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Enlightenment Traditions and the Legal and Political System of the United States of America

Edited by
Michał Urbańczyk, Kamil Gaweł, and Fatma Mejri

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Preface

The volume presented here is entitled *Enlightenment Traditions and the Legal and Political System of the United States of America*. It is already the twenty-second volume in the Adam Mickiewicz University Law Books series. In this series, scholars affiliated with Adam Mickiewicz University in Poznan present the results of their research, independently or in cooperation with other institutions. Often, they address topics that go beyond the framework of the Polish legal system. This is also the spirit of the present volume, which, reaching back to the American experience, is a continuation of the inquiries of volume sixteenth (*American Law and American Jurisprudence: Interpretations, Challenges, Procedures*) and volume nineteenth (*Fight Against Discrimination. Human Dignity in American Legal Tradition*). There is no particular need to justify an inquiry into the legal system of the most powerful country in the world. Each article addressing this topic enriches the Polish scientific debate with new perspectives. It is all the more satisfying to state that the present volume, by referring to a number of problems, significantly enhances the Polish scientific discussion space. In addition to the obvious scientific value, these efforts also have a popularizing aspect, which allows us to look at the United States of America from a different perspective.

In this volume, the authors have decided to analyze the legal and constitutional issues by referring to the origins of American constitutionalism, which in its basic form is a child of the Age of Enlightenment. The conviction that it is possible to describe and order reality by means of reason lies at the heart of rationalism. This belief was reflected in the progressive solutions adopted by the Founding Fathers, leading to the separation of powers or the Bill of Rights of the United States. These, and other solutions, provide our authors with a source of inspiration for both historical and contemporary analysis. Although characterized by varying degrees of detail, they draw from the same Enlightenment source, frequently raising questions about its relevance.

The editors of the volume would also like to thank the Polish Rationalist Association, which subsidized the creation of the volume. This organization has been

working for years on behalf of individual rights and freedoms and the promotion of science. It affirms rationalism and thus refers in a particularly affirmative way to the Age of Enlightenment and its intellectual effects, such as the Constitution of the United States of America.

M.U., K.G., and F.M.

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Introduction: Enlightenment Roots of American Law

Michał Urbańczyk, Kamil Gaweł,** and Fatma Mejri****

The anthropocentric orientation of the Age of Enlightenment and the recognition of reason as the main instrument in the cognition of the world certainly had a huge impact on the development of vitally important legal and political institutions and mechanisms. Among the basic ideas of the Enlightenment, understood as a philosophical movement that emerged in Europe during the seventeenth and eighteenth centuries, are rationalism, empiricism, individualism, and the idea that people had certain natural rights. Although Europe is considered the birthplace of Enlightenment thought, Enlightenment ideas went beyond the old continent, reaching various corners of the world, including, of course, America, and undoubtedly had a significant influence on the legal and political system of the United States. The United States of America was formed on the basis of the ideas and fundamental beliefs of Montesquieu, Jean-Jacques Rousseau, and Voltaire (and others). The Enlightenment emphasizes the basic rights of the individual, such as liberty, equality, and property, placing the individual at the center and using them as a point of reference. This resulted in the development of the concept of human rights as universal and inalienable, as reflected in many constitutions and declarations of human rights, including the Declaration of the Rights of Man and of the Citizen during the French Revolution and in the United States Declaration of Independence. In addition, philosophers like Montesquieu developed the theory of the separation of

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powers, which resulted in the establishment of constitutional government. In the United States, the Constitution established a system for the separation of powers and introduced innovations such as the independence of the judiciary and limits on the power of those governing.

The Declaration of Independence, penned in 1776, stands as a notably lucid and concise articulation of the Enlightenment ideals that had emerged during the eighteenth century. It was profoundly shaped by both the European Enlightenment and domestic philosophical thinking, which sought to apply scientific methodologies to the realms of politics, science, and religion. This intellectual movement emphasized religious tolerance and the restoration of literature, art, and music to their rightful positions as significant subjects of study in academia. The American Enlightenment not only laid the intellectual groundwork for the American Revolution but also served as the catalyst for the composition of the Declaration of Independence. Prominent figures in the American Enlightenment, including political luminaries such as John Adams, James Madison, Alexander Hamilton, Benjamin Franklin, and Thomas Jefferson, held Enlightenment principles in high regard. These Enlightenment philosophers placed a premium on ideals like equality, freedom, and individual rights. In response to the British government's perceived failure to ensure equal rights for the American colonies, Thomas Jefferson, under the influence of John Locke's philosophy, incorporated into the Declaration of Independence demands for the rights to life, liberty, and the pursuit of happiness.[1]

James Madison, conversely, directly integrated Enlightenment concepts into the Bill of Rights, championing the freedoms of speech, religion, and assembly. The framers of the US Constitution drew inspiration from the social contract theories of philosophers such as Rousseau, Locke, and Montesquieu. In the spirit of Enlightenment thought, American thinkers called into question the unchecked authority of both church and state. They distanced themselves from the ongoing power struggles between these entities and asserted that the church should not intrude on an individual's temporal aspirations. Furthermore, they maintained that a government, elected by the people, must act in the best interests of its citizens, or it would be subject to overthrow. Consequently, the US government was structured into three branches, in accordance with Montesquieu's ideas, with the express goal of establishing a system of checks and balances. This system has endured as a hallmark of American governance, ensuring the protection of individual liberties and the prevention of undue concentration of power.

Nowadays, the United States is often presented in contrast to Europe, especially in the context of the political systems and legal solutions used in these two regimes. This is because they seem extremely different and distant yet derive their

[1] Harold J. Berman, "The Impact of the Enlightenment on American Constitutional Law," *Yale Journal of Law & the Humanities* 4, no. 2 (1992): 311–34.

roots from the same Enlightenment principles and ideas. Through the awakening of a sense of independence and the desire to separate from Britain, Americans, with a special role accorded to the founding fathers, created a separate state based on the world's first constitution. Even at its outset, one can feel the not-inconsiderable influence of Enlightenment ideas expressed through the oft-repeated phrase "We the people." This already shows the timeless nature of this document, in which power was invested in the people, whose representation of the will became the president. Reflected in just these three words was the idea proposed by philosophers like Locke and Rousseau, which suggested that governments derive their legitimacy from the consent of the governed. It thus established a government based on the will of the people.

The Constitution reflects many key Enlightenment principles and ideas. It was based on popular sovereignty, which asserts that the ultimate authority and power of the government derive from the consent of the governed, the separation of powers advocated by Enlightenment philosophers like Montesquieu, respect for the rights that were contained within the Bill of Rights, thus emphasizing the importance and value of the individual in Enlightenment thought, and much more factors. The foundation of the US Constitution is firmly grounded in the tenets of Enlightenment philosophy, embracing and integrating many of its fundamental principles and concepts. The framers of the Constitution were driven by a profound commitment to establishing a government that would serve as a bulwark against any encroachment on individual rights, thus advancing the cause of liberty, and curbing the latent dangers of despotic rule. Their visionary work was intricately woven into the fabric of Enlightenment ideals, which aspired to bring about a fairer and more rational society guided by reason and the fundamental dignity of individuals. Many other democratic legal and political systems in Europe were shaped by the same values. Although today it seems that these systems are sometimes almost radically different, we can find their common roots. Moreover, it is not the case, as it is out of the systems' common roots that its contemporary problems arise, which also consist of current political and legal tendencies.

In order to present the issue of the influence of the Enlightenment traditions on the political and legal system of the United States and the system as such, along with its key rights and freedoms, as fully as possible, this monograph is divided into three parts. The first part, "Ideas and Interpretations," presents the ideological basis, the influence of the founding fathers on the shape of the American system, and the roots and foundations on which the basic institutions were established. The second part, "Legal and Political System and Its Consequences," deals with issues regarding the formation of power and its control based on Montesquieu's principle of the separation of powers. This separation of powers, as outlined in *The Spirit of the Laws*, greatly influenced the structure of the United States government, emphasizing the importance of separating powers among the legislative, executive, and

judicial branches to maintain a system of checks and balances and prevent tyranny. In this case, researchers have focused particular interest on the impeachment procedure or the relationship between the legislative and executive branches in the context of the budget process. Congressional oversight has its roots in the system of checks and balances established by the Founding Fathers in the US Constitution, which grants Congress the power to legislate and appropriate funds.

The separation of powers within the US Constitution is bolstered by a system of checks and balances, a fundamental cornerstone of the American system of government. Each branch, whether it be legislative, executive, or judicial, possesses mechanisms that allow it to influence and monitor the actions of the other branches. For instance, should the President exercise their veto power, Congress retains the ability to override it with a two-thirds majority vote, ensuring that decisions are not unilateral. Congress also holds the power to impeach and remove a sitting President or federal judge, further underscoring the accountability of executive and judicial officials. Meanwhile, the President's authority to appoint federal judges and justices is subject to Senate confirmation, guaranteeing that these important roles are performed judiciously. The judiciary itself possesses the power of judicial review, enabling it to declare laws or executive actions unconstitutional, thus safeguarding the integrity of the Constitution. Finally, Congress wields the power of the purse, allowing it to control the budget and funding for government operations, which can be used as a means to influence and oversee the executive branch's policies and priorities. This intricate system of checks and balances ensures that no single branch becomes overly dominant and that the principles of liberty, accountability, and stability remain paramount within the US government.

The last part of this monograph—"Liberties, Rights, and Procedures," presents texts collected from authors that deal not only with rights as such but also with contemporary problems confronting the basic rights, freedoms, and related legal-political procedures formed under the Constitution and case law. Undoubtedly, a key role in regard to the American system of rights and freedoms is played by The Bill of Rights, the first ten amendments to the Constitution, which explicitly protects individual rights such as freedom of speech, freedom of religion, and freedom of the press, a right to a fair trial. These rights are rooted in Enlightenment principles that emphasized the importance of individual liberties. However, these rights today face different problems. The above chapter describes, among other issues, the problem of underage illegal immigrants, a wave of whom is flooding America, as well as the impact of paid education on the crisis of legal education, and the issue of the right to abortion in the context of the *Dobbs v. Jackson Women's Health Organization* ruling, which moved almost the entire world.

This monograph discusses in a particularly unique way the Enlightenment influence on the shape and development of the legal institutions and politics of the Unit-

ed States. Beginning with the historical aspects underpinning the system, moving through the system itself to the contemporary problems faced by the United States in the context of some of its most fundamental rights and freedoms, the reader gains an understanding of the legal and political system of the United States of America. In addition, due to the wide range of topics touched upon in the studies by various authors, a summary is not included at the end of this book.

Part I

IDEAS AND INTERPRETATIONS

Chapter 1

Three Pillars of the American Founding

*Marcin Gajek**

INTRODUCTION

The Founding Era occupies a very special place in the American political tradition. Countless books and articles discussing various aspects of the political ideas of the Founders have been published and continue to be published. The fascination of both scholars and the general public with the Founding is understandable and could be, at least partly, explained by the desperate need of a relatively young nation to constitute its own national political mythology. As a result, the Founding Fathers are frequently presented as national heroes, almost demi-gods, who founded a new nation on philosophically sound principles and skillfully designed its political institutions in a fashion resembling the ancient lawgivers, such as Solon or Lycurgus. However, what often escapes our attention is the extent to which these men operated within the frameworks of both religious and philosophical ideas inherited from their ancestors. That is one of the reasons why Russel Kirk decided to write about *The Roots of American Order* instead of *The Creation of the American Republic* as Gordon S. Wood did.[1] Kirk's purpose was to demonstrate that "America's order did not arise *de novo* but emerged from a patrimony of thought and the lessons of experience."[2] Obviously, that does not mean that the Founders were slavishly attached to the past, nor that they merely replicated the old institutions on American soil. They

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[1] Russell Kirk, *The Roots of American Order* (Chicago: Open Court Publishing Company, 1977); Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (Chapel Hill: The University of North Carolina Press: 1987).

[2] Jeff Polet, "Did America Have a Founding?", Intercollegiate Studies Institute, February 8, 2021, https://isi.org/modern-age/did-america-have-a-founding/.

Marcin Gajek, "Three Pillars of the American Founding." In *Enlightenment Traditions and the Legal and Political System of the United States of America*, edited by Michał Urbańczyk, Kamil Gaweł, and Fatma Mejri, 23–41. Poznań: Adam Mickiewicz University Press, 2024. © Marcin Gajek 2024. DOI: 10.14746/amup.9788323242543.2.

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truly were people of their times, and the influence of eighteenth-century Enlightenment philosophy on American legal and political institutions is beyond any dispute. The purpose of this article is simply to demonstrate that certain political concepts, which we usually identify with the Age of Reason, could be ingrained in America more naturally due to the prior existence of religious and political ideas, which had already taken root there during the colonial era. I will discuss certain fundamental convergences and discrepancies between these intellectual trends and demonstrate how the interplay between them resulted in the shaping of a specifically American, and thus unique, political tradition.

PROTESTANTISM

The Puritans were, according to Herbert L. Osgood, the only "politically self-conscious" group out of the early settlers arriving in America,[3] and for that reason we should discuss their contribution to American political tradition first. It needs to be stressed, however, that this contribution is multi-faceted. On the one hand, it has been observed on numerous occasions that Puritanism (and Protestantism in general) created favorable conditions for the growth of political liberalism and a democratic form of government. On the other hand, the history of American puritanism includes a quasi-theocratic regime established in Massachusetts, accompanied by an open hostility towards democracy and egalitarianism. The foundations for the latter were laid by Calvin himself, who taught that the church was a community of believers to which only those can be admitted whose piety had been rigorously tested by others. Proving to oneself and to fellow believers that one was an elect of God was a permanent obligation. It also required strict discipline. Although the Christ alone "ought to rule and reign in the Church," under his absence here on Earth "he uses the ministry of men whom he employs as his delegates" to do "his works by their lips." Thus, the clergy should occupy a privileged position, since they are "his ambassadors to the world" and "the interpreters of his secret will."[4] Needless to say, a church based on the foregoing convictions could hardly be egalitarian. The elitist element was introduced and justified by Calvin as part of God's wisdom. Additionally, his aversion to disorder and anarchy resulted in a system that greatly limited freedom both of thought and of religious practice.

Naturally, many of the foregoing views were transferred to America by the Puritans. The famous sermon *A Model of Christian Charity* delivered by John Win-

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[3] Herbert L. Osgood, "The Political Ideas of the Puritans," *Political Science Quarterly* 6, no. 1 (1891): 1.

[4] John Calvin, *Institutes of the Christian Religion*, trans. John Allen (Philadelphia: Presbyterian Board of Publication, 1816), vol. 3, book 4, chap. 3, 54.

throp in 1630 begins with the extensive justification of social stratification, which is presented by the preacher as a part of God's plan.[5] While the entire sermon is community-oriented and emphasizes the obligations of (especially more prosperous) members of the community towards each other (the very essence of 'Christian charity'), it clearly sanctions social inequalities, which are easily translated into political realities. On a different occasion, Winthrop openly criticized democracy, which did not possess any sanction in the Bible and was frequently "accounted the meanest and the worst of all forms of government" among most nations. It was "branded with reproachful epithets,"[6] while historians noted its instability and tendency to disorder. Winthrop's views on this matter were shared by a substantial part of the Puritans. Suffice to mention a personal letter from John Cotton, in which he wrote: "Democracy, I do not conceive that ever God did ordain as a fit government, either for church or commonwealth."[7] The Boston preacher vehemently defended a political system in which only church members of good standing would enjoy the right to vote and hold public offices and, by analogy, condemned a democratic design in which policy decisions would be made by popular assemblies.

To summarize, the Puritans settling in America in the first half of the seventeenth century were by no means revolutionaries. They did not envision a radically egalitarian society. "The political theory which first came to the front in Massachusetts and which dominated its policy for half a century was moderately aristocratic."[8]

Yet, it would be a mistake to believe that the antiegalitarian attitudes of Winthrop and Cotton dissociate them entirely from the views of the Founding Fathers. On the contrary, in the age of the American Revolution, hardly any leading American statesmen considered himself a democrat. While they all shared strong republican sentiments, combined with the aversion towards monarchy, the majority of them viewed democracy with open antipathy. They perceived it as the rule of an unpredictable mob and, consequently, dismissed it as a form of government that does not provide stable frameworks for practicing liberty. For these reasons, they preferred the republican form of government, which "refine(s) and enlarge(s) the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country." Their vision of the government, based on the principle of "the delegation of the government . . . to a small number of citizens elected by the rest"[9] was actually quite close to the views of these Puritan

[5] John Winthrop, "A Model of Christian Charity," in *Puritan Political Ideas, 1558–1794*, ed. Edmund S. Morgan (Indianapolis, New York: The Bobbs-Merrill Company, Inc., 1965), 70–73.

[6] Quoted after Osgood, "The Political Ideas of the Puritans," 20.

[7] John Cotton, "Copy of a Letter from Mr. Cotton to Lords Say and Seal in the Year 1636," in *Puritan Political Ideas*, 163.

[8] Osgood, "The Political Ideas of the Puritans," 19.

[9] James Madison, "Federalist No. 10," in *The Federalist Papers*, ed. Clinton Rossiter (New York: Penguin Publishing Group, 2003), 76.

leaders who advocated a Presbyterian (rather than congregational) model of church organization, in which the power was entrusted to the hands of 'elders' (in practice, a body composed of the elite, elected both from the clergy and laymen).

That said, Puritanism also contained numerous elements which paved the way for the democratic political institutions in America. And, as in the previous case, the roots of these 'progressive' elements can be traced back to Calvin himself. Despite the semi-authoritarian features of the regime he has established in Geneva, the French theologian on numerous occasions expressed his negative opinion of monarchy as a form of government easily degenerating into tyranny. He certainly did not believe in the divine right of kings to rule. While assuming the absolute sovereignty of God, Calvinism at the same time was hostile to absolutism both in the church and in the state. Overall, as Osgood argues, "Calvinism, in spite of the aristocratic character which it temporarily assumed, meant democracy in church government."[10] In the political debates of the age, it consequently placed its bets "against absolutism and on the side of limited or popular power."[11]

The American Puritans followed their teacher in this regard as well. The already quoted Winthrop, while critical of democracy, maintained that political power must be limited and that no government should be arbitrary. He argued that while magistrates should possess a relatively large administrative power, the freemen were the real source of political authority and should have a right to elect their representatives.[12] Also in this regard, the views of the Massachusetts governor were accompanied by those of John Cotton. In his commentary on the Book of Revelation, he saw it necessary "that all power that is on earth be limited, Church-power or other."[13] He based his views in this regard on a conviction that power has a corruptive influence on man, thereby laying grounds for precisely that sort of argument which more than a century later James Madison so eloquently advanced in the *Federalist No. 51*.[14] The Puritan anthropology based on the concept of the original sin provided an additional argument for those of the Framers, who propagated the necessity of basing the constitutional framework on the division of powers and the mechanism of checks and balances.

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[10] Herbert L. Osgood, "The Political Ideas of the Puritans II," *Political Science Quarterly*, 6, no. 2 (1891): 229. It needs to be added that in the realities of the colonial New England the Puritan model of church organization was easily transferred into domain of politics.

[11] Osgood, "The Political Ideas of the Puritans," 8.

[12] Osgood, "The Political Ideas of the Puritans," 20.

[13] John Cotton, "An Exposition Upon the Thirteenth Chapter of the Revelations," in *American Political Thought: Readings and Materials*, ed. Keith E. Whittington (New York: Oxford University Press, 2017), 25.

[14] "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."—James Madison, "Federalist No. 51," in *The Federalist Papers*, 319.

On the other hand, however, Puritan theology emphasized certain 'liberal' elements in human nature. After all, God equipped man with both reason (necessary to make informed, rational decisions) and free will. It was beyond dispute for the Puritans that freedom of man was a part of God's plan. Puritan political archetypes were republican in nature. They included both resistance to tyranny and the glorification of freedom of choice.[15] But not only that. Through the concept of a covenant, revitalized and reinterpreted in a specific protestant fashion, they prepared the grounds for liberal political concepts. The Puritan clergyman and cofounder of New Haven, John Davenport, argued in his *Discourse about Civil Government in a New Plantation* that the divine origins of power not only sanction and strengthen it but also impose on public official additional obligations. The ultimate purpose of government is "the public and common Good."[16] Power executed on behalf of the Creator must reflect his intentions. And since he has blessed man with the gifts of free will and reason, political authorities must create conditions allowing man to make use of those gifts. Ultimately, among the fundamental duties of the government, which result directly from God's plan, is the requirement to guarantee "life, good order, liberty and prosperity."[17] As Alice Baldwin rightly noted, the theory of government delivered by the Puritan clergyman constituted the basis for the system in which the rights and liberties of the people must be protected by the restrictions imposed upon the rulers. In a very Lockean fashion (though more than a quarter of a century before the publication of the *Two Treaties of Government*), Davenport argued that "governments are limited by the purpose for which they were founded, viz. the good of the people."[18]

The concept of the (new) covenant with God, developed by Calvin in his *Institutes of the Christian Religion*, also proved to have profound democratic implications for church organization. According to the teachings of one of the first English Separatists, Robert Browne, "the church is a company of a number of Christians or believers, which by a willing covenant made with their God are under the government of God and Christ."[19] The concept of a covenant with God, however, was easily translated into political terms. In 1639, the New England clergy stated that "Every city is united by some covenant among themselves; the citizens are received into *jus civitatis*, or right of city privileges by the same oath."[20]

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[15] Cf. Stanisław Filipowicz, *Pochwała rozumu i cnoty. Republikańskie credo Ameryki* (Kraków, Warszawa: Znak, Fundacja im. Stefana Batorego, 1997), 51.

[16] John Davenport, *A Discourse about Civil Government in a New Plantation Whose Design Is Religion* (Cambridge, Mass.: Samuel Green and Marmaduke Johnson, 1663), 17, accessed December 18, 2022, https://quod.lib.umich.edu/e/evans/N00042.0001.001/1:2?rgn=div1;view=fulltext.

[17] Alice Baldwin, *The New England Clergy and the American Revolution* (Durham: Duke University Press, 1928), 23.

[18] Baldwin, *The New England Clergy and the American Revolution*, 23.

[19] Quoted after Osgood, "The Political Ideas of the Puritans," 14.

[20] Quoted after Osgood, "The Political Ideas of the Puritans," 24. One of the most comprehensive discussions of the contribution of the Protestant concept of covenant into American political and legal

Apart from paving the way for the concept of a social contract (one of the constitutive elements of the political philosophy of liberalism), the idea of a covenant found its logical complement in the conviction that legitimate government can only be based on the consent of the governed (which later became one of the central philosophical ideas of the *Declaration of Independence*). Richard Hooker offered one of the best-known expressions of that doctrine in his famous sermon delivered in 1638, in which he observed that "the foundation of society is laid firstly in the free consent of the people" and that "the choice of public magistrate belongs unto the people by God's own allowance."[21] There is widespread agreement among scholars that Hooker's views greatly influenced the form and the content of the *Fundamental Orders of Connecticut* adopted in 1639 and celebrated as the first written constitution in American history. The citizens of the three towns that made up the colony declared in the document's preamble that they "associate and conjoin" themselves "to be as one Public State or Commonwealth"[22] thereby practicing the social contract well before it was advanced as a theoretical concept by Thomas Hobbes and later by John Locke.

Progressive ideas, despite aversion presented by some more conservatively oriented Massachisetts clergy, were diffusing quickly and ultimately have founded perhaps their best-spoken advocates in Roger Williams and John Wise. The former, expelled from the Massachusetts Bay Colony, founded the Rhode Island and Providence Plantations on the basis of an egalitarian constitution that provided for majority rule and guaranteed religious liberty. As he argued in one of his best-known treaties, "civil states with their officers of justices in their respective constitutions and administrations are . . . essentially civil, and therefore not judges, governors, or defenders of the spiritual or Christian state and worship,"[23] thus laying the foundations for the doctrine of the separation of state and church. He also believed that "the sovereign, original, and foundation of civil power lies in the people" and that, consequently, all governments are established by the people and possess "no more power, nor for no longer time, than the civil power or people consenting and agree-

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tradition was offered by Donald S. Lutz and Jack D. Warren in *A Covenanted People: The Religious Tradition and the Origins of American Constitutionalism* (Providence: John Carter Brown Library, 1987).

[21] James Hammond Trumbull, "Abstracts of Two Sermons by Rev. Thomas Hooker," in *Collections of the Connecticut Historical Society* (Hartford: Published for the Society, 1860), 1: 20.

[22] "Fundamental Orders of Connecticut," The Avalon Project. Documents in Law, History and Diplomacy, accessed December 18, 2022, https://avalon.law.yale.edu/17th_century/order.asp.

[23] Roger Williams, "The Bloody Tenet of Persecution for Cause of Conscience," in *American Political Thought*, eds. Kenneth M. Dolbeare, and Michael S. Cummings (Washington: CQ Press, 2010), 19. In the same treaty, he argued that "magistrates, as magistrates, have no power of setting up the form of church government, electing church officers, punishing with church censures, but to see that the church does her duty herein. And on the other side, the churches as churches, have no power . . . of erecting or altering forms of civil government, electing of civil officers, inflicting civil punishment."—Williams, "The Bloody Tenet of Persecution for Cause of Conscience," 21.

ing shall betrust them with."[24] While Williams' views might have been too radical for the Massachusetts clergy in the 1640s, only seven decades later John Wise could openly claim that "Democracy is Founded in Scripture" without risking banishment.[25]

Finally, the congregational model of church organization established in Plymouth, despite initial resistance from the Massachusetts clergy, who favored Presbyterianism, quickly became dominant in all the colonies which had their roots in Massachusetts Bay. It is crucial, however, to point out that in seventeenth-century New England, religious and political views were closely intertwined and theories regarding the proper church organization were easily translated into the domain of politics. Religious congregations quickly became the basis for political self-government. Puritan congregations offered their members opportunities for developing civic and political skills by giving them direct control over all important aspects of how the community functioned: from the erection of a church building, through hiring a preacher, to supervising the finances. The congregations were, in effect, miniature political systems with diverse interests, leaders and committees, conflicts, and consensus. In other words: Puritanism helped to develop a participatory political culture—a necessary element of a well-functioning form of government based on the idea of self-government. At the beginning of the eighteenth century—several decades before the American Revolution began—the intellectual grounds for it had been already prepared by merging religious beliefs with political vocabulary. Since we have already discussed the former, let us now turn our attention to the latter.

THE "WHIG SCIENCE OF POLITICS"

While considering the origins of American constitutionalism, Gordon S. Wood argues that "the Founders who created America's constitutional structure at the end of the eighteenth century were Englishmen with a strong sense that they were heirs of the English tradition of freedom."[26] That is why the philosophical and legal arguments used by them while justifying separation from Great Britain replicated, to a great extent, the language and vocabulary of the English Whigs. The similarity of the arguments was so significant that some scholars consider the American Revo-

[24] Williams, "The Bloody Tenet of Persecution for Cause of Conscience." Osgood claims that although for specific historical, social, and political circumstances at times Puritan clergy supported theocracy, "the theory of the secularized state" was "inherent in the very idea of the Reformation" and that we can find the "germ of it" already in the writings of Calvin—Herbert L. Osgood, "The Political Ideas of the Puritans II," 211–13.

[25] John Wise, "Democracy is Founded in Scripture," in *American Political Thought*, 23–28.

[26] Gordon S. Wood, *The Idea of America. Reflections on the Birth of the United States* (New York: Penguin Press, 2011), 173.

lution as one of the "three British revolutions."[27] The writings of James Harrington, Algernon Sidney, John Trenchard, and Thomas Gordon were, next to those of John Locke, Charles Montesquieu, and David Hume, among those most frequently cited by the creators of the American republic.

What made their writings so popular among Americans was the fact that the 'Whig science of politics' provided archetypes that perfectly suited the political situation of colonists considering separation from the Crown. It juxtaposed freedom (identified with parliamentarism and self-government) and tyranny (associated with the personal power of the kings). The Whigs embraced an early idea of the natural rights of the people, whom they regarded as the true sovereign. "The participation by the people in the government was what the Whigs commonly meant by political or civil liberty."[28] English Whigs, just like their American counterparts, were predominantly Puritans and Congregationalists. Their views on the proper organization of the church went hand in hand with the appreciation of self-government. However, since direct democracy, while remaining the ideal, was impossible to practice in the realities of modern societies, Whigs embraced and put great emphasis on the idea of representation. This, logically, resulted in a conviction about the supremacy of parliament in the constitutional structure, since the members of parliament are directly elected by citizens and therefore can truly represent their interests, as well as be easily held accountable for their actions. From the perspective of the Whigs, representatives should strictly follow the instructions of their constituents strictly and therefore they truly represent the will and interests of the people.

Overall, the Whigs favored a republican form of government (identified with liberty, virtue, and public interest) and regarded monarchy with disdain (as a form of government easily degenerating into tyranny).[29] Their political ideas included, as Wood phrased it, a "paranoic mistrust of power"[30] based on the conviction that all power has a tendency to degenerate and people administering it tend to abuse it. "Men that are above all fear, soon grow above all shame," reminded the authors of *Cato's Letters*.[31] "Considering what sort of a creature man is, it is scarcely possible

[27] See John G. A. Pocock, ed., *Three British Revolutions. 1641, 1688, 1776* (Princeton: Princeton University Press, 1980).

[28] Wood, *The Creation of the American Republic. 1776–1787*, 24. It is worth noting that the classical republican tradition defined citizenship in the same terms: "The citizen . . . is defined by no other thing so much as by partaking in decision and office"—Aristotle, *Politics*, trans. Carnes Lord (Chicago: University of Chicago Press, 2013), book 3, chap. 1, 1275a23–24, 63.

[29] Trevor Colbourn's *The Lamp of Experience. Whig History and the Intellectual Origins of the American Revolution* (Chapel Hill: University of North Carolina Press, 1965) remains one of the best overviews of the English Whigs' political theories and its adoption by the Founding Fathers. Cf. Wood, *The Creation of the American Republic, 1776–1787*, 3–45.

[30] Wood, *The Creation of the American Republic, 1776–1787*, 17.

[31] Thomas Gordon and John Trenchard, *Cato's Letters*, vol. 1 (Indianapolis, 1724), Liberty Fund Network, accessed December 20, 2022, https://oll.libertyfund.org/title/gordon-cato-s-letters-vol-1-november-5-1720-to-june-17-1721-lf-ed.

to put him under too many restraints, when he is possessed of great power."[32] The constitutional limitations imposed on the rulers are, therefore, a *sin qua noncondition* of the preservation of liberty. The 'Whig science of politics' incorporated the Puritan view of human nature as being prone to evil. Men are governed "by their passions; which being boundless and insatiable, are always terrible when they are not controlled," warned Gordon and Trenchard.[33]

But the need to control the rulers is preceded by the need to control the ruled. The Whigs' glorification of liberty should not be mistaken for the consent for anarchy. Human nature itself provides the strongest arguments for the necessity of political power. Without a government controlling human passions, liberty quickly transforms into a license. Overall, individual liberty cannot exist without order implemented by lawmakers, but it is equally in danger if the power of rulers is not bounded by laws. Madison's already quoted argument formulated in the *Federalist No. 51* simply restated the knowledge inherited by the Founders from their English predecessors. Constitutional government, which embodies both the concept of the rule of law and that of limited government, is therefore one of the cornerstones of liberty. Power based on the arbitrary will of the ruler is the very definition of tyranny. "Whenever law ends, tyranny begins," succincyly observed Locke.[34]

However, laws alone are not a sufficient guarantee of freedom. The other necessary condition is virtue. Moreover, in this regard, the Whigs followed the path laid out by classical republican thinkers. *Res publica*, the form of government dedicated to the common good and based on broad political participation, cannot survive without citizens capable of thinking about and acting for the public good. Liberty is conditioned by civic virtue, understood as the ability to accept reasonable sacrifices for the common good. Rejecting virtue is equivalent to the primacy of egoistic instincts. When virtue disappears, the commonwealth dies. The republic degenerates, as Aristotle warned, into democracy, the rule of the self-interested mob. And if one trusts the opinion expressed by Plato, democracy sooner or later turns into tyranny. On the eve of the American Revolution, political writers on both sides of the Atlantic bemoaned corruption and moral decay as the primary sources of the political crisis. "England's very greatness as an empire had created a poison which was softening the once hardy character of the English people, sapping their time-honored will to fight for their liberty, leaving them, as never before in history, weakened prey the designs of the Crown."[35] The English Constitution, once admired all over the world and praised as the foundation of Englishmen's political freedom, had been undermined "till at length, under the hands of bribery and corruption, it

[32] Gordon and Trenchard, *Cato's Letters*.

[33] Gordon and Trenchard, *Cato's Letters*.

[34] John Locke, *Two Treatises of Government* (Cambridge, Mass.: Cambridge University Press, 1967), chap. 16, 202, 418.

[35] Wood, *The Creation of the American Republic, 1776–1787*, 36.

seems *rotten* to the very core," as Enoch Huntington, a clergyman from Connecticut, phrased it in his sermon in 1775.[36]

In light of the foregoing remarks, it should not surprise us that the American Revolution was frequently presented by its adherents as an act of moral regeneration. On the eve of the announcement of the Declaration of Independence, John Adams wrote in a letter to his wife Abigail that "the new Governments we are assuming . . . will require a Purification from our Vices and an Augmentation of our Virtues."[37] Things were seen in the same vein by his cousin Samuel Adams, who viewed the American revolution as a "golden opportunity of recovering the Virtue and reforming the Manners of our Country."[38] Despite their preoccupation with properly designed political institutions—as attested by the ratification debate—the Founding Fathers (just like the English Whigs) remained faithful students of the ancient authors, who believed that republican government cannot last without civic virtues. Without them, even the most wisely and carefully framed political institutions are doomed to failure. During the ratification debate in Virginia, James Madison called it a "chimerical idea" to suppose "that any form of government will secure liberty or happiness without any virtue."[39]

Thus, the American Revolution was supposed to be an act of moral regeneration. But at the same time, it was presented on numerous occasions as an act of political regeneration, a return to the true principles of English freedom, which have their roots in the Magna Carta and have been solidified by the Glorious Revolution and its offspring, the Bill of Rights. On countless occasions, American colonists presented their resistance to the Crown in terms of the fight for their rights as Englishmen.[40] They repeatedly claimed, as James Wilson did in 1775, that it was "both the letter and the spirit of British Constitution" which provided grounds for their actions.[41] Americans "sincerely believed," argues Wood, "they were not creating any new rights or new principles prescribed only by what ought to be, but saw themselves claiming 'only to keep their old privileges,' traditional rights and principles of all Englishmen, sanctioned by what they thought had always been."[42] That is one of the reasons why

[36] Quote after Wood, *The Creation of the American Republic, 1776–1787*, 12.

[37] John Adams, "John Adams to Abigail Adams, July 3, 1776," in *The Political Writings of John Adams*, ed. George W. Carey (Washington: Regnery Publishing, 2000), 652.

[38] Quoted after Pauline Maier, *The Old Revolutionaries: Political Lives in the Age of Samuel Adams* (New York: Vintage Books, 1982), 33.

[39] Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (New York: B. Franklin, 1888), 3: 537.

[40] See, for example, "The Resolutions of the Stamp Act Congress, October 19, 1765," in *Principles and Acts of the Revolution in America*, ed. Hezekiah Niles (Baltimore: W.O. Niles, 1822), 456–57 or "Declaration and Resolves of the First Continental Congress, October 14, 1774," Teaching American History, accessed December 21, 2022, https://teachingamericanhistory.org/document/declaration-and-resolves-of-the-first-continental-congress.

[41] Quoted after Wood, *The Creation of the American Republic, 1776–1787*, 12.

[42] Wood, *The Creation of the American Republic, 1776–1787*, 13.

the American Revolution was frequently characterized as quintessentially conservative. It was not so much a rebellion as an act of restitution in the eyes of the people who carried it out. Just like the political writings of the Whigs guided the Founders' pens, the British Constitution guided their actions.

However, the importance of Whig political theories for shaping American political culture in the Founding era extends beyond the mere fact of their English credentials. One of their most profound contributions to the political theory of the era was their ability to combine the classical republican tradition with modern, post-Renaissance, and proto-liberal ideas. Thereby, the Whigs provided a crucial link in the long chain connecting the eighteenth-century project created by the Founding Fathers with the classical republican tradition. Americans were engaged in multilevel retrospection. Thus, when reconstructing the intellectual pillars of the American Founding, we are forced to work backward—from the theories of eighteenth- and seventeenth-century English thinkers to the ancient philosophers.

REPUBLICANISM

According to Stanisław Filipowicz, the creed of the American Revolution is embodied in the notion of the republic.[43] While reconstructing the meaning of the term, the Founders reached directly to the source—the writings of Aristotle, Cicero, and Polybius. In colonial times, the Americans had already familiarized themselves with the political and intellectual legacy of antiquity. The number of references to the classics increased dramatically in the Founding Era.[44] In 1775, John Adams identified the principles of the American Revolution with "the principles of Aristotle and Plato, of Livy and Cicero."[45] However, the Founders' reception of the classical republican tradition was selective, and so the following discussion thereof must be likewise selective.

[43] Filipowicz, *Pochwała rozumu i cnoty. Republikańskie credo Ameryki*, 11.

[44] Out of the huge literature on the subject let us mention: Richard M. Gummere, *The American Colonial Mind and the Classical Tradition. Essays in Comparative Culture* (Cambridge: Harvard University Press, 1963); Richard M. Gummere, "The Classics in a Brave New World," *Harvard Studies in Classical Philology* 62 (1957); Meyer Reinhold, *Classica Americana: The Greek and Roman Heritage in the United States* (Detroit: Wayne State University Press, 1984); John Latimer, "The Classical Tradition in America," *The Classical World* 58, no. 5 (1965); Carl J. Richard, *The Founders and the Classics: Greece, Rome, and the American Enlightenment*, Cambridge: Harvard University Press, 1995); Mortimer N. Sellers, *American Republicanism. Roman Ideology in the United States Constitution* (New York: New York University Press, 1994); Caroline Winterer, *The Culture of Classicism: Ancient Greece and Rome in American Intellectual Life 1780–1910* (Baltimore: Johns Hopkins University Press, 2002); Carl J. Richard, *Greeks & Romans Bearing Gifts: How the Ancients Inspired the Founding Fathers* (Lanham: Rowman & Littlefield Publishers, 2008); Thomas E. Ricks, *First Principles: What America's Founders Learned from the Greeks and Romans and How That Shaped Our Country* (New York: HarperCollins, 2020).

[45] John Adams, "Novanglus," in *The Political Writings of John Adams*, 26.

The Founders, following the teaching of the ancient authors, treated it as an axiom that some forms of government are simply better than others since they reflect the natural order of things, including the natural right of man to self-governance. The above-cited Adams was convinced that “there is no good government but what is republican,”[46] since only a republic is agreeable with human nature.

Out of numerous elements constituting the classical republican tradition, the concept of natural law was proved to be of crucial importance for Americans justifying their rebellion against the British Crown. “When the English Constitution with its emphasis on the rights of Englishmen failed to provide adequate succor, the colonial radicals turned to a law which transcended all human contrivances.”[47] They claimed that they based their actions on the “principles of nature and eternal reason.”[48] Since all men “have one common original,” argued Alexander Hamilton, “they participate in one common nature, and consequently have one common right.”[49] According to John Zvesper, the Founders followed, to a great extent, the classical, Aristotelian vision of politics as inherently ethical activity, and presented happiness (*eudaimonia*) as the ultimate end of both man and the government.[50] But at the same time, from the foregoing assumption, they drew quite modern conclusions, providing a solid philosophical justification for the concept of political liberty and individual rights. Since happiness was the natural end of humanity, then the basic natural rights included “enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing happiness and safety.”[51]

But apart from fundamental philosophical assumptions about the nature of politics and political association, the republican tradition also provided Americans with some practical instructions concerning the construction of government. The glorification of the republic went hand in hand with the commendation of the mixed government. In this regard, ancient writers, English Whigs, and American Founders spoke in unison, but the classical origins of the concept need to be acknowledged. It was Cicero who praised the mixed republican government for its stability and longevity provided by a certain degree of equality and equilibrium.[52] Needless to say,

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[46] John Adams, “Thoughts on Government,” in *The Political Writings of John Adams*, 484. In a letter to his cousin Samuel Adams he repeated the very same thought: “It is a fixed principle that all good government is and must be republican.”—“John Adams to Samuel Adams, October 18, 1790,” in *The Political Writings of John Adams*, 665.

[47] Charles F. Mullet, “Classical Influences on the American Revolution,” *The Classical Journal* 35, no. 2 (1939): 94–95.

[48] Adams, “Novanglus,” 26.

[49] Quoted after John Zvesper, “The American Founders and the Classical Political Thought,” *History of Political Thought* 10, no. 4 (1989): 705.

[50] Zvesper, “The American Founders and the Classical Political Thought,” 705–06.

[51] “The Virginia Declaration of Rights,” National Archives, accessed December 29, 2022, https://www.archives.gov/founding-docs/virginia-declaration-of-rights.

[52] Marcus Tullius Cicero, “On the Republic,” in *On the Republic and On the Laws*, trans. David Fott (Ithaca: Cornell University Press, 2014), I.69–70, 60–61.

the Framers supplemented the idea of mixed government with the modern concept of the division of powers (as well as the mechanism of checks and balances). James Otis argued in his *Rights of the British Colonies* that "those states have ever made the greatest figure, and have been most durable, in which those powers have not only been separated from each other, but placed each in more hands than one, or a few."[53]

However, the concept of mixed government, in addition to providing stability, also referred to the idea of a common good. After all, the republic was understood as a form of government that transcends narrow particularisms. Although it could take many particular forms, Aristotle distinguished it from the corrupted forms of government by its preoccupation with the common good.[54] It was Plato who laid the foundations for such an understanding of the nature of political community when arguing that "it's not the concern of law that any one class in the city fare exceptionally well, but it contrives to bring this about in the city as a whole, harmonizing the citizens by persuasion and compulsion, making them share with one another the benefit that each is able to bring to the commonwealth."[55] Republicanism assumed a certain fundamental community of ends and interests.

Regardless of significant revisions, Italian Renaissance thinkers also presented a mixed form of government as an arrangement that guarantees, to a degree, the participation of all social groups in the political process. Such a design provided equilibrium and stability, but it also guaranteed that the policies of the state would accommodate the needs and interests of all groups constituting the political community.[56]

This way of thinking was replicated in eighteenth-century America, where "no phrase except 'liberty' was invoked more often by Revolutionaries than 'the public good.'"[57] Therefore, when Otis claimed that the end of every government is "the good of the whole,"[58] he was simply expressing the widespread sentiment of the era. It was self-evident by "both reason and revelation" that "the public safety" and the "good of the community" were "the supreme law of the state—being standard and measure" by which all laws and government actions were to be judged.[59]

The common reverence for the public good had its logical consequence in the glorification of self-government. Since in a republic the common good was identi-

[53] James Otis, "The Rights of the British Colonies Asserted and Proved," in *Collected Political Writings of James Otis*, ed. Richard Samuelson (Indianapolis: Liberty Fund, 2015), 128.

[54] Aristotle, *Politics*, book 3, chap. 6–7, 1279a18–1279b10, 73–74.

[55] Plato, *The Republic*, trans. Allan Bloom (New York: Basic Books, 1991), 519e–520a, 198. In the earlier passage, he instructed: "In the founding the city we are not looking to the exceptional happiness of any one group among us but, as far as possible, that of the city as a whole." Plato, *The Republic*, 420b, 98.

[56] See Maurizio Viroli, *Republicanism* (New York: Hill and Wang, 2002), 5.

[57] Wood, *The Creation of the American Republic, 1776–1787*, 55.

[58] Otis, "The Rights of the British Colonies Asserted and Proved," 125.

[59] Samuel West, "A Sermon Preached Before the Honorable Council, and the Honorable House of Representatives of the Colony of the Massachusetts-Bay, May 29th, 1776," in *The Pulpit of the American Revolution: or, the Political sermons of the Period of 1776*, ed. John W. Thornton (Boston: Gould and Lincoln, 1860), 297.

cal to the happiness and welfare of the people, the best way of realizing it was to allow the people to have a voice in government. Although this did not necessarily imply praise for direct democracy, it certainly assumed the necessity of the people's political participation in self-governmental institutions. For that reason, in his sermon Samuel West condemned all forms of government that are "not subject to the control of the people" and that do not provide for "a proper representation of the people" as being "very apt to degenerate into tyranny."[60] The concern for the common good and political liberty mutually conditioned each other.

But also in this regard, the generation of the Founders replicated the way of thinking about the government that had been defined by classical republicans. Liberty and equality were for the ancients the characteristics of the political sphere, as opposed to the domain of the private household (*oikos*), characterized by the absolute rule of the master over the rest of the household members and slaves. The republican concept of liberty was founded on the idea of non-domination; citizens were subject only to collectively established laws (and magistrates executing these laws) and not to the arbitrary will of another person (the latter being a characteristic feature of tyranny as well as of the relations between slave and master). The republican tradition created a sharp juxtaposition between a subject and a citizen. The latter is "defined by no other thing so much as by partaking in decision and office."[61] Therefore, the right to participate in public (political) life was both a characteristic of a citizen and the essence of political liberty.

Despite significant differences in the ancient and modern understanding of politics, there can be no doubts that the roots of the principle of the people's sovereignty, so greatly glorified by the eighteenth-century revolutionaries, lay in classical republicanism and, for that reason, the American Founders referred to it both in search for inspiration and in order to find useful arguments in their dispute with the British parliament. They fully agreed with Montesquieu, who argued that since "in a free state, every man, considered to have a free soul, should be governed by himself, the people as a body should have legislative power."[62] Yet, the French thinker was a great advocate of political representation, as were the American Founders. Good government did not mean direct democracy, but it did imply the consent of the governed. The institution of elections—allowing people to hold their representatives accountable for their actions—was the cornerstone of the modern republican project. As Wood explained, "(by) allowing the people to elect their magistracy, republicanism would work to 'blend the interests of the people and their rulers' and thus 'put down every animosity among the people.' In the kind of states where

[60] West, "A Sermon Preached Before the Honorable Council, and the Honorable House of Representatives of the Colony of the Massachusetts-Bay, May 29, 1776," 280–81.

[61] Aristotle, *Politics*, 1275a23–24, 63.

[62] Montesquieu, *The Spirit of Laws* (Cambridge: Cambridge University Press, 2006), book 11, chap. 6, 159.

'*their governors shall proceed from the midst of them*', the people could be surer that their interests would be promoted exclusively, and therefore, in turn, would 'pay obedience to officers properly appointed' and maintain 'no discontents on account of their advancement.'"[63]

The foregoing quote draws our attention to the fact that in the American case, the peans to freedom were accompanied by an emphasis put on obedience and order. As an endless number of American authors repeated, liberty does not mean license or lawlessness. It refers to the classical concept of autonomy, which, by definition, means self-imposing (*auto*) certain rules (*nomoi*) on one's own behavior. That is why republican freedom is founded on and guaranteed by the rule of law. However, the mere laws, as we have already observed, are not enough to sustain republican institutions. They are equally supported by the character and spirit of the people. What made the ancient republics great was not their military force but the virtues of their citizens. And what ultimately destroyed them was not an external military threat but an internal disease: the decay of *mores*. The stress put on the necessity of civic virtues was yet another element that created a full circle between the eighteenth-century American Founders, English Whigs, and ancient republican thinkers.

CONCLUSIONS

As I attempted to demonstrate, the roots of the American political tradition reach much deeper than the social and political thought of the Enlightenment. We can identify them in the writings of seventeenth-century English political writers, sixteenth-century Church reformers, and Renaissance thinkers rediscovering republican ideas, while the longest of them reach back to the times of Polybius, Cicero, and Aristotle. Thomas Jefferson, writing retrospectively to Henry Lee about the object of the Declaration of Independence, stated that it was "not to find out new principles, or new arguments, never before thought of, not merely to say things which had never been said before; but to place before mankind the common sense of the subject, in terms so plain and firm as to command their assent, and to justify ourselves in the independent stand we are compelled to take. Neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, it was intended to be an expression of the American mind and to give to that expression the proper tone and spirit called for by the occasion. All its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc."[64] In light of the foregoing quote, we should

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[63] Wood, *The Creation of the American Republic, 1776–1787*, 57.

[64] Thomas Jefferson, "Thomas Jefferson to Henry Lee, May 8, 1825," in *Writings* (New York: The Literary Classics of the United States, 1984), 1501.

regard the events of 1776 not as the foundation of the American political tradition but rather as the embodiment of its most important elements, which started taking shape as soon as the signatories of the Mayflower Compact had gone ashore. Its peculiarity consists in the unique combination of faith and reason, optimism and skepticism, utopianism and realism, the past and the present. While many of its constitutive elements may seem incompatible, we need to remember that the Founders of the American Republic were statesmen (in other words: practicing politicians, lawyers, public officers, ambassadors, etc.) first and only later (and only relatively few of them) political thinkers. That is why their use of philosophical, religious, and ideological arguments was driven by pragmatism rather than by academic or philosophical rigor. Lance Banning was certainly correct when he observed that although logically it could have been "inconsistent to be simultaneously liberal and classical. Historically it was not."[65] In the eyes of the eighteenth-century American statesmen, it was perfectly possible to combine the classical republican ideas of the common good and virtue with modern protoliberal concepts of individual rights and an appreciation of private property. They "may have drawn from a coherent (which is not to say consistent) universe of thought that could contain important elements of both philosophies in a persistent, fruitful tension."[66] For the same reasons, they were perfectly capable of combining enlightened rationalism with evangelical Calvinism. They were interested in what we might call an applied political theory rather than in the 'purity' of certain categories and 'labels' (such as republicanism, liberalism, conservatism, etc.) that contemporary historians of political thought so frequently use.

This abundance of inspirations contributed to the eclecticism of the American political tradition, which, despite occasional attempts made by some scholars, cannot be reduced to a single 'school' of thought or ideology.[67] Classical republican, protoliberal, and puritan ideas, filtered through the optimism and rationalism of the Enlightenment, melted on American soil into a peculiar synthesis, which continues to fascinate scholars and students of political thought.

Summary: The paper offers a brief discussion of the main intellectual sources which inspired the American Founding Fathers. It argues that the generation of the Founders operated to

[65] Lance Banning, "Jefferson Ideology Revisited: Liberal and Classical Ideas in the New American Republic," *The William and Mary Quarterly* 43, no. 1 (1986): 12.

[66] Banning, "Jefferson Ideology Revisited: Liberal and Classical Ideas in the New American Republic," 19.

[67] Louis Hartz's *Liberal Tradition in America* (New York: Harcourt, Brace & World, 1955) remains probably the best-known attempt of such a one-dimensional presentation of the American political tradition. On the eclecticism of the early American political thought see Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Belknap Press of Harvard University Press, 1967), chap. 2, 22–54.

a considerable extent within the frameworks of political, religious, and philosophical ideas whose origins extend far beyond the Enlightenment. These ideas prepared the ground for many political institutions usually associated with the Age of Reason and, despite occasional discrepancies, made the advancement of liberal democracy in the consecutive decades more natural. Furthermore, it argues that the unique and distinctive character of the American political tradition cannot be understood properly without taking into account its eclectic intellectual foundations.

Keywords: the Founding Fathers, Protestantism, republicanism, Whigs

BIBLIOGRAPHY

Adams, John. "John Adams to Abigail Adams, July 3, 1776." In *The Political Writings of John Adams*, edited by George W. Carey, 651–53. Washington: Regnery Publishing, 2000.

Adams, John. "John Adams to Samuel Adams, October 18, 1790." In *The Political Writings of John Adams*, edited by George W. Carey, 664–70. Washington: Regnery Publishing, 2000.

Adams, John. "Novanglus." In *The Political Writings of John Adams*, edited by George W. Carey, 22–104. Washington: Regnery Publishing, 2000.

Adams, John. "Thoughts on Government." In *The Political Writings of John Adams*, edited by George W. Carey, 482–98. Washington: Regnery Publishing, 2000.

Aristotle. *Politics*. Translated by Carnes Lord. Chicago: University of Chicago Press 2013.

Bailyn, Bernard. *The Ideological Origins of the American Revolution*. Cambridge: Belknap Press of Harvard University Press, 1967.

Baldwin, Alice. *The New England Clergy and the American Revolution*. Durham: Duke University Press, 1928.

Banning, Lance. "Jefferson Ideology Revisited: Liberal and Classical Ideas in the New American Republic." *The William and Mary Quarterly* 43, no. 1 (1986): 3–19.

