Questions in Politics

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Questions in Politics Editorial Staff

About the GPSA

Georgia Political Science Association

Founded in 1968, the Georgia Political Science Association (GPSA) is the professional association for political science practitioners and educators in Georgia. Membership is drawn from the public, private, and academic sectors. We welcome members, attendees, participants, and students from around the world.

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Questions in Politics

The Journal of the Georgia Political Science Association
Volume IV

Contents

Questions in Politics
The Journal of the Georgia Political Science Association
Volume IV

Preface

Questions in Politics (*QiP*), the scholarly journal of the Georgia Political Science Association (GPSA). welcomes our readers to Volume IV. The articles published here began as papers presented at the 2016 Annual Meeting of the GPSA. The authors then submitted the manuscripts to the journal, where they were anonymously and thoroughly reviewed. After further review and editing, out of eleven manuscripts submitted, five are published here.

We are pleased to announce that the first article in Volume IV, "To Defer or Not Defer: The Dilemma of Federal Courts of Appeal Determining the Reach of US Law" by Dr. Maureen Stobb of Georgia Southern University, is the McBrayer Award winner for 2016. The McBrayer is given annually to the best paper presented at the Annual Meeting. The winning author or authors have traditionally received a certificate and a cash award. To further recognize this achievement, the McBrayer winner is the first article in this volume.

All five of the articles in Volume IV do have one theme in common: The importance of the judiciary. Although four articles are in the field of American politics and one is in the area of international relations, all directly or indirectly acknowledge the key role played by the courts in interpreting law and applying it to individual cases. In *Democracy in America*, Alexis de Tocqueville writes, "There is almost no political question in the United States that is not resolved sooner or later into a judicial question" (Tocqueville 2000, 257). The articles by Stobb and by Rutkowski et al. are explicitly about the federal courts. Taulbee's argument about citizenship turns on key rulings by the US Supreme Court, while Rodgers analyzes policies that will be interpreted by state and federal courts. The horrible questions raised by the Rwandan genocide end up in court, as Tures examines in his analysis of the African Court on Human and Peoples' Rights. Courts are essential political institutions and make rulings with political consequences. To twist Hamilton's phrase from *Federalist* number 78, the judiciary contributes more to the political process than "merely judgement." Political science should, as the authors of the articles demonstrate, continue to recognize courts as political institutions with all the complexities and contradictions that also afflict legislatures and executives.

The home for *QiP* remains the web. Go to gpsa-online.org and click on "*Questions in Politics*." For the foreseeable future, a few copies of each volume will continue to be published. Copies of Volumes I through III remain available. Contact either of us to purchase a copy.

Finally, we continue to thank our anonymous reviewers, as well as the Editor, James "Larry" Taulbee, and the Managing Editor, Matthew E. Van Atta, for their efforts to continuously improve this journal.

Thomas E. Rotnem and Adam P. Stone

Questions in Politics
Volume IV Abstracts

The duty of the courts in America is, as John Marshall said, "to say what the law is." In the area of international diplomacy, however, the president is the sole voice of the nation. In an increasingly interconnected world, judicial interpretation of the law's meaning can cause diplomatic tension and conflict. This is particularly true when American courts decide to apply US statutes to regulate conduct that occurred abroad. Although courts have generally deferred to the executive's determinations of the foreign policy consequences in such situations, scholars argue that a revolution is in progress. The Supreme Court is less willing to defer to the executive on these matters. Less is known about the reaction of the lower federal courts to this trend. This article examines the approaches employed by the Federal Courts of Appeal in determining the reach of US law. It shows that the executive branch's influence in these cases is highly contingent on the position it takes, and that the combined impact of legal factors is stronger than that of judges' policy proclivities. These results add to growing evidence of a decline in deference to the Executive and provide insight into how courts are adapting to our increasingly globalized economy.

The genocide in Rwanda spurred the global community to action, leading to calls for a more permanent court to try such human rights abuse cases, instead of the ad hoc system that existed in the early 1990s. Now there is an International Criminal Court as well as a regional tribunal, the African Court on Human and Peoples' Rights (ACHPR). The ACHPR, which is located in the same Tanzanian city as the ad hoc tribunal that tried defendants accused of perpetrating massacres, may be even more critical for the cause of human rights than the ICC. This regional court enables citizens to accuse their government of abuse, in court. Research shows that countries which signed the protocol

permitting such challenges are also more likely to provide civil liberties and political rights to their people, aiding the cause of freedom for Africa.

Citizenship and the Presidency:
Parsing Article II.1(5) of the US Constitution

James Larry Taulbee, *Emory University* *Page 57*

Article II.1(5) of the US Constitution defines who is eligible to serve as president of the United States. Simple requirements often lead to major controversies. In this case, the primary issues arise over how to construe the phrase "natural born." After an exposition and definition of some basic concepts, the article will use a brief analysis of several hypothetical questions to illustrate the problems of constitutional and statutory interpretation. It will then discuss English common law as it existed in the late eighteenth and early nineteenth centuries, the first acts of Congress insofar as they are relevant in determining the meaning of the natural-born requirement, and the relevance of the Fourteenth Amendment. The article will finally analyze seven cases where eligibility for the presidency has surfaced as an issue. Not surprisingly, some controversial issues that arose early in US history still have currency. Finally, the narrative will summarize the issues and continuing areas of uncertainty.

Biggest Loser? Obama's Administrative Agencies and the Supreme Court

Adam Rutkowski, *University of Georgia*
Allison Vick, *University of Georgia*
Martha Humphries Ginn, *Augusta University*
Lance Y. Hunter, *Augusta University* *Page 81*

For at least the last decade, universities and colleges across the nation have been seeking ways to improve the student learning experience. Specifically, educational scholars have been addressing problems of low retention, progression, and graduation rates (RPG). Within this realm, literature focuses on improving student study skills, improving institutional resources to identify and help improve at-risk students, and improving student engagement. The key seems to be that the more engaged a student is, the better that student will perform. The purposes of this article are to investigate students' engagement, satisfaction, and performance in a "Flipped-Hybrid classroom." Specifically, this article addresses the question: Does the flipped classroom experience improve student engagement, satisfaction, and performance? We expect our preliminary results from a pilot study to find that students will be more engaged,

that there will be fewer withdrawals and D's/F's, and that end-of-course A/B rates will be higher than non-flipped control classes.

A Comparative Analysis of Sexual Assault Policies among Four University System of Georgia (USG) Institutions

Jenna Rodgers, *University of North Georgia* *Page 107*

This article explores campus sexual assault policies, specifically as it relates to Georgia campuses. Different colleges and universities are examined, including smaller campuses like the University of North Georgia and Georgia College and State University, and larger campuses like the University of Georgia and Georgia Institute of Technology. The policies of these institutions will be examined and compared to the University System of Georgia policy, as well as different federal statutes, to see which policies are more comprehensive and which are simply the minimum required. The policies will be analyzed for effectiveness and inclusivity. The paper will also explore the different obstacles that sexual assault survivors could face, including some of the most common myths that are used against victims, as well as difficulty finding and utilizing resources. Finally, the effects of social media and mass media and how they could be used as both a hindrance and an asset in addressing the issue of campus sexual assault on Georgia campuses in considered.

Questions in Politics
The Journal of the Georgia Political Science Association
Volume IV

To Defer or Not Defer: The Dilemma of Federal Courts of Appeal Determining the Reach of US Law[1]

Maureen Stobb
Georgia Southern University

The duty of the courts in America is, as John Marshall said, "to say what the law is." In the area of international diplomacy, however, the president is the sole voice of the nation. In an increasingly interconnected world, judicial interpretation of the law's meaning can cause diplomatic tension and conflict. This is particularly true when American courts decide to apply US statutes to regulate conduct that occurred abroad. Although courts have generally deferred to the executive's determinations of the foreign policy consequences in such situations, scholars argue that a revolution is in progress. The Supreme Court is less willing to defer to the executive on these matters. Less is known about the reaction of the lower federal courts to this trend. This article examines the approaches employed by the Federal Courts of Appeal in determining the reach of US law. It shows that the executive branch's influence in these cases is highly contingent on the position it takes, and that the combined impact of legal factors is stronger than that of judges' policy proclivities. These results add to growing evidence of a decline in deference to the Executive and provide insight into how courts are adapting to our increasingly globalized economy.

Justice Stephen Breyer recently noted the challenges judges face because of "an ever more interdependent world," and concluded "it has become clear that, even in ordinary matters, judicial awareness can no longer stop at the border" (Breyer 2015, 4). The nature of litigation has changed as routine

[1] I thank Brett Curry, Lisa Holmes, Linda Camp Keith, Robert Lowry, Banks Miller, Clint Peinhardt, James Larry Taulbee, the editors, and the anonymous referees for valuable comments on this project.

transactions cross national boundaries (Breyer 2015). Seemingly domestic cases increasingly have international consequences (Breyer 2015). Federal appeals courts must determine the reach of the US government's regulatory authority in this environment. Courts will often defer to executive expertise in this arena, adhering to the idea that issues arising in foreign affairs cases are distinct from those present in domestic litigation and should be subjected to a different standard (Bradley 1999).[2] However, recently scholars have drawn attention to a decline in such deference (Sitaraman and Wuerth 2015).[3] Admitting that the courts are not as informed as other branches about American foreign relations, Supreme Court justices have expressed a willingness to take this step (Breyer 2015).[4] However, few studies examine the lower federal courts' readiness to make decisions independent of executive pronouncements in foreign affairs cases.

In this article, I investigate the extent to which lower federal courts challenge the Executive in one type of foreign affairs case, suits in which the plaintiff asks the court to apply US statutes to regulate conduct occurring abroad, and to identify factors significantly influencing this decision. I focus my analysis on the Federal Courts of Appeal because they decide many more cases than the Supreme Court and are the last resort for the majority of litigants (Hettinger, Lindquist, and Martinek 2006; Songer, Sheehan, and Haire 2000). Little is known about the degree of deference to the Executive in foreign affairs cases at this level of the judicial hierarchy. Although courts are hesitant to apply US law abroad if the Executive is against such an extension, they will make independent judgments concerning the foreign policy consequences of their decisions when the Executive is in favor of the application of US law. Furthermore, my results indicate that principles of international law influence judges more than their policy proclivities. These findings are important because, given our increasingly interdependent world and globalized economy, these types of legal cases are likely to increase in the future. Understanding patterns and trends in how the Courts of Appeal are handling these disputes is a valuable contribution to the field of judicial politics.

This article proceeds as follows. First, I present scholarly evidence that judicial deference in foreign affairs cases is declining. Second, I explain the legal principles governing the subset of foreign affairs cases analyzed in this study, those involving the extraterritorial application of US law. Third, I discuss

[2] Bradley (1999) defines the term employed in legal scholarship for this phenomenon, "foreign affairs exceptionalism," as "the view that the federal government's foreign affairs powers are subject to a different, and generally more relaxed, set of constitutional restraints than those that govern its domestic powers" (1096).

[3] Sitaraman and Wuerth (2015) refer to this decline in deference as "normalization" (1901).

[4] Justice Breyer notes this reality and expresses hope that lawyers and academics will close the "information gap" (Breyer 2015, 114).

measurement and modeling issues before presenting my results. Finally, the conclusion explores the implications of my findings.

The Decline of Deference to the Executive in Foreign Affairs Cases

The judiciary's role is to resolve controversies in accordance with the rule of law and to exercise the power to void the actions of Congress and the president that are contrary to the ideals of justice enshrined in the Constitution (*Considering the Role of Judges* 2011). Litigation with an international component in national courts, or foreign affairs litigation, challenges judges in fulfilling this role (Mahoney 2013). Since the Supreme Court decided *U.S. v. Curtis-Wright* in 1936, the courts have granted the Executive wide-reaching power in international affairs. Courts make sharp distinctions between domestic and foreign affairs, and hold that the federal government is not limited by the usual constitutional constraints in the latter (Bradley 1999). Judges practicing this type of deference employ arguments in a manner in foreign affairs cases not seen in analogous domestic cases (Bradley 1999). Scholars note a decline in this type of reasoning and of deference to the Executive's assessments of foreign policy interests in cases where one would expect both (Bradley 2000, 659–63).[5] Courts have shifted the analysis from constitutional arguments relying on the unique role of the Executive to reasoning employing ordinary principles of administrative law and tools for interpreting statutes (Sitaraman and Wuerth 2015).

This shift occurred in three waves: post–Cold War academic criticism of this type of deference (1990s); the Supreme Court's post–September 11th rejection of executive arguments in war on terror cases; and the Roberts Court's treatment of foreign relations cases without resort to sharp distinctions between domestic and foreign affairs in its reasoning (Sitaraman and Wuerth 2015). Political scientists have also documented the trend. Evidence suggests that the Supreme Court not only makes decisions concerning American foreign policy, it has often ruled against the executive branch (King and Meernik 1999a, 1999b). Researchers documenting the decline in judicial deference admit the process is not yet complete (Sitaraman and Wuerth 2015). Scholars recognize that the Supreme

[5] Bradley identifies five overlapping subsets of foreign affairs exceptionalism, or types of deference to the Executive: the political question doctrine, where the president's decision is in his authority (citing *Terlinden v. Ames* 1900); executive branch lawmaking deference, shown to executive agreements and grants of head of state immunity (citing *Dames & Moore v. Regan* 1981 and *The Schooner Exchange v. McFaddon* 1812); *Chevron* deference, or respect to permissible agency constructions of a statute (citing *INS v. Aguirre-Aguirre* 1999); persuasiveness deference, general respect stemming from the Executive's status as a "knowledgeable representative"; and international facts deference, or respect for the executive branch's assessment of US foreign relations interests (citing *Department of the Navy v. Egan* 1988).

Court has left untouched dozens of lower-court rulings resting on sharp distinctions between domestic and foreign affairs (Vladek 2015).[6] Thus, justices may be ready to reject executive deference in foreign affairs cases, but are not yet willing to force the approach on lower-level federal judges (Vledek 2015).

Because the Supreme Court sends "mixed signals" (Vladek 2015, 330), with inconsistent case law in particular issue areas, the trend toward declining deference may be weaker in the lower levels of the federal judiciary (Bradley 2015). The Courts of Appeal struggle to define legal doctrine in foreign affairs cases. For example, legal scholars note that the circuit courts have not clearly defined what amounts to giving "serious weight" to executive opinions in private actions against foreign parties (Clarens 2007, 428). Political scientists have produced evidence that lower courts are even less likely than the Supreme Court to decide in favor of the Executive (King and Meernik 1999b). Researchers also document a willingness among federal appellate courts to find in favor of civil liberties claims despite executive assertions of national security interests. However, the probability that a particular court will take this approach appears to be contingent on variations in judicial philosophies (Randazzo 2010). Results may also depend on the type of deference considered (Bradley 2015).[7]

One central aim of this article is to draw attention to a significant, often overlooked, dimension of this ongoing debate about the degree of judicial deference. We know little about how lower court judges decide cases implicating US foreign policy interests when they challenge executive assertions or make decisions without guidance from the political branches of government. It is important to understand judicial decision-making in this context because judges are making foreign policy determinations. Foreign policy, expressed as a declaration of intent or in the form of action, sets America's relations with the world (Hastedt 2015). This process necessarily involves choices about the importance of US relations with other nations. Ties to some states will rank as higher priorities than those with others. In deciding whether to apply US law in a case in which states have overlapping jurisdiction, judges make choices that may offend other nations. In their willingness to offend some states but not others, judges express a ranking of American relationships abroad. Judges communicate American priorities, making decisions that could conflict with Congress' and the Executive's intentions for the conduct of US foreign affairs. Specifically, with regard to the subject of this analysis, extraterritorial application of American standards can frustrate the efforts of diplomats to achieve regulatory

[6] Vladek (2015, 322) cites *Janko v. Gates* (2014, 2015) and *Carmichael v. Kellogg, Brown & Root Servs, Inc*. (2009, 2010).

[7] For example, legal scholars suggest that the lower courts will generally accord significant, often dispositive, deference to the executive branch with respect to whether to grant immunity to foreign officials.

coordination with other states, a complex process of international bargaining between actors with, at times, divergent preferences (Drezner 2007).[8] When US courts unilaterally apply aggressive economic regulations and labor standards to actions committed in lesser-developed countries, they risk triggering accusations of American imperialist behavior. In other cases, international norms, such as the prohibition against torture, may encourage US courts to act or even mandate that they do so. Judges must weigh important foreign policy considerations in any case that involves the extraterritorial application of US law. The goal of the next section is to explain the legal principles governing this category of foreign affairs cases.

Legal Principles Governing the Extraterritorial Application of US Law

State regulation of conduct outside their borders is occurring more frequently and is extremely controversial (International Bar Association 2009, 5). International law recognizes five bases for regulating conduct: territorial (objective and subjective), nationality, passive personality, protective, and universal. A state may apply its domestic law when the conduct occurs in its territory (subjective territorial principle) or the actions have substantial effects in the state's territory (objective territorial principle) (International Bar Association 2009, 12).[9] A state's law is also applicable if a defendant (nationality) or a victim is a national (passive personality), when the activity could damage the state's vital interest (protective) (International Bar Association 2009, 12), and for "horrific crimes … of universal concern" (universal) (Meyer 2010, 144)."[10] In the latter cases, any state may prosecute the accused wherever found (Knox 2010). Because these grounds for jurisdiction are not mutually exclusive, more than one country may have authority under international law to decide a case, creating conflicts among states with overlapping jurisdiction (Knox, 2010). As world markets become increasingly interconnected, this situation occurs more frequently, generating "novel questions of law" (Coleangelo 2011, 1021). Plaintiffs can circumvent the legal systems of other nations in order to take advantage of the many benefits offered by US courts, such as mandatory jury trials, opt-out class actions, and freedom from liability for defendant's

[8] For example, states with middle to high income levels can afford to impose stringent economic regulation, while societies focused on obtaining the basic necessities of life may view strict standards as a luxury they cannot support.

[9] For example, the International Bar Association noted that US courts have employed the effects doctrine in interpreting antitrust law. My study focuses on the area of public international law governing when states can apply their domestic laws to a dispute, rather than mundane questions of private international law in which choice of law depends upon different rules.

[10] Meyer cites the Restatement (Third) of the Foreign Relations Law of the United States.

litigation costs (Baker 2013). Other nations do not accept these "plaintiff-favoring rules and remedies [as a matter of public policy]" (Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom 2013, 26–29). Applications of US law can therefore be viewed as unreasonable interference with another sovereign's policy choices reflecting "unique socio-economic conditions" (Brief for the Government of Canada 2004, 2) and labeled "judicial interference" with the national sovereignty of the territorial state (Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom 2013, 6, 12–13, 24).[11] In making such arguments, other nations have played on judicial concern for US economic interests abroad. For example, Canada asserted the need for mutual cooperation, given the fact that the United States and Canada enjoy the "largest bilateral trading relationship in the world" (Brief for the Government of Canada 2004, 1). States have explicitly pointed out that application of US laws "to foreign nationals and foreign conduct have rightly been criticized on grounds of foreign relations, international law or comity, often by the U.S.'s closest allies" (Brief of the Governments of the Federal Republic of Germany and Belgium 2004, 10). Clearly, when judges apply American law in any of these situations, they risk undermining US relationships abroad.

Congress often does not give courts guidance on this issue, failing to define the geographical reach of most statutes (Meyer 2010). Nor does case law provide clear rules to employ in tackling these controversies. For example, in applying one of the central canons of construction implicated in these cases, the presumption against extraterritoriality, courts have developed, as the Supreme Court stated, "a collection of tests for divining what Congress would have wanted, complex in formulation and unpredictable in application" (*Morrison v. National Australia Bank, Ltd.* 2010, 248). This canon of construction holds that courts should assume that Congress did not intend a US statute to apply to extraterritorial conduct unless Congress expressly states that purpose (*Murray v. Schooner Charming Betsy* 1804).[12] Within a single issue area, the standard of the Court varies.[13] Lower federal courts must wrestle with vague and competing standards. Their approach

[11] The foreign governments objected to the assertion of US courts' authority to adjudicate claims filed by Nigerian villagers against companies incorporated in the Netherlands and England because the involvement of a US corporate affiliate was insufficient to establish jurisdiction, the conduct in this case did not have a sufficiently close connection to the United States, and universal jurisdiction is generally limited to criminal cases.

[12] The Court stated that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains" (118).

[13] For example, in *Hartford Fire Insurance Co. v. California* (1993), the Court focused on the "substantial effect" on US trade in applying the Sherman Act to foreign conduct (796). However, in *F. Hoffman-La Roche Ltd. v. Empagran S.A.* (2004), the Court rejected the application of the Sherman Act to foreign conduct because it was "unreasonable" considering the competing state's ties to and interests in regulating the activity (175).

will depend on which line of Supreme Court precedents they follow (Knox 2010). In addition, the Supreme Court has not directly addressed the relationship between the presumption against extraterritoriality and *Chevron* deference to the Executive (Bradley 2000). *Chevron* deference is a principle of administrative law that requires courts to defer to a government agency's interpretation of a statute it administers if the statute is ambiguous or silent on the issue, and the agency interpretation is a reasonable and permissible construction of the statute (*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 1984). This poses a dilemma if the application of a law raises the issue of its extraterritorial validity, but the executive agency insists it applies; the court will have no clear guidance on how to resolve the conflict between the two principles (Bradley 2000). Judges struggle to balance the competing interests in these cases, explicitly recognizing that an assertion of US authority risks sparking "international discord" (*Kiobel v. Royal Dutch Petroleum* 2013, 1664). Judges may try to predict the reaction of other states to the application of US law in a dispute over which they have concurrent jurisdiction. I expect judges will look to international legal principles defining acceptable bases for applying US law in this situation. In my analysis below, I measure the weight of these principles compared to that of executive pronouncements, and the judge's policy preferences.

Data and Variables

To investigate the relative influence of legal and policy factors on judicial decisions to apply American standards abroad, I constructed a dataset of US Courts of Appeal cases involving the extraterritorial application of US laws from the LEXIS NEXIS database. As noted above, judges on these courts hear a considerable number of wide-ranging claims, far more than the Supreme Court (Hettinger, Lindquist, and Martinek 2006; Songer, Sheehan, and Haire 2000). For example, in fiscal year 2002, the circuit courts resolved almost 58,000 appeals, covering most areas of federal law (Hettinger, Lindquist, and Martinek 2006). I gathered a set of 113 civil suits filed by individuals and corporations, decided between 1964 and 2015, involving an issue of the application of US law to conduct occurring abroad.[14] Because my focus is deference to the executive branch in civil cases, I did not include criminal cases in which the US government prosecuted individuals for foreign conduct. I also excluded cases in which the US Executive is the defendant,

[14] Using the search term "extraterritorial w/5 application," I retrieved over 400 cases involving the extraterritorial application of US law. I narrowed the initial results to cases in which at least some conduct occurred outside the United States, and the court was asked to assert jurisdiction and enforce American standards.

as prior studies thoroughly explore this issue.[15] I added to this pool 49 US appellate court decisions concerning the application of the Alien Tort Statute (1789) studied in my prior research, increasing the case count to 162.[16] Data concerning US trade relationships, an important variable in my investigation, was available only through 2012. As a result, I had to drop 32 cases from the quantitative analysis, leaving 130 decisions in my total dataset. A broad array of cases is included. For example, my dataset contains claims based on American antidiscrimination laws and employment regulations, and disputes over commercial transactions.[17]

As noted above, I am primarily interested in measuring the influence of the Executive's position and of legal principles governing this area of law. I employed several variables to measure the significance of the presence of a basis for regulating foreign conduct under international law. I expect this factor will increase the probability that a court will apply US statutes. To measure the influence of a basis for territorial jurisdiction, the strongest grounds for applying US law, I included *U.S. conduct*, a variable coded 1 if any conduct relevant to the dispute arguably occurred in the United States, and 0 if otherwise.

My reading of the cases indicated that courts do indeed consider claims of US conduct, or a lack of such a claim, to be a significant factor. For example, in cases involving the application of the Securities and Exchange Act abroad, courts discussed in depth the extent to which conduct arguably occurred in or had substantial effects on US territory (subjective and objective territorial jurisdiction). *Morrison v. National Australia Bank* (2008) provides an illustration. The court focused on whether the foreign plaintiffs alleged that conduct directly causing losses to investors occurred in the United States (*Morrison v. National Australia Bank* 2008). Because the foreign defendant's actions in the United States were "merely preparatory," the Securities and Exchange Act did not apply (*Morrison v. National Australia Bank* 2008, 176).[18]

[15] As mentioned above, prior studies have examined courts' willingness to challenge executive decisions, particularly in judging its actions in the war on terror (Randazzo 2010). I did include cases in which the plaintiff appealed a decision by an executive agency, however, as the conduct concerned was not committed by an executive agency, but rather by a private defendant. In addition, I wanted to explore the impact of the defendant's home country's trade ties to the US government. I could not do so in cases in which the US government is the defendant.

[16] The Alien Tort Statute (ATS) (1789) gives US courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." It has been applied to hold foreign citizens accountable for human rights violations. For example, in *Filártiga v. Peña-Irala* (1980), the Second Circuit found that US courts had jurisdiction over allegations of the torture and murder of a Paraguayan boy in Paraguay by a Paraguayan official.

[17] Laws implicated included, for example, Title VII of the Civil Rights Act (1964) and the National Labor Relations Act (1935).

[18] The Second Circuit found significant "the striking absence of any allegation that the alleged fraud affected American investors or America's capital markets" (*Morrison v. National Australia Bank* 2008, 176).

