the president to command the military directly, no matter whether Congress had granted an authorization or not. Regarding the extra sources of authorization, presidents have circumvented Congress when starting wars and instead turned to the U.N. Security Council and NATO partners for authorization and support since President Harry Truman,[17] notably the Korean and Gulf Wars—in which President George H.W. Bush had already deployed 500,000 troops to the Gulf countries before receiving the Congressional authorization[18]—with authorizations from the UN Security Council.[19,20] More recently, Barack Obama also exercised war power during military actions against Libya in 2011 without any statutory support from Congress, claiming that "authority" came from United Nations resolutions and NATO allies.[21] These presidents preferred to give the executive branch complete control over all exterior matters, the possibility of which the framers of the Constitution were fully aware of and vehemently opposed to. Furthermore, scholars, numerous executive branch agencies—notably the Justice Department—and even the Supreme Court (from the sole-organ theory in foreign affairs in the 1936 Curtiss-Wright decision[22]) have advocated for independent presidential powers in foreign policy. This widespread support provided a plausible reason for the president's violation of the resolution, once again weakening the negative impact and consequences of presidents' violation of the WPR. The president's absolute control over the military, combined with the possibilities of gaining authorization from international organizations and the apathy of the Supreme Court and Congress to punish violations of the WPR, have allowed the president to conduct small military operations with little regard for legal risk. In addition, since the WPR provided a 60-day window for a president to conduct small-scale military actions, for which he only needed to notify the Congress in advance but did not need an authorization for, the WPR did not in fact take away too much war power from the president in small-scale warfare, but just established regulations on the power.

Thirdly, homeland security became a new concern after the September 11 Attacks, opening up a new frontier that was not contemplated when the WPR was formulated: foreign wars to defend homeland security.[23] Concerns about terrorist attacks and homeland security led to little criticism over constitutional violation in military intervention and air force attack in Syria and Libya in the 2010s. In effect, the WPR was further weakened by the president's expanding power to conduct military operations abroad under the banner of homeland security.

16 Milkis and Nelson, 565.

17 Fisher, Louis, "Unchecked Presidential Wars," *University of Pennsylvania Law Review* 148, no. 5 (2000): 1637–72, https://doi.org/10.2307/3312751.

18 Kheel, Rebecca, "House Votes to Repeal 1991, 1957 War Authorizations," The Hill, June 29, 2021, https://thehill.com/policy/defense/560763-house-votes-to-repeal-1991-1957-war-authorizations/.

19 United Nations Security Council Resolution 84 (1950).

20 United Nations Security Council Resolution 678 (1991).

21 Curtis A. Bradley, and Jack L. Goldsmith, "Obama's AUMF Legacy," *The American Journal of International Law* 110, no. 4 (2016): 628–45, http://www.jstor.org/stable/10.5305/amerjintelaw.110.4.0628.

22 United States v. Curtiss-Wright Export Corp., 299 U.S. 304.

23 Bradley, Curtis A., and Jack L. Goldsmith, "Congressional Authorization and the War on Terrorism," *Harvard Law Review* 118, no. 7 (2005): 2047–213,. http://www.jstor.org/stable/4093316.

Conclusions and Future of the WPR

For self-governance and sovereignty to exist, Congressional oversight of the use of military force, whether overt or covert, is essential. No matter what kind of crisis may develop, only Congress has the constitutional power to determine whether to declare war or enter a state of peace. Any transfer of such power to a president who asserts "inherent" power or attempts to oust Congress by turning to the UN Security Council or NATO nations for "authorizations" over offensive operations are both a danger to and violation of democracy and the constitutional governance. The War Powers Resolution of 1973 successfully achieved its goal of correcting the president's preference leading to a dangerous constitutional transgression (launching a full-scale war without Congressional declaration of war) but fell short of restricting the president's attempt to erode legislative power and power to start military campaigns under the pretext of protecting national or homeland security. The main reasons for this phenomenon are: 1) The inaction, in clarifying the specific actions a president can take charge of during the war, from the Congress and the Supreme Court that relates to the fear of claiming responsibility, 2) The president's position as commander in chief that brings him absolute control over the standing army, and 3) the homeland security threat posed by terrorism that gives the president new excuses for overseas military action. The passage of the War Powers Resolution (WPR) brings some positive news as it offers a relatively clear description of the current war powers held by the president. This clarity prevents future presidents from extending these powers arbitrarily, as had been done prior to the passage of the WPR. In essence, the WPR stands as a significant milestone in regulating the president's war powers, particularly in a time when the United States possesses a formidable military force. While it may not have fully achieved the goal of limiting the president's excessive war powers in one sweeping action, the resolution successfully establishes a framework for regulating presidential war powers. Furthermore, it sets the stage for ongoing efforts to further clarify the scope and constraints of these powers, ensuring that they do not exceed their rightful limits.

In addition, the expansion of the presidential war powers cannot be separated from the society's efforts to expand the president's power in handling foreign affairs, which is worth reflecting on as a lesson. Over the past 50 years, there has been a notable trend among political scientists, legal scholars, and historians advocating for a substantial increase in presidential powers, including the authority to declare war without Congressional proclamation or approval. However, it is disconcerting to observe that many of these scholars have not given due consideration to fundamental constitutional principles such as checks and balances and the system of separate authorities while defending this transfer of power as lawful. This shift in thinking has often downplayed the significance of maintaining a balance of power between the branches of government. For instance, proponents of expanded presidential war powers argue that such authority is necessary for swift and decisive action in times of crisis. They may cite examples like the Gulf of Tonkin Resolution in 1964, where Congress granted President Lyndon B. Johnson broad authority to take military action in Vietnam without a formal declaration of war. Similarly, the Authorization for Use of Military Force (AUMF) resolutions passed in the aftermath of the 9/11 attacks have been invoked to justify military actions beyond traditional declarations of war. However, it is crucial to recognize that these examples illustrate a gradual erosion of Congress's role in deciding matters of war, which undermines the system of checks and balances enshrined in the Constitution. By concentrating power in the hands of the executive branch, the delicate equilibrium established by the framers of the Constitution is disrupted, potentially leading to an overreach of presidential authority. In essence, while some argue for an enhanced presidency, it is imperative to maintain a careful consideration of constitutional principles and the separation of powers in order to safeguard the integrity and balance of our democratic system.

Going forward, efforts from the legislature are incorporating the presidential war powers into a more sophisticated regulating mechanism. A new bill introduced by Senator Tim Kaine (D-VA), S. 1939, would abolish the WPR and establish a process for quick responses to emerging threats to national security. On the other hand, critics to Kaine's bill pointed out that the measure could worsen the situation by giving a 20-person legislative committee significant influence, which could increase presidential power by undermining the 515 other members of Congress and allowing greater secrecy during the warfare decision-making.[24] Nevertheless, the WPR is successful as an attempt to properly regulate and balance the war powers of the supreme commander of the world's most powerful military;

24 Fisher, Louis, "Don't Invite More Presidential Wars," The Hill, February 2, 2016, https://thehill.com/opinion/op-ed/204599-dont-invite-more-presidential-wars/.

it is highly possible to see the WPR serving as a reference for other military powers to standardize the constitutional regulation for their military leaders and war power distributions.

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