Calvin, John. *Institutes of the Christian Religion*. Translated by John Allen. Philadelphia: Presbyterian Board of Publication, 1816.

Cicero, Marcus Tullius. "On the Republic." In *On the Republic and On the Laws*. Translated by David Fott, 29–124. Ithaca: Cornell University Press, 2014.

Colbourn, Trevor. *The Lamp of Experience. Whig History and the Intellectual Origins of the American Revolution*. Chapel Hill: University of North Carolina Press, 1965.

Cotton, John. "Copy of a Letter from Mr. Cotton to Lords Say and Seal in the Year 1636." In *Puritan Political Ideas, 1558–1794*, edited by Edmund S. Morgan, 167–73. Indianapolis, New York: The Bobbs-Merrill Company, Inc., 1965.

Cotton, John. "An Exposition Upon the Thirteenth Chapter of the Revelations." In *American Political Thought: Readings and Materials*, edited by Keith E. Whittington, 24–25. New York: Oxford University Press, 2017.

Davenport, John. *A Discourse about Civil Government in a New Plantation Whose Design Is Religion*. Cambridge, Mass.: Samuel Green and Marmaduke Johnson, 1663. Accessed December 18, 2022, https://quod.lib.umich.edu/e/evans/N00042.0001.001/1:2?rgn=div1;view=fulltext.

"Declaration and Resolves of the First Continental Congress, October 14, 1774." Teaching American History. Accessed December 21, 2022. https://teachingamericanhistory.org/document/declaration-and-resolves-of-the-first-continental-congress.

Elliot, Jonathan, ed. *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, vol. 3. New York: B. Franklin, 1888.

Filipowicz, Stanisław. *Pochwała rozumu i cnoty. Republikańskie credo Ameryki*. Kraków, Warszawa: Znak, Fundacja im. Stefana Batorego, 1997.

Fundamental Orders of Connecticut. The Avalon Project. Documents in Law, History and Diplomacy. Accessed December 18, 2022, https://avalon.law.yale.edu/17th_century/order.asp.

Gordon, Thomas, and John Trenchard. *Cato's Letters*, vol. 1. Indianapolis, 1724. Liberty Fund Network, accessed December 20, 2022, https://oll.libertyfund.org/title/gordon-cato-s-letters-vol-1-november-5-1720-to-june-17-1721-lf-ed.

Gummere, Richard M. *The American Colonial Mind and the Classical Tradition. Essays in Comparative Culture*. Cambridge: Harvard University Press, 1963.

Gummere, Richard M. "The Classics in a Brave New World." *Harvard Studies in Classical Philology* 62 (1957): 119–39.

Hartz, Louis. *Liberal Tradition in America*. New York: Harcourt, Brace & World, 1955.

Jefferson, Thomas. "Thomas Jefferson to Henry Lee, May 8, 1825." In *Writings*, 1501. New York: The Literary Classics of the United States, 1984.

Kirk, Russell. *The Roots of American Order*. Chicago: Open Court Publishing Company, 1977.

Latimer, John. "The Classical Tradition in America." *The Classical World* 58, no. 5 (1965): 129–32.

Locke, John. *Two Treatises of Government*. Cambridge: Cambridge University Press, 1967.

Lutz, Donald S., and Jack D. Warren. *A Covenanted People: The Religious Tradition and the Origins of American Constitutionalism*. Providence: John Carter Brown Library, 1987.

Madison, John. "Federalist No. 10." In *The Federalist Papers*, edited by Clinton Rossiter, 71–78. New York: Penguin Publishing Group, 2003.

Madison, John. "Federalist No. 51." In *The Federalist Papers*, edited by Clinton Rossiter, 317–21. New York: Penguin Publishing Group, 2003.

Maier, Pauline. *The Old Revolutionaries: Political Lives in the Age of Samuel Adams*. New York: Vintage Books 1982.

Montesquieu. *The Spirit of Laws*. Cambridge: Cambridge University Press, 2006.

Mullet, Charles F. "Classical Influences on the American Revolution." *The Classical Journal* 35, no. 2 (1939): 92–104.

Osgood, Herbert L. "The Political Ideas of the Puritans." *Political Science Quarterly* 6, no. 1 (1891): 1–28.

Osgood, Herbert L. "The Political Ideas of the Puritans II." *Political Science Quarterly* 6, no. 2 (1891): 201–31.

Otis, James. "The Rights of the British Colonies Asserted and Proved." In *Collected Political Writings of James Otis*, edited by Richard Samuelson, 125–28. Indianapolis: Liberty Fund, 2015.

Plato. *The Republic*. Translated by Allan Bloom. New York: Basic Books, 1991.

Pocock, John G. A., ed. *Three British Revolutions. 1641, 1688, 1776*. Princeton: Princeton University Press, 1980.

Polet, Jeff. “Did America Have a Founding?” Intercollegiate Studies Institute. February 8, 2021. https://isi.org/modern-age/did-america-have-a-founding/.

Reinhold, Meyer. *Classica Americana: The Greek and Roman Heritage in the United States*. Detroit: Wayne State University Press, 1984.

“The Resolutions of the Stamp Act Congress, October 19, 1765.” In *Principles and Acts of the Revolution in America*, edited by Hezekiah Niles, 456–57. Baltimore: W.O. Niles, 1822.

Richard, Carl J. *Greeks & Romans Bearing Gifts: How the Ancients Inspired the Founding Fathers*. Lanham: Rowman & Littlefield Publishers, 2008.

Richard, Carl J. *The Founders and the Classics: Greece, Rome, and the American Enlightenment*. Cambridge: Harvard University Press, 1995.

Ricks, Thomas E. *First Principles: What America’s Founders Learned from the Greeks and Romans and How That Shaped Our Country*. New York: HarperCollins, 2020.

Sellers, Mortimer N. *American Republicanism. Roman Ideology in the United States Constitution*. New York: New York University Press, 1994.

Trumbull, James Hammond. “Abstracts of Two Sermons by Rev. Thomas Hooker.” In *Collections of the Connecticut Historical Society*, vol. 1, 19–21. Hartford: Published for the Society, 1860.

“The Virginia Declaration of Rights.” National Archives. Accessed December 29, 2022, https://www.archives.gov/founding-docs/virginia-declaration-of-rights.

Viroli, Maurizio. *Republicanism*. New York: Hill and Wang, 2002.

West, Samuel. “A Sermon Preached Before the Honorable Council, and the Honorable House of Representatives of the Colony of the Massachusetts-Bay, May 29, 1776.” In *The Pulpit of the American Revolution: or, the Political sermons of the Period of 1776*, edited by John W. Thornton, 259–322. Boston: Gould and Lincoln, 1860.

Williams, Roger. “The Bloody Tenet of Persecution for Cause of Conscience.” In *American Political Thought*, edited by Kenneth M. Dolbeare, and Michael S. Cummings, 18–21. Washington: CQ Press, 2010.

Winterer, Caroline. *The Culture of Classicism: Ancient Greece and Rome in American Intellectual Life 1780–1910*. Baltimore: Johns Hopkins University Press, 2002.

Winthrop, John. “A Model of Christian Charity.” In *Puritan Political Ideas, 1558–1794*, edited by Edmund S. Morgan, 70–73. Indianapolis, New York: The Bobbs-Merrill Company, Inc., 1965.

Wise, John. “Democracy is Founded in Scripture.” In *American Political Thought*, edited by Kenneth M. Dolbeare, and Michael S. Cummings, 22–27. Washington: CQ Press, 2010.

Wood, Gordon S. *The Creation of the American Republic, 1776–1787*. Chapel Hill: The University of North Carolina Press, 1987.

Wood, Gordon S. *The Idea of America. Reflections on the Birth of the United States*. New York: Penguin Press, 2011.

Zvesper, John. “The American Founders and the Classical Political Thought.” *History of Political Thought*, no. 4 (1989): 701–18.

Chapter 2

Who Are You, Mr. Adams?

*Tomasz Tulejski**

INTRODUCTION[1]

American political reflections are informed by the singularly American experience, consisting of colonial history, the War of Independence, the making of a new state, and what Montesquieu called the spirit of the laws—that is, a set of objectively verifiable factors that inform the specific, unique perceptions of the categories that govern social and political life. However, the Founding Fathers and the subsequent generations of Americans had the comfort of being able to create the instruments of collective life in almost any way they wished, although it would be erroneous to think that they built in on "ploughed soil." First, the organic communities that had functioned there for more than two hundred years had spontaneously formulated their rules of governance, and second, the long colonial experience under the British Empire was not without its aftermath. Also, it is quite significant that in the eighteenth century, when the foundations of American statehood were taking shape, turbulent events were unfolding in Europe, with a profound effect on the political reflection across the ocean.

After all, the founders of the United States were true sons of the old Europe, who never severed intellectual contact with it, so their deliberations were an extension of the disputes that troubled the old continent, though applied to the new, post-colonial circumstances. Thus, the local conditions, on the one hand, as well as the European pre-revolutionary and revolutionary experience, on the other, had a decisive impact on the political debates during the first decades of the United States. These two factors also determined the nature of political thought of the most emi-

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nent American political philosopher of the founding period, John Adams, whom Russell Kirk[2] and Peter Viereck[3] recognized as being among the most important conservative thinkers. His name also features in the Encyclopedia of American Conservatism.[4] However, I am not convinced whether such pigeonholing of the second President of the United States is correct or warranted. Therefore, in this brief analysis, I will try to answer the following question: was he a republican, a conservative, or perhaps a liberal? Naturally, I am aware that these categories are somewhat vague, which is why I will focus on several characteristic elements involved in an attempt to answer the above question. Simultaneously, this will provide an opportunity to outline the main themes in the political and constitutional thought of the author of *Discourses on Davila* against the backdrop of the republican, conservative, and liberal traditions. Consequently, I will first analyze Adams' vision of human nature, and subsequently discuss the relationships within the political community. I will then dissect Adams' views on democracy and the French Revolution, followed by his notions of the political system, before concluding with considerations relating to property.

At the outset, however, a few remarks are due on the intellectual or personal relationships with those who are considered to have inspired Adams or been his ideological companions. The second President showed substantial regard for the republican *neo-Roman* thinkers, most notably Sidney, of whose *Discourses on Government* he wrote that they still arouse his "fresh admiration" upon being read again after forty-six years.[5] Thus, when drafting the constitution of Massachusetts, he made Sidney's words the state motto: *Manus haec inimica tyrannis ense petit. Placidam sub libertate quietem*. Elsewhere, speaking of the source of inspiration, he mentions Harrington, Locke, Montesquieu, and even Hobbes.[6] In his writings, he also repeatedly invokes Machiavelli, Polybius, Livy, Herodotus, and Tacitus.

Meanwhile, his relationship with Burke and his attitude to the latter's philosophy should be described as distanced, which might be attributed to Adams' megalomania and quarrelsomeness. Their only meeting, which took place in London in 1783, was very briefly recounted in his diaries: "I was introduced, by Mr. Hartley, on a merely ceremonious visit, to the Duke of Portland, Mr. Burke, and Mr. Fox; but finding nothing but ceremony there, I did not ask favors or receive any thing

[2] Russell Kirk, *Conservative Mind: From Burke to Eliot* (Washington: Ragnery Publishing, Inc., 2001), 86–109.

[3] Peter Viereck, *Conservative Thinkers: From John Adams to Winston Churchill* (London, New York: Routledge, 2005), 87–95.

[4] Bruce Frohnen, Jeremy Beer, and Jeffrey O. Nelson, *American Conservatism: An Encyclopedia* (Wilmington: ISI Books, 2006), 9–11, 534–44.

[5] John Adams, "To Thomas Jefferson, Quincy, 17 September, 1823," in *The Works of John Adams, Second President of the United States* (Boston: Little, Brown and Co., 1850–56), 10: 410.

[6] John Adams, "To J.H. Tiffany, Quincy, 31 March, 1819," in *The Works of John Adams, Second President of the United States*, 10: 377.

but cold formalities from ministers of state or ambassadors."[7] In a letter to Jefferson, however, he called Burke and Samuel Johnson "superstitious slaves, or self-deceiving hypocrites."[8] Still, there can be no doubt that he also harbored genuine words of contempt for Thomas Paine, Burke's adversary.

HUMAN NATURE

Underlying Adams' entire political philosophy is a definite vision of human nature, and the latter must be the cornerstone of all realistic and useful reflections on the state. As early as 1760, he noted in his diary that "all civil government, is founded and maintained by the sins of the People. All armies would be needless if Men were universally virtuous. . . . In short, Vice and folly are so interwoven in all human Affairs, that they could not, possibly, be wholly separated from them without tearing and rending the whole system of human Nature and state."[9] Clearly, Adams entertained no illusions about the human condition, thus markedly opposing Jefferson's optimism. Historical retrospection, personal experience, and Calvinist formation[10] prompted him to look upon the human as an inherently corrupt, depraved, vile, hypocritical being, and he adopted such assumptions when formulating his political conception. This should also be the premise around which political institutions must be constructed, because "if there were no ignorance, error, or vice, there would be neither principles nor systems of civil or political government."[11]

The two fundamental forces guiding human behavior are sex drive and the desire to acquire and hold property, which he expressed bluntly, in quite an undiplomatic manner: "That the first want of man is his dinner, and the second his girl, were truths well known to every democrat and aristocrat, long before the great philosopher Malthus arose, to think he enlightened the world by the discovery."[12] If so, then primal drives take precedence over reason, self-love trumps love for others, virtue is the exception to transgression, altruism to self-interest, and lust for power to humble service to the homeland. "We know," Adams wrote, "that ignorance, vanity, excessive ambition, and venality, will, in spite of all human precautions, creep into

[7] John Adams, "Life of John Adams," in *The Works of John Adams, Second President of the United States*, 1: 405.

[8] John Adams, "To Thomas Jefferson, Quincy, 25 December, 1813," in *The Works of John Adams, Second President of the United States*, 10: 82.

[9] John Adams, "Diary, December 18, 1760," in *The Works of John Adams, Second President of the United States*, 2: 107.

[10] John P. Diggins, *John Adams* (New York: Macmillan, 2003), 17–18.

[11] John Adams, "Letter to Samuel Adams, 18 October, 1790," in *The Works of John Adams, Second President of the United States*, 6: 415.

[12] John Adams, "Letter to John Taylor, Quincy, 15 April 1814," in *The Works of John Adams, Second President of the United States*, 6: 516.

government, and will ever be aspiring at extravagant and unconstitutional emoluments to individuals, let us never relax our attention, or our resolution, to keep these unhappy imperfections in human nature, out of which material, frail as it is, all our rulers must be compounded, under a strict inspection and a just control."[13] Consequently, he finds absurd the fanciful delusions of Rousseau, Pain, Turgot, Condorcet, or Wollstonecraft, who speculate that with the development of knowledge and the liberation of reason from the fetters of superstition, morality will thrive and human ultimately achieve happiness, because the human will always and everywhere be guided by the primal passions, while "self-interest, private avidity, ambition, and avarice, will exist in every state of society, and under every form of government."[14] The drive for power is also intrinsic to every form of government, as it satisfies the need to stand out and gain recognition in the eyes of others. After all, nothing in human nature is "more essential or remarkable, than the *passion for distinction*. A desire to be observed, considered, esteemed, praised, beloved, and admired."[15] Machiavelli, in whose footsteps Adams follows, cogently argued that the latter desire is behind the development of society and the perpetual internal rivalry it is afflicted by. That desire is also responsible for both the existence of enslavement and the need for freedom. Some desire to transcend whatever limits their power may be subject to; others want to circumscribe it and gain power over their own destiny.

Such a concept of human nature is in line with the perspective adopted by Burke, for whom the state is an instrument for curbing human passions and uniting them in one direction, although he had more faith in the goodness and virtue of the human, their social penchant and moral imagination. The erstwhile, pre-revolutionary order was not a stage populated by ruthless individuals whose wickedness was constrained by power, but by actors who played their parts in a play written by the Creator. "All the pleasing illusions," Burke wrote in *Reflections*, "which made power gentle, and obedience liberal, which harmonized the different shades of life, and which, by a bland assimilation, incorporated into politics the sentiments which beautify and soften private society, are to be dissolved by this new conquering empire of light and reason. All the decent drapery of life is to be rudely torn off. All the superadded ideas, furnished from the wardrobe of a moral imagination, which the heart owns, and the understanding ratifies, as necessary to cover the defects of our naked shivering nature, and to raise it to dignity in our own estimation, are to be exploded as a ridiculous, absurd, and antiquated fashion."[16] This is why Adams

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[13] John Adams, "On Self-Delusion," in *The Works of John Adams, Second President of the United States*, 3: 437.

[14] John Adams, "A Defence of the Constitutions of Government of the United States," in *The Works of John Adams, Second President of the United States*, 6: 448.

[15] John Adams, "Discourses on Davila," in *The Works of John Adams, Second President of the United States*, 6: 232.

[16] Edmund Burke, "Reflections on the Revolution in France," in *Selected Works of Edmund Burke* (Indianapolis: Liberty Fund, 1999), 2: 170–71.

shares greater kinship with the classic republicanism of Machiavelli, or the English *neo-Roman* republican reflection of the latter half of the seventeenth century, for the Florentine sees the human as Adams does, observing in *Discourses on Livy* that "they who lay the foundations of a State and furnish it with laws must, as is shown by all who have treated of civil government, and by examples of which history is full, assume that 'all men are bad, and will always, when they have free field, give loose to their evil inclinations; and that if these for a while remain hidden, it is owing to some secret cause, which, from our having no contrary experience, we do not recognize at once, but which is afterwards revealed by Time, of whom we speak as the father of all truth."[17] For the representatives of the *neo-Roman* reflection, too, power is the remedy for human wickedness and depravity. Hence, Milton writes, "foreseeing that such courses must needs tend to the destruction of them all, they agreed by common league to bind each other from mutual injury, and jointly to defend themselves against any that gave disturbance or opposition to such agreement."[18] Meanwhile, Sidney observes that "Every man has passions; few know how to moderate, and no one can wholly extinguish them."[19] Naturally, both argue exploiting the contractualist method, much the same as Adams, but the crucial point is that they see human nature as essentially flawed, but also recognize its rational and social dimension. That depraved character bears on the relations within the society which, as Machiavelli had already demonstrated, involve a natural dialectic between the rich and the poor.

ARISTOCRACY AND THE PEOPLE

Therefore, Machiavelli maintains in *Discourses on Livy* that "in every republic, there are two conflicting factions, that of the people and that of the nobles,"[20] which engenders two tendencies: the people do not want to tolerate the rule and oppression of the aristocracy, while the aristocracy seeks to control and oppress the people. This results in a natural division into two warring factions separated by conflicting interests in terms of property and politics. Inspired by this fact, Harrington makes property the mainstay of power in the political society.[21] Seeing himself as the latter's disciple in this respect, Adams applies the same paradigm to divide society into strata in his own analysis. Like Hamilton or Madison, he was deeply convinced that

[17] Niccolò Machiavelli, *Discourses on Livy*, trans. Ninian H. Thomson (Mineola: Dover Publications, 2007), 31.

[18] John Milton, "The Tenure of Kings and Magistrates," in *The Prose Works of John Milton* (Philadelphia: John W. Moore, 1847), 1: 377.

[19] Algernon Sidney, *Discourses Concerning Government* (Indianapolis: Liberty Classics, 1990), 234.

[20] Machiavelli, *Discourses on Livy*, 33.

[21] James Harrington, "The Commonwealth of Oceana," in *The Oceana and Other Works of James Harrington* (London: A. Millar, 1747), 39–40.

the inequality between people is natural and so was the correlation between property and political influence.[22] Admittedly, people are born with equal rights, but "to teach that all men are born with equal powers and faculties, to equal influence in society, to equal property and advantages through life, is as gross a fraud, as glaring an imposition on the credulity of the people, as ever was practiced by monks, by Druids, by Brahmins, by priests of the immortal Lama, or by the self-styled philosophers of the French revolution."[23] "When a citizen," Adams writes elsewhere, "perceives his fellow-citizen, whom he holds his equal, have a better coat or hat, a better house or horse. . . . He cannot bear it."[24]

However, unlike his federalist friends, he was not an advocate of the power of the few. On the contrary, he saw it as a threat similar to the power of the democratic *masses*.[25] Nor did he share their belief in the ability of the electorate to control the elite, convinced that without appropriate institutional instruments, the very idea of representation would be destroyed. The existence of social inequality is a fact observed in any society, no matter how democratic or equal it claims to be. Due to the differences of wealth, merit, virtue, intelligence, or wisdom some "acquired the confidence and affection of their fellow-citizens to such a degree that the public have settled into a kind of habit of following their example and taking their advice. These sources of inequality, which are common to every people, and can never be altered by any, because they are founded in the constitution of nature." Their existence is indispensable in the very institution of power and free government to exist as well. Such a *natural aristocracy* is the "brightest ornament and glory of the nation, and may always be made the greatest blessing of society, if it be judiciously managed in the constitution." However, if its influence and role are not subject to reasonable restrictions, it will become "the most dangerous; nay, it may be added, it never fails to be the destruction of the commonwealth."[26]

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[22] Indeed, the Philadelphia Convention witnessed a clash between two opposing approaches to the future constitution: an aristocratic and a more democratic one. The Federalists took the predominance of the property elite for granted and deemed it no threat to the republican system. Conversely, the Anti-Federalists, who firmly believed in the ideal of adequate representation (reflecting the exact composition of society), saw it as the greatest threat. The fundamental differences between the two solutions were expounded by Madison in *Federalist No. 10*: "The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens and greater sphere of country, over which the latter may be extended. The effect of the first difference is, on the one hand to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations"—James Madison, "Federalist No. 10," in Alexander Hamilton, James Madison, and John Jay, *The Federalist*, ed. Jack R. Pole (Indianapolis, Cambridge: Hackett Publishing Company, Inc., 2005), 52.

[23] Adams, "Letter to John Taylor, III, Quincy, 15 April, 1814," 453–54.

[24] Adams, "A Defence of the Constitutions of Government of the United States," 6: 95.

[25] Diggins, *John Adams*, 167–68.

[26] Adams, "A Defence of the Constitutions of Government of the United States," 6: 397.

Observation of the European states and the dominance of the nobility there—which was increasingly associated with the property-holding elite—led Adams to conclude that the rule of the few represented the gravest threat to the constitution and free republican government.[27] Of course, America was not encumbered by that aristocratic experience, but this did not matter to Adams because aristocracy always exists, regardless of its provenance or the name it assumes. The division into a *natural aristocracy*—the aristocracy of virtue, merit, or wisdom—and *artificial aristocracy*, deriving from money or lineage is irrelevant to Adams as far as its political role is concerned. The former is vague and indefinite, and the latter is more tangible, but the power of either is measured simply by how much support they manage to garner among the public. "Without searching volumes, Mr. Taylor, I will tell you in a few words what I mean by an aristocrat, and, consequently, what I mean by aristocracy. By an aristocrat, I mean every man who can command or influence two votes; one besides his own," regardless of whether he does it through "his virtues, his talents, his learning, his loquacity, his taciturnity, his frankness, his reserve, his face, figure, eloquence, grace, air, attitude, movements, wealth, birth, art, address, intrigue, good fellowship, drunkenness, debauchery, fraud, perjury, violence, treachery, pyrrhonism, deism, or atheism; for by every one of these instruments have votes have been obtained and will be obtained."[28] The existence of *aristocracy* as Adams understands it is therefore not linked to any legal distinction, convention, or title, as in old Europe, but to the ability to influence other citizens in the political process. In America there are no titles or hereditary nobility, but "nobility must and will exist, though without the name, as really as in countries where it is hereditary."[29]

This does not mean that Adams affirms the existence of a social hierarchy; as a realist, he merely acknowledges its existence, it is an undeniable fact and it would be naïve, even foolish, to ignore it. Does that constitute a conservative point of view? If conservatism is typified by political realism, then undoubtedly yes, but let us remember that, like Machiavelli, Adams tended to side with the people and saw a major threat to the republic in the aristocracy, because if its influence and role are not reasonably circumscribed, then it is "the most dangerous; nay, it may be added, it never fails to be the destruction of the commonwealth."[30] This fundamentally contradicts Burke's notions of aristocracy: "A true natural aristocracy is not a separate interest in the state, or separable from it. It is an essential integrant part of any large body rightly constituted. It is formed out of a class of legitimate presumptions, which, taken as generalities, must be admitted for actual truths. To

[27] Robert R. Palmer, *The Age of the Democratic Revolution: A Political History of Europe and America,1760–1800*, (Princeton: Princeton University Press, 1970), 67–74.

[28] Adams, "Letter to John Taylor, Quincy, 15 April 1814," 456–57.

[29] Adams, "A Defence of the Constitutions of Government of the United States," 6: 125.

[30] Adams, "A Defence of the Constitutions of Government of the United States," 6: 397.

be bred in a place of estimation; to see nothing low and sordid from one's infancy; to be taught to respect one's self; to be habituated to the censorial inspection of the public eye; to look early to public opinion; to stand upon such elevated ground as to be enabled to take a large view of the wide-spread and infinitely diversified combinations of men and affairs in a large society." No nation may exist without it, therefore "The state of civil society which necessarily generates this aristocracy is a state of Nature; and much more truly so than a savage and incoherent mode of life."[31]

He found natural aristocracy to be the healthy core of any society, selflessly applying its excellent talents in the service of the public good. Society is by nature hierarchical, and Burke believes that this is an element of the Creator-given order, whereby he does not mean material divisions, but the fact that people possess different and unequal moral and intellectual qualifications. Being guided by virtue, concern for the common good, and ultimately the recognition of the essence of the ancient order are not available to everyone equally. The prudence enabling one to separate what is dangerous from what complies with the tradition of the community, to distinguish between freedom and license, is available only to the aristocracy of virtue and reason, not to the people viewed from a purely arithmetical standpoint. Asserting the opposite would have to result in subjecting the eternal and immutable rules of justice, the fundamental laws of the kingdom to an arbitrary will informed by the changing moods of the unpredictable masses. *Neo-Romans* argue in the same vein, seeing a fundamental difference between the virtue of the few and the majority who do not possess it.[32] Perhaps Adams would have agreed that the natural aristocracy is endowed with special qualities of spirit and intellect, but he did not share the view that its interests were always aligned with those of the community. Inspired by the theories of political cycles developed by Polybius, Cicero, and Machiavelli, he was convinced that it invariably must transform into oligarchy in the end. Therefore, instead of extirpating human passions, he sought to channel them into actions beneficial to the state. Therefore, as he observed in *Discourses on Davila*, "to regulate (them) and not to eradicate them is the province of policy."[33] In contrast, Burke regarded the virtue of natural aristocracy as the sole bulwark against the destruction of policy and the disintegration of the world. Nonetheless, what Adams and the *last Old Whig* certainly have in common is an equally harsh assessment of democracy, the rule of the people, and the French Revolution.

[31] Edmund Burke, *An Appeal from the New to the Old Whigs* (London: J. Dodsley, 1791), 107–08.

[32] See John Milton, "The Second Defence of the People of England," in *The Prose Works of John Milton*, 2: 503, 525.

[33] Adams, "Discourses on Davila," 246.

DEMOCRACY

This is because Adams entertains no illusions about the nature of democratic rule, even if it succeeds in avoiding or abolishing the rule of the aristocracy in one way or another. He kept a keen eye on the Shays' Rebellion and saw the aftermath of the anger of the unruly mob. Like their aristocratic adversaries, the democrats are envious, petty, and spoilt, desirous of power and profit. They are as eager to trample on minority rights as the aristocrats are to despise the rights of the majority.[34] He thus follows the path set out by the republicans of antiquity (Polybius and Cicero) and Machiavelli, to whom that system was one of license that worked to the detriment of the representatives of power and ordinary citizens. Consequently, in Adams' point of view, the events of the French Revolution were a perfect exemplification of how such governments end. He is particularly averse to the democratic superstitions that grant unlimited sovereignty to the *people* understood in a numerical sense. His remarks about the apostle of the *Age of Reason*—Thomas Paine—are quite forthright: "I am willing you Should call this the Age of Frivolity as you do: and would not object if You had named it the Age of Folly, Vice, Frenzy Fury, Brutality, Daemons, Buonaparte, Tom Paine, or the Age of The burning Brand from the bottomless Pitt: or any thing but the age of Reason. I know not whether any Man in the World has had more influence on its inhabitants or affairs for the last thirty years than Tom Paine. There can be no Severer satyr in the Age. For Such a mongrel between Pigg and Puppy, begotten by a wild Boar on a Bitch Wolf; never before in any Age of the World was suffered by the Poltroonery of mankind, to run through Such a Career of Mischief. Call it then the Age of Paine. He deserves it much more than the Courtezan who was consecrated to represent the Goddess in the Temple at Paris, and whose name, Tom has given to the Age. The real intellectual faculty has nothing to do with the Age the Strumpet or Tom."[35] The people and their tribunes are generally insatiable in their desires and, having seized power will use it unrestrainedly and unscrupulously, turning the state into a realm of anarchy. The dictatorship of the individual will be the only remedy, putting an end to chaos at the expense of free-

[34] "This is not my doctrine, Mr. Taylor. My opinion is, and always has been, that absolute power intoxicates alike despots, monarchs, aristocrats, and democrats, and jacobins, and *sans culottes.* I cannot say that democracy has been more pernicious, on the whole, than any of the others. Its atrocities have been more transient; those of the others have been more permanent. The history of all ages shows that the caprice, cruelties, and horrors of democracy have soon disgusted, alarmed, and terrified themselves. They soon cry, this will not do; we have gone too far! We are all in the wrong! We are none of us safe! We must unite in some clever fellow, who can protect us all, —Cæsar, Bonaparte, who you will! Though we distrust, hate, and abhor them all; yet we must submit to one or another of them, stand by him, cry him up to the skies, and swear that he is the greatest, best, and finest man that ever lived!"—Adams, "Letter to John Taylor, Quincy, 15 April 1814," 477.

[35] John Adams, "Letter to Benjamin Waterhouse, 29 October 1805," in *The Selected Writings of John and John Quincy Adams*, eds. Adrienne Koch and William Peden (New York: A.A. Knopf, 1946), 148.

dom. However, if democracy manages to escape becoming a military tyranny, then in time the *popular representatives*, the leaders of the people, will also enjoy their privileged position, laying the foundations for a new, this time the democratic elite of wealth or power. "We are told," he observes mockingly in *Discourses on Davila*, "that our friends, the National Assembly of France, have abolished all distinctions. But be not deceived, my dear countrymen. Impossibilities cannot be performed. Have they leveled all fortunes and equally divided all property? Have they made all men and women equally wise, elegant, and beautiful?"[36] Thus, every democracy will eventually yield a new aristocracy, only to start this pernicious systemic cycle anew.

"You say—he addresses Taylor—I might have exhibited millions of plebeians sacrificed to the pride, folly, and ambition of monarchy and aristocracy." This is very true. And I might have exhibited as many millions of plebeians sacrificed by the pride, folly, and ambition of their fellow plebeians and their own, in proportion to the extent and duration of their power. Remember, democracy never lasts long. It soon wastes, exhausts, and murders itself. There never was a democracy yet that did not commit suicide. It is in vain to say that democracy is less vain, less proud, less selfish, less ambitious, or less avaricious than aristocracy or monarchy. It is not true, in fact, and nowhere appears in history."[37] In *Letters on a Regicide Peace*, Burke arrives at the same diagnosis, judging the work of the French revolutionaries thus: "Instead of the religion and the law by which they were in a great politick communion with the Christian world, they have constructed their Republick on three bases, all fundamentally opposite to those on which the communities of Europe are built. Its foundation is laid in Regicide; in Jacobinism; and in Atheism."[38] The destruction of the moral foundations of society simultaneously releases its members from their duties to their fellows and the community, and where the power of the state does not reach, human relations resemble the Hobbesian state of nature. The recognition of the sovereignty of the people elevates what is temporary and changeable to the status of a principle while deprecating what is eternal and enduring. In a situation in which there is no theoretical distinction between the rulers and the ruled, the arbitrary will of the majority, or the *general will* as Rousseau would have it, is relieved from any of its extraneous constraints, opening the way to tyranny exercised—perversely so—in the name of freedom.

"Such a constitution of freedom," Burke wrote, "if such can be, is in effect no more than another name for the tyranny of the strongest faction; and factions in republics have been, and are, fully as capable as monarchs, of the most cruel oppression and injustice. It is but too true that the love, and even the very idea, of genuine liberty is extremely rare. It is but too true that there are many whose whole scheme of

[36] Adams, "Discourses on Davila," 232.

[37] Adams "Letter to John Taylor, Quincy, 15 April 1814," 484.

[38] Edmund Burke, "Letters on a Regicide Peace. Letter No. 1. On the Overtures of Peace," in *Selected Works of Edmund Burke*, 3: 124.

freedom is made up of pride, perverseness, and insolence."[39] The reification of public liberty thus construed invariably entails enslavement of individual life. To Burke, the simultaneous exercise of power and control over it is inconceivable, which corresponds with Adams' view, though the latter derives it from an old conception of mixed polities, which emerged early on as part of this reflection.

THE BALANCE OF POWER

What could be done, then, to have the political system ensure the survival of the republic? Adams sought the answer in the achievements of classical republican political thought and the British experience. Indeed, attempts to solve the perennial problem of balance between the various elements of society may already be found in the deliberations of Polybius, whose *History*, book 4, describes the Roman Republic as a mixed system that combines the advantages of monarchy, the role of the leader and popular rule.[40] Tremendously important for the Romans, the balance of the social forces is also the backbone of Machiavelli's disquisition in *Discourse*s, where he elaborates on Polybius' argument. This is crucial since it would be difficult to overstate Machiavelli's influence on the Atlantic political discourse in the seventeenth century, as demonstrated by Pocock. The ceaseless dialectic between the mighty (*grandi*) and the people (*popolo*), whose desires, emotions (*umiori*) are mutually at odds, contributes to the creation of laws enacted for the sake of liberty, while political processes are shaped through the effect of individual social forces within the state. Thus, for a constitution to be legitimate it must be linked to the nature of the political society in which it operates. It must therefore provide the various groups and interests in a society with a sufficient level of influence and control while policies are being formulated. Such an approach to systemic rules, whereby they are a function of the principle of balance, characterized English political thought of the seventeenth century as well. The mindset was also shared by much of the republican milieu in the latter half of that century, who espoused the *neo-Roman* theory cited by Adams in his reflections, and by the English constitutional theorists of the following century, de Lolme in particular. He thus attempts to devise an institutional system that would mitigate the destructive influence of the aristocracy on political processes and ensure that the social balance between the aristocracy and the rest of the body politic is maintained. Since popular governments always degenerate into anarchy and aristocracies into oligarchy, only a government that combines all good features of the respective systems has a chance of survival be-

[39] Edmund Burke, *A Speech of Edmund Burke, Esq. at the Guildhall, in Bristol: previous to the late election in that city upon certain points relative to his parliamentary conduct* (London: J. Dodsley, 1780), 58.

[40] Wilfried Nippel, "Ancient and modern republicanism: 'mixed constitution' and 'ephors,'" in *The Invention of the Modern Republic*, ed. Biancamaria Fontana (Cambridge: Cambridge University Press, 1994), 9.

cause it balances the conflicting interests of various social groups, the interests of the property elite, and the common people. As he stated in his speech in Braintree, "liberty depends upon an exact Ballance, a nice Counterpoise of all the Powers of the state. . . . The best Governments of the World have been mixed."[41] Then, in *Defence*, he argues thus: "Happiness, whether in despotism or democracy, whether in slavery or liberty, can never be found without virtue. The best republics will be virtuous, and have been so; but we may hazard a conjecture, that the virtues have been the effect of the well ordered constitution, rather than the cause. And, perhaps, it would be impossible to prove that a republic cannot exist even among highwaymen, by setting one rogue to watch another; and the knaves themselves may in time be made honest men by the struggle."[42] On the other hand, Adams cuts the umbilical cord that binds virtue and the republic: "It is not true, in fact, that any people ever existed who loved the public better than themselves, their private friends, neighbors, etc., and therefore this kind of virtue . . . is as precarious a foundation for liberty as honor or fear; it is the laws alone that really love the country."[43] Thus, if having the rich and the poor agree voluntarily is impossible, they must be compelled to do so: one should artificially induce virtuous acts—that is, actions that aim at the good of the community and not just its part. Such a task, according to Adams, can only be accomplished by a properly designed institutional system involving bicameralism, where the upper house would be *aristocratic* and separate from the *popular* chamber. Here, Adams draws on the British experience, where the House of Lords, albeit influential, is somewhat weaker than the Commons, and constitutes an *exile* for outstanding individuals and a means of neutralizing them, though it still offers the opportunity to use their talents for the good of the state. The elevation of social status through ennoblement results at the same time in diminished influence and separation from the main political processes, which are focused in the Commons. The idea was realized in the Constitution for the State of Massachusetts, drafted by Adams in 1779. It was modeled on the British system of checks and balances, which, according to Adams, was the only one capable of ensuring systemic stability.[44] It was founded on wealth qualification for voters and candidates, whereby the qualification for Senate candidates was three times higher than for the representative chamber. A special role in the constitutional system designed by Adams would belong to the executive, which would neutralize particularly ambitious and influential individuals through absolute veto and an appointment system for the upper house. The author expected that since the executive was formed following general elections and remained linked to the lower house, it would be "the natural friend of the people,

[41] John Adams, *Notes for an Oration at Braintree, 1772*, quoted after Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (Chapel Hill, London: University of North Carolina Press, 2011), 198.

[42] Adams, "A Defence of the Constitutions of Government of the United States," 6: 219.

[43] Adams, "A Defence of the Constitutions of Government of the United States," 6: 208.

[44] David J. Siemers, "John Adams's Political Thought," in *A Companion to John Adams and John Quincy Adams*, ed. David Waldstreicher (Malden: Wiley-Blackwell, 2013), 109–15.

and the only defense which they or their representatives can have against the avarice and ambition of the rich and distinguished citizens."[45] Adams thus envisaged the president to be the key element in the system, ensuring its stability and balance, "the attention of the whole nation should be fixed upon one point, and the blame and censure, as well as the impeachments and vengeance for abuses of this power, should be directed solely to the ministers of one man."[46] Hence the great responsibility that rests on the authors of the American system, which is why he concludes his argument in *A Defence of the Constitutions* as follows: "All nations, under all governments, must have parties; the great secret is to control them. There are but two ways, either by a monarchy and standing army or by a balance in the constitution. Where the people have a voice, and there is no balance, there will be everlasting fluctuations, revolutions, and horrors, until a standing army, with a general at its head, commands the peace, or the necessity of an equilibrium is made appear to all, and is adopted by all."[47] The above clearly manifests the influence of the English tradition, an inspiration of which Adams made no secret. He found balanced government emulating the British model a modern ideal that he wished to apply in the American circumstances.[48] However, contrary to Burke's position, Adams was a determined and implacable enemy of the monarchy, despite almost lifelong accusations of monarchism. Adams detested the institution that was so crucial for the *Old Whig* as much as the ancient Roman republicans had done; *odium regni* invariably guided his political actions. Central to the conservatives, the institution was antithetical to the republican creed in Adams' eyes. The contractualist notion of the origins of the state enabled him to create a political order *ad hoc*, though in a fundamentally different dimension than was the case with the revolutionaries. He drew on the past, seeking inspiration and models, embraced all that was useful, and rejected anything that he deemed absurd and outdated. Nonetheless, his approach was completely different to Burke's, for whom the past and the ever-valid principles legitimized the present. The former structures, institutions, beliefs, convictions, and customs supplied the building blocks to construct the edifice of the present, one which cannot

[45] Adams, "A Defence of the Constitutions of Government of the United States," 4: 585.

[46] Adams, "A Defence of the Constitutions of Government of the United States," 4: 586.

[47] Adams, "A Defence of the Constitutions of Government of the United States," 4: 588.

[48] As regards the British system of balance, Burke noted as follows: "He who thinks that the British Constitution ought to consist of the three members, of three very different natures, of which it does actually consist, and thinks it his duty to preserve each of those members in its proper place and with its proper proportion of power, must (as each shall happen to be attacked) vindicate the three several parts on the several principles peculiarly belonging to them. He cannot assert the democratic part on the principles on which monarchy is supported, nor can he support monarchy on the principles of democracy, nor can he maintain aristocracy on the grounds of the one or of the other or of both. All these he must support on grounds that are totally different, though practically they may be, and happily with us they are, brought into one harmonious body. A man could not be consistent in defending such various, and, at first view, discordant, parts of a mixed Constitution, without that sort of inconsistency with which Mr. Burke stands charged"—Burke, *An Appeal from the New to the Old Whigs*, 31.

be built on demand nor altered at will. This is echoed in the famous passage from *Reflections*: "Society is indeed a contract. Subordinate contracts, for objects of mere occasional interest, may be dissolved at pleasure; but the state ought not to be considered as nothing better than a partnership agreement in a trade of pepper and coffee, callico or tobacco, or some other such low concern, to be taken up for a little temporary interest, and to be dissolved by the fancy of the parties. It is to be looked on with other reverence; because it is not a partnership in things subservient only to the gross animal existence of a temporary and perishable nature. It is a partnership in all science; a partnership in all art; a partnership in every virtue, and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born. Each contract of each particular state is but a clause in the great primaeval contract of eternal society, linking the lower with the higher natures, connecting the visible and invisible world, according to a fixed compact sanctioned by the inviolable oath which holds all physical and all moral natures, each in their appointed place."[49]

LIBERTY AND PROPERTY

The ultimate goal of Adams' envisaged arrangement of political life is to preserve liberty. One should therefore consider briefly what the second President meant by that term. His republican disposition and references to the antique republican ethos suggest that he may have had some form of Roman *libertas* in mind—that is, the possibility of participation in the public life of the community. This conjecture, however, is only half the truth, as liberty understood in this fashion is only a tool to achieve something that is much more important for Adams. In this respect, he repeatedly invokes the *pre-liberal* and *liberal* tradition when discussing the life, liberty, and property of individuals. Just as in *neo-Roman* thought, which ventured beyond the classical republican paradigm, liberty is a primal category, preceding the act of political unification. Although Adams does not argue in a contractualist style (although he believes that the consent of the people is the sole moral grounds for the government), he takes for granted what had been asserted about freedom by Milton,[50] Nedham,[51] Sidney, or Neville, who explicitly invoked life, liberty and prop-

[49] Burke, "Reflections on the Revolution in France," 192–93.

[50] "No man, who knows aught, can be so stupid to deny, that all men naturally were born free, being the image and resemblance of God himself, and were, by privilege above all the creatures, born to command, and not to obey: and that they lived so, till from the root of Adam's transgression, falling among themselves to do wrong and violence"—Milton, "The Tenure of Kings and Magistrates," 377.

[51] "[T]he end of all Government is (or ought to be) the good and ease of the People, in a secure enjoyment of their Rights, without Pressure and Oppression"—Marchamont Nedham, *The Excellency of a Free State* (London: A. Millar and T. Cadell, 1767), 87.

erty, the classic Lockean triad. In any case, Locke himself defines freedom without reducing it merely to negative liberty,[52] seeing it as the freedom to exercise natural rights within a community based on *non-domination*. Apparently, this is how Adams conceives it, as a kind of combination of *negative* liberty that can only be preserved through republican *positive* liberty. Hence, a participatory institutional system is supposed to safeguard the life, liberty, and property of the citizens. It is difficult to determine whether he interpreted them in line with the *Declaration of the Rights of Man and of Citizen* or in terms of the English tradition founded on the ancient *Englishmen's Liberties*; still, the important thing is that he can undeniably be regarded as one of the fathers of the American constitutional tradition of liberty. Indeed, he was a great advocate of individual liberty, appreciating the importance of freedom of the press, religion, and trial by jury. When drafting the Massachusetts Constitution, he placed the declaration of rights at the very beginning of the document. Then, during the constitutional debate, he endorsed its ratification while opting to include the *Bill of Rights*, which he had persuaded Jefferson to write.

Among these rights, Adams prioritized property which, following Locke, he recognized as a sacred and inviolable right, therefore the degree to which it is protected is a yardstick of justice of government: "The moment the idea is admitted into society, that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence."[53] This does not apply solely to the property of the rich, who are able to protect themselves. What Adams has in mind first and foremost is the property of the people, because it is the foundation of their system of representation. Its absence would cause the constitutional system of balances to collapse and the republic would descend into oligarchy: "The very name of a republic implies, that the property of the people should be represented in the legislature, and decide the rule of justice."[54] Clearly, Adams understands liberty and property like a liberal but defends them like a republican. They do, of course, play a role in stabilizing the system, but differently than in Burke, for whom they are immanent to the God-given earthly order that is best embodied in the *ancient* English constitution. "Our Constitution is like our island, which uses and restrains its subject sea; in vain the waves roar. In that Constitution I know, and exultingly I feel, both that I am free and that I am not free dangerously to myself or to others. I know that no power on earth, acting

[52] "For liberty is, to be free from restraint and violence from others; which cannot be, where there is no law: but freedom is not, as we are told, a liberty for every man to do what he lists: (for who could be free, when every other man's humour might domineer over him?) but a liberty to dispose, and order as he lists, his person, actions, possessions, and his whole property, within the allowance of those laws under which he is, and therein not to be subject to the arbitrary will of another, but freely follow his own"—John Locke, "Two Treatise of Government," in *The Works of John Locke* (Oxford, Edinburgh: C. and J. Rivington et al., 1824), 4: 370.

[53] Adams, "A Defence of the Constitutions of Government of the United States," 6: 9.

[54] Adams, "A Defence of the Constitutions of Government of the United States," 4: 295.

as I ought to do, can touch my life, my liberty, or my property. I have that inward and dignified consciousness of my own security and independence, which constitutes, and is the only thing which does constitute, the proud and comfortable sentiment of freedom in the human breast."[55] Consequently, liberty is the outcome of long-standing social development, a category aligned with the nature of a particular community and the freedoms of others. Liberty and power exist side by side, bound together in such a way that one cannot be without the other. Hence, it does not suffice for liberty to be only "connected with order; and that not only exists with order and virtue but cannot exist at all without them. It inheres in good and steady government, as in its substance and vital principle."[56] He believed in natural rights, but any attempt at defining them must have culminated for Burke in the disaster of abstraction.

CONCLUSIONS

Let us then try to answer the initial question about John Adams' ideological affiliation. Naturally, like any empirical doctrine, it is replete with ambiguities as well as occasional contradictions. However, in light of the above, it can hardly be considered a conservative doctrine in the sense attributed, for instance, to the reflection of Burke's, the most eminent figure of European conservative thought. Thus, Adams does not revere the antiquity and *ancientness* of institutions, as their claim to legitimacy is altogether different, whereas old age and prescription do not inspire his respect. If something different is the case, it is only because it corroborates his philosophical propositions and justifies the validity of his argument through practice. As an enemy of monarchy and aristocracy, Adams thus found himself in the mainstream of contemporary American thought, which was in opposition to European conservatism. Furthermore, the most significant aspect is that Burke, like every conservative of the period, adopted a pessimistic attitude or, like de Maistre—living amidst the ruins—placed his last hope in God's grace and some unspecified event that would change the face of the world after the collapse. Meanwhile, all that can be done is to defend the last enclaves of Tradition and the old world from the revolutionary deluge. Adams took a thoroughly opposite approach. One has to remember that in his youth he had been a revolutionary, though, of course, in a different sense to that which the term revolution acquired in the wake of events in the Paris revolt of 1789 and subsequent years. On the other hand, he was a realist and pragmatist, who realized that revolution had to be followed by a period in which a new political order was built. Even so, being one of its main architects, he

[55] Edmund Burke, "On the Reform of the Representation in the House of Commons," in *The Works of the R.H. Edmund Burke* (London: Henry G. Bohn, 1856), 6: 151.

[56] Burke, *An Appeal from the New to the Old Whigs*, 35.

did not avail himself of the building blocks originating with the French *literati* and their American admirers but took advantage of the material prepared much earlier, namely by the classical republican tradition, which was much more conservative than French republican thought. For this reason, his ideas sometimes ran parallel to those of Burke, though only coincidentally, as it were. For while the Irishman was intransigent in his fight against the Enlightenment, the second President considered himself its child, aspiring to implement the postulations of Enlightenment in a responsible and balanced manner, steering as clear from utopia as possible (incidentally, Burke also drew abundantly on the achievements of the Scottish Enlightenment, but sought to highlight its conservative themes). Instead of impeding political progress (a category alien to conservative thought), he wanted to channel it in the desired direction, to spare America the fate of France. Thus, nearing the end of his days, the embittered and pessimistic Burke ordered his ashes to be scattered so that the Jacobins would not defile his remains, whereas Adams wrote in a letter to David Sewall: "We shall leave the world with many consolations. It is better than we found it. Superstition, persecution, and bigotry are somewhat abated; governments are a little ameliorated; science and literature are greatly improved, and more widely spread. Our country has brilliant and exhilarating prospects before it, instead of that solemn gloom in which many of the former parts of our lives have been obscured. The condition of your State, I hope, has been improved by its separation from ours, though we scarcely know how to get along without you."[57] I am not convinced that these are the words of a conservative, as they rather befit a republican with the sensibility of a classical liberal. The fact that Adams was not a democrat does not make him a conservative in the least unless it is all it takes to be one in the United States.

Summary: The purpose of the chapter is to answer the question of whether John Adams' political thought placed him in the conservative, liberal, or republican trend. The main problem analyzed in the chapter concerns the essential elements of John Adams' political reflections, such as the intellectual inspirations of the second president of the United States, his concept of human nature, his analysis of the structure of political society, and the mechanics of the political system. These are presented from the point of view of the uniquely American social and political experience. The scientific analysis consists of reflecting on the key elements of John Adams' social and political philosophy from the perspective of conservatism, liberalism, and republicanism. This allows us to conclude that the fundamental categories that define these three styles of political thinking in Europe cannot be directly applied to American conditions. The chapter argues that despite the fundamental differences between the American and European political traditions, John Adams' thought is not conservative

[57] John Adams, "To David Sewall, Quincy, 22 May, 1821," in *The Works of John Adams, Second President of the United States*, 10: 399.

in nature, but much closer to neo-Roman republicanism and the classical pre-liberal and liberal traditions. The chapter shows how the study of political categories must always be conducted in the context of a particular political and social tradition and political experience.

Keywords: the Founding Fathers, John Adams, conservatism, republicanism, liberalism

BIBLIOGRAPHY

Adams, John. "A Defence of the Constitutions of Government of the United States." In *The Works of John Adams, Second President of the United States*, vol. 4, 269–588. Boston: Little, Brown and Co., 1850–56.

Adams, John. "A Defence of the Constitutions of Government of the United States." In *The Works of John Adams, Second President of the United States*, vol. 6, 3–220. Boston: Little, Brown and Co., 1850–56.

Adams, John. "Diary, December 18, 1760." In *The Works of John Adams, Second President of the United States*, vol. 2, 154–56. Boston: Little, Brown and Co., 1850–56.

Adams, John. "Discourses on Davila." In *The Works of John Adams, Second President of the United States*, vol. 6, 223–403. Boston: Little, Brown and Co., 1850–56.

Adams, John. "Letter to Benjamin Waterhouse, 29 October 1805." In *The Selected Writings of John and John Quincy Adams*, edited by Adrienne Koch and William Peden, 148–49. New York: A.A. Knopf, 1946.

Adams, John. "Letter to John Taylor, Quincy, 15 April 1814." In *The Works of John Adams, Second President of the United States*, vol. 6, 447–521. Boston: Little, Brown and Co., 1850–56.

Adams, John. "Letter to Samuel Adams, 18 October, 1790." In *The Works of John Adams, Second President of the United States*, vol. 6, 414–20. Boston: Little, Brown and Co., 1850–56.

Adams, John. "Life of John Adams," in *The Works of John Adams, Second President of the United States*, vol. 1, 1–644. Boston: Little, Brown and Co., 1850–56.

Adams, John. "On Self-Delusion." In *The Works of John Adams, Second President of the United States*, vol. 3, 432–37. Boston: Little, Brown and Co., 1850–56.

Adams, John. "To David Sewall, Quincy, 22 May, 1821." In *The Works of John Adams, Second President of the United States*, vol. 10, 399. Boston: Little, Brown and Co., 1850–56.

Adams, John. "To J.H. Tiffany, Quincy, 31 March, 1819." In *The Works of John Adams, Second President of the United States*, vol. 10, 377–78. Boston: Little, Brown and Co., 1850–56.