I included the indicator *U.S. defendant*, coded 1 if a defendant is a US citizen and 0 if not, to account for applications of US law based on the nationality principle. Courts appear to find the nationality of defendants (nationality principle) to be an important factor, explicitly considering this issue when the defendant's status as a US corporation was disputed.[19] Similarly, to measure the impact of the passive personality principle, I included the variable *U.S. plaintiff*, coded 1 if a plaintiff was a US citizen or corporation and 0 if not. Plaintiffs' nationality was noted as a basis for applying US law in several cases.[20]

I also account for the impact of allegations that a heinous criminal offense serving as a basis for universal jurisdiction occurred. Courts discussed the characterization of an offense as a crime of universal concern at length in numerous ATS cases.[21] I operationalize violations of international human rights norms as abuses of physical integrity rights that are condemned by the international community: torture, genocide or crimes against humanity (Davis 2006, 2008). The variable, *physical integrity violation*, is coded 1 if the plaintiff claims a violation of physical integrity on the grounds discussed above, and 0 if no such claim is made (Davis 2006, 2008). I did not find any evidence that courts considered whether the conduct in question could damage America's vital interest (the protective principle) in my set of cases. Therefore, I do not employ a variable measuring reliance on this principle. In addition, under international law, a defendant's claim of foreign official immunity can bar suit. For example, courts dismissed several ATS cases because of the defendant's status as a foreign official.[22] Thus, I include a dichotomous indicator that takes a value of 1 in cases where the defendant is a foreign state or foreign official, *foreign state/official defendant*.

To measure the influence of the Executive, I read executive submissions in cases in which it asserted a clear position on the application of US law. This occurred in approximately 15 percent of the 130 cases examined in my analysis. I employed two indicators to test for executive deference: *U.S. Executive against* and *U.S. Executive for*. The variable *U.S. Executive against* is coded as 1 if the executive branch expressly asserted a position against the application of US law abroad. The variable *U.S. Executive for* is coded 1 if the Executive expressly communicated its position in favor of such an application. I ran these variables in separate models to compare the impact of each. The literature suggests that executive deference is declining but provides little guidance on variation in impact stemming from the Executive's particular position in this type of case.

[19] See, for example, *Mujica v. AirScan Inc.* (2014).
[20] See, for example, *Liu Meng-Lin v. Siemens AG* (2014).
[21] See, for example, *Filártiga v. Peña-Irala* (1980).
[22] See, for example, *Matar v. Dichter* (2009).

Therefore, to formulate my expectations concerning these factors, I closely reviewed judicial opinions in which the Executive asserted a position, looking for arguments based on the distinct role of the Executive in foreign affairs. I considered such arguments to be evidence of deference to the Executive.

Appeals courts appear more likely to defer when the Executive is against extraterritorial application because of claimed negative, practical consequences for American foreign relations.[23] Although agreeing with the Executive as to the outcome under these circumstances, Courts of Appeal have rejected reasoning based on the Executive's unique constitutional role in foreign affairs in numerous cases, resting their rulings on other grounds, such as international comity.[24] I found this type of deferential reasoning most often in cases involving determinations of sovereign and official immunity, arguments that applications of American law abroad will violate a US treaty or executive agreement, and executive estimations of resulting international friction.[25] For example, in *Tachiona v. United States* (2004), plaintiffs sued a foreign head of state and official for alleged human rights abuses. The Second Circuit allowed the Executive to intervene, emphasizing that the constitutional grants of power to the Executive "are regarded as explicit textual manifestations of the inherent presidential power to administer, if not necessarily to formulate … the foreign policy of the United States" (*Tachiona v. United States* 2004, 214), and that the government's interpretation was "entitled to great weight" (223). Similarly, in *Matar v. Dichter* (2009), the Second Circuit noted that allowing private individuals to sue foreign officials in US courts could expose US officials to reciprocal actions abroad, and that the Executive "is uniquely positioned to consider how its stance will affect the Government's ability to assert immunity on behalf of US officials sued in foreign courts" (16–18). Drawing on this qualitative examination, I expect that judges will be less likely to extend the reach of US law abroad when the Executive is against such an application.

Appeals courts appear more willing to challenge the Executive if the latter's position is in favor of extending the reach of US law. Generally, an executive agency such as the Securities and Exchange Commission presented

[23] The main exception in my dataset is *Amerada Hess Shipping Corporation v. Argentine Republic* (1987). The Reagan administration argued against the application of the ATS to the case, but the Second Circuit disagreed.

[24] See, for example, *Ungaro-Benagas v. Dresdner Bank A.G.* (2004). The Second Circuit agreed with the Executive in its denial of a claim against German banks for stealing assets during the Nazi rule, but relied on international comity analysis rather than the Executive's expressed concern for foreign policy consequences and assertion of the political question doctrine. In *Sarei v. Rio Tinto, PLC* (2008), the Ninth Circuit ignored the Executive's concerns that the application of the ATS in the case could cause serious diplomatic friction, a failure noted in the dissents of Judge Ikuta and Kleinfield.

[25] See, for example, *Hwang Joo v. Japan* (2003), a case concerning sovereign immunity, and *Motorola Mobility v. AU Optronics* (2014), a case involving international fact deference.

the Executive's position and judges dismissed these arguments.[26] Courts hearing appeals of administrative agency decisions also exhibited a lack of executive deference.[27] Judges rejected assertions of *Chevron* deference to executive agency interpretations concerning congressional intent to apply US law abroad, often relying instead upon the presumption against extraterritoriality. The Second Circuit succinctly explained this approach in *Liu Meng-Lin v. Siemens AG* (2014). According to the court, the presumption "can resolve the question of congressional intent without the need to resort to the interpretation of agency regulations under *Chevron*" (*Liu Meng-Lin v. Siemens AG* 2014, 182). It continued, "[i]t is far from clear that an agency's assertion that a statute has extraterritorial effect, unmoored from any plausible statutory basis for rebutting the presumption against extraterritoriality, should be given deference" (*Liu Meng-Lin v. Siemens AG* 2014, 182).[28] I find that language deferring to the Executive is generally absent from this group of cases.

Judges discuss "[t]he fear of outright collisions between domestic and foreign law" that are "a potential source of friction between the United States and foreign countries," and make their own estimation of foreign policy consequences (*Boureslan v. Aramco* 1988, 1021). For example, disagreeing with the EEOC's arguments in favor of applying the Age Discrimination in Employment Act (ADEA) abroad, the Court of Appeals for the Third Circuit focused on congressional intent to avoid international friction, noting congressional awareness that the United States does not have "the right to impose its labor standards on another country" (*Denty v. Smith Klein Beecham* 1997, 150–51). Similarly, the Fifth Circuit declined to give *Chevron* deference to the Department of Justice's assertions that the Americans with Disabilities Act should apply abroad, arguing it was more prudent to apply the presumption against extraterritoriality, to "protect against unintended clashes with laws of other nations" (*Spector v. Norwegian Cruise Line* 2000, 644). I therefore expect that the variable *U.S. Executive for* will not have a significant impact on the decision to apply US statutes to foreign conduct.

[26] See, for example, *Boureslan v. Aramco* (1988); *Denty v. Smith Kline Beecham* (1997); *Morrison v. National Australia Bank* (2008); *Liu Meng-Lin v. Siemens AG* (2014); *Spector v. Norwegian Cruise Line* (2004). However, in *Stevens v. Premier Cruise Lines* (2000), the Eleventh Circuit agreed with the executive agency.

[27] See, for example, *Asplundh tree Company v. NLRB* (2004); *Keller Foundation/Case Found v. Tracy* (2012*); International Longshoreman's Assoc. AFL-CIO v. NLRB* (1995) (in which the DC Circuit Court failed to discuss extraterritorial application of US law). However, in *Gustafson v. International Progress Enterprises, Inc*. (1987), the DC Circuit exhibited deference in an appeal of an administrative agency decision.

[28] In my dataset, the agency interpretation is often expressed in an amicus brief, but the idea that the presumption against extraterritoriality trumps an agency's interpretation could at least partially explain the lack of deference shown in these cases.

Drawing on past studies of foreign affairs cases, I include a variable to account for the probability that courts consider the potential for their decisions to cause international friction (Keith, Holmes, and Miller 2013; Miller, Keith, and Holmes 2015).[29] Researchers studying asylum claims employed the level of bilateral trade between the United States and the applicant's country of origin to measure the influence of US interests in preserving "good relations with allies" on judicial decisions (Keith, Holmes, and Miller 2013; Miller, Keith, and Holmes 2015, 63). This indicator is particularly appropriate for my purposes given that, in amicus briefs, nations have referenced their trade relationships with the United States to bolster arguments that the court should be wary of creating international friction.[30] As in prior studies, the indicator is lagged one year, and logged to address any skew in the distribution (Keith, Holmes, and Miller 2013; Miller, Keith, and Holmes 2015). The variable *logged total trade* measures the annual level of US trade with the defendant's country of nationality and with the foreign territory on which conduct occurred. I expect courts will be less likely to apply US law to regulate conduct that occurred in the territory of a major trading partner.

To control for the competing orientations that could guide judges in these cases, I obtained information about the policy proclivities of the judges hearing each case. Prior findings in the judicial politics literature indicate that, in general, liberals tend to vote in favor of opening access to the courts, while conservatives tend to close it (Segal and Spaeth 1993, 165). Conservative judges should therefore be less likely than liberal judges to vote to apply US law abroad. [31] I follow Giles, Hettinger, and Peppers's (2001) approach to measuring judicial policy preferences—the most widely accepted for this level of the US federal courts. The authors employ knowledge gained about the selection process of federal judges by including the influence of home-state senators. When a vacancy occurs in a state in which a senator is from the president's party, the president will generally defer to that senator. Therefore, the senator's Poole-Rosenthal score is used to measure the judge's policy preferences. If two senators in the judge's home state are from the president's party, the variable is coded as the average of their scores. When neither of the senators from the home state are members of

[29] The authors found that the probability that an immigration judge grants asylum decreases as the amount of trade between the sending country and the United States increases.

[30] See, for example, the Brief for the Government of Canada (2004, 1).

[31] Legal scholars and political scientists debate the extent to which judges' personal values influence litigation outcomes. I do not wish to assert a strong view on this issues in this article. I assume that judges' notions about the level of deference that the courts should show to other institutions could influence their decision to apply US law in these cases. Political scientists label this type of judicial restraint as policy-oriented behavior, expressing a preference concerning the distribution of government power (Baum 1997, 59). Legal scholars refer to "jurisprudential" orientations influencing the interpretation of the law, or "competing orientations" guiding judges that could be "correlated with alternative political philosophies" (Kahan, Hoffman, Evans, Devins, Lucci, and Cheng 2016, 361).

the president's party, the president's Poole-Rosenthal score is employed because the president likely has the final word (Giles, Hettinger, and Peppers 2001).

The dependent variable in my analysis, *vote for extraterritorial application*, is the vote to apply US law to a case involving foreign conduct. The unit of analysis is the individual judge's vote per nationality of each foreign defendant in a case. Thus, if a claim involves defendants from two different countries, an individual judge's vote is counted twice (once for each defendant). The final number of judicial votes is 516. Modeling on each of the 216 judges' votes allows me to more precisely detect the influence of an individual judge's characteristics (Davis 2006, 2008), and further delineation according to the defendant's nationality and the place of relevant conduct is necessary to determine the effects of US trade relationships unique to each foreign country involved in the case. I employ a selection model: the dependent variable is a dichotomous indicator coded 1 if a judge votes to extend American law to extraterritorial conduct, and 0 if the judge votes against such an application.

Analysis

Because the dependent variable is dichotomous, I use a logit model (Gujarati and Porter 2009). To control for the fact that an individual judge may hear numerous cases in my dataset, I cluster the errors on the judge. My results are reported in Table 1.

I find only modest evidence of deference to the Executive in these cases. In the model employing *U.S. Executive for*, the variable was not significant. For space considerations, I do not include a table with those results, as the findings for the other variables were consistent. In the model employing *U.S. Executive against*, the variable was not significant at conventional levels (0.05), but was significant at the 0.10 level. Because the sample size is small, this is arguably of substantive significance. These results are consistent with my reading of these cases. As Table 2 clearly indicates, rates of deference are heavily contingent on the position of the Executive.

Two facts relevant under international law are highly significant: a contention that some wrongful conduct occurred in the United States and allegations of a violation of an international norm. Judges applied US law more often if a plaintiff made these claims. The level of US trade with states holding competing claims of jurisdiction (either as the defendant's home country or the state in which the conduct occurred) has a highly significant and negative effect on the likelihood that a judge will vote to apply US law to foreign conduct.[32] As expected, judges

[32] Robust standard errors clustered on the judge are employed for all models to control for autocorrelation and heteroskedasticity.

Table 1: Probability of Extraterritorial Application of US Law

	Statistical Significance	Predicted Probability of a Vote to Apply US Law Abroad	
U.S. Amicus Against	−1.13 (0.65) †	40% (not against)	21% (against)
U.S. Conduct	0.83 (0.33) **	31% (none alleged)	44% (some alleged)
U.S. Plaintiff	0.25 (0.32)		
U.S. Defendant	−0.18 (0.30)		
Physical Integrity Violation	1.42 (0.41) **	28% (not alleged)	55% (alleged)
Foreign State/Official Defendant	-0.36 (0.37)		
Logged Total Trade	−0.20 (0.05) **	66% (trade is low)	30% (trade is high)
Ideology (liberal to conservative)	−0.76 (0.38) *	46% (more liberal)	30% (more conservative)
Constant	0.77 (0.55)		
N of Judge Votes	516		
N of Judges	230		
Wald X2	35.03 (p=0.0000)		

† *p < 0.1, * p < 0.05, ** p < 0.01. Robust standard errors clustered on the judge in parentheses.*
Source: Data from Giles, Hettinger, and Peppers (2001) and Keith, Holmes, and Miller (2013).

Table 2: Rates of Deference in Subset of Cases in which Executive Position Asserted

Percent Executive Favors Extraterritorial Application 42%		**Percent Executive Opposes Extraterritorial Application 57%**	
Court Agreed	Court Rejected	Court Agreed	Court Rejected
37%	63%	82%	18%

are less likely to vote to apply American statutes if a state with concurring jurisdiction is a major US trading partner. Finally, the control for judicial ideology reached conventional levels of significance. Judges identified as more conservative are less likely to apply US law to regulate extraterritorial conduct.

I evaluated the substantive impact of each variable by calculating the predicted probability that a judge would decide to apply US law abroad as each

variable changed.[33] The intervention of the Executive has a relatively small effect. When the Executive expressly opposes application of US law, a vote for this outcome is 19 percent less probable.[34] Facts relevant under international law have a larger impact than the Executive's position. If a plaintiff claims that the defendant violated physical integrity rights, judges are 27 percent more likely to decide to apply US law to conduct that occurred abroad.[35] In addition, when the plaintiff alleges that wrongful conduct occurred in the United States, judges are 13 percent more likely to vote in favor of jurisdiction.[36] Taken together, these results indicate that legal factors have a strong influence on outcomes. US trade relationships had the greatest substantive impact, of any one factor, on the decision to apply US law. A judge is 36 percent less likely to vote to apply US law when the trade level is high.[37] This finding is worthy of future research, as it may indicate that judges consider trade links when estimating the impact of their decisions on US relationships abroad. Future studies should investigate the mechanism by which this factor influences outcomes. Finally, the impact of the control for judicial ideology—though still statistically significant—is less than that of US trade relationships, the Executive's position, and legally relevant facts. Judges that are more conservative are 16 percent less likely to vote to assert jurisdiction. This is consistent with prior findings in the judicial politics literature (Segal and Spaeth 1993).

Discussion and Conclusion

My findings have several important implications for our understanding of when judges are willing to extend the reach of US law abroad, risking international discord. First, the executive branch's influence in these cases is highly contingent on the position it takes. The executive's arguments have a strong impact when a high-level department is against an extraterritorial application of American standards. I argue such intervention raises a red flag for the courts. They interpret the Executive's position as an indication that foreign policy issues beyond judicial cognizance are at issue, and conclude that the application of US law may embroil them in a foreign relations disaster. Judges therefore do not want to risk causing international friction when the Executive warns of a minefield. At the same time, even when agreeing with the Executive as to the outcome, lower courts reserve their ability to reject the Executive's position in future cases by not consistently employing arguments

[33] I hold all other variables constant at their means.
[34] The probability drops from 40 to 21 percent.
[35] The probability increases from 28 to 55 percent.
[36] An increase from 31 to 44 percent occurs.
[37] The probability falls from 66 to 30 percent.

resting on the Executive's expansive foreign affairs power. Judges are more likely to completely reject the Executive's Branch's arguments when the Executive favors extraterritorial application. Courts show little deference to executive agency arguments that US law applies to foreign conduct. Judges give more weight to legal principles based on avoiding international discord (the presumption against extraterritoriality) than they give to doctrines rooted in deference to executive agencies (*Chevron* deference). In these cases, courts independently estimate the likelihood that their decision will cause friction in US relationships abroad.

Second, I find that the combined influence of legal factors is stronger than that of judges' policy proclivities. Ideology certainly matters, but less so than the facts deemed significant under international law. Judges appear more willing to risk negative foreign policy consequences if international legal principles legitimize the application of US law. When a defendant is accused of a crime condemned by the international community, American courts are significantly more likely to hold the perpetrator accountable. In addition, judges are more comfortable applying American law if they can rely on the territorial principle, the most accepted basis for regulating conduct under international law. Scholars should not be too quick to dismiss the significance of legal factors in cases involving complex foreign policy issues.

Much of the scholarly debate thus far has centered on determining if the Supreme Court defers to the Executive on foreign policy. I shift the focus to the Circuit Courts of Appeal, presenting evidence that judges at this level of the court hierarchy reject executive deference under specific circumstances and rely on international legal principles to determine the reach of US law. Courts explicitly make independent judgments concerning the potential that a decision to apply American law will cause international friction. In an increasingly globalized economy, such assertions of power may enable courts to become an equal player in the realm of foreign affairs. Combined with similar phenomena observed by scholars in various areas of the law, judicial application of US legal standards abroad may substantially weaken the president's extraordinary foreign relations powers.

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No Reservations about Stopping Another Hotel Rwanda Case: The African Court on Human and Peoples' Rights[1]

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The genocide in Rwanda spurred the global community to action, leading to calls for a more permanent court to try such human rights abuse cases, instead of the ad hoc system that existed in the early 1990s. Now there is an International Criminal Court as well as a regional tribunal, the African Court on Human and Peoples' Rights (ACHPR). The ACHPR, which is located in the same Tanzanian city as the ad hoc tribunal that tried defendants accused of perpetrating massacres, may be even more critical for the cause of human rights than the ICC. This regional court enables citizens to accuse their government of abuse, in court. Research shows that countries which signed the protocol permitting such challenges are also more likely to provide civil liberties and political rights to their people, aiding the cause of freedom for Africa.

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Nearly 25 years ago, the world watched in horror as Rwanda became the site of perhaps the worst of the massacres of the 1990s. At the time, there was little more than an ad hoc tribunal system available to deal with the genocide, implemented after the atrocities were committed. Now, in the same city where the Rwanda tribunal operated in Arusha, Tanzania, an African Court on Human and Peoples' Rights (ACHPR) has emerged to protect the peoples of continent, often from the regimes that rule them. Evidence shows that the countries which have given the most power to allow individuals to bring cases before the court are among the more democratic countries in Africa, showing a nexus between respect for rights and international law in this regional court, perhaps supplanting the International Criminal Court (ICC) as an institution that can best handle African cases involving human rights.

Over three months in 1994, the world watched with horror as more than 800,000 Tutsis and moderate Hutu tribesmen were massacred by their own countrymen in Rwanda (National Public Radio 2014). Such abuses spurred not only the formation of the International Criminal Court (ICC), but a protocol to create a continental court as part of the African Charter, which became known as the African Court on Human and Peoples' Rights (ACHPR) just four years later (African Court on Human and Peoples' Rights 2016) in Tanzania.

The location of the court is not a random location. In the 2004 movie *Hotel Rwanda*, protagonist Paul Rusesabagina and his family flee to Tanzania, like so many refugees from the bloody ethnic cleansing. It is therefore not surprising that the ad hoc judiciary body set up to prosecute those who waged genocide would be headquartered in Arusha, Tanzania (with offices in Kigali, Rwanda). Labeled the International Criminal Tribunal for Rwanda by the United Nations, or UNICTR (2015), it served as an early predecessor, and perhaps a model, for the African Court on Human and Peoples' Rights, also based in Arusha. After the court came into force in 2004, nearly half of the continent signed the protocol accepting the ACHPR's jurisdiction.

Tanzania and Rwanda offer an interesting contrast. The former provides a fairly wide range of freedoms to its people while the latter does not, perhaps owing to the legacy of the brutal genocide. Yet both signed not only the protocol authorizing the court, but also a special declaration unprecedented in international tribunals: the ability of a country's citizens to challenge the state in court. The pair is typical of contemporary Africa, where part of the continent is forging a path to freedom while the rest of the region is ruled by leaders which seek to tighten their grip around the countries they dominate.

Are those countries pursuing democracy more likely to support the court and this special declaration designed to protect human rights, or is there no relationship between a country's treatment of its citizens and support for such a

tribunal? To determine this, an extensive review of the literature and cases concerning the ACHPR, the ICRT, and the ICC is conducted. The connection between the ACHPR protocol, approval of the special declaration of the ACHPR, and its potential link to democracy will also be examined. Data on the level of freedom for the members of the African Union is gathered, comparing those who have ratified the protocol on the African Court on Human and Peoples' Rights, as well as the special declaration on whether individuals and nongovernmental organizations (NGOs) can bring cases before the ACHPR and other African countries. After reporting on the findings, the positives and negatives of this new regional court are discussed, with an eye toward the future direction of the court, its member countries, and whether the development of such a court could be instrumental in holding those accountable for genocide in other regions (like Syria's Aleppo in the Middle East).

African Democracy

Unlike the genesis of the African Court on Human and Peoples' Rights, primarily a subject for international legal journals, Africa's history of democracy has been well covered. Just as others wrote about three waves of democracy on a global level (Diamond 2011), Africa experienced these waves and counterwaves across the region as well (Guseh and Oritsejafor 2005). While there was some early optimism of revolutionaries and reformers that their struggles would pay off in the form of a democratic regime, some of these cases were undermined after independence by a series of wars for postcolonial succession among the revolutionary leaders, or other groups. (Ihonvbere 1996). The struggles occurred not just for independence, but for who would rule the state thereafter.

Any confidence in institutional freedoms was also undone by the Cold War and the colonial legacies, where opportunistic militaries sought to take advantage of the new state chaos by overthrowing nascent regimes. Often times they would align themselves with the Western world, or Eastern bloc, or even playing one side off against the other during the Cold War era. (Ihonvbere 1996). The region became a battleground for a bipolar tug-of-war between the leading two superpowers, with democracy being the only guaranteed casualty. Of the 36 countries in Africa who won independence in the 1950s, 1960s, and 1970s, 33 became undemocratic countries (Lumumba-Kasongo 2007, 126). Lumumba-Kasongo (2007, 215) also wrote that there is more to the issue than foreign meddling. He pointed out that "although liberal democratic practices defined in the rituals of pluralistic elections have been expanding in Africa, this transition is being challenged by the presidential third-term syndrome." He calls this "political zombiism," where the incumbent stays in power through nearly supernatural powers (Lumumba-Kasongo 2007, 128).

For every Nelson Mandela of South Africa who swore off a third term, there has been a Robert Mugabe of Zimbabwe, or a Blaise Compaore of Burkina Faso, a Lansana Conte of Guinea (Conakry) or an Isaias Afewerki of Eritrea (Lumumba-Kasongo 2007, 129). Such leaders choose to rewrite the constitution, manipulate events, and employ patron-client networks, or use "belly politics" to trade food for support (Lumumba-Kasongo 2007, 130–32).

Moller and Skaaning (2013, 97) confirm the decline and dearth of democracy in sub-Saharan Africa before the end of the Cold War. The "big bang" of democracy in Africa (co-extensive with the fall of the Berlin Wall for East Europe) emerged in the early 1990s. "The democratization of the early 1990s transformed a region dominated by closed autocracies into one where almost half the countries had ostensibly democratic governments by the mid-1990s. A decline of democracy was evident in several countries, such as Madagascar, Central African Republic, Guinea-Bissau, and Mali. Conspicuously absent in sub-Saharan Africa were genuine instances of liberal democracy—only Cape Verde qualified—though there were a number of polyarchies" (Moller and Skaaning 2013, 97). Polyarchies are less than democratic in that they combine free elections with illiberal human and political rights.

As for North Africa, Moller and Skaaning (2013) claim that the third wave of democracy passed by the region (and the Middle East). Even the Arab Spring was met by reversals of success in the region (Egypt) as well chaotic civil war (Libya). Diamond (2011) agrees, saying that the Arab Spring would hardly represent a "fourth wave" of democracy.

Other troubling signs come from a focus on, and admiration of, China's growth combined with a desire for leaders to stay in power under the guise of "free and fair" elections. Byemelwa (2016) describes contemporary times as "Africa's 'democratic recession,'" where elected leaders refuse to cede power and rebels seek to take power for keeps.

But not all are pessimistic about the region. Diamond (2011) writes that democracy has persisted in several African countries, despite the presence of lower income status, showing wealth is not a necessary condition for freedom. And he adds that polls show people want democracy, not because the West wants it, "but because it provides political goods—personal freedom, voice, accountability, popular sovereignty, and rule of law—that authoritarian regimes cannot" (Diamond 2011, 307). And there are some results to cheer. "In sub-Saharan Africa, while only 2 countries were considered free in 1972, currently 11 are now classified as free," write Guseh and Oritsejafor (2005).

The question is whether international law can be the "game changer" this region needs to break this undemocratic deadlock. Or will international law serve as a different form of illiberalism, imposing judicial control over the will of the people?

African Human Rights

Universalism vs. Cultural Relativism

The subject of international law and human rights in Africa centers on a classic debate between those who feel that such rights apply to any and all situations, and those who claim it depends upon the context. The former camp is known as the universalist theory, while the latter group is called cultural relativism (Cobbah 1987; Ibhawoh 2000; Okere 1984; Thakur 2001, 367).

Among universalists like Jack Donnelly (1984, 403), the feeling is that humans are universal, so why not have human rights that are also universal? He finds plenty of international confirmation in the Universal Declaration on Human Rights and the covenants on civil and political rights and on economic, social and cultural rights. Donnelly (1984, 402–3) also claims that there is a First World, Second World, and Third World commitment to human rights. He tells his audience that nearly every culture has provisions against torture, as well as policies for due process (Donnelly 1984, 405).

Donnelly's arguments are contested by Cobbah (1987), who claims that African rights, which have been generally ignored by the scholarly literature, are more about communitarianism; these are about the rights of the group as opposed to the individual (310). The basic unit of society is the family. The extended family (not necessarily related to the individual) has roles and responsibilities to fulfill. This includes respecting communally held property, as well as accepting a hierarchical political structure (Cobbah 1987, 322–23). Additionally, the Afrocentric approach tends to favor economic rights over political rights (Cobbah 1987, 331).

Cultural relativists like Cobbah (1987, 330) reject the arguments for a universal application of human rights, claiming that Donnelly (1984) feels that international conceptions of human rights are Western, and that non-Western cultures should adopted this Western model. Pannikker (1982) even goes so far as to say that these human rights might be a "Trojan Horse" for Western domination.

Worth noting in this defense is that Donnelly (1984, 401) claimed, "I shall ultimately try to defend a weak cultural relativist position that permits limited deviations from 'universal' human rights standards," showing at least some acceptance of cultural impact. Furthermore, Donnelly strikes back at the cultural relativists, writing "Communitarian defenses of traditional practices usually cannot be extended to modern nation states and contemporary nationalist regimes" (Donnelly 1984, 411). His argument contends that leaders like Idi Amin of Uganda cannot justify his actions on African culture (Donnelly 1984, 413), something echoed by Thakur (2001, 369). Donnelly (2013, 78) is also critical of African traditions that value the person by group or community

membership, rather than their humanity, and claims that such recognition of human rights was not the tradition on the continent (Donnelly 2013, 79).

Also, Ibhawoh (2000, 841) contends that the decision to lump all African culture into one group is too monolithic. African cultures are diverse, and dynamic. In fact, Weeramanty (1997) claims that globalization is driving universalism in human rights, as people from Africa can view how other cultures live, and see the similarities in rights respected. "The polarized debate over the universality or cultural relativity of human rights seems to have given way in recent years to a broad consensus that there is indeed a set of core human rights to which all humanity aspired" (Ibhawoh 2000, 838).

African Charter: Strengths and Weaknesses

Is the African tradition really one of antipathy or acceptance of cross-cultural human rights? Earlier in the 1960s, the Organization of African Unity sought to affirm sovereignty for the new states as the key guiding principle, forbidding any violation of it (Welch 1981, 401). This came at the price of both maintaining traditional colonial boundaries of those states and also the right to insulate regimes that controlled the states, which often led to horrific abuses by protected governments. That is why in 1981, the Organization of African Unity banded together to craft the African Charter (Okere 1984, 141), also known as the Banjul Charter, based on their meeting place in The Gambia. African leaders were inspired to act because of the murders committed by Idi Amin in Uganda, Jean Bedel Bokassa in the Central African Republic, and leaders of Equatorial Guinea. Okere (1984, 144) wrote: "Despite the studied, if scandalous, silence of the O.A.U. over these grave and massive violations of human rates, which indeed render the member states guilty of complicity, international opinion could not help being revolted."

But though it sought an ideological balance between East and West, nondiscrimination toward all, and "African values" (Okere 1984, 145–46), the African Charter has not accomplished its lofty goals:

> 27 June 2011 marked the 30th anniversary of the adoption of the African Charter on Human and Peoples' Rights [known in this article and the literature as the African Charter]. The African Charter is Africa's most important regional human rights instrument for the promotion and protection of human rights. 30 years after the adoption of the African Charter, there are still gross and consistent violations of human rights in several African States parties to the African Charter as noted by the African Commission on Human and Peoples' Rights (African Commission) in its March 2011 resolutions on the 'human

> rights situation' in North Africa in particular in Algeria, Libyan Arab Jamahiliya and Tunisia. (Ssenyonjo and Nakitto 2012, 4).

Why is the African Charter not working as planned? Mutua (1999, 345) suggests that it is because the overwhelming number of states who devised the African Charter were non-democracies. Ibhawoh (2000, 854–55) believes that the male-dominated cultural relativists represent a problem for the African Charter. Ssenyonjo and Nakitto (2012, 102) argue that the rights promoted include the African conception of the "rights of collectives," community rights, group rights, or solidarity rights. Thornberry (1998, 149) claims that though this African Charter purports to support peoples, it does not apply to minorities. African nations see this as a "European" problem, a legacy left over from the colonial days. But that may be a function of the perceived precarious position of the postcolonial state. "Doubtful of their political legitimacy and apprehensive of their political stability, the leaders of one-party states are jittery and hypersensitive to criticism. All media of expression are appropriated as mouthpieces of the single political party … Freedom of association is limited to joining the only recognized political party" (Okere 1984, 146–47). Unfortunately, research by Hackenesch (2015) reveals that this trend persists today among African one-party systems or dominant party systems.

Freedom of assembly is not the only outstanding issue with the African Charter. Okere (1984, 154) points out that the Banjul Charter lacks a right of privacy and is hardly a strong document to enforce gender rights, leading to disputes over marriage and polygamy, and other gender issues (Ibhawoh 2000, 855).

Despite the African Charter's shortcomings, it is an important document for the region. It was perhaps meant to complement the Universal Declaration of Human Rights, showing African commitment to these rights with global appeal (Okere 1984, 142), improving on silence over abuses. Ssenyonjo and Nakitto (2012, 455) find that African countries have moved from authoritarian to democratic states since the writing of the African Charter. Perhaps the bulk of the problems are not with the African Charter itself, but with the organization initially charged with enforcing it (Mutua 1999, 343): the African Commission on Human and Peoples' Rights (or African Commission).

African Commission: A Disappointment

While human rights supporters find the African Charter was at least a good start with some need for improvement, there is little sympathy for the African Commission on Human and Peoples' Rights today and its attempts to implement the Banjul Charter (Ibhawoh 2000, 846). First of all, to serve on the African Commission, one did not have to be a lawyer or even to have legal experience

(Okere 1984, 150). As a result, African Commission rulings do not "reference jurisprudence from national and international tribunals" (Mutua 1999, 348).

The African Commission has been hampered in other ways, besides judicial inexperience. The rules work against this institution. For one, the African Commission can only interpret the African Charter if a state requests it; there are severe limits on the ability of individuals and NGOs to bring a complaint before the African Commission (Mutua 1999, 345–46) as well. There are also restrictions on African Commission communications, and the ability of the Commission to publish its findings, requiring permission from the Organization for African Unity's (OAU) Assembly of the Heads of State (Mutua 1999, 349). And international law often favors the state. Gidon Gottlieb was quoted as saying, "Laws are made to protect the state from the individual, and not the individual from the state (Kegley and Blanton 2014, 303). Sovereignty trumps interventions.

Most importantly, "neither the Charter nor the Commission provides for enforceable remedies of a mechanism for encouraging and tracking state compliance with decisions" (Mutua 1999, 349). Reports are made, but there is little thought about the goals of such reports, their breadth, and few helpful details (Mutua 1999, 350). Even when a report is made, there is no system by which the African Commission can enforce compliance, which leads few states to issue a compliance report (Mutua 1999, 351). Perhaps that is why there is so little reform or adherence to the African Charter in its early days.

Could a Court Solve the Case of the Ineffective Charter?

Mutua (1999, 342) contends that the African Charter does not work well because of a poor enforcement mechanism. The inability of the African Commission to implement the Banjul Charter effectively (Okere 1984, 151) may have helped contribute to tragedies like the Rwandan massacres of 1994 (Mutua 1999, 343). As Franceschi (2014, 89) states, "African human rights instruments often tend to be general, ambiguous, full of claw-back clauses, and to a certain point, uncommitted."

Stung by criticism over its poor response, the OAU took steps to remedy the situation by developing a court to provide the charter enforcement that was lacking. "The adoption in June 1998 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Human Rights Court) by the Assembly of Heads of State and Government of the Organization of African Unity (OAU) is potentially an important step in the protection of human rights in the African continental system" (Mutua 1999, 342). It should be noted the original African Charter did not envision a court in its formation (Mutua 1999, 360).

But the Rwandan calamity did more than just awaken Africa to the weaknesses of its human rights commitment. "The 1994 genocide in Rwanda

awakened the international conscience and brought to question concepts and systems for the protection of human rights. The broader international community became aware of their duty to mediate and actually get involved whenever and wherever there was a systematic and widespread abuse of Human Rights; when a State was unable or reluctant to protect its own citizens from avoidable human rights catastrophes—mass murder, rape, starvation" (Franceschi 2014, 7). An International Criminal Tribunal was set up for Rwanda (Leithead 2015) the way it had been developed for the former Yugoslavia (Baros 2003, 58).

Four years after the Rwanda genocide, the United Nations did more than form ad hoc tribunals to solve such carnage on the African continent and elsewhere.

> The Rome Statute was adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (hereinafter: ICC). On the same day and in accordance with Article 125, the Statute was opened for signature in Rome until 17 October 1998 and then in New York, at the United Nations Headquarters, until 31 December 2000. The ICC was created by a treaty, which means that it has a different legal basis than the existing ad hoc international criminal tribunals (Baros 2003, 58).

Not only would the ICC have more power to deal with suspected war criminals in trials, but could deter future human rights abusers with stiffer sentences.

The Legacy of International Legal Tribunals in Africa

The problem is that African countries are generally skeptical about international law, for a variety of reasons. Polymenopoulou (2012) finds that this African ambivalence over international law stems from its use in justifying colonialism and denying rights. Being excluded from international lawmaking and adjudication bodies like the Permanent Court of International Justice (PCIJ), even to try cases, did not help (Yusuf 2015). This was exemplified by International Court of Justice (ICJ) Judge Gerald Fitzmaurice, who challenged the notion that nations have a legal right of self-determination. A "non-existent entity couldn't possess a legal right," Fitzmaurice concluded (Yusuf 2015). Even notions like "human rights" were seen as creations of Western governments, to be possibly used to justify foreign incursions (Polymenopoulou 2012).

Regional views slowly began to change with the United Nations General Assembly (UNGA) resolution against colonialism in December 1960, and a change in the ICJ's institutional composition after the Ethiopia and Liberia vs. South Africa case over Namibia in 1966 (Yusuf 2015). Self-determination was also recognized as a legal right in the 1970s cases (2015). With more optimism

over the power of international law, African states began to have cases tried in international courts, now seen as legitimate, in the 1970s, 1980s, and 1990s.

With the horrors of the Rwandan massacres of 1994, the hastily created United Nations International Criminal Tribunal in Rwanda (the UNICTR, which was established by the United Nations Security Council) resembled so many other ad hoc courts to try crimes against humanity, similar to the court handling such cases in the former Yugoslavia. Though the tribunal was only a temporary solution (AllAfrica.com 2012), the ability of the court to try suspects, as well as the confidence it showed in the new Rwandan regime to handle several cases itself, even extraditing suspects to the government in Kigali, showed the trust many in the international community began to show the African governments (BBC 2014).

Before the UNICTR's business was concluded at the end of 2015, it indicted 93 suspects, sentenced 62 of them, and turned 10 over to Rwanda for domestic prosecution (referring another three over to the Mechanism for International Criminal Tribunals (MICT) for prosecution). Of the remainder, 14 were acquitted, two died awaiting prosecution, and two had their indictments withdrawn before the trial began (UNICTR 2015).

Cognizant that many of these terrible slaughters were tried in temporary tribunals, similar to the ad hoc post–World War II cases, governments signed the Rome Treaty creating an International Criminal Court (ICC), one that would be permanent and show those who commit massacres that they would face justice. That initially appeared to be a far cry from the reactive nature of genocide cases, where such were crafted after the fighting concluded, too late to be of any deterrence. Fifteen years after the Rwanda cases, there were four separate crimes against humanity investigated by the ICC (*New African* 2009). Indeed, by 2016, 34 of the 54 members of the African Union had signed the Rome Treaty (Moses 2016).

But this preliminary widespread acceptance of the ICC began to sour, as those four African cases were the *only* cases the international court was investigating. Rwanda never signed the ICC (*The East African* 2015), preferring to work with the ICTR, though the relationship was not always amicable with this ad hoc tribunal (Human Rights Watch 2014). At the 23rd African Union (AU) Heads of State and Government Assembly in the Equatorial Guinea capital Malabo, the members began to criticize the ICC (*Africa Research Bulletin* 2014). Kenya was angered that the ICC blamed President Kenyatta and other government officials for the 2008 electoral violence that led to hundreds of deaths, prompting the country to claim that the ICC was "targeting Africa" (*The East African* 2013). Note that the indictments against Kenyatta and associates were dropped because key prosecution witnesses refused to testify (Bowcott 2014). Burundi expressed similar dismay after the ICC launched a probe of

postelection deaths after the country's president ran for an unprecedented third term in 2015, leading the country to join Kenya in threatening to quit the ICC (Moses 2016).

Others claimed that countries like Uganda, which supported the ICC, were doing so because they were using cases like the one against the domestic rebel group The Lord's Resistance Army (LRA) "as a way to eliminate local opponents" (*The East African* 2015). Even ICC supporters like South Africa and Uganda chose not to arrest Sudanese President Omar al-Bashir when he visited both countries, despite an outstanding ICC warrant for his arrest (Moses 2016).

Regional Court Potential Solution: The African Court on Human and Peoples' Rights

The ACHPR in Contrast to the ICC

In the *Christian Science Monitor* ("Global Newsstand" 2014), George Kegoro summed up the local sentiment toward international law, saying that leaders wanted "African solutions to African problems." That view showed why the region began showing so much support for the African Court on Human and Peoples' Rights (ACHPR). Indeed, local delegates to conferences began expressing views that they preferred the ACHPR to the ICC (*The East African* 2015). But what is the ACHPR, and where did this regional support come from?

Even as the Rome Treaty was being signed and the details of the ICC were being hashed out, African leaders were already developing their own court. The African Court on Human and Peoples' Rights (ACHPR) was created on June 10, 1998, in Ouagadougou, Burkina Faso (*International Journal of African Renaissance Studies* 2008) by the outgoing Organization of African Unity (OAU), before the creation of the new African Union (Kiebling 2014). The ACHPR eventually merged with the African Court of Justice, something called for by the AU (Ssenyonjo and Nakitto 2016). The African Union later expanded the mandate of the court to include an international criminal law section (Kiebling 2014), having more power than other courts and tribunals to investigate such cases (Ssenyonjo and Nakitto 2016).

The rationale behind this regional court was twofold. First, there was the belief that national courts could either be controlled by other African branches of government or be too timid to challenge these other institutions on grave matters of human rights violations (Byaruhanga 2004). Second, there were fears that the African Union's African Commission on Human and Peoples' Rights (hereafter referred to as the Commission) would lack the ability to prosecute cases and administer justice (Martorana 2008) and uphold the African Union's Charter on Human and Peoples' Rights (hereafter referred to as the Charter). Indeed, the Commission, which had existed since 1987 to uphold human rights

(Odinkalu 2013), had not achieved the fulfillment of the Charter. The creation of the ACHPR (Court) served to help the African Union's Commission achieve its mandate (Ebobrah 2011). It is also important to note that by adopting a "victim-centered approach," the ACHPR was similar in focus to the ICC, and even exceeded its European counterpart, the European Court of Human Rights (Antkowiak 2011).

The Theory of Transnational Courts and Their Importance in Promoting Freedom

But it is more than just a victim-centered approach, or even the expanded court mandate to prosecute international crime that makes the African Court on Human and Peoples' Rights (ACHPR) important for the region in general, and democracy in particular. And that is the special declaration to the protocol establishing the ACHPR that allows individuals and NGOs to bring cases before the court.

In their *International Organization* article, Robert Keohane, Andrew Moravcsik, and Ann-Marie Slaughter (2000) provided a distinction between interstate courts and transnational courts. In the case of the former, cases are brought by, and involve, only states. In the latter, individuals and NGOs can appear before the court. The differences "are significant for the politics of dispute settlement and legalization in world politics," for several reasons (Keohane, Moravcsik, and Slaughter 2000).

In interstate courts, states either implement or fail to implement decisions, according to Keohane, Moravcsik, and Slaughter. The chances of enforcing court decisions at the international level is considered less likely to occur than for domestic courts. Scholars on this subject contends that a contrast exists between international and domestic courts over "mechanisms of political control. Indeed, the distinction between international courts operating in anarchy and domestic courts, backed by the power of the state, is central to much of the writing in the field" (Ginsburg 2013, 486).

Adjudicators face state pressure in their rulings. If an individual wishes to bring a case, he or she must engage in costly legislative lobbying or navigate the government bureaucracy, another action that is hardly a low-cost endeavor, especially for the relatively limited rulings such courts tend to issue (Keohane, Moravcsik, and Slaughter 2000). Examples of such courts include the International Court of Justice (ICJ) as well as trade courts like GATT and the WTO ruling authority.

On the other hand, transnational courts do not give states the monopoly of control in cases. According to Keohane, Moravcsik, and Slaughter (2000), these courts generate more litigation; they establish precedent, as well as "jurisprudence autonomous of national interests." Such rulings from the court

produce new legal norms, as well as internal pressure for compliance (Keohane, Moravcsik, and Slaughter 2000).

An interesting dynamic emerges when the national courts align with the international courts when it comes to enforcement of decisions handed down from above, often in conflict with other branches of government (Keohane, Moravcsik, and Slaughter 2000). An international court can give domestic judges the political cover they need when locked in an intra-governmental dispute with the legislature or chief executive, especially if the state's court was initially barred or intimidated from properly disposing of the case. Even if the subject matter is not exactly the same, the international ruling can often be applied to a related domestic case (see Sloss and Van Alstine, 2015).

For transnational courts like the ACHPR, the latter distinction is the key, because such courts tend to be linked to the presence of democracy. "Liberal democracies are particularly respectful of the rule of law and most open to individual access to judicial systems; hence attempts to embed international law in domestic legal systems should be most effective among such regimes. In relations involving nondemocracies, we should observe a near total reliance on interstate dispute resolution. Even among liberal democracies, the trust placed in transnational dispute resolution may vary with the political independence of the domestic judiciary," write Keohane, Moravcsik, and Slaughter (2000).

Are democracies more likely to actually follow international legal norms on human rights? According to Joyner (2005), state behavior shows that leaders see international law as real enough and will frequently comply with it. Hill (2010, 1161) finds that while being a signatory to some international treaties may lead to poor regime behavior, being a party to other treaties boosts human rights compliance. Gleditsch (1993, 301) finds stronger evidence that democracies promote human rights better than their more authoritarian counterparts. Thakur (2001, 366) concurs, claiming "increasing democratization will lead simultaneously to an enhancement of human rights and a more peaceful world."

Additional research suggests that international law can also help foster democracy, even when there is domestic pressure on courts to refrain from relying on global standards. "International law was not rejected per se in all areas: In matters having no bearing on this [*sic*] foreign affairs, several national courts were willing to apply international law. National courts' reference to one another's decisions on human rights issues has proved a highly effective tool of cross-fertilization. Anne-Marie Slaughter suggested that '[c]ourts may well feel a particular common bond with one another in adjudicating human rights cases … because such cases engage a core judicial function in many countries around the world'" (Benvenisti 2008, 4; also Slaughter 1994, 103–6). Also, the courts can use such international law to alleviate stress of globalizing forces that seek to undermine democracy from abroad (Benvenisti 2008, 1).

Scheppele (2005) finds the judicial branch may be more apt to guarantee democracy than the legislative branch. Bellamy (2007) makes the case that courts, especially constitutional courts or special courts, may be "a necessary supplement to democracy." With regard to Africa, Widner (2001, 64) concludes "Empirically, in Africa, courts have played a range of roles. In some cases, they have figured prominently in the settlement of conflict and the move to multiparty systems."

Eric Neumayer argues in his article "Do International Human Rights Treaties Improve Respect for Human Rights?" that effective human rights treaties are more likely to be successful in countries with democratic governments and strong civil societies who participate in NGOs. Conversely, he also argues that when these same treaties occur in autocratic countries, it tends to lead to even more human rights violations (Neumayer 2005).

Neumayer applies this thinking directly to a study on African human rights, in which he makes an interesting point. He asserts, "Governments in African countries perceive a strong civil society as a challenge and contest of their mostly autocratic rule, to which they react with more violations of personal integrity rights" (Neumayer 2005). To further complicate things, he finds that "treaty ratification is the more beneficial the more democratic the country" (Neumayer 2005, 949). Therefore, it can be concluded that due to the mostly autocratic nature of regimes in Africa, it less likely it is that there will be a positive effect taken from the passage of human rights treaties on the continent. Overall, Neumayer's (2005) findings support the notion that human rights treaties are most likely to be in effective in democratic countries and not so effective in autocratic countries (where they will likely only make the situation worse).

The ACHPR and Democracy

Just as democracy is emerging in the continent of Africa, so too is the development of this regional court which goes further than most tribunals in the scope of its mission and who can bring a case before it, for those countries who signed the special declaration (Article 5(3) and Article 34). The theory is that respect for regional courts is linked to democratic behavior. This leads to the hypothesis of the theory of transnational courts and freedom.

> *The more freedom a country provides its people, the more likely it is to empower the African Court on Human and Peoples' Rights.*

As a result, the African countries that sign the protocol establishing the African Court on Human and Peoples' Rights will extend more freedom to their citizens than those that do not. Those African countries that also sign the special declaration to the court protocol, enabling its own citizens and NGOs to bring

such cases before the court, will provide even more freedom to their people than those countries that merely sign the ACHPR protocol and only allow the state to be involved in ACHPR cases.

Research Design

Variables

Independent Variable: African Court on Human and Peoples' Rights Empowerment

This variable designates how much power a country gives an individual or NGO to bring a case before the African Court on Human and Peoples' Rights, even against the member state. "Individuals and NGOs cannot bring a suit against a state unless two conditions are met. First, the Court will have discretion to grant or deny such access. Second, at the time of ratification of the Draft Protocol or thereafter, the state must have made a declaration accepting the jurisdiction of the Court to hear such cases" (Mutua 1999, 355).

Okere (1984, 158) tells us the importance of enabling an individual or group to challenge a state in an international tribunal, drawing a difference even between Africa's ACHPR and its counterparts in Europe and America. To determine this variable, the ACHPR site is utilized to distinguish this level of support. The following designation is employed:

Countries received a score of 1 indicate "African Union Member States Which Have Ratified the Protocol and Deposited the Special Declaration of the said Protocol." That means they have signed and deposited Article 5(3) and Article 34 of the ACHPR, enabling individuals and NGOs to challenge the state in court. A "2" means "African Union Member States Which Have Ratified the Protocol." Cases with a "3" are "African Union Member States Which Have Ratified the Protocol but Have Not Deposited the Instrument of Ratification (Meaning Not Yet a Party to the Protocol)." Those with a "4" are "African Union Member States Which Have Not Ratified the Protocol." Finally, the countries with a score of "5" are "Not a Member of the African Union." (ACHPR 2016). These are identified in Table 1.

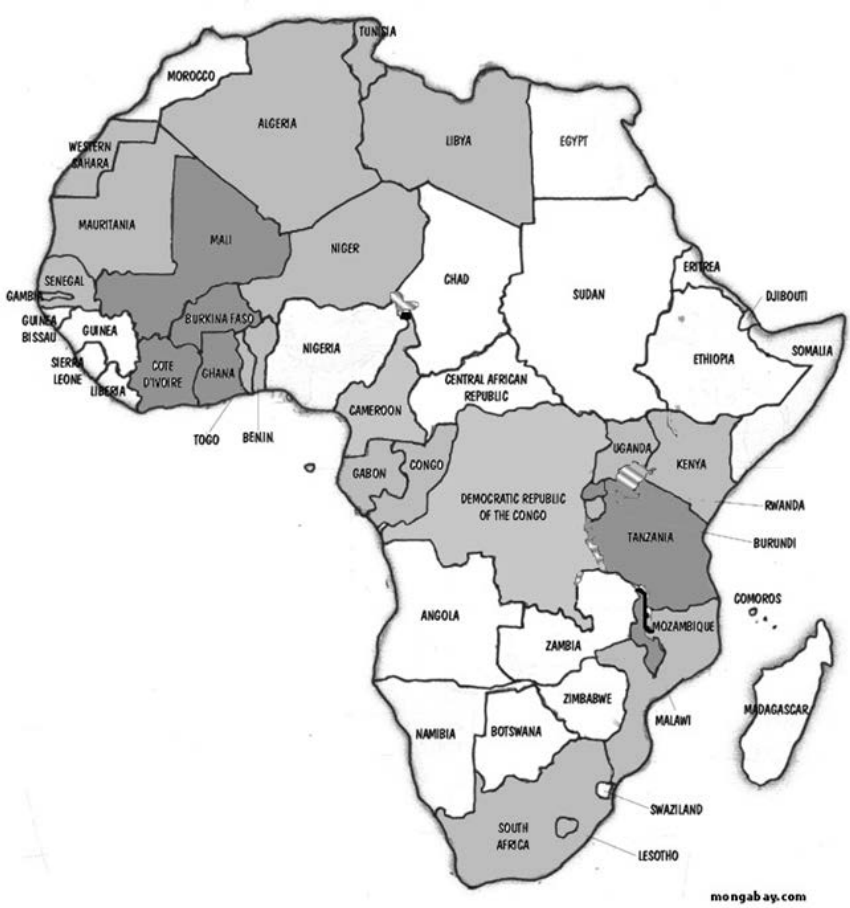
In addition, the countries that have fully enabled the African Court on Human and Peoples' Rights (ACHPR) to have individuals and nongovernmental organizations (NGOs) bring cases to the court (those with a score of 1, which signed and deposited the special declaration, listed in Table 2) are shown in dark gray in Map 1. Those recognizing the court as being able to hear cases with states as parties to the court are in medium gray. The two countries in the lightest gray with stars (the Democratic Republic of Congo and Cameroon) have ratified, but not deposited, their ratification, and received a score of 3.

Table 1: African Countries in Our Sample, and ACHPR Support

African Country	ACHPR
Burkina Faso	1
Ghana	1
Ivory Coast	1
Malawi	1
Mali	1
Rwanda	1
Tanzania	1
Algeria	2
Benin	2
Burundi	2
Comoros	2
Congo, Republic of	2
Gabon	2
Gambia	2
Kenya	2
Lesotho	2
Libya	2
Mauritania	2
Mauritius	2
Mozambique	2
Niger	2
Nigeria	2
Sahrawi Arab Democratic Republic	2
Senegal	2
South Africa	2
Togo	2
Tunisia	2
Uganda	2
Cameroon	3
Congo, Democratic Republic of	3
Angola	4
Botswana	4
Cape Verde	4
Central African Republic	4
Chad	4
Djibouti	4
Equatorial Guinea	4
Eritrea	4
Ethiopia	4
Guinea (Conakry)	4
Guinea-Bissau	4
Liberia	4
Madagascar	4
Namibia	4
Sao Tome and Principe	4
Seychelles	4
Sierra Leone	4
Somalia	4
South Sudan	4
Sudan	4
Swaziland	4
Zambia	4
Zimbabwe	4
Morocco	5[2]

[2] During the time of the analysis, Morocco was not part of the African Union. Morocco and the African Union have since patched up their three-decade-long set of differences, and the North African country is rejoining the AU (Mohamed 2017). However, this event took place in 2017, so it does not affect our analysis, which concluded in 2016.