Adams, John. "To Thomas Jefferson, Quincy, 17 September, 1823." In *The Works of John Adams, Second President of the United States*, vol. 10, 410–11. Boston: Little, Brown and Co., 1850–56.

Adams, John. "To Thomas Jefferson, Quincy, 25 December, 1813." In *The Works of John Adams, Second President of the United States*, vol. 10, 82–85. Boston: Little, Brown and Co., 1850–56.

Burke, Edmund. *An Appeal from the New to the Old Whigs*. London: J. Dodsley, 1791.

Burke, Edmund. "Letters on a Regicide Peace. Letter No. 1. On the Overtures of Peace." In *Selected Works of Edmund Burke*, vol. 3, 1–394. Indianapolis: Liberty Fund, 1999.
Burke, Edmund. "On the Reform of the Representation in the House of Commons." In *The Works of the R.H. Edmund Burke*, vol. 6, 144–53. London: Henry G. Bohn, 1856.
Burke, Edmund. "Reflections on the Revolution in France." In *Selected Works of Edmund Burke*, vol. 2, 1–476. Indianapolis: Liberty Fund, 1999.
Burke, Edmund. *A Speech of Edmund Burke, Esq. at the Guildhall, in Bristol: previous to the late election in that city upon certain points relative to his parliamentary conduct*. London: J. Dodsley, 1780.
Diggins, John P. *John Adams*. New York: Macmillan, 2003.
Frohnen Bruce, Jeremy Beer, and Jeffrey O. Nelson B. *American Conservatism: An Encyclopedia*. Wilmington: ISI Books, 2006.
Harrington, James. *The Oceana and Other Works of James Harrington*. London: A. Millar, 1747.
Kirk, Russell. *Conservative Mind: From Burke to Eliot*. Washington: Ragnery Publishing, Inc., 2001.
Locke, John. "Two Treatise of Government." In *The Works of John Locke*, vol. 4, 207–337. Oxford, Edinburgh: C. and J. Rivington et al., 1824.
Machiavelli, Niccolò. *Discourses on Livy*. Translated by Ninian H. Thomson. Mineola: Dover Publications, 2007.
Madison, James. "Federalist No. 10." In Alexander Hamilton, James Madison, and John Jay, *The Federalist*, ed. Jack R. Pole, 48–54. Indianapolis, Cambridge: Hackett Publishing Company, Inc., 2005.
Milton, John. "The Second Defence of the People of England." In *The Prose Works of John Milton*, vol. 2, 477–527. Philadelphia: John W. Moore, 1847.
Milton, John. "The Tenure of Kings and Magistrates." In *The Prose Works of John Milton*, vol. 1, 374–99. Philadelphia: John W. Moore, 1847.
Nedham, Marchamont. *The Excellency of a Free State*. London: A. Millar and T. Cadell, 1767.
Nippel, Wilfried. "Ancient and modern republicanism: 'mixed constitution' and 'ephors.'" In *The Invention of the Modern Republic*, edited by Biancamaria Fontana, 6–26. Cambridge: Cambridge University Press, 1994.
Palmer, Robert R. *The Age of the Democratic Revolution: A Political History of Europe and America,1760–1800*. Princeton: Princeton University Press, 1970.
Sidney, Algernon. *Discourses Concerning Government*. Indianapolis: Liberty Classics, 1990.
Siemers, David J. "John Adams's Political Thought." In *A Companion to John Adams and John Quincy Adams*, edited by David Waldstreicher, 102–24. Malden: Wiley-Blackwell, 2013.
Viereck, Peter. *Conservative Thinkers: From John Adams to Winston Churchill*. London, New York: Routledge, 2005.
Wood, Gordon S. *The Creation of the American Republic, 1776–1787*. Chapel Hill, London: University of North Carolina Press, 2011.

Chapter 3

"Enlightenment Democracy": Tara Ross' Reflections on the Origins and Functioning of the Electoral College of the United States of America

*Kamil Gaweł**

INTRODUCTION

Tara Ross is an American jurist whose seminal works are dedicated to the original American institution of the Electoral College.[1] This paper focuses primarily on

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[1] It would probably be most expedient to quote from the author's official website: "Tara Ross is nationally recognized for her expertise on the Electoral College. She is the author of *Why We Need the Electoral College* (2019), *The Indispensable Electoral College: How the Founders' Plan Saves Our Country from Mob Rule* (2017), *We Elect A President: The Story of our Electoral College* (2016), and *Enlightened Democracy: The Case for the Electoral College* (2nd ed. 2012). She is also the author of *She Fought Too: Stories of Revolutionary War Heroines* (2019), and a co-author of *Under God: George Washington and the Question of Church and State* (2008) (with Joseph C. Smith, Jr.). Her Prager University video, *Do You Understand the Electoral College?* is Prager's most-viewed video ever, with more than sixty million views. Tara often appears as a guest on a variety of talk shows nationwide, and she regularly addresses civic, university, and legal audiences. She's contributed to many law reviews and newspapers, including the *National Law Journal*, *USA Today*, the *Washington Examiner*, *The Hill*, *The Washington Times*, and FoxNews.com. She's addressed audiences at institutions such as the Cooper Union, Brown University, the Dole Institute of Politics, and Mount Vernon. She's appeared on Fox News, CSPAN, NPR, and a variety of other national and local shows. Tara is a retired lawyer and a former Editor-in-Chief of the *Texas Review of Law & Politics*. She obtained her B.A. from Rice University and her J.D. from the University of Texas School of Law. She resides in Dallas with her husband and children." More information about the Ross' activities is available on her official website: https://www.taraross.com/about (accessed December 17, 2022).

Kamil Gaweł, "'Enlightenment Democracy': Tara Ross' Reflections on the Origins and Functioning of the Electoral College of the United States of America." In *Enlightenment Traditions and the Legal and Political System of the United States of America*, edited by Michał Urbańczyk, Kamil Gaweł, and Fatma Mejri, 63–78. Poznań: Adam Mickiewicz University Press, 2024. © Kamil Gaweł 2024. DOI: 10.14746/amup.9788323242543.4.

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an analysis of selected reflections from Ross' *Enlightened Democracy: The Case for the Electoral College*.[2] The selected excerpts (*Part One: The Origins of the Electoral College* as well as *Part Two: An 18th-Century Solution for the 21st Century*) represent a compromise between the formula of the text and the richness of Ross' observations. The parts in question deliver the author's commentaries on the rationale behind the introduction of this institution and the contemporary aspects in the functioning of the Electoral College and, as already mentioned, this study focuses on those in the light of Ross' work. As regards the former, the principal themes examined here include the reluctance of the Founding Fathers towards democracy, the relations between different social strata, the understanding of the term "republic," the system of checks and balances, as well as the debates during the Constitutional Convention. Matters relating to the functioning of the institution are discussed in the context of federalism, contemporary attitudes to democracy, the current pace of information flow, as well as the advantages and drawbacks of the Electoral College. With respect to the eponymous "Enlightenment traditions," it is worth noting that the affirmation of various eighteenth-century solutions pervades all Ross' reflections. On the one hand, she draws on the notion of "Enlightenment democracy" to interpret categories such as "republic," "democracy," and, more broadly, the social and political relations in general. On the other hand, there is a deep conviction that the solutions dating back to that period do apply today.

In the first place, this paper will attempt to characterize a major part of Ross' thoughts on the Electoral College. There is no particular need to substantiate one's interest in a body that elects the leader of a state as politically significant as the United States of America. Ross' reflections constitute a contribution in the lively debate concerning this institution that is taking place in America. It is therefore worth examining the arguments formulated by one of the leading representatives among the "defenders" of the Electoral College. Discussed here, Ross' observations revolve around two issues relating to the institution, namely its origins and functioning, both of which the author assesses positively. Such an approach to the matter yields the essence of Ross' views.

Secondly, this study aims to popularize Ross as well as her views within scholarly discourse in Poland. Again, the need for research on the manner in which the American president is elected does not require special justification. It is anything but insignificant, in view of the social and political impact of that state (also on Poland), as well as given the extensive links between the election of the President by the Electoral College and research into political and legal doctrines or constitutionalism. It appears that issues surrounding the Electoral College receive little attention

[2] Tara Ross, *Enlightened Democracy: The Case for the Electoral College* (Dallas: Colonial Press, L.P., 2012).

from Polish scholars.[3] For this reason, Ross' deliberations have been quoted quite abundantly. The desire to familiarize the Polish reader with the matter at hand has also dictated, albeit to a limited extent, the choice of the excerpts to be cited.

THE ORIGINS OF THE ELECTORAL COLLEGE, ACCORDING TO TARA ROSS

Ross places a definite emphasis on the negative attitude of the Founding Fathers towards democracy, drawing attention to several problems in this respect. She analyzes the virtually organic aversion of most Founding Fathers to pure democracy and the apparent contradiction that such an approach may engender in contemporary America: "This fact may come as a surprise to many Americans, who mistakenly believe that the United States was established as a democracy. The founding generation, however, intentionally omitted the word "democracy" from their governing documents. The Founders, by and large, were opposed to pure democracy, which allowed bare majorities to tyrannize over minority groups. Instead, the founding generation intended to create a republic—or, arguably republican democracy—which would incorporate a spirit of compromise and deliberation into decision—making."[4]

A position of this kind has been widely supported in pertinent literature by such scholars as Ryszard Małajny.[5] Vernon Louis Parrington notes that prior to the French Revolution, the term "democracy" evoked distinctly negative emotions among Americans.[6]

[3] Concerning presidential elections in the United States in general, on should mention, for example, the publication by Rett Ludwikowski and Anna Ludwikowska, see Rett Ludwikowski and Anna Ludwikowska, *Wybory prezydenckie w USA na tle porównawczym* (Warszawa: LexisNexis Polska, 2009). Bogdan Mucha's study is also extremely valuable, see Bogdan Mucha, *System wyboru Prezydenta Stanów Zjednoczonych Ameryki* (Toruń: Wydawnictwo Adam Marszałek, 2014).

[4] Ross, *Enlightened Democracy: The Case for the Electoral College*, 15.

[5] The author analyzes the positions of several Founding Fathers, observing as follows: "Today, the 'Fathers of the Constitution' enjoy a well-merited reputation as the founders of American democracy. Yet, in reality, they were less than fond of unrestricted democracy and therefore it would be misguided to drape them in the togas of popular tribunes. For Alexander Hamilton, democracy meant a concept akin to ochlocracy; for Elbridge Gerry, the worst of all political evils; for Fisher Ames, 'an illuminated hell, that in the midst of remorse, horror, and torture, rings withfestivity'; and for John Adams—who would speak in the strongest of terms—'the most miserable, unjust and hateful form of polity . . . arbitrary, tyrannical, bloody, cruel, and intolerable a government,'" see Ryszard Małajny, *Doktryna podziału władzy "Ojców Konstytucji USA"* (Katowice: Uniwersytet Śląski, 1985), 151–52.

[6] Vernon Louis Parrington, *Mentalność kolonialna 1620–1800*, trans. Henryk Krzeczkowski (Warszawa: Państwowy Instytut Wydawniczy, 1968), 457. It may be noted that the many classics with whom the Founding Fathers were conversant had also condemned democracy. For instance, Aristotle found democracy to be a "degenerate" form of government, see Giovanni Reale, *Historia filozofii starożytnej*, vol. 2, *Platon i Arystoteles*, trans. Edward I. Zieliński (Lublin: Redakcja Wydawnictw KUL, 2012), 516. More broadly on the influence of the antique thought in the political reflection of the Founding Fa-

Closely related to democracy, there is also the matter of the social relationship between the minority and the majority. Ross observes that the Founding Fathers were concerned about the threat to the liberties of the minority from the democratic majority. In her opinion, the Founding Fathers had learned the lessons of history and equated pure democracy with ochlocracy.[7] According to a deep conviction they shared, governance relying on "the wise, the good, and the rich" was the superior form. In the American realities, the latter stratum consisted of people referred to as 'gentlemen' (the equivalent of the English gentry). The emphasis on the association between liberty and property resulted in a constant fear of the "rule of the mob."[8]

In the subchapter tellingly titled "The Evils of Democracy," Ross highlights the differences between the notions of "republic" and "democracy," observing that: "The Constitution does not guarantee "every State in this Union" a democratic form of government, but rather 'a Republican Form of Government.' The difference is more than merely semantic. Republicanism expects that a country will thrive when people are governed by representatives who are elected based on their wisdom, integrity, and civic virtue. These representatives are intended to deliberate and reach wise compromise with other representatives. A democratic, or populist, theory of government, by contrast, would assume that the 'main repository of wisdom and virtue' is in the people themselves."[9]

The fact that the Founding Fathers set "republic" against "democracy" has been extensively discussed in the literature. Bernard Bailyn asserts that the two terms were close to each other, often even being used as synonyms. This does not change the fact that "republic" carried more positive connotations, as it brought the primacy of order and virtue to mind. Conversely, "democracy" was often associated with social disorder.[10] Małajny describes the relationship between the two terms in a similar fashion, as he finds that the founding fathers saw republic and democracy as opposites, and largely gave unequivocal preference to the former. In the spirit of Bailyn,

thers (mainly concerning the concept of a mixed system) see, for example, Małajny, *Doktryna podziału władzy "Ojców Konstytucji USA,"* 44–47.

[7] Ross, *Enlightened Democracy: The Case for the Electoral College*, 16–17. Cf. another meaningfully titled work by Ross—that is, *The Indispensable Electoral College: How the Founders' Plan Saves Our Country from Mob Rule* (Washington, DC: Regnery Gateway, 2017).

[8] Małajny, *Doktryna podziału władzy "Ojców Konstytucji USA,"* 120–22.

[9] Ross, *Enlightened Democracy: The Case for the Electoral College*, 19–21. Ross goes on to cite arguments raised during the ratification debate. She concludes that both supporters and opponents of the constitution generally agreed on the advantages of republicanism over democracy. Regarding the debate that accompanied the ratification of the US Constitution, it may be worthwhile to mention essay no. 39 in *The Federalist Papers*, in which James Madison examines whether the draft constitution is compatible with republican principles, see James Madison, "No. 39: The Conformity of the Plan to Republican Principles," in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (Mineola: CreateSpace Independent Publishing Platform, 2020), 182–87.

[10] Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Belknap Press of Harvard University Press, 2017), 282.

Małajny also underlines a peculiar kind of concurrence of those notions. From the standpoint of this study, it may also be noted that the vision of a republic espoused by the Founding Fathers was decidedly elitist according to the latter author.[11] Based on the conceptions of the Founding Fathers, Marcin Król attempts to define the term "republicanism": "In the simplest terms, republicanism may be defined as a conviction that citizens motivated by public virtue should dedicate themselves to the common good. Thus, republicanism condemns individualism, egoism, pursuit of one's own interest, while praising such virtues as selflessness and concern for the good of the community. The community is more important than the individual."[12] In the subchapter "Reflecting the Sense of the People," Ross elaborates on the attitude of the Founding Fathers' attitude to "the people," noting that "the Founders' statements against democracy were not indicative of the opposition to self-government. To the contrary, the Founders knew and often spoke of the need to allow the will of the people to operate in the new government that they were crafting." As an example of such a stance, Ross cites Madison.[13]

In another tellingly titled subchapter, "A Republic, If You Can Keep It,"[14] Ross draws attention to the political system established under the US Constitution, referring to bicameralism with its distinct modes of electing members of the various chambers, the division of power between the federal government and the states, or

[11] Małajny, *Doktryna podziału władzy "Ojców Konstytucji USA,"* 154–55. Incidentally, the elitism of the Founding Fathers came in various shapes and shades. Examining their approach to the natural equality of the people, Wiktor Osiatyński observes: "It is self-evident to Jefferson, much less to Adams, and least to Hamilton." Wiktor Osiatyński, *Ewolucja amerykańskiej myśli społecznej i politycznej* (Warszawa: Państwowe Wydawnictwo Naukowe 1983), 52. Absence of elitism on Jefferson's part seems more complex; Michał Urbańczyk describes the attitude of the statesman to equality of the people thus: "[P]eople are equal in the moral aspect, which the law should respect. However, every man makes different use of their reason and abilities. Hence, there is no actual equality between people and a certain hierarchy emerges in a society." Consequently, the differences in one's use of reason and ability prompt Jefferson to distinguish a "natural aristocracy," composed of individuals distinguished by talent and virtue. Michał Urbańczyk, *Idea godności człowieka w orzecznictwie Sądu Najwyższego Stanów Zjednoczonych Ameryki* (Poznań: Wydawnictwo Naukowe UAM, 2019), 55–56.

[12] Marcin Król, *Historia myśli politycznej: od Machiavellego po czasy współczesne* (Gdańsk: ARCHE, 2003), 99. The author points out that the prevalent notion among the Founding Fathers was that people are generally driven by passions. Even so, they believed that the latter could be transformed into interests that may be balanced against one another, thus working towards the common good.

[13] Ross, *Enlightened Democracy: The Case for the Electoral College*, 22. The author draws attention to Madison's attachment to self-governance as expressed in *Federalist No. 39*, see James Madison, "Federalist No. 39: The conformity of the plan to republican principle," 182. Ross also cites James Wilson, who argued in a similar vein. As an aside, the latter Founding Father contributed substantially to the shape of the American presidency. This issue is discussed by Christopher S. Yoo in "James Wilson as the Architect of the American Presidency" in *The Life and Career of Justice James Wilson*, ed. Randy E. Barnett (Washington, DC: Georgetown Center for the Constitution, 2019), 64–96.

[14] The title of the subchapter echoes the question addressed to Benjamin Franklin after the Constitutional Convention. When asked about the systemic shape of the American state was, he replied: "Republic, if you can keep it." Quoting the anecdote, Ross refers to the system of checks and balances that the Founding Fathers had created, see Ross, *Enlightened Democracy: The Case for the Electoral College*, 23.

the special majority required to overturn a presidential veto. Against this background, Ross places the Electoral College, which she considers an ultimate safeguard of the system.[15] Indeed, the American system of checks and balances is invoked in the literature exceedingly often. It was premised on enhancing the Montesquian doctrine of the separation of powers with interrelationships and limitations, pursuing the idea of having things in check and balance.[16] The question of the relationships between the powers is one of the reasons why the participants in the Constitutional Convention established the Electoral College for the purpose of electing the president. Simplifying somewhat, it may be said that the introduction of a strong legislature into the American political system prompted the decision-makers gathered at the convention to abandon the idea of electing the executive through the national lawmaking body. Carol Berkin draws attention to the correlation between these two issues: "As the debates unfolded, the central question proved to be whether the president should be empowered to police the legislature. For having created a bicameral congress and endowed it with broad-ranging powers, including the right to levy taxes and to regulate foreign trade, the delegates now wondered if the legislature needed some check upon its authority."[17] Following Ross' argument, the matter is discussed below.

Ross formulates a similar view to Berkin's. Having the executive elected by the national legislature was indeed taken into consideration for most of the time of the Constitutional Convention,[18] owing, among other things, to the experience of the colonial period. As Wilson stated: "Before the Revolution, both the executive and the judiciary did not rest in the hands of the people, or those whom the people had empowered. It had a different and alien source. It was exercised according to foreign rules and geared towards the realization of foreign interests."[19] Hence, it is no sur-

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[15] Ross, *Enlightened Democracy: The Case for the Electoral College*, 24. Ross states: "The Founders buttressed the new government with one last protective device: The Electoral College. The new presidential election system provides at least two reasonable concessions to the minority. First, a presidential candidate cannot be elected simply by gaining a majority in a handful of states. Instead, the presidential candidate must garner support across the nation to have a reasonable probability of being elected. Second, the majority is provided with several methods by which may amplify its voice, allowing it to make a statement that would otherwise go unnoticed in a direct popular vote." This quote foreshadows the exposition on the merits of the Electoral College, discussed here in greater detail later on.

[16] Jolanta A. Daszyńska, *Kryzysy i kompromisy w Stanach Zjednoczonych Ameryki czasów Ojców Założycieli* (Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2018), 53. The classic essay pertaining to the system is *Federalist No. 51*, which delves into the division of powers, see James Madison, "Numer 51," in *Eseje polityczne federalistów*, ed. Frederick Quinn, trans. Barbara Czarska (Kraków, Warszawa: Znak, Fundacja im. Stefana Batorego, 1999), 149–54. The checks and balances system is described in detail by Andrzej Pułło in *System konstytucyjny Stanów Zjednoczonych* (Warszawa: Wydawnictwo Sejmowe 1997), 20–24, 56.

[17] Carol Berkin, *Doniosłe rozstrzygnięcie. Tworzenie amerykańskiej konstytucji*, trans. Jerzy S. Kugler (Warszawa: Wydawnictwo Sejmowe: Kancelaria Sejmu, 2005), 93–94.

[18] Ross, *Enlightened Democracy: The Case for the Electoral College*, 30–31.

[19] Mucha, *System wyboru Prezydenta Stanów Zjednoczonych Ameryki*, 25. Naturally, in Wilson's view, the attitude towards the legislature—which apparently protected the interests of the colonists—was quite different.

prise that the experience informed the debate at the Convention, whose participants would set out by affirming the option of the executive being elected by the national legislature.[20] Only after the aforementioned stalemate over the shape of the legislature was broken did new conditions arise in which the choice of the executive could be envisioned differently, although it provoked new concerns as well. Previously, most had believed that a strong legislature must exercise control over the executive—of which they were distrustful—whereas after July 16 they began to fear the rise of the legislature.[21] As a compromise solution, the Electoral College dispelled the doubts regarding the division of power between its branches, but also mitigated the concerns about the redistribution of powers between the federal government and the states. Ross underlines that during the deliberations of the Constitutional Convention, the College was perceived as a solution that benefited both large and small states: "The election requires the active involvement of each state, yet support from a regional constituency alone is insufficient to win the Electoral College. The President must win local support across the nation to be elected." According to Ross, the Electoral College reified the values of the "Great Compromise" and lent them a federal dimension.[22] The author outlines the origins of American federalism, noting, for instance, the weakness of the state when the Articles of Confederation were in force. The problem was then resolved by establishing a "federalist republic," where the duties and responsibilities were shared between the central government and the states.[23]

AN ENLIGHTENMENT SOLUTION IN THE TWENTY-FIRST CENTURY

Ross discusses the benefits for American society arising from the existence of the Electoral College. Drawing attention to the (aforementioned) federalist element in the debate on the Electoral College, she concludes that modern Americans often have little understanding of the emphasis on state sovereignty that many of

[20] Early on in the debate, this view received strong support in, for example, the statement by Charles Pinckney of June 2, see Max Farrand, ed., *The Record of the Federal Convention of 1787* (New Haven: Yale University Press, 1911), 1: 91.

[21] July 16 witnessed the "Great Compromise"; Daszyńska describes the moment as follows: "The Great Compromise between large and small states, those with high population density and those where population was scarce. What satisfied the delegates from such diverse states were the principles governing the elections to Congress. Two senators would always be elected to the Senate, or the upper house, regardless of the state's population. On the other hand, members of the House of Representatives, or the lower house, would be elected proportionately to the population of the state," see Daszyńska, *Kryzysy i kompromisy w Stanach Zjednoczonych Ameryki czasów Ojców Założycieli*, 51–52. Małajny discussed the Founding Fathers' fears of an overly powerful legislature in a fragment on the "despotism of the legislature," see Małajny, *Doktryna podziału władzy "Ojców Konstytucji USA,"* 142–47.

[22] Ross, *Enlightened Democracy: The Case for the Electoral College*, 31–33.

[23] Ross, *Enlightened Democracy: The Case for the Electoral College*, 34–35.

the Founding Fathers had valued. In Ross' opinion, the latter was convinced that limited powers of the federal government would be a safeguard of the freedom which they had won. Present-day Americans often look to the federal government for action.[24] The evolution of the relationship between the states and the federal government is also a major topic in American constitutionalism. Given our context, Pułło aptly observes that "the creators of the Constitution were more inclined to see the danger to the future state in the federal competence being assumed by the states than vice versa. The authors of *The Federalist* devoted much effort to demonstrating how strong the power of the states was compared to the central government. The future development of the country, however, brought about the opposite."[25] Ross observes that Americans have considerably devalued the significance of federalism, and as a result, no longer see the advantages of the Electoral College.[26] Consequently, federalism is understood as a token of "respect" for the sovereignty of the states and acknowledgment of the fact that the United States is a "union of states." The Electoral College is commonly associated by scholars with support for federalism thus construed.[27] Ross' approach to such a notion of federalism is critiqued by Alan E. Johnson, who argues that it lacks historical and constitutional grounds. Moreover, he does not share Ross' conviction that the Electoral College was established to protect what he calls "her version of eighteenth-century federalism."[28]

Ross also accentuates the problems arising from the "development of a populist mentality." Once again, she underscores the gap between the republican approach of the Founding Fathers and the far more democratic approach of the Americans today, who do not understand the republican logic of indirect elections behind the Electoral College. In the relevant section of her argument, it constitutes a contradiction with evidently practical and contemporary consequences: "The founding generation established republican safeguards as protection against tyranny, but modern Americans have never been exposed to such tyranny (or mob anarchy for that matter) and such a threat seems more hypothetical than real." Even so, such a mindset affects contemporary American attitudes towards the Electoral College. Since they do not consider "pure democracy" a threat, they have no reason to endorse the solution

[24] Ross, *Enlightened Democracy: The Case for the Electoral College*, 56–57.

[25] Pułło, *System konstytucyjny Stanów Zjednoczonych*, 151. Małajny's more general reflections on federalism are also valuable in this context, see Ryszard Małajny, *Amerykański prezydencjalizm* (Warszawa: Wydawnictwo Sejmowe, 2012), 32–33.

[26] Ross, *Enlightened Democracy: The Case for the Electoral College*, 60.

[27] Donald Haider-Merkel et al., "The Role of Federalism in Presidential Election," in *Choosing A President. The Electoral College and Beyond*, eds. Paul D. Schumaker and Burdett A. Loomis (New York: Chatham House Publishers Inc., 2002), 131.

[28] Alan E. Johnson, *The Electoral College. Failures of Original Intent and proposed Constitutional and Statutory Changes for Direct Popular Vote*, 2nd ed. (Pittsburgh: Philosophia Publications, 2021), 142.

that such concerns brought forth.[29] In her deliberations, Ross links the distinct approaches of modern-day Americans and the Founding Fathers toward democracy with the problem of the "minority president." This corresponds well with a remark by Bogdan Mucha, who observes that the system of electing the President through the Electoral College is criticized today chiefly from a doctrinal and philosophical standpoint. Opponents of the system allege its being undemocratic and maintain that it leads to "wasting" votes cast for the losing candidate in a given state.[30] To date, candidates who had not received the most votes in the general election were elected president on five occasions.[31] Ross asserts that the winner-take-all principle which applies in most states is not constitutional. The decision of individual states to implement it manifests, in her view, the benefits of federalism. The states of Nebraska and Maine have exercised their discretion in this regard, shaping their systems differently than the rest.[32]

Ross also raises the question of access to information and the latest news, as well as the ability to communicate, which have changed radically since 1787.[33] She maintains, however, that this does not render obsolete that particular reason for the introduction of the Electoral College, which derived from the amount of information available to the citizens. After all, global interdependencies and socio-economic in-

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[29] Ross, *Enlightened Democracy: The Case for the Electoral* College, 61–63. This is aptly reflected in the following: "Many critics of the Electoral College maintain that the country's presidential election powers have become outdated in a society that increasingly believes itself to be democratic."

[30] Mucha, *System wyboru Prezydenta Stanów Zjednoczonych Ameryki*, 298.

[31] This was the case in 1824, 1876, 1888, 2000 and 2016. Ross, *The Indispensable Electoral College. How the Founders' Plan Saves Our Country from Mob Rule*, 161–71.

[32] Ross, *Enlightened Democracy: The Case for the Electoral* College, 68–70. It is worth quoting from Ross: "Maine and Nebraska, with four and five votes, respectively, have each adopted a different system. Their elections do not follow the winner–take–all rule; instead, votes are allocated based upon congressional district. The freedom of states to do exactly as they wish is one of the great benefits of federalism." Due to the fact that when commenting on the Americans' attitudes to democracy Ross mentions a president who lost the popular vote but won in the Electoral College, I follow a different order of description than the successive chapters of *Enlightened Democracy: The Case for the Electoral College*.

[33] As noted earlier, access to information and news was one of the main reasons why the Electoral College was introduced. However, it is worth recalling what access to information people in eighteenth-century America actually had. In 1725, only five newspapers were published in the colonies. By 1765, there were already twenty five, two of them appearing in a foreign language (i.e., in German). Their relative spread does not change the fact that only a fraction were available in more remote regions of the colonies. The process of formulating an opinion that spanned all colonies was forged only gradually, see Henryk Katz, *Historia Stanów Zjednoczonych Ameryki* (Wrocław: Zakład Narodowy im. Ossolińskich, 1971), 16. Zbigniew Lewicki provides a comprehensive depiction of the communication realities in eighteenth-century America. In a somewhat pessimistic tone, this author states that "the development of the postal system was dependent on the development of the road infrastructure, which was a major limiting factor. Until the mid-eighteenth century, practically no real roads had been built in the colonies: Indian roads were used, the simplest ways of access to new farms were created; at times it proved possible to improve the path used by pack horses enough so that carts could pass through as well, but wherever possible goods were transported by water," see Zbigniew Lewicki, *Historia cywilizacji amerykańskiej. Era tworzenia 1607–1789* (Warszawa: Wydawnictwo Naukowe Scholar, 2021), 429–30.

terconnectedness have increased: "Along with the improvement in communications has come a similar change in the nature of commerce. The economy increasingly becomes, not just more national, but also more global." As a result, sound political choices require much greater knowledge than before, hence the classic argumentation from the time of the Constitutional Convention, which emphasized access to knowledge and the vision of politics as a matter of one elite or another, remains valid.[34] The chapter entitled "The Benefits of Federalism"[35] contains a section defending the federal perspective in thinking about the Electoral College. According to the author, the advantages of the electoral system outweigh its shortcomings, whereas the consequences of its elimination are difficult to predict.[36]

Towards the end of Chapter Five, Ross draws attention to several other interesting issues. The author stresses that by recognizing the value of the smaller states the Electoral College protects them from being dominated by the larger ones.[37] This is a classic theme, articulated emphatically in the deliberations of the Constitutional Convention. Gunning Bedford's speech offers an eloquent example: "Gunning Bedford, the lumbering giant from Delaware, was the first to bluntly accuse his enemies of conspiracy. 'I do not, gentlemen, trust you,' he told the large-state delegates. 'If you possess the power, the abuse of it could not be checked.'"[38] In "Preserving Federalism," Ross compellingly recapitulates the observations concerning the influence of the Electoral College on the contemporary facet of American federalism. Specifically, people who call for direct election of the president overlook the interests of their states whilst focusing on what they may gain from a different voting paradigm.[39] In the author's opinion, the Electoral College continues to fulfill its tasks, which from the outset include protecting the rights of the smaller states. In a similar vein, the rights of the smaller states are underlined by Earl Ofari Hutchinson.[40]

[34] Ross, *Enlightened Democracy: The Case for the Electoral* College, 63–64.

[35] In the *Introduction* to the chapter, Ross quotes an excerpt from President Ronald Reagan's speech, in which the latter states that without the Electoral College, the dominance of the large and populous states would be considerable. Furthermore, Reagan emphasizes the importance of state sovereignty to American freedom. Ross subscribes to such vision, reasserting the link between the Electoral College and federalism, see Ross, *Enlightened Democracy: The Case for the Electoral College*, 67–68.

[36] Ross, *Enlightened Democracy: The Case for the Electoral College*, 70–71. The subchapter analyzes a number of election campaigns.

[37] Ross, *Enlightened Democracy: The Case for the Electoral College*, 79. Ross observes: "The Electoral College, then, accomplishes an important goal: it ensures that the voices if small states are not drowned out altogether, as they otherwise could be. It ensures that the largest states will not rule as majority tyrants over their smaller neighbors. As the small states are protected, so are the voters who reside within them."

[38] Berkin, *Doniosłe rozstrzygnięcie. Tworzenie amerykańskiej konstytucji*, 85. More statements along those lines may be found, such as Oliver Ellsworth's of July 25, in which he expressed concern about the potential dominance of the larger states during the elections of the executive. Farrand, *The Record of the Federal Convention of 1787*, 111.

[39] Ross, *Enlightened Democracy: The Case for the Electoral College*, 79–80.

[40] Earl O. Hutchinson, *What's Right and Wrong with the Electoral College* (Los Angeles: Independently published, 2020), 29.

In the chapter entitled "Moderation and Compromise," Ross highlights the relationship between the two-party system in the United States and the Electoral College, as she finds that the combination of these institutions contributes to preventing extreme groups and radical minorities from coming to power.[41] This tallies with one of the reasons for the introduction of the Electoral College, namely the fear of factions and conspiracies. To the Founding Fathers, "faction" meant "an association pursuing socially reprehensible ends."[42] In this respect, the Electoral College demonstrated an advantage over the election of the President by the national legislature as an hoc body, whereby the electors did not gather in one location but voted in the capitals of their states. Consequently, it was less susceptible to the factional conspiracies that Gouverneur Morris warned against if the president were to be elected by the national legislature. Berkin observes: "Gouverneur Morris raised old fears—and added what for these overwhelmingly Protestant delegates was a chilling comparison to the practices of Roman Catholicism. 'If the Legislature elect,' Morris declared, 'it will be the work of intrigue, of cabal, and of faction; it will be like the election of a pope by a conclave of cardinals; real merit will rarely be the title to the appointment.'"[43]

In another fragment,[44] Ross shows how the Electoral College fits in with the entire system of checks and balances and, considering the systemic context, notes that it would be difficult to predict the impact on the American system should the Elec-

[41] Ross, *Enlightened Democracy: The Case for the Electoral College*, 81–82.

[42] Ryszard Małajny, *Trzy teorie podzielonej władzy*, (Warszawa: Wydawnictwo Sejmowe, 2001), 271. The meanings of terms such as "faction" and "party" derived from the work of numerous authors, such as St John (1st Viscount Bolingbroke), David Hume, or Edmund Burke, see Izabella Rusinowa, *Z dziejów amerykańskich partii politycznych* (Warszawa: "Egross," 1994), 10. Bolingbroke's thoughts on the matter are worth quoting here: "*Faction* is to *party* what the *superlative* is to the *positive*. *Party* is a political *evil*, and *faction* is *the worst of all parties*," see Henry St John Bolingbroke, "Idea króla—patrioty" in *Idea króla—patrioty. Wybór pism*, trans. Agnieszka Kuczkiewicz-Fraś and Piotr Musiewicz (Kraków: Ośrodek Myśli Politycznej, 2020), 200–01.

[43] Berkin, *Doniosłe rozstrzygnięcie. Tworzenie amerykańskiej konstytucji*, 94. The matter is addressed by Hamilton in *Federalist No. 68*: "And as the Electors, chosen in each State, are to assemble and vote in the State in which they are chosen, this detached and divided situation will expose them much less to heats and ferments, which might be communicated from them to the People, than if they were all to be convened at one time, in one place. Nothing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption." Alexander Hamilton, "No. 68: The Mode of the Electing the Presidency," in *The Federalist Papers*, 333. *Federalist No. 68* is a classic contribution to the debate on the Electoral College. Georg Grant notes that Hamilton's aim was indeed to defend the Electoral College, and includes the text of the entire essay in his book (*The Importance of the Electoral College*), thus underscoring its importance. Georg Grant, *The Importance of the Electoral College* (Tennessee: Franklin, 2020), 87–92.

[44] Entitled "The Solar System of Governmental Power." This is a reference to a speech by John F. Kennedy, who spoke of the Electoral College as follows: "It is not only the unit vote for the Presidency we are talking about, but a whole solar system of governmental power. If it is proposed to change the balance of power of one of the elements of the solar system, it is necessary to consider all the others," see Ross, *Enlightened Democracy: The Case for the Electoral College*, 87.

toral College be abolished. Perhaps, as proponents of direct voting see it, it would be minimal, but Kennedy, who anticipates the loss of systemic balance, may also be right.[45] Although such arguments concern power relations within the already existing political system of the United States, it is worth stressing once again that much the same provided grounds for the creation of the Electoral College.

Another issue examined by Ross is the alternative methods of electing the President, where she once again embraces the systemic perspective to assert that change may have adverse, system-wide corollaries. The crucial question is whether the potential introduction of direct presidential elections would entail the elimination of the second ballot. Such a requirement has been formulated in most historical proposals for direct voting, but Ross points out that it does not feature in the National Popular Vote (NPV) project. Presidential campaigns in France (of 2002 and 2012) are cited by the author as an example of a system where the second round is harmful to the stability and moderate nature of political life: "As demonstrated in these examples, the French direct election system had worked against coalition-building and moderate candidates in that country."[46]

The National Popular Vote plan presupposes "an interstate agreement, whereby the legislatures in the fifty states and the District of Columbia would appoint presidential electors who would be obligated to vote for the candidate who has received the highest proportion of voter's votes nationwide."[47] Interestingly, Ross notes that NPV would promote the winner-take-all phenomenon, which is one of the complaints voiced by the critics of indirect presidential elections through the Electoral College as part of the current model: "NPV realizes on the same dynamic, removing 'winner-take-all' from the state level and implementing it at the national level. In this way, third parties will still be discouraged, but these direct election advocates will be able to achieve the more purely democratic process that they desire."[48] Indeed, the criticism is often leveled at the Electoral College that the winning candidate takes over all the electors in a state, a problem described above. Another frequent consequence to which Ross refers in the preceding quote is the perpetuation of the two-party system. According to Mucha, it is quite common in jurisprudence to criticize the unitary method, because the adoption of the winner-take-all principle exacerbates the possibility of asymmetries arising between the number of votes of the voters and the electors.[49]

"Stability and Certainty in Elections" is a chapter devoted to the advantages of the Electoral College with respect to the elections themselves. The author observes

[45] Ross, *Enlightened Democracy: The Case for the Electoral College*, 87.

[46] Ross, *Enlightened Democracy: The Case for the Electoral College*, 88–91.

[47] Mucha, *System wyboru Prezydenta Stanów Zjednoczonych Ameryki*, 316.

[48] Ross, *Enlightened Democracy: The Case for the Electoral College*, 91–92. Ross expounds her views on the NPV in the article entitled "Legal and Logistical Ramifications of the National Popular Vote Plan," *Federalist Society Review* 11, no. 2 (2010): 37–44. Accessed November 20, 2022, https://www.ifs.org/doclib/20101021_Ross2010NPVIssues.pdf.

[49] Mucha, *System wyboru Prezydenta Stanów Zjednoczonych Ameryki*, 304.

that supporters of the Electoral College often emphasize its importance for the stability of the election process. In the case of direct elections, the "theft" of votes may have an impact—albeit a minor one, of course—on the final outcome. With the Electoral College, such a possibility is radically limited; an attempt to influence the outcome of an election by "stealing" votes would have to be coupled with a prediction where such an action could yield the desired effect. Naturally, opponents of the Electoral College argue that the prospect of electoral fraud is greatly exaggerated, whereas Ross points out that the Electoral College tends to amplify an electoral victory and contributes to the finality of elections.[50] As regards that "finality," Berkin makes some pertinent remarks on the 2000 elections: "Albert Gore or George W. Bush—Americans would learn the name of the victor over their morning coffee. It was not so. For weeks, indeed months, what will surely become the most celebrated disputed election in presidential history dragged on. Accusations and counteraccusations of fraud, deception, mechanical error, and human error raged around the votes cast in the state of Florida."[51] Ross further emphasizes the impact of the Electoral College on reducing errors and potential fraud, advantages which should be attributed to the very essence of electing a president in this manner: "The Electoral College minimizes the impact of fraud and error by isolating problems to one state or a handful of states."[52]

The tellingly titled "Imperfect World, Optimal Solution" is the last of the subchapters discussed here. In it, the author reiterates her observations about the merits of the Electoral College. The realistic overtone is tangible in both the title and the content since the crux of the matter lies in searching for the best possible solution rather than an ideal one. Such a position is well reflected in the fragment concerned with eliminating potential electoral fraud: "The Electoral College system cannot completely eliminate the incentive for fraud. Where people are vying for power, there will always be motivation to cheat. This is human nature."[53] It would be difficult not to see this as a conservative stance, which is widely believed to involve the conviction that human nature is permanently flawed while social conflicts are inevitable.[54]

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[50] Ross, *Enlightened Democracy: The Case for the Electoral College*, 97.

[51] Berkin, *Doniosłe rozstrzygnięcie. Tworzenie amerykańskiej konstytucji*, 7–8. Mateusz Radajewski maintains that this was one of the most significant cases heard by the US Supreme Court in recent years, see Mateusz Radajewski, "Weryfikacja ważności wyników wyborów na przykładzie sprawy *Bush v. Gore*," in *Identyfikacja granic wolności i praw jednostki. Prawnoporównawcza analiza tożsamego przypadku pod kątem praktyki stosowania prawa amerykańskiego i polskiego*, ed. Mariusz Jabłoński (Wrocław: E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa. Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego, 2016), 343.

[52] Ross, *Enlightened Democracy: The Case for the Electoral College*, 101–02.

[53] Ross, *Enlightened Democracy: The Case for the Electoral College*, 104–05.

[54] Kazimierz Dziubka, Bogdan Szlachta, and Lech M. Nijakowski, *Ideologie we współczesnym świecie* (Warszawa: Wydawnictwo Naukowe PWN, 2008), 120–21.

CONCLUSIONS

The above excerpts from *Enlightened Democracy: The Case for the Electoral College* are not intended as an exhaustive overview of Ross' thoughts on the Electoral College. Nor, of course, do they aim to cover all the issues associated with this institution. The aim of this study is merely to introduce the reader to Ross' observations concerning two specific areas mentioned in the title and popularize her views on the College.

The rather frequent critical voices according to which the Electoral College is ineffectual simply because it is an institution with a long history seem to verge an oversimplification.[55] Elucidating the origins and some of the principles that govern the functioning of the College may be important for readers in Poland and elsewhere because one can be virtually certain that the institution will remain a part of the American legal and political system in the foreseeable future. Mucha advances a valuable commentary: "In the American constitutional system, it is extremely difficult, if not impossible, to adopt constitutional amendments which would violate the interests of the states in the process, since it suffices for sixteen states to disagree, and which would go against the interests of the two largest political parties, notably their systemic position, by, for example, adopting a proportional allocation of electoral votes and opening the way to a multi-party system modeled on the parliamentary democracies of Europe. The alternative proposals are interesting, but with no real chance of being implemented."[56]

Summary: This text discusses Tara Ross' reflections on the Electoral College of the United States of America. In her book *Enlightened Democracy: The Case for the Electoral Colleges*, the author explores the origins and functioning of the Electoral College, and an analysis of these themes is the primary goal of this study. Moreover, it sets out to introduce the Polish reader to the Electoral College in greater detail and acquaint them with the debates concerning that institution in the United States. The views of other authors are also cited, as Ross' observations are considered in the light of the history of political-legal thought and constitutionalism.

Keywords: Tara Ross, Electoral College, US Constitution, Enlightenment

[55] In this context, one could cite the valuable remark Andrzej Kohut makes regarding the 2016 presidential election: "The complicated electoral procedure, sometimes considered a relic of the past, proved to be effective." Such observations concerning the Electoral College are another objective of the text. Popularization of the issue may be helpful for those who approach it from different perspectives than purely legal ones, see Andrzej Kohut, *Ameryka. Dom podzielony* (Kraków: Szczeliny, 2022), 31.

[56] Mucha, *System wyboru Prezydenta Stanów Zjednoczonych Ameryki*, 324.

BIBLIOGRAPHY

Bailyn, Bernard. *The Ideological Origins of the American Revolution*. Cambridge: Belknap Press of Harvard University Press, 2017.

Berkin, Carol. *Doniosłe rozstrzygnięcie. Tworzenie amerykańskiej konstytucji*. Translated by Jerzy S. Kugler. Warszawa: Wydawnictwo Sejmowe: Kancelaria Sejmu, 2005.

Bolingbroke, Henry St John. "Idea króla—patrioty." In *Idea króla—patrioty. Wybór pism*. Translated by Agnieszka Kuczkiewicz-Fraś and Piotr Musiewicz, 45–144. Kraków: Ośrodek Myśli Politycznej, 2020.

Daszyńska, Jolanta A. *Kryzysy i kompromisy w Stanach Zjednoczonych Ameryki czasów Ojców Założycieli*. Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2018.

Dziubka, Kazimierz, Bogdan Szlachta, and Lech M. Nijakowski. *Ideologie we współczesnym świecie*. Warszawa: Wydawnictwo Naukowe PWN, 2008.

Farrand, Max, ed. *The Record of the Federal Convention of 1787*, vol. 1. New Haven: Yale University Press, 1911.

Grant, Georg. *The Importance of the Electoral College*. Tennessee: Franklin, 2020.

Haider-Markel, Donald, Melvin Dubnick, Richard Elling, and Paul D. Schumaker. "The Role of Federalism in Presidential Elections." In *Choosing a President: The Electoral College and Beyond*, edited by Paul D. Schumaker and Burdett A. Loomis, 53–73. New York: Chatham House Publishers Inc., U.S., 2001.

Hamilton, Alexander. "No. 68: The Mode of the Electing the Presidency." In Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, 332–335. Mineola: CreateSpace Independent Publishing Platform, 2020.

Hutchinson, Earl O. *What's Right and Wrong with the Electoral College*. Los Angeles: Independently published, 2020.

Johnson, Alan E. *The Electoral College. Failures of Original Intent and proposed Constitutional and Statutory Changes for Direct Popular Vote*, 2nd ed. Pittsburgh: Philosophia Publications, 2021.

Katz, Henryk. *Historia Stanów Zjednoczonych Ameryki*. Wrocław: Zakład Narodowy im. Ossolińskich, 1971.

Kohut, Andrzej. *Ameryka. Dom podzielony*. Kraków: Szczeliny, 2022.

Król, Marcin. *Historia myśli politycznej: od Machiavellego po czasy współczesne*. Gdańsk: ARCHE, 2003.

Lewicki, Zbigniew. *Historia cywilizacji amerykańskiej. Era tworzenia 1607–1789*. Warszawa: Wydawnictwo Naukowe Scholar, 2021.

Ludwikowski, Rett, and Anna Ludwikowska. *Wybory prezydenckie w USA na tle porównawczym*. Warszawa: LexisNexis Polska, 2009.

Madison, James. "No. 39: The Conformity of the Plan to Republican Principles." In Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, 182–87. Mineola: CreateSpace Independent Publishing Platform, 2020.

Madison, James. "Numer 51." In *Eseje polityczne federalistów*, edited by Frederick Quinn, translated by Barbara Czarska, 149–54. Kraków, Warszawa: Znak, Fundacja im. Stefana Batorego, 1999.

Małajny, Ryszard. *Amerykański prezydencjalizm*. Warszawa: Wydawnictwo Sejmowe, 2012.

Małajny, Ryszard. *Doktryna podziału władzy "Ojców Konstytucji USA"*. Katowice: Uniwersytet Śląski, 1985.
Małajny, Ryszard. *Trzy teorie podzielonej władzy*. Warszawa: Wydawnictwo Sejmowe, 2001.
Mucha, Bogdan. *System wyboru Prezydenta Stanów Zjednoczonych Ameryki*. Toruń: Wydawnictwo Adam Marszałek, 2014.
Osiatyński, Wiktor. *Ewolucja amerykańskiej myśli społecznej i politycznej*, Warszawa: Państwowe Wydaw. Naukowe, 1983.
Parrington, Vernon Louis. *Mentalność kolonialna 1620–1800*. Translated by Henryk Krzeczkowski. Warszawa: Państwowy Instytut Wydawniczy, 1968.
Pułło, Andrzej. *System konstytucyjny Stanów Zjednoczonych*. Warszawa: Wydawnictwo Sejmowe, 1997.
Radajewski, Mateusz. "Weryfikacja ważności wyników wyborów na przykładzie sprawy *Bush v. Gore*." In *Identyfikacja granic wolności i praw jednostki. Prawnoporównawcza analiza tożsamego przypadku pod kątem praktyki stosowania prawa amerykańskiego i polskiego*, edited by Mariusz Jabłoński, 343–68. Wrocław: E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa. Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego, 2016.
Reale, Giovanni. *Historia filozofii starożytnej*, vol. 2, *Platon i Arystoteles*. Translated by Edward I. Zieliński. Lublin: Redakcja Wydawnictw KUL, 2012.
Ross, Tara. *Enlightened Democracy: The Case for the Electoral College*, Dallas: Colonial Press, L.P., 2012.
Ross, Tara. *The Indispensable Electoral College. How the Founders' Plan Saves Our Country from Mob Rule*. Washington, DC: Regnery Gateway, 2017.
Ross, Tara. "Legal and Logistical Ramifications of the National Popular Vote Plan." *Federalist Society Review* 11, no. 2 (2010): 37–44. Accessed November 20, 2022, https://www.ifs.org/doclib/20101021_Ross2010NPVIssues.pdf.
Rusinowa, Izabella. *Z dziejów amerykańskich partii politycznych*. Warszawa: „Egross," 1994.
Urbańczyk, Michał. *Idea godności człowieka w orzecznictwie Sądu Najwyższego Stanów Zjednoczonych Ameryki*. Poznań: Wydawnictwo Naukowe UAM, 2019.
Yoo, Christopher S. "James Wilson as the Architect of the American Presidency." In: *The Life and Career of Justice James Wilson*, edited by Randy E. Barnett. Washington, DC: Georgetown Center for the Constitution, 2019.

Websites

Tara Ross' blog. Accessed December 17, 2022, https://www.taraross.com/about.

Chapter 4

The Institution of the Jury in the Works of the Founding Fathers on the Federal Constitution

*Wojciech Kwiatkowski**

INTRODUCTION

This study aims to discuss the origins of the jury institution in the United States. The term "jury" denotes three independent institutions in the US,[1] whose common denominator is that they are composed of randomly selected citizens who make specific decisions as part of the trial. In the grand jury, the panel of jurors decides whether an individual can be indicted. In the trial jury, their task is to assess the evidence presented during the trial and, on such grounds, return a verdict concerning the guilt of the defendant. In a civil proceeding, on the other hand, the panel of jurors (the civil jury) decides conclusively regarding the facts of the case. A model in which those are the citizens who make certain decisions in the judicial proceedings originated in medieval England and was later transferred with the entire acquis of common law to the British colonies in North America. Its essential principles and guarantees were also incorporated into the text of the Constitution of the newly established American state. However, it was a process whose final outcome may be seen as a compromise between the two contemporary political factions. The compromise contributed measurably to the final ratification of the federal Constitution

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[1] See esp. Wojciech Kwiatkowski, *Geneza i praktyka instytucji przysięgłych w amerykańskim procesie karnym* (Warszawa: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2021).

Wojciech Kwiatkowski, "The Institution of the Jury in the Works of the Founding Fathers on the Federal Constitution." In *Enlightenment Traditions and the Legal and Political System of the United States of America*, edited by Michał Urbańczyk, Kamil Gaweł, and Fatma Mejri, 79–97. Poznań: Adam Mickiewicz University Press, 2024.
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by the founding states. Conversely, its present-day significance has been shaped by the case law of the US courts, notably the judgments of the federal Supreme Court.

THE JURY IN THE BRITISH COLONIES IN NORTH AMERICA

A trial in which the evidence is assessed and specific facts ascertained by the citizens as opposed to the judge did not emerge in the British colonies in North America. Nor is it the fruit of the work of the Founding Fathers of the United States. In fact, the institution of the jury was brought to the colonies in North America by the British colonizers, along with the entire body of common law.

In the *First Charter of Virginia* of April 1606 as well as in the later *Instructions for the Governing of Virginia*, King James I guaranteed each colonizer all such rights, guarantees, and privileges that those persons had had or would have been entitled to while in England.[2] Almost from the very beginning of the colony of Virginia, both criminal and civil cases were tried in the presence of a jury, and the principle continued to apply in the successively established British colonies.[3] As early as 1623, those in New England adopted a law on the judiciary according to which "all Criminal facts, and also matters of trespass and debts between man and man should be tried by the verdict of twelve Honest men to be Impanelled by authority in form of a Jury upon their oath."[4] In 1635, the first regular grand jury panel was established in the New England colonies. In Massachusetts, the Bill of Rights of 1641 provided that "in all actions at law it shall be the liberty of the plaintiff and defendant by mutual consent to choose whether they will be tried by the bench or by a jury, unless it be where the law upon just cause hath otherwise determined. The like liberty shall be granted to all persons in criminal cases,"[5] and that "all jurors shall be chosen continu-

[2] "We do for Us, our Heirs and Successors, Declare by these Presents, that all and every the Persons, being our Subjects, which shall dwell and inhabit within every or any of the several Colonies and Plantations, and every of their children, which shall happen to be born within any of the Limits and Precincts of the said several Colonies and Plantations, shall HAVE and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of England, or any other of our said Dominions." The text of both documents originates from John E. Wakelyn, ed. *Americas Founding Charters: Primary Documents of Colonial and Revolutionary Era Governance* (Westport: Greenwood Publishing Group, 2006), 1: 28–37.

[3] After Randy J. Holland, "State Jury Trials and Federalism: Constitutionalizing Common Law Concepts," *Valparaiso University Law Review* 38, no. 2 (2004): 377.

[4] Cited after Leon C. Hills, *History and Genealogy of the Mayflower Planters and First Comers to Ye Olde Colonie* (Baltimore: Genealogical Publishing Com., 1975), 92.

[5] Massachusetts Body of Liberties of 1641. Available at: Liberty Fund Network, accessed October 10, 2022, https://oll.libertyfund.org/page/1641-massachusetts-body-of-liberties. On this issue, see also Susan C. Towne, "The Historical Origins of Bench Trial for Serious Crime," *The American Journal of Legal History* 26, no. 2 (1982): 124–28.

ally by the Freemen of the town where they dwell."[6] Several years later, provisions introduced into the Bill would set out the amount of fines for avoiding jury duty. In the colony of Connecticut, jurors were chosen by the court, but each municipality within a judicial district had to have a representative on the panel.[7]

In numerous jurisdictions, jury panels would handle not only serious crimes, but also minor offenses, or even conduct which merely went against the morals. The same was the case with civil proceedings, which sometimes were concerned with minor, strictly civil disputes. They acted promptly, and if the case was a criminal one, the jury also decided on the penalty, which conformed not only to the law in force in the colony but also to religious precepts. In the colony of New Plymouth, regardless of any other law enforcement bodies operating there, grand jury panels played a role in maintaining public order and upholding local moral norms. Thus, they were invested with powers to investigate violations of the laws, as well as tasked with maintaining peace and promoting prosperity. Recruited from among the members of the local community,[8] the jury panels constituted an ideal forum that provided an opportunity to co-manage a particular administrative entity and exercise certain supervisory prerogatives on behalf of its residents. These included, for example, determining the amounts of local taxes, overseeing how public funds were spent, appointing local officials, or deciding on the layout of public roads.[9]

The decisions that the jury panels took in particular cases also fostered a certain legal distinctiveness, which set the colonists apart from the Crown. While the founding charters issued to the individual colonies stipulated that laws made there could not contravene those made in England, the distance from the higher courts across the ocean, the widespread lack of legal training among those serving as judges,[10] and the very harsh living conditions faced by people from various cultural and religious backgrounds soon caused the colonial law to be "adapted" to the realities in place. It was within that very framework that the jurors played a very important part, delivering conclusive interpretations of the substantive laws that were largely

[6] Massachusetts Body of Liberties of 1641.

[7] Edgar J. McManus, *Law and Liberty in Early New England: Criminal Justice and Due Process, 1620–1692* (Amherst: University of Massachusetts Press, 2009), 63.

[8] As to the principle, active right to vote in this respect was reserved to free males who held land in ownership.

[9] See esp. Matthew P. Harrington, "Law-Finding Function of the American Jury," *Wisconsin Law Review* 377 (1999): 386–87.

[10] Absence of juridical education was ubiquitous among the judges of the colonies and persisted until the early nineteenth century, when the US saw the first comprehensive programs to educate future lawyers. Hence, it should be no surprise that as many as six out of eleven judges on the Supreme Court of Massachusetts in 1760–1774 had no legal background. More broadly in Brian J. Moline, "Early American Legal Education," *Washburn Law Journal* 42 (2004): 775; Albert W. Alschuler and Andrew G. Deiss, "A Brief History of the Criminal Jury in the United States," *University of Chicago Law Review* 61, no. 3 (1994): 905.

detached from the circumstances prevailing in the "New Earth,"[11] having been enacted elsewhere. In doing so, they were guided by the notions of social justice on which the common law was founded as well as the moral norms and values relevant to the community. That particular competence—that is, the right to appraise the law on which the trial relied, translated into the vital role of the jury panels in the dispute between the colonies and the Crown preceding the War of Independence.

THE JURY AND THE WAR OF INDEPENDENCE

In 1751, the General Assembly of the colony of South Carolina issued a proclamation to the effect that "any person who shall endeavor to deprive us of so glorious a privilege of trial by jury was an enemy to the people of the colony."[12] However, this was not the first manifestation of discontent among the people of the British colonies. As tensions grew between the colonists and the Crown, the former saw the power that rested with the citizens on the various jury panels to be the only one that was entirely under their control. Moreover, it was the sole viable instrument against the oppression that they suffered from the representatives of the ruler.

The actual protection against the oppression of the authorities that the jury panels afforded to the colonists was consolidated by a number of high-profile court cases, whose prime examples included the Peter Zener trial and the trial of the soldiers responsible for the Boston Massacre. The first of those[13] involved a New York journalist and author of a series of articles that spoke critically of the governor of the colony of New York. For that reason, bypassing the grand jury, Zenger was indicted directly by the governor. The verdict of acquittal delivered by the jury (despite the incriminating evidence presented by the defendant himself) was deemed a response of the colonists to the provisions on penalties for the felony of disseminating "seditious libel." Standing at the second trial, on the other hand, were Captain Preston and eight British soldiers charged with participation in the Boston Massacre,[14] although it was perceived as a demonstration of the colonists' ability to prosecute the British

[11] The jury's prerogative to interpret law did not apply in some of those, for example, in the colony of New York. See more broadly in William E. Nelson, "The Lawfinding Power of Colonial American Juries," *Ohio State Law Journal* 71, no. 5 (2010): 1004–28.

[12] The South Carolina General Assembly Declaration of 1751, Liberty Fund Network, accessed October 10, 2022, https://wvsae.org/the-foundation-of-liberty/.

[13] On this issue, see esp. Peter A. Davis, *From Androboros to the First Amendment: A History of America's First Play* (Iowa: University of Iowa Press, 2015), 103–29; Richard Kluger, *Indelible Ink: The Trials of John Peter Zenger and the Birth of America's Free Press*, 1st ed. (New York: W. W. Norton & Company, 2016); Neil Vidmar and Valerie P. Hans, *American Juries: The Verdict* (New York: Prometheus Books, 2007), 42–47.

[14] More broadly, see, for example, Jonathan Witmer-Rich, "Restoring Independence to the Grand Jury: A Victim Advocate for the Police Use of Force Cases," *Cleveland State Law Review* 65, no. 535 (2017): 544–45.

military and those royal officials who abused their power. The jurors on the grand jury repeatedly refused to indict those inciting revolt, while trial jury panels also effectively obstructed the enforcement of English customs and fiscal laws in court. Furthermore, it was common for jury panels in civil cases to assess the facts and subsequently interpret civil contracts in a manner that protected the interests of the inhabitants of the colonies in the first place, at the expense of the English merchants.

Since the institution of the jury—being an actual power available to the colonists—came to pose a real threat to the English policies towards the dominions in New Earth, the authorities in London realized that the prerogatives and independence of the people's courts in the colonies had to be curtailed. This was effected through changes in the law governing the selection of jurors. Abrogating the principles that had applied for centuries, whereby the jurors were chosen among the "local community," it was adopted that any particular jury would be selected from a list of individuals compiled by the authorities in London. Enforcement of the Sugar Act and the Stamp Act were also excluded from the jurisdiction of the jury. These matters were devolved to the admiralty courts based in Halifax.[15] Both Acts were later rescinded by the British Parliament, although simultaneously the latter passed laws which, in the case of a charge of treason, contravened the existing common law principle that the place where an act was committed determined the venue of the trial and the selection of the jury.

In July 1776, the colonies promulgated the Declaration of Independence.[16] This document corroborated the creation of states independent from the Crown[17] on the North American continent. An important part of the Declaration was a list of allegations (grievances) of the colonists addressed to the King. For instance, George III was arraigned "for depriving us in many cases, of the benefits of Trial by Jury: For transporting us beyond Seas to be tried for pretended offences."[18] Similar assertions had been advanced in earlier correspondence with the King—that is, in the *Declaration of Rights and Grievances* and the *Appeal to the Inhabitants of Quebec* of 1774, as well as in the *Declaration of Causes and Necessity of Taking Up Arms* of 1775.

Upon the proclamation of the Declaration of Independence, each state adopted its own constitution. Those documents were ideologically consistent with acts such as the Charter of Liberties, and the Bill of Rights of 1689, as well as with the interpretations of British common law by contemporary thinkers such as William

[15] See Zbigniew Lewicki, *Historia cywilizacji amerykańskiej. Era tworzenia 1607–1789* (Warszawa: Wydawnictwo Naukowe Scholar, 2009), 490.

[16] In its entirety, the title read *The Unanimous Declaration of the Thirteen United States of America*.

[17] The widespread rationale behind the Polish translation of "state" as "stan (lit. state as opposed to a political entity)" fails to reflect the essential traits of American federalism. After all, what functions there (currently) is fifty sovereign states, which devolved only a proportion of their competences to the federal bodies.

[18] Declaration of Independence: A Transcription, National Archives, accessed October 10, 2022, https://www.archives.gov/founding-docs/declaration-transcript.

Blackstone and Thomas Coke. Their common feature was that they provided for the right to trial by jury. For instance, the New York Constitution of April 1777 included a provision which stipulated that "this convention doth further ordain, determine, and declare, in the name and by the authority of the good people of this State, that trial by jury, in all cases in which it hath heretofore been used in the colony of New York, shall be established and remain inviolate forever."[19] The Virginia Declaration of Rights of June 1776 stated both the number and place of origin of trial jurors, as well as providing that "the ancient trial by jury is preferable to any other and ought to be held sacred."[20] The Massachusetts Constitution of 1780, on the other hand, prescribes in Article 12 as follows: "And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, except for the government of the army and navy, without trial by jury."[21]

THE JURY IN THE DRAFTS OF THE FEDERAL CONSTITUTION

In 1777, the Continental Congress adopted the Articles of Confederation and Perpetual Union. The instrument established a loose union of states with a common body, namely the Congress. However, such a formula of cooperation between the former colonies proved highly inefficient which, given the external threat, required a completely different modality of cooperation to be discussed. Ultimately enacted in 1787, the Constitution of the United States introduced a thoroughly new paradigm of relations between the erstwhile colonies. In doing so, the Founding Fathers were guided by two fundamental ideas. First, they sought to create a system in which citizens were guaranteed freedom, equality, and active participation in the exercise of power. Second, they wished to safeguard the citizens against the despotic inclinations of those in power. Several methods were envisioned to accomplish those objectives, including the transfer of an extent of power into the hands of the popular court—that is, a jury.

All draft constitutions debated at the Philadelphia Convention contained provisions relating to the jury. The final draft of the Constitution, however, provided

[19] The Constitution of New York: April 20, 1777, Avalon Project—Documents in Law, History and Diplomacy, accessed October 10, 2022, http://avalon.law.yale.edu/18th_century/ny01.asp.

[20] Virginia Declaration of Rights of 1776, National Archives, accessed October 10, 2022, https://www.archives.gov/founding-docs/virginia-declaration-of-rights.

[21] The Massachusetts Constitution of 1780, Commonwealth of Massachusetts, accessed October 10, 2022, https://www.mass.gov/info-details/learn-about-the-history-of-the-jury-system.

solely for a trial jury in criminal proceedings. Article III, Section 2, of the Constitution stated that "The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." In this relatively simple sentence, the authors of the Constitution addressed four vital issues. First, the Constitution recognizes that in criminal cases the trial shall take place before the jury, who would decide regarding the guilt of the defendant. Second, the Constitution excludes cases subject to the impeachment procedure from the jurisdiction of the jury. Third, the Constitution establishes a general jurisdiction to conduct a trial in a criminal case (the venue) based on *locus delicti*.[22] Fourth, however, the Constitution asserts that Congress shall possess exclusive competence to determine the jurisdiction of the trial jury when a criminal act has been committed outside the borders of the United States, but with an effect within the US territory, or has been committed to the detriment of a US citizen or the state, or has been committed in an area under the sovereign authority of a federal body.[23]

At the same time, the Constitution failed to offer answers to a number of important questions. First, it was unclear what should be done when an offense was committed in several states or on the territory of one state but in several judicial districts.[24] Second, how should one approach the question of full trial if the prohibited act qualified as a felony under both federal and state law? Such quandaries have been resolved to some extent by the case law of the US Supreme Court. In part, they have also been regulated by Congress (e.g., with regard to tax offenses or interstate transportation).[25]

Moreover, it was also not entirely logical to make it imperative in the Constitution that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury."[26] After all, such a formula implies that the authorities are in fact statutorily obligated

[22] Naturally, this means a trial taking place before a federal court for a crime defined in federal statutes.

[23] On this issue see Charles Doyle, *Venue: A Brief Look at Federal Law Governing Where a Federal Crime May Be Tried*, CRS Report 2014, no. RS22361, 4–5 and opinions in *Jones v. United States*, 137 U.S. 211 (1890).

[24] While in the early years of the American state governed by the Constitution the boundaries of eleven of the thirteen founding states coincided with the boundaries of the judicial districts, the Founding Fathers were aware that the newly established state would in future have to be divided into judicial units that did not necessarily overlap with the boundaries of the states.

[25] To a degree, such problems were solved by the case law of the US Supreme Court and the statutes enacted by the Congress (e.g., with respect to fiscal felony or interstate transportation). On this issue see Charles Doyle, *Venue: A Legal Analysis of Where a Federal Crime May Be Tried*, CRS Report 2018, no. RL33223, FAS Project on Government Secrecy, accessed October 10, 2022, https://fas.org/sgp/crs/misc/RL33223.pdf.

[26] Available at: Constitution Annotated, accessed October 10, 2022, https://constitution.congress.gov/browse/article-3/section-2/clause-3/.

to hold a trial by jury regardless of the nature of the crime or the will of the defendant in this regard. This type of trial-related injunction may also be considered contradictory to the established practice in the founding states, whereby only "more serious" crimes were tried before the jury, while misdemeanors or minor offenses were heard by a justice of the peace or even a representative of the magistracy.[27]

Solutions to vital questions concerning the place of origin of the jurors (vicinage)[28] and the formal requirements that candidates for the position have to satisfy were also lacking in the Constitution. While it was indisputable to all that the principles based on which the trial jury had operated for hundreds of years would be adopted, this was not secured in the content of the Constitution. The draft Constitution by James Madison did include a pertinent provision, but although it was voted through in the House of Representatives, it did not receive the support of the Senate. However, regarding the formal requirements for jury candidates, the shortcomings in this respect were rectified relatively quickly by the parliament. Adopted in 1789, the Federal Judiciary Act devolved relevant competence to the individual states, which today may be seen in terms of the influence of state legislation on the work of a federal, constitutional body such as the trial jury. All jurisdictions adopted that a male with the right to vote, who (except in Vermont) owned property or paid taxes in a given state, was eligible to become a juror. In Maryland, atheists were excluded from jury service. Requirements on intelligence or so-called "good character" were also introduced in numerous legislations.

There is no reliable information that would explain why the Founding Fathers chose not to include provisions pertaining to the grand jury in the Constitution, considering that the institution had enjoyed profound respect in the colonial era. Just as with the absence of formal requirements posited for prospective jurors, it may also be surmised that the matter was omitted because it was taken for granted that the grand jury would operate in line with the principles entrenched in common law or, alternatively, that a law would be passed to that effect. However, given the Federalists' fear of a body whose working methodology (including, in particular, the power to conduct its own inquiry) could prove an obstacle to strong federal authorities, this may have been a deliberate measure. Indeed, a proportion of the US political milieu at the time was wary of the jurors as persons who are potentially capricious, unpredictable, and susceptible to emotions, and hence incapable of making socially and politically difficult decisions.[29] This is indirectly supported by

[27] Such reasoning has been adopted by the US Supreme Court as it examined *Callan v. Wilson* nearly a century later. See the opinions in *Callan v. Wilson*, 127 U.S. 540 (1888).

[28] In English law, vicinage meant the immediate vicinity of the location where a prohibited act has been committed or, alternatively, the county concerned (or its specific part).

[29] On this issue see esp. Daniel D. Blinka, "Jefferson and Juries: The Problem of Law, Reason, and Politics in the New Republic," *The American Journal of Legal History, Marquette University Law School Faculty Publications* 47, no. 1 (2005): 66–98.

historical facts, as the state of Virginia abandoned the legal reform which intended to grant jurors broad prerogatives both in criminal trial and broadly understood administration of the state.

Also, the issue of trial by jury in civil cases was altogether ignored in the Constitution, although the matter was raised on several occasions during the Convention (by Hugh Williamson of North Carolina, for example).[30] Such an outcome appears to have resulted from a dispute between the two political factions at the time—that is, the *Federalists* and the *Anti-Federalists*. The former believed that the strength and vitality of the state would derive from a strong federal government; at the same time, they stressed that the newly formed state urgently needed sources of funding to develop. The funds in question were to be supplied mainly by foreign loans and taxes. From that standpoint, the civil jury represented a potential threat, since in colonial times such panels routinely refused to recognize debt claims from British merchants or, when they did, the liability was substantially reduced. Similarly, the "ordinary citizens" sitting on the civil juries took a similar approach to tax obligations. It may be noted that a number of delegates at the Philadelphia Convention made attempts to introduce provisions on the civil jury. A relevant amendment was voted through at the committee, although it was not adopted in plenary.

THE DRAFTING AND ADOPTION OF THE BILL OF RIGHTS BY THE STATES

The Constitution ratification process in New York, Pennsylvania, and Maryland was actually a manifesto calling for amendments concerning the most important civic guarantees, as they were seen at the time. The voices of some of the Founding Fathers reverberated quite prominently in the public debate. For instance, it may be worth citing Patrick Henry, who asserted that "trial by jury is the best appendage offreedom. . . . We are told that we are to part with that trial by jury with which our ancestors secured their lives and property. . . . I hope we shall never be induced by such arguments, to part with that excellent mode of trial."[31] For his part, Richard Henry Lee maintained that "the right to trial by jury is a fundamental right of free and enlightened people and an essential part of a free government."[32] In a text from

[30] On this issue see esp. William V. Dorsaneo III, "Decline of Anglo-American Civil Trial," *SMU Law Review*, 71, no. 1 (2018): 359.

[31] "Fact Sheet: Safeguarding a Pillar of American Freedom—An Historical Primer on the Right to Jury Trial in Civil Cases," Center for Justice & Democracy, accessed October 10, 2022, https://centerjd.org/content/fact-sheet-safeguarding-pillar-american-freedom-historical-primer-right-jury-trial-civil.

[32] "Trial By Jury: 'Inherent And Invaluable,'" West Virginia Association for Justice, accessed October 10, 2022, https://www.wvaj.org/index.cfm?pg=HistoryTrialbyJury.

1788, John Dickinson[33] contended that "trial by jury is the cornerstone of our liberty. It is our birthright."[34] Also, in a 1789 letter addressed to Thomas Paine, Thomas Jefferson underlined that "another apprehension is that a majority cannot be induced to adopt the trial by jury; and I consider that as the only anchor, ever yet imagined by man, by which a government can be held to the principles of its constitution."[35] John Madison, on the other hand, argued that "trial by jury cannot be considered as a natural right, but a right resulting from the social compact which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature."[36] In an essay in *The Federalist*, Alexander Hamilton observed that "the friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it (the jury) as a valuable safeguard to liberty; the latter represent it as the very palladium of free government."[37]

Seeing the need to supplement the Constitution, James Madison came forward with a draft Bill of Rights in June 1789. The document was to be integral to the Constitution, introducing a catalog of individual rights, while a relatively large part of the Bill referred to the jury. Madison's draft included several separate provisions relating to jurors. Section 5 of his proposal stipulated that "no State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."[38] In Section 6, the author suggested that a provision on the jury in civil cases be added to the Constitution, according to which no "fact triable by jury, according to the course of common law, be otherwise re-examinable than may consist with the principles of common law."[39] Then, Section 7 of the draft affirmed that "The trial of all crimes (except in cases of impeachments, and cases arising in the land or naval forces, or the militia when on actual service in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites; and in all crimes punishable with loss of life or member, presentment or indictment by a grand jury shall be an essential preliminary, provided that in cases of crimes com-

[33] Dickinson, the author of the series known as *Letters from a Farmer in Pennsylvania*, is considered a "writer of the American Revolution" in the US.

[34] "Trial By Jury: 'Inherent And Invaluable.'"

[35] Thomas Jefferson, "From Thomas Jefferson to Thomas Paine, 11 July 1789," Founders Online, accessed October 10, 2022, https://founders.archives.gov/documents/Jefferson/01-15-02-0259.

[36] James Madison, "Amendments to the Constitution, (8 June) 1789," Founders Online, accessed October 10, 2022, https://founders.archives.gov/documents/Madison/01-12-02-0126.

[37] Alexander Hamilton, "The Federalist Papers: No. 83," Avalon Project—Documents in Law, History and Diplomacy, accessed October 10, 2022, https://avalon.law.yale.edu/18th_century/fed83.asp.

[38] "1789: Madison, Speech Introducing Proposed Amendments to the Constitution," Liberty Fund Network, accessed October 10, 2022, https://oll.libertyfund.org/page/1789-madison-speech-introducing-proposed-amendments-to-the-constitution.

[39] "1789: Madison, Speech Introducing Proposed Amendments to the Constitution."

mitted within any county of which may be in possession of an enemy, or in which a general insurrection may prevail, the trial may by law be authorized in some other county of the same state, as near as may be to the seat of the offense. . . . In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate."[40]

Finally adopted in September 1789 and approved by the majority of states—as required by the Constitution—in 1791, the ten articles of the Bill of Rights secured most of the fundamental (for the time) individual rights. The Fifth Amendment[41] pertains to the grand jury, the initial part of the Sixth Amendment addresses crucial issues relating to the trial jury in criminal proceedings, while the Seventh Amendment introduces the institution of the civil jury and sets out its essential competencies. Before discussing particular amendments, it is worth noting that none of them specify whether their provisions apply to federal and state authority or only to the former. This is a fundamental question, all the more so since the overwhelming majority of civil and criminal cases in the US are heard before state courts and under state law. Nor do any of the amendments resolve whether serving as a juror is a civic duty or a privilege. Apart from a reference to common law, no clear legal grounds for that duty can be identified. In the eighteenth and nineteenth centuries, it was an honor or a privilege to be a member of a particular social or professional group, though it also entailed an obligation to appear in court and, not infrequently, pay for accommodation and board (a matter of substantial importance given the

[40] "1789: Madison, Speech Introducing Proposed Amendments to the Constitution."

[41] In the Polish translations of the federal Constitution as well as in the Polish literature on the system or the law in force in the US, one often comes across the term "poprawka (lit. correction)" to the Constitution. It is used to refer to those contents of the US Constitution which, over more than 230 years, have been added to the original text or, alternatively, have introduced certain substantive changes. In the opinion of this author, the Polish term is erroneous and, as such, should not be employed (especially in legal publications). After all, when one analyzes the Bill of Rights, it turns out that with very few exceptions, it did not "correct" anything in the original text of the Constitution, but—at most—added completely new provisions. Much the same is the case with most of the contents adopted later. In this context, the term "nowela (novel)" used in this study appears to be a universal notion. Moreover, it is also consistent with the rules of legislative technique applicable in Poland. After all, one speaks of "*nowelizacja* (novel) of Article 55 of the Constitution of the Republic of Poland of 2006" or "*nowelizacja* of the Budget Act," as opposed to "correction" to the aforementioned laws. Hence, the term "poprawka" is used colloquially to refer to the drafts of acts which alter the law previously in effect in a given matter, developed, for example, by the relevant parliamentary committees. It might be added that this particular linguistic mistake is not the only one encountered in translations of specific institutions of American law. Further inaccurate translations include terms such as "hrabstwo (lit. the estate held by a count)" to denote "county" (rather than "okręg (district)" or "powiat (poviat or ≈ district), "jury" as "sędziowie przysięgli (lit. sworn judges)" rather than "przysięgli (≈jurors), or "verdict" as "wyrok (lit. judgment/sentence)". In the author's opinion, this is largely due to the translation of such terms into Polish based on the first available equivalent in the dictionary or the terminology heard in dubbed American motion pictures or in journalistic reports, whilst disregarding the legal culture or the origins of that country's political system. On this issue, see also Zbigniew Lewicki, *Historia cywilizacji amerykańskiej. Era sprzeczności 1787–1865* (Warszawa: Wydawnictwo Naukowe Scholar, 2010), 8.

absence of developed transport routes). Nowadays, such issues have become even more acute, even though a rule has been introduced according to which the expenses that jurors incur while participating in the work of the judiciary are to be covered by state authorities, with jurors also receiving a "daily wage."

FIFTH AMENDMENT TO THE CONSTITUTION

According to the Fifth Amendment, "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger." In this rather brief wording, the key provision grants the exclusive competence to indict an individual to the grand (pre-trial) jury and recognizes that the grand jury may exercise its powers in two ways. The first is to issue a "presentment,"[42]—that is, a letter drafted by the panel stating that, in the case they are examining, a felony has been committed. The writ is submitted to the court, bypassing the public prosecutor. This procedure is an alternative to the second option, which is decidedly more frequently used in practice—that is, a petition from the prosecutor to the grand jury to indict an individual.

The Fifth Amendment fails to answer a range of important questions concerning the grand jury. First, it does not indicate whether the obligation to establish a grand jury is binding only on the federation or on the individual states as well. After all, the provenance of the institution is strictly associated with the states, while it was obvious that the vast majority of felonies violate state-level criminal statutes. However, the matter has been clarified in the case law of the US Supreme Court.[43]

The Amendment does not state how many persons should make up a grand jury panel, nor does it specify any formal requirements they are subject to or outline how they will be selected. No information is provided regarding the system under which pre-trial jurors perform their duties (i.e., whether they are elected for a specific term or whether the panel is convened on an ad hoc basis). Furthermore, the Amendment does not explain how the members of the panel reach their decisions. Naturally, no one challenged the existing medieval rules of procedure for this body, according to which only a "decent citizen" from the judicial district where the crime has

[42] A synthetic translation of the term into Polish is lacking. However, "wniosek przysięgłych (motion of the jury)" used in this study appears to reflect the nature of the institution most comprehensively and simultaneously highlights its distinctiveness from the prosecutor's indictment.

[43] In the latter half of the nineteenth century, the Supreme Court found that Fourteenth Amendment was not intended to establish a state criminal proceeding as stipulated in Fifth Amendment to the extent in which it pertains to the grand jury. Consequently, whether such a body would function in a given state was left at the discretion of that state. See the opinions in *Hurtado v. California*, 110 U.S. 516 (1884).

been committed (venue) may be a member of the grand jury and that the pre-trial jury consists of twenty-three persons and takes decisions by an absolute majority.

Moreover, the Fifth Amendment to the Constitution does not clarify which crimes are "capital" or "otherwise infamous" and, as such, should be within the purview of the grand jury.[44] Thus, the power to determine the catalog of such offenses is left to the legislature and the courts. The definition of a dishonorable offense was also considerably influenced by the acquis of common law.

SIXTH AMENDMENT TO THE CONSTITUTION

Pursuant to the Sixth Amendment to the Constitution, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of (i.e., originating from) the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." To some degree, the above reiterates the provisions of Article III of the Constitution, although it also regulates a number of new issues. First and foremost, it explicitly affirms that the defendant may request the relevant authorities to arrange for their trial by jury. This right is not constrained by the category of the offense involved. The content of the Sixth Amendment is, in a sense, an attempt to "mitigate" the substance of Article III of the Constitution which unconditionally enjoins the authorities to hold a trial by jury at each end of every case. It must be emphasized, however, that over the years this Amendment has provided grounds for excluding certain categories of cases from the jurisdiction of the trial jury in favor of a bench trial, in which a judge decides regarding guilt and penalty.

This Amendment imposes an obligation on the federal authorities to conduct a procedure of selecting the jurors so that it is composed of persons residing in the state and the judicial district where the felony has been committed (vicinage)[45] while stipulating that the boundaries of such district must be statutorily defined beforehand.[46] This particular provision of the Sixth Amendment supplements Article III of the Constitution, which adopts the principle enabling determination of the venue.[47]

[44] In *Duke v. United States* of 1937, the US Supreme Court found that when one has committed an offence subject to a fine not exceeding $500 and six months' imprisonment without community service, federal public prosecution may bypass the grand jury and submit the indictment directly to the court. See the opinions in *Duke v. United States*, 301 U.S. 492 (1937).

[45] Sixth Amendment does not equate "judicial district" with the "vicinity of the place where the crime has been committed" known from common law (which may be considered the historical meaning of "vicinage"). Hence, in minor states whose judicial district overlaps with the state boundary, the jurors selected in a case may originate from its distant region.

[46] As of 2022, there are ninety four judicial districts in the US.

[47] Moreover, federal law (28 U.S. Code para. 1861 in conjunction with 28 USC para. 1869(d)) admits division of judicial district in view of purposive considerations. Given the content of Sixth Amend-

It should be noted that the authors of the Amendment finally abandoned a term dating back to medieval England, namely peers—that is, the defendant's equals. This equality was conceived in terms of status, origin, education, or wealth.

The Sixth Amendment provides that the defendant has the right to a public trial in court. This means that all trial-related activities should be overt—whether for the parties to the trial, the media, or the public (with the exception of deliberations of the jury). Importantly, it was evident from the outset that the principle also extended to the very selection of jurors in a given case and the particulars through which the potential jurors may be identified. One might add that already in the early years of the American state, this obligation was discharged, for example, through public announcement of the list of jury candidates.

The Sixth Amendment establishes the requirement that those serving on the panel must be impartial with regard to the case. Over more than two centuries of the American state, the standards of jury impartiality have evolved significantly. When that provision was being added to the Constitution, the rule was that only a white and tax-paying, land-owning male was eligible as a juror. This inevitably excluded many social groups from work for the benefit of justice, the most numerous of which were women[48] and people of color.[49] Consequently, one could cite multiple verdicts of the trial jury of which much can be said but not that they were returned by impartial jurors.[50] However, the judge's participation in the jury selection procedure and their supervision of the trial proceedings may be considered an element that satisfies that constitutional imperative. It is also a *voir dire* procedure in which the parties to the trial actively contribute.

Still, the Amendment fails to answer several important questions yet again. First and foremost, there is the composition of the trial jury itself; more specifically, it is not explicitly stated how many people there must be on the jury panel in order for the trial to be deemed compatible with the standards set out in the Constitution. It may be assumed that it was obvious for the representatives of the states work-

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ment, this enables jurors to be selected from a different area of the district than where the crime has been committed. In line with judgments in *Barrett v. United States*, 169 U.S. 218 (1898) and *Matheson v. United States*, 227 U.S. 540 (1913), such an approach does not violate the guarantees of the defendant set out in Sixth Amendment to the Constitution. More broadly in David Fellman, *The Defendant's Rights Today* (Madison: University of Wisconsin Press, 1977) 201.

[48] When the Sixth Amendment was being adopted, the Anglo-Saxon rule in force defined women as *propter defectum sexus* and, as such, incapable of performing juror duties. More broadly in Wojciech Kwiatkowski, "Kobiety i czarnoskórzy w ławach przysięgłych w Stanach Zjednoczonych," *Zeszyty Prawnicze* 21, no. 1 (2021): 301–23.

[49] As the American state was established, only three founding states officially (e.g., in their constitutions) denied suffrage to black persons. On the other hand, it was only in 1860 that the first black males sat on the jury. More broadly in Kwiatkowski, "Kobiety i czarnoskórzy w ławach przysięgłych w Stanach Zjednoczonych."

[50] The criminal proceedings in the wake of the Greensboro Massacre are a model example of such a trial.

ing on the Bill of Rights that one would draw on the well-established common law principle that a panel in a criminal trial consists of twelve persons. Nevertheless, the matter was not entirely clear and it was only case law that would resolve the issue. Separately, it should be stressed that the equally vital question of how (i.e., by what majority) the panel arrives at the verdict was not clarified either. Nonetheless, the authors of the Bill of Rights are likely to have naturally opted for the solution which had been applied since the fourteenth century, namely that in a criminal trial the jury must unanimously agree on the verdict as to the guilt of the defendant. Furthermore, the Amendment does not suggest a solution in a situation where a single crime has been committed in at least two states,[51] or on the territory of one state but in more than one judicial district. Nor does the Amendment offer an answer regarding how, subject to the principle of autonomy of individual jurisdictions (dual sovereignty), one should resolve in multi-jurisdictional offenses and whether it is admissible to transfer a criminal trial to another judicial district (change of venue) and, if so, in what circumstances.

SEVENTH AMENDMENT TO THE CONSTITUTION

The Seventh Amendment to the Constitution provides as follows: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." This Amendment is the only one to address full trial in civil cases, making the United States the only country where that type of institution is applicable in civil proceedings.

The Amendment contains two significant provisions. The first, known as the preservation clause, specifies the types of cases that must be decided by a jury. The other—the re-examination clause—prevents federal judges from overturning jury verdicts as regards the panels' findings of fact which constitute the grounds for the verdict. It may be noted that, as the Seventh Amendment was adopted, it remained unclear which common law the Constitution invoked. By that time, individual states had already developed distinct procedural practices and their own precedents,[52] while the federal courts were new. Hence, "common law" was taken

[51] At present, such crimes include, for example, interstate abduction of a person, terrorist act, espionage, drug trafficking, economic crime, or cybercrime.

[52] As previously noted, the jurors in the colonies made the definitive interpretation of the substantive law. In deciding guilt, they were guided primarily by the social justice underlying common law as well as local moral norms and values relevant to the community in which they lived. It was common in the Puritan colonies for jurors to take advice in the courtroom from anyone who had the knowledge which would help them establish certain facts. It was due to those characteristics that jurors would play an instrumental role in "Americanizing" English common law. In consequence, one could also be

to mean the legal environment inherited from the Crown (i.e., the law and court procedures) employed in the course of the full court trial as at the date of ratification of the Amendment by the states.[53] The types of cases decided by the civil jury panels were to resemble the practice in force in 1791.

Finally, it is worth mentioning that matters that the Seventh Amendment omits entirely include the composition of the panel, the selection of jurors, or the manner in which they determine the verdict. Again, it was evident that one would draw on the relevant custom which had applied prior to the establishment of the United States. Furthermore, the Amendment also does state whether the right to a full trial in civil cases applies in proceedings before state courts.

CONCLUSIONS

In the American realities, the institution of the jury is one of the more prominent components of what is not so much the American judicial process, but "American civilization" in the broadest sense. It also offers evidence that the ideas of the Founding Fathers are still alive and influence the lives of citizens in that country. Even so, both the pre-trial and the two trial juries have undergone a unique process of adaptation to modern realities, primarily through the adjudications of the US Supreme Court. To this day, the latter confronts issues such as the direct analysis of the evidence presented at the trial, the definition of an impartial jury, or attempts to define what a prompt and public trial by jury (in criminal cases) actually means.

As the history of the American state shows, the crucial issue, given the federal makeup of the United States, was extending those provisions of the Constitution which concerned jury participation in pre-trial and trial proceedings to the states. The constitutions of all thirteen original states secured this institution with respect to pre-trial and trial (civil and criminal) juries alike. By the time the Fourteenth Amendment was ratified in 1868, that right had been assured in the constitutions of thirty-six of the thirty-seven states. Today, only a full criminal trial is constitutionally guaranteed in state proceedings (although the catalog of felonies entitling one to a full criminal trial continues to evolve). Meanwhile, the institution of a pre-trial or trial jury in civil cases operates in many jurisdictions, although this is often based on a law passed by the state legislature rather than the state constitution. At

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certain that the law pertaining to the same legal issue differed between colonies (and even townships), which is now one of the core features of American case law.

[53] In the 1830 judgment in *Parsons v. Bedford* (*Parsons v. Bedford*, 28 U.S. 433, 1830), the US Supreme Court explicitly found that the English common law is involved. In *Dimick v. Schiedt* of 1935 (*Dimick v. Schiedt*, 293 U.S. 474 (1935)), the Supreme Court officially held that the Amendment in question should be interpreted in line with the common law of England as at the date of its ratification by the states—that is, in 1791.

that level, the institutions in question have witnessed a number of significant alterations which to some degree blur their historical picture.

Summary: The study aims to discuss the origins of the institution of juries in the legal order of the United States. The term "jury" in the United States refers to three independent institutions, the common denominator of which is that it is a group of randomly selected citizens who make certain trial decisions. Within the grand jury, a panel of jurors decides whether to indict an individual. In a trial jury (trial jury), their task is to evaluate the evidence presented at trial and, based on this, render a verdict on the guilt of the accused. In a civil trial, on the other hand, a panel of jurors (civil jury) decides definitively on the facts that have emerged in the case.

Keywords: trial jury, civil jury, Fifth Amendment, Sixth Amendment, Seventh Amendment

BIBLIOGRAPHY

Alschuler, Albert W., and Andrew G. Deiss. "A Brief History of the Criminal Jury in the United States." *University of Chicago Law Review* 61, no. 3 (1994): 867–928. https://doi.org/10.2307/1600170.

Blinka, Daniel D. "Jefferson and Juries: The Problem of Law, Reason, and Politics in the New Republic." *The American Journal of Legal History, Marquette University Law School Faculty Publications* 47, no. 1 (2005): 35–103. https://doi.org/10.2307/30039492.

Davis, Peter A. *From Androboros to the First Amendment: A History of America's First Play*. Iowa: University of Iowa Press, 2015.

Dorsaneo III, William V., "Decline of Anglo-American Civil Trial." *SMU Law Review* 71, no. 1 (2018): 353–68.

Doyle, Charles. *Venue: A Brief Look at Federal Law Governing Where a Federal Crime May Be Tried*. CRS Report 2014, no. RS22361.

Doyle, Charles. *Venue: A Legal Analysis of Where a Federal Crime May Be Tried*, CRS Report 2018, no. RL33223. FAS Project on Government Secrecy. Accessed October 10, 2022, https://fas.org/sgp/crs/misc/RL33223.pdf.

"Fact Sheet: Safeguarding a Pillar of American Freedom—A Historical Primer on the Right to Jury Trial in Civil Cases." Center for Justice & Democracy. Accessed October 10, 2022, https://centerjd.org/content/fact-sheet-safeguarding-pillar-american-freedom-historical-primer-right-jury-trial-civil.

Fellman, David. *The Defendant's Rights Today*. Madison: University of Wisconsin Press, 1977.

Hamilton, Alexander. "The Federalist Papers: No. 83." Avalon Project—Documents in Law, History and Diplomacy. Accessed October 10, 2022, https://avalon.law.yale.edu/18th_century/fed83.asp.

Harrington, Matthew P. "Law-Finding Function of the American Jury." *Wisconsin Law Review* 377 (1999): 377–440.

Hills, Leon C. *History and Genealogy of the Mayflower Planters and First Comers to Ye Olde Colonie*. Baltimore: Genealogical Publishing Com., 1975.

Holland, Randy J. "State Jury Trials and Federalism: Constitutionalizing Common Law Concepts." *Valparaiso University Law Review* 38, no. 2 (2004): 373–403.

Jefferson, Thomas. "From Thomas Jefferson to Thomas Paine, 11 July 1789." Founders Online. Accessed October 10, 2022, https://founders.archives.gov/documents/Jefferson/01-15-02-0259.

Kluger, Richard. *Indelible Ink: The Trials of John Peter Zenger and the Birth of America's Free Press*. 1st ed. New York: W. W. Norton & Company, 2016.

Kwiatkowski, Wojciech. *Geneza i praktyka instytucji przysięgłych w amerykańskim procesie karnym*. Warszawa: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2021.

Kwiatkowski, Wojciech. "Kobiety i czarnoskórzy w ławach przysięgłych w Stanach Zjednoczonych." *Zeszyty Prawnicze* 21, no. 1 (2021): 301–23. https://doi.org/10.21697/zp.2021.21.1.11.

Lewicki, Zbigniew. *Historia cywilizacji amerykańskiej. Era sprzeczności 1787–1865*. Warszawa: Wydawnictwo Naukowe Scholar, 2010.

Lewicki, Zbigniew. *Historia cywilizacji amerykańskiej. Era tworzenia 1607–1789,* Warszawa: Wydawnictwo Naukowe Scholar, 2009.

Madison, James. "Amendments to the Constitution, (8 June) 1789." Founders Online. Accessed October 10, 2022, https://founders.archives.gov/documents/Madison/01-12-02-0126.

McManus, Edgar J. *Law and Liberty in Early New England: Criminal Justice and Due Process, 1620–1692.* Amherst: University of Massachusetts Press, 2009.

Moline, Brian J. "Early American Legal Education." *Washburn Law Journal* 42 (2004): 775–802.

Nelson, William E. "The Lawfinding Power of Colonial American Juries." *Ohio State Law Journal* 71, no. 5 (2010): 1003–29.

Towne, Susan C. "The Historical Origins of Bench Trial for Serious Crime." *The American Journal of Legal History* 26, no. 2 (1982): 123–59. https://doi.org/10.2307/844838.

"Trial By Jury: 'Inherent And Invaluable.'" West Virginia Association for Justice. Accessed October 10, 2022, https://www.wvaj.org/index.cfm?pg=HistoryTrialbyJury.

Wakelyn, John E., ed. *Americas Founding Charters: Primary Documents of Colonial and Revolutionary Era Governance*, vol. 1. Westport: Greenwood Publishing Group, 2006.

Vidmar, Neil, and Valerie P. Hans. *American Juries: The Verdict*. New York: Prometheus Books, 2007.

Witmer-Rich, Jonathan. "Restoring Independence to the Grand Jury: A Victim Advocate for the Police Use of Force Cases." *Cleveland State Law Review* 65, no. 535 (2017): 535–59.

"1789: Madison, Speech Introducing Proposed Amendments to the Constitution." Liberty Fund Network. Accessed October 10, 2022, https://oll.libertyfund.org/page/1789-madison-speech-introducing-proposed-amendments-to-the-constitution.

Acts of Laws and Regulations

The Constitution of New York: April 20, 1777. Avalon Project—Documents in Law, History, and Diplomacy. Accessed October 10, 2022, http://avalon.law.yale.edu/18th_century/ny01.asp.

Declaration of Independence: A Transcription. National Archives. Accessed October 10, 2022, https://www.archives.gov/founding-docs/declaration-transcript.

Massachusetts Body of Liberties of 1641. Liberty Fund Network. Accessed October 10, 2022, https://oll.libertyfund.org/page/1641-massachusetts-body-of-liberties.

The Massachusetts Constitution of 1780. Commonwealth of Massachusetts. Accessed October 10, 2022, https://www.mass.gov/info-details/learn-about-the-history-of-the-jury-system.

The South Carolina General Assembly Declaration of 1751. Liberty Fund Network. Accessed October 10, 2022, https://wvsae.org/the-foundation-of-liberty/.

The Virginia Declaration of Rights of 1776. National Archives. Accessed October 10, 2022, https://www.archives.gov/founding-docs/virginia-declaration-of-rights.

Case Citations

Barrett v. United States, 169 U.S. 218 (1898).

Callan v. Wilson, 127 U.S. 540 (1888).

Dimick v. Schiedt, 293 U.S. 474 (1935).

Duke v. United States, 301 U.S. 492 (1937).

Hurtado v. California, 110 U.S. 516 (1884).

Jones v. United States, 137 U.S. 211 (1890).

Matheson v. United States, 227 U.S. 540 (1913).

Parsons v. Bedford, 28 U.S. 433 (1830).

Part II

LEGAL AND POLITICAL SYSTEM AND ITS CONSEQUENCES

Chapter 5

The Federal Budget Process in the United States of America, or the Battlefield between the President and Congress

*Przemysław Pest**

INTRODUCTION[1]

In the 1975, article entitled "The Battle of the Budget," Allen Schick, one of the most prominent experts on the federal budget in the United States, observed as follows: "The budget is a perennial battleground of American politics. Everybody fights. Agencies strive for more money, and budget offices for more control over spending. The president announces one set of budget priorities; Congress enacts another. Within Congress, it is House versus Senate, authorizing versus appropriations committees, and spenders versus savers. It could hardly be otherwise. With tens of billions of dollars at issue every year, and with vital interests and policies hinging on the outcomes, the budget has virtually boundless potential for conflict."[2] Hence, this article aims to outline the essential premises of the federal

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[1] The study includes a number of theses and conclusions formulated previously by this author in the monograph entitled *Równoważenie się władzy ustawodawczej i władzy wykonawczej w procedurze tworzenia i uchwalania budżetu w Stanach Zjednoczonych Ameryki i Rzeczypospolitej Polskiej* (Wrocław: PRESSCOM, 2019). The text relies on the material collected during 2017 research stay at the University of Wyoming, under a Fulbright scholarship.

[2] Allen Schick, "The Battle of the Budget," *Proceedings of the Academy of Political Science* 32, no. 1 (1975), 51.

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budget procedure in the United States of America in the light of conflict between the President and Congress, with particular attention to the constitutional regulations in this regard.

THE ORIGINS OF THE FEDERAL BUDGET PROCESS AND THE PRESIDENTIAL BUDGET PROPOSAL

The Constitution of the United States of America does not contain any extensive provisions concerning public finance. In fact, it is only Article I, relating to the legislature, which lists its pertinent powers in Section 8: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States," while Section 9 states that "no money shall be drawn from the treasury, but in consequence of appropriations made by law." The former prerogative, which empowers Congress to decide on the sources of public revenue, is referred to as the taxing power, whereas the latter, involving approvals of public expenditure, is known as the spending power.[3] Together, they constitute the so-called "power of the purse" vested in the legislature, which represents one of the most important checks and balances against the executive.[4]

The fact that the authors of the US Constitution entrusted the power of the purse to Congress derived from the English parliamentary tradition, in which the foremost function of the legislature had originally been to decide on the levy of taxes, the revenue from which was then allocated to specific public ends.[5] The legal culture and history of the United States, as well as the pragmatism of US legal and financial doctrine, resulted in the absence of general principles underlying the structure of the budget system. Neither does US legislation provide explicitly for budgetary principles.[6] Moreover, the federal Constitution, apart from the aforementioned general provisions regarding taxing power and spending power, does not stipulate anything that would pertain to the federal budget itself or the budget procedure. The institution of the budget as it is understood today was not widespread at the time the US Federal Constitution was drafted. The earliest budget-like public financial plans were developed in European countries, first in England and then in Poland.[7]

[3] Bill Heniff Jr., Megan S. Lynch and Jessica Tollestrup, *Introduction to the Federal Budget Process*, CRS Report to Congress 2012, no. 98–721, 1–5.

[4] Aaron B. Wildavsky, *The New Politics of the Budgetary Process* (New York: HarperCollins Publishers, 1992), 36.

[5] Ryszard M. Małajny, *Pozycja ustrojowa Kongresu USA* (Katowice: Uniwersytet Śląski, 1991), 1: 111.

[6] Teresa Dębowska-Romanowska, *Realizacja jedności i powszechności w ustawie budżetowej* (Warszawa: Wydawnictwo Prawnicze, 1982), 51.

[7] Natalia Gajl, *Gospodarka budżetowa w świetle prawa porównawczego* (Warszawa: Wydawnictwo Naukowe PWN, 1993), 16, 28.

In the United States, the concept of drafting and enacting a uniform budget only became the subject of a broader debate at the beginning of the twentieth century.[8]

If one were to use Polish legal and financial terminology, the first stage of the budget procedure would be, in the case of the federal budget, the preparation of its draft by the executive and subsequent submission to Congress. However, the federal Constitution does not mention such a task in the catalog of the President's competencies.[9] Throughout the nineteenth century and in the early twentieth century, the President did not prepare a unified draft budget for the entire federal executive apparatus; instead, individual federal agencies submitted their respective drafts of financial plans to Congress.[10] However, due to abrupt surges in federal revenue and expenditure in the early twentieth century, particularly during the First World War, the need for a centralized drafting process became apparent.[11] Thus, the federal budget procedure was codified for the first time in the Budget and Accounting Act of 1921. The act required the President to develop a federal budget proposal annually and submit it to the legislature. Under the new law, federal agencies lost the ability to request to be apportioned specific public funds directly from Congress, except when this was called for by either chamber.[12] Although the Polish academic literature uses the term "federal budget draft," the President's Budget is merely a detailed petition stating the financial requirements of federal agencies and programs through which the President's policies are to be pursued. Its submission—unlike the draft budget bill submitted to the Sejm by the Council of Ministers in line with Articles 221 and 222 of the Polish Constitution—does not take place as part of legislative initiative.[13] The presidential budget proposal conveys the priorities of the administration concerned and the values that the incumbent of the White House wishes to realize. The actual nature of the presidential budget proposal is well reflected in the words of President Joe Biden: "Don't tell me what you value. Show me your budget, and I'll tell you what you value."[14] The budget proposal submitted by the President provides a point of departure for work on the federal budget in Congress, though it is not passed by Congress, as is the case with the budget bill submitted to the Sejm

[8] Allen Schick, *The Federal Budget: Politics, Policy, Process* (Washington: Brookings Institution Press, 2007), 10.

[9] Heniff Jr., Lynch, and Tollestrup, *Introduction to the Federal Budget Process*, 1–5.

[10] Schick, *The Federal Budget: Politics, Policy, Process*, 14.

[11] Schick, *The Federal Budget: Politics, Policy, Process*, 14.

[12] Andrzej Pułło, *Prezydent a Kongres USA w świetle konstytucyjnych zasad podziału i równoważenia władz* (Gdańsk: Uniwersytet Gdański, 1986), 115.

[13] Pursuant to Article 221, Constitution of the Republic of Poland, the right to introduce legislation concerning a Budget, an interim budget, amendments to the Budget, a statute on the contracting of public debt, as well as a statute granting financial guarantees by the State, shall belong exclusively to the Council of Ministers. Furthermore, Article 222 provides that the Council of Ministers shall submit to the Sejm a draft Budget for the next year no later than three months before the commencement of the fiscal year. In exceptional instances, the draft may be submitted later.

[14] Hillary Rodham Clinton, *What Happened* (New York: Simon & Schuster 2017), 224.

by the Council of Ministers in Poland. The draft budget, or rather budgets (as formal uniformity of the budget does not apply in the United States), is prepared, as shown later on, by the House of Representatives.

The 1921 Act also established two new public administration bodies which were granted vital powers in the budget procedure. The first was the Bureau of the Budget, subordinate to the President, whose principal task was to develop the presidential budget proposal. The Bureau of the Budget functioned initially within the Department of the Treasury. In 1939, it was transferred to the Executive Office of the President of the United States. In 1979, its name was changed to the Office of Management and Budget. The Office collects spending requirements of individual federal agencies and then prepares the budget proposal for the following fiscal year.[15] However, it is not just a straightforward aggregation of the financial requirements of the various federal agencies, since this office oversees the implementation of the President's programs, therefore the planned expenditure of the various agencies is assessed in the light of the presidential policies.[16] The second body introduced under the aforementioned act was the General Accounting Office, which was renamed in 2004 to the Government Accountability Office. It is the supreme audit body in the United States, which is why it is referred to in the literature as the "controlling arm of Congress."[17]

THE BUDGET PROCESS IN CONGRESS

In the second stage of the budget process, the federal budget is passed by Congress. As already noted, according to Article 1, Section 9 of the federal Constitution, "no money shall be drawn from the treasury, but in consequence of appropriations made by law." This provision, encapsulating the congressional power of the purse, is reified in specific budgetary powers of Congress. Congress may: refuse to allocate funds to programs proposed by the President; cease to finance ongoing programs; make the allocation of public funds subject to the President's compliance with certain conditions; monitor the implementation of individual programs following allocation of requested amounts, particularly in terms of accomplishment of the intended objectives; also, it may grant higher spending limits (appropriations) than those proposed, thus seeking to compel the executive branch to carry out undertakings it finds preferable.[18] It is also worth noting that, unlike in Poland, neither the Constitution nor

[15] Michelle D. Christensen, *The Executive Budget Process: An Overview*, CRS Report 2012, no. R42633, 2–5.

[16] Mariusz Jagielski, *Prezydent USA jako szef administracji* (Kraków: Zakamycze, 2000), 198–99.