Map 1: Support for the African Court on Human and Peoples' Rights, 2016[3]



[3] The map was provided by Mongabay.com. The author color-coded the countries based on data from the African Court on Human and Peoples' Rights (2016).

Table 2: Signatories of the Special Declaration of the African Court on Human and Peoples' Rights.

Country	Signed & Deposited Article 5(3) and Article 34 Protocol to the ACHPR
Burkina Faso	1998
Malawi	2008
Mali	2010
Tanzania	2010
Ghana	2011
Rwanda	2013
Cote d'Ivoire	2013

Table 3: Measures of Tendency for Support of the ACHPR

Statistics

African Court on Human and Peoples' Rights

N	Valid	369
	Missing	0
Mean		2.84
Median		2.00
Mode		4
Std. Deviation		1.157

Our analysis of all African countries from 2010 to 2016 produces 369 cases for us to analyze. For reasons why the specific years and countries were chosen, see the next section on the spatial-temporal domain. On the five-point scale for acceptance of ACHPR authority and provisions allowing citizens to challenge states, the mean is 2.84, while the median is 2, and the mode is 4, according to Table 3. This means the average African country is more likely to be split between ratifying the ACHPR and refusing to do so.

As Table 4 shows, a little more than 10 percent of all cases include a country that signed the special declaration (Articles 5(3) and 34), enabling citizens and NGOs to bring cases before the court. Roughly 40 percent of all cases include a country which has approved of the African Court on Human and Peoples' Rights, while a slightly larger percentage have not signed the protocol accepting the court's authority, as you can see in Table 4, and in column form in Figure 1. Two countries (the Democratic Republic of Congo and Cameroon) have not

Table 4: Frequency Distribution for Support of the ACHPR

African Court on Human and Peoples' Rights

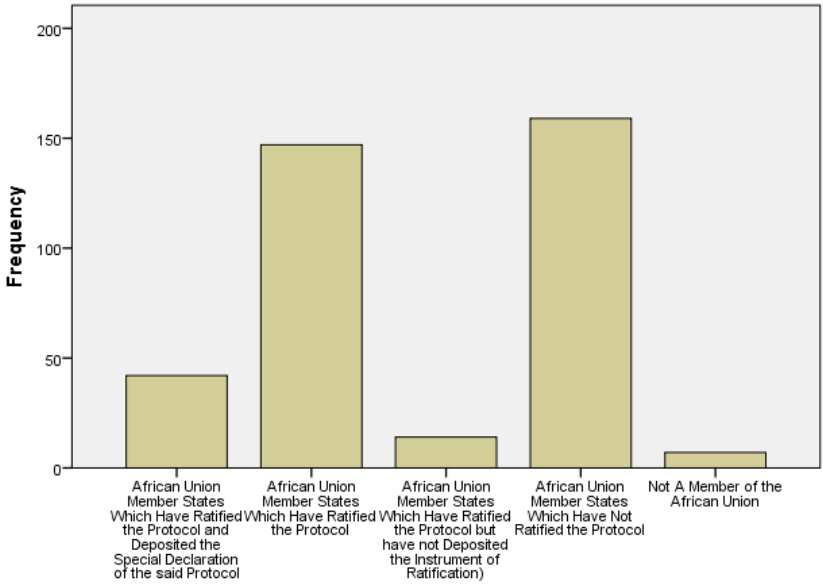
		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	African Union Member States Which Have Ratified the Protocol and Deposited the Special Declaration of the said Protocol	42	11.4	11.4	11.4
	African Union Member States Which Have Ratified the Protocol	147	39.8	39.8	51.2
	African Union Member States Which Have Ratified the Protocol but have not Deposited the Instrument of Ratification	14	3.8	3.8	55.0
	African Union Member States Which Have Not Ratified the Protocol	159	43.1	43.1	98.1
	Not a Member of the African Union	7	1.9	1.9	100.0
	Total	369	100.0	100.0	

completed approval of the ACHPR protocol while one in the survey is not an African Union member or court signatory (Morocco), in our survey.

Dependent Variable: Freedom

In order to determine whether a country is experiencing freedom or not, the Freedom House dataset (2016) is employed. Their analysis, *Freedom in the World*, examines a country's political rights and civil liberties in a pair of seven-point scales, with more freedom closer to scores of one and less freedom closer to scores of seven. The measure for political rights examines three subcategories: (1) electoral processes, (2) political pluralism and participation, and (3) the functioning of government. The four civil liberties subcategories include (1) freedom of expression and belief, (2) association and organization rights, (3) rule of law, and (4) personal autonomy and individual rights.

Figure 1: African Court on Human and Peoples' Rights Signatories and Support



Then there is an overall rating. "The average of a country's or territory's political rights and civil liberties ratings" (the Freedom Rating), determines the states of Free (1.0 to 2.5), Partly Free (3.0 to 5.5) or Not Free (5.5 to 7.0)," (Freedom House 2016).[4]

As you can see in Map 2, the modal category for African countries is "not free" for 2016. The mean score for Africa's freedom measure (with freedom being a one, partial freedom being a two, and an unfree country getting a three) is 2.19, showing a definitive trend toward illiberalism.

This information is confirmed by the Freedom House data (2016), showing that 41 percent of all African countries were unfree for 2016 (see Figure 2). Another 40 percent were partly free, leaving only 19 percent of countries as meeting the "free" designation. These few free countries were in West Africa and southern Africa.

[4] More details about what the numbers 1, 2, 3, 4, 5, 6, or 7 mean can be found here: https://freedomhouse.org/report/freedom-world-2016/methodology.

Map 2: Freedom Scores for Africa for 2016

Source: Map from *Freedom of the World,* 2016, Africa.

Figure 2: African Court on Human and Peoples' Rights Signatories

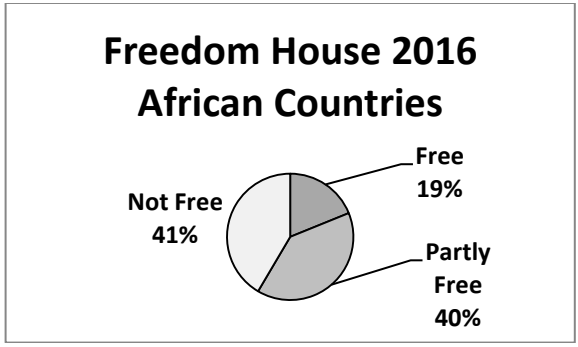


Table 5: Freedom, Political Rights and Civil Liberties in Africa, 2010–2016

Statistics

		Freedom Score, From Freedom House	Freedom House Political Rights Score (1 = Free, 7 = Not Free)	Freedom House Civil Liberties Score (1 = Free, 7 = Not Free)
N	Valid	369	369	369
	Missing	0	0	0
Mean		2.21	4.54	4.31
Median		2.00	5.00	4.00
Mode		2	6	5
Std. Deviation		.733	1.860	1.544

An examination of descriptive statistics shows that countries with lower scores (closer to one) on the ACHPR variable give more power to the regional court. Lower scores on the freedom measures (political rights, civil liberties, and overall freedom scores) mean more respect for the rights of the individual. In other words, a negative relationship indicates country support for the African court, and freedom for the people.

As Table 5 shows, the average political rights and civil liberties score is roughly in the middle of the Freedom House (2016) seven-point scale, with scores slightly leaning toward the less free designation (7). It is the same with the mean of the overall freedom score (2.21), which is closer to unfree (3) than free (1).

Table 5 also reveals that for political rights and civil liberties, the African countries in our survey lean slightly closer to a less free designation than more freedom. The median scores for both measures are actually "partly free," with African countries doing a slightly better job at providing some protection for civil liberties.

Results from Table 6 confirm that the modal category is partly free, though not free cases form Africa are a close second. Among our survey, less than 20 percent are considered free by Freedom House (2016). This confirms the literature cited, which indicates that while democracy in Africa is on the rise, the continent must go a long way before it can be considered to have experienced a democratic wave in recent years.

Table 6: Frequency Distribution for Freedom in Africa, 2010–2016

Freedom Score, From Freedom House

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Free	68	18.4	18.4	18.4
	Partly Free	155	42.0	42.0	60.4
	Not Free	146	39.6	39.6	100.0
	Total	369	100.0	100.0	

Table 7 shows that in the cases of political rights, more cases in our survey lean toward a score of seven, indicating regimes in Africa providing less respect for political rights. Given that sources (Guseh and Oritsejafor 2005) have written about the prior dearth of democracy in Africa, the results do give the reader some reason for optimism about the region.

Like the measure of political rights, Table 8 reveals that more countries in our survey deprive their people of civil rights, rather than enforce such protections. But just as respect for rights are on an upward trend, the same can be said for Freedom House's measure of civil liberties. In fact, the data reveal a slightly better record for protecting civil liberties than political rights.

Table 7: Frequency Distribution for Political Rights in Africa, 2010–2016

Freedom House Political Rights Score (1 = Free, 7 = Not Free)

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	1	23	6.2	6.2	6.2
	2	38	10.3	10.3	16.5
	3	71	19.2	19.2	35.8
	4	32	8.7	8.7	44.4
	5	53	14.4	14.4	58.8
	6	94	25.5	25.5	84.3
	7	58	15.7	15.7	100.0
	Total	369	100.0	100.0	

Table 8: Frequency Distribution for Civil Liberties in Africa, 2010–2016

Freedom House Civil Liberties Score (1 = Free, 7 = Not Free)

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	1	7	1.9	1.9	1.9
	2	52	14.1	14.1	16.0
	3	51	13.8	13.8	29.8
	4	85	23.0	23.0	52.8
	5	90	24.4	24.4	77.2
	6	51	13.8	13.8	91.1
	7	33	8.9	8.9	100.0
	Total	369	100.0	100.0	

Figures 3, 4, and 5 show a graphic representation of the frequency distributions, enabling the audience to see how the African countries in our survey provide or deprive the freedoms of their citizens.

Figure 3: Freedom House Scores for Africa, 2010–2016

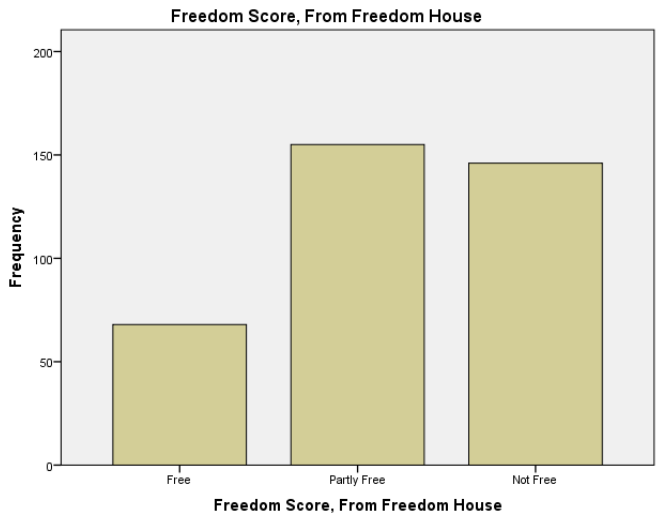


Figure 4: Political Rights Scores for Africa, 2010–2016

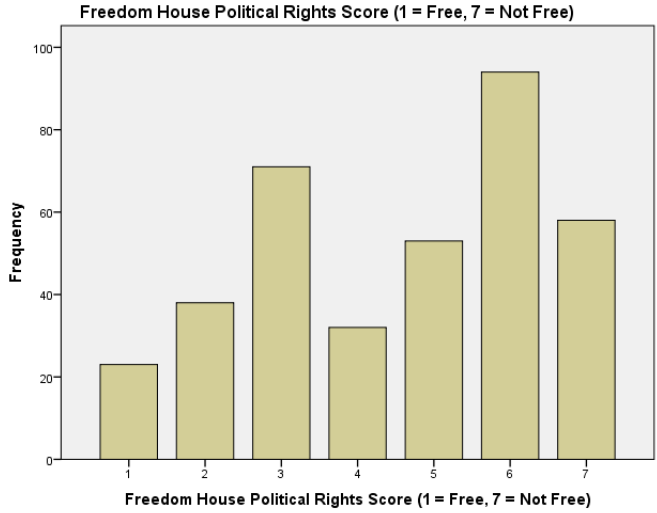
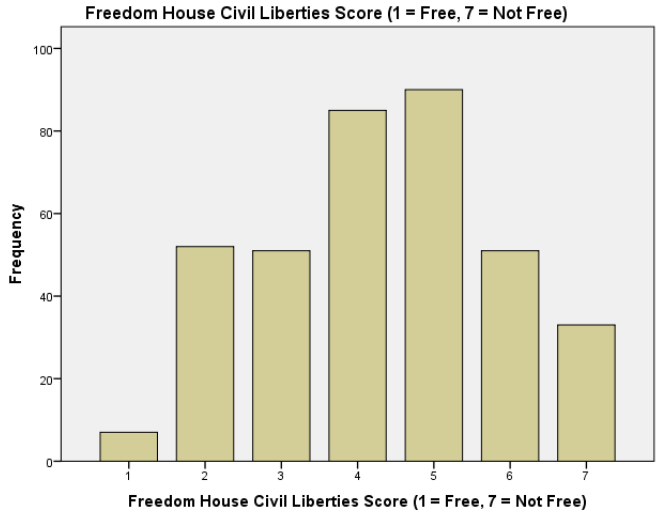


Figure 5: Civil Liberties Scores for Africa, 2010–2016



Spatial Temporal Domain

In order to examine the argument that signing on to the African Court on Human and Peoples' Rights can impact a country's freedom, all 55 African countries were analyzed from 2010 to 2016. Before 2010, only one country had signed on to the ACHPR, but that number grew in Africa, starting in 2010. The unit of analysis is therefore the country-year.

Analysis of the African Court on Human and Peoples' Rights and Freedom

This study evaluates the hypothesis that the more power that countries give the African Court on Human and Peoples' Rights to allow civilians their day before an international tribunal on domestic or foreign concerns, the more likely its government is to respect the freedoms of its people. It tests the idea that as African states not only ratify the ACHPR but empower it to allow people and nongovernment organizations to plead their cases before the court, the greater the chances the country will to protect the civil liberties of its citizens, as well as the political rights of these people. This section reveals the results of these tests.

Bivariate Correlations

As Table 9 indicates, the connection between the independent and dependent variables showed support for a positive relationship. Countries ranking stronger

Table 9: Bivariate Correlations, African Court on Human and Peoples' Rights and Freedom House Scores, 2010–2016

Correlations

		African Court of Human and Peoples' Rights	Freedom House Political Rights Score (1 = Free, 7 = Not Free)	Freedom House Civil Liberties Score (1 = Free, 7 = Not Free)	Freedom Score, From Freedom House
African Court of Human and Peoples' Rights	Pearson Correlation	1	.220**	.233**	.158**
	Sig. (2-tailed)		.000	.000	.002
	N	369	369	369	369
Freedom House Political Rights Score (1 = Free, 7 = Not Free)	Pearson Correlation	.220**	1	.899**	.909**
	Sig. (2-tailed)	.000		.000	.000
	N	369	369	369	369
Freedom House Civil Liberties Score (1 = Free, 7 = Not Free)	Pearson Correlation	.233**	.899**	1	.895**
	Sig. (2-tailed)	.000	.000		.000
	N	369	369	369	369
Freedom Score, From Freedom House	Pearson Correlation	.158**	.909**	.895**	1
	Sig. (2-tailed)	.002	.000	.000	
	N	369	369	369	369

**. Correlation is significant at the 0.01 level (2-tailed).

on giving the ACHPR more power to hear cases of individuals and NGOs against states fared better on the Freedom House measure, as well as subcategories for civil liberties and political rights, from 2010 to 2016. The relationships were significant at or near the .001 level, indicating a very strong likelihood that the results cannot be attributed to chance.

Additional tests on the relationship between support for the African Court on Human and Peoples' Rights and data from Freedom House also reveal a strong connection between the variables, as seen in Table 10. The findings show free and partly free states are more likely to sign the special declaration empowering individuals to take their cases before the ACHPR, while countries that are "not free" are less likely to do so. It is a similar story for signatories of the ACHPR protocol, though not as strong as the results for those that signed the protocol

Table 10: African Court on Human and Peoples' Rights (ACHPR) and Freedom, a Chi-Square Analysis

African Court of Human and Peoples' Rights * Freedom Score, From Freedom House Crosstabulation

			Freedom Score, From Freedom House			
			Free	Partly Free	Not Free	Total
African Court of Human and Peoples' Rights	African Union Member States Which Have Ratified the Protocol and Deposited the Special Declaration of the said Protocol	Count	8	29	5	42
		Expected Count	7.7	17.6	16.6	42.0
	African Union Member States Which Have Ratified the Protocol	Count	31	67	49	147
		Expected Count	27.1	61.7	58.2	147.0
	African Union Member States Which Have Ratified the Protocol but have not Deposited the Instrument of Ratification)	Count	0	0	14	14
		Expected Count	2.6	5.9	5.5	14.0
	African Union Member States Which Have Not Ratified the Protocol	Count	29	52	78	159
		Expected Count	29.3	66.8	62.9	159.0
	Not A Member of the African Union	Count	0	7	0	7
		Expected Count	1.3	2.9	2.8	7.0
Total		Count	68	155	146	369
		Expected Count	68.0	155.0	146.0	369.0

Chi-Square Tests

	Value	df	Asymp. Sig. (2-sided)
Pearson Chi-Square	55.843[a]	8	.000
Likelihood Ratio	64.859	8	.000
Linear-by-Linear Association	9.173	1	.002
N of Valid Cases	369		

a. 4 cells (26.7%) have expected count less than 5. The minimum expected count is 1.29.

and special declaration. African countries which have not signed the protocol giving authority to the ACHPR are more likely to be unfree, and less likely to be free or even partly free. The results are significant at the .001 level, indicating that the chances that the null hypothesis of no relationship is accurate are slight, at best. This provides potential evidence of a strong connection between the ACHPR and freedom in the contemporary sample of African countries.[5]

A Special Note about Rwanda and Benin

It is worth noting that Rwanda has given its notice that it intends to leave the African Court on Human and Peoples' Rights (ACHPR) shortly, while Benin has indicated that it plans to ratify the special protocols enabling people and NGOs to bring cases to the court, even against their own regime (ACHPR 2016). Rwanda is a "not free" country in 2016, and Benin is recognized as free by Freedom House today. This should strengthen the relationship in the future between endowing the court with rights to hear certain cases involving citizens and NGOs, and freedoms that a country provides.

Conclusion

Lessons Learned

In this article, we looked at the global and regional debate over universalism or the applicability of human rights law in nearly all contexts, and cultural relativism, which means certain regions have different conceptions of rights or varying ideas of how to enforce them. The African Court on Human and Peoples' Rights (ACHPR) provides the balance between universalism and cultural relativism. It employs human rights law, derived in Africa from many peoples, based on international standards, with that "Afrocentrism" perhaps missing from international law and international courts (Cobbah 1987, 331). No longer can the leaders of African states legitimately claim "cultural relativism" anymore as a defense for acts that have nothing to do with the culture of any African country (Donnelly 1984, 411).

"The polarized debate over the universality or cultural relativity of human rights seems to have given way in recent years to a broad consensus that there is indeed a set of core human rights to which all humanity aspired," writes Ibhawoh (2000, 838). He adds that "Adaptation and integration must be done in

[5] It should be noted that similar chi-square analyses on the subcategories of respect for political rights, and respect for civil liberties, and ACHPR support, also yield statistically significant relationships, despite the additional degrees of freedom from the expanded categories (seven-point scales in each case).

a way that does not compromise the cultural integrity of peoples" (Ibhawoh 2000, 839). That is what the court can do: provide an African enforcement of universal charters which so many regional cultures believe in, keeping such enforcement from being seen as being an imposition from beyond the continent.

As for our analytical research, we have discovered that the African Court on Human and Peoples' Rights (ACHPR) can be a positive force for democracy in Africa. After decades of skepticism about international law as a force for neocolonialism, African countries saw the importance of prosecuting those who abuse the rights of their people, such as the massacre in Rwanda. But concerns about the International Criminal Court (ICC) only targeting African people has led countries to leave or express skepticism about whether their country should remain in the ICC. A solution is the ACHPR, which provides an "African solution" by having locals try cases involving regional rules being broken. While there is concern when a country like South Africa announces their intention to leave the ICC, there is an alternative on the continent that can pick up the slack. And its connection to fostering liberal democracy, not just elections, is the key finding of this research project.

As Lumumba-Kasongo (2007, 132) observes, "International organizations and agencies, foreign governments, human rights organizations, international and regional research institutes, and policy centers should continue to support genuine democracy and democratic practices by working through close-collaboration and partnerships with local and grassroots organizations." It is also clear that they should be working with effective institutions like the African Court on Human and Peoples' Rights in Tanzania, which clearly cultivate expression of freedom.

Future Directions

There is more research to be done on the ACHPR. First of all, it would be interesting to see if Article 5(3) and Article 34 cases result in the individual or the government prevailing. Also, what is the track record for enforcement by the ACHPR? How does it compare to the results of the UNICTR (2015)?

Certainly, other factors need to be analyzed to see if there is a connection to both ratifying the ACHPR and the country's rights record on economic and social variables. For example, we could look at a country's economic and human development to see if another pattern emerges. Links between the ACHPR and other measures of democracy that look at different factors, like elections (Vanhanen 1992) and institutional characteristics, like Polity data (McLaughlin et al. 1998).

Moreover, just as the African Union was motivated to create this special court based on the experience of regional tribunals in Europe and the Americas (Okere 1984, 158), so too could the African Court spur the formation of other

regional courts where such enforcement is lacking, like East Asia (Mutua 1999, 353) or the Middle East.

But this research project is more than just an exercise in gathering sources, data entry, and statistical analyses. It is to also determine whether such a court as the ACHPR is worth supporting or not. Western countries, with money to spend on democracy promotion, typically think of the state, rather than regimes and institutions that could help protect a country's fledgling or emerging republics. As the evidence shows, some of those millions might be better spent supporting a court instead of solely upon a country and its state. It may also encourage other countries to sign the treaty protocol for the court in the first place, or (if signed) ratify the special declaration (Articles 5(3) and 34) allowing people and subnational groups their chance at a balanced trial.

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Citizenship and the Presidency: Parsing Article II.1(5) of the US Constitution

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Article II.1(5) of the US Constitution defines who is eligible to serve as president of the United States. Simple requirements often lead to major controversies. In this case, the primary issues arise over how to construe the phrase "natural born." After an exposition and definition of some basic concepts, the article will use a brief analysis of several hypothetical questions to illustrate the problems of constitutional and statutory interpretation. It will then discuss English common law as it existed in the late eighteenth and early nineteenth centuries, the first acts of Congress insofar as they are relevant in determining the meaning of the natural-born requirement, and the relevance of the Fourteenth Amendment. The article will finally analyze seven cases where eligibility for the presidency has surfaced as an issue. Not surprisingly, some controversial issues that arose early in US history still have currency. Finally, the narrative will summarize the issues and continuing areas of uncertainty.

The Constitution of the United States has only three requirements for those aspiring to the presidency: citizenship, age, and residency. Article II.1(5) states:

> No person except a natural born Citizen or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible who shall not have attained to the age of thirty five Years, and been fourteen Years a Resident within the United States.

The requirements are simple in formulation, but simple statements in legal documents often mask myriad minefields of potential problems. While the age question has always seemed straightforward, the residency requirement did stir some debate in the early years of the Republic over how the term "resident" might be defined and the requirement satisfied. After that brief flurry of debate, the residency requirement never again surfaced as a serious issue in the electoral process (Corwin 1957, 330n,).[1] In contrast, heated debates over the meaning of "natural born Citizen" still have considerable currency.

Constitutional Interpretation

Not surprisingly, several "schools" of constitutional interpretation have emerged over the years. Space does not permit a review of all. The argument will proceed on the premise that interpreting the Constitution requires a balancing act. Laurence Tribe (1995) has observed: "the lawyer's tools of parsing text, intention, and structure are essential to avoid the temptation—increasingly prevalent among legal academics these days—of resorting to 'free-form' methods of interpreting the Constitution" (1227). Professor Tribe's three-pronged arsenal of weapons—parsing, intent, and structure—forms the methodological approach of this article, because taking one analytical tool as always superior to the other two, or as sufficient by itself, can produce results that make little sense.

Parsing the Constitution I: The Citizenship Requirement

The Constitution uses the phrase "citizen of the United States" in three different provisions to set qualifications for representatives, senators and the president (Art. I § 2, Art. I §3, Art. II § 1). Clearly the citizenship requirement by itself indicates that citizenship in *the United States* existed prior to, and independent of, the entry into force of the Constitution. Common sense and logic might tell us that the Framers would not have crafted the document in a way that might exclude anyone who had gone through the rigors of the Revolution and the political trials of life under the Articles of Confederation. Nonetheless, this exercise requires that we rely on the text as written in its plain form. The first problem comes from determining when the *United States* as a distinctive legal entity came into existence. Though unspecified, the Framers must have had in mind some prior date of origin that would not impose an impossible burden and all would accept as valid.

[1] Herbert Hoover had not resided in the United States for fourteen years prior to his nomination. The concern was voiced, but never rose to a legal challenge (Corwin 1957).

An article in the *Christian Science Monitor* (DeLear 2012) claims that the term United States originated with three letters to the editor of the Virginia *Gazette* (Williamsburg) sent by an unknown author in March 1776. Regardless, the usual attribution is to Jefferson because the phrase appears in the heading of the Declaration of Independence: "A Declaration by the Representatives of the UNITED STATES OF AMERICA in General Congress assembled." This would make the official date of first use July 4, 1776, the date of formal adoption by the Second Continental Congress, thus occurring considerably before the colonies gained formal independence as a sovereign state. The question then would become the status of the Declaration of Independence as a legal document that establishes the formal legal identity of the thirteen colonies. No American court has ever considered the Declaration to have any legal significance (Wills 2002, xxv).[2]

If the Declaration of Independence does not offer a legal basis, then perhaps the Articles of Confederation do. The Preamble to the Articles states: "Whereas the Delegates of the United States of America, in Congress, assembled did on the 15th day of November in the Year of Our Lord One thousand Seven Hundred and Seventy seven, and in the *Second Year* of the Independence of America agree to certain Articles of Confederation and perpetual Union …" Article 1 specifies that, "The Stile of this Confederacy shall be 'The United States of America.'"

The Articles do use the term "in the Second Year of the Independence of America" which seemingly refers back to the Declaration. Yet, accepting either the date of the Declaration or that for the adoption of the Articles still poses a problem. July 4, 1776, does not quite fit with the date of entry into force of the Constitution in 1788. If we take that date and work backward, some entity that could be identified as the United States would have had to have been in existence sometime early in 1774. This eliminates the Articles as the source as well (Kesavan 2002).

Perhaps we should accept Abraham Lincoln's contention (Lincoln 1861) that the union that became the United States existed from the date of the First Continental Congress in Philadelphia that convened on September 5, 1774.

[2] In *Cotting v. Godard* (1901), the Court stated:

> The first official action of this nation declared the foundation of government in these words: "We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness." While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government.

Alternatively, perhaps a better date would be October 20, 1774, when the First Continental Congress adopted the Articles of Association in response to the "Intolerable Acts" the British government had imposed on its subjects in the American colonies (Articles of Association 1774). Others have suggested different dates, but at this point, whatever date the Framers had in mind remains an interesting historical mystery that has no relevance to current controversies. Nonetheless, it still poses a problem for textual analysis (see Blackman 2010).

Parsing the Constitution II: The Residency Requirement

Other issues come to mind as well. Does the residence requirement mean fourteen consecutive years, or a cumulative total of fourteen? Does it require physical presence, or simply legal domicile? Many prominent citizens were out of the colonies on various missions in Europe for lengthy periods of time. For example, from 1778 to 1788, John Adams served overseas almost continuously in Paris, Amsterdam, and London. (McCullough 2001, 167–388). From a narrow constructivist perspective (ordinary meaning of words), he was not then "resident within" even though he had not formally (legally) changed his place of domicile. Given its ordinary meaning, residence does imply physical presence. The word "within" reinforces the idea that an insistence on physical presence reflected the belief of the Framers that a president should be intimately familiar with everyday American life. This would lead us directly to a conclusion that Adams did not meet the requirement as "Resident within the United States" while in fact living in Europe.

If we make no allowance for individuals being "on government business," one can argue that the phrase does not specify that the years be consecutive—that the requirement does not mean fourteen consecutive years, but fourteen years as a cumulative total. This brings us back to the question of date of origin. Bearing in mind the discussion of date of origin in the previous section, even if interpreted as cumulative, this would still mean that Adams would not have qualified to run as Washington's vice president (a problem if Washington had died in office), although he would then have been eligible by the time of his own candidacy if 1774 was the date of origin.

More interestingly, what does that mean for more modern times? Could a person, otherwise eligible, having spent only 14 years in the United States over their life and all of these before the age of 18 be eligible? Or, how about someone who spent 7 years before the age of 18, left for 30 years, and came back for 7 years before declaring? If we rely only on the text and not on subsequent legislation, the answer ought to be yes, but the issue has never arisen in any meaningful sense. The question of electability stands as a separate nonrelevant issue.

Parsing the Constitution III: The Citizenship Requirement II—Commas Can Induce Confusion

As an illustration of taking a method to extreme to prove a point, Steiker, Levinson, and Balkin (1995) argue that no president since Zachary Taylor has met the constitutional requirements for eligibility (243). The analysis rests upon a purely logical grammatical parsing. To review, Article II begins: "No person except a natural born Citizen or a Citizen of the United States, at the time of the Adoption of this Constitution …" Note the position of the comma—the qualifier "at the time of the Adoption" modifies both of the prior requirements. So, by logic and grammar, one has to be either a natural-born citizen of the United States at the time of adoption, *or* a citizen of the United States at the time of adoption. Hence, Zachary Taylor born in 1784, is the last president born before the time of adoption. In fact, Tyler (1790) and Polk (1795), who preceded Taylor, did not meet the condition, either.

For those who might object that this parsing makes little sense because the second phrase would then merely repeat the first, this conclusion would ignore a category of individuals the Framers might have wished to reward for their allegiance during the time of the Revolution. The second stipulation would permit those "naturalized" citizens, who otherwise met the requirements and had shown their allegiance to the new country, to have the exactly same rights as citizens. Adoption of the Constitution would remove any barrier to those who chose America instead of its oppressor. This would still bar "Johnny come lately" immigrants who subsequently become naturalized citizens (Steiker, Levinson, and Balkin 1995, 244).

At this point, we might question the foresight of the Framers unless they all were radical Jeffersonians and truly believed that a revolution would occur every so often which would obviate any problems, or perhaps they all missed the comma lesson in school. Misplaced commas can cause much grief (Truss 2003). *Still, the comma is where it is*, and grammatical rules have not changed to obviate its placement (Garner 2002, 15–20). We must assume that the Framers intended to place the comma there. In passing, one should note that this instance does not represent the only questionable comma in the Constitution. But, rules that differentiate between commas with regard to their importance must in turn rely on a "theory of commas." As an outside analyst, one must presume, given the extensive editing of the document before final adoption, the comma survived because it gave meaning:

> Thus, the Framers may well have believed that it would be dangerous for the Republic to have a president whose republican spirit had not been born through baptism by total immersion in the holy spirit of

> 1775–1787. Could one really trust a leader whose own freedom was not fought for and earned through an audacious appeal to heaven, but who was instead handed his freedom routinely and unceremoniously as an expected birthright? (Steiker, Levinson, and Balkin 1995, 243)

This is a very interesting conclusion. Did the Framers have the foresight to think that by postulating requirements for president that would be impossible to fulfill, they might force new generations to engage in their own exercise in Constitution building? We could speculate, but our chosen method will not permit such a departure from protocol.

Parsing the Constitution IV: Natural-Born Citizens

Unlike the other two requirements, questions about the parameters that define the term "natural born" have arisen in a number of elections over the years. The presidential qualification clause forms the sole use of the term in the Constitution. Although the Constitution gives Congress the authority to "to establish an uniform rule of naturalization" (Article I.2.2), as with many other terms, the document does not contain a precise statement of who qualified as a citizen. In fact, much was debatable prior the adoption of the Fourteenth Amendment in 1868. This has led many to conclude that the omission was deliberate to avoid tackling very difficult political questions such as the status of Negro slaves and the distinction between state and national citizenship (Gordon 1968, 2).

The inclusion of the natural-born citizen clause can be traced back to early discussions among the country's founders. In late July 1787, John Jay sent a letter to George Washington, and possibly to other delegates at the Constitutional Convention, which stated:

> Permit me to hint, whether it would be wise and seasonable to provide a strong check to the admission of Foreigners into the administration of our national Government; and to declare expressly that the Command in Chief of the American army shall not be given to nor devolve on, any but a natural born Citizen. (Farrand 1911, 61)

Despite much speculation over the years, no one has determined what prompted Jay's concern. Moreover, notes from the constitutional convention have nothing useful to contribute to an answer. In this case we must seek out other avenues that might shed some light on intent.

We do know that questions of "foreign influence," particularly the possibility of wealthy persons immigrating to the United States to seek the presidency as

well as that of a potential but American monarchy formed very real concerns by the Framers as well as of the general public. Akhil Amar (2005) chronicles the concerns and anxieties over the possibility that ambitious and duplicitous foreigners, such as a foreign earl or duke, might cross the Atlantic with immense wealth and a vast retinue, and use his resources to buy friends on a scale that no home-grown citizen could match. He concludes that this fear led the Framers to incorporate Article II's "most questionable eligibility rule" (161).

These fears certainly entered into the construction of the qualifications, duties, and powers of the chief executive officer of the new republic. Justice Story in his commentaries distinguished "natural born" citizens eligible to be president from "foreigners" who are generally excluded, noting the exception only for a "naturalized citizen to become president" when such person was a citizen at the time of the adoption of the Constitution "out of respect for those distinguished revolutionary patriots, who were born in a foreign land, and yet had entitled themselves to high honors in their adopted country" (Story 1833, 3: §§ 1472–73). This interpretation gives support to the idea broached earlier, that the second category mentioned had the intent of recognizing those who had sacrificed and endured the hardships during the struggle for independence. However, it still does not shed any light on the meaning of natural born.

Some Preliminary Definitions and Distinctions

Understanding the discussion requires a slight digression to provide some background on how citizenship in general has been defined historically. Citizenship may be acquired "naturally" through application of one of two (or both as in US law) principles: born on the soil (*ius soli*)[3] and born of the blood (*ius sanguinis*). Throughout history, *ius sanguinis* with citizenship normally passing solely through the male side has been used much more than *ius soli* side. As a second consideration, in modern times, one must make a distinction between nationality, statutory citizenship, and constitutional or "birthright" citizenship. Often conflated in discussions as they are in the Constitution, nationality and citizenship are not exact synonyms and should not be used interchangeably particularly with respect to contemporary American and British law (Glahn and Taulbee 2017, chap. 9).[4]

Indeed, although the Constitution does not make a distinction, American statutory law does so in explicit language. Certain persons can be "non-citizen"

[3] Note, although often written *jus*, *ius* is the Latin spelling. The Latin alphabet has no "j."

[4] Some societies do pass identity through the female side. For example, according to *halakha* (the corpus of rabbinic legal texts, body of religious law), if one of the parents is not Jewish, the child will take the status of the mother. Hence, Jewish identity passes basically through the mother's side. A "natural born Jew" must have a Jewish mother. Interestingly, classical Judaism draws no distinction in its laws between religious and nonreligious life. In theory, Jewish religious tradition does not recognize distinctions based on national, racial, or ethnic identities (see Kertzer 1996).

nationals." Section 308 of the Immigration and Naturalization Act (8 USC 1452(b)) confers US nationality but not US citizenship, on persons born in "an outlying possession of the United States" or born of a parent or parents who are noncitizen nationals who meet certain physical presence or residence requirements. The term "outlying possessions of the United States" is defined in Section 101(a)(29) of the INA as American Samoa and Swains Island. No other statutes define any other territories or any of the states as outlying possessions.[5]

However, designated as commonwealths, Puerto Rico and the Northern Marianas exist as separate cases. In addition, the people of Guam are officially in an "unincorporated organized territory" of the United States. The Jones Act (1917) recognized Puerto Ricans as legal citizens of the United States of America, but with a form of circumscribed citizenship with restricted rights (statutory citizenship).[6] For the sake of brevity, I will note that the following comments on Puerto Rico apply equally to the Northern Marianas, but some may not apply to Guam. For the purposes here, the difference has no importance.

Puerto Ricans can live, travel, and work in any part of the United States without legal restrictions. They may not vote in presidential elections (but have a say in primaries to select candidates). Residents on the island pay US Social Security tax but not federal income tax. Like the District of Columbia, Puerto Rico elects a nonvoting delegate to the US Congress. Interestingly, mainland constitutional citizens who elect full-time residence in Puerto Rico may not vote in federal elections because the right to vote is tied to state residency in terms of representation and the Electoral College. On the other hand, if citizens born in Puerto Rico move to one of the fifty states and acquire permanent residence, they can vote (Flegenheimer and Chozick 2016).

The most important distinction here stems from the simple fact that Congress can change, amend, or terminate the status of future Puerto Rican children born on the island. The Jones Act as well as the legislation for Guam and the Northern Marianas provided eligible residents with statutory, not constitutional citizenship. Statutory citizenship means simply that citizenship depends upon the law that

[5] Aliens and Nationality, 8 USC 1452 (January 3, 2012). Source: June 27, 1952, ch. 477, title III, ch. 2, §341, 66 Stat. 263; Pub. L. 97-116, §18(p), Dec. 29, 1981, 95 Stat. 1621; Pub. L. 99-396, §16(a), Aug. 27, 1986, 100 Stat. 843; Pub. L. 99-653, §22, Nov. 14, 1986, 100 Stat. 3658; Pub. L. 100-525, §8(q), Oct. 24, 1988, 102 Stat. 2618; Pub. L. 102-232, title III, §305(m)(8), Dec. 12, 1991, 105 Stat. 1750; Pub. L. 103-416, title I, §102(b), Oct. 25, 1994, 108 Stat. 4307. June 27, 1952, ch. 477, title III, ch. 2, §341, 66 Stat. 263; Pub. L. 97-116, §18(p), Dec. 29, 1981, 95 Stat. 1621;

[6] *Puerto Rican Federal Relations Act of 1917* (Jones Act—Puerto Rico), Pub. L. 64–368, 39 Stat. 951 (March 2, 1917); *The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America*, Pub. L. 94–241, 90 Stat. 263 (March 24, 1976). After World War II, the *Guam Organic Act of 1950*, 48 U.S.C. § 1421 et seq., established Guam as an unincorporated organized territory of the United States, provided for the structure of the island's civilian government, and granted the people US citizenship.

defines it. Persons born in the fifty states have constitutional citizenship by simple circumstance of place. Unlike constitutional citizenship, new legislation could redefine the status of future statutory citizens with respect to the constitutional rights enjoyed. The fascinating question is: Could a person born in Puerto Rico of Puerto Rican citizen parents qualify as a constitutionally legitimate candidate for the US presidency?

The Impact of British Common Law and Other Sources

The Framers, of course, would have been intimately familiar with British statutes and practice when they used terms like "natural born," since the statutes were binding law in the colonies before the Revolutionary War. They were also well documented in *Blackstone's Commentaries*, "a text widely circulated and read by the Framers and routinely invoked in interpreting the Constitution" (Clement and Kayal 2015, 162). Interestingly, the Supreme Court has never had to deal with this particular issue within the specific context of a challenge to the eligibility of a candidate. For the reasons discussed in the preceding section, textual analysis alone cannot provide an answer. In this case, one must look for guidance from other sources with respect to discerning intent. Based on that discussion, one can say that the relevant materials unambiguously convey the simple idea that "natural born Citizen" means a citizen from birth who does not need to go through naturalization proceedings. Yet this leaves open many questions.

A number of US Supreme Court cases give some insight into how the Court would proceed in the event of such a challenge. The Supreme Court has long recognized that two particularly useful sources in understanding constitutional terms are English common law and enactments of the First Congress (*Wisconsin v. Pelican Ins. Co.*). In *Smith v. Alabama*, the Court held that words and phrases used, but not defined, within the Constitution should generally "be read in light of British common law," since the US Constitution is "framed in the language of the English common law" (also, *Calder v. Bull*). Note that this statement simply indicates that English common law forms a tool for use; it does not imply that English law has any effect in the everyday legal business of the United States except in those states that have formally incorporated it into their legal codes or constitutions. The actions of the First Congress have special meaning because so many of the Framers of the Constitution served.

British law clearly recognized the principle of *ius soli*[7] (Gordon 1968, 6–7). However, even in the eighteenth century, some controversy surrounded the requirements governing citizenship via *ius sanguinis*. While some elements of

[7] Book the First: Chapter the Tenth: Of People, Whether Aliens, Denizens or Natives (*Blackstone's Commentaries on the Laws of England*, 354 et seq.). For a summary of the evolution of British nationality law, see Gordon (1968, 6–7).

British law changed over time, particularly with respect to women with British citizenship married to foreigners and resident overseas, British statutes did recognize children born abroad to subjects of the British Empire as "natural-born Subjects" for all intents, constructions, and purposes. As stated by Blackstone in his 1765 treatise:

> [A]ll children, born out of the king's ligeance, whose fathers were natural-born subjects, are now natural-born subjects themselves, to all intents and purposes, without any exception; unless their said fathers were attainted, or banished beyond sea, for high treason; or were then in the service of a prince at enmity with Great Britain (*Blackstone's Commentaries* 1765, 361).

The first American law drew on the British precedent. Clement and Katyal (2015) note:

> the First Congress established that children born abroad to U.S. citizens were U.S. citizens at birth, and explicitly recognized that such children were "natural born Citizens." The Naturalization Act of 1790 provided that "the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: Provided, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States. (162)

Note the qualification that limited the scope of *ius sanguinis.* As with other issues, the legislation leaves open the question of how one might determine "residency" for the purposes of the legislation. However, considering the law governing nationality passed in 1795, in the United States, the common understanding of the term "natural born" at the time of the drafting of the Constitution seemingly was more expansive than the English common law meaning of that term at the time.

With respect to this first law, eight of the eleven members of the committee that proposed the natural-born eligibility requirement to the Convention served in the First Congress and none objected to a definition of "natural born Citizen" that included persons born abroad to citizen parents (Lohman 2000–2001, 371). Moreover, considering the letter from Jay which presumably led to the discussion during the Constitutional Convention, we can conclude that the original intent was not to limit eligibility only to those born within the boundaries of the United States. Such an interpretation would have made Jay's own children ineligible because they were born in Spain and France during the period he represented the United States overseas (Maskell 2016, 19).

The argument takes on another dimension, however, because the Congress repealed the 1790 law in 1795. The replacement statute still granted citizenship to foreign-born children of American citizens, but for some unknown reason, eliminated the phrase "natural born." This accords with the accepted statutory designations of today which refer only to citizenship at birth and by naturalization, with the former group divided into individuals born to residents and those born to citizens abroad. Nonetheless, the absence of the term and a definition continue to lurk in the shadows as issues.

Parsing a Statute: Certainty May Be in the Eye of the Beholder

The 1795 act was repealed in 1802 and replaced by legislation that essentially reaffirmed the status of foreign-born children of American citizens (*Naturalization Act of 1802*, §4). However, a rearrangement of language created an interesting ambiguity. The 1802 law stated that "the children of persons who now are, or have been citizens of the United States, shall, though born out of the limits or jurisdiction of the United States, be considered as citizens of the United States" (*Naturalization Act of 1802,* §4). Little controversy arose until Horace Binney, a distinguished lawyer, argued that the plain meaning of the language effectively meant that foreign-born children of American citizens born after 1802 did not have citizenship. Binney's argument brought a quick response from Congress, which passed a new statute in 1855 making an explicit statement:

> That persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States … (Act of Feb. 10, 1855, ch. 71, §1)

This legislation continued until 1940 without substantial change, except to confer upon American women equal right to transmit citizenship (Gordon 1968, 14).

Amendment XIV.1

Section 1 of the Fourteenth Amendment states that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without

> due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Scholars and others have endlessly debated the intent and impact of Section 1 in terms of its specification of citizenship, due process, and equal protection. While the issues of equal protection and due process merit scrutiny because of the extension of their meaning and use by the Court in the twentieth century, much of this seems no more than the fabled "tempest in a teapot" with regard to citizenship. Given the context, the reasonable and generally accepted view of its purpose is that in speaking of citizenship acquired by birth or naturalization in the United States, the Fourteenth Amendment did not seek to do any more than to guarantee citizenship to former slaves. The amendment did not attempt to supersede previous definitions, nor change the status of progeny born to citizens outside the jurisdiction of the United States. The Court itself has cautioned against interpreting later enacted provisions of the Constitution as amending, merely by implication, separate, earlier provisions of Constitution (*Freytag v. Commissioner*). Still, we must note the decision in the following case.

Parsing a Decision: Confirming *Ius Soli*—*Wong Kim Ark*

In *U.S. v. Wong Kim Ark* (1898), the Supreme Court set forth how the common law regarding citizenship had evolved in America. Taken to its logical conclusion, the 1898 case held that an individual born abroad to American parents could not be deemed a "natural-born citizen." Although the Court did not specifically address the presidential Natural-Born Citizen Clause, it nevertheless made reference to the clause and proceeded to explicate the Fourteenth Amendment in light of the English common law. The case centered on an individual, born in the United States (California), whose parents themselves were not eligible for citizenship. In 1894, Wong Kim Ark left the United States for a visit to China. Upon returning in 1895, he was refused re-entry on the basis that he was not a citizen of the United States. Concluding that Wong Kim Ark was a US citizen, the Court explained "[t]he fundamental principle of the common law with regard to English nationality was birth within the allegiance, or *ius soli*" (*U.S. v. Wong Kim Ark* 1898, 657). As explicated earlier, this principle meant that anyone born within British dominions was deemed a natural-born British subject, regardless of parentage. The Court held fast to this interpretation of the common law and quoted from numerous sources as well as American case law:

> Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization. A person born out of the jurisdiction of the United States

> can only become a citizen by being naturalized, either by treaty, as in the case of annexation of foreign territory, or by authority of Congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization acts. (*U.S. v. Wong Kim Ark* 1898, 701)

The problem with the case is that the majority of the Court *did take* the "definition" in the Fourteenth Amendment to mean that children of US citizens born overseas would have "naturalized citizenship," not one based upon *ius sanguinis*. As noted earlier, this violated prior Court practice in that, unless specifically targeted, newer amendments to the Constitution would not change prior usages and understandings.

Recognizing the inconsistency, Chief Justice Fuller's dissent (with Justice Harlan concurring) expressed the concern that:

> [i]f the conclusion of the majority opinion is correct, then the children of citizens of the United States, who have been born abroad since July 28, 1868, when the amendment was declared ratified, were, and are, aliens, unless they have, or shall on attaining majority, become citizens by naturalization in the United States; and no statutory provision to the contrary is of any force or effect (*U.S. v. Wong Kim Ark* 1898, 706).

Fuller then argued:

> Considering the circumstances surrounding the framing of the Constitution, I submit that it is unreasonable to conclude that "natural-born citizen" applied to everybody born within the geographical tract known as the United States, irrespective of circumstances, and that the children of foreigners, happening to be born to them while passing through the country, whether of royal parentage or not, or whether of the Mongolian, Malay or other race, were eligible to the Presidency, while children of our citizens, born abroad, were not (*U.S. v. Wong Kim Ark* 1898, 715).

Based on this conclusion, Fuller maintained that statutes passed by Congress regarding the status of such children, which ran contrary to the English birthplace rule, were meant as "declaratory, passed out of abundant caution, to obviate misunderstandings which might arise from the prevalence of the contrary rule elsewhere" (*U.S. v. Wong Kim Ark* 1898, 714). He stated that "[i]n my judgment,

the children of our citizens born abroad were always natural-born citizens from the standpoint of this Government" (*U.S. v. Wong Kim Ark* 1898, 714). The majority rejected this view, however, accepting only the narrower British common law rule of *jus soli*, ignoring changes in the interpretation of British law at the end of the eighteenth century that encompassed a limited *ius sanguinis*. As a footnote here, Fuller extended the reasoning above to argue also that Wong Kim Ark *did not* have citizenship—that in essence, *ius soli* did not apply to the children of foreign citizens born in the United States (*U.S. v. Wong Kim Ark* 1898, 727).

From a more modern perspective, the Court majority erred slightly in its interpretation. (Strauss 1996, 877–935). The *Wong Kim Ark* Court answered only the rather simplistic question of whether "within the allegiance" of America, in the narrow meaning of born on American soil. It made no attempt to define the breadth of "within the allegiance." Nothing within the decision precludes a determination that some children may be born in a foreign land, but are still "within the allegiance" of the United States. Fuller's dissent, not the majority opinion, reflects the actions of Congress, although as discussed earlier, subsequent legislation did attempt to define eligibility even more narrowly.

Women and Leadership

The women's rights movement gained considerable traction after World War I with the passage of the Nineteenth Amendment (1920) and other measures that, while falling short of granting full equality, still removed onerous provisions from previous statutes. The 1907 *Act in Reference to the Expatriation of Citizens and their Protection Abroad* stripped American citizenship from women who married foreign nationals. In 1922, Congress changed the law to permit most, but not all, American-born women who married foreigners to retain their US citizenship (Cable Act of 1922). For example, women who married men ineligible for citizenship, such as Chinese immigrants, still forfeited their US citizenship. The enactment of the *1934 Citizenship Act*, passed to make the United States compliant with the provisions of the newly ratified Inter-American *Convention on the Nationality of Women* (1933), finally removed all restrictions. The Convention mandated States Parties (states that have formally ratified/accepted) "explicitly set sexual equality as a principle to be incorporated into national legislation." Among other important changes, the law permitted nationality and citizenship to pass through the maternal as well as the paternal line and removed all conditions that imposed the nationality of her husband if an American woman married a foreign national.[8]

[8] Act of May 24, 1934, Section 1, 48 Stat. 797; amending, 10 Stat. 604 (1855) amending 2 Stat. 155 (1802) together with 34 Stat. 1229 (1907), 8 U.S.C.A. § 6 (1926). (see Bredbenner 1998, Simon 2014).

The Importance of the 1940 Legislation

The 1934 law made some important changes, but the *Immigration and Nationality Act of 1940* planted an important milestone. Specifically, the legislation intended to codify the nationality laws of the United States. The legislation drew on a five-year study by a Cabinet Committee, comprised of the Secretary of State, the Attorney General, and the Secretary of Labor. First, the 1940 Act defined naturalization as the "acquisition of nationality after birth" because "this meaning is now universally attributed to the word." Most importantly, the legislation explicitly defined the three ways citizenship could be acquired. With some subsequent tweaking, these still remain the basis for current legislation: (1) reiterating the Fourteenth Amendment and confirming the traditional reliance on *ius soli*, "birth in the United States, by those subject to the jurisdiction thereof"; (2) birth outside the United States to American parents confirming a limited acceptance of the principle of *jus sanguinis*; and, (3) naturalization of aliens, usually through familiar judicial processes.