[17] Ryszard Szawłowski, "The General Accounting Office—najwyższy organ kontrolny Stanów Zjednoczonych," *Kontrola Państwowa*, no. 1 (1992): 109.

[18] Małajny, *Pozycja ustrojowa Kongresu USA*, 111.

federal legislation provides for a separate discharge procedure whereby the actual implementation of the budget is granted or denied approval. Congressional supervision over public spending is exercised by the competent Congressional committees (the House Appropriations Committee and the Senate Appropriations Committee in the main) as part of their work on the budget for the upcoming year.[19]

However, in financial matters, the position of Congress relative to the President has not always been that strong. In the relationship between the legislature and the executive in budget matters we can distinguish three periods.[20] In the first, from 1789 to 1921, Congress had a decisive say in the matter. The beginning of the second period was marked by the adoption of the Budget and Accounting Act of 1921, which significantly extended the prerogatives of the President in the budget procedure. It was not until the widespread public backlash against the actions of the administration under President Richard Nixon that Congress was given the opportunity to pass legislation increasing its powers in the budget process.[21] The Congressional Budget and Impoundment Control Act of 1974 was signed into law by President Nixon less than a month before he resigned from office. The act in question ushered in the third period, characterized by a relative balance in the relationship between Congress and the President in budget matters.[22] Previously, Congress had not had the legal instruments to address budgetary issues in their totality. Admittedly, certain dedicated bodies did function at the time, including the House Appropriations Committee and the Senate Appropriations Committee, responsible for establishing limits on prospective expenditure, as well as the House Ways and Means Committee and the Senate Finance Committee, which were in charge of revenue, but their competences spanned only sections of the country's financial management, not its entirety. Nor did Congress possess a legal instrument that would have enabled it to approve, by virtue of a single bill, the global amounts of public revenue and spending. For this reason, Congress was dependent on the President's proposals, which clearly circumscribed its power of the purse and hampered the checks and balances of the executive branch.[23]

Under the Congressional Budget and Impoundment Control Act of 1974, the start of the fiscal year was moved by three months (from July 1 to October 1) to give Congress more time to work on the federal budget proposal. In addition, new budget committees were introduced in both chambers (House Budget Committee and Senate Budget Committee) which are tasked with preparing the budget reso-

[19] Marian Grzybowski and Andrzej Kulig, *Systemy ustrojowe Stanów Zjednoczonych i Kanady* (Kraków: Oficyna Wydawnicza Abrys, 2015), 5.

[20] Schick, *The Federal Budget: Politics, Policy, Process*, 9.

[21] Patricia D. Woods, *Who Has the Power of the Purse: The Guide to the Federal Budget Process* (Washington: The Woods Institute, 2018), 75–76.

[22] Schick, *The Federal Budget: Politics, Policy, Process*, 19.

[23] Abner J. Mikva, "The Congress, The Purse, The Purpose, and The Power," *Georgia Law Review* 21, no. 1 (1986): 7.

lution, a new legal instrument within the congressional power of the purse. Furthermore, the act established a specialized agency to assist members of Congress in analyzing the presidential budget proposal, namely the Congressional Budget Office.[24] This institution was intended as a counterpoise to the presidential Office of Management and Budget.

Section 300 of the Congressional Budget and Impoundment Control Act of 1974 includes the schedule for the congressional budget process for any fiscal year (see table 1).

Table 1. Schedule for congressional budget process for fiscal year

On or before	**Action to be completed**
First Monday in February	President submits his budget.
February 15	Congressional Budget Office submits report to Budget Committees.
Not later than 6 weeks after President submits budget	Committees submit views and estimates to Budget Committees.
April 1	Senate Budget Committee reports concurrent resolution on the budget.
April 15	Congress completes action on concurrent resolution on the budget.
May 15	Annual appropriation bills may be considered in the House.
June 10	House Appropriations Committee reports last annual appropriation bill.
June 15	Congress completes action on reconciliation legislation.
June 30	House completes action on annual appropriation bills.
October 1	The fiscal year begins.

The first phase of congressional work on the federal budget consists in preparing the budget resolution, for which the Budget Committees of both chambers are responsible. The Budget Resolution, once voted through by both chambers of Congress, constitutes the core document for the legislature based on which the federal budget proper is developed.[25] The concurrent resolution on the budget sets forth appropriate levels for the fiscal year beginning on October 1 of such year and for at least each of the four ensuing fiscal years for the following, inter alia, (1) totals of new budget authority and outlays; (2) total Federal revenues and the amount, if any, by

[24] Cf. Philip G. Joyce, *The Congressional Budget Office: Honest Numbers, Power, and Policymaking* (Washington: Georgetown University Press, 2011).

[25] James V. Saturno, *The Congressional Budget Process: A Brief Overview*, CRS Report 2011, no. RS20095, 4–5.

which the aggregate level of Federal revenues should be increased or decreased by bills and resolutions to be reported by the appropriate committees; (3) the surplus or deficit in the budget; (4) new budget authority and outlays for each major functional category, based on allocations of the total levels set forth pursuant to paragraph; (5) the public debt. The significance of the budget resolution is evinced in the fact that it is the sole bill passed by Congress in which global amounts of public revenue and expenditure are stated. Although prior to its introduction, Congress had indeed enacted bills that determined the limits on planned public outlays (appropriation bills) and tax bills concerned with the amount of public revenue, no legal instrument was available to Congress through which all federal revenue and expenditure may be controlled.[26] Consequently, the budget resolution needs to be recognized as one of the most important instruments enabling the exercise of the congressional power of the purse.

The preparation of the federal budget, comprising twelve separate bills, is delegated to the House Appropriations Committee. The principle arising from the Constitution extends the exclusive right of legislative initiative granted to the House with respect to all bills pertaining to public revenue (Article I, Section 7: "All bills for raising revenue shall originate in the House of Representatives"), inclusive of appropriation bills. The House Appropriations Committee is divided into twelve subcommittees, each of which develops one bill that sets the appropriations within its respective jurisdiction.[27] The subcommittees draft the budget bills to the extent of public appropriations which they have been allocated based on the amounts stated in the budget resolution.[28] Once all bills have been drafted by the subcommittees, they are passed by the Committee and referred to the House of Representatives. Having been approved in the House, the bills are subsequently referred to the Senate to be examined by the Senate Appropriations Committee. If the Senate introduces any amendments, the dedicated conference committee prepares reports containing consolidated versions of the bills. These bills, in identical versions, are then voted on by the House and Senate.

THE PRESIDENTIAL VETO AND IMPOUNDMENT

When such appropriation bills have been passed in identical wording by both chambers of Congress, they are submitted to the President, in line with Article I, Section 7 of the federal Constitution: "Every bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States; if he approves it he shall sign it, but if not he shall re-

[26] Schick, *The Federal Budget: Politics, Policy, Process*, 119.
[27] Heniff Jr., Lynch, and Tollestrup, *Introduction to the Federal Budget Process*, 1–24.
[28] Schick, *The Federal Budget: Politics, Policy, Process*, 61.

turn it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a law. But in all such cases, the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered in the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law." From the moment the United States was established until 2016, presidents chose to veto appropriation bills eighty-three times, with twelve vetoes overturned by Congress. The record holder in this regard was President Bill Clinton, who vetoed fourteen such bills, with none overridden later by Congress.[29] The President's prerogative to veto is a legal instrument that allows the executive to check and balance the legislative power in the course of the budget process, a counterpoise to the congressional power of the purse. In numerous states, governors have been granted the right to veto only selected provisions in the bills that they are submitted for signature, which is otherwise known as the line-item veto. At the federal level, however, the President has no such power at their disposal. An attempt to confer it on the President in the Line Item Veto Act of 1996 failed two years later as the instrument was declared unconstitutional under the federal Constitution by the Supreme Court in *Clinton v. City of New York*. Even so, President Bill Clinton made use of the instrument several times in 1997 before it was pronounced incompatible with the federal Constitution.[30]

Another legal instrument that the President is entitled to use to limit the congressional power of the purse is the so-called "impoundment."[31] The term denotes the refusal of the President to expend public funds they are allocated by Congress in the appropriation bill,[32] thus proceeding contrary to the will of the legislature. It is observed in the literature that the nature of the institution is actually not unlike the selective veto.[33] Impoundment was not often employed by American presidents in the nineteenth and first half of the twentieth century. However, it would see in-

[29] Meghan M. Stuessy, *Regular Vetoes and Pocket Vetoes: In Brief*, CRS Report 2016, no. RS22188, 5–7.

[30] Cf. Ireneusz Kondak, "Stany Zjednoczone: weto selektywne a konstytucyjny kształt procedury ustawodawczej (Clinton v. City of New York, i inni. Orzeczenie Sądu Najwyższego USA z 25 czerwca 1998 r.)," *Przegląd Sejmowy* 7, no. 1(30) (1999), 149–54.

[31] Jagielski, *Prezydent USA jako szef administracji*, 214.

[32] Ryszard M. Małajny, *Amerykański prezydencjalizm* (Warszawa: Wydawnictwo Sejmowe, 2012), 476.

[33] Pułło, *Prezydent a Kongres USA w świetle konstytucyjnych zasad podziału i równoważenia władz*, 133.

creasing use after the Second World War, which peaked during the presidency of Richard Nixon, escalating into the so-called "impoundment war" during his term in office.[34] President Nixon impounded between 17 and 20% of all appropriations passed by Congress in the successive fiscal years, using the funds thus obtained for purposes that Congress did not approve, such as financing military interventions abroad. When Congress overrode his veto of the Federal Water Pollution Control Act Amendments of 1972, which provided, for example, for allocating public funds to water conservation, President Nixon declared that the monies in question would not be spent in any case, which was tantamount to a double veto. Impoundment became a weapon in the hands of the President to combat the congressional power of the purse and, quite openly, undermined the spending power that is constitutionally granted to the legislature.[35] Using that legal instrument, the President would create budget reserves and place a limit, as he saw fit, on the public funds for federal programs that had been allocated by Congress in appropriation bills.[36] Congressional control over public spending was restored by virtue of the aforementioned Congressional Budget and Impoundment Control Act of 1974, the last chapter of which is devoted to impoundment. The act made it possible for Congress to effectively counteract impoundment on the President's part, though, at the same time, it sanctioned the impoundment instrument itself.[37] Consequently, the President may still temporarily suspend the funds passed by Congress, exploiting that peculiar "chink" in the power of the purse vested in the legislature. Even so, its practical importance has clearly diminished following the enactment of the 1974 law.

CONCLUSIONS

To recapitulate, the power of the purse granted to Congress under the US Federal Constitution places the legislature at the forefront of the budget process. The actual federal budget, which comprises appropriation bills, is developed by Congress on the basis of the budget resolution, which also originates with that body. The strict structural and personal separation between the legislature and the executive, as well as the fact that Congress is entrusted with the exclusive right to determine appropriations, translate into the actual significance of the congressional power of the purse: one of the crucial systemic checks and balances in the United States of America. The so-called presidential budget proposal is, in fact, only a request stating financial requirements, but it is not a budget bill equivalent to what the Polish

[34] Małajny, *Amerykański prezydencjalizm*, 479.

[35] Małajny, *Amerykański prezydencjalizm*, 478–79.

[36] Andrzej Kulig, "Stany Zjednoczone Ameryki," in *Systemy ustrojowe państw współczesnych*, eds. Stanisław Bożyk and Marian Grzybowski (Białystok: Temida 2, 2012), 75.

[37] Małajny, *Amerykański prezydencjalizm*, 482.

Council of Ministers submits as part of the exclusive right to legislative initiative in Poland. Congress may allocate funds in an amount less than that requested by the President, or even decide not to finance a particular federal program. Within the framework of checks and balances, the congressional power of the purse is offset by the President's power to veto the budget bill(s) passed by Congress. Such reciprocal checks and balances ensure a relative systemic balance between the legislative and the executive branches in the federal budget process. Attempts to augment the budgetary prerogatives of the President, by, for example, granting them the recourse to line-item veto or impoundment, were met with opposition from the other two powers, the legislature and the judiciary. Still, it is worth noting that the tremendous increase in the number of federal programs that rely on appropriations seen in recent decades, as well as the complexity of procedures through which the latter are determined, have a palpable adverse effect on the ability of Congress to balance the executive. Members of Congress do not have sufficient knowledge and time to assess in-depth whether the amount of public funding requested by the President for individual programs is justified. It is often the case that the process of determining appropriations amounts to "capping" presidential proposals automatically by a default percentage.[38] Moreover, the power of the purse is also constrained by the decreasing share of discretionary spending, which is subject to the budget procedure, in the total amount of public expenditure. Currently, it accounts for a mere 30% of public spending. The remaining 70% of the outlays, known as mandatory/direct spending, remain outside the annual budget procedure.

Summary: The article discusses the essential premises of the federal budget procedure in the United States from the standpoint of conflict between the President and Congress, with particular emphasis on the pertinent constitutional regulations. The article outlines the nature of the congressional power of the purse, as well as describes a number of involved instruments, such as the presidential budget proposal, the congressional budget resolution, appropriation bills, the presidential veto, and impoundment.

Keywords: federal budget, power of the purse, appropriations, checks and balances

BIBLIOGRAPHY

Christensen, Michelle D. *The Executive Budget Process: An Overview*, CRS Report 2012, no. R42633.

Dębowska-Romanowska, Teresa. *Realizacja jedności i powszechności w ustawie budżetowe.* Warszawa: Wydawnictwo Prawnicze, 1982.

[38] Małajny, *Pozycja ustrojowa Kongresu USA*, 147–48.

Gajl, Natalia. *Gospodarka budżetowa w świetle prawa porównawczego*. Warszawa: Wydawnictwo Naukowe PWN, 1993.

Grzybowski, Marian, and Andrzej Kulig. *Systemy ustrojowe Stanów Zjednoczonych i Kanady*. Kraków: Oficyna Wydawnicza Abrys, 2015.

Heniff Jr., Bill, Megan S. Lynch, and Jessica Tollestrup. *Introduction to the Federal Budget Process*, CRS Report to Congress 2012, no. 98-721.

Jagielski, Mariusz. *Prezydent USA jako szef administracji*. Kraków: Zakamycze, 2000.

Joyce, Philip G. *The Congressional Budget Office: Honest Numbers, Power, and Policymaking*. Washington: Georgetown University Press, 2011.

Kondak, Ireneusz. "Stany Zjednoczone: weto selektywne a konstytucyjny kształt procedury ustawodawczej (Clinton v. City of New York, i inni. Orzeczenie Sądu Najwyższego USA z 25 czerwca 1998 r.)." *Przegląd Sejmowy* 7, no. 1(30) (1999): 149–54.

Kulig, Andrzej. "Stany Zjednoczone Ameryki." In *Systemy ustrojowe państw współczesnych*, edited by Stanisław Bożyk and Marian Grzybowski, 49–88. Białystok: Temida 2, 2012.

Małajny, Ryszard M. *Amerykański prezydencjalizm*. Warszawa: Wydawnictwo Sejmowe, 2012.

Małajny, Ryszard M. *Pozycja ustrojowa Kongresu USA*, vol. 1, Katowice: Uniwersytet Śląski, 1991.

Mikva, Abner J. "The Congress, The Purse, The Purpose, and The Power." *Georgia Law Review* 21, no. 1 (1986): 1–15.

Pest, Przemysław. *Równoważenie się władzy ustawodawczej i władzy wykonawczej w procedurze tworzenia i uchwalania budżetu w Stanach Zjednoczonych Ameryki i Rzeczypospolitej Polskiej*. Wrocław: PRESSCOM, 2019.

Pułło, Andrzej. *Prezydent a Kongres USA w świetle konstytucyjnych zasad podziału i równoważenia władz*. Gdańsk: Uniwersytet Gdański, 1986.

Rodham Clinton, Hillary. *What Happened*. New York: Simon & Schuster, 2017.

Saturno, James V. *The Congressional Budget Process: A Brief Overview*, CRS Report 2011, no. RS20095.

Schick, Allen. "The Battle of the Budget." *Proceedings of the Academy of Political Science* vol. 32, no. 1 (1975): 51–70. https://doi.org/10.2307/1173617.

Schick, Allen. *The Federal Budget: Politics, Policy, Process*. Washington: Brookings Institution Press, 2007.

Stuessy, Meghan M. *Regular Vetoes and Pocket Vetoes: In Brief*, CRS Report 2016, no. RS22188.

Szawłowski, Ryszard. "The General Accounting Office—najwyższy organ kontrolny Stanów Zjednoczonych." *Kontrola Państwowa* no. 1 (1992): 106–15.

Wildavsky, Aaron B. *The New Politics of the Budgetary Process*. New York: HarperCollins Publishers, 1992.

Woods, Patricia D. *Who Has the Power of the Purse: The Guide to the Federal Budget Process*. Washington: The Woods Institute, 2018.

Chapter 6

Constitutional Background and the Practice of Impeachment in the United States

*Mateusz Radajewski**

INTRODUCTION

The Constitution of the United States of September 17, 1787, is undoubtedly one of the most important normative acts in history to date. After all, it brought forth a system that proved to be extremely durable and adaptable in the changing social, political, and economic circumstances. However, its robustness has not been determined solely by the provisions of the Constitution itself, but also by the unique historical conditions and the American political culture. Still, it remains undeniable that the legal solutions adopted in the 1787 Constitution largely set the course for the systemic development of the United States and, consequently, made a vital contribution to the political and economic standing that the country has attained. Hence, it is no surprise that the particular legal institutions provided for in the US Constitution continue to be a source of inspiration as one seeks optimal systemic solutions that could be applied in the legal systems elsewhere. One of those is impeachment, which the US Constitution lays down as the instrument to enforce the liability on the part of the President and other federal officials. For this reason, it represents a compelling and important object of research in legal sciences.

Consequently, this study will focus on the legal solutions associated with impeachment in the United States. Specifically, aspects under consideration will in-

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clude the origin of the institution, its subjective and objective scopes, as well as procedural characteristics and actual application. Thus structured, the inquiry will provide a basis for a number of relevant conclusions.

THE ORIGINS OF IMPEACHMENT IN THE US POLITICAL SYSTEM

Prior to a detailed discussion of the legal issues involved in the US impeachment, it may be worthwhile to reconstruct its origins so as to place the institution in its proper historical context and answer to what extent the impeachment provided for in the Constitution of 1787 had been inspired by legal solutions known previously.

The origins of the liability of public officials can be traced back as far as antiquity.[1] The example of ancient Athens is usually cited in this context, where various forms of holding public officials accountable existed. Arguably, this even included the proceedings as part of ostracism, which enabled persons who posed a threat to the foundations of democracy to be eliminated from public life.[2] It may be noted, however, that a solution more akin to modern impeachment was devised in ancient Sparta, whose law made it possible to try the ruling diarchs for an abuse of power. In such cases, the adjudicating body would be composed of the second king, the ephors, and the gerontes, while the sanctions it was entitled to administer included the death penalty, exile, deposition, and a fine.[3]

The mechanisms developed in antiquity proved incompatible with the legal and political realities of the Middle Ages. The special status of the monarch did not allow solutions that would enable their liability to be enforced directly, and the sole available form of public response to any abuses of power by the ruler was rebellion, which was legitimate only in extreme circumstances. At the same time, it should be remembered that such a power check entailed very serious risks since its use would in many cases result in a struggle that plunged the state into a profound crisis.[4] Hence, as early as the late Middle Ages, efforts were made to devise legal solutions under which the liability of the most important persons in the state could be enforced as part of its normal functioning. The first such mechanism was impeachment, which emerged in the English system in the fourteenth century.

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[1] Michał Pietrzak, *Odpowiedzialność konstytucyjna w Polsce* (Warszawa: Wydawnictwo Naukowe PWN, 1992), 7.

[2] Krzysztof Wójtowicz, "Zasady i praktyka funkcjonowania odpowiedzialności konstytucyjnej w innych państwach," in *Trybunał Stanu w PRL*, ed. Zofia Świda-Łagiewska (Warszawa: Książka i Wiedza, 1983), 31.

[3] Tadeusz Maciejewski, *Historia powszechna ustroju i prawa* (Warszawa: Wydawnictwo C. H. Beck, 2015), 16.

[4] Wójtowicz, "Zasady i praktyka funkcjonowania odpowiedzialności konstytucyjnej w innych państwach," 32–33; Pietrzak, *Odpowiedzialność konstytucyjna w Polsce*, 31–32.

Generally speaking, impeachment in medieval England was a procedure whereby any English subject, including a royal official, could be charged with breaking the law or at least acting against the interests of the state. A distinctive feature of impeachment was that the most important procedural roles were distributed between the two Houses of Parliament. Thus, the indictment could be brought by the House of Commons, while its legitimacy was decided by the House of Lords.[5] Significantly, this division was directly substantiated in English law. The House of Lords was the superior judicial body, while the House of Commons represented all the countries that possessed powers of prosecution within the framework of jury courts.[6]

One should remember that the English impeachment had certain significant shortcomings that prevented its function—that is, holding officials who abused their power accountable, from being realized to the full. This should be attributed mainly to the fact that the monarch had means at their disposal which, in practice, enabled them to influence the proceedings in parliament and even nullify their outcomes. Notably, those measures included the right to dissolve or adjourn parliament, as well as the right of pardon with respect to the convicted. Thus, the effectiveness of English impeachment largely depended on the mutual balance of power between the parliament and the ruler.[7]

The English practice of using impeachment is relatively extensive, with more than a hundred cases attested. However, it remained in abeyance from the mid-fifteenth until the early eighteenth century, chiefly due to the strong position of the Tudors on the English throne.[8] The institution saw a revival in the seventeenth century,[9] though it should be noted that the ruler was able to exercise clemency over the impeached as long as 1701. It was not until the Act of Settlement that that power was abolished, opening up the prospect of actual accountability for royal officials. In practice, this would never materialize, as the eighteenth century saw the rise of political accountability of the English ministers,[10] which supplanted the systemic role that impeachment could have played. Unsurprisingly, its importance would

[5] Pietrzak, *Odpowiedzialność konstytucyjna w Polsce*, 31–32.

[6] Wójtowicz, "Zasady i praktyka funkcjonowania odpowiedzialności konstytucyjnej w innych państwach," 34–35.

[7] Wójtowicz, "Zasady i praktyka funkcjonowania odpowiedzialności konstytucyjnej w innych państwach," 32–33.

[8] Wójtowicz, "Zasady i praktyka funkcjonowania odpowiedzialności konstytucyjnej w innych państwach"; Aleksander Makowski, in Aleksander Makowski and Longin Pastusiak, *Impeachment. O usuwaniu polityków z urzędu* (Warszawa: Konsalnet, 1999), 14.

[9] *Constitutional Grounds for Presidential Impeachment. Report by the Staff of the Impeachment Inquiry* (Washington, 1974), 4–6.

[10] Marek Wąsowicz, *Historia ustroju państw Zachodu. Zarys wykładu* (Warszawa: Liber, 2007), 156–60; Michał Sczaniecki, *Powszechna historia państwa i prawa* (Warszawa: Wydawnictwo Prawnicze LexisNexis, 2007), 317–18.

decline from the eighteenth century onwards, only to be used for the last time in the early nineteenth century.[11]

The close historical and legal ties between England and the independence-seeking colonies in North America made impeachment attractive enough for the authors of the US Constitution to include it in their work. This was primarily due to the fact that they envisioned a strong executive, which would nevertheless be sufficiently controlled by the legislature that represented the people. Even so, the creators of the US Constitution modified certain vital aspects of impeachment, as they did not intend it to be used for the direct criminal prosecution of public officials, but conceived it as a mechanism enabling their removal from office, for example, in order to institute ordinary criminal proceedings against them before common courts.[12] This influenced the particular aspects of impeachment-related provisions in the federal Constitution, particularly in terms of penalties imposed under such a procedure.

IMPEACHMENT IN THE US SYSTEM: GENERAL REMARKS

Before embarking on a detailed analysis of the constitutional solutions pertaining to impeachment, a general characterization of the institution is indispensable. First, its essential framework should be reconstructed based on several provisions of the US Constitution, as impeachment is referred to in Article I, Sections 2 and 3, Article II, Sections 2 and 4, and Article III, Section 2. The first of those states that it is the exclusive prerogative of the House of Representatives to formulate impeachment charges. This is supplemented by Article I, Section 3, according to which only the Senate is empowered to decide on the merits of the indictment brought by the House of Representatives. This provision also mentions the sanctions to be applied by the Senate upon finding the impeached party guilty. Specifically, it can only rule on the expulsion from office and the loss of capacity to accept and perform any honorary or remunerated position in the state service.

The subsequent relevant provision—that is, Article II, Section 2, which concerns the presidential right of clemency, expressly asserts that it does not apply to those convicted by the Senate. However, from the standpoint of this study, the most important of the aforementioned provisions is Article II, Section 4, which addresses the fundamental issues relating to impeachment. First, it identifies the subjects that are liable under this procedure ("The President, Vice President and all Civil Offi-

[11] See Wójtowicz, "Zasady i praktyka funkcjonowania odpowiedzialności konstytucyjnej w innych państwach," 34–39; Makowski, 18.

[12] Makowski, 23–24. More broadly on the debates surrounding impeachment during the work on the Constitution, see *Constitutional Grounds for Presidental Impeachment. Report by the Staff of the Impeachment Inquiry*, 7–17.

cers of the United States"). Second, it specifies acts that may provide grounds for the indictment formulated by the House of Representatives; these are confined to treason, bribery, or other high crime or misdemeanors.

The above are further supplemented by Article III, Section 2, which pertains to the judiciary. Among other things, it states that while criminal cases are to be tried by a jury, impeachment is not subject to such a procedure. Although on the face of it the regulation may appear irrelevant, even superfluous, it is worth noting that through such a wording the constitutional legislator qualified at least some of the cases heard under this procedure as criminal ones.

Although a detailed analysis of the provisions cited above follows later on, certain general conclusions arising from the constitutional provisions on impeachment should be stated. In the first place, the institution in question dovetails perfectly with the system of checks and balances that characterizes the American system.[13] Without a doubt, it serves to balance the executive power by the legislature and, importantly, the judiciary as well (in view of the fact that federal judges may also be held liable within the framework of impeachment). Thus, the representative body of the parliament is entrusted with the vital function of overseeing the lawfulness of actions of all other actors in the system of governance and has the competence to eliminate those who abuse their power from public life. Consequently, by the will of the constitutional legislator, Congress has in a sense become the guardian and guarantor of the foundations of the American system, having been granted powers relating to impeachment.

Second, it seems legitimate to conclude that by ruling on the merits of the indictment brought by the House of Representatives, the Senate is exceptionally vested with judicial capacity. This is determined not only by the material aspect of such a prerogative of the Senate but also by the pertinent reference in Article III of the US Constitution, which regulates the judicial power in its entirety. Therefore, it must be presumed that the constitutional legislator has delegated its exercise not only to the courts but also to the upper chamber of Congress, albeit to a very limited extent. Apparently, this might affect how the Senate understands its role in the impeachment process, namely that determining the charges formulated in the House of Representatives should, at least to some extent, be distanced with regard to current politics. On the other hand, the authors of the Constitution do not

[13] Sczaniecki, *Powszechna historia państwa i prawa*, 329; Andrzej Pułło, *System konstytucyjny Stanów Zjednoczonych* (Warszawa: Wydawnictwo Sejmowe, 1997), 21–22; Jarosław Szymanek, "Determinanty amerykańskiego systemu prezydenckiego," in *Idee, instytucje i praktyka ustrojowa Stanów Zjednoczonych Ameryki*, eds. Paweł Laidler and Jarosław Szymanek (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2014), 211, 219. Doubts in this regard were expressed by Jerzy Jaskiernia who, however, ultimately concluded that impeachment may be considered "a peculiar preventive brake," as opposed to "a typical brake within the system of tripartite division of powers"—Jerzy Jaskiernia, "Zagadnienie podstaw do wszczęcia procedury impeachment przeciwko urzędnikom federalnym w prawie i praktyce ustrojowej Stanów Zjednoczonych," *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 37, no. 4 (1975): 133–34.

seem to have intended for senators who adjudicate impeachment to be required to divest themselves of their political views or even their party affiliation. After all, the decision to grant judicial powers to the Senate had to take into account that it was a political body. Therefore, the senators involved in the impeachment process should not so much act as thoroughly impartial judges but be guided in their final decisions, even more so than in any other matters, by the good of the nation in the first place, as opposed to their own political sympathies.

Third, in its essentials, impeachment should be regarded as a reification of so-called constitutional accountability—that is, the liability of the supreme state officials for infringements of the law that do not necessarily constitute a crime.[14] The American model of such accountability is strictly parliamentary, which means that, unlike the procedure in many other countries, the process aimed at enforcing it takes place exclusively before the parliament, without the involvement of the judiciary. This highlights its political dimension.

Given the above, one should also draw attention to the separation of the procedural roles in impeachment between the two houses of parliament. Although undoubtedly inspired by the English system, this is also underpinned by the constitutional characteristics of each chamber of Congress. Indeed, in the American system, the parliamentary role of the House of Representatives is evident in its very name: it is to represent the people as a whole. This is evinced in its composition, which relies on the population criterion for each state. The Senate was assigned a different role. Since two senators are invariably elected from each state, this house represents the constituent parts of the federation. Thus, collectively, the Senate embodies the union of all states. Now, as regards impeachment, it follows that the prosecution powers have been entrusted to the representatives of the American people in their entirety, while judicial powers are granted to a body that, in a particular fashion, epitomizes the unity of the state. This reflects the special position of federal officials, who serve the state as a whole and can only be tried for the abuse of power by the supreme representation of that state. Furthermore, it needs to be noted that the authors of the Constitution envisaged the Senate as a more conservative and restrained chamber,[15] which would make it better suited to judging abuses of power in a fair and just manner.

In terms of general observations concerning impeachment, one should also underscore the particular nature of the sanctions administered under this procedure, which comprise only early removal from office and, potentially, prohibition from

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[14] Bogusław Banaszak, *Porównawcze prawo konstytucyjne współczesnych państw demokratycznych* (Warszawa: Lex a Wolters Kluwer business, 2012), 287; Monika Kowalska, *Odpowiedzialność członków egzekutywy przed Trybunałem Stanu w III Rzeczypospolitej Polskiej* (Lublin: Wydawnictwo Uniwersytetu Marii Curie-Skłodowskiej, 2018), 45–46.

[15] Stanisław Gebert, *Kongres Stanów Zjednoczonych Ameryki* (Wrocław, Warszawa, Kraków, Gdańsk: Zakład Narodowy im. Ossolińskich, 1981), 97.

holding state functions in the future. It follows that the institution in question is primarily a preventive one—that is, it is intended to preclude violations of the law (abuse of office) in the future. On the other hand, its repressive dimension is limited. While both removal from office and prohibition from holding public positions may undoubtedly be seen as just requital for the abuses committed, this is not their primary purpose. This is also corroborated by the constitutional norm, according to which a conviction by the Senate does not preclude holding one criminally liable, whereby typical repressive sanctions are imposed following judgment.

SUBJECTS LIABLE UNDER IMPEACHMENT

Detailed reflections on impeachment in the United States should set out with an analysis of its subjective scope—that is, the catalog of persons who may be held liable thereunder. This matter is regulated by the previously cited Article II, Section 4, which states that the House of Representatives may impeach "all civil Officers of the United States," including the explicitly listed President and Vice President.

The structure of the provision suggests that the authors of the Constitution intended impeachment to be primarily an instrument through which the President and Vice President may be influenced, with a view to safeguarding the correct functioning of those bodies. Simultaneously, the American Constitution unequivocally asserts that other persons—that is, all civil servants of the United States, may also be accountable under impeachment.

The above term employed by the US Constitution legislator in Article II, Section 4 is not entirely clear. Undoubtedly, since it refers to "civil" officers, military officials are not accountable before Congress.[16] There is also little doubt that "civil Officers of the United States" denote those who hold the most important positions in the administration, meaning members of the cabinet such as the Secretary of State. Still, it is debatable whether lower-ranking officials can be indicted under impeachment and, to resolve this question, it is argued that two classes of federal officials may be distinguished within the Constitution itself: the principal ones, appointed by the President following the recommendation and consent of the Senate, as well as the inferior ones who, in line with Article II, Section 2 of the Constitution, can be appointed otherwise—that is, by the President alone, by the courts or the heads of ministerial departments. Consequently, within the meaning of the Constitution, only a person who assumes their office in any manner described above will be an officer. By the same token, all other federal officials, even if they perform their duties within the administration in a narrow sense, will not be civil officers as referred

[16] Anna Hadała-Skóra, "Competences of the United States Congress in the Impeachment Procedure," *Przegląd Prawa Konstytucyjnego* 58, no. 6 (2020): 584.

to in Article II, Section 4 of the US Constitution, and thus will not be liable under impeachment.[17]

Given the subjective scope of that institution, one should also consider whether it extends to the members of Congress as well. Although they are not appointed by the President (or a court or the head of a ministerial department), they do perform one of the most important functions in the state, which begs the question of whether the designation of a civil officer in Article II, Section 4 of the Constitution applies to them as well. Unlike the aforementioned hypothetical liability of lower-ranking state functionaries, this issue had its practical ramifications, since the idea of indicting one senator was raised in the House of Representatives as early as 1787.[18] Still, it must be assumed that the above arguments regarding the definition of US officials in terms of impeachment are also fully applicable to the members of Congress. In effect, they must be denied such status, which renders any impeachment of the senators inadmissible.[19]

As regards the subjects that may be liable under impeachment, one cannot fail to note that federal judges fall within the above definition of a civil officer in the service of the United States.[20] In their case, the institution in question acquires a particular significance, as it is the only means of removing them from office for committing reprehensible acts. Thus, with respect to federal judges, impeachment performs a role construed in other systems as disciplinary liability, whereby one is usually answerable to bodies composed exclusively of other members of the judiciary. At the same time, the substantial differences between standard disciplinary liability and impeachment warrant the conclusion that US federal judges are in a particularly comfortable position as far as the possibility of losing their office for misconduct is concerned. This is due to the fact that a range of actions that could result in removal from office under disciplinary liability are nevertheless tolerated in the United States, as impeachment proceedings are not instituted in cases that are not vital to the state. Such a state of affairs, pathological in itself, appears to be incompatible with the US Constitution, which expressly states in Article III, Section 1 that judges shall hold their office as long as they hold it "during good Behaviour." Hence, the state apparatus should respond by removing a judge from office whenever they commit an act that seriously offends the dignity of their office. This should lead to

[17] Jared P. Cole and Todd Garvey, *Impeachment and Removal*, CRS Report 2015, no. R44260, 3–6.

[18] Ultimately, his liability was not pursued through impeachment because the defendant lost his seat in the parliament, among other things. The issue is discussed more extensively by A. Makowski, who also reconstructs the positions on the lawfulness of impeaching a member of Congress in the House of Representatives; see Makowski, 30–34.

[19] Cole and Garvey, *Impeachment and Removal*, 3.

[20] This excludes so-called territorial judges, who hold office temporarily and may be dismissed by the President before their term expires. (Jaskiernia, "Zagadnienie podstaw do wszczęcia procedury impeachment przeciwko urzędnikom federalnym w prawie i praktyce ustrojowej Stanów Zjednoczonych," 120; Gebert, *Kongres Stanów Zjednoczonych Ameryki*, 489).

the conclusion that if impeachment, by virtue of its nature, fails to accomplish such a goal, the legislature should devise alternative methods of removing federal judges, and the pertinent legal regulations should not be considered unconstitutional.[21]

Concerning the subjective scope of impeachment, it is also necessary to determine whether it applies to "civil officers of the United States" who no longer hold their office. After all, it would seem that if the purpose of the institution in question is first and foremost to remove a person from office, it would be pointless to have a person whose term has expired impeached by the House of Representatives. On the other hand, the sanctions imposed by the Senate include declaring an individual incapable of accepting and performing any honorary or remunerated position in public service. And yet, administering such a sanction undoubtedly makes sense with regard to persons who no longer hold any public office at any given time. Moreover, if impeachment were to apply only to the incumbents, they could easily avoid the liability by handing in their resignation in advance. Admittedly, the essential intention of the institution would thus be preserved (the wrongdoer would lose power), but refraining from having a misdeed discredited by a Senate conviction is hardly acceptable. In consequence, there is no evident legal impediment to the impeachment and trial of a person who has already lost the status of a "civil officer of the United States." However, it must be noted that systemic practice is not uniform in this regard. On the one hand, one could cite the case of William Belknap, who resigned from his post as Secretary of War a few hours before being indicted, yet the Senate deemed itself competent to decide on the legitimacy of the charges against him (which, incidentally, ended in his acquittal). On the other, resignation from office caused the impeachment procedure to be discontinued in a number of cases, including Richard Nixon's, for instance.[22] Significantly, a different approach was adopted in 2021 with another former US President, Donald Trump, whose trial in the Senate ended less than a month after his term had elapsed.

Considering the above, it would appear that impeaching anyone for an act they committed prior to assuming federal office would be inadmissible. Although the Constitution does not preclude such an eventuality explicitly, it would hardly be reconcilable with the essential intent of the institution, which is to enable the legislature to control the actions of officials. Also, since the House of Representatives is empowered to indict a federal official for a given act as part of impeachment, this, in a sense, includes the presumption that the act was committed in connection with the function held, or at least while discharging that function.[23] Nonetheless, it did happen that

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[21] See Makowski, 43–44 and the studies cited there, esp. Raoul Berger, *Impeachment. Constitutional Problems* (Toronto, New York, London: Harvard University Press, 1974), 177–78.

[22] Cole and Garvey, *Impeachment and Removal*, 16–17.

[23] In the course of the Bill Clinton trial, more than 400 law professors signed a letter in which it was argued that for a conviction under impeachment, a connection must be ascertained between the defendant's alleged act and their official duties. However, that interpretation was rejected, not least

impeachment also encompassed acts committed by the arraigned individual before they came into federal office. The case in question involved Judge Gabriel Thomas Porteous, whom the Senate convicted for wrongdoing whilst serving as a state judge and seeking appointment to a federal court, among other things. However, no formal indictment has ever been brought by the House of Representatives in respect of any US official solely for misdeeds prior to their assumption of a federal position.[24]

OBJECTIVE SCOPE OF LIABILITY UNDER IMPEACHMENT

Having discussed the categories of subjects who may be charged and convicted under impeachment, attention should now focus on the grounds for liability thus arising. As previously noted, this particular issue is regulated in Article II, Section 4 of the US Constitution, which provides that removal from office upon conviction by the Senate is only possible where treason, bribery, or any other high crimes or misdemeanors are involved. An interpretation of these terms is therefore indispensable.

It is relatively easy to determine the normative substance of "treason," as the notion is directly defined in the Constitution itself, specifically in Article III, Section 3, which states that only waging war against the United States or joining, aiding, or supporting its enemies constitutes treason. Similarly, "bribery," whose meaning is well-established in both common law[25] and US legislation,[26] generally denoting the crime of corruption, is hardly considered doubtful.

Conversely, the precise meaning of the terms "high crimes" and "misdemeanors" is somewhat problematic. In this respect, it is widely observed that those concepts developed within English parliamentary law, which was autonomous with respect to criminal law as well.[27] Consequently, they cannot be equated exclusively with felonies. Liability under impeachment may therefore result from criminal acts in the strict sense, as well as from other types of abuse of power, even if they do not fall within the purview of criminal legislation.[28] This corresponds to the unique na-

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because of the inconsistent views of the signatories, who themselves acknowledged that there must be exceptions to the aforementioned rule, especially where particularly serious offences such as murder are involved. (Michael J. Gerhardt, "The Special Constitutional Structure of the Federal Impeachment Process," *Law and Contemporary Problems* 63, no. 1–2 (2000): 248–49).

[24] Cole and Garvey, *Impeachment and Removal*, 15–16.

[25] Cole and Garvey, *Impeachment and Removal*, 7, including the work cited there—that is, William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1769), 139.

[26] The felony defined as "bribery" is described in detail in para. 201 18 United States Codex.

[27] Makowski, 47–48; Jaskiernia, "Zagadnienie podstaw do wszczęcia procedury impeachment przeciwko urzędnikom federalnym w prawie i praktyce ustrojowej Stanów Zjednoczonych," 124–25.

[28] Tom Ginsburg, Aziz Huq, and David Landau, "The Comparative Constitutional Law of Presidential Impeachment," *The University of Chicago Law Review* 88, no. 1 (2021): 112; Cole and Garvey,

ture of impeachment, notably the delegation of traditional prerogatives to a political body such as the Senate.[29] It is also consistent with the range of sanctions employed within this framework, which pertain exclusively to the exercise of public functions and the capacity to assume them. It also tallies with the constitutional stipulation that a conviction by the Senate does not preclude ordinary criminal proceedings. Such characteristics underline the political, and not necessarily criminal, nature of impeachment.[30]

Moreover, regarding the objective scope of that institution, the question arises as to whether it is not broader in the case of federal judges—that is, whether it does not extend to acts other than those enumerated in Article II, Section 4 of the US Constitution. This is due to the fact that, as already noted, Article III, Section 1 of the US Constitution states that it is requisite for a judge to hold the office in an irreproachable manner. Now, since a judge may be removed only through impeachment, this might warrant the conclusion that they may thus be held accountable not only for "treason, bribery, high crimes or misdemeanors," but also for any other manifestation of the reprehensible exercise of office.[31] However, such an interpretation does not appear acceptable. Indeed, Article II, Section 4 of the US Constitution clearly specifies the grounds for impeachment against any civil officer of the United States, therefore Article III, Section 1 cannot be presumed to alter the latter norm. Instead, as previously observed, it should be construed as a provision that allows the legislature to devise an alternative procedure for removing judges who may not have engaged in "treason, bribery, high crimes or misdemeanors" but have committed acts that are tantamount to the reprehensible exercise of the judicial office.

PROCEEDINGS BEFORE CONGRESS

Having discussed the essential grounds for impeachment and its objective scope, it is necessary to take a look at the related procedural aspects, which are in no way regulated at the constitutional level.

The right to institute proceedings before the House of Representatives is available first and foremost to any member of the House. This may also ensue at the request of other entities, including in particular the US Judicial Conference (in the case of federal judges) or state legislatures. It is also permissible for impeachment

Impeachment and Removal, 7–8; Makowski, 49–50; Gebert, *Kongres Stanów Zjednoczonych Ameryki*, 488–89; Izabela Kraśnicka, "Dwukrotny impeachment prezydenta Donalda Trumpa jako precedens w historii Stanów Zjednoczonych Ameryki," *Przegląd Sejmowy* 169, no. 2 (2022): 89.

[29] Gerhardt, "The Special Constitutional Structure of the Federal Impeachment Process," 246.

[30] Cole and Garvey, *Impeachment and Removal*, 8.

[31] Cole and Garvey, *Impeachment and Removal*, 9.

to commence as a result of a petition submitted to the House of Representatives and approved by the latter. Subsequently, the case is then examined by one of the relevant committees, most often the Judiciary Committee, so as to inquire into the allegations and advise the House whether there are grounds for impeaching a particular person. It should be remembered that the committee's position is not binding on the House, which is why one can impeach officials who, in the committee's opinion, are innocent.[32]

Indictment is effected by virtue of the ordinary majority. Once a resolution regarding the matter has been passed, the House of Representatives appoints its representatives, known as managers, who then present the indictment to the Senate. Upon completion of this task, the managers report to the House concerning the performance of their duty.[33]

The core impeachment proceedings take place before the Senate. First of all, it summons the defendant to appear either in person or represented by a defense counsel, although this obligation is not absolute. The defendant has the right to argue against the articles of impeachment as well as to plead that the charges are insufficient or that they are not a civil officer of the United States and therefore not subject to impeachment at all.[34]

The Senate then holds a hearing, which may be conducted in its entirety during a plenary session of the Senate or partly before a committee. It opens with the charges being read by the attorneys of the House of Representatives. The hearing is chaired by the President but, if a trial is brought against the President of the United States, the Chief Justice of the Federal Supreme Court takes their place, in line with Article I, Section 3 of the US Constitution.[35] The chairperson decides on all evidentiary matters, although they may refer them to the entire Senate for decision. Moreover, any senator may request that an issue be examined by the chamber acting in plenary. The hearing ends with closing speeches from both parties, whereby the attorneys of the House of Representatives are the last to speak.[36]

Upon conclusion of the hearing, the senators go into closed session, followed by an open vote on the verdict, with each article of impeachment voted on separately. A two-thirds majority of the attending senators is required for conviction. If this occurs, the Senate decides in yet another vote whether to impose the sanc-

[32] Cole and Garvey, *Impeachment and Removal*, 17–19; Gebert, *Kongres Stanów Zjednoczonych* Ameryki, 490.

[33] Cole and Garvey, *Impeachment and Removal*, 19.

[34] Cole and Garvey, *Impeachment and Removal*, 20.

[35] During Donald Trump's second trial, Chief Justice John Roberts refused to preside over the Senate. This aroused some controversy, as he did not explain his position (Kraśnicka, "Dwukrotny impeachment prezydenta Donalda Trumpa jako precedens w historii Stanów Zjednoczonych Ameryki," 101). However, it seems that Roberts' stance was due to the fact that Donald Trump was already a former US President at the time, and therefore the premise arising from the above norm was not met.

[36] Cole and Garvey, *Impeachment and Removal*, 21.

tion, which prohibits the individual concerned from accepting and performing any honorary or remunerated function in the state service. Here, the chamber arrives at the decision by an ordinary majority.[37]

THE INSTITUTION OF IMPEACHMENT IN PRACTICE

Following the analysis of the legal background of American impeachment, it would be fitting to discuss impeachment in practice, at least by way of a general outline. Consequently, it may be possible to illustrate the extent to which the solutions provided in the federal Constitution (whose considerable potential is indisputable) have proved relevant to the functioning of the US political system.

First of all, it should be noted that by October 2022, formal impeachment charges had been brought in the US in just twenty-one cases. The vast majority of the latter—that is, fifteen, involved federal judges, including one federal Supreme Court judge. One procedure was instituted against a member of Congress (senator)[38] and, similarly, a Cabinet member (Secretary of War) was impeached on one occasion only. Three US Presidents were indicted in the four remaining cases, with impeachment brought twice against Donald Trump.

To date, impeachment has resulted in conviction and removal from office in eight instances, exclusively involving federal judges. Also, only in three of those did the Senate resolve to bring the additional sanction to bear, prohibiting individuals from holding state offices.[39] Nine further cases, including all presidential defendants, culminated in acquittal. In the remaining four cases, the Senate refrained from making the final decision, as the term in office of the defendants had come to an end.[40]

It is observed in the doctrine that the acts which provide grounds for convictions under impeachment can be classified into three general categories. The first encompasses acts in which power was exceeded or abused. Such was the nature of allegations

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[37] Cole and Garvey, *Impeachment and Removal*, 21. However, that practice was criticized to some degree in the doctrine, which maintained that such decision should also be made by a two-thirds majority (Kraśnicka, "Dwukrotny impeachment prezydenta Donalda Trumpa jako precedens w historii Stanów Zjednoczonych Ameryki," 90 and the literature cited there).

[38] At the same time, this was the first successful impeachment by the House of Representatives.

[39] Interestingly, Alcee Hastings, one of the federal judges with respect to whom the Senate opted for no penalty, was elected a member of the House of Representatives shortly after that conviction and served in that capacity for almost twenty years until his death in 2021. Hastings is also the only representative of the African-American minority to have been convicted by impeachment.

[40] Based on information available from the official website of the US Senate: https://www.senate.gov/about/powers-procedures/impeachment/senate-impeachment-role.htm and the House of Representatives: https://history.house.gov/Institution/Origins-Development/Impeachment/ (accessed October 28, 2022).

against President Andrew Johnson, who was indicted for violating the law which limited his freedom to dismiss members of the Cabinet without the consent of the Senate.

The second category comprises acts which, generally speaking, consist of inappropriate exercise of one's office. For instance, Judge John Pickering was convicted for appearing in court intoxicated and using "profane" language. In contrast, the third category of activities that warrant impeachment conviction includes exploiting one's office for illegitimate purposes, such as personal gain. A typical example of such an activity is accepting bribes, which resulted in the Senate's conviction of the aforementioned Judge Alcee Hastings.[41]

It may be noted that the impeachment procedure itself has been instituted in the House of Representatives much more frequently—that is, around sixty times, but the ensuing formal indictments were fewer. Here, probably the most notorious case involved President Richard Nixon who, most likely fearing conviction, resigned from office and caused the proceedings to be terminated already in the first chamber of Congress.[42]

CONCLUSIONS

The above analysis enables one to formulate certain conclusions about impeachment as such, as well as its characteristics and usefulness in the contemporary US political and legal system. Thus, it should be noted in the first place that impeachment is an institution with a well-established tradition, dating back to medieval England. At first glance, this very fact might raise some doubts as to its contemporary applicability. However, the authors of the US Constitution did not adopt the English solutions blindly, but adapted them to the overall system they designed, based on the Enlightenment conception of separation of powers. For this reason, as part of the entire framework of governance in the United States, impeachment has stood the test of time and proved to be an instrument that does meet the needs of the present day.[43]

Even so, such an observation does not mean that all aspects of the US impeachment prompt no reservations or doubts at the very least. It appears that the most serious issue associated with the institution is the irremovability of judges. Under the assumption that the removal of a federal judge from office is only admissible if they are convicted by the Senate, the constitutional provision according to which

[41] Cole and Garvey, *Impeachment and Removal*, 11–15; Makowski, 50.

[42] Makowski, 93–94.

[43] Interestingly, it has not always been appraised along these lines. In particular, prior to the attempted indictment of Richard Nixon, numerous criticisms of impeachment were articulated in the doctrine, while it was recognized relevant only insofar as it applied to judges; see Jaskiernia, "Zagadnienie podstaw do wszczęcia procedury impeachment przeciwko urzędnikom federalnym w prawie i praktyce ustrojowej Stanów Zjednoczonych," 119–20 and the literature cited there.

judges cannot be removed if their exercise of office is irreproachable becomes an illusory one. This represents a major gap, which could be addressed either by using impeachment against judges much more frequently or, which seems more appropriate, developing an alternative procedure for removing those judges who have engaged in reprehensible conduct. In doing so, it would be necessary to separate the procedures from each other to the greatest extent possible, so that Congress retains the right to try federal judges for acts that are exceptionally objectionable and detrimental to the interests of the state. This is because the power to adjudicate such cases is directly granted to the Senate by the Constitution.

In other respects, impeachment solutions seem to deserve a largely positive assessment. The catalog of subjects accountable before Congress has been correctly constructed, and remains consistent with the role of Congress and the position of the most important federal officials within the system. The catalog of acts that may constitute grounds for impeachment does not arouse any major controversy either, and its relative vagueness cannot be regarded as a defect. That indefiniteness is indeed justified by the political nature of the liability to which the procedure is dedicated. This is further supported by the narrow catalog of penalties that the Senate may decide to impose, and especially by its restraint in applying the sanction by virtue of which an individual is deprived of the ability to hold state offices after conviction.

The peculiar nature of impeachment also justifies entrusting relevant prosecutorial and judicial prerogatives to the parliament. Although such a conclusion may appear highly controversial, having such cases heard and decided by the federal Supreme Court, as it had been originally intended,[44] would not be appropriate, since the latter body would acquire excessive political significance. It would also be problematic given the President's power to appoint Supreme Court judges. Thus, it must be assumed that the Supreme Court's adjudication in impeachment cases would require a thorough modification of the pertinent constitutional solutions and the court itself. Indeed, such a court would perform its duties reliably and retain unassailable integrity only if its members were not nominated by the President. Furthermore, in order to eliminate the risk of impeachment being abused to influence the President, it would be necessary to adopt a much higher majority threshold in the House of Representatives required for indictment, so that it would only be feasible with the significant participation of the political milieu supporting the head of state.[45]

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[44] Makowski, 93–94; Jaskiernia, "Zagadnienie podstaw do wszczęcia procedury impeachment przeciwko urzędnikom federalnym w prawie i praktyce ustrojowej Stanów Zjednoczonych," 123.

[45] In this context, Polish solutions concerning the constitutional accountability of the head of state may be regarded as exemplary. The latter is indicted by a body composed of members of both chambers of parliament, by a two-thirds majority vote. The adjudication itself is entrusted to a body composed of persons elected by the first chamber, unlike the common courts, whose judges are appointed by the President. Incidentally, the Polish model of constitutional accountability does, however, demonstrate other shortcomings that impede its correct functioning, but any related reflections are beyond the scope of this study.