Nonetheless, U.S. Supreme Court decisions as well as those from other federal courts use a two-way test. In numerous decisions they have held that the general categories of "citizens" are: (1) those who are "natural born" citizens, that is, those who are citizens "by birth" or "at birth," including all native-born citizens, and (2) those who were born "aliens" but chose to be "naturalized."[9] Perhaps the clearest statement of views came in *Miller v. Albright* (1998):

> There are "two sources of citizenship, and two only: birth and naturalization." *United States v. Wong Kim Ark*, 169 U.S. 649, 702 (1898). Within the former category, the Fourteenth Amendment of the Constitution guarantees that every person "born in the United States, subject to the jurisdiction thereof, becomes at once a citizen of the

This particular case formed a prime argument in the movement for the Bricker Amendment in the early 1950s in that the treaty, when ratified, became part of the Federal Code, and thus required the United States to adopt policies that it might not have done otherwise. You see this same rationale in current US practice. The Senate regards all human rights treaties as "non-self executing," meaning that they can be applied by US courts only through the provisions of the enabling legislation, adopted as part of the ratification process. The enabling legislation defines relevant terms and obligations. Hence, courts may not interpret the treaty for themselves. (Taulbee 2000, 152–57).

[9] *Elk v. Wilkins*, 112 U.S. 94, 101 (1884); *Luria v. United States*, 231 U.S. 9, 22 (1913); *Rogers v. Bellei*, 401 U.S. 815, 828 (1971); *Schneider v. Rusk*, 377 U.S. 163, 165 (1963); *MacIntosh v. United States*, 42 F.2d 845, 848 (2nd Cir. 1930); *Diaz-Salazar v. INS*, 700 F.2d 1156, 1160 (7th Cir. 1982), cert. den. 462 U.S. 1132 (1983); *Mustata v. U.S. Department of Justice*, 179 F.3d 1017, 1019 (6th Cir. 1999); *Robinson v. Bowen*, 567 F.Supp. 1144, 1145-1146 (ND Cal. 2008); *Hollander v. McCain*, 566 F.Supp. 63, 66 (D.N.H 2008).

> United States, and needs no naturalization." 169 U.S. at 702. Persons not born in the United States acquire citizenship by birth only as provided by Acts of Congress (Id. at 703).

However, in a more recent case, the Supreme Court indicated that under current law and jurisprudence, a child born to US citizens while living or traveling abroad, and a child born in the geographic United States, had the same legal status. In *Tuan Anh Nguyen v. INS* (2001), the Court said that a woman who is a US citizen living abroad and expecting a child had a choice. She could re-enter the United States and have the child born in the United States, or could stay abroad and not travel back to this country and have the child born abroad, and that the child in either case would have the same status as far as US citizenship: "[T]he statute simply ensures *equivalence* between two expectant mothers who are citizens abroad if one chooses to reenter for the child's birth and the other chooses not to return, or does not have the means to do so" (*Tuan Anh Nguyen v. INS* 2001, 61).

Concerning the contention made in earlier cases that everyone who is made a citizen only by federal statute is a "naturalized" citizen (even those who are made citizens at birth by statute), the common understanding and usage of the terms "naturalized" and "naturalization," as well as the precise legal meaning under current federal law, now indicate that someone who is a citizen "at birth" is *not* considered to have been "naturalized" (*Millar v. Albright*). The Supreme Court recently recognized in *Tuan Anh Nguyen v. INS* that federal law now specifically defines "naturalization" as the "conferring of nationality of a state upon a person *after* birth."

Seven Controversies

Since the founding, the issue of eligibility has been raised seven times: Chester A. Arthur (1880), Charles Evans Hughes (1916), Barry Goldwater (1964), George Romney (1968), John McCain (2008), Barack Obama (2008), and Ted Cruz (2016). As the first, the Arthur controversy actually set the pattern. Arthur was born in 1829 of an Irish father and American mother. Rumors circulated that he had actually been born in Canada while his mother visited relatives, not in Vermont. If so, he would not have met the requirements of the 1802 statute that would have applied because that law did not recognize matrilineal transfer through *ius sanguinis*. Presumably evidence surfaced toward the end of Arthur's term that confirmed the Canadian birth rumor, but no action was ever initiated. Arthur Hinman, who had been hired by the Democratic Party to investigate the background of opposing candidates, had first produced a story that Arthur had actually been born in Ireland, an allegation

easily disproved. His later book that contained the Canadian allegation had little credence because of the earlier controversy (Hinman 1884; Hylton 2009; Karabell and Schlesinger 2004).

The challenge to Hughes involved two assertions, one of which involves a technical point about the Fourteenth Amendment that I explored earlier. Breckinridge Long, who subsequently gained a rather unsavory reputation for anti-Semitism while serving as assistant secretary of state during World War II, challenged Hughes because although Hughes's mother was clearly a citizen born in New York State and no one disputed his place of birth, his father held British citizenship. Long (1916) argued that a difference existed between "native born" and "natural born." As somewhat of a red herring, Long also argued that Hughes's birth in 1862 occurred before enactment and ratification of the Fourteenth Amendment, which clearly made *ius soli* a legal principle. On the first point, considerably before Long's contention, the Supreme Court in *Inglis v. Trustees of Sailor's Snug Harbor* (1830) had stated:

> Nothing is better settled at the common law than the doctrine that the children even of aliens born in a country while the parents are resident there under the protection of the government and owing a temporary allegiance thereto are subjects by birth.

So even if both parents had had foreign citizenship at the time of his birth, through *ius soli* Hughes clearly had the right to claim American citizenship. His continued residence would have signified allegiance confirming his choice. Do not read too much into this statement because the context and the facts made it easy for the Court to adopt, as it did in another similar case a month later. Even so, Justice Story was not a happy camper in either case.

The Goldwater challenge came from the fact that his birth occurred in the Arizona Territory in 1909 before its admission to statehood in 1912. This had little basis because Arizona formed an organized "incorporated territory" formed in 1863 with the division of the New Mexico Territory. Interpretations of the language and intent in the legislation defining the status of the territories have always suggested that Congress meant to grant US citizenship to folks born there. Hypothetically, if Barack Obama had been born in 1932 in the Territory of Hawaii, he would have qualified through *ius soli* because Hawaii was an organized incorporated territory of the United States from July 7, 1898, through August 21, 1959 (Organic Act). The interesting question today would be if a citizen of Guam, an organized unincorporated territory, chose to run.

In the lead up to the presidential primaries in 1968, newspapers began raising questions about George Romney's place of birth. Romney, at the time the governor of Michigan, emerged as an early challenger to Richard Nixon. Interestingly,

the challenges to his eligibility came from Democrats who raised the circumstances of his birth, foreshadowing the later controversies over McCain, Obama, and Cruz (Hosenball 2012). Romney's grandparents were American citizens who were polygamous Mormons. They had fled the United States with their children because of the federal government's prosecution of polygamists. Romney was born in a Mormon colony in Mexico. When the Mexican Revolution began, fearing for their safety, the family moved back to the United States (Rosenbaum 1995). The issue, of course, was Romney's place of birth. At the time, legal experts, including those at the Congressional Research Service, clearly supported his claim to "natural born" citizenship. It became a non-issue when his support disappeared after his famous comment that with respect to Vietnam, he had "the greatest brainwashing that anybody could get" (Rosenbaum 1995). He withdrew from the race.

The "birther movement," among others, raised the issue concerning the eligibility of Ted Cruz and Barack Obama, but actually the interesting controversy in the run-up to the 2008 election involved John McCain, not Barack Obama.[10] Senator McCain was born on a military base in the Panama Canal Zone while his father (career US Navy, eventually a four-stripe admiral) was stationed there. While under US jurisdiction and governance, the question became, did control and governance mean that the Canal Zone constituted US "territory" in the sense that those living there, particularly American citizens, enjoyed the full benefits and protections of the Constitution? As an exercise in solidarity, and affirmation of Supreme Court decisions, the Senate passed a unanimous resolution declaring that: "The circumstances of Senator McCain's birth satisfy the original meaning and intent of the Natural Born Citizen Clause, as confirmed by subsequent legal precedent and historical practice" (*Congressional Record* 2008).

Cruz was born in Canada in 1970. Like Obama, his mother had American nationality and citizenship, his father did not. The obvious difference comes from the fact that Obama was born on US territory, Cruz was not. *Given current American law and practice*, Cruz was correct in insisting that "the son of a U.S. citizen born abroad is a natural-born citizen." (8 U.S. Code § 1401). Currently, American nationality and citizenship pass through both paternal and maternal links. As discussed earlier, that has not always been true. Until the 1934 Citizenship Act, nationality and citizenship passed only through the male side; hence Ted Cruz would not have met the citizenship test although Obama would have.

As a final note on the Obama controversy, many asserted that President Obama's birth occurred outside the United States. If true, this would have been a critical issue because his father was not a US citizen at the time of the

[10] For the views and analyses of the Birther Movement, visit "The Birthers: Dedicated to the Rebirth of Our Constitutional Republic": http://birthers.org/.

president's birth. In *United States v. Ahumada-Aguilar* (1999), the Court noted that: "The applicable law for transmitting citizenship to a child born abroad when one parent is a U.S. citizen is the statute that was in effect at the time of the child's birth." The federal laws in effect in 1961, would have required for citizenship at "birth" of one born outside of the United States to only *one* citizen-parent, that such citizen-parent must have resided in the United States for not less than ten years, at least five of which were after the age of fourteen. Because of her age, the president's mother would not have met the requirement.

Conclusion

Despite the constitutional history, the nearly unanimous consensus of legal and constitutional scholars, and the consistent, relevant case law, doubts still persist perhaps because in the era after the 1940 law, no definitive Court case dealing with the specific issues has ever emerged. While the clear tenor of opinion in the most recent federal cases, as well as the majority of scholarship on the subject, agree that the term "natural born citizen" would most likely include in addition to individuals born in the United States, (a) those born abroad to US citizen-parents, at least one of whom had previously resided in the United States, and (b) those born abroad to one US citizen parent who, prior to the birth, had met the requirements of federal law for physical presence in the country, the reasoning in Court opinions still places citizenship through *ius sanguinis* at the will of the Congress instead of as a logical extension of allegiance. On the one hand, it is hard to believe that Congress would overturn practice that predates the Constitution. In an era of "globalization" where great numbers of Americans travel and work abroad for lengthy periods, it is difficult to conceive that Congress would enact legislation that would adversely affect the children of citizens born overseas in denying them "natural born" status. But, on the other hand, given the current political climate that includes a backlash against globalization, nothing is impossible (Buttonwood 2016).

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Biggest Loser? Obama's Administrative Agencies and the Supreme Court

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On the surface, President Obama's administration has a victorious record at the Supreme Court, including successes in National Federation of Independent Businesses v. Sebelius (health care), Texas Department of Housing v. Inclusive Communities Project (racial housing discrimination), and Obergefell v. Hodges (same-sex marriage). However, when looking at cases in which a federal agency of the Obama administration is a party to a case, we find that the administration prevails in less than 50 percent of cases. When comparing the Obama administration to other recent presidential administrations, we find this falls short of their average success rates. We explore explanations for why the Obama administration might be less successful in the Supreme Court's rulings on federal agency administrative action by examining factors including deference under Chevron v. Natural Resources Defense Council, judicial ideology, and presidential popularity. We find that Obama's lower success rates are not attributable to citation of Chevron, ideology, or presidential popularity. Future research is needed to determine if ideology plays

a role with individual justices as well as to determine if the increasing reliance on executive orders led to greater judicial scrutiny for the Obama administration.

Historically, scholarship on agency success in the Supreme Court has consistently found that agencies are very successful litigants, with average success rates of at least 70 percent (Canon and Giles 1972; Crowley 1987; Handberg 1979; Pritchett 1948; Sheehan 1990, 1992; Tanenhaus 1960). Multiple factors are at play with these high levels of success, including the role of the Office of the Solicitor General in carefully selecting winnable cases, as well as the level of judicial deference built into the Administrative Procedure Act (APA). The substantial evidence test, along with the arbitrary and capricious test in the APA, assumes that the agency has expertise and makes rational and objective decisions unless proven otherwise (Horowitz 1994). This creates somewhat of a conundrum, because judicial review of agencies is designed to curb abuses of agency discretion, but the courts are expected to, and do, give the agencies great deference in this review. This deference would not be altogether problematic if it were applied across all agencies regardless of the agency's political orientation or the substantive policies made, but research suggests that is not the case. In fact, Canon and Giles (1972) found that the Supreme Court's willingness to defer to an agency was due to the justices' attitudes toward the policies made by the agency and not whether they followed proper procedures.

Our research builds on existing studies by asking if success varies across presidential administrations, with particular emphasis on the Obama administration. At the close of the US Supreme Court's 2014 term, the media and members of the public praised the Obama administration for its legal victories including the Affordable Care Act upheld, same-sex marriage legalized, and a tool to fight housing discrimination maintained. The media was full of praise for these victories; in fact, one source suggested the Obama administration won nearly all the politically significant cases at the Supreme Court at the end of the term (Hurley 2015). While other news outlets recognized that the Obama administration was not entirely successful, they praised the administration's ability to get their agenda through a conservatively stacked Supreme Court (Lemieux 2016). While the outcomes of these cases are significant and well publicized, it has been suggested that the Obama administration's agency success rate at the Supreme Court is actually relatively low. In fact, Obama's percentage of victory, when the United States or a federal agency is involved, is below 50 percent (Roeder 2015). So, despite the landmark cases that have been decided in favor of the Obama administration's agenda, the

administration did not fare well overall. Our goal is to first see how Obama's success (or lack thereof) compared to other recent presidents; then, if a significant difference is found, to investigate possible explanations for the disparity.

To do so, we will discuss several variables that have been used to explain success of a presidential administration's administrative agencies at the Supreme Court. These include deference to the agency under the precedent *Chevron U.S.A. Inc. v. Natural Resources Defense Council* (1984), the dominant ideology of the Court, the direction of the lower court, whether the United States is the petitioner, and presidential popularity.

Deference under *Chevron*

In exploring judicial review of contemporary administrative agency actions, it is vital to start out with a discussion of *Chevron*—the landmark case that changed the way administrative agency cases are decided. *Chevron U.S.A. Inc. v. Natural Resources Defense Council* (1984) changed the paradigm of administrative agency decisions by invoking democratic theory as its basis for requiring deference to executive (agency) interpretations of the law (Merrill 1992, 978). Acknowledging that many instances of statutory interpretation require an agency to resolve policy, and not legal, issues, and that agencies are given policy-making responsibilities by Congress, the Court established what has become known as the *Chevron* two-step test. According to *Chevron*, the courts must first decide if Congress has spoken clearly to the exact question at issue in the agency litigation, or if it was silent or ambiguous as to the issue. If the Court decides the former, it must give effect to the unambiguous intent of Congress. If the Court decides the latter, it should defer to the agency if its interpretation is reasonable and based on a permissible construction of the statute.

Chevron and its two-step test effectively modified the meaning of deference since courts were no longer merely required to give some credence to the agency's statutory interpretation. Rather, the decision required that if both conditions of the test were met, the Court was unable to substitute its own construction of the statute for that of the agency. In other words, the reviewing court had not only to consider the agency's interpretation, but to give controlling weight to the agency's construction, making it much more difficult to overturn an agency's decision (Starr 1986, 296). Legal scholars have argued that the doctrines that governed agency litigation prior to *Chevron* were schizophrenic (Seidenfeld 1994, 93). Prior to this landmark decision, federal courts took a case-by-case approach to agency litigation, which led to contradictory case law and inconsistent precedent (Callahan 1991, 1276). As a result, *Chevron*'s apparent partial departure from precedent has been regarded as an important innovation in administrative law because it created a procedural formula for courts to

follow (Merrill 1992, 976). Effectively *Chevron* moved deference from sliding scale phenomena to a switch that could either be turned on or off (Merrill 1992).

It is believed that the two-step test put forth by *Chevron* ultimately led to an increased level of deference to administrative agencies. The decision also gave rise to scholarship that argued for varying levels of strictness in the Court's interpretation. While some scholars assert *Chevron* receives a strict interpretation the majority of the time (Merrill 1992; Hennig 1999; Pierce 1988; 1995), others believe the precedent has been implemented in a flexible manner (Callahan 1991; Seidenfeld 1994; Sunstein 1990). Specifically, Pierce (1988) asserts that a strong reading of *Chevron* is the proper reading because agencies are the best-equipped institutions to resolve policy questions in the states that grant the agency its legal power. Agencies also deserve more deference than the federal courts because agencies are subject to the public (Pierce 1988).

Research on the *Chevron* decision has included a focus on the empirical question of whether the decision has actually altered deference. While *Chevron* has been regarded as directing courts to give greater deference to administrative agencies, Merrill (1992) argues that there is no discernible relationship between the application of the decision and greater deference to the agency's interpretations. In fact, he finds that cases applying the *Chevron* doctrine have produced fewer affirmations than those not applying the doctrine.

These ideas are substantiated by a study showing that of the 107 cases that were found to be *Chevron* applicable in the fifteen years following the ruling, only 64 (around 60 percent) cases were compliant (Hennig 1999). In 19 percent of the cases, the Court outright refused to apply the standard and instead imposed its own judgment as to the correct interpretation of the statute's language. This study found that close to 20 percent of the cases violate the *Chevron* rule. From this information, one might conclude that the Supreme Court only selectively complies with the *Chevron* test if it agrees with the agency's interpretation.

This less-than-perfect compliance rate is buttressed by the finding that there was a simple increase in deference to the agency by the justices (Richards, Smith, and Kritzer 2006). This fact stands in contrast to the commonly held belief at the time that the Supreme Court's deference to administrative agencies would increase dramatically. What, then, accounts for varying levels of deference?

Justice Ideology

The Administrative Procedure Act of 1946 (APA) decreed a significant role for the courts in federal administration. Congress passed the APA as a means to prevent the misuse and abuse of administrative authority, to implement procedural controls on administrative activities, and to compel agencies to provide information about their structures and operations. Judicial review of administrative agencies

stems largely from these policy preferences codified in the APA and recapitulated in amendments to the act like the Privacy and the Freedom of Information Acts. Deciding whether an agency has provided substantial evidence to support their ruling, or whether an agency has abused its discretion, is a highly subjective endeavor which may rely, unconsciously or not, on a judge's personal view of the subject matter (Rosenbloom & O'Leary 1997).

Earlier scholarship suggested ideology may play a part in judicial review of agencies depending on the substantive policy issue at hand in the case (Canon and Giles 1972). Crowley (1987) finds that the type of agency might play off of ideology to ultimately influence the outcome; for example, liberal justices are more likely to support social agencies, while conservative justices are more likely to support economic agencies. Tailoring this point more narrowly is the idea that the specific policy's position on the liberal-to-conservative spectrum affects the justices' votes; that is, liberal justices will support liberal policies and conservative justices will support conservative policies (Sheehan 1990, 1992).

Recent scholarship echoes the importance of ideology as a factor in rulings on administrative agency actions. It is vital to remember that judges are generally political creatures because of their appointment process and may vote in administrative cases along ideological lines (Caruson and Bitzer 2004). But perhaps judicial ideology is not the most important variable in administrative agency decisions. Deen, Ignagni, and Meernik (2005) find that while judicial ideology is important, partisan politics between the agency and the Court is even more suggestive. This is a key point to consider as Obama's administration leans liberally while the Court leans conservatively. The interplay between the Court and the agencies' ideologies is substantiated by the finding that justices' votes in administrative law cases are influenced by the ideology of the president under whom the administrative decisions were made (Smith 2007). However, Miller, Banks, and Curry (2008) found that a judge's subject matter expertise should also be considered in determining their likelihood to defer to the agency.

Attempts to understand judicial behavior in administrative agency litigation should also contemplate the extent to which justices might behave strategically. Schubert (1958), one of the first to apply game theory to judicial decision making, demonstrated that Supreme Court justices were strategic decision makers who wanted to maximize their influence on the Court. A strategic perspective suggests that judges are policy-oriented actors who attempt to advance their own policy preferences while simultaneously considering the preferences of other actors and anticipating the actions they take, realizing that all interactions are structured by institutions (Murphy 1964). Research on strategic behavior by Supreme Court justices includes strategic misrepresentation of preferences, persuasion, and bargaining (Baum 1997; Brenner 1982, 1989; Epstein and Knight 1998; Hammond, Bonneau, and Sheehan 2005; Maltzman

and Wahlbeck 1996; Wahlbeck, Spriggs and Maltzman 1998); strategic behavior occurring within the judicial hierarchy (McNollgast 1995; Songer, Segal, and Cameron 1994); as well as strategic behavior between the branches of government (Eskridge 1991; Gely and Spiller 1990; Segal 1997).

The strategic model assumes that judges act rationally to bring policy as close as possible to their own preferred outcome (McNollgast 1995, 1636). This model departs from the strictly attitudinal approach in alleging that judges may vote against their preferences in some instances to achieve more desirable results in the long run (Baum 1997). Therefore, a strategic model does not deny that attitudes play a significant role in decision making, but rather augments this assumption to include explanation for behavior that appears to be in direct contrast to a judge's sincere preferences. Therefore, if we find judicial ideology is not as significant in these cases, it may be due to strategic voting.

While the importance of judicial ideology, displayed either sincerely or through strategic behavior, cannot be disputed, factors such as precedent can limit their ideologically based decision-making (Segal and Cover 1989). As other variables are presented, we will explain how presidents have fared in the post-*Chevron* era. This will lead us to consider whether it is who the president is, and not just the ideology of said president, that matters.

Direction of the Lower Court

Related to the theory of judicial ideology influencing voting behavior in administrative agency cases is the idea that the directionality of the lower court decision might impact agency success. Specifically, if ideology matters, agencies should be successful when the policy direction of the agency's decision is congruent with the policy direction of the majority of the reviewing court. In fact, when controlling for the ideological direction of the agency's decision, researchers found directionality to have a significant influence on the level of deference granted (Crowley 1987; Sheehan 1990, 1992; Spaeth and Teger 1982). Further, Corley, Collins, and Calvin (2009) specifically identified factors of the lower court opinion that have the capability of influencing the actual content of a Supreme Court opinion. The authors found that the Supreme Court often uses the language and writing from a lower court that aligns with the ideology of the Court's majority decision. This displays a willingness of the Supreme Court to, at minimum, acknowledge lower Court decisions in their opinions.

US Petitioner Status

A less frequently discussed variable in administrative agency success at the Supreme Court is US petitioner status. Scholarship pertaining to this variable

often speaks in terms of the effect of the solicitor general, the United States' legal representative before the Supreme Court. Thus assumptions have to be made about how the prestige of US petitioner status stems from the Office of the Solicitor General (OSG) by likening the presence of the solicitor general to US petitioner status. Early research suggests that the solicitor general's influence is not significant (McGuire 1998). Supplanting this finding, later works find that the United States as the petitioner might matter if the solicitor general's ideology is proximate to the ideology of the justices (Bailey, Kamoie, and Maltzman 2004). This suggests the possibility that US petitioner status matters only if the position of the United States matches the ideology of the majority of the Court.

Petitioner Status of the United States is also found to be important because of the expertise of the solicitor general. Black and Owens (2012, 2013) find that the solicitor has a large influence on case outcomes because attorneys from the Solicitor General's Office have greater success than other attorneys. This can most likely be attributed to the Office's long-standing and established relationship with the Supreme Court. Another line of research within this variable is the idea of the United States as a repeat player. The United States is a repeat player as a petitioner and has some of the best lawyers with the most experience before the Court (Szmer, Songer, and Bowie 2016). Therefore, the United States is believed to have a huge advantage.

Presidential Popularity

In examining how successful post-*Chevron* presidents have been in administrative agency cases, we decided it was necessary to explore the role of a president's popularity in agency success. While several studies have found that presidential approval ratings can be translated into political capital to help influence congressional behavior (Brace and Hinkley 1992; Rivers and Rose 1985), research on presidential power over the Supreme Court has very few systematic empirical studies but relies on anecdotes or case studies. Ducat and Dudley (1989) have found that presidential prestige, measured by approval ratings, was a significant determinant of the presidential success at the district court level. At the Supreme Court level, Mishler and Sheehan (1993, 1996) found that the Court does act in a majoritarian manner by supporting popular presidents. One of the most comprehensive studies by Yates and Whitford (1998) looked at all presidential power cases from 1949 to 1993 to see if judges' votes were conditioned upon the presidents' approval rating. Operationalizing presidential approval as both an average and a trend in approval, Yates and Whitford (1998) find that increases in approval, measured either way, led to an increased likelihood that a justice would vote in favor of the president. Smith

(2007) examined the role of presidential and Supreme Court relations in influencing administrative cases and found that judicial administrative decision-making could be influenced by the ideological views of the president at the time the agency decision was made. This research encourages further evaluation of the influence of presidential popularity on specific decisions by the Supreme Court in agency cases.

Data and Methods

To explore whether the president influenced agency success in the Supreme Court, our primary data source is the Supreme Court Database (Spaeth et al. 2016). Since we are also interested in the role *Chevron* has in deference, we began our analysis in the 1985 term, which was over a full year after this landmark ruling. Within the database, we used the petitioner and defendant variable to identify the cases involving an administrative agency as a party. Including all cases from the 1985 term through the 2015 term, we identified a total of 394 cases that clearly involved at least one agency as a party. Our unit of analysis is the case itself and not the individual votes of the Justices.[1]

Since our primary research question is determining if the president influences agency success, our dependent variable in the study is *agency wins*. The *agency wins* variable is a dichotomous variable that captures whether the agency wins (1) or loses (0) a Supreme Court decision. To create this variable, we first looked at whether the agency was the petitioner or the respondent in the case and created a dummy variable identifying the cases where the agency was the petitioner. There is a winning party variable in the Supreme Court Database that identifies the cases where the petitioner won. We combined the information in these two variables to create the agency variable. Cases coded as the agency winning included those where the agency was the petitioner and the petitioner was the winning party, and cases where the agency was the respondent and the plaintiff lost.

[1] Our research question deals with levels of success for presidential administrations in administrative agency litigation and not the voting behavior of individual justices. We are focused on whether an agency won or lost so while the final vote count matters in determining the prevailing party, how each justice voted is not our primary concern. Further, the Spaeth Supreme Court database codes individual justices' votes on ideological lines rather than providing which party won or lost. In order to use justice vote as the unit of analysis, we would have to recode the justice votes in terms of votes for the winning and losing parties and were wary of the subjectivity that might be involved. While there are limitations in using the case as the unit of analysis, we thought it was worth it to stay true to the research question.

To explore our primary independent variable, we needed to create a variable identifying the president during the case. Since we wanted to gauge whether the cases championed by a given administration were more successful than those of other administrations, we had to account for some lag in the new administration taking charge of filings in the Supreme Court. Therefore, in election years, we coded the cases for that term to reflect the president in office prior to the election and did not attribute the cases to the new administration until the term beginning the following year. We then created five dichotomous presidential administration variables that indicate the administration in the term the case was decided. A value of (1) indicates the decision occurred during a given administration, and a value of (0) indicates the decision occurred during all other administrations. The administrations included are: *Reagan*, *HW Bush*, *Clinton*, *GW Bush*, and *Obama*. Remember that our time frame includes only the second Reagan administration because we included only cases in the term after *Chevron* was decided. We are interested in exploring whether there are systematic differences in our dependent variable, *agency wins*, and the different presidential administrations, with particular emphasis on the Obama administration.

Given that we are also interested in exploring whether the *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984) decision led to greater deference to an agency, we needed to identify the cases where the majority opinion cited the case.[2] The *Chevron cited* case variable captures whether the majority opinion in each Supreme Court case cites the case. The variable is dichotomous, and (1) indicates the majority opinion cited the case and (0) indicates the majority opinion did not cite the case. We hypothesize that there will be a positive relationship between this variable and our dependent variable, *agency wins*.

We have also included several controls grounded in the existing literature on agency success in the Supreme Court. One of the most obvious controls in the judicial behavior literature is ideology of the justices. Since our unit of analysis is the case and not the justice, we could not use standard measures of individual justices' ideology like Segal and Cover (1989) scores or Martin and Quinn (2002) measures of judicial ideology. To capture ideology at the case level, we decided to focus on the author of the majority opinion, which is coded in the Spaeth database. From there, we identified the party appointing president of justice and compared it to the party of the president when the case was decided. We then created the *party congruence* control variable where cases were coded as one if the party of appointing president of the majority opinion

[2] To identify cases where the majority opinion cited *Chevron*, we took the case citation and viewed the entire case on the Supreme Court section of Justia.com. We then used ctrl-F to search *Chevron*.

writer and president in office during case are the same and zero otherwise. We expect to find a positive relationship between this congruence variable and our dependent variable, *agency wins*.

Another important control variable is the one identifying the agency as the petitioner. The *US petitioner* variable is coded one if the agency is petitioner and zero otherwise. We expect a positive relationship with this measure and our dependent variable for two reasons. First is the reality that the Supreme Court is more likely to reverse than affirm cases generally (Bernhardt 1948; Handberg and Hill 1980; Klein and Hume 2003; Scott 2006; Songer, Segal, and Cameron 1994; Wermiel 2008). Second, the Solicitor General's Office typically only appeals cases they think have a better chance of prevailing on the merits. Since the Supreme Court is well aware of the solicitor general's careful screening of cases to appeal, the Court often rules in favor of the "tenth justice" (Wohlfarth 2009).

Existing literature also suggest that the directionality of the lower court decision might influence the outcome of the case, again factoring in the Court's predilection to reverse. We create a variable, *lower court congruence*, that captures the congruence between the lower court decision direction and the appointing president of the majority opinion writer. If the agency is petitioner, we assume the agency wants the Court to reverse, so they would prefer that the lower court directionality to be the opposite of the majority opinion writer (in other words, if the directionality of the lower court decision is conservative, a majority opinion writer appointed by a Democratic would benefit the agency). Alternatively, if the agency is the respondent, they want the Court to affirm, so they would prefer that the lower court decision's directionality to coincide with the party of the appointing president of the majority opinion writer. The variable itself captures the instances when the congruence (or lack thereof) between the lower court's decision and majority opinion author's ideology benefit the agency, and those cases are coded as one and all other instances are coded as zero.

To measure whether the popularity of a president, both across and within administrations, influences agency success, we gathered each president's approval rating from Gallup in early October.[3] We used the approval rating from early October because it coincided with the start of the Supreme Court's term, and we held it as a constant across each individual term. While imperfect, we wanted to allow for temporal precedence in the measure and assumed that the justices would not be tracking the polls every morning before oral arguments. We anticipate a positive relationship between the *presidential popularity* variable

[3] Data on presidential popularity was retrieved from Gallup: http://www.gallup.com/poll/124922/presidential-job-approval-center.aspx.

and dependent variable. In other words, we expect the agency to be more likely to win when the president championing their case is popular.

Finally, we include two other potential independent variables that explore the basis of the decision provided by the Court. The *regulation* variable is coded as one if the decision was based on an administrative regulation. The *statutory* variable is coded as one if the decision was based on statutory construction. With both of these controls, we anticipate positive relationships with the variable and our *agency wins* variable because the Court typically defers to agencies in both types of cases.

We have cross-sectional time-series data with a dichotomous dependent variable. In order to assess the effect our primary variables of interest have on the likelihood an agency wins a Supreme Court decision, we used random effects logistic regressions with a lagged dependent variable to control for autocorrelation. In addition, we conducted Hausman tests to compare the results from random-effects and fixed-effects estimations in order to determine which approach is more appropriate given the distribution and nature of the data. We determined that the results in all estimations indicates that random-effects estimations are appropriate.

Findings

Before examining the results from our time-series logistic analyses, we first looked at the summary statistics for all our variables in Table 1 as well as the agency success rates across presidential administrations in Figure 1. The bars in Figure 1 reflect the percentage of cases where the agency is successful on the merits in each presidential administration. Interestingly, despite his success at high-profile cases, President Obama's overall success rate is dramatically lower than those of his predecessors. His agencies were successful in the Court only about 40 percent of the time. President Clinton was also less successful than other contemporary presidents but was still a full 20 percent more successful than Obama. Reagan's success rate here only includes the few years after the *Chevron* decision, and if you look at his entire presidency, his success rate is well over 70 percent. In our sample, President George H. W. Bush was the most successful before the Court, with a success rate of almost 76 percent. While George W. Bush's success rate is higher than the Democratic presidents immediately before and after his administration, it is still lower than the other Republican presidents examined here with a success rate of approximately 68 percent.

In Table 2, we look at each presidential administration separately in an effort to understand varying levels of success in the five administrations regarding the likelihood their administrative agencies prevail in Supreme Court decisions. As is displayed in Models 1, 3, and 4, the Reagan and Clinton administrations have

Table 1: Summary Statistics

	Observations	Frequency Distribution		Mean	Stand. Dev.	Min	Max
Reagan	394	0=290	1=104	.26	.44	0	1
HW Bush	394	0=320	1=74	.18	.39	0	1
Clinton	394	0=310	1=84	.21	.41	0	1
GW Bush	394	0=320	1=74	.18	.39	0	1
Obama	394	0=336	1=58	.14	.35	0	1
Chevron Cited	394	0=313	1=81	.20	.40	0	1
Presidential Popularity	394	—	—	54.3 3	12.9 4	25	87
Party Congruence	394	0=151	1=243	.61	.48	0	1
US Petitioner	394	0=163	1=261	.58	.49	0	1
Lower Court Congruence	394	0=186	1=208	.52	.49	0	1
Regulation	394	0=347	1=47	.11	.32	0	1
Statutory	394	0=138	1=256	.64	.47	0	1

Figure 1: Agency Success by Presidential Administration

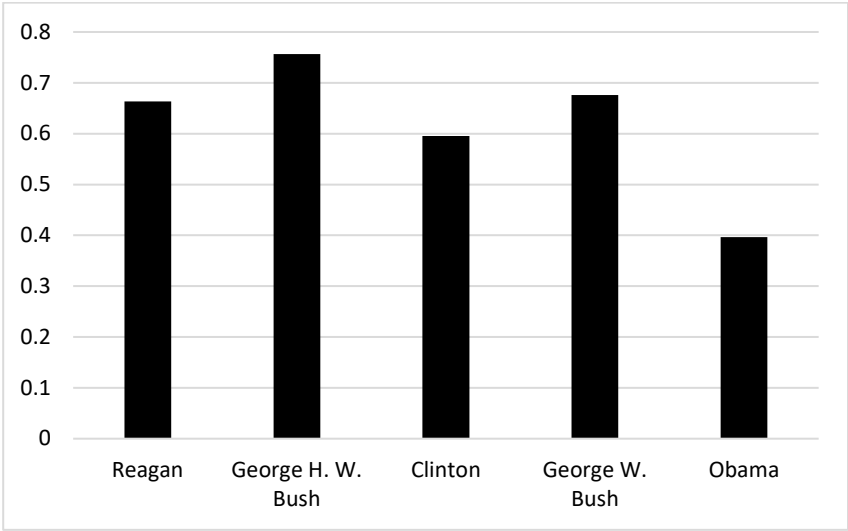

Table 2: Agency Wins by Administration

Independent Variables	Model 1 (DV = Agency Wins)	Model 2 (DV = Agency Wins)	Model 3 (DV = Agency Wins)	Model 4 (DV = Agency Wins)	Model 5 (DV = Agency Wins)
Reagan	−.11 (.26)				
HW Bush		.68 (.30)**			
Clinton			−.10 (.28)		
GW Bush				.41 (.29)	
Obama					−.99 (.32)***
Chevron Cited	.30 (.28)	.33 (.28)	.32 (.28)	.32 (.28)	.38 (.29)
Party Congruence	.23 (.22)	.11 (.22)	.17 (.24)	.15 (.22)	.11 (.22)
Lower Court Congruence	.39 (.21)*	.37 (.21)*	.38 (.21)*	.40 (.21)*	.36 (.22)
US Petitioner	.64 (.22)***	.63 (.22)***	.62 (.22)***	.67 (.22)***	.59 (.22)***
Presidential Popularity	.02 (.00)**	.01 (.00)**	.02 (.00)**	.02 (.00)**	.01 (.00)
Regulation	−.02 (.40)	−.02 (.40)	.00 (.40)	−.04 (.40)	−.10 (.40)
Statutory	.00 (.26)	.00 (.26)	-.00 (.26)	−.01 (.26)	−.00 (.26)
Lagged Agency Wins	−.24 (.22)	−.30 (.23)	−.24 (.22)	−.25 (.22)	−.37 (.23)
N	393	393	393	393	393
Prob > chi2	.0076***	.0019***	.0077***	.0047***	.0004***
Wald X^2	22.43***	26.21***	22.39***	23.75***	30.30***

*p < .10; **p < .05; ***p < .01; standard errors in parentheses.

negative and insignificant relationships with the likelihood of Supreme Court success, while the GW Bush administration has a positive and insignificant

relationship. However, the two remaining administrations display significant relationships regarding the likelihood their agency will win a Supreme Court case.

In Model 2 in Table 2, we see that there is a positive and statistically significant relationship between the HW Bush administration and the likelihood of Supreme Court success at the .05 level. As we move from 0 (all other administrations) to 1 (HW Bush administration), the likelihood that an agency within the HW Bush administration will win a Supreme Court case increases by .68. This is a significant and noticeable increase. In contrast, in examining the results pertaining to the Obama administration in Model 5 in Table 2, we find that the likelihood an agency within the Obama administration will win a Supreme Court case decreases by .99 when moving from 0 (all other agencies) to 1 (the Obama administration), and the relationship is statistically significant at the .01 level. This indicates that agencies within the Obama administration have a significantly smaller likelihood of success regarding Supreme Court decisions compared with agencies in the four previous administrations.

In regard to the significance of the remaining variables in the models, we see that the majority opinion's citation of *Chevron* does not significantly relate to success in any of the administrations studied here. Looking back at Table 1, we can see that the citation of *Chevron* is rather infrequent. Only about 20 percent of the cases in our sample even cite the case, which could have contributed to the lack of significance. Interestingly, when we look at the frequency of citation of *Chevron* across the administrations, we find that the less successful presidents actually saw an increase in citations when compared to the more successful ones. Specifically, both Clinton and Obama had *Chevron* cited in about 25 percent of their cases, whereas Reagan had 15 percent, Bush I had 19 percent, and Bush II had 20 percent. However, the difference was not significant in chi-square analysis. In future research, we would like to explore these citations in greater depth to see if they were provided to bolster the ruling in the case or to distinguish it.

Additionally, we did not find a significant relationship between agency success, the variable measuring congruence between the majority opinion writer's ideology (as measured by appointing president), and the president during the litigation. This is surprising, but it may be a function of the rather basic way we were forced to measure this variable given that our unit of analysis was the case and not the individual justice's vote. If we were able to implement a more refined measure, we may have found a significant relationship. It is also possible that the justices are engaging in strategic behavior at times and not voting their sincere ideological preferences in each instance with long-term goals in mind. Further, the variable *lower court congruence* may be capturing some of the role of judicial ideology in this process. Remembering that this variable captures the congruence between the lower court decision direction and

the appointing president of the majority opinion writer, it is interesting to note that this variable has a positive and significant effect on the likelihood of an agency winning a Supreme Court decision in Models 1 through 4. In other words, under all presidents studied here except Obama, the congruence (or lack thereof) between the lower court's decision and majority opinion author's ideology impacted agency success. While we cannot make too much of the lack of significance in Model 5, it does at least suggest that the explanation that Obama was less successful due simply to the ideological makeup of the Court is not supported in our analysis.

Now we turn to our *US Petitioner* variable and find that it has a positive and statistically significant effect on the likelihood the agency wins across all models. Thus, if the agency is the petitioner in a Supreme Court case, there is a greater likelihood of the agency prevailing in Supreme Court decisions. It should be noted again that the Office of the Solicitor General winnows down all the possible appeals to the ones the government is most likely to win so its success is not necessarily indicative of bias in favor of the government, but rather the solicitor's role in agenda setting.

Before exploring presidential popularity, we want to point out that our two independent variables about the basis of the decision provided by the Court (*regulation* and *statutory*) were insignificant in all the models. While agencies do typically defer to agencies in both types of cases, this was not a factor in success in our models.

Finally, we look to see if the popularity of a president in each term impacts success. We hypothesized that the more popular a president was, the more likely they were to be successful. We find that is exactly the case in Models 1 through 4. Thus, for all presidents except Obama, *presidential popularity* has a positive and significant influence on the likelihood the agency wins. This finding indicates that as presidents have higher approval ratings, there is a greater likelihood their agencies will win Supreme Court decisions.

In interpreting the results from logistic regression, it is also important to examine the predictive margins as they pertain to the primary independent variables of interest. Table 3 reports the predictive margins for the effect each presidential administration variable has on the expected likelihood that an agency within that administration will win a Supreme Court decision. The predictive margins indicate the expected likelihood an agency within each administration wins a Supreme Court decision when all other control variables are held constant at their mean values. All predictive margins displayed in Table 3 and discussed below are statistically significant at the .01 level. In examining the predictive margins in Table 3, Model 6, we see that when the Reagan variable is at 1 (which indicates Supreme Court cases decided in the Reagan administration) there is a .60 expected likelihood an agency within the administration wins, and

Table 3: Predictive Wins—Agency Wins by Administration

Independent Variables = Presidential Administration/ Presidential Administration Comparison Group	Model 6 (DV = Agency Wins)	Model 7 (DV = Agency Wins)	Model 8 (DV = Agency Wins)	Model 9 (DV = Agency Wins)	Model 10 (DV = Agency Wins)
Reagan	.60				
	(.02)***				
Reagan Comparison Group	.63				
	(.04)***				
HW Bush		.74			
		(.05)***			
HW Bush Comparison Group		.60			
		(.02)***			
Clinton			.61		
			(.05)***		
Clinton Comparison Group			.63		
			(.02)***		
GW Bush				.69	
				(.05)***	
GW Bush Comparison Group				.61	
				(.02)***	
Obama					.43
					(.06)***
Obama Comparison Group					.66
					(.02)***
N	393	393	393	393	393

when the Reagan variable is set at 0 (all other administrations), there is a .63 expected likelihood of agency success.

However, the HW Bush and GW Bush administrations have a greater expected likelihood of agency success compared with the other three administrations. The expected likelihood of agency success within the HW Bush administration is .74, and all other administrations have a .60 expected likelihood of agency success. The GW Bush administration has a .69 likelihood of agency success, while the other administrations have a .61 expected

likelihood. In contrast, the Clinton and Obama administrations have a lower expected likelihood of agency success compared to other administrations. The Clinton administration has a .61 expected likelihood of agency success, and all other administrations have a .63 expected likelihood. Lastly, the Obama administration has a .43 expected likelihood of agency success, and all other administrations have a .66 likelihood. These predictive probabilities reinforce our general premise that Obama is less likely to be successful in the Supreme Court than all other presidents studied here.

Table 4 reports the predictive margins for the effect the 1984 *Chevron* case being cited in the majority opinion has on the expected likelihood of agency success across the five different presidential administrations from 1985 to 2015. All the predictive margins found in Table 4 and discussed below are statistically significant at the .01 level. The predictive margins indicate that in four out of the five models (Models 11, 12, 13, and 14 include the Reagan, Clinton, HW Bush, and GW Bush presidential administration variables in separate models), when the *Chevron* case is cited in the majority opinion, the agency in each administration has a .68 expected likelihood of winning a Supreme Court case. Additionally, in the same four models, the agency in each administration has a .61 expected likelihood of winning the Supreme Court case when the *Chevron* case is not cited. In Model 15 (the model that includes the Obama administration variable), we see that the expected likelihood of agency success is .69 when the *Chevron* case is cited and .61 when it is not cited. These results indicate that across the five different administrations, the expected likelihood that an agency will prevail in a Supreme Court case is at a minimum .07 percentage points higher (.08 percentage points higher when the Obama administration variable is included) when the *Chevron* case is cited in the majority opinion. Therefore, while the *Chevron* variable was not significant in our time series logistic regression models, citation of *Chevron* does modestly and significantly increase the expected probability of success for an agency in the Supreme Court across all presidential administrations.

Discussion

The primary aims of this project were first to explore whether the Obama administration was less successful in the Supreme Court in administrative agency litigation than the previous four administrations despite several historic and well-publicized victories in the Court. Second, we addressed why the Obama administration was the biggest loser in our sample. The obvious answer would be presumed to be ideological disparity between the president and the Court. However, we did not find any relationship between the judicial ideology of the majority opinion writer and agency success across all of the administrations studied here. Further, when we looked at the congruence between the opinion

Table 4: Predictive Margins:
Agency Wins when *Chevron* Case cited by SC Majority across Administrations

Independent Variables = *Chevron* Cited	Model 11 (DV = Agency Wins)	Model 12 (DV = Agency Wins)	Model 13 (DV = Agency Wins)	Model 14 (DV = Agency Wins)	Model 15 (DV = Agency Wins)
Chevron Cited by Majority/Reagan	.68 (.05)***				
Chevron Not Cited by Majority/Reagan	.61 (.02)***				
Chevron Cited by Majority/HW Bush		.68 (.05)***			
Chevron Not Cited by Majority/HW Bush		.61 (.02)***			
Chevron Cited by Majority/Clinton			.68 (.05)***		
Chevron Not Cited by Majority/Clinton			.61 (.02)***		
Chevron Cited by Majority/GW Bush				.68 (.05)***	
Chevron Not Cited by Majority/GW Bush				.61 (.02)***	
Chevron Cited by Majority/Obama					.69 (.05)***
Chevron Not Cited by Majority/Obama					.61 (.02)***
N	393	393	393	393	393

writer and the lower court decision, we found a significant relationship in all administrations except the Obama administration. It may be the Court was more concerned with procedure than policy with the Obama administration and that is why the ideological congruence with the lower court is not significant; but confirming that would require a more in-depth content analysis of the Court's decisions. Further, it may be that the role of ideology occurs at an individual justice level and not the majority opinion writer. Administrative agency cases can be quite technical, and certain justices have more expertise than others on various issues. Therefore, opinion assignment may be based on utility and not proximity to the preferred outcome. Finally, some justices may be voting strategically in these cases, and while it may appear that ideology did not matter, the justices were in fact voting more sophisticatedly to achieve long-term goals. Future research should explore individual voting behavior in these cases and see if ideology helps explain support for individual presidential administrations.

We were hopeful that adherence to the *Chevron* precedent might help explain agency success, but citation of it was not significantly related to agency success. We did find it interesting that the Court actually cited *Chevron* marginally more in Democratic administrations than Republican ones, although those administrations were less successful in the Court's ruling in administrative agency cases. We also found that citation of *Chevron* did increase the predictive probability of agency success significantly across all administrations and even to a very slightly greater degree under President Obama. However, it was not the landmark watershed decision dramatically mandating agency deference many speculated it would have been. It may have created a culture of deference even without citation potentially evidenced by President GHW Bush's having the highest level of agency success, with him winning in 76% of cases, but it was not sustained through the Clinton administration.

One thing that remained constant across all the administrations was the success an agency enjoyed when they were the petitioner. The Court was significantly more likely to rule in favor of the agency if they were the ones petitioning for review. While this finding may alarm some fearful of the expansion of the administrative state at the expense the public and their rights, agencies appeal only a fraction of the cases decided against them in the lower courts. Since there is a large pool of cases to appeal from, the federal government via the Office of the Solicitor General can be selective in choosing cases to appeal and thus increasing its chances of prevailing on the merits.

In addition to seeing if agency success was dependent on the presidential administration, we wanted to see if success by individual presidents varied depending on their popularity for any given term. We found this was the case for all presidents except Obama. Thus, for Reagan, GHW Bush, Clinton, and GW Bush, the more popular they were at the start of the term, the more likely

they were to be successful in the Supreme Court. However, this did not hold for President Obama. Therefore, we are not able to conclude that his popularity ratings (or lack thereof) explains his lack of success before the Supreme Court.

In general, we found that the conservatively leaning Court ruled more favorably toward agencies of conservative administrations instead of the agencies of liberal administrations. Given the time frame included here, this finding might be partially related to the resurgence of federalism in the Rehnquist era (Meddaugh 2015). Meddaugh (2015) compared conservative justices on the Burger and Rehnquist Courts and found that those on the Rehnquist Court were more supportive of states' rights policy. In our existing data, we cannot determine whether the apparent preference for conservative administrations was in actuality a resurgence of federalism, or whether it was the Court using the guise of federalism to strike down liberal policy (Colker and Brudney 2001; Cross 1999). Future research is needed to explore our findings in greater depth through content on these cases to see if there are states' rights issues involved and how the conservative justices voted on these issues.

Ultimately, the explanation for the differences across presidential administrations may lie in the much more complicated area of agency actions. It is probable that the lack of success by President Obama is due to the administration trying to accomplish more via executive orders or through the bureaucracy because the partisan deadlocked legislative branch was not enacting his policy preferences. Yates (1999) analyzed the specific reasons that would cause a president to pass an executive order compared to alternate methods and found that the lack of popularity for a president may significantly increase the number of executive orders issued. Rudalevige (2012) evaluated significant individual president's records in creating executive orders and found that Obama increased the percentage of executive orders passed. Further, the president may very well be utilizing his powers as executive in chief to accomplish his policy objectives through administrative rulemaking. When these orders or rules are challenged judicially, the courts may be striking down perceived overreach by the executive branch. Future research is needed to explore in greater depth the role of executive orders with particular attention on the content and context of these orders. If executive orders continue to proliferate, there is a significant separation of powers crisis looming.

This project has established that the Obama administration's administrative agencies are clearly not receiving the deference that agencies have historically received. We also learned that this discrepancy in success is not based on ideology or presidential popularity; therefore, it may be based more on the nature of the decisions agencies are now making and how they systematically differ from that of previous administrations. Exploring these differences is the

next step in our understanding why Obama appears to have been the biggest loser in the Supreme Court in administrative agencies cases in recent decades.

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A Comparative Analysis of Sexual Assault Policies among Four University System of Georgia (USG) Institutions[1]

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This article explores campus sexual assault policies, specifically as it relates to Georgia campuses. Different colleges and universities are examined, including smaller campuses like the University of North Georgia and Georgia College and State University, and larger campuses like the University of Georgia and Georgia Institute of Technology. The policies of these institutions will be examined and compared to the University System of Georgia policy, as well as different federal statutes, to see which policies are more comprehensive and which are simply the minimum required. The policies will be analyzed for effectiveness and inclusivity. The paper will also explore the different obstacles that sexual assault survivors could face, including some of the most common myths that are used against victims, as well as difficulty finding and utilizing resources. Finally, the effects of social media and mass media and how they could be used as both a hindrance and an asset in addressing the issue of campus sexual assault on Georgia campuses in considered.

Rape is an act of power and violence that continues to plague society. Rape was initially not considered a crime against women but rather a property crime against a woman's father or husband (Meier and Nicholson-Crotty 2006, 853). This idea of coverture paints a picture of women simply as property to be bought and sold. Fast-forward to current day, and American women have made

[1] The author would like to thank Dr. Beth Rauhaus, without whom this article would not have been possible. Thank you for your mentorship and dedication to this project.

tremendous strides in regards of women's rights. They are elected to public office, manage major corporations, and have run for president. One of the most important privileges that women have fought for is the ability to attend institutions of higher education. Colleges and universities as places of learning are expected to be a safe and enriching environment. Young women and men attend these institutions for personal growth and with the hope of becoming contributing members of American society. Faculty also plays an important role in colleges and universities. Their guidance is crucial for these young people on their journey to adulthood. However, students face many dangers on college campuses across the country.

One of the gravest dangers students face is the threat of sexual assault and rape, which runs rampant across American college campuses. According to numerous studies, between 11.5 and 27.2 percent of students have reported some sort of rape and sexual assault (Ziering and Dick 2015). The possibility of up to one in five students experiencing an act of sexual assault in what should otherwise be a secure and constructive learning environment is startling. This becomes more distressing because many more cases of rape and assault go unreported. Recently, the Georgia state legislature has seen a bipartisan movement to make changes to sexual misconduct policies. A group of senators joined together to propose legislation that would require some university officials to work with local authorities in cases of sexual assault or rape on campuses. Unfortunately, the bill was tabled. While this seems like a positive thing, opponents of the movement argued that instituting another party in the process would alienate victims because they would have to continually relive the event (Davis 2015). Nonetheless, there has been movement in the state to change sexual misconduct policies to bring due process more in line with the traditional legal system.