In conclusion, it should be underlined once again that US impeachment merits an overall positive assessment as an institution. It may serve as a source of inspiration for systemic solutions in other countries. Nonetheless, one should remember that the strength of American constitutionalism does not lie only, or even primarily, in the legal solutions designed several hundred years ago, but also derives considerably from the American political and legal culture, in which solutions that might prove anachronistic or even harmful in a different socio-political context are readily adapted to contemporary challenges. Consequently, any attempts at adopting American solutions, including those relating to impeachment, require great caution and the ability to see systemic solutions from a broad perspective. "Transplanting" the legal mechanisms discussed in this study into an incompatible substrate may, in fact, result in failure or even the destruction of a given democratic system. After all, opting for erroneous solutions in mechanisms enabling the removal of power-abusing individuals may foster their impunity, and consequently contribute to informal modifications of the government system and the transformation of democracy into authoritarianism. In its turn, such a phenomenon would be utterly at odds with the goals of impeachment, the political thought of the authors of the US Constitution, and the ideals of Enlightenment.

Summary: The subject of the author's reflection is the institution of impeachment provided for in the US Constitution. The subject of analysis is its genesis in the American system, its subject and object scope, as well as the procedural aspects related to its application. The author also presents reflections on the sanctions that are applied under impeachment. The study is completed with analyses of the practical aspects of the use of this institution in the United States, especially in recent years.

Keywords: American law, impeachment, US Constitution, United States Congress

BIBLIOGRAPHY

Banaszak, Bogusław. *Porównawcze prawo konstytucyjne współczesnych państw demokratycznych*. Warszawa: Lex a Wolters Kluwer business, 2012.

Cole, Jared P., and Todd Garvey. *Impeachment and Removal*, CRS Report 2015, no. R44260.

Constitutional Grounds for Presidential Impeachment. Report by the Staff of the Impeachment Inquiry. Washington, 1974.

Gebert, Stanisław. *Kongres Stanów Zjednoczonych Ameryki*. Wrocław, Warszawa, Kraków, Gdańsk: Zakład Narodowy im. Ossolińskich, 1981.

Gerhardt, Michael J. "The Special Constitutional Structure of the Federal Impeachment Process." *Law and Contemporary Problems* 63, no. 1–2 (2000): 245–56.

Ginsburg, Tom, Aziz Huq, and David Landau. "The Comparative Constitutional Law of Presidential Impeachment." *The University of Chicago Law Review* 88, no. 1 (2021): 81–164.

Hadała-Skóra, Anna. "Competences of the United States Congress in the Impeachment Procedure." *Przegląd Prawa Konstytucyjnego* 58, no. 6 (2020): 583–90. https://doi.org/10.15804/ppk.2020.06.47.

Jaskiernia, Jerzy. "Zagadnienie podstaw do wszczęcia procedury impeachment przeciwko urzędnikom federalnym w prawie i praktyce ustrojowej Stanów Zjednoczonych." *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 37, no. 4 (1975): 119–35.

Kraśnicka, Izabela. "Dwukrotny impeachment prezydenta Donalda Trumpa jako precedens w historii Stanów Zjednoczonych Ameryki." *Przegląd Sejmowy* 169, no. 2 (2022): 85–108. https://doi.org/10.31268/PS.2022.100.

Kowalska, Monika. *Odpowiedzialność członków egzekutywy przed Trybunałem Stanu w III Rzeczypospolitej Polskiej*. Lublin: Wydawnictwo Uniwersytetu Marii Curie-Skłodowskiej, 2018.

Maciejewski, Tadeusz. *Historia powszechna ustroju i prawa*. Warszawa: Wydawnictwo C. H. Beck, 2015.

Makowski, Aleksander, and Longin Pastusiak. *Impeachment. O usuwaniu polityków z urzędu*. Warszawa: Konsalnet, 1999.

Pietrzak, Michał. *Odpowiedzialność konstytucyjna w Polsce*. Warszawa: Wydawnictwo Naukowe PWN, 1992.

Pułło, Andrzej. *System konstytucyjny Stanów Zjednoczonych*. Warszawa: Wydawnictwo Sejmowe, 1997.

Sczaniecki, Michał. *Powszechna historia państwa i prawa*. Warszawa: Wydawnictwo Prawnicze LexisNexis, 2007.

Szymanek, Jarosław. "Determinanty amerykańskiego systemu prezydenckiego." In *Idee, instytucje i praktyka ustrojowa Stanów Zjednoczonych Ameryki*, edited by Paweł Laidler and Jarosław Szymanek, 205–22. Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2014.

Wąsowicz, Marek. *Historia ustroju państw Zachodu. Zarys wykładu*. Warszawa: Liber, 2007.

Wójtowicz, Krzysztof. "Zasady i praktyka funkcjonowania odpowiedzialności konstytucyjnej w innych państwach." In *Trybunał Stanu w PRL*, edited by Zofia *Świda*-Łagiewska, 30–57. Warszawa: Książka i Wiedza, 1983.

Websites

House of Representatives. Accessed October 28, 2022, https://history.house.gov/Institution/Origins-Development/Impeachment.

US Senate. Accessed October 28, 2022, https://www.senate.gov/about/powers-procedures/impeachment/senate-impeachment-role.htm.

Chapter 7

The Origins of Congressional Oversight

*Maciej Turek**

INTRODUCTION[1]

Apart from legislative power, the function of parliamentary control is one of the most important prerogatives of contemporary legislative branches. In the case of the United States national legislature, the US Congress, oversight "enables . . . to assess whether federal agencies and departments are administering programs in an effective, efficient, and economical manner and to gather information that inform legislation."[2] The renewed interest in this congressional duty observed recently might be attributed to the series of high-profile investigations conducted by the US Congress in the past few years. The two impeachment procedures of Donald Trump, three US House committees seeking Trump's financial records, or activities of the Select Committee to Investigate the January 6 Attack on the United States Capitol might be the most prominent, but by no means exhaust the list of congressional investigations conducted in the Trump Era. Yet their magnitude ensures they will constitute significant case studies for the future students of congressional oversight. Members of the US Congress paying close attention to presidential conduct and potential excesses of executive authority, are not limited to recent years in their inquiries. The Teapot Dome Scandal, Truman Committee, Watergate, Church Committee, Iran-Contras affair, Bill Clinton's impeachment, the 9/11 Commission, the Hurricane Katrina inquiry, or the BP oil spill investigation are only a few examples of

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[2] Ben Wilhelm et al., *Congressional Oversight Manual*, CRS Report 2021, no. RL30240, 2.

Maciej Turek, "The Origins of Congressional Oversight." In *Enlightenment Traditions and the Legal and Political System of the United States of America*, edited by Michał Urbańczyk, Kamil Gaweł, and Fatma Mejri, 131–44. Poznań: Adam Mickiewicz University Press, 2024. © Maciej Turek 2024. DOI: 10.14746/amup.9788323242543.8.

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fulfilling congressional oversight functions. But questions periodically arise regarding the authority of congressional oversight, the boundaries of the investigations, and how the president and the whole executive branch apparatus should approach them. While for casual observers of American politics congressional inquiries into specific issues are justified, others, presidents and numerous lawmakers included, find these investigations to be nothing else but political theatre, aimed at weakening the administration, while promoting the most prominent individuals involved in investigating. And with the hundred and eighteenth US House of Representatives proudly announcing its intention to hold the Biden administration accountable in a variety of policy areas, it is worth taking a closer look at how congressional oversight emerged.

Therefore, this chapter aims to study the origins of this authority, which, as almost everything that is part of the American system of government, is the legacy not only of the Founding Fathers but also English laws and colonial times. Every student of US politics is familiar with that rare but most dramatic step of the congressional oversight that is the impeachment process. It shall be noted that impeachment will not be analyzed in this chapter, as this very issue is covered eloquently somewhere else in this volume. Nevertheless, this part aims at addressing some of the questions related to congressional oversight, namely what events led to the development of the investigative function of the US Congress? What were the sources of its authority? How did the executive branch react to the oversight-related activities of the federal legislature? While it might seem that mechanisms and procedures developed more than two hundred years ago are long forgotten, a remarkable number of patterns created during the very first act of congressional oversight are familiar to observers of political processes in modern-day America.

AMERICAN FOUNDING AND THE CONGRESSIONAL OVERSIGHT

For the Founders, creating some sort of controlling mechanism of the executive branch was deemed a necessity. In his famous political pamphlet, *The Common Sense*, Thomas Paine devoted one of the chapters to describing the mischiefs of monarchy.[3] More importantly, one finds to major part of America's founding document, The Declaration of Independence, to be a description of the harms and injuries that the colonies suffered from the actions of King George III. What the colonists criticized most was the lack of representation in the British parliament, as well as the fact that the institution's legislation made life in the colonies harder. The Sugar

[3] Ian Shapiro and Jane E. Calvert, eds., *Selected Writings of Thomas Paine* (New Haven: Yale University Press, 2014), 12–19.

Act, Currency Act, Quartering Acts, Stamp Act, Townshend Acts, or Tea Act were, in fact, all actions undertaken by the parliament. But it was widely believed, and for a good reason, that the monarch dominating the representative assembly bore greater responsibility for the passing of this legislation than the members of parliament individually or collectively. There was thus a widespread belief that the head of state, if not properly checked by the people's representatives, would sooner or later rush to hurt the citizens.

However, one might look for the sources of the legislative oversight of the federal executive branch, yet such an activity would prove fruitless. Historian Arthur M. Schlesinger Jr. noted that upon America's founding "it was not considered necessary to make an explicit grant of such authority. The power to make laws implied the power to see whether they were faithfully executed. The right to secure needed information had long been deemed by both the British Parliament and the colonial assemblies as a necessary and appropriate attribute of the power to legislate."[4] The investigative practices of the British Parliament date back to the second half of the sixteenth century. From when it was first introduced in 1571, until the settlement of the British colonies in North America, the authority only grew. These powers included not only calling witnesses to give testimony but also equipping the legislative branch with the right to punish for contempt, which was reportedly used frequently and with cruelty. Fining or even imprisoning witnesses who did not comply with requests for providing documents or appearing in person was common in Britain. The policy jurisdiction was initially limited to military matters. But soon it started also including such issues as "the Poor Laws, prison administration, the operations of the East India Company, the sending of children out of the country for instruction in Catholicism, and the revision of the laws pertaining to bankruptcy."[5] It clearly showed that the powers were broad and those areas that at any moment might become the subject of an investigation were virtually unlimited. Moreover, as the colonies modeled their forms of government on British examples, the "representative assemblies . . . came to utilize the power of investigation because they assumed that inasmuch as the power was customary of the legislative process in the Parliament, its adoption and exercise was just as proper in the Colonies."[6] Therefore, the inhabitants of the lands that later became the United States, and more importantly, the lawmakers who were members of colonial representative bodies, were quite acquainted with the assemblies serving as the necessary check upon executive officers.

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[4] Arthur M. Schlesinger Jr., "Introduction to Previous Edition," in *Congress Investigates: A Critical and Documentary History*, eds. Roger A. Bruns, David L. Hostetter, and Raymond W. Smock (New York: Facts on File, 2011), xxi.

[5] Telford Taylor, *Grand Inquest: The Story of Congressional Investigations* (New York: Simon and Schuster, 1955), 8.

[6] Marshall E. Dimock, *Congressional Investigating Committees* (Baltimore Johns University Press, 1929), 53.

If this authority was taken for granted, it might explain "the lack of constitutional text about congressional investigative power."[7] But what is also worth noting is how infrequently the issue of regular legislative oversight was mentioned during the Constitutional Convention. At one point, while discussing congressional organization, George Mason remarked that the federal lawmakers would be "not only legislators but they possess inquisitorial power. They must meet frequently to inspect the Conduct of public offices."[8] But otherwise, issues related to congressional control of the executive seem to have been debated only in the context of impeachment procedures.[9] The Founders thus created a vacuum that in later years was the frequent subject of federal court judgments. But before these were passed, there must have been a precedent that would create a dispute worth petitioning to the court. While nothing of that sort occurred during the first congressional inquiry, it did demonstrate that oversight was an area with many potential constitutional loopholes just waiting to be filled by political practice.

ST. CLAIR DEFEAT

The American Constitution is a document written in rather general if not vague language. It thus took several years to see how the federal government would operate under the rules that the Constitution established. As the investigative powers are not explicitly stated, but implied, it took an investigation to see how the oversight authority would operate in the real world. One of the issues that the First Congress considered is barely mentioned as an example of oversight or investigation, as the "review of Robert Morris record as Superintendent of Finance during the period of the Continental Congress"[10] was of a rather historical nature, and not concerning contemporary legislative-executive relations. The first activity to be considered in the literature as a congressional investigation occurred in 1792. The inquiry was in the area of the military, as its subject was the American troops under the command of Major General Arthur St. Clair having been defeated in combat by the Native Americans. The inquiry was of some importance, as it would set the example of congressional-presidential relations for decades to come. President Washington was well aware that acting as the first chief executive, his actions would be carefully studied not only by his successors but also by members of the congressional

[7] Michael W. McConnell, *The President Who Would Not Be King. Executive Power under the Constitution* (Princeton and Oxford: Princeton University Press, 2020), 135.

[8] Max Farrand, *The Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1966), 2: 206.

[9] McConnell, *The President Who Would Not Be King. Executive Power under the Constitution*, 133–36.

[10] Louis Fisher, *The Law of Executive Branch: Presidential Power* (New York: Oxford University Press, 2014), 209.

and judicial branches. As he confessed to James Madison shortly after assuming the presidency, "As the first at everything, in our situation will serve to establish a precedent, it is devoutly wished on my part that these precedents be fixed on true principles."[11] And so he acted in the St. Clair case.

Arthur St. Clair was the governor of the Northwest Territory, the vast expanse of land that forms today's states of Ohio, Indiana, Illinois, and Michigan, or what is now called the Midwest. Throughout the history of North America, these territories were inhabited by Indian tribes, many of whom were the allies of the British. But when the American Revolutionary War was concluded with the Treaty of Paris, "Britain, without consulting or even mentioning its Indian allies, ceded to the United States all territories south of the Great Lakes, east of the Mississippi and north of Florida."[12] In legal terms, the extensive territories were open to American settlers, particularly after "the Constitution affirmed congressional authority over Indian affairs in the commerce clause."[13] For the Indians, though, American settlers were nothing but intruders, willing to not only capture their lands but also to make a profit out of them. Thus, after the American Revolution succeeded, Indians were famous for raiding white properties throughout the newly created United States. These incursions often ended in violent encounters involving militias on the part of the Americans. While treaties with Indians were concluded in other parts of the country, "neither the treaties nor militia pacified the warriors . . . in the Northwest Territory"[14] in the 1790s. Therefore, acting on advice from the Secretary of War, General Henry Knox, President Washington appointed Governor St. Clair a general of the American army and summoned him to make sure Indians would not disturb Americans willing to inhabit the areas, nor the US government, which was interested in westward expansion. In the summer of 1791, St. Clair led an army of around 1,500 men,[15] whose task was to "construct a series of forts that would become bases of operation against Indian Tribes that were attacking American settlers on the Ohio frontier."[16] The construction was to be built north of Fort Washington, today's Cincinnati, where St. Clair's army would march. After one such march in November, the troops built a camp near the river of Wabash. But early in the morning, the Americans were attacked by the tribes of Shawnee, Delaware, and Miami, in what

[11] Mark J. Rozell, "George Washington and the Origins of Executive Privilege," in *George Washington and the Origins of the American Presidency*, eds. Mark J. Rozell, William D. Pederson, and Frank J. William (Westport: Praeger, 2000), 146.

[12] Colin G. Calloway, *The Victory with No Name: The Native American Defeat of the First American Army* (New York: Oxford University Press, 2015), 17.

[13] Calloway, *The Victory with No Name: the Native American Defeat of the First American Army*, 25.

[14] George C. Chalou, "General St. Clair's Defeat, 1792–1793," in *Congress Investigates: A Critical and Documentary History*, eds. Roger A. Bruns, David L. Hostetter, and Raymond W. Smock (New York: Facts on File, 2011), 3.

[15] Taylor, *Grand Inquest: The Story of Congressional Investigations*, 17.

[16] Douglas L. Kriner and Eric Schickler, *Investigating the President. Congressional Checks on Presidential Power* (Princeton, Oxford: Princeton University Press, 2016), 9.

proved to be "the biggest victory Native Americans ever won and proportionately the biggest military disaster the United States ever suffered."[17] But for the American government, "more than 650 soldiers . . . killed and 271 more wounded"[18] by the Indians was not only a major embarrassment but also a significant concern about the quality of the army and its ability to defend the new nation. If "the warriors of the Ohio country had destroyed the US Army,"[19] what if American troops would have been facing a regular and well-equipped armed forces of a much stronger opponent?

Shortly after the news of the failure of General St. Clair's expedition reached the American capital, Congress decided to step in. However, the calls for explanations of the defeat that originated in early February 1792 were not resolved until the end of March. And even then, possibly because it was the first-ever congressional inquiry into executive actions, US House members were quite unsure of how to proceed. Some congressmen wanted President Washington to conduct an investigation; others believed it was a duty of the House, as "the impeachment powers rested with the House . . . so did the investigative power."[20] Distinct voices argued that Congress should not undertake any investigations into the executive, as it was not only troubling from a separation of powers perspective but also had the potential to embarrass Washington. Finally, Representative Hugh Williamson of North Carolina suggested forming a special committee to investigate the Wabash defeat, an idea also encouraged by James Madison, at that time a House member representing Virginia. The notion was taken up by Thomas Fitzsimons of Pennsylvania,[21] who promoted and built a coalition around creating a select committee "to inquire relative to such objects as come properly under the cognizance of this House, particularly respecting the expenditures of public money."[22] The committee was thus instituted, consisting of seven members with Fitzsimons as chairman, with the authority of Congress to invite members of the executive branch to give testimony and demand any documents that might have been useful.

The creation of the committee was also welcomed by General St. Clair himself. As his actions had been widely condemned, he was interested in clearing his name. Also, St. Clair had been in a similar position before. As a commander during the American Revolutionary War, one of his missions was defending Fort Ticonderoga, today located near the border of the states of New York and Vermont. But in the summer of 1777, vastly outnumbered by the British, St. Clair decided to withdraw his garrison and the fort was captured by the opposing army. The decision was widely criticized, as it opened the way for the commander of British forces, Lieutenant Gen-

[17] Calloway, *The Victory with No Name: The Native American Defeat of the First American Army*, 5.

[18] Kriner and Schickler, *Investigating the President. Congressional Checks on Presidential Power*, 9.

[19] Chalou, "General St. Clair's Defeat, 1792–1793," 7.

[20] Chalou, "General St. Clair's Defeat, 1792–1793," 8.

[21] Annals of Congress, House of Representatives, Second Congress, First Session, 490–94.

[22] Taylor, *Grand Inquest: The Story of Congressional Investigations*, 22.

eral John Burgoyne, to Saratoga, where his troops were eventually defeated. Seeking to clear his name, St. Clair was exonerated by the court-martial, which allowed many Americans to view him as a viable commander. While he did not seek to continue his military career, his name was rather known and allowed him to act as a member of the Pennsylvania Council of Censors as well as a delegate to the Confederation Congress, where in 1787 he also served as its one-year-term president. But after the Wabash defeat, St. Clair seemed to relive his nightmare of Ticonderoga.

Thus, as he had no recourse to a congressional inquiry as a public forum in which to state his case, St. Clair wasted little time. He not only "made his personal papers available to the committee, but he also attended most of its sessions."[23] In a testimony to the Select Committee, the general argued that the reasons for the mission's failure were not as much his personal flaws as a commander but rather poor operational timing in the Department of War that in the long term made his soldiers ill-prepared for an Indian attack. St. Clair presented his mission as plagued by a series of misfortunes, including delays in the delivery of boats and horses, and serious issues with troops, many of whom were "swept off the streets or jails . . . and sent to Fort Washington with little or no training."[24] Added to this was the fact that two very important members of the military personnel—General Richard Butler, second in command in St. Clair's army, and Quartermaster Samuel Hodgson—were supposed to arrive in Ohio in early summer, but in fact came as late as in September,[25] causing several logistics complications. At the same time, St. Clair presented correspondence with Henry Knox, the Secretary of War, that demonstrated that Knox, though very aware of all the issues with personnel and supply, nevertheless strongly encouraged St. Clair to proceed according to the original schedule.[26] The general indeed presented his vindication as if he were in the courtroom, expecting a select committee to become an impartial referee that would set him free and assign blame to the federal government bureaucracy.

Even though it was the first-ever congressional investigation, select committee members envisioned their role just as St. Clair did. Three days after Congress authorized the existence of the committee, the body asked Secretary Knox to deliver any papers or records from his office that might have been related to the case.[27] As Chairman Fitzsimons saw the committee's oversight function "under the cognizance of the House, particularly respecting the expenditures of public money,"[28] a similar request was soon presented to the Department of the Treasury, led by Alexander Hamilton.

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[23] Chalou, "General St. Clair's Defeat, 1792–1793," 9.
[24] Taylor, *Grand Inquest: The Story of Congressional Investigations*, 21.
[25] Taylor, *Grand Inquest: The Story of Congressional Investigations*, 21.
[26] Chalou, "General St. Clair's Defeat, 1792–1793," 9.
[27] Taylor, *Grand Inquest: The Story of Congressional Investigations*, 21.
[28] Quoted after Dimock, *Congressional Investigating Committees*, 88.

It was soon recognized, however, that the respective department heads could not have decided to pass any executive branch documents to the federal legislature without the authorization and knowledge of the President. Therefore Secretary Knox informed President Washington of an innovative development in the investigation on the same day that he received a congressional request. The following day, Washington summoned his Cabinet—Secretary of State Thomas Jefferson, Attorney General Edmund Randolph, and the Secretaries already contacted by the Select Committee, Knox and Hamilton, to discuss the matter. It was rather an unusual gathering, not only because Washington rarely called his Secretaries to meet together, but also because he asked them to do so on a Saturday. This very fact clearly demonstrated how significant this issue – the first-ever congressional request regarding the separation of powers and thus the very heart of American constitutional theory—had been to President Washington. Jefferson's notes reveal the magnitude of the Saturday, March 31, 1792, Cabinet meeting. As the Secretary of State noted, "The President had called us to consult, merely, because it was the first example, and he wished that so far as it should become a precedent it should be rightly conducted. He neither acknowledged, denied, nor even doubted the propriety of what the House was doing, for he had not thought upon nor was acquainted with subjects of this kind: he could readily conceive there might be papers so secret in nature, as that they ought not be given up."[29]

With the first meeting being inconclusive, the Cabinet members had to meet again the following Monday, April 2. This second discussion was more fruitful, as its participants generally agreed on the course of action that followed, namely, as again indicated by "We had all considered, and were of one mind, first, that the House was an inquest, and therefore might institute inquiries. Second, it might call for papers generally. Third, the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public: consequently were to exercise discretion. Fourth, that neither the committees nor House have a right to call on the Head of a Department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President."[30] Such a conclusion had notable consequences for the course of action in the St. Clair defeat investigation. Two days after the second meeting, "Washington ordered Knox and Hamilton to turn over copies of the pertinent records to the Committee."[31]

As the President perceived Congress as a co-equal branch of government, he believed he could not simply ignore congressional pleas for documents of an important nature or the confessions of executive officers in possession of information of vital importance. However as presented in the Cabinet's position, Washington

[29] Quoted after Taylor, *Grand Inquest: The Story of Congressional Investigations*, 23.
[30] Quoted after Rozell, "George Washington and the Origins of Executive Privilege," 147.
[31] Chalou, "General St. Clair's Defeat, 1792–1793," 3.

thought that the authority of the chief executive allows for a certain level of discretion when dealing with documents created within the executive branch. Apparently, Washington believed that there were at least three types of documents that were in possession of the executive officers. Two of them could have been shared with the national legislature, but not without conditions. Firstly, Washington "announced that the original record would stay in the physical custody of the department. It was agreed that the House of Representatives could send a clerk to check that the copies prepared for the committee were accurate and complete."[32] But there were also papers that should not have been in plain view. They could be seen by Congress, but revealing them to the wider public would not be in the interests of the federal government or the United States. Even though he maintained that the legislative branch had the authority to request executive documents, "Washington established as a condition that legislators review in closed session any information that, if publicly disclosed, would bring harm to the national interest."[33] Finally, the President believed there were also documents that the executive could not give away to Congress, as it would reveal information that might harm the public interest. It was for the President to decide which documents have such potential, but significantly, if chief executives were to withhold the documents, a potential "injury has to be to the *public*, not the President, his associates, or his political party. Information should not be withheld because it might embarrass the administration or reveal improper or illegal activities."[34] Until 1974, "this rule has been followed by every successive President in the light of his individual judgements,"[35] and since Dwight Eisenhower's administration, it has been known as executive privilege. But when in the midst of the Watergate investigation Richard Nixon's lawyers claimed executive discretion was total, the presidency was denied that right by the court. While acknowledged by the Supreme Court in *United States v. Nixon*, the authority in this very case was also judged as not unlimited. As indicated unanimously by the justices, "neither the doctrine of separation of power nor the generalized need for confidentiality of high-level communications . . . can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all the circumstances."[36]

But in the St. Clair case, no document was withheld, as the Cabinet, under the arguments made by Washington, was of the opinion that "there was not a paper that could not be produced."[37] As it was believed by the President that "General St. Clair shall have justice,"[38] the Select Committee was granted the right to review papers

[32] Chalou, "General St. Clair's Defeat, 1792–1793," 3.

[33] Rozell, "George Washington and the Origins of Executive Privilege," 147.

[34] Fisher, *The Law of the Executive Branch: Presidential Power*, 209.

[35] Alan Barth, *Government by Investigation* (Clifton, New Jersey: The Viking Press, 1973), 31.

[36] *United States v. Nixon*, 418 U.S. 684 (1974).

[37] Fisher, *The Law of Executive Branch: Presidential Power*, 209.

[38] Quoted after Taylor, *Grand Inquest: The Story of Congressional Investigations*, 24.

as well as to receive testimonies, delivered in person, by individuals with knowledge related to St. Clair's mission. The General himself "attended most of the committee sessions, while Secretary Knox testified before the Committee,"[39] as well as Quartermaster "Hodgson and others called to testify upon the request of the committee or of the principal individuals under investigation."[40] For instance, Secretary "Knox had detained certain military officers in Philadelphia, so that they might give testimony,"[41] while Secretary Hamilton also appeared before the Select Committee.[42]

All the papers and testimonies allowed the committee to conclude its work in a relatively short time, as on May 8, 1792, the committee report was ready. While it exonerated St. Clair, it did not present the administration, particularly the Department of War, in a good light. According to the Committee report, the general "had it in contemplation to commence the expedition at least one month earlier than it was commenced, with few he then had, which was not very different from the real forces in action; but was prevented for the want of the Quartermaster and contractor, and in consequence of the extreme deficiencies and derangement of the business of their Departments, the person sent forward by the Quartermaster being totally incompetent to the business; and the contractor's agents not being sufficiently supplied with money to enable them to execute their duties."[43] Congressmen blamed delays on the part of Department of War for the failure of the St. Clair mission. As for the general himself, the Committee was of the opinion that "the failure of the late expedition can in no respect be imputed to his conduct."[44] The report emphasized that mistakes on the part of Quartermaster Hodgson and the Military Stores Departments, responsible for supplying soldiers with the military equipment, in fact, any equipment, made the army ill-prepared for undertaking any expedition. When the Indians attacked, it "was unexpected, the troops having been just dismissed for the morning parade."[45] St. Clair's conduct on the battlefield, on the other hand, "appears to have been cool and deliberate in the whole of the action, and officers in general active and intrepid. The whole order of march, as far as the Committee are capable of expressing the opinion, appears to have been judicious, and the ground for action well chosen."[46] With that summary, the first congressional investigation on the executive branch of America's federal government appeared to be concluded.

But when it was read to the full House upon its conclusion, the discussion on how to act on the information reported therein was postponed until November,

[39] Chalou, "General St. Clair's Defeat, 1792–1793," 9.

[40] Quoted in: Taylor, *Grand Inquest: The Story of Congressional Investigations*, 24.

[41] Chalou, "General St. Clair's Defeat, 1792–1793," 9.

[42] Ernest J. Eberling, *Congressional Investigations: A Study of the Origin and Development of the Power of Congress to Investigate and Punish for Contempt* (New York: Octagon Books, 1928), 37.

[43] Annals of Congress, 1112.

[44] Annals of Congress, 1113.

[45] Annals of Congress, 1110.

[46] Annals of Congress, 1110.

which marked the start of the second session of Congress. Moreover, when the Select Committee report reappeared at the beginning of the next congressional session, "friends of Knox and Hamilton stirred up considerable opposition to the report."[47] Numerous representatives argued that major actors in the Wabbash defeat should present new documents and give testimonies again.[48] In effect, "the report itself was recommitted for further consideration by the Second Committee,"[49] now operating as a five-member body. The Second Committee's actions were the same as those of the first Select Committee, with the exception that it also dealt with writings prepared by Secretary Knox and Quartermaster Hodgson as rebuttals to the original report. But again, the Select Committee was unpersuaded, as an auxiliary report presented on February 15, 1793, confirmed the judgement of the initial report. But again, Congress chose not to take any action. By the end of the month, as the Second Congress of the United States was set to expire, "the Committee of the Whole . . . ordered the Select Committee be discharged from any further consideration."[50] After investigating its first case, the US House was presented with two versions of the report. But without any action, the first inquiry seems to be incomplete, even if the investigation was concluded by the Committee.

CONCLUSIONS

What is thus the conclusion of the investigation itself? First and foremost, the St. Clair inquiry, an unprecedented step, established a right of Congress to actually investigate the actions of the executive branch. Until then, oversight powers not explicitly stated in the Constitution were perceived as illegitimate by a number of members of both the legislative and executive branch. But with the St. Clair inquiry, they were nevertheless confirmed as a congressional authority. The House Select Committee subpoenaed the executive officials for papers and testimonies, which were granted. In the background of the investigation, if not its frontline, there was an active involvement of several individuals, responsible for drafting America's founding documents and setting its constitutional structure in motion. Cabinet members, Thomas Jefferson and Alexander Hamilton, as well as Representative James Madison of Virginia, did not dispute the federal legislature's investigative powers. In fact, the executive actions build an "assumption that compliance with congressional request should be the default of presidential administrations."[51] By his conduct in the St.

[47] Taylor, *Grand Inquest: The Story of Congressional Investigations*, 25.

[48] Chalou, "General St. Clair's Defeat, 1792–1793," 11–13; Taylor, *Grand Inquest: The Story of Congressional Investigations*, 25.

[49] Taylor, *Grand Inquest: The Story of Congressional Investigations*, 25.

[50] Chalou, "General St. Clair's Defeat, 1792–1793," 14.

[51] Wilhelm et al., *Congressional Oversight Manual*, 2.

Clair inquiry, President Washington indeed confirmed that the role of the American head of state, the president, was far from that of the British monarch. While it is argued that “to make executive . . . the subject to impeachment was to make him, not a king,”[52] the St. Clair case also demonstrated that the American executive might be investigated in cases that by their nature were unrelated to presidential impeachment, but to find answers that would make ways to improve the government service.

At the same time, Washington established presidential authority to decide which documents may be passed to Congress. While executive privilege, as it was later to be called, was judged by the federal courts as not unlimited, it has been broadly used by Washington’s successors, from John Adams through Abraham Lincoln, Richard Nixon, and Bill Clinton to Donald Trump. The first chief executive thus set the precedent of the presidency actively seeking to limit the boundaries of congressional inquiry.

The St. Clair investigation was also the first to reveal what was later demonstrated in numerous inquiries. In general, “many times when prior to an investigation it has been generally assumed that personal inefficiency or culpability is to blame . . . inquiry shows that such waste is merely the natural concomitant of inefficient organization.”[53] In the St. Clair case, it was a matter of inefficiency on the part of more than one individual, and not the troops’ commander. The investigation itself demonstrated that even the separation of powers and the highest ideals of the Founders cannot keep politicians from acting according to their core instincts and that instead of impartially searching for answers, some might be willing to include politics in their considerations when the opportunity arises. The St. Clair congressional inquiry was welcomed by “the Jeffersonians, who were already using the disaster as a stick with which to beat the incumbent Federalists,”[54] to which, of course, the Federalists responded by diluting any immediate effects that the Select Committee reports might have had.

Finally, the St. Clair inquiry proved to Congress that investigating is the proper way of seeking information that helps improve the workings of government. If not for the notes and testimonies offered by witnesses, and the documents requested and delivered by the executive branch, the legislature might have been unable to eliminate Department of War deficiencies identified during the first investigation. In the larger sense, “the proper office of a representative assembly is to watch and control the government: to throw the light of publicity on its acts; to compel a full exposition and justification on all of them which anyone considers questionable; to censure them if found condemnable.”[55] But the first step to fulfilling all the above

[52] McConnell, *The President Who Would Not Be King. Executive Power under the Constitution*, 57.

[53] Dimock, *Congressional Investigating Committees*, 88.

[54] Taylor, *Grand Inquest: The Story of Congressional Investigations*, 24.

[55] John Stuart Mill, *Considerations on Representative Government* (New York: The Bobbs-Merrill Company, 1958), 300.

duties would be to seek information which would provide the basis for further action. As James Madison remarked, “no man can be a competent legislator who does not add to an upright intention and a sound judgement a certain degree of knowledge of the subjects on which he is to legislate.”[56] Therefore, proper congressional oversight is in part investigating, and in part legislating.

Summary: The chapter explores the historical development and legal foundations of the United States Congress’s oversight function. It emphasizes the critical role oversight plays in ensuring federal agencies and departments administer programs effectively, efficiently, and economically, contributing to informed legislation. The resurgence of interest in congressional oversight, especially in light of recent high-profile investigations, underscores its significance in monitoring executive conduct and authority. Drawing on examples from American history, the article investigates the origins of congressional investigative power, its legal basis without explicit constitutional text, and the precedent-setting investigations that have shaped the practice. Through a detailed examination of foundational events and legal interpretations, the Author articulates how oversight mechanisms, rooted in English laws and colonial practices, have evolved to become a cornerstone of American governance, enabling Congress to scrutinize executive actions and uphold democratic accountability. The study concludes that congressional oversight, while occasionally contentious, is a fundamental aspect of the US political system, ensuring transparency and accountability in government operations.

Keywords: congressional oversight, United States Congress, Arthur St. Clair

BIBLIOGRAPHY

Barth, Alan. *Government by Investigation*. Clifton, New Jersey: The Viking Press, 1973.
Calloway, Colin G. *The Victory with No Name: The Native American Defeat of the First American Army*. New York: Oxford University Press, 2015.
Chalou, George C. “General St. Clair’s Defeat, 1792–1793.” In *Congress Investigates: A Critical and Documentary History*, edited by Roger A. Bruns, David L. Hostetter, and Raymond W. Smock, 1–32, New York: Facts on File, 2011.
Dimock, Marshall E. *Congressional Investigating Committees*. Baltimore Johns University Press, 1929.
Eberling, Ernest J. *Congressional Investigations: A Study of the Origin and Development of the Power of Congress to Investigate and Punish for Contempt*. New York: Octagon Books, 1928.
Farrand, Max. *The Records of the Federal Convention of 1787*, vol. 1–4. New Haven: Yale University Press, 1966.
Fisher, Louis. *The Law of the Executive Branch: Presidential Power*. New York: Oxford University Press, 2014.

[56] James Madison, “Federalist No. 53,” in *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1999), 300.

Kriner, Douglas L., and Eric Schickler. *Investigating the President. Congressional Checks on Presidential Power*. Princeton, Oxford: Princeton University Press, 2016.

Madison, James. "Federalist No. 53." In *The Federalist Papers*, edited by Clinton Rossiter, 330–36. New York: New American Library, 1999.

McConnell, Michael W. *The President Who Would Not Be King. Executive Power under the Constitution*. Princeton and Oxford: Princeton University Press, 2020.

Mill, John Stuart. *Considerations on Representative Government*. New York: The Bobbs-Merrill Company, 1958.

Rozell, Mark J. "George Washington and the Origins of Executive Privilege." In *George Washington and the Origins of the American Presidency*, edited by Mark J. Rozell, William D. Pederson, and Frank J. William, 145–54. Westport: Praeger, 2000.

Schlesinger Jr., Arthur M. "Introduction to Previous Edition." In *Congress Investigates: A Critical and Documentary History*, edited by Roger A. Bruns, David L. Hostetter, and Raymond W. Smock, xx-xxv. New York: Facts on File, 2011.

Shapiro, Ian, and Jane E. Calvert, eds. *Selected Writings of Thomas Paine*. New Haven: Yale University Press, 2014.

Taylor, Telford. *Grand Inquest: The Story of Congressional Investigations*. New York: Simon and Schuster, 1955.

Wilhelm, Ben, Todd Garvey, Christopher M. Davis, Walter J. Oleszek, Clinton T. Brass, Ida A. Brudnick, Maeve P. Carey et al. *Congressional Oversight Manual*, CRS Report 2021, no. RL30240.

Chapter 8

Judicial Power in the American System, with Particular Emphasis on the Impeachment Procedure

Izabela Dorywała-Kosmalska and Julia Pietrasiewicz***

INTRODUCTION

Since 1787, the Constitution has been the supreme law of the United States of America. Its first three articles form the basis for the functioning of the state and shape the system that is in force, namely the separation of power. According to this, the federal government is divided into three branches: the executive, which consists of the President; the bicameral Congress, which exercises legislative power; and the judicial branch, consisting of the Supreme Court and other federal courts. This 'trias politic model' was first introduced by Charles-Louis de Secondat, baron de La Brède et de Montesquieu, a French judge and political philosopher, who postulated that to ensure freedom as effectively as possible, these three branches shall be separate and act independently. He believed that "when the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."[1] The separation of powers is basically the division of responsibilities into distinct branches to limit any one branch in exercising the core functions of another; the legislative is responsible

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[1] Montesquieu, *The Spirit of Laws* (Kitchener: Batoche Books, 2001), 173.

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for enacting laws and imposing taxes, the executive is responsible for enforcing the laws, while the judicial branch interprets the laws. According to Montesquieu, the key is to maintain the judiciary's power as real, not only as ostensible power.[2] This is important because the intention of the separation of powers is to prevent the concentration of unchecked power by providing for "checks" and "balances" to avoid autocracy and preclude any overreaching by one branch over another.

IMPEACHMENT: A TOOL OF ACCOUNTABILITY

One of the institutions significant in the separation of power is impeachment. The United States Constitution allows The House of Representatives to impeach, and the Senate to remove, executive and judicial officers. A judicial officer, in this case, should be understood as a person with the responsibilities and powers to facilitate, arbitrate, preside over, and make decisions and directions in regard to the application of the law.[3] This leads to the judicial power of the United States, which is established by Article III of the Constitution, which states: "The judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office."[4] "Good behavior" has no legal definition and has been the subject of numerous discussions. For example, Professor Martin Redish believes that "Good Behavior" should simply be used as a cross-reference to the "High Crimes and Misdemeanors" standard for impeachment set out in Article II, Section 4, to which federal judges are also subject.[5] This is most probably not the right opinion. In our view, we should follow the reasoning of Professors Prakash and Smith, who proposed the following: "Good Behavior" provides a distinct method, above and beyond impeachment, for removing federal judges from office, at a standard of misbehavior somewhat lower than that required under impeachment.[6] Section 2 of this article also requires trial by jury in all criminal cases, except impeachment cases. At the same time, we must remember that the legal system of the United States is based on federal law and is extended by statutes

[2] Stephen Holmes, "Lineages of the Rule of Law," in *Democracy and the Rule of Law*, eds. Adam Przeworski and José María Maravall (Cambridge: Cambridge University Press, 2003), 26.

[3] "Judicial Officer Law and Legal Definition," USLegal, accessed June 10, 2020, http://definitions.uslegal.com/j/judicial-officer/.

[4] United States Senate, Constitution of the United States, Article III, Section 2.

[5] Martin H. Redish, "Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis," *Southern California Law Review* 72, no. 2–3 (1999): 673, 692.

[6] Saikrishna Prakash and Steven D. Smith, "How To Remove a Federal Judge," *The Yale Law Journal* 116, no. 1 (2006): 86.

passed by state legislatures and local laws adopted by counties and cities. Based on that, impeachment can also occur at the state level. Each state's legislature can impeach state officials, including the governor, in accordance with their respective state constitution.

HIGH CRIMES AND MISDEMEANORS

As mentioned before, impeachment can be used in the cases of crimes and misdemeanors on the part of judicial officers, and that also applies to state judges. The concept of "high crimes and misdemeanors" is found in the US Constitution. It also appears in state laws and constitutions as a basis for disqualification from holding office. Originating in English common law, these words have acquired a broad meaning in US law.[7] The exact meaning of the phrase cannot be found in the Constitution itself. Article II, Section 4, states that "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, treason, bribery, or other High Crimes and Misdemeanors."[8] High crimes refer to those punishable offenses that only apply to high persons, that is, to public officials, those who, because of their official status, are under special obligations that ordinary persons are not under, and which could not be meaningfully applied or justly punished if committed by ordinary persons.[9] Currently, doctrine and writing state that the phrase "High crimes and misdemeanors" refers to breaches of fiduciary duty. High crimes and misdemeanors are not limited to the commission of crimes, but they do not include mere political differences. While violations of criminal law provide grounds for impeachment, high crimes and misdemeanors encompass breaches of the duties of loyalty, good faith, and care, and of the obligations to account and to follow instructions (including the law and Constitution) when administering one's office.[10]

As we know, the United States judiciary is independent of the government and consists of the Supreme Court, the US Court of Appeal, and the US District Courts. The Constitution of 1787 itself regulates the court system in a very general way, determining only the jurisdiction of the Supreme Court, without indicating the number of judges, the manner of their selection, or the general rules characterizing how judges function. This regulation is included in the first part of Title 28 of the United

[7] Impeachable Offenses, Legal Information Institute, accessed June 10, 2020, https://www.law.cornell.edu/constitution-conan/article-2/section-4/impeachable-offenses.

[8] United States Senate, Constitution of the United States, Article II, Section 4.

[9] Jon Roland, *Meaning of High Crimes and Misdemeanors*, The Constitution Society, Last updated: August 14, 2020, https://www.constitution.org/1-Constitution/cmt/high_crimes.htm.

[10] Robert G. Natelson, "Impeachment: The Constitution's Fiduciary Meaning of 'High . . . Misdemeanors,'" *Federalist Society Review* 19 (2018): 72.

States Code.[11] Initially, in the Supreme Court, there were six judges (justices), including the chairman of the court (chief justice). Currently, the Court has nine members. This number was established in The Judiciary Act of 1869, sometimes called the Circuit Judges Act of 1869, which states that "the Supreme Court of the United States shall hereafter consist of the Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum, and for the purposes of this act there shall be appointed an additional associate justice of said court."[12] What is important to note is that its decisions are final and legally binding for all parties. The Constitution does not formulate specific requirements that a potential candidate must meet. Every man or woman, regardless of their age, property, place of residence, education, or even citizenship, can obtain the presidential nomination. The only limitation is the prohibition of selecting a person who is related to or associated in the first or second degree with an incumbent member of the Supreme Court. In practice, however, the choice of a judge largely takes on the nature of the political strategy of the incumbent president, who seeks to gain the support of certain social or local groups from which the nominee originates. It is clear from past practice that candidates were appointed whose views coincided, if not completely then in the main part, with the views of the president himself. In the first years of the functioning of the Supreme Court, close associates of the President, George Washington, were appointed as the first judges.

As we have observed in recent years, despite the passage of time, this method of selecting candidates for the Supreme Court has not changed significantly: they were elected from among the members of the political party with whom the president was associated, with the assumption that they would continue the adopted direction of adjudication, even after the current president's term expires, and after the election of a presidential candidate with the opposing political and ideological beliefs. When making a decision, the Supreme Court reviews the actions of state and federal governments and decides whether the laws are constitutional. The number of judges adjudicating in individual federal courts varies and derives directly from the law. Among the courts of appeals, the most numerous in terms of the number of judges is the United States Court for the Ninth Circuit, in which twenty-nine regional judges adjudicate.[13] What is worth mentioning is that while the US Constitution omits such aspects as how they are to be chosen, it does state that federal judges retain their offices as long as they perform them impeccably. In practice, this means that a federal court judge can hold office throughout their life unless they are removed from office by the impeachment procedure. State courts have a three-tier structure. Courts of the first instance, which deal with civil and criminal cases, are trial courts, created

[11] 28 U.S.C. paras. 1–482.

[12] Judiciary Act of 1869, para. 1.

[13] Statement of Circuit Judge Alex Kozinski to the House Judiciary Subcommittee on Courts. US House of Representatives. October 21, 2003.

by the Senate. The second instance is the court of appeal, these courts are called legislative courts or specialized courts, including the Court of Federal Compensation, the Appellate Court of Veterans, the Tax Court, the Court of International Trade, and bankruptcy courts. The third most important is the Supreme Court. The situation of the judicial branch on a state level is definitely more complicated and unfortunately, it is impossible to describe the structure in a synthetic way, but what is also worth mentioning is that on this level judicial branch can be impeached. This paper will also raise the subject of impeachment regarding state judges.

EXAMINING JUDICIAL ACCOUNTABILITY MECHANISMS: FROM RECALL TO IMPEACHMENT

However, before we move on to discuss the impeachment procedure and examples of cases over the years, it is worth noting that various other legal solutions apart from impeachment have been adopted in state legislation to deprive a judge of their office, such as recall, removal by the state parliament by voting, address—removal by the governor upon the motion of the two chambers of the state parliament, or removal by the appropriate committee or by the court upon the motion of these committee. In almost all states, it was not limited to accepting only one of the procedural routes, rather the aforementioned procedures operate side by side, creating a consistent system for controlling judges' work. One institution worth mentioning is recall, which is a vote on the removal initiated by collecting the appropriate number of signatures under an appropriate application (petition). According to the California Constitution, a recall "is the power of the electors to remove an elective officer"[14] and can be called whenever voters wish "to express their dissatisfaction with their elected representatives." State laws differentiate the entities whose removal by means of the recall procedure is admissible. Every public officer is subject to removal in the State of Nevada,[15] in Minnesota a member of the Senate or the House of Representatives, an executive officer of the state identified in Article V, Section 1 of its Constitution, or a judge of the Supreme Court, the Court of Appeals, or a District Court,[16] whereas in the state of Idaho every public officer can be removed with the exception of judicial officers.[17] The normative solution adopted in a given state also determines the conditions for initiating the procedure. Cancellation by recall[18] is possible regardless of the assessment of the official's work, and thus can be seen as an instrument of control in voters' hands, or depends on the form of particularly reprehensible behavior. In

[14] The Constitution of the State of California, Article II, Section 13.

[15] The Constitution of the State of Nevada, Article II, Section 9.

[16] The Constitution of the State of Minnesota, Article VIII, Section 6.

[17] The Constitution of the State of Idaho, Article VI, Section 6.

[18] Robert L. Owen, "The Recall of Judges," *The Yale Law Journal* 21, no. 8 (1912): 655–58.

states that have adopted the second of the indicated models of the recall institution, reasons for cancellation (grounds for recall) are usually a violation of oath, improper performance of duties, or committing a crime. In the event of a vacancy occurring, either as a result of the deprivation of the office through an appropriate procedure or as a result of death or resignation, state law provides for various arrangements for filling the seized office. In most states, the governor then gains the right to appoint a successor, who holds office until it is taken over by a person elected in the next general election. For example, in Nevada, the governor does not have unlimited freedom of choice, because they appoint one of the three candidates proposed by the competent committee. When depriving a judge of office due to the recall procedure, in some states there is a solution, which presupposes holding elections for a given office, separate from voting on the removal or connected with it.

When discussing the ways of appointing and dismissing a justice in the American legal order, it is also necessary to describe the institution of retention election. These are general elections, during which eligible citizens decide whether the current justice will hold office for another term, or whether a newly elected person should take his or her position. The current justice shall not compete with other candidates. However, state regulations have led to many modifications to this basic type of election. Retention election is inextricably connected with substantive choice. It is after the candidates have been appointed by the commission and appointed by the governor (or the legislature) that a general vote takes place. Depending on specific state regulations, the candidates appointed by the executive are required to hold their office for the indicated trial period and then are assessed by citizens. If the required majority of votes is obtained, the justice retains his or her office and performs it until the end of the originally appointed term of office.[19] Currently, retention elections are carried out in nineteen states, in six of them with regard to the judges of the courts of all instances.

Another way for a justice to be removed from the Supreme Court is through resignation. In the initial period of judicial activity of the Supreme Court, its composition changed very dynamically. Of the thirteen judges nominated in the first years of the existence of the Court up to 1801, six of them resigned from their positions. Those resignations had two basic, common causes: low prestige of the position held and technical difficulties in performing the role of a judge caused by the ill-conceived construction of how the district appellate courts function. However, all of the methods mentioned above can be considered an easy method, while impeachment is recognized as the hardest and most complicated way.

Thus far, nineteen actual impeachments of federal officers have taken place. Of these, fifteen were federal judges: thirteen district court judges, one Court of Ap-

[19] Mary A. Celeste, "The Debate over the Selection and Retention of Judges: How Judges Can Ride the Wave," *Court Review: The Journal of the American Judges Association* 46 (2010): 84.

peals judge (who also sat on the Commerce Court), and one Supreme Court Associate Justice. Since the Supreme Court first convened in 1790, there have been 113 justices and only one ever has been impeached. On the state level, the court for the trial of impeachments may differ somewhat from the federal model. For instance, in New York, the Assembly (lower house) impeaches, and the State Senate tries the case, but the members of the seven-judge New York State Court of Appeals (the state's highest, constitutional court) sit with the senators as jurors as well.[20] On the federal level, however, the impeachment process follows a unified procedure. An impeachment begins when an official behaves in a manner that the people believe disqualifies him or her from further public service. A complaint requesting an impeachment investigation of that official is lodged with the House of Representatives. That request may be general in its scope and can be filed by individual citizens or at the request of a single Representative, a group of Representatives, or the President. The next step is to forward such a complaint to the House Judiciary Committee, which forwards it to the Subcommittee on the Constitution. This Subcommittee is then required to investigate the situation, and if there is a basis for impeachment, Articles of Impeachment are created. These are the set of charges drafted against a public official and do not result in the removal of the official, but instead require the enacting body to take further action, such as bringing the articles to a vote before the full body. First, the full Judiciary Committee acquainted itself with them and voted, and in the event of approval, then the House of Representatives votes. If at least one article gets a majority (218 out of 435 members) vote, then the person at the office can be impeached. The next step is the move to the Senate, which becomes a courtroom. A team of lawmakers from the House, known as managers, plays the role of prosecutors. The accused has defense lawyers, while the Senate serves as the jury. To find the impeached official guilty, the Senate votes again, and this time a two-thirds majority is required. The Constitution allows the Senate to impose two penalties: remove the individual from that specific office, or remove the individual from that office and also prohibit him from holding all future offices.

LANDMARK IMPEACHMENT CASES IN UNITED STATES HISTORY

In order to explain the procedure of impeachment in detail, we shall now present the most important and famous processes that have taken place so far or are currently in progress. In our opinion, it is necessary to start with what was definitely the most-publicized affair, namely that regarding the Supreme Court judge, Samuel

[20] The Constitution of the State of New York, Article VI, Section 24.