The US Department of Education recently launched investigations of policies and practices of over 50 colleges and universities across the country after an influx of reports of misconduct to the department. In response to these investigations and the "Dear Colleague" letter from the Department of Education to all institutions receiving Title IX funds, a Georgia state representative brought suit against the Department of Education, claiming that current sexual misconduct policy could be discriminatory to the accused, most of whom are men (Johnson 2016). A number of arguments have opposed this change. One argument that is very concerning is that sexual misconduct policies should be created to protect the accused as well. The suit in question "cites concerns that such cases could tarnish the reputations of accused male students, ruin career prospects and cost students their tuition money should they be expelled" (Johnson 2016). One of the major concerns with this logic is that it does not account for the reputation or educational success of the reporting party;

the focus is placed with the accused rather than with the accuser. While the accused certainly have rights that should be preserved, creating policy focused on preserving the accused discounts the victim and could contribute to a growing culture of non-reporting and the perpetuation of rape culture on campus.

These types of initiatives are alarming because not only do they continue to condone and gender sexual assault and rape, but they could increase instances of victim shaming which could lead to a further decrease in reporting. The present reluctance to report could be due to many different factors: the continued spread of rape myths and rape culture, a lack of active representation of women in both the street-level bureaucracy and decision-making positions, and the volatile nature of the media. It is necessary, then, to have sexual assault policies in place at institutes of higher learning that are inclusive, comprehensive, and thorough in order to protect the rights and lives of all college and university students. The goal of this work is to examine policies theoretically and to offer an explanation of how policies may set the tone for culture on campus. The research will tie theory to practice by interpreting policies, rather than using a specific policy to argue a point, and discuss possible implications of how the policy may be implemented on campus, how the policies and procedures may create a culture of reporting vs. non-reporting, and how they may possibly deter future acts or reduce the severity of crimes that do happen. This project will examine the sexual assault policies of the University of Georgia, Georgia Institute of Technology, University of North Georgia, and Georgia College and State University, as well as the policies set forth by the University System of Georgia to determine their comprehensiveness and efficiency. The definitions of terms vital to the study of sexual assault and rape on college and university campuses can be found in footnote 1.[2]

[2] Sexual assault—"rape, sodomy, aggravated sodomy, statutory rape … sexual battery, and aggravated sexual battery" (University of North Georgia 2015).

Consent—"The state of Georgia does not have an established definition for Consent" (University of North Georgia, 2015). However, different colleges and universities in the State have their own qualifications for lack of consent, which will be specifically defined when necessary.

Title IX—a law that guarantees that no one will be discriminated against due to their sex while attending a facility that receives federal funding. This is the reason why women's athletics has grown, as well as what protects both women and men from experiencing sexual assault at federally funded schools.

Campus Sexual Assault/Rape—according to different reporting regulations, these assaults will be considered in the statistics for the organization only if the incident happened on campus. This would exclude incidents that happen off campus involving university students, as well as those incidents that have no location listed.

Theories and Literature Review

Theories

Representative bureaucracy is the theory that passive representation will lead to active representation. This suggests that bureaucrats represent client groups in two different ways. Passive representation occurs when members of minority groups are included in the organization. This would apply to members of different racial and ethnic groups as well as women; or, essentially, to any group underrepresented in the organization (Bradbury and Kellough 2011, 158). Active representation, however, happens when "bureaucrats act in ways that benefit those members of the public who have similar characteristics" (Smith and Monaghan 2013, 51).

Street-level bureaucrats provide services directly to the people and deal with the public daily. While most would not think of classifying university officials, police officers, first responders, or emergency room workers as bureaucrats, these are often some of the first individuals to be involved with incidents where sexual assault has been alleged. Most victims of sexual assaults are women. In the case of sexual misconduct and sexual violence, reporting is remarkably low, often because victims face what is perceived as hostile scrutiny from those to whom they report the claim. Women tend to be more likely to report their attacks to a female officer rather than to a male officer, simply because there is an expectation of a sympathetic response, which is an example of active representation. (Meier and Nicholson-Crotty 2006, 852).

Evidence also shows that women in leadership positions tend to make policy decisions in a way that may favor typically "feminine" issues, like health and human services, reproductive rights, childcare, and sexual assault (Bradbury and Kellough 2011, 160). While representative bureaucracy and the composition of street-level bureaucrats at these institutions are not necessarily studied in this work, both these theories have the potential to affect sexual assault policies in a positive way. Simply by increasing the number of women in leadership positions, as well as at street-level positions, the potential for effective and efficient organizational change that would benefit victims would become a much more likely possibility.

Another theory that could function as a catalyst for changes made at an organizational level, rather than at an individual level, is a trauma-informed social policy. Trauma-informed social policy focuses promoting a safe and confidential environment for victims and those experiencing adversity (Bowen and Murshid 2016, 223). An important aspect of trauma-informed social policy is transparency and trust. People expect as much transparency as possible from the bureaucracy; they want to know what is going on and how processes are being carried out. Historically, in cases of campus sexual

assault, the administration of the universities and the university police have been very secretive about assaults and sometimes tried to dissuade victims from reporting. There has also been evidence of victim shaming and questioning of the validity of claims women make against their attackers on campus (Paludi 2016, 51). This idea of transparency leading to trustworthiness cannot be ignored. If college administrations and campus police are more transparent and follow through on these accusations of assault, the students on campus may come to trust them more and feel less like they will be judged for reporting their attack.

Rape Culture and Questions of the Validity of Accusations

Rape culture is a term that is used to show how "[s]exual violence and rape [are] being validated, justified, and obfuscated" in society (Boux and Daum 2015, 153). Rape culture is used in American society to talk about rape and sexual violence in a way that almost normalizes the behavior in a way that will sometimes blame the victim. We often hear when a woman is raped or assaulted that she was "asking for it" because of what she might have been wearing or if she was under the influence of something, and where

> rape is understood to be … a tool of social control … an unfortunate side-effect of alcohol-infused events, a turn-on for males and females alike when depicted in mainstream media and pornography, [or] the right of husbands and male significant others to force their wives and female partners to have sex against their will. (Boux and Duam 2015, 154)

These situations are seen often in environments where victims are discouraged from reporting their attacks for different reasons (Boux and Daum 2015, 154).

Many of these situations can be seen on college campuses. Victims on college campuses often also have to deal with the idea of "real rape," or the idea that a rape or assault must be violent and perpetrated by a stranger to be considered an actual assault (Boux and Duam 2015, 152). Many times, rapes that occur on college campuses are often considered "acquaintance rapes," or assaults in which the parties know each other (Boux and Duam 2015, 172). Not only do victims of acquaintance rape have to deal with the accusation of their rapes not being "real rape"; they also have to deal with being accused of reporting "bad sex" as an assault "bad sex" myth paints "rape victims [as] liars and/or [that they are] trying to cover 'bad sex'" (Boux and Duam 2015, 183). While this certainly happens in some cases, it does not happen a majority of the time, so it is vital that policy be created to be inclusive and comprehensive in order to promote a campus culture of respect and that will encourage reporting. Sexual misconduct

policies should take these concerns into account and include these scenarios in order to provide the best environment for the community as a whole.

Social Media and Its Influence

On college campuses, social media can be an invaluable tool for rape victims. Sites like Facebook and Twitter allow victims to come together in places like support group pages, which gives them a support system and sometimes a place to 'call out' their attackers. Studies show that 56 percent of American adults own a smartphone, and those aged 18–44 only use their smartphones for making phone calls 16 percent of the time (Boux and Duam 2015, 167). This means that these adults are using their phones more for other types of communications, like texting and social media. Another service that is very often used for the transfer of data is YouTube, which claims to have one billion viewers a month and "reaches more U.S. adults ages 18–34 than any cable network" (Boux and Daum 2015, 168). These increases in online communication and immediate accessibility to day-to-day interactions give both victims and law enforcement a place to find or bring evidence of rape and sexual assault. People share almost everything on social media, and this type of situation is no different. This could give law enforcement and legal officials access to evidence of rape and sexual assault that may not have been otherwise reported.

The downside is that this open forum can also work to spread different rape myths, like the idea of "real rape" (Boux and Daum 2015, 169). Those who perpetrate these crimes can use social media as a place to brag with a certain sense of anonymity. The idea that people can essentially say what they want on social media without any immediate repercussions can breed an environment that could reinforce rape myths, like the "she is lying" myth (Boux and Daum 2015, 169). However, this could also work in reverse. Social media could give a platform for victims to come together for support, but it could also give them solid evidence for their cases brought against their attackers. Prosecutors could use the evidence, such as videos and text postings that are put on social media, to supplement their cases.

The Media

Social media is not the only form of media that can be used to both reinforce and battle rape myths. Mass media is consumed in America and around the world every day. The media can be used for many different purposes in society, including informing the public in order to influence policy agenda-setting, as well as gatekeeping. Gatekeeping occurs when the media determines what stories and issues are "important" for the public to consume while withholding "unimportant" stories. On the surface, it would seem that the media and policy making might not be connected. Voltmer and Koch-Baumgarten (2010) discuss

the "volatility" of the media and the focus on "newsworthy" events as reasons that make it may seem the media is not involved in policymaking decisions (2). Most of the time, something does not stay relevant in the news for long and is gone as soon as something more "breaking" comes along. This goes completely against the traditional way in which policy is developed and implemented. Often, changes in policy are motivated by structural issues and take time to carry out (Voltmer and Koch-Baumgarten 2010, 2). However, public opinion can serve as a most beneficial indicator of what policy changes are desired, but much of public opinion comes from what people read or see in the media. This can sometimes pose a problem for policymakers, because they are expected to act as leaders, not just on the whim of the public (Voltmer and Koch-Baumgarten 2010, 2).

Another problem that can come with issues of rape and sexual assault is the portrayal of women and "women's issues" in the media. Women's issues are often seen as "soft" news stories and not hard-hitting stories that demand a lot of airtime. An issue like sexual assault tends to be seen as a "women's issue" and therefore may not get the airtime it is due. Another issue with sexual assault and rape specifically in the media is how rape culture has permeated mass media. Often when a story about a rape or sexual assault is delivered, a woman's intentions are called into question. People often immediately ask, "What was she wearing?" or "Was she drunk?" or "Did she give him the wrong idea about her intentions?" The immediate victim shaming that happens when these cases are being reported on the news is startling. This happens often when college athletes are involved. Athletics, like football and basketball, bring a tremendous amount of revenue to college and universities as well as build up their reputation. This could cause some concern for the university when an accusation is brought against a star athlete; if the story gets out, people could stop making donations or going to games, it could possibly damage the reputation of the school (Ziering and Dick 2015). Because media coverage could serve as a signal to policy makers about what issues are important to the people, the rapid change of issues that are covered in regard to campus sexual assault, or to sexual assault in general, could send the message to these policy makers that it is not a concern to the public.

Title IX

Title IX of the Education Amendments of 1972, more commonly referred to as simply Title IX, was signed in June 1972 by Richard Nixon. Title IX guarantees that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance" (US Department of Education 2015). This covers a multitude of areas, including sexual harassment. If a student is sexually

assaulted or raped and their attacker remains on the campus, it could be deemed discrimination on the basis that it would create a hostile and unfit learning environment. These regulations apply to all institutions that receive federal funding, including "approximately 16,500 local school districts, 7,000 postsecondary institutions, as well as charter schools, for-profit schools, libraries, and museums … vocational rehabilitation agencies and education agencies of 50 states, the District of Columbia, and territories and possessions of the United States" (US Department of Education, 2015).

If a complaint is brought to the attention of the US Department of Education, they will initiate an investigation into the allegations brought against the school and proceed accordingly. This is exactly what has happened in recent years across the country.

Institutional Background

University of Georgia

The University of Georgia (UGA), located in Athens, has one of the most well-known college football programs in the region and was the first state-supported and state-chartered university in the country. It is one of four research universities in the University System of Georgia and has an enrollment of just over 35,000.

Georgia Institute of Technology

The Georgia Institute of Technology, or Georgia Tech (GA Tech), is located in Atlanta. They are a research university with a student enrollment of just over 23,000. Georgia Tech is one of the schools in Georgia that has been in the news regarding their sexual misconduct policies and issues of sexual assault and rape on campus, specifically those involved with fraternities and sororities. One fraternity recently came under fire when an email sent by a senior member detailed that the brothers should just get girls drunk enough and they will sleep with them ("GA Tech Fraternity Brother Sends 'Rape Bait' Email, Issues Apology Letter" 2013). This clearly violates Georgia Tech's sexual misconduct policy, which states that "consent cannot be gained by force, intimidation or coercion, by ignoring or acting in spite of objections of another, or by taking advantage of the incapacitation of another, where the respondent knows or reasonably should have known of such incapacitation" (Georgia Institute of Technology 2016, 2).

University of North Georgia

University of North Georgia (UNG), known as NGCSU in some of the data, is a state university with four campuses, the main one being located in

Dahlonega. UNG is one of the nation's senior military colleges and has a very large military population.

Georgia College and State University

Georgia College and State University (GCSU) is a state university located in Milledgeville, which is southeast of Atlanta and northeast of Macon. GCSU has an enrollment of over 6,000, which includes undergraduate and graduate programs.

Methods and Research Design

The intention of this policy study is to determine whether or not the sexual assault and misconduct policies of the University System of Georgia are sufficiently representative and inclusive and to see how different university policies compare to the USG policies. The schools selected for the study provided different settings, demographics of students, and sizes, allowing for a fairly inclusive study to determine if the policies currently in place at these institutions line up with USG policies and if any exceed the minimum requirements or need to be expanded. The University of Georgia and Georgia Institute of Technology are classified as research universities within the University System of Georgia. These institutions focus on research to benefit the state as a whole as well as a commitment to teaching and learning. The University of North Georgia and Georgia College and State University are classified as state universities, meaning that they focus on benefiting their region of the state as well as working to benefit students in an interdisciplinary way.

The choice of schools studied is significant because each institution represents different areas of the state and, therefore, different populations. However, they still have similarities in their policies. Locating the policies for these institutions was vital in order to determine to easily assessable they were. Most of the policies were fairly simple to find with a simple Internet search, while some took longer to find. The data that was studied were the definitions of relevant terms, where the individual policies drew inspiration from, what resources were readily available to members of the communities affected by the policies, and what committees or groups were available to advocate for the inclusivity of these policies. These categories were chosen because they would show the similarities and differences between the policies while also determining how inclusive they were.

The enrollment data for all four institutions appears in Table 1. The number of the enrolled students between the University of Georgia and Georgia Tech are fairly similar, while the University of North Georgia has almost double the student population of Georgia College and State University. The data also show

Table 1: Enrollment Data

	UGA	GA Tech	UNG	GCSU
Female	57.2%	30.6%	56%	61%
Male	42.8%	69.4%	44%	39%
White	68.4%	46.2%	76%	81.6%
Asian	10.1%	16.1%	3.4%	1.6%
Black or Other African American	8.3%	5.6%	4.6%	7.7%
Hispanic	5.00%	5.6%	11.4%	4.8%
American Indian or Alaska Native	<1%	<1%	0.2%	<1%
Hawaiian or Other Pacific Islander	<1%	<1%	*	<1%
Multiracial	3.4%	2.3%	3.0%	
Not Reported	4.6%	1.4%	1.4%	<1%
International	–	21.9%	–	–
Total Enrollment	36,574	25,034	18,219	6,889
PELL Funds	$27,350,719	$10,896,174	$25,179,845	$5,354,195

*UNG combines Asian and Hawaiian or Other Pacific Islander into a single group.
Sources: UGA: University of Georgia (2016); GA Tech: Georgia Institute of Technology (2015); UNG: University of North Georgia (2015b); GCSU: Georgia College and State University (2015b), with PELL Funds data for UNG from Georgia College and State University (2016).

that females make up the majority of enrolled students at all of the institutions with the exception of Georgia Tech, where there are twice as many males.

Findings

Analysis of the policies of the four institutions and the University System of Georgia (USG) reveal some similarities between the policies of all, as well as some telling differences. As can be expected, all four universities have very similar policies and policy language when compared to the USG policies. All five institutions include specific definitions of types of assault and relevant terms. Table 2 (pages 118 and 119) illustrates what details are included in the policies and how they compare to the University System of Georgia.

The University System of Georgia

The University System of Georgia (USG) is the institutional body that governs all public universities in Georgia. Within the USG, the Board of Regents is the governing committee that is made up of nineteen members appointed by the governor (University System of Georgia 2017a). One of the main duties of the

Board of Regents is to create policy that will allow "The Board … [to promulgate] rules and policies for the governance of the University System and its constituent units" (University System of Georgia 2017a). These rules and policies will function as a model and example for the member institutions' creation of policy. The current sexual misconduct policy for the USG was created in March 2015 and all member institutions are expected to have similar policies in place by July 1, 2016 (University System of Georgia 2016). Table 1 illustrates what details are included in the policies and how they compare to the University System of Georgia.

The USG policy uses the Violence Against Women Act (VAWA) as a model for their sexual assault policy and is committed "to offer students, faculty, counselors and law enforcement referrals for victim assistance and education about crime" (University System of Georgia 2017b). The title of this statute, however, is misleading. It implies that only women are seen as victims and protected by these policies. This is a problem because campus sexual assault and rape is not limited to the scenario of a woman being the victim and a man being the aggressor. Many "critics of the VAWA argue that because violence is a problem for both men and women, the fact that the VAWA only addresses the needs of women is both too narrow and too paternalistic; it suggests that women need special protection" (Conway, Ahern, and Steuernagel 2005, 217). Simply the VAWA referencing just women in the title gives the impression that the VAWA applies only to women.

However, those who support VAWA claim that the language of the act itself is gender neutral and can be applied to anyone (Conway, Ahern, and Steuernagel 2005, 217). The language in the USG policy seems to follow this pattern: "the University System of Georgia is committed to ensuring a safe learning environment that supports the dignity of all members of the University System of Georgia community" (University System of Georgia 2016, 3). The sexual misconduct policy never specifies that only women are to be covered but rather refers to victims and aggressors simply as people or persons. The policy also includes sex and gender as protected classes. This gender-neutral language would ideally cover all members of the campus communities, but using only the VAWA as a guide could pose some concerns.

The USG Web site has a section detailing the different resources and committees that are available through the University System of Georgia, their major committee being the Violence Against Women Steering Committee. This committee "was formed to identify practices for preventing and responding to violent acts against women" (University System of Georgia 2017b). This committee, while intended to work with campuses to create policy that will help the student body as a whole, seems to be gendered. The mission is to assist women, therefore leaving a large portion of the student populations unprotected.

Table 2: Campus Assault Policies Compared

	How is sexual assault defined?	What is being said about campus violence?	Groups, networks, and resources available for students	Relevant committees or groups within the organization
University System of Georgia (USG)	"Consent: Words or actions that show a knowing and voluntary willingness to engage in mutually agreed-upon sexual activity. Consent cannot be gained by force, intimidation or coercion, by ignoring or acting in spite of objections of another, or by taking advantage of the incapacitation of another, where the respondent knows or reasonably should have known of such incapacitation. Consent is also absent when the activity in question exceeds the scope of consent previously given. Past consent does not imply present or future consent. Silence or an absence of resistance does not imply consent. Minors under the age of 16 cannot legally consent under Georgia law."[1] "Dating violence: Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the alleged victim."[2] "Sexual Assault: An umbrella term referring to a range of nonconsensual sexual contact, which can occur in many forms including but not limited to rape and sexual battery."[3]	Uses Violence Against Women Act as a model. Includes sex and gender as protected classes	No specific mention of required or suggested on campus resources.	The Violence Against Women Steering Committee[4]
UNG	Exact same language as USG Policy	Includes sex and gender as protective classes.[5]	Does not list available resources online for students.	None
GCSU	No mention of silence not signifying consent, as well as minors under 16 not being able to consent as per Georgia law. Goes more in depth about the details of sexual assault.[6]	Includes sex and gender as protective classes.[7]	Includes 8 on-campus student resources and educational programs.[8]	Coordinated Community Response Team[9]

Table 2: Campus Assault Policies Compared (continued)

	How is sexual assault defined?	What is being said about campus violence?	Groups, networks, and resources available for students	Relevant committees or groups within the organization
UGA	Uses the Civil Rights Act of 1964 as a model, rather than USG Policy or VAWA policy. Defines sexual harassment, rather than sexual assault. The term consent is not specifically defined, although similar language to the consent definition used by the other institutions is included.[10] Includes details of threats and submission as forms of harassment.[11] Specifically includes same-sex harassment as a violation of the policy.[12]	Makes mention of adhering to federal and state laws.[13] Mentions many more protected classes.[14]	Includes 15 on-campus student resources and 3 community resources in policy.[15]	Lists specific University administrators that handle sexual assault/harassment cases.[16]
GA Tech	Uses same language as USG; however, does not include a definition of dating violence.	Links directly to the USG policy Does not list any specific protected classes.	Includes 8 on-campus student resources and "numerous" community resources.[17]	VOICE[18]

Notes:
1–4. (University System of Georgia, 2016)
5. (University of North Georgia, 2015a)
6–9. (Georgia College and State University, 2015a)
10–16. (University of Georgia, 2015)
17–18. (Georgia College and State University, 2015a)

There is also no mention in the policy or on the USG Web site itself of what on campus resources are required or recommended. This is a problem because different colleges and universities could have very different resources that may not be inclusive enough to benefit the students most effectively.

University of Georgia

At first glance, UGA's policies seem to be the most inclusive and comprehensive; they include many more protected classes such as different sexual orientations and gender identities rather than simply sex and gender. They are also the only ones who specifically include same-sex harassment as a violation of the policy. According to the *Washington Post*, seventeen forcible sex offenses were reported on campus between 2010 and 2012 (*Washington Post*). Their policies outline consent as:

> without clear words or actions that are knowingly, freely and actively given indicating permission to engage in mutually agreed upon sexual activity … or where a person is incapable of giving consent due to the use of drugs or alcohol, or due to an intellectual or other disability. (University of Georgia 2015)

However, there are some issues with this policy. UGA has recently come under fire in the media after changing their reporting methods as they pertain to sexual assaults. In 2014, UGA changed its reporting policy to include rapes that were committed off campus and reported to third-party groups. This new reporting practice caused the number of assaults at UGA to skyrocket, going from 6 in 2013 to 71 in 2014. However, the policy was reversed in 2015, bringing the number of assaults down to 11 (Shearer 2015). The reversal of this policy caused the data to fall more in line with what was happening at other southern universities, allowing UGA to seem much more ordinary in that sense.

The "Non-Discrimination and Anti-Harassment Policy" (University of Georgia 2015) on the surface seems like a reputable and beneficial policy. However, it includes all types of harassment and discrimination and does not isolate sexual harassment and misconduct. They also use the Civil Rights Act of 1964 rather than the USG policy or VAWA as a model. This poses a concern because it could lead to sexual misconduct and sexual assaults being lumped in with other types of harassment and not being addressed appropriately. UGA does, however, have a tremendous list of on-campus and off-campus resources for students listed in the policy as well as proper administrative contacts. The policy was fairly simple to locate.

Georgia Institute of Technology

Although Georgia Tech has had some issues with fraternities and sororities in relation to sexual misconduct on campus, they do have one of the only policies

that explains that incapacitation prevents consent. Incapacitation would include drunkenness, and the actions that would transpire in the situation described in the e-mail would not be considered consenting. This is one example of the positive details that are included in this policy. The policy also includes on-campus resources for students and other members of the university community. There are, however, some things that are vague or left out entirely. Georgia Tech's policy does not specifically define dating violence, which could lead to some ambiguity as to what would be protected under the policy. Dating violence, much like spousal violence and rape, is one of the actions that seem to have been harder to regulate and protect. Another limitation of this policy is that it does not list any specific protected classes but simply covers all members of the university community.

University of North Georgia

The enrollment for undergraduate and graduate students is just of 17,000 on all four campuses. The combined data for North Georgia College and State University and Gainesville Stave College as reported in the *Washington Post* for 2010 to 2012 was four forcible sex offences. The University of North Georgia policies, as of their 2015 publication, does not necessarily define consent, but rather defines lack of consent. Their definition states, "the act must be committed either by force, coercion, intimidation, or through use of the victim's mental incapacity or physical helplessness (including intoxication)" (University of North Georgia 2015b).

The Sexual Misconduct Policy for UNG uses the same language as the USG policy, almost word for word. It includes sex and gender as protected classes and the purpose of the policy is to ensure "a safe learning environment that supports the dignity of all members of the University of North Georgia community" (University of North Georgia 2015b). This very similar language to the USG policy. The UNG policy also uses gender-neutral language and includes sex and gender as protected classes. However, there are no resources for students listed on any university publications and there are no on-campus committees that were formed to ensure proper handling of these incidences. I found that the policy is fairly easy to find with a simple Internet search, while the whole USG policy was slightly more difficult to locate.

Georgia College and State University

GCSU's policies are similar to USG policies, as well as to the policies of the other institutions I studied. The GCSU policy does go more in depth about the definition of sexual assault and what would constitute it. However, there are some differences in GCSU's policies. Their definition of consent does not include anything about silence not signifying consent. Sex and gender are the only classes listed as protected classes. The policy lists eight on-campus resources

for students, including specific administrators and their contact information for students, as well as a copy of the incident reporting form that students would need to fill out in the event of an incidence of rape or sexual misconduct. There is an established committee that works with the campus community to create policies and resources that will benefit the university community as a whole.

Conclusions and Future Research

Some data show that up to 80–90 percent of sexual assault victims on college campuses do not come forward, according to a study that was carried out for the Department of Justice, which looked at two large schools (Gray 2014). Although this data may not apply to all campuses and situations, it does not seem entirely farfetched. Women and men alike often do not want to report their assaults for different reasons; they could feel ashamed and do not want people to know, or they may think administrators and authorities will not believe them. The data would strongly suggest that a rape culture that shames victims exists on college campuses. This is a societal construct that will not easily go away. Changing this culture will require policies that are comprehensive and inclusive in order to provide the best and most fulfilling environments for all members of university communities.

In order to address deficiencies in campus sexual assault and misconduct policies, research should focus on representativeness, inclusiveness, and comprehensiveness. Currently, most of the members of the Board of Regents committee responsible for policy are men. While that does not necessarily mean that they will not create the best and most inclusive policies, it is possible that increasing the number of women on the panel could place greater focus on these sorts of "feminine" issues. The same can be said for having a greater number of women on campus police forces and in other street-level administrative positions. By having more women available to victims, there is a possibility that reporting will go up and administrators will gain a better understanding of what is needed within the community and how that could be reflected in the policies.

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