Chase. He remains the only US Supreme Court justice to ever have been impeached. He was an earnest Federalist supporter, known for his open adherence both on and off the bench, and campaigned strongly for John Adams in the election of 1800. In 1803, Chase delivered a grand jury charge to the US circuit court in Maryland that was sharply critical of the Republicans for repealing the 1801 judiciary statute and abolishing the circuit judgeships that the act in question had established. After Jefferson took office, Chase began openly attacking the President and his policies. Chase even took to condemning the Democratic-Republicans from the bench. It is believed that because of his actions and statements, President Jefferson decided to remove the judge, who might have posed a severe problem in continuing to exercise power. The President immediately wrote to Joseph Nicholson, one of his party leaders in the House of Representatives, suggesting action against Chase: "Ought this seditious and official act on the principles of our Constitution, and on the proceedings of a State, to go unpunished? And to whom so pointedly as yourself will the public look for the necessary measures? I ask these questions for your consideration, for myself, it is better that I should not interfere."[21] Virginia Congressman John Randolph of Roanoke rose to the challenge and took charge of the impeachment. The House of Representatives served Chase with eight articles of impeachment in late 1803, which centered on three charges.[22] The first charge arose from Chase's remarks before the Baltimore grand jury. The second charge stemmed from his conduct in the 1800 treason trial of John Fries. The third charge focused on Chase's conduct in the 1800 sedition trial of James Callender. Together, the House managers argued that these three charges represented judicial misconduct amounting to impeachable high crimes and misdemeanors. On March 12, 1804, the US House of Representatives voted to impeach Chase by a seventy-three to thirty-two margin, appointing John Randolph, a cousin of Jefferson and a mercurial politician in his own right, to head the House Managers responsible for prosecuting Chase in his trial before the Senate. The trial began on February 9, 1805, and the House Managers took ten full days to present the testimony of more than fifty witnesses. Chase did not testify during the proceedings but instead read a prepared statement that attempted to overturn the charges. To convict Chase twenty-two votes, or two-thirds of the Senate, were necessary. On March 1, 1805, the Senate announced that Chase was acquitted on all counts.[23] The closest vote was nineteen to fifteen in favor of convicting Chase for his anti-Democratic-Republican remarks to the Baltimore

[21] Thomas Jefferson, "From Thomas Jefferson to Joseph H. Nicholson, 13 May 1803," Founders Online, accessed June 10, 2020, https://founders.archives.gov/documents/Jefferson/01-40-02-0278.

[22] "The Samuel Chase Impeachment Trial," Law Library—American Law and Legal Information, accessed June 10, 2020, https://law.jrank.org/pages/5151/Chase-Samuel-Samuel-Chase-Impeachment-Trial.html.

[23] "Samuel Chase," Supreme Court History, accessed June 10, 2020, https://web.archive.org/web/20070713052523/http://www.supremecourthistory.org/02_history/subs_timeline/images_associates/007.html.

grand jury.[24] The impeachment raised constitutional questions over the nature of the judiciary and was the end of a series of efforts to define the appropriate extent of judicial independence under the Constitution. It set the limits of the impeachment power and helped to set the parameters of what kinds of conduct would warrant a judge's removal from the bench. The failure of the Senate to convict allowed Chase to return to the Supreme Court and serve 6 more years as an associate justice. More importantly, the acquittal deterred the House of Representatives from using impeachment as a partisan political tool.

After Justice Chase's case, there were two other moves to impeach sitting justices. The first came in 1952, when William O. Douglas was the subject of hearings, although the procedure of impeachment was not initiated until 1969. The second was the 1969 case of Associate Justice Abe Fortas when he became the first Supreme Court Justice to step down under threat of impeachment after submitting a letter of resignation. In 1968, President Johnson nominated Fortas to replace the retiring Chief Justice Earl Warren, and subsequently a series of scandals erupted. It was discovered that Fortas was teaching in a summer school at American University with a salary of approximately $15,000, which was 40% of his salary as a Supreme Court Justice. However, his remuneration was paid not by American University but by Arnold & Porter law firm clients, many of whom had cases potentially heading to the Supreme Court.[25] Moreover, he was accused of receiving $20,000 from the Wolfson Foundation, a family foundation of Louis Wolfson, who was indicted for securities fraud. According to Canon 25 of "The Canons of Judicial Ethics" prepared in 1922 for the American Bar Association by a committee headed by Chief Justice William Howard Taft: "A judge should avoid giving ground for any reasonable suspicion that he is utilizing the power or prestige of his office to persuade or coerce others to patronize or contribute, either to the success of the private business or to charitable enterprises."[26] Therefore, his conduct was viewed as clearly contrary to the aforementioned canon and the US Constitution, meaning the articles of impeachment were prepared. As a result, though Justice Fortas returned the money, his reputation was ruined and he stepped down from the Court in shame. His cautionary tale should teach all Justices that the appearance of impropriety can crush an otherwise stellar career.

Shortly after Justice Abe Fortas' resignation, Congressman Gerald Ford made an attempt to remove the US Supreme Court Justice William O. Douglas from the bench. On April 15, 1970, in his speech before the House floor, Ford accused Justice Douglas of writing for pornographic magazines, of espousing a 'hippie-yippie-style revolution' in his writings, of accepting $350 for an article he wrote on folk music

[24] Kenneth Jost, *Supreme Court A to Z* (Thousand Oaks: CQ Press, 2012), 238.

[25] Ciara Torres-Spelliscy, "The Cautionary Tale of Abe Fortas," Brennan Center for Justice, February 6, 2018, https://www.brennancenter.org/blog/cautionary-tale-abe-fortas.

[26] "Justice Fortas Impeachment," CQ Press Library, accessed June 10, 2020, https://library.cqpress.com/cqalmanac/document.php?id=cqal69-1247815.

in the magazine Avant Garde, of ties with Albert Parvin, the owner of Las Vegas Gambling enterprises, and possible links with some of Mr. Parvin's underworld as societies.[27] Despite these allegations, on December 3 the Special House Judiciary Subcommittee voted three to one that it had found no grounds for impeaching Justice Douglas. The Subcommittee divided the allegations into two categories: charges involving judicial conduct and charges involving non-judicial conduct. The distinction was made in an attempt to resolve the controversy created by the two constitutional provisions, which affect the impeachment of federal judges. One provision states that federal judges shall hold their offices subject to "good behavior" (Article III, Section 1). The other states that an impeachable offense shall be "treason, bribery, or other high crimes and misdemeanors" (Article II, Section 4). The report stated thus: "Such a distinction permits recognition that the content of the word 'misdemeanor' for conduct that occurs in the course of the exercise of the power of the judicial office includes a broader spectrum of action than is the case when non-judicial activities are involved."[28] Although Congressmen Ford's endeavor proved unsuccessful, he did author the most memorable definition summarizing the spirit of American impeachments, judicial and otherwise. When asked what an impeachable offense was, he stated, "an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history."[29]

Definitely, the second most important process of impeachment in United States history is the first impeachment of any judge that occurred in the US. The first federal officer to be impeached was John Pickering. During his career, he served as Chief Justice of the New Hampshire Superior Court of Judicature and as a judge for the US District Court for the District of New Hampshire. His impeachment was based on similar motives to the ones that caused the process of Justice Samuel Chase. It was part of Thomas Jefferson's plan to remove Federalist judges from office. He sent evidence to the House of Representatives against Pickering, accusing him of having made unlawful rulings and being of bad moral character due to intoxication while on the bench. Again Nicholson and Randolph played key roles in the whole process. What is worth mentioning is that this case was the one to shape the entire process of impeachment, as never before had impeachment gone further than the committee of the House of Representatives. That is why for most of the first two months a Senate committee was put to work on drafting detailed rules of procedure. John Pickering was in declining health. In 1801, he had suffered a nervous breakdown and had been

[27] "Role of Vice-President Designate Gerald Ford in the Attempt to Impeach William O. Douglas," Ford Library Museum, accessed June 10, 2020, https://www.fordlibrarymuseum.gov/library/document/0023/1687418.pdf.

[28] "Justice Douglas Impeachment," CQ Press Library, accessed June 10, 2020, https://library.cqpress.com/cqalmanac/document.php?id=cqal70-1292316.

[29] Kenneth C. Davis, "The History of American Impeachment," Smithsonian Magazine, June 12, 2017, https://www.smithsonianmag.com/history/what-you-need-know-about-impeachment-180963645/.

unable for a term to perform his judicial duties. When he returned to the bench, his conduct was notably inconsistent; he frequently appeared in an intoxicated state. It should be noted that Judge Pickering was not represented in person or by counsel—the proceedings consisted largely of the uncontested presentation of the evidence. The Senate declined to postpone judgment until confirmation of the insanity of the accused. It declared that it would follow the English precedent (including "the very celebrated case of Warren Hastings")[30] and pronounce judgment on each of the articles. Pickering was convicted of all charges by the US Senate by a vote of nineteen to seven and removed from office on March 12, 1804. However, Pickering's impeachment was controversial, in large part because the Constitution defines impeachable offenses as "treason, bribery, or other high crimes and misdemeanors." While Pickering may have been unfit to serve as a federal judge, he had not committed any crime.[31]

Latterly, the most conspicuous and exceptional case is the Impeachment of the Supreme Court of Appeals of West Virginia.[32] While nowadays the impeachment of an individual justice is a common practice in the US, to commence this procedure against the entire institution is undoubtedly precedential. The Supreme Court of Appeals of West Virginia is the State Supreme Court of the State of West Virginia, consisting of five justices selected by partisan election. On the appropriate ballot, in addition to the candidates' names, their party affiliation is stated, which most often indicates their views. Thus, this case is regarded as rather political, as the Republicans held the legislature and governor's office, whereas the Democrats elected the majority of the justices in the Supreme Court of Appeals of West Virginia. At the end of 2017, the media reported the expenses of the court. The United States Attorney for the Southern District of West Virginia initiated an investigation and, as a result of an audit conducted by the state's legislative auditor, many irregularities were detected, such as undocumented use of court-owned vehicles and rental cars paid for by the State for personal use, while ignoring federal law for taxable fringe benefits,[33] personal use of an antique desk, and the improper purchase of gift cards. Moreover, justices purportedly spent over $1,114,000 on individual office renovations. The former Chief Justice of the West Virginia Supreme Court of Appeals, Allen Loughry, was indicted on twenty-two counts and convicted of eleven federal

[30] William F. Swindler, "High Court of Congress: Impeachment Trials, 1797–1936," *American Bar Association Journal* 60, no. 4 (1974): 420–28.

[31] "Federal Judge John Pickering Remembered for His Impeachment," Constitutional Law Reporter, accessed June 10, 2020, https://constitutionallawreporter.com/2017/04/04/john-pickering-federal-judge-impeachment/.

[32] Campbell Robertson, "West Virginia House of Delegates Votes to Impeach Entire State Supreme Court," The New York Times, August 14, 2018, https://www.nytimes.com/2018/08/14/us/west-virginia-impeach-supreme-court.html?fbclid=IwAR1Lk3tirgt73qK6V2t49WubRKjKmdxGuELqhzmzoYGV-N--szGawOBXf6g.

[33] Supreme Court of Appeals of West Virginia—Legislative Audit Report, 2018, accessed June 10, 2020, https://www.documentcloud.org/documents/4438388-Supreme-Court-of-Appeals-4-15-18.html.

offenses including wire and mail fraud, witness tampering, and making false statements to federal investigators. The fifth Supreme Court Justice, Menis Ketchum, resigned from the court office and pleaded guilty to a felony count of wire fraud, as a result of which the Supreme Court of Appeals annulled Ketchum's license to practice law in the state of West Virginia.

Consequently, the West Virginia House Judiciary Committee commended the impeachment of all four remaining justices with each trial held separately: Justice Allen Loughry for personal use of state computer equipment and state vehicles, use of public funds to frame personal mementos, overspending for renovations, moving an antique Cass Gilbert desk to his own home, false statements to federal investigators; Justice Margaret Workman, Justice Robin Davis and Justice Beth Walker for lack of oversight and overspending. After the full House of Delegates decided to impeach the four remaining justices, Justice Robin Davis resigned from office, although she was still considered to have been impeached. Thus far, only Justice Beth Walker has been tried, while the others await their proceedings. After receiving articles of impeachment and approving the trials' rules and dates, the West Virginia Senate concluded not to remove Justice Beth Walker from office, as it was decided that public condemnation would serve as sufficient punishment. Justice Margaret Workman's trial was blocked by an injunction issued by five circuit justices reconstituted temporarily in the West Virginia Supreme Court of Appeals on the grounds of a violation of the separation of power doctrine. In consequence, not only was this trial postponed but also the entire process of the Impeachment of the Supreme Court of Appeals of West Virginia was halted, as the injunction retroactively was applied to Justice Robin Davis' and Justice Allen Loughry's cases. The West Virginia Senate asked the US Supreme Court to overturn the injunction but the Court later refused to review a case involving the impeachment of West Virginia's Supreme Court.[34]

CONCLUSIONS

As we can see, the system of selecting and removing judges in the American system is highly complex, very unclear, and complicated. It aroused numerous controversies and discussions, which was especially evident on the occasion of President Trump's recent election of a new Supreme Court judge. Nevertheless, it does not seem that in the near future, there will be any changes in any system, whether federal or state. The jurisdiction and powers of the Supreme Court are clearly defined, and although the judge's party affiliation still plays a significant role, it is not

[34] Brad McElhinny, "U.S. Supreme Court Declines to Hear W.Va. Impeachment Case," MetroNews, October 7, 2019, http://wvmetronews.com/2019/10/07/u-s-supreme-court-declines-to-hear-w-va-impeachment-case/.

the decisive factor influencing the ruling. The position of the Supreme Court has significantly strengthened among the central authorities, and today there is not the slightest doubt about the great prestige of the justices' position. At the state level, the court system seems to be tailored to specific states. Of course, allegations of corruption remain; however, these always appear and are often motivated by false arguments and have a political background. What's more, even with the most efficient system, instances of corruption might occur, a state of affairs that depends to a large extent on the nature of the person and the circumstances. Even attempts to change the requirements that a judge should meet would not guarantee that each time he or she would be appointed as a judge of impeccable character.

Summary: The chapter delves into the historical and legal frameworks underpinning the judicial power in the United States, with a special focus on the impeachment process. The authors explore the constitutional basis of judicial power, rooted in the separation of powers principle, and the unique mechanism of impeachment provided for in the US Constitution. The research underscores the impeachment process's significance as a check on judicial (and other federal) officers, ensuring accountability and adherence to "good behavior" standards. By examining various historical impeachment cases, the article highlights the complexity and nuanced interpretations of "high crimes and misdemeanors" and the balance between judicial independence and accountability. The conclusion emphasizes the enduring relevance of impeachment in safeguarding democratic principles and the rule of law, despite its rarity and the controversies it often engenders.

Keywords: American law, judicial power, impeachment, constitutional law, separation of powers

BIBLIOGRAPHY

Celeste, Mary A. "The Debate over the Selection and Retention of Judges: How Judges Can Ride the Wave." *Court Review: The Journal of the American Judges Association* 46 (2010): 82–100.

Davis, Kenneth C. "The History of American Impeachment." Smithsonian Magazine, June 12, 2017, https://www.smithsonianmag.com/history/what-you-need-know-about-impeachment-180963645/.

"Federal Judge John Pickering Pickering Remembered for His Impeachment." Constitutional Law Reporter. Accessed June 10, 2020, https://constitutionallawreporter.com/2017/04/04/john-pickering-federal-judge-impeachment/.

Holmes, Stephen. "Lineages of the Rule of Law." In *Democracy and the Rule of Law*, edited by Adam Przeworski and José María Maravall, 19–61. Cambridge: Cambridge University Press, 2003.

Impeachable Offenses. Legal Information Institute. Accessed June 10, 2020, https://www.law.cornell.edu/constitution-conan/article-2/section-4/impeachable-offenses.

Jefferson, Thomas. "From Thomas Jefferson to Joseph H. Nicholson, 13 May 1803." Founders Online. Accessed June 10, 2020, https://founders.archives.gov/documents/Jefferson/01-40-02-0278.

Jost, Kenneth. *Supreme Court A to Z* . Thousand Oaks: CQ Press, 2012.

"Judicial Officer Law and Legal Definition." USLegal. Accessed June 10, 2020, http://definitions.uslegal.com/j/judicial-officer/.

"Justice Douglas Impeachment." CQ Press Library. Accessed June 10, 2020, https://library.cqpress.com/cqalmanac/document.php?id=cqal70-1292316.

"Justice Fortas Impeachment." CQ Press Library. Accessed June 10, 2020, https://library.cqpress.com/cqalmanac/document.php?id=cqal69-1247815.

McElhinny, Brad. "U.S. Supreme Court Declines to Hear W.Va. Impeachment Case." MetroNews, October 7, 2019, http://wvmetronews.com/2019/10/07/u-s-supreme-court-declines-to-hear-w-va-impeachment-case/.

Montesquieu. *The Spirit of Laws*. Kitchener: Batoche Books, 2001.

Natelson, Robert G. "Impeachment: The Constitution's Fiduciary Meaning of 'High . . . Misdemeanors.'" *Federalist Society Review* 19 (2018): 68–72.

Owen, Robert L. "The Recall of Judges." *The Yale Law Journal* 21, no. 8 (1912): 655–58. https://doi.org/10.2307/784839.

Prakash, Saikrishna, and Steven D. Smith. "How To Remove a Federal Judge." *The Yale Law Journal* 116, no. 1 (2006): 72–137. https://doi.org/10.2307/20455714.

Redish, Martin H. "Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis." *Southern California Law Review* 72, no. 2–3 (1999): 673–706.

Robertson, Campbell. "West Virginia House of Delegates Votes to Impeach Entire State Supreme Court." The New York Times, August 14, 2018, https://www.nytimes.com/2018/08/14/us/west-virginia-impeach-supreme-court.html?fbclid=IwAR1Lk3tirgt73qK6V2t49WubRKjKmdxGuELqhzmzoYGV-N--szGawOBXf6g.

Roland, Jon. "Meaning of High Crimes and Misdemeanors." The Constitution Society, Last updated: August 14, 2020, https://www.constitution.org/1-Constitution/cmt/high_crimes.htm.

"Role of Vice-President Designate Gerald Ford in the Attempt to Impeach William O. Douglas." Ford Library Museum. Accessed June 10, 2020, https://www.fordlibrarymuseum.gov/library/document/0023/1687418.pdf.

"Samuel Chase." Supreme Court History, accessed June 10, 2020, https://web.archive.org/web/20070713052523/http://www.supremecourthistory.org/02_history/subs_timeline/images_associates/007.html.

"The Samuel Chase Impeachment Trial." Law Library—American Law and Legal Information. Accessed June 10, 2020, https://law.jrank.org/pages/5151/Chase-Samuel-Samuel-Chase-Impeachment-Trial.html.

Swindler, William F. "High Court of Congress: Impeachment Trials, 1797–1936." *American Bar Association Journal* 60, no. 4 (1974): 420–28.

Supreme Court of Appeals of West Virginia—Legislative Audit Report, 2018. Accessed June 10, 2020, https://www.documentcloud.org/documents/4438388-Supreme-Court-of-Appeals-4-15-18.html.

Torres-Spelliscy, Ciara. "The Cautionary Tale of Abe Fortas." Brennan Center for Justice, February 6, 2018, https://www.brennancenter.org/blog/cautionary-tale-abe-fortas.

Acts of Laws and Regulations

United States Code.
Judiciary Act of 1869.
Statement of Circuit Judge Alex Kozinski to the House Judiciary Subcommittee on Courts. US House of Representatives. October 21, 2003.
The Constitution of the State of California.
The Constitution of the State of Idaho.
The Constitution of the State of Minnesota.
The Constitution of the State of Nevada.
The Constitution of the State of New York.
The Constitution of the United States.

Part III

LIBERTIES, RIGHTS, AND PROCEDURES

Chapter 9

Rights

*Tomasz Raburski**

INTRODUCTION[1]

The importance of rights to the American legal system is hard to overestimate. Rights are the cornerstone of the American legal and political system, as well as of the identity of citizens. They are universally considered vital for promoting and protecting democracy, economic and social justice, and protecting individual autonomy and property. The public sphere in the United States can be described as an arena where groups and individuals discuss and fight over their rights. The language of rights permeates both public and private life and is one of the defining features of American culture.[2]

Although rights are an important part of every modern legal system, their status in the United States is distinctive. If we compare two related legal systems—in the United States and in the United Kingdom—the differences are striking.[3] In the USA, the role of rights has historically been much more important. The obvious

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[2] Mary A. Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991); Richard A. Primus, *The American Language of Rights* (Cambridge: Cambridge University Press, 2004).

[3] For example, Manfred Berg and Martin H. Geyer, eds., *Two Cultures of Rights: The Quest for Inclusion and Participation in Modern America and Germany* (Cambridge: German Historical Institute, Cambridge University Press, 2002); Tomasz Raburski, *Prawo podmiotów: Etyka—prawo—polityka* (Poznań: Wydawnictwo Poznańskiego Towarzystwa Przyjaciół Nauk, 2021); Mary A. Glendon, "Rights in Twentieth-Century Constitutions," *The University of Chicago Law Review* 59, no. 1 (1992); Glendon, *Rights Talk: The Impoverishment of Political Discourse*, 145–70.

Tomasz Raburski, "Rights." In *Enlightenment Traditions and the Legal and Political System of the United States of America*, edited by Michał Urbańczyk, Kamil Gaweł, and Fatma Mejri, 163–83. Poznań: Adam Mickiewicz University Press, 2024. © Tomasz Raburski 2024. DOI: 10.14746/amup.9788323242543.10.

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difference is the centrality of the written constitution and the Bill of Rights in the United States. There is no comparable document in the UK and the British tradition of rights, reaching back to the Magna Carta (1215), took different institutional forms. Rights in the USA were more individualistic and much more expansive than those in the UK. The burden of the protection of rights falls on individuals and the court system and much less on the central institutions (such as the parliament in the UK). In consequence, the history of rights in the USA is the history of landmark cases.

COLONIAL ERA

After the English colonization of America, a complex mosaic of legal regimes arose. It consisted of English (sometimes Dutch, Scottish or French) and local laws, customs, charters, grants, and ordinances. Soon, the colonial legal order became very different from the original English one. This environment became the birthplace of a new tradition of rights.

It is often claimed that the American tradition of rights is of Lockean origin. This traditional view was challenged by contemporary historians of ideas, most notably John G. A. Pocock, who in his *The Machiavellian Moment* (1975) reconstructed the republican tradition on which American constitutionalism was built.[4] The tensions between these two intellectual strands have remained a latent driving force in the evolution of the American legal system.[5]

John Locke was a major figure in the modern tradition of natural rights (Grotius, Hobbes, Pufendorf). In his *Two Treatises of Government* (1689), Locke argued that people possess certain fundamental rights, like the right to life, liberty, and property, which exist prior to any particular government.[6] All people are naturally free and equal, and political authority, therefore, arises from the consent of the governed, who create governments in order to protect these rights and promote the common good. Several elements of his theory had a deep impact on the American legal tradition. His concept was very individualistic, emphasizing the importance of personal accountability and the protection of private property. Rights were a protective instrument in the hands of individuals against the government. Locke was also one of the authors of the draft of the Fundamental Constitutions of Carolina, later adopted by the Lords Proprietors of the Province of Carolina in 1669. The Constitu-

[4] John G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975); Isaac Kramnick, "Republican Revisionism Revisited," *The American Historical Review* 87, no. 3 (1982).

[5] Michael J. Sandel, "The Constitution of the Procedural Republic: Liberal Rights and Civic Virtues," *Fordham Law Review* 66, no. 1 (1997).

[6] John Locke, *Two Treatises of Government* (London: Cambridge University Press, 1967).

tions sought to combine the freedoms of English common law with the hierarchical structure of French feudalism to create a form of government that would protect the rights of the colonists while maintaining stability in the colony.

The common element of in works (both *Two Ttreatises* and *Fundamental Constitutions*) was his concept of property rights.[7] Locke argued that when a person combines their labor with the land or an object, they are entitled to the fruits of that labor. Locke suggested that if an individual took something from nature, transformed it, and used it to create a product, they should be able to claim it as their own. His concept of original appropriation (the transition from common to private ownership of land by the means of individual labor) was essential for the treatment of land on the new territories.[8]

For the American understanding of property rights, Lockean ideas competed with those presented by William Blackstone.[9] Blackstone's four volumes of *Commentaries On The Laws of England* (1765–1769) were the major source of jurisprudence in England and America during the late eighteenth century and early nineteenth century, and are still widely regarded as one of the most influential works of legal scholarship in the common law jurisprudence. It was the first systematic and comprehensive review of English law, and its practical importance was immense.[10]

Blackstone incorporated the concept of natural rights into the English legal system. According to Blackstone, there are three absolute natural rights: life (and personal security), liberty, and property. This triad of fundamental rights can be later traced in the Fourteenth Amendment ("nor shall any State deprive any person of life, liberty, or property, without due process of law").

Blackstone viewed property as the most significant of these three rights. While Locke tried to balance the institution of private property with other principles, for Blackstone the primacy of private property should have no exemptions. Private property rights must be given priority over any other kind of interest, including public interests. "So great moreover is the regard of the law for private property, that it will not authorise the least violation of it; no, not even for the general good of the whole community."[11] In consequence, for Americans, the right to property became the most important, even paradigmatic right, heavily influencing the evolution of the legal system.[12]

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[7] Glendon, *Rights Talk: The Impoverishment of Political Discourse*, 21–22.

[8] James Tully, "Rediscovering America: The *Two Treatises* and Aboriginal Rights" in *Locke's Philosophy: Content and Context*, ed. Graham A. J. Rogers (Oxford: Clarendon Press, 1994).

[9] William Blackstone, *Commentaries on the Laws of England* (Boston: Beacon Press, 1962).

[10] Michael Lobban, *A History of the Philosophy of Law in the Common Law World 1600–1900* (Dordrecht: Springer, 2016) 99–110; Glendon, *Rights Talk: The Impoverishment of Political Discourse*, 21–25.

[11] Blackstone, *Commentaries on the Laws of England*, 1: 139.

[12] Albert S. Miles, David L. Dagley, and Christina H. Yau, "Blackstone and His American Legacy," *Australia & New Zealand Journal of Law & Education* 5, no. 2 (2000).

Besides the philosophical and scholarly traditions of Europe, the idea and form of the American Constitution stemmed also from local grounds and experience. Colonies had their charters and governments, and these charters included various forms of property, voting, and taxation rights. In reality, colonists in America were second-class citizens compared to their British counterparts. They were subject to British taxation and British laws, but their civil and political rights were largely denied. Colonists were not allowed to participate in the political process, had no representation in the British Parliament, and their right to a fair trial was very limited. They were second-class citizens, treated as mere subjects by the Crown.

Two distinctive features of colonial political culture had profound consequences for the later developments of rights in America. First, colonies were semi-autonomous and were granted their rights by the Crown. In consequence, individuals were not the only rights-bearers. Rights were also held by colonies, companies, and other organizations.[13]

Second, the status and rights of inhabitants of the colonies differed significantly. Full rights were granted only to free white males. Many colonists signed indenture contracts before migration and their legal status was close to temporary slavery. These indentured servants were treated as property and lacked basic rights. Women, both free and enslaved, were largely excluded from legal and political rights. They had no property rights, could not vote, and were not allowed to hold public office. They were also barred from certain professions and could not participate in the legal system as a plaintiff or a defendant. Blacks, either free or enslaved, were denied all rights and were subject to both legal and extralegal forms of violence and discrimination. Native Americans were treated as outsiders, members of "foreign nations," and thus their rights were not recognized. These categories (free citizens, indented servants, slaves) were preserved in the legal system of the early United States and cast a long shadow over its social and political history. American constitutional history is a history of the emancipation of these groups by giving them access to full legal and civil rights.[14]

AMERICAN CONSTITUTION

The distinct American tradition of constitutional rights arose from three sources: English legal tradition, local political and legal practice, and the ideas of the Enlightenment.[15] These intellectual currents were not harmonious and collided in many aspects. At the time of the American War of Independence, these tensions were not

[13] Adam Winkler, *We the Corporations: How American Businesses Won Their Civil Rights*, 1st ed. (New York: Liveright Publishing Corporation, a Division of W.W. Norton & Company, 2018), 3–30.

[14] Norton J. Horvitz, "Rights," *Harvard Civil Rights—Civil Liberties Law Review* 23, no. 2 (1988).

[15] Primus, *The American Language of Rights*, 78–126; Waldron, *'Nonsense upon Stilts': Bentham, Burke, and Marx on the Rights of Man*, 13–21; Lobban, *A History of the Philosophy of Law in the Common Law World 1600–1900*, 123–53.

fully visible nor verbalized. The moment of revelation came with the French Revolution, when three modern traditions of rights became apparent. We can judge and analyze the American constitution and the Bill of Rights from this later vantage point. The discourse of rights ("human rights" or "rights of man") of French philosophers and revolutionaries was tied closely to the ideas of universality, naturality, or inalienability. This discourse was more moral and political than legal and although French revolutionary constitutions declared the protection of many of these rights, these declarations were void, overblown rhetoric.

English tradition was, from the very beginning, much more reserved. The revolution was a great shock to British public opinion. Its protagonists were demonized and events were often framed in terms of a struggle between order and chaos. The phrase "human rights" was an easily recognizable marker of revolutionary discourse, foreign to English tradition and perilous to the social order. The English response to the revolutionary discourse of human rights came in two different forms.

Edmund Burke argued that the concept of human rights was ultimately a dangerous form of idealism. He argued that ideas of human rights were too abstract, vague, and destructive in practice. Burke's concept of rights connected them with historical privileges and liberties, acquired by Englishmen in the historical process, a result of a long struggle between the subjects and the Crown.[16]

In contrast with the French tradition of human rights, Burke insisted that rights were granted in a historical moment, and they embody the collected experience of past generations. Burke insisted that revolutionaries destroyed this chain of tradition and installed a new, abstract system of institutions, ignoring the complexities of society and human nature.

Another form of criticism was put forward by Jeremy Bentham in his *Anarchical Fallacies* (written around 1796).[17] Bentham's criticism of human rights (or more generally, natural rights) was based on utilitarian and early positivist grounds. He argued that the French declarations and constitutions made a promise that is vague, unrealistic and so far-fetched that no government can meet the standards demanded of them. As he famously stated: "Natural rights is simple nonsense: natural and imprescriptible rights (are) rhetorical nonsense—nonsense upon stilts."[18] For Bentham, human rights are an anarchical concept, undermining the existing government and the legal system. Rights are an important legal concept, but they should be treated as an integral part of the positive law. They should be based on the statutes given by the sovereign to protect certain interests of individuals.

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[16] Jeremy Waldron, ed., *'Nonsense upon Stilts': Bentham, Burke, and Marx on the Rights of Man* (London, New York: Methuen, 1987), 77, 95.

[17] Jeremy Bentham, "Anarchical Fallacies," in *'Nonsense upon Stilts': Bentham, Burke, and Marx on the Rights of Man*, ed. Jeremy Waldron (London, New York: Methuen, 1987); Waldron, *'Nonsense upon Stilts': Bentham, Burke, and Marx on the Rights of Man*, 29–45.

[18] Bentham, "Anarchical Fallacies," 53.

Following Burke's and Bentham's criticism, the English legal system moved away from Blackstone's natural law jurisprudence and rights became a progressively less important concept of British constitutionalism. The American path was different, and their constitutionalism remained defined in the terms of rights. During the American War of Independence, they used the rhetoric of natural rights (incorporating elements from both the French tradition and the English doctrine of ancient rights of Englishmen, predating the powers of the English parliament) to challenge British rule.[19] In stark contrast to Great Britain, Blackstone's *Commentaries* remained influential and cited until this day.[20]

Americans established their stance in opposition to the British by incorporating French arguments but adapting them to their own legal and political experience. The most influential pamphlet on rights in revolutionary America, *The Rights of Man* (1791), authored by Thomas Paine (who took an active part in the revolutionary events in France), took aim at Burke's criticism of human rights.[21] The French idea of ahistorical, universal, God-given rights was used by the Americans as a justification for their refusal of British rule. The appeal to natural rights is a key part of the *Declaration of Independence*, and the need for their protection was the reason for establishing the Union.[22]

As a consequence of that, a third, distinct tradition of constitutional rights emerged. This was not apparent during the constitutional debate, because important features of this tradition would be formed later, in the next century with the establishment of judicial review.[23] With a judicial review, rights cease to be, as Bentham feared, mere political or moral declarations, undermining the social order and becoming one of the central legal institutions. Unlike the French idea of human rights, American constitutional rights lacked the abstract universalism of the former. On the contrary, many of these American rights seem, from a contemporary perspective, too specific (e.g., protection against housing soldiers in civilian homes).

Most of all, though, the American and French Constitutions had fundamentally different aims. While the latter was an instrument of radical transformation

[19] Lobban, *A History of the Philosophy of Law in the Common Law World 1600–1900*, 124.

[20] Miles, Dagley, and Yau, "Blackstone and His American Legacy"; Glendon, *Rights Talk: The Impoverishment of Political Discourse*, 24–25.

[21] Thomas Paine, *The Rights of Man* (London: Penguin Books, 1984); Craig Nelson, *Thomas Paine: Enlightenment, Revolution, and the Birth of Modern Nations* (New York: Viking, 2006).

[22] "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. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it." See also Lobban, *A History of the Philosophy of Law in the Common Law World 1600–1900*, 130–36.

[23] On the earlier history of this institution, see Lobban, *A History of the Philosophy of Law in the Common Law World 1600–1900*, 136–39.

of French society, the former was intended to promote internal peace and security. The same can be said of constitutional rights. The French rights were a revolutionary act, designed to dismantle the pre-existing social and political structures of the ancien régime. Conversely, American rights were intended to protect and preserve freedoms that were threatened by the British and could be endangered by the federal government in the future.

It is worth noting that the main text of the Constitution does not declare any rights and liberties. It is primarily a document regulating the form, scope, and goals of the government, based on the ideas of agrarian republicanism rather than a liberal concept of strong individualism.[24] This lack of rights in the main text of the constitution is even more evident when we compare it to other early constitutions: the French constitutions of 1791 and 1793, or to the Declaration of Independence (1776).

The original framers of the Constitution did not believe it was necessary to include a Bill of Rights in the text, because rights were already protected by the state constitutions. They believed that the powers granted to the federal government by the Constitution were sufficiently limited to prevent it from infringing on individual rights.[25] Contrary to this, anti-federalists claimed that a bill of rights should be an essential part of the constitution to protect citizens from the possibility of any abuse of power by the federal government or prevent the slippery slope of government encroachment on individual freedoms.

The public continued to demand a Bill of Rights during the ratification debate in the states, in many situations making ratification conditional on the assurance of a Bill of Rights. This demand came from a variety of sources, including state and local governments, popular newspapers, and political leaders. This demand was such a loud one that James Madison eventually proposed the Bill of Rights as an amendment to the Constitution. This was done to appease the public and ensure that the Constitution was ratified.

The main source of influence for the Bill of Rights was the Virginia Bill of Rights drafted by George Mason and adopted by the state of Virginia in 1776. This influential document also provided the model and the language for the other state constitutions and bills of rights that were adopted in the late eighteenth century.

The Bill of Rights is written in the form of ten amendments to the US Constitution. It explicitly guarantees the following rights:

1. freedom of religion, speech, press, assembly, and petition;
2. right to bear arms;
3. freedom from the quartering of soldiers;

[24] Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*; Kramnick, "Republican Revisionism Revisited"; Glendon, *Rights Talk: The Impoverishment of Political Discourse*, 41–48.

[25] Glendon, "Rights in Twentieth-Century Constitutions," 525.

4. freedom from unreasonable search and seizure;
5. right to due process;
6. right to a speedy and public trial;
7. right to trial by jury;
8. freedom from cruel and unusual punishment.

The Ninth Amendment of the United States Constitution states that: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The clause was intended to protect citizens from having their state-guaranteed rights taken away by the federal government.

As evidenced by this list, the selection of rights is highly unusual. Some rights found here are unique among constitutions, for example, the right to bear arms, freedom from unreasonable searches and seizures, or freedom from cruel and unusual punishments. On the other hand, many rights considered a standard for modern constitutionalism are not mentioned here, for example, the right to privacy. Many rights were introduced by later amendments. However, the concept of social and economic rights never became widely accepted in the United States, and these rights were not incorporated into the Constitution, in stark contrast to other modern constitutions.[26] In 1944, President Franklin D. Roosevelt put forward a proposal for the Second Bill of Rights. He intended to add a series of economic rights to the existing Bill of Rights, such as the right to a job, the right to education, the right to social security, and the right to health care. The Second Bill of Rights was never enacted, leaving it an unsuccessful project.

States were considered the primal political communities, while the Union was supposed to be secondary, derivative, and limited in its scope. This understanding was reflected in the Tenth Amendment, which states that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." In consequence, the federal government was considered rather a threat to individual rights, as opposed to the states, which were their protectors. In 1794, state power was further strengthened by the Eleventh Amendment, which granted states sovereign immunity.

The further evolution of the American system led to a reinterpretation of the Ninth Amendment (often referred to as the "unenumerated rights" amendment).[27] On its basis, the Supreme Court has inferred many new constitutional rights, beyond those explicitly listed in the Constitution, most notably, the right to vote, the right to privacy, the right to marry, or the right to travel. The right to vote was not specifically addressed in the Constitution of the United States. It was only after the Civil War that the Fifteenth Amendment to the Constitution was ratified, which

[26] Glendon, "Rights in Twentieth-Century Constitutions," 1992.

[27] Ronald Dworkin, "Unenumerated Rights. Whether and How Roe Should Be Overruled," *The University of Chicago Law Review* 59, no. 1 (1992).

granted voting rights to African-American men. In 1920, the Nineteenth Amendment expanded the voting rights to women.

One of the most significant advancements in the realm of constitutional rights during the era of the Civil War was the implementation of the Thirteenth and Fourteenth Amendments. These amendments drastically altered the legal landscape of the United States by abolishing slavery and ensuring equal protection of the law to all citizens, respectively. Exceptionally influential was the equal protection clause, a legal basis for numerous rights-related Supreme Court decisions.

At the end of the eighteenth century, the American concept of rights did not differ much from the European legal traditions. Rights granted by the federal constitution were more political declarations than effective instruments. This changed at the beginning of the nineteenth century, with the invention of judicial review.

NINETEENTH-CENTURY DEVELOPMENTS

The institution of judicial review was not invented in the United States; rather, it was derived from the English common law system. However, within the legal and political context of the newly born United States, it was refined and enhanced, becoming the cornerstone of the American system of constitutional government. This led to the creation of an exceptional American tradition of rights.

The institution of judicial review was created as the result of the *Marbury v. Medison* case. *Marbury v. Madison* was a landmark Supreme Court decision from the year 1803.[28] The legal dispute was initiated by William Marbury, who had been appointed by President John Adams as a Justice of the Peace in the District of Columbia. Marbury demanded that Secretary of State James Madison deliver to him his official commission. Madison refused and Marbury brought a lawsuit against him in the Supreme Court.

The case reached the Supreme Court, where Chief Justice John Marshall delivered the opinion of the court. In this opinion, he declared that Madison's refusal to deliver Marbury's commission was unconstitutional and that the Court had the power to declare executive actions unconstitutional. This was the first time that a court had asserted the power of judicial review—the power to declare a law unconstitutional. This decision established a precedent that has been affirmed throughout the history of the United States: the Supreme Court is the ultimate arbiter of the Constitution and is the highest authority for interpreting the law.

This power became essential for protecting the rights of citizens, and it has been used to strike down laws that violate the rights of individuals. It must be emphasized that with *Marbury v. Madison* case, the American judiciary became a power-

[28] *William Marbury v. James Madison, Secretary of State of the United States*, 5 U.S. 137 (1803).

ful mechanism which turned constitutional rights into effective instruments in the hands of individuals, states, and organizations.

For the first half of the nineteenth century, judicial review was applied not for the protection of individual rights, but for the resolution of disputes between different branches of government. This was known as the "judicial control of administrative action," and it was seen as a way to ensure that government officials acted within the scope of their authority. This type of judicial review was used to ensure that the executive and legislative branches carried out their responsibilities in accordance with the Constitution and laws of the United States. This type of judicial review was not used to protect the rights of individuals, but to ensure that the government acted within the scope of its authority.

The Abolitionist Movement was primarily concerned with the status of African-Americans and the institution of slavery, and sought to achieve its goals through the use of both legislative and political means. The language of rights and the judicial machinery aimed at protecting them were primarily utilized by defenders of slavery. The argument for the protection of property rights was used to counter the call for the abolition of slavery. Slavery was seen as a form of property, and thus slaveowners argued that they had a right to own slaves and that their property rights should be respected.

The debate about the states' rights, conducted for most of the nineteenth century and centering on the interpretation of the Tenth Amendment, was mainly driven by the Southern states, which wanted to preserve the right to keep slaves. In 1857, the Supreme Court ruled in the Dred Scott decision that slaves were not citizens and that Congress could not prohibit slavery in the states. This decision sparked a public outcry and led to the Civil War. In the *Plessy v. Ferguson* case of 1896, the Supreme Court relied on the language of rights to uphold the practice of racial segregation. The Court held that the "separate but equal" doctrine did not violate the Equal Protection Clause of the Fourteenth Amendment because the law did not deny anyone their rights.

In conclusion, contrary to popular belief, rights in the nineteenth century did not have an emancipatory effect on American society but were seen more as a way to maintain the status quo.[29] It was not until the women's and labor movements in the second part of the 19th century that rights (e.g., right to vote, to own a property, to access higher education for women) became a vehicle of change and emancipation. The emergence of civil rights as a central and incentive legal concept in the public sphere occurred during the twentieth century, and the most graphic example of this change is the civil rights movement of the 1960s and 1970s.

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[29] Primus, *The American Language of Rights*, 174–75; Horvitz, "Rights."

HOHFELDIAN ANALYSIS

Until the early twentieth century, the conceptual aspect of legal rights remained underdeveloped. This contrasted with the European continental jurisprudence, which had a long tradition of detailed analysis of legal concepts. Compared to the thorough works of Ihering or Windscheid, American scholarly works remained superficial, unsystematic, and casuist. However, this changed with the publication of Wesley Newcomb Hohfeld's seminal work, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, which provided a systematic framework for understanding legal rights.[30] By providing a systematic framework for understanding legal rights, Hohfeld's work revolutionized the field of jurisprudence and has been cited by courts and legal scholars ever since.[31]

Hohfeld's work was based on the juxtaposition of jural opposites and jural correlatives, which were conceptualized as pairs of mutually exclusive concepts that together comprise our understanding of rights. He argued that legal rights could be broken down into four such pairs:

Right (Claim-right)	Privilege (Liberty)[32]	Power	Immunity
Duty	No-Right	Liability	Disability

1. Right (Claim-right, or right in a strict sense) is a legally enforceable claim that one has to realize some benefit or be free from some burden.
2. Duty (a negative correlative of a claim-right) is a legally enforceable obligation to do or refrain from doing something.
3. Privilege/Liberty is a lack of a duty to abstain from the action.
4. No-right (a negative correlative of liberty) is the absence of a legal right and means that the person has no right to infringe on the sphere of someone else's liberty.
5. Power is a legally enforceable right to impose some burden or confer some benefit on another, or to change somebody's legal relations.
6. Liability (a negative correlative of power) is a legally enforceable obligation to suffer some burden or to forego some benefit.
7. Immunity is a legally enforceable right to be free from somebody's else power.

[30] Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (Yale: Yale University Press, 1920).

[31] Primus, *The American Language of Rights*, 34–38.

[32] Hohfeld used the term "privilege," but modern scholars prefer replacing it with "liberty." Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays*; Heidi M. Hurd and Michael S. Moore, "The Hohfeldian Analysis of Rights," *The American Journal of Jurispru*dence 63, no. 2 (2018).

8. Disability (a negative correlative of immunity) means that the other actor has no power in the sphere of immunity.

According to Hohfeldian analysis, legal rights can be either active or passive. Active rights give the holder of the right the power to do something, while passive rights give the holder the right to not do something or the right to be free from interference. Additionally, there are mere correlates of rights, such as duties correlating to the right of another person to do something, or a liability correlating to the right to receive compensation for damages. Hohfeld argued that rights and privileges should always be allocated to an individual person, while duties and obligations need to be fulfilled by an individual person towards another person.

The Hohfeldian analysis of rights does not rely on rigid, formal definitions, but instead is more focused on the use of language in everyday life. His analytical approach focused on the relations between these concepts, which he argued let us better understand the complexities of the legal order. Hohfeldian analysis of rights became the dominant framework for American legal scholars. As American culture and scholarship have gained increasing global significance, it has also become known in other countries, even those from the circle of continental legal cultures.

TWENTIETH CENTURY

The twentieth century marked a new era in the history of constitutional rights.[33] Their character shifted from a conservative to a more progressive stance, and judicial review became a widely used mechanism for the protection of these rights. It was also a period of increased judicial activism and the establishment of more expansive interpretations of the Constitution, as well as a time of intensive civil rights legislation and the emergence of international human rights law.

The scope of rights extended to encompass new groups: women, people of color, LGBTQ. This expansion was the result of a variety of factors, including court rulings, legislation, and social movements (e.g., the civil rights movement of the 1950s and 1960s).[34] The scale of changes that took place will become clear if we look at two landmark cases that opened the twentieth century: *Plessy v. Ferguson* (1896) and *Lochner v. New York* (1905).[35] In the case of *Plessy v. Ferguson*, the Supreme Court established the constitutionality of racial segregation laws, deciding that "separate but equal" facilities would be allowed, and not violate the Fourteenth Amendment rights. The decision set a precedent for the Jim Crow laws, state and local laws that

[33] Primus, *The American Language of Rights*, 180–82; Sandel, "The Constitution of the Procedural Republic: Liberal Rights and Civic Virtues."

[34] Gwendolyn M. Leachman, "From Protest to Perry: How Litigation Shaped the LGBT Movement's Agenda," *University of California, Davis Law Review 1668* 47 (2014).

[35] *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Lochner v. New York*, 198 U.S. 45 (1905).

enforced racial segregation in the United States, and which would remain in effect until the 1950s and 1960s. *Plessy v. Ferguson* would be overturned in 1954 by the Supreme Court's decision in *Brown v. Board of Education*.

In the *Lochner v. New York* case, the Supreme Court held that a New York labor law limiting the hours that bakery employees could work violated the freedom of contract, which was protected by the Fourteenth Amendment. The decision set a precedent that decreased the power of the government to regulate the economy, creating an era of laissez-faire economics, in which the interests of business owners and employers were favored over those of workers and consumers.[36] Many laws regulating working conditions, such as minimum wages and maximum hours, were struck down, as were laws prohibiting child labor and establishing safety standards in the workplace.

The New Deal policies of the 1930s marked a major shift in the legal framework around rights in the US. The policies sought to strengthen economic security and promote economic growth by introducing a range of social programs to help those in need. These programs included the Social Security Act (1937), which provided a pension system for retirees, and the National Labor Relations Act (1935), which gave workers the right to bargain collectively.

The Lochner era ended with the *West Coast Hotel Co. v. Parrish* case (1937), in which the US Supreme Court upheld the constitutionality of Washington state's minimum wage law for women.[37] The Court held that the Washington minimum wage law was a valid exercise of the state's police power to protect the health, safety, and welfare of its citizens and was a legitimate use of the state's power to protect the public. The Court also held that the law was not an arbitrary interference with freedom of contract, as the Court viewed the law as a reasonable regulation of an essential aspect of the state's labor market. This decision marked the end of an era in which the court had consistently sided with businesses and employers over the rights of workers and employees, opening the door for future protection of labor rights.[38]

An important step forward in the history of civil rights was the *United States v. Carolene Product Co.* case (1938).[39] The case established that it was a legitimate exercise of Congress' power to regulate interstate commerce and to protect public health, and that economic regulations were presumptively constitutional. The ruling is of great importance, not only for its contribution to the future development of consumer rights in the 1960s but also for the most famous footnote in American constitutional law.[40] Footnote four recognizes that legislation aimed at "discrete and

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[36] Winkler, *We the Corporations: How American Businesses Won Their Civil Rights*, 160–230.

[37] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

[38] Glendon, "Rights in Twentieth-Century Constitutions"; Glendon, *Rights Talk: The Impoverishment of Political Discourse*, 26–32.

[39] *United States v. Carolene Products Company*, 304 U.S. 144 (1938).

[40] Horvitz, "Rights," 396.

insular minorities" can be an exception to the usual presumption of constitutionality and can be subject to a higher standard of judicial review. This statement had a profound influence on the future development of civil rights, the interpretation of the Equal Protection Clause, and judicial review in general, marking a shift from a legal emphasis on property rights to other individual rights.

The most important period of change in the civil rights development was the Warren Court Era (1953–1969). During this period, the Supreme Court issued several landmark rulings that significantly advanced the cause of civil rights. The American court rulings are often described as either conservative or progressive. The Warren Court is widely recognized as the most progressive Supreme Court in American history. Subsequent chief justices tended to be increasingly conservative, resulting in the reversal of some of the decisions of the Warren Court.[41]

The rulings of the Warren Court had such a deep impact on the legal system that it can be accurately referred to as a constitutional revolution. It is widely regarded as a landmark of judicial activism, representing a shift of power from the legislative branch to the judiciary. The Supreme Court took a more active role in deciding the outcomes of political battles, and increasingly served as a venue for the resolution of important political issues. It can be said that the contemporary concept of rights and the role they play in the American public sphere were defined in the Warren Court era.

The Warren Court was particularly interested in issues related to racial segregation, voting, criminal procedure and justice, free speech, and privacy. In a series of decisions, the Warren Court ended the "separate but equal" doctrine and addressed the problem of racial inequality in America.

The Supreme Court heard several cases that challenged the legality of racial segregation, and these cases had a lasting impact on civil rights in the US. The most significant case was *Brown v. Board of Education* (1954), challenging racial segregation in public schools. This decision overturned the "separate but equal" doctrine of *Plessy v. Ferguson*, and effectively ended legal school segregation.[42] In *Heart of Atlanta Motel v. United States* (1964), the freedom from racial discrimination was expanded to all public accommodation.[43] Finally, in *Loving v. Virginia* (1967), the Supreme Court declared that laws prohibiting interracial marriage were unconstitutional.[44] The Warren Court also issued decisions that limited the power of the police to conduct searches and seizures and that protected free speech and the right to due process of law.

The Supreme Court's actions were in accordance with the Civil Rights Movement and the Civil Rights Act of 1964. The federal statute, proposed by President

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[41] David Luban, "The Warren Court and the Concept of a Right," *Harvard Civil Rights—Civil Liberties Law Review* 34 (1999).

[42] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

[43] *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

[44] *Loving v. Virginia*, 388 U.S. 1 (1967).

John F. Kennedy and pushed forward by President Lyndon B. Johnson, prohibited discrimination on the basis of race, color, religion, sex, or national origin. The Act barred unequal application of voter registration requirements, as well as racial segregation in schools, employment, and public accommodations. Additionally, the Civil Rights Act provided the legal framework for the federal enforcement of the constitutional right to vote, as well as the enforcement of desegregation in public places and public institutions.

During this period the term "politics of rights" was coined, and the civil rights movement became highly professionalized (or, as some activists say, "highjacked by the lawyers").[45] Besides traditional forms of social and political action, they used strategic litigation, a chiefly legal strategy, in which a meticulously chosen lawsuit was used as a means of achieving social or political change, by setting a precedent or raising public awareness of the issue of civil rights. The politics of rights has since become a major part of American political discourse, adopted by both liberal and conservative activists.[46]

The second most significant decision of this period was decided by the Burger Court (1969–1986), but it was prepared by the previous decisions in the Warren Court era. *Roe v. Wade* (1973) did not stem from a direct interpretation of any of the amendments to the Constitution but was a result of a precedent set in the *Griswold v. Connecticut* (1965) case, whereby a right to privacy was established.[47] In this case, the Supreme Court struck down a Connecticut law that prohibited the use of contraceptives, even by married couples. The Court ruled that the law violated the constitutionally protected right to privacy, which was implied by the First, Third, Fourth, and Fifth Amendments of the Constitution. the court used the famous "penumbra" metaphor, stating that "The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy." The penumbra metaphor, in addition to the concept of unenumerated rights, resulted in a considerable expansion of the discourse of rights in the legal and political sphere.[48] The language of rights has become the most important moral and political language in the United States.

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[45] Sandra R. Levitsky, "To Lead with Law. Reassessing the Influence of Legal Advocacy Organizations in Social Movements." in *Cause Lawyers and Social Movement*, eds. Austin Sarat and Stuart A. Scheingold (Stanford: Stanford University Press, 2006).

[46] Stuart A. Scheingold, *The Politics of Rights. Lawyers, Public Policy, and Political Change* (Ann Arbor: The University of Michigan Press, 2004); Thomas Hilbink, "The Right's Revolution?: Conservatism and the Meaning of Rights in Modern America," *Studies in Law, Politics and Society* 48 (2009); John P. Heinz, Anthony Paik, and Ann Southworth, "Lawyers for Conservative Causes: Clients, Ideology, and Social Distance," *Law & Society Review* 37, no. 1 (2003); Leachman, "From Protest to Perry: How Litigation Shaped the LGBT Movement's Agenda."

[47] *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[48] Luban, "The Warren Court and the Concept of a Right."

The *Roe v. Wade* decision (1973), which established a constitutional right to abortion in the United States, was a direct result of the *Griswold v. Connecticut* case. This right to privacy, established in this case was extended in *Roe v. Wade* to include a woman's right to choose to have an abortion. The Court ruled that the right to privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

The standard narrative taught for decades in American legal schools was that those two legal cases (*Roe v. Wade*, *Brown v. Board of Education*) were the cornerstone of the contemporary American constitutional order. They both represented major changes in the way the law was interpreted and how the courts approached constitutional issues. However, this account has been challenged, as detailed and more systematic studies showed that their direct impact was less important, and they were only part of a wider shift in the legal and political landscape.[49]

Over the next few decades, the development of rights was further advanced, although Supreme Court rulings became increasingly conservative.[50] Rights discourse was no longer just a tool of liberal politics, as conservative groups also began to employ it to assert their claims in the public sphere.[51] Conservatives sought to protect such rights as the right to own firearms, the right to bear arms, freedom of speech, and religious freedoms. The anti-abortion movement developed, opposing the *Roe v. Wade* decision. The movement was successful in passing several state and federal laws restricting access to abortion, including the Partial-Birth Abortion Ban Act of 2003 and the Unborn Victims of Violence Act of 2004. In 2022, the Supreme Court overturned *Roe v. Wade* and upheld a series of state laws that severely restricted the right to abortion. As a consequence of the *Dobbs v. Jackson Women's Health Organization* decision, the right of privacy established in *Griswold v. Connecticut* case was opened to further scrutiny.[52]

American society has become highly polarized and rights became the main instrument of political struggle. The culture wars of the late twentieth and early twenty-first centuries have been largely characterized by the use of rights language. This can be seen in the debates over issues such as abortion, same-sex marriage, and the role of religion in public life, all of which featured a variety of actors using rights language to support their respective positions.[53] In those political struggles,

[49] Gerald N. Rosenberg, *The Hollow Hope. Can Courts Bring About Social Change?* (Chicago: The University of Chicago Press, 1991); Gerald N. Rosenberg, "Much Ado About Nothing? The Emptiness of Rights' Claims in the Twenty-First Century United States," *Studies in Law, Politics and Society* 48, no. 1 (2009); Scheingold, *The Politics of Rights. Lawyers, Public Policy, and Political Change,* xix.

[50] Luban, "The Warren Court and the Concept of a Right," 8.

[51] Hilbink, "The Right's Revolution?: Conservatism and the Meaning of Rights in Modern America"; Heinz, Paik, and Southworth, "Lawyers for Conservative Causes: Clients, Ideology, and Social Distance."

[52] *Dobbs v. Jackson Women's Health Organization*, 19-1392, 597 U.S. (2022).

[53] Heinz, Paik, Southworth, "Lawyers for Conservative Causes: Clients, Ideology, and Social Distance."

rights have been used to both validate and delegitimize a range of social and political views.

One can observe that the rights struggles were hard to resolve because rights are antagonistic. The claims of one group clash with counterclaims from another group.[54] The abortion debate is a clear example of how rights can be used to justify opposing positions.

On the theoretical level, this can be observed in Ronald Dworkin's influential theory of rights, which rose to prominence in the 1970s.[55] In his theory, rights are trumps: they are stronger than any other arguments, especially arguments from interests, utilitarian reasons or collective goods. However, the problem that arises here is how to resolve disputes between two parties when they have different rights. In consequence, making rights the central concept of the public sphere fuels disputes and leads to greater polarization. Furthermore, the focus on rights has generated a situation where there is less emphasis on other aspects of the public sphere, such as public interest. This has had a detrimental effect on the public sphere, as it can lead to a situation where there is little room for nuanced debate and dialog.[56] The contrast between American theories of rights and the theory of Robert Alexy, a prominent figure in European constitutionalism, is especially evident. In Alexy's theory, rights are not trumps, but *prima facie* arguments that are balanced with other legal principles and interests.[57]

Another noteworthy development in the American legal system has been the growing importance of the rights of corporations as civil rights.[58] In the United States, the concept of group rights was regarded with great disdain and mistrust, with the exception of the rights of corporations. This reluctance to recognize group rights was partially rooted in the nation's history of individualism, which has largely shaped the nation's legal framework. In the last decades of the twentieth century, American corporations became treated as citizens, to a degree unprecedented in any other legal system.[59] In the case *Santa Clara County v. Southern Pacific Railroad Company* (1886), the Supreme Court established the "personhood" of corporations, granting them all the rights and protections of individuals under the Fourteenth Amendment.[60] As the consequence, the equal protection clause (including protection against discrimination or unequal treatment) started to be applied to corporations. This ruling has been used to argue for a wide range of rights for corpora-

[54] Glendon, "Rights in Twentieth-Century Constitutions," x.

[55] Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977); Primus, *The American Language of Rights*, 11–24.

[56] Glendon, *Rights Talk: The Impoverishment of Political Discourse.*

[57] Robert Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2010).

[58] Winkler, *We the Corporations: How American Businesses Won Their Civil Rights.*

[59] Horvitz, "Rights," 398–400; Winkler, *We the Corporations: How American Businesses Won Their Civil Rights.*

[60] *Santa Clara County v. Southern Pacific Railroad Company*, 118 U.S. 394 (1886).

tions, including the right to free speech and the right to freedom of religion. The most recent example is the 2010 *Citizens United v. FEC* case, in which the Supreme Court ruled that the First Amendment prohibited the government from restricting political expenditures by corporations and unions.[61] The Court reasoned that political spending is equivalent to speech, and therefore should receive the same level of protection.[62]

CONCLUSIONS

This article explored the development and role of rights in the American legal system. Rights are not only an important legal concept but are also fundamental to the whole American public sphere. Several features make the American tradition of rights distinct. In the period following the American Revolution, the institutional mechanism making rights operative legal institutions, and not merely moral or political statements, was developed. Judicial review has allowed individuals to effectively raise claims based on their constitutional rights. The American legal and political system has increasingly revolved around the conflicting rights of individuals. This institutional framework of rights has had a significant impact on other liberal democracies.

In consequence, in the United States, legal discourse centers on constitutional rights, whereas human rights do not possess the same legal significance as in other countries. Human rights are mainly discussed in academic circles, rather than in courts.[63]

The other distinct feature of the American legal system is that constitutional rights are viewed as a mechanism for limiting government power. This is in contrast to Europe, where constitutional rights are seen as principles or program norms that governments must protect and uphold to the highest degree. Furthermore, conflicts between individuals, including natural persons and corporations, are rarely viewed as a rights-based constitutional issue.[64]

The history of American rights is complex and composed of numerous conflicting themes. For a long period, the concept of rights as a means of emancipation has been dominant. However, in recent decades, the tension between the various demands of different interest groups has become increasingly visible. The challenges and debates that have occurred in the past continue to shape the current legal and social landscape of the United States.

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[61] *Citizens United, Appellant v. Federal Election Commission*, 558 U.S. 310 (2010).

[62] Winkler, *We the Corporations: How American Businesses Won Their Civil Rights*, 324–76.

[63] Glendon, "Rights in Twentieth-Century Constitutions."

[64] Glendon, "Rights in Twentieth-Century Constitutions," 525–26. There is no institution similar to the *Drittwirkung* of rights found in most of the European legal systems. Bartosz Skwara, "W obronie bezpośredniego horyzontalnego obowiązywania praw człowieka," *Przegląd Sejmowy* 1 (2017).

Summary: This article explores how rights have shaped America's legal system and political culture, from colonial times to today. It begins with a look at how rights first emerged in colonial America and then examines the American Constitution as a key legal document. Then the nineteenth-century development of rights discourse is discussed, including the emergence of judicial review. Moving to the twentieth century, it describes the analytical framework of Wesley N. Hohfeld, and how the politics of rights have evolved in the second half of the century. Finally, it reflects on the role of rights in today's American public sphere.

Keywords: rights, culture, history of law, law and politics

BIBLIOGRAPHY

Alexy, Robert. *A Theory of Constitutional Rights*. Oxford: Oxford University Press, 2010.

Bentham, Jeremy. "Anarchical Fallacies." In *'Nonsense upon Stilts': Bentham, Burke, and Marx on the Rights of Man*, edited by Jeremy Waldron, 29–76. London, New York: Methuen, 1987.

Berg, Manfred, and Martin H. Geyer, eds. *Two Cultures of Rights: The Quest for Inclusion and Participation in Modern America and Germany*. Cambridge: German Historical Institute, Cambridge University Press, 2002.

Blackstone, William. *Commentaries on the Laws of England*. Boston: Beacon Press, 1962.

Dworkin, Ronald. *Taking Rights Seriously*. Cambridge: Harvard University Press, 1977.

Dworkin, Ronald. "Unenumerated Rights. Whether and How Roe Should Be Overruled." *The University of Chicago Law Review* 59, no. 1 (1992): 381–432.

Glendon, Mary A. "Rights in Twentieth-Century Constitutions." *The University of Chicago Law Review* 59, no. 1 (1992): 519–38. https://doi.org/10.2307/1599944.

Glendon, Mary A. R*ights Talk: The Impoverishment of Political Discourse*. New York: Free Press, 1991.

Heinz, John P., Anthony Paik, and Ann Southworth. "Lawyers for Conservative Causes: Clients, Ideology, and Social Distance." *Law & Society Review* 37, no. 1 (2003): 5–50.

Hilbink, Thomas. "The Right's Revolution?: Conservatism and the Meaning of Rights in Modern America." *Studies in Law, Politics and Society* 48 (2009): 43–68. https://doi.org/10.1108/S1059-4337(2009)0000048005.

Hohfeld, Wesley N. F*undamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays*. Yale: Yale University Press, 1920.

Horvitz, Morton J. "Rights." *Harvard Civil Rights—Civil Liberties Law Review* 23, no. 2 (1988): 293–406.

Hurd, Heidi M., and Michael S. Moore "The Hohfeldian Analysis of Rights." *The American Journal of Jurisprudence* 63, no. 2 (2018): 295–354. https://doi.org/10.1093/ajj/auy015.

Kramnick, Isaac. "Republican Revisionism Revisited." *The American Historical Review* 87, no. 3 (1982): 629–64. https://doi.org/10.2307/1864159.

Leachman, Gwendolyn M. "From Protest to Perry: How Litigation Shaped the LGBT Movement's Agenda." *University of California, Davis Law Review 1668* 47 (2014): 1667–751.

Levitsky, Sandra R. "To Lead with Law. Reassessing the Influence of Legal Advocacy Organizations in Social Movements." In *Cause Lawyers and Social Movement*, edited by Austin Sarat and Stuart A. Scheingold, 145–63. Stanford: Stanford University Press, 2006.

Lobban, Michael. *A History of the Philosophy of Law in the Common Law World 1600–1900*. Dordrecht: Springer, 2016.

Locke, John. *Two Treatises of Government*. London: Cambridge University Press, 1967.

Luban, David. "The Warren Court and the Concept of a Right." *Harvard Civil Rights—Civil Liberties Law Review* 34 (1999): 7–37.

Miles, Albert S., David L. Dagley, and Christina H. Yau. "Blackstone and His American Legacy." *Australia & New Zealand Journal of Law & Education* 5, no. 2 (2000): 46–59.

Nelson, Craig. *Thomas Paine: Enlightenment, Revolution, and the Birth of Modern Nations*. New York: Viking, 2006.

Paine, Thomas. *The Rights of Man*. London: Penguin Books, 1984.

Pocock, John G. A. *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*. Princeton: Princeton University Press, 1975.

Primus, Richard A. *The American Language of Rights*. Cambridge: Cambridge University Press, 2004.

Raburski, Tomasz. *Prawo podmiotów: Etyka—prawo—polityka*. Poznań: Wydawnictwo Poznańskiego Towarzystwa Przyjaciół Nauk, 2021.

Rosenberg, Gerald N. *The Hollow Hope. Can Courts Bring About Social Change?*. Chicago: The University of Chicago Press, 1991.

Rosenberg, Gerald N. "Much Ado About Nothing? The Emptiness of Rights' Claims in the Twenty-First Century United States." *Studies in Law, Politics and Society* 48, no. 1 (2009): 1–42. https://doi.org/10.1108/S1059-4337(2009)0000048004.

Sandel, Michael J. "The Constitution of the Procedural Republic: Liberal Rights and Civic Virtues." *Fordham Law Review* 66, no. 1 (1997): 1–20.

Scheingold, Stuart A. T*he Politics of Rights. Lawyers, Public Policy, and Political Change.* Ann Arbor: The University of Michigan Press, 2004.

Skwara, Bartosz. "W obronie bezpośredniego horyzontalnego obowiązywania praw człowieka." *Przegląd Sejmowy* 1 (2017): 79–101.

Tully, James. "Rediscovering America: The *Two Treatises* and Aboriginal Rights." In *Locke's Philosophy: Content and Context*, edited by Graham A. J. Rogers, 165–96. Oxford: Clarendon Press, 1994.

Waldron, Jeremy, ed. *'Nonsense upon Stilts': Bentham, Burke, and Marx on the Rights of Man*. London, New York: Methuen, 1987.

Winkler, Adam. *We the Corporations: How American Businesses Won Their Civil Rights*, 1st ed. New York: Liveright Publishing Corporation, a Division of W.W. Norton & Company, 2018.

Case Citations

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

Citizens United, Appellant v. Federal Election Commission, 558 U.S. 310 (2010).

Dobbs v. Jackson Women's Health Organization, 19-1392, 597 U.S. (2022).

Griswold v. Connecticut, 381 U.S. 479 (1965).
Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).
Lochner v. New York, 198 U.S. 45 (1905).
Loving v. Virginia, 388 U.S. 1 (1967).
Plessy v. Ferguson, 163 U.S. 537 (1896).
Santa Clara County v. Southern Pacific Railroad Company, 118 U.S. 394 (1886).
United States v. Carolene Products Company, 304 U.S. 144 (1938).
West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
William Marbury v. James Madison, Secretary of State of the United States, 5 U.S. 137 (1803).

Chapter 10

The *Flores* Settlement Agreement and the Evolution of the Rights of Unaccompanied Migrant Minors in the US

*Anna Bartnik**

INTRODUCTION

In January 2017, Donald Trump officially took office and became the forty-fifth President of the United States. The time he spent at the White House was marked by political and social tensions. Trump exercised his power to 'Make America Great Again' (his campaign slogan), and he assumed that restoring the power of the US required putting Americans first in his political and social agenda. This simply meant that in Trump's American society, there was no place for immigrants, who were "stealing jobs" from American citizens, benefitted from social programs that they were not entitled to, and were "criminals and rapists" who "came from shithole countries."[1] In line with his opinions on immigration and immigrants, President Trump introduced an immigration policy based on racial prejudice and xenophobic fears.

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[1] Massimiliano Demata, "'A Great and Beautiful Wall': Donald Trump's Populist Discourse on Immigration," *Journal of Language Aggression and Conflict* 5, no. 2 (2017): 274–94; Michael McCluskey, "Profanity and the President: News Use of Trump's Shithole Comment," *Newspaper Research Journal* 40, no. 4 (2019): 415–30; Robert Hartmann McNamara, *The Criminalization of Immigration: Truth, Lies, Tragedy, and Consequences* (Santa Barbara: ABC-CLIO, 2020), 5; Tony Platt, "Insecurity Syndrome. The Challenges of Trump's Carceral State," in *Crimmigrant Nations: Resurgent Nationalism and the Closing of Borders*, eds. Robert Koulish and Maartje van der Woude (Fordham: Fordham University Press, 2020), 56.

Anna Bartnik, "The *Flores* Settlement Agreement and the Evolution of the Rights of Unaccompanied Migrant Minors in the US." In *Enlightenment Traditions and the Legal and Political System of the United States of America*, edited by Michał Urbańczyk, Kamil Gaweł, and Fatma Mejri, 185–207. Poznań: Adam Mickiewicz University Press, 2024. © Anna Bartnik 2024. DOI: 10.14746/amup.9788323242543.11.

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American immigration policy and law have always raised concerns in society, but during the Trump administration, the changes he made brought more controversies than ever before. One of the reasons lies in the fact that the President hit the most vulnerable group of immigrants, minors. As a result of his "zero tolerance" policy and family separations at the border, it was children who suffered the most. Social and political activists raised the alarm about the violation of human and child rights, the treatment of minors with no respect for their human dignity, and the growing number of cases that resulted in asylum claims being rejected without a proper review. Despite the fact that the problem of children in immigration custody was nothing new in American immigration politics, the day-to-day practices of immigration agencies challenged standards that were settled in the past. The arrival of a huge migrant caravan in 2018, revealed the weakness of a system that was supposed to protect minors. The caravan started in Honduras with no more than 200 members, but by the time the group reached the US-Mexico border, it had grown in size to approximately 10,000 people.[2] The migrants who decided to join the caravan were mostly from the Northern Triangle countries (Honduras, El Salvador, Guatemala), and were fleeing gang violence, economic hardship, and political instability. Among the members of the group was a significant number of minors, both unaccompanied and accompanied.

Central American child migration to the United States has been an increasing problem for years. It started in the late 1980s when people started leaving the region and heading for the United States to reunite with relatives and find better economic opportunities for their families and themselves. The first significant "crisis" featuring unaccompanied minors appeared in 2014. Detentions of so-called UACs (unaccompanied alien children[3]) increased by 88% (2013 FY—35,200; 2014 FY—66,120). Between 2011 and 2016, US immigration agents apprehended almost 180,000 unaccompanied minors. It should be noted that this number does not include those who made it to the United States or those who only made it to Mexico.[4] Ninety-one percent of the more than 68,000 children detained in Mexico between 2016 and 2018 were deported and had no chance of arriving at the US port of entry. As with adults, minors on the move are exposed to a variety of potential risks like accidents, assaults, scams, kidnapping, trafficking, rapes, murders, detention and deportations.[5] Even if they reached the US-Mexican border, their situation did not

[2] Dara Lind, "The Migrant Caravan, Explained," Vox.com, October 25, 2018, https://bit.ly/2yz8jef; "Key Facts About the Migrant and Refugee Caravans Making Their Way to the USA," Amnesty International, November 16, 2018, https://bit.ly/3Nj9eot.

[3] An "alien" is the term that was used by Immigration and Customs Enforcement (ICE) for noncitizens. Today it is more often replaced by the terms 'noncitizen' and 'individual.' The language policy aiming to stop the use of offensive words referring to immigrants (e.g., "illegal immigrant") makes an exception for some such terms when necessary in legal paperwork, since some of the terms are language used in existing statutes.

[4] Michael Clemens and Kate Gough, "Child Migration from Central America," Center for Global Development June 20, 2018, https://bit.ly/3FAr8B4.

[5] Mark Isaacs, "Migrant Caravan," *Journal of Paediatrics and Child Health* 55, no. 10 (2019): 1280–82.

significantly improve. Detention in the US has become something to fear, and this is particularly true during the Trump administration. The presidential decision to criminally prosecute people crossing the border without a visa resulted in a widely criticized policy of family separations.[6] Even ending the zero-tolerance policy in June 2018, did not solve the problem, and federal data revealed that in 2019, still five migrant children per day continued to be separated from their parents at the US-Mexico border.[7] Minors were separated from their parents or legal guardians with whom they were migrating, and their cases were processed like those who were unaccompanied. The media reported on the so-called "missing children." The federal government lost control of 1,475 unaccompanied minors awaiting deportation hearings and was unable to make contact with them, a majority of them being minors who were released into the care of parents and other close relatives living in the US. But there is also a group of those whose parents were deported after being separated at the border and their location was unknown.[8] Due to the lack of records linking deported parents with separated children, they could not be reunited.

The increasing number of unaccompanied minors on the US-Mexican border, together with a lack of officers and complex, time-consuming procedures, resulted in a backlog that emerged at the border and in immigration courts. The media and activists reported that immigrant minors who barely spoke English or spoke only their native language were unable to express their needs or protect themselves. Thousands of children face immigration judges each year without appointed counsel. The analysis of asylum cases shows that only one out of ten claimants wins his or her case if he or she has no representation. With representation, asylum seekers have a five times greater chance of winning their case.[9] Furthermore, the huge increase in the number of minors detained in immigration facilities poses a significant challenge to the capacity of these buildings and the conditions they offer to young people. Despite the fact that standards of care had been known for years due to the *Flores* Settlement Agreement (FSA) and its subsequent changes, it transpired that the agencies responsible for detained minor migrants notoriously neglected those rules. Children were housed in prison-like facilities, often placed in cells with unrelated adults, or were detained for more than twenty days, as the 2016 ruling in *Flores v. Lynch* said.[10] This situation raised questions and concerns about the legacy

[6] It is worth noting that undocumented presence in the United States is not a criminal offense but a civil infraction.

[7] Riane Roldan and Alana Rocha, "Migrant Children Are Still Being Separated from Parents, Data Shows," The Texas Tribune, July 12, 2019, https://bit.ly/2kyonJw.

[8] Ed Pilkington, "Parents of 545 Children Still Not Found Three Years after Trump Separation Policy," The Guardian, October 21, 2020, https://bit.ly/3DmFVN2.

[9] "Asylum Representation Rates Have Fallen Amid Rising Denial Rates," TRAC Syracuse University, November 28, 2017, https://bit.ly/3Npttkl.

[10] *Flores v. Lynch*, No. 15-56434 (9th Cir. 2016), US Court of Appeals for the Ninth Circuit, Justia. US Law, accessed November 2, 2022, https://bit.ly/3FEtG1g.

of FSA and the children's well-being. During the Trump administration, the problem was exacerbated due to the outbreak of the Covid-19 pandemic. Security measures taken to prevent the spread of the pandemic reduced the capacity of detention facilities and migrant shelters: the number of beds available was reduced by half in many of them. However, immigration advocates highlighted an issue that had a significant impact on migrant children. Following the idea that the virus accompanies migrants, the Trump administration announced the implementation of the so-called 'Title 42' to reduce the threat of spreading it. That policy allowed them to deny entry to any immigrant, including asylum seekers. It is believed that Title 42 "directly violates several domestic and international policies requiring the federal government to provide for the best interests of children in their care."[11] Furthermore, Title 42 allowed hotels to be used as detention facilities, despite standards established in the FSA that required licensed detention centers and family reunification programs.[12] This solution did not completely fail to meet the rules included in the original version of the agreement, as it stated that in emergency situations officials can place children in unlicensed programs. The sudden increase in the number of unaccompanied minors and the Covid-19 pandemic became an explanation for implementing unusual measures.

The paper presented here offers an in-depth analysis of the legacy of the *Flores* Settlement Agreement. It has been assumed that the issue of unaccompanied minors in American immigration policy has not been properly solved, despite a more than two-decade debate and several changes made on the basis of FSA in order to make it work better. Immigration policy is a sensitive, complex, and challenging area of American politics. American society and the US Congress have been divided in their opinion on immigration for decades. As a result, we have a system that is outdated and needs comprehensive reform, but the federal legislature cannot find a compromise. It is worth noting that the situation of legislative limbo created space for court activity. The case of the evolution of FSA standards of care for minors in immigration custody showed the significant role that courts played in this process. After discussing the reasons for the problem that resulted in an agreement being reached between the Immigration and Naturalization Service (INS) and activists, this paper focuses on the role of courts and analyzes the influence of the judiciary on the development of the idea of unaccompanied migrant minor rights in the United States. The last part of this discussion focuses on contemporary issues related to the problem that was exacerbated during Donald Trump's administration and asks whether Biden's policy has responded to the situation.

[11] Ennely Medina, "From Flores to Title 42: Unaccompanied Children in Detention," *Harvard Human Rights Journal* 35 (2022): online journal, April 20, 2022, https://bit.ly/3WnVywm.

[12] Jorge Barrera, "How a 35-Year-Old Case of a Migrant Girl From El Salvador Still Fuels the Border Debate," CBC Radio, June 28, 2019, https://bit.ly/2kTsj7E.

THE BATTLE OVER JENNY FLORES CASE

The introductory remarks given above present basic data showing that the problem of unaccompanied minors apprehended at the US-Mexican border has been increasing for decades. However, securing the best interests of a child and providing proper care for young detainees was not a highly debated issue until the 1980s. The lack of oversight over the INS as to whether its activity complied with child welfare laws and the lack of regulations and/or standards set forth for minors in immigration custody resulted in controversial situations that were ultimately questioned in court. Among the failures mentioned in public debates most often as regards minors' needs were strip searches, indefinite detention, limited family visits, no adequate educational instruction or recreation activity, the lack of proper medical care in immigration facilities, and sharing the space with unrelated adults. They were all included in the 1985 complaint (*Flores v. Meese*),[13] which significantly impacted later changes in American politics.[14]

The history of the evolution of the rights of migrant minors is inextricably linked with the name of the Salvadoran girl Jenny Flores, despite the fact that she was just one of the plaintiffs in this case. Jenny, a fifteen-year-old child, escaped from El Salvador to be reunited with her mother, an unauthorized immigrant living in the US but was detained by the US immigration authorities.[15] The girl complained that after apprehension she was handcuffed, strip-searched, and finally, she spent two months in immigration custody. At that time, the INS only released unaccompanied minors into their parents' custody, a practice which was believed to be planned in order to arrest and deport immigrant parents living in the US illegally. Fear of being deported stopped Jenny's mother from picking her daughter up in person from a juvenile detention center where she was awaiting her deportation hearing. Instead, she sent a girl's aunt, but the INS did not allow a young detainee to be released to a third-party adult, despite the family connection between them. Flores, like other detained unaccompanied minors, was placed in a facility that three decades earlier had been used to be a hotel. The INS adapted the building by putting a chain-link fence in front of it and installed a sally port and a concertina wire around it. In an interview for National Public Radio (NPR), Carlos Holguin, one of the original immigration lawyers who argued on behalf of Jenny Flores, explained: "When we began to look

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[13] *Flores v. Meese*, US District Court for the Central District of California—681 F. Supp. 665 (C.D. Cal. 1988) March 7, 1988, Justia. US Law, accessed November 9, 2019, https://bit.ly/3zZHGyT. Meese is for Edwin Meese, the US attorney general at the time.

[14] Jasmine Aguilera, "Body Cavity Searches, Indefinite Detention and No Visitations Allowed: What Conditions Were Like for Migrant Kids Before the Flores Agreement," Time, August 21, 2019, https://bit.ly/2HmLzT0; Susan J. Terrio, *Whose Child Am I?: Unaccompanied, Undocumented Children in U.S. Immigration Custody* (Oakland: University of California Press, 2015), 11.

[15] *Flores v. Meese*; J. J. Mulligan Sepúlveda, *No Human Is Illegal: An Attorney on the Front Lines of the Immigration War* (New York: Melville House, 2019), 91.

at the conditions that existed in the facilities in which the INS was placing these children, those conditions were completely inconsistent with any true concern for child welfare or their well-being. So the lawsuit basically argued two things. One is that the INS should screen other available adults and release children to them if they appeared to be competent and, you know, not molesters and things of that nature, and that—secondly, that the government needed to improve the conditions existing in facilities in which it held minors to meet minimum child welfare standards."[16]

The original suit was fundamentally two-fold. First, it claimed that the INS' release policy (UACs could only be released under the care of their parents or legal guardians) violated the rights of due process rights. The due process clause of the Fifth Amendment provides that "no person shall . . . be deprived of life, liberty or property, without due process of law" and it applies to aliens within the jurisdiction of the United States, even if their presence is unlawful.[17] Second, it claimed that the INS' detention policy regarding procedures upon arrest, as well as the deplorable conditions in its facilities, resulted in the mistreatment of minors and violated their rights. One of the core issues to be considered by the judge, Robert Kelleher,[18] was whether the INS policy of routinely strip-searching apprehended immigrant minors violated the Fourth Amendment of the United States Constitution that says: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[19] The judge also had to decide whether the strip-searching practice used by immigration officers extended to "unreasonable searches" as described in the Fourth Amendment.[20] Note that the INS policy concerning procedures exercised by border agents varied and depended on the sector. In sectors where the number of juvenile apprehensions was not significant, strip searches were rarely used, but in the San Diego Sector or El Centro Sector Border Patrol it was often used. Considering that border patrol officers routinely used a pat-down search for weapons or contraband upon apprehension, it raised concerns about whether a strip search of minors in Border Patrol staging facilities was really necessary. Activists defending child rights stressed that the data confirmed that minors did not constitute a threat. Statistics showed that there were only twenty incidents of weapon or contraband discovery out of approximately

[16] "The History Of The Flores Settlement And Its Effects On Immigration," NPR, June 22, 2018, https://n.pr/2ETRxvZ.

[17] *Mathews v. Diaz*, 426 U.S. 67, 77, 96 S. Ct. 1883, 1890, 48 L. Ed. 2d 478 (1975), Casetext: Smarter Legal Research, accessed November 22, 2022, https://bit.ly/3Xn8VgU; *Wong Wing v. United States*, 163 U.S. 228, 238, 16 S. Ct. 977, 981, 41 L. Ed. 140 (1896), Casetext: Smarter Legal Research, accessed November 22, 2022, https://bit.ly/3XqCAWo.

[18] Robert Kelleher, a United States district judge of the United States District Court for the Central District of California.

[19] Fourth Amendment, Constitution Annotated, accessed November 22, 2022, https://bit.ly/3tf1JFQ.

[20] The Fourth Amendment's protections extend to undocumented aliens. *Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982), Justia. US Law, accessed November 22, 2022, https://bit.ly/2AncdKL.

84,000 aliens searched in 1987. Interestingly, only four of them related to minors and only one was due to a strip search.[21]

A strip search is one of the most intrusive activities that significantly undermines human self-esteem and dignity and affects his or her sense of security. In the past, courts commented several times (e.g., *Bell v. Wolfish* (1979), *Mary Beth G. v. City of Chicago* (1983)) on using this procedure and described it as dehumanizing, humiliating, and terrifying.[22] The scope and character of the negative consequences of a strip search in the case of minors were significantly worse. In many cases, the embarrassing nudity enforced by immigration officers in the situation of dependency of minors caused trauma and seriously impacted the children's psychological well-being. Judge Kelleher stressed that the decision to use a strip search for minors should follow a solid justification for such action. At the same time, one cannot deny the government's interest in conducting the search to provide security in detention facilities. However, unlike jails or prisons, where adults charged with serious crimes were routinely strip-searched, detention facilities for migrant minors have never experienced serious problems with security. Judge Kelleher supported his opinion with a decision in *Giles v. Ackerman* (1984) that held that routinely strip-searching individuals arrested for minor offenses violated their constitutional rights and it could only be conducted if jail officials had "a reasonable suspicion" that an individual was carrying a concealed weapon or contraband and posed a security threat.[23] Reasonable suspicion became a key issue when making a decision on the legitimization of the strip search. The analysis of other court rulings in cases that questioned the right of enforcement officers to strip-search (e.g., *Stewart v. Lubbock County, Texas* (1985), *Logan v. Shealy* (1982), *Kirkpatrick v. City of Los Angeles* (1986), *United States v. Handy* (1986))[24] showed that judges agreed in their opinion that using such a procedure for minor offenders needed solid justification, otherwise it violated their rights. However, when it came to unaccompanied minor migrants, no standards concerning arrest, detention, or custody were established, because the court decisions in the cases cited above related to adults. The 1985 class-action

[21] Aguilera, "Body Cavity Searches, Indefinite Detention, and No Visitations Allowed: What Conditions Were Like for Migrant Kids Before the Flores Agreement"; Terrio, *Whose Child Am I?: Unaccompanied, Undocumented Children in U.S. Immigration Custody*.

[22] *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979); *Terry v. Ohio*, 392 U.S. 1, 18 n. 15, 88 S. Ct. 1868, 1878, n. 15, 20 L. Ed. 2d 889 (1968); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983), Casetext: Smarter Legal Research, accessed November 14, 2022, https://casetext.com/.

[23] *Giles v. Ackerman,* 746 F.2d 614 (9th Cir. 1984), cert. denied, 471 U.S. 1053, 105 S. Ct. 2114, 85 L. Ed. 2d 479 (1985), Casetext: Smarter Legal Research, accessed November 14, 2022, https://casetext.com/.

[24] *Stewart v. Lubbock County, Texas*, 767 F.2d 153 (5th Cir. 1985), cert. denied, 475 U.S. 1066, 106 S. Ct. 1378, 89 L. Ed. 2d 604 (1986); *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981), cert. denied, 455 U.S. 942, 102 S. Ct. 1435, 71 L. Ed. 2d 653 (1982); *Kirkpatrick v. City of Los Angeles*, 803 F.2d 485, 489 (9th Cir. 1986); *United States v. Handy*, 788 F.2d 1419, 1420-21 (9th Cir. 1986), Casetext: Smarter Legal Research, accessed November 14, 2022, https://casetext.com/.

lawsuit challenged the situation and aimed to change the INS policy. Judge Kelleher, in his opinion delivered three years later, noted that it was unconstitutional to strip-search children without establishing a plausible need to do it and that such a policy violated the Fourth Amendment. He also confirmed that detained minors could be released to an adult relative who was not in INS detention. Furthermore, in some unusual circumstances and under strict conditions, a UAC could be released to an unrelated adult, who was obliged to take care of the minor's well-being and to ensure his or her presence in future immigration proceedings.[25]

This ruling by Judge Kelleher provided a significant confirmation that the INS policy on juvenile detainees needed urgent reform. The standards used by immigration officers did not protect the interests and well-being of those who were especially vulnerable. Migrant minors were separated from their relatives and detained in immigration custody for weeks or months. Furthermore, children were often placed in prison-like facilities, despite the fact that they were subject to no criminal charges. Activists who defended their rights stressed that the fundamental constitutional right of due process for minors, including the right to be released to the custody of a "responsible adult," was violated and should be changed. Although Kelleher's ruling resonated with the expectations of activists and advocates, their optimism diminished when in 1990 a three-judge panel of the Ninth Circuit Court of Appeals reversed the decision.[26] The INS' victory was temporary, and a year later the Ninth Circuit *en banc*[27] in *Flores v. Meese* (1991) reinforced Kelleher's decision and ordered that minors awaiting their deportation hearings must be released to related or responsible unrelated adult parties.[28] The decision was based on the idea that detention could be justified only if the INS could prove that a minor would be a threat to the community or would pose a risk of flight. Furthermore, the Court required the INS to conduct mandatory hearings for detained minors before an immigration judge, who would establish the terms and conditions of their release. It also allowed the INS to make detention decisions on immigrant minors on a case-by-case basis. This policy was believed to best protect the interests of a child and the public.[29] The ruling of the Ninth Circuit Court confirmed that governmental detention of children should not be a standard procedure but a last resort. In cases where the institutional confinement of a minor is inevitable, it should be used only if other, less restrictive alternatives, are not possible.

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[25] Richard A. Karoly, "*Flores v. Meese*: INS' Blanket Detention of Minors Invalidated," *Golden Gate University Law Review* 22, no. 1 (1992).

[26] *Flores v. Meese*, US Court of Appeals for the Ninth Circuit—934 F.2d 991 (9th Cir. 1990), Justia. US Law, accessed November 22, 2022, https://bit.ly/3tR3BoE.

[27] A full eleven-judge court.

[28] *Flores by Galvez-Maldonado v. Meese*, US Court of Appeals for the Ninth Circuit—942 F.2d 1352 (9th Cir. 1991), Casetext: Smarter Legal Research, accessed November 22, 2022, https://bit.ly/3Vngtyh.

[29] *Flores v. Meese*.

FROM THE US SUPREME COURT HOLDING TO THE *FLORES* SETTLEMENT AGREEMENT

After a few years of extensive court battles, the agenda of the case eventually entered the United States Supreme Court. The hearing began in October 1992 and in March 1993, the Court delivered a win to the government and overturned two lower federal courts' rulings, stating that the INS should release children to other responsible adults or child-welfare organizations when possible.[30] Seven justices found that the INS' release procedures did not violate substantive or procedural due process rights. "Where a juvenile has no available parent, close relative, or legal guardian, where the government does not intend to punish the child, and where the conditions of governmental custody are decent and humane, such custody surely does not violate the Constitution. It is rationally connected to a governmental interest in 'preserving and promoting the welfare of thechild.' . . . We are . . . unaware, that any court . . . has ever held that a child has a constitutional right not to be placed in a decent and humane custodial institution if there is available a responsible person unwilling to become the child's legal guardian but willing to undertake temporary legal custody."[31] The Court held that the due process of law was satisfied with the right to a hearing before an immigration judge and therefore we could not speak of any violation of the Fifth Amendment. Justice Antonin Scalia, who wrote the majority opinion, also disagreed with calling arrangements made by the INS to take care of UACs "detention," and described it rather as "legal custody."[32] According to his explanation, the facilities where minors were waiting for their cases to be processed met state licensing requirements for the provision of shelter care, foster care, or any other related services to dependent children, which made them "legal custody." In his opinion, "detention" refers to correctional institutions.[33] Although Justice O'Connor and Justice Souter shared Scalia's opinion that INS' policy did not violate due-process clauses, they decided to stress the most important aspect of the case and wrote in their separate concurrence that children "have a core liberty interest in remaining free from institutional confinement."[34] Only two justices, John Paul Stevens and Harry A. Blackmun, did not agree with the majority. They believed that the core issue of the *Flores* case was not the right to be released to unrelated adults but the right to be freed from

[30] *Reno v. Flores*, 507 U.S. 292 (1993), Justia. US Law, accessed December 13, 2022, https://bit.ly/3Fs0gSl.

[31] *Reno v. Flores*.

[32] Chief Justice William H. Rehnquist and Associate Justices Byron R. White, Sandra Day O'Connor, Anthony M. Kennedy, David H. Souter, and Clarence Thomas joined Justice Scalia's majority opinion.

[33] Rebeca M. Lopez, "Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody," *Marquette Law Review* 95, no. 4 (2012): 1635–78.

[34] Mark Walsh, "High Court Upholds I.N.S. Detention Of Suspected Illegal Alien Children," EducationWeek, March 31, 1993, https://bit.ly/3v2A4c8.

government confinement. Justice Stevens also pointed out that the "best interest of the child" could not be a criterion to judge the INS detention policy because it violated children's liberty: "So long as its cages are gilded, the INS need not expend its administrative resources on a program that would better serve its asserted interests and that would not need to employ cages at all."[35] According to the dissenting opinion, the reason why the litigation continued for many years in courts lay in the erroneous assumption that the core issues to be solved were detention conditions and the exclusion of unrelated adults as possible custodians. However, this class action lawsuit aimed to prove that minors held in detention facilities did not have "freedom from physical restraint" which the Constitution guaranteed to similarly situated citizens. They supported their opinion with Section 504 of the Juvenile Justice and Delinquency Prevention Act of 1974, which was believed to demonstrate the preference of Congress for juvenile release.[36]

Contrary to other justices, Stevens and Blackman considered the fundamental issue of the case to be "the freedom of physical restrictions." The majority opinion of the US Supreme Court held that the INS policy was constitutional because UACs could not be simply released on bond or on their own recognizance. The government's obligation was to provide adequate care and not release minors to unrelated adults.[37] Amanda V. Reis notes that "the lasting impact of the Reno decision was not the holding itself; instead, its lasting legacy was the *Flores* Agreement."[38]

Despite the fact that the final opinion of the US Supreme Court explained that the INS policy was correct and that the agency could detain minors instead of releasing them to unrelated adults, the standards of care in immigration custody were still called into question. Although existing regulations allowed temporarily placing UACs in facilities designed for other purposes in emergency situations or keeping them in immigration custody for weeks or even months, INS officials agreed that humanitarian concerns over children laid the basis for the agency's cooperation with activists that resulted in the signing of the *Flores* Settlement Agreement in 1997. Doris Meissner, then INS Commissioner, explained why her agency, which won the case in the US Supreme Court, decided to sign the FSA: "We have a responsibility to enforce the laws at the border. But for those who are especially vulnerable—young people and families—there are other measures that can be taken that, of course, enforce the law but are not so excessively harsh as to violate a principle so funda-

[35] *Reno v. Flores* (1993), No. 91–905, FindLaw, accessed December 19, 2022, https://bit.ly/2M5GMp6.

[36] Public Law 93-415, 93rd Congress, September 7, 1974, accessed December 19, 2022 https://bit.ly/3FHiaQU.

[37] Natalie Lakosil, "The Flores Settlement: Ripping Families Apart under the Law," *Golden Gate University Law Review* 48, no. 1 (2018): 31–62.

[38] Amanda V. Reis, "Codifying Flores: A Call to Congress to Protect Migrant Families from Deterrent Border Policies," *Roger Williams University Law Review* 7, no. 1 (2022): 140–58.

mental as young children being in detention for long periods of time."[39] The agreement established minimum standards for the treatment of minors in immigration detention. It required a "prompt" removal from immigration custody (but until 2015 the length of detention was not specified), allowed children to be released into the care of a qualified guardian, required that facilities, where minors were held, should be licensed to care for dependent children, and that juveniles should not be transported by the INS vehicles with detained adults. The FSA required immigration officials to provide minors with food and drinking water, medical assistance, adequate ventilation, and temperature control, access to toilets and sinks, and adequate supervision to protect minors from others.[40] Finally, the document restricted the time spent by UACs in Border Patrol facilities to seventy-two hours and allowed attorney-client visits in INS facilities. Parties signing FSA also agreed to its termination, five years from the date of the final court approval of this agreement or three years after the court determines that the INS is in substantial compliance with it.[41] The *Flores* Settlement Agreement was a milestone decision that prioritized humanitarian concerns, but it had a significant disadvantage: it was a court settlement, not a law. Although it had the force of the law until it was codified by Congress, any administration could decide how to implement that court decision. The FSA was not only criticized over whether the INS had fully implemented these regulations since its inception, but it was soon significantly challenged by changes in the George W. Bush administration.

NEW CENTURY, NEW CHALLENGES, OLD ISSUES

The last decades of the twentieth century boosted immigration advocates' hopes that the situation of minors detained by the INS could change. Since they were based on a temporary agreement reached in court and did not have a solid legislative base, the changes were believed to be uncertain and in effect made pro-immigration organizations more actively urge the Congress to act. After the 9/11 terrorist attacks, the Bush administration launched the War on Terror policy, supported by necessary pieces of legislation. What is important for the analysis of the evolution of detention policy of migrant minors was the fact that in the idea of the War on Terror, immigration policy was considered to be a national security issue. In parallel to the new policy and its goals, the US Congress enacted the Homeland Security Act in 2002. This piece of legislation introduced a reform of the federal

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[39] "Barbershop: Border Separations," NPR, June 16, 2018, https://n.pr/3Gpi8il.

[40] William A. Kandel, *Unaccompanied Alien Children: An Overview*, CRS 2017, no. R43599, accessed December 30, 2022, https://bit.ly/3vrTU0A.

[41] *US District Court Stipulated Settlement Agreement in Flores v. Reno (1997)*, American Immigration Lawyers Association (AILA), accessed December 29, 2022, https://bit.ly/2Ei7t9m.

administration that changed the structure and the scope of the responsibilities of its agencies. First, immigration issues were transferred from the Department of Justice to the newly created Department of Homeland Security (DHS). Second, the INS no longer existed and its responsibilities for the processing and treatment of minors detained by immigration officers were divided between DHS, the Department of Health and Human Services (HHS) Office of Refugee Resettlement (ORR). The duties of the DHS were limited to the detention, transfer, and repatriation of minors, while ORR officers were required to provide appropriate care for UACs in custody.[42] The dispersion of duties and responsibilities between several DHS agencies raised concerns that it would be more difficult to screen their work and monitor whether their actions comply with the standards introduced by the FSA.[43] Additionally, immigration policy after September 11, 2001, was based on tougher enforcement, more restrictive controls, and broader expedited removal of illegal aliens. For immigration advocates, this moment of transformation in federal agencies puts standards set by the FSA at risk of being neglected or forgotten. The ORR expressed its positive commitment to the legacy of the FSA and in 2003 formed the Unaccompanied Alien Children (UAC) Program, which incorporated the provisions of the *Flores* Agreement.[44] However, in 2006, the ICE ended the catch-and-release policy, explaining that it had proved to be inefficient and did not ensure individuals appeared for hearings. The ICE also declared that the change was inspired by concerns that human traffickers could start "renting" children in an attempt to pass the groups off as families. This decision meant that detained families had to wait for their court hearings in immigration facilities rather than being released into the community. The conditions in the facilities dedicated to the detention of migrant families did not comply with the FSA standards. At that time, there were two family detention centers in the United States, in Berks County, Pennsylvania, and the Don T. Hutto Residential Center (Hutto) in Texas. Hutto was opened in an abandoned correctional institution and was operated by a private for-profit company, the Corrections Corporation of America. A report presented by the American Civil Liberties Union described conditions that were offered to minors as 'prison-like', where children were forced to wear prison uniforms, were

[42] Homeland Security Act of 2002, PUBLIC LAW 107–296—NOV. 25, 2002 116 STAT. 2135, Department of Homeland Security, accessed December 30, 2022, https://bit.ly/2t4j9p7.

[43] The managing of immigration processes after the enactment of the Homeland Security Act of 2002 was transferred to many specialized units. Customs and Border Protection (CBP) became responsible for processing UACs arrested along the border, Immigration and Custom Enforcement (ICE) physically transports them from CBP detention facilities to ORR custody and is responsible for returning those who were ordered to be removed. The ORR is responsible for detention of migrant minors from noncontiguous countries and for juveniles from Mexico and Canada who may be victims of trafficking or have asylum claims pending. US Citizenship and Immigration Services (USCIS) is responsible for the initial adjudication of asylum applications filed by UACs. The Executive Office for Immigration Review (EOIR) (an agency in the Department of Justice) conducts immigration removal proceedings.

[44] Medina, "From Flores to Title 42: Unaccompanied Children in Detention."

offered limited or no educational opportunities, and were threatened with separation from their families.[45] In March 2007, immigration advocates decided to file a lawsuit and accused Hutto of violating the FSA.[46] In response, the government argued that the FSA applied only to unaccompanied migrant minors but the court did not share that opinion. In particular, US District Judge Sam Sparks agreed that the detention of non-criminal migrant minors in a secure facility did not violate the FSA because this document only set forth standards of care and encouraged the use of alternative detentions but did not forbid detention. However, the FSA provided that a minor may be held in a "secure facility" only if he or she "is chargeable" with a crime. A year after the ACLU sued the government, the *Hutto* Settlement Agreement was signed. It bolstered the significance of the standards introduced by the FSA by stressing that they applied to all children in INS and then DHS custody. Following the Agreement, the ICE announced reforms aimed at improving standards in facilities like that at Hutto, including external oversight, installing monitoring systems overseeing everyday operations, allowing minors over the age of twelve to move freely around the facility, installing privacy curtains around toilets, providing full-time on-site medical care, and improving educational opportunities or nutritional value of food.[47] Although the *Hutto* Settlement Agreement updated the FSA standards, it was criticized for its limited usage. Although the FSA addressed systemic problems regarding the detention of migrant minors, the Hutto Agreement applied only to children in the Hutto facility. It did not extend the same standards to the Berk facility or any other facilities that the ICE would use to detain families in the future. Finally, under the pressure of public opinion, the Obama administration requested the DHS to review its policy and no longer use the secure facilities to detain families.

Since 1997, when the *Flores* Settlement Agreement was signed, there have been many other cases decided by the courts that illustrated how immigration agencies had problems with the FSA standards (e.g., *Fabian v. Dunn*, *Walding v. United States*). In all these cases, the same class of violations repeated: humiliation, sexual, physical, or emotional abuse, and improper punishments. This situation has not changed, despite the fact that Congress partially codified the terms of the FSA. To secure the best interests of the child and address concerns that the Border Patrol did not adequately screen UACs for reasons they should not be returned at the border and sent back to their home countries, in 2008 Congress passed the William Wilber-

[45] "Case Summary in the ACLU's Challenge to the Hutto Detention Center," ACLU, accessed December 30, 2022, https://bit.ly/3vyArez.

[46] *Bunikyte, ex rel. Bunikiene v. Chertoff*, No. A-07-CA-164-SS, 2007 WL 1074070 (W.D. Tex. Apr. 9, 2007), ACLU, accessed December 30, 2022, https://bit.ly/3jEZ1HY.

[47] Walsh, "High Court Upholds I.N.S. Detention Of Suspected Illegal Alien Children"; Bill O. Hing, *American Presidents, Deportations, and Human Rights Violations: From Carter to Trump* (Cambridge: Cambridge University Press, 2018), 96–97.

force Trafficking Victims Protection Reauthorization Act (TVPRA).[48] This was the first success of advocates fighting for unaccompanied minors' rights since signing the FSA. At least some of the issues they had been calling for became codified. The Act directed federal agencies to implement policies ensuring that UACs would be safely repatriated to their native countries or places of their last habitual residence. Minors from contiguous countries (Mexico and Canada) were to be returned without additional penalties. Juveniles from other countries than Mexico and Canada and UACs from those countries apprehended away from the border were to be placed in HHS custody and subject to removal proceedings. What is important, the TVPRA required that migrant children from contiguous states be screened within forty-eight hours of being apprehended in order to determine whether they should be returned or placed in HHS custody and removal proceedings.[49]

The situation regarding the conditions in detention facilities became an issue in 2014 when there was significant growth in the number of UACs and family units being apprehended. Undocumented, unaccompanied migrant minors and family units entered the USA from Mexico but originated mostly from Central America.[50] Many of them lodged asylum claims and could not be placed in regular removal proceedings, as usually happened with families apprehended near the border. At that time, there was only one family detention center, which had limited capacity, and therefore the government opened three more. In particular, two of these (in Karnes City and Dilley in Texas) operate under the ICE Family Residential Standards. Despite the "suggestion" from Congress that the ICE should look for alternatives to the detention of families and UACs, DHS Secretary Jeh Johnson announced that due to the unprecedented influx of migrant families and UACs, they would be detained instead of releasing them into the community after issuing the Notice to Appear for an immigration court hearing.[51] The goal of the policy was to deter other migrants, but its implementation was immediately questioned in court. In February 2015, litigation regarding *Flores* Settlement was brought to the District Court of California. The plaintiffs in the *Flores v. Lynch* case alleged that the detention and release policy implemented in the new detention centers opened by the government violated the FSA standards. Defendants argued that the FSA regulations were only designed for UACs and announced that they would file a motion amending the Agreement. However, the District Court judge, Dolly M. Gee, did not agree with the argument

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[48] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, PUBLIC LAW 110–457—DEC. 23, 2008, 122 STAT. 5044, U.S. Government Information, accessed December 30, 2022, https://bit.ly/3Gb21Dw; Susan F. Martin, *A Nation of Immigrants* (Cambridge: Cambridge University Press, 2021), 342.

[49] *US District Court Stipulated Settlement Agreement in Flores v. Reno*.

[50] Laura Briggs, *Taking Children: A History of American Terror* (Oakland: University of California Press, 2021), 150.

[51] Julia Preston, "Detention Center Presented as Deterrent to Border Crossings," New York Times, December 14, 2014, https://nyti.ms/3Ck703C.

that the standards introduced in 1997 could not be applied to accompanied minors in immigration custody.[52] She also rejected the government's motion to modify the FSA. Judge Gee ordered defendants to make all possible efforts toward family reunification, detain class members in appropriate facilities, release class members without unnecessary delay, and release an accompanying parent when releasing a child (unless he or she is subject to mandatory detention or poses a safety risk). The court also held that compliance with detention conditions should be monitored and that the government should provide a class counsel with monthly statistical information.[53] The government appealed but found limited support for its arguments. The Ninth Circuit court upheld the District Court's opinion that "minors who arrive with their parents are as desirous of education and recreation, and as averse to strip searches, as those who come alone."[54] However, the Ninth District Court reversed the lower court judgement that the FSA also applied to parents accompanying minors. On the one hand, this decision strengthened the 1997 Agreement stressing that there is no difference between unaccompanied and accompanied minors and that all deserve the same standards of care. On the other, it weakened the release policy due to the narrow interpretation of the FSA, which in the court opinion did not provide for any rights to adults. Thus, despite the fact that a minor should be released as soon as possible into his or her parent's custody, it does not mean that the parent should experience preferential treatment in this situation and be released with a child.[55] Furthermore, the Ninth District Court stressed that the original litigation that ultimately led to the *Flores* Settlement Agreement dealt with releasing a minor into the custody of unrelated adults and that intent was clear enough to say that the lower court erroneously interpreted the document requiring the government to release the accompanying parent.[56] Furthermore, the Ninth District Court's judges noted that the parents were not plaintiffs in the *Flores* case nor members of the two certified classes and this is another reason why they cannot be afforded affirmative release rights.

In January 2017, Donald Trump was sworn into office and became the forty-fifth President of the United States. He held very restrictionist, anti-immigrant views that quickly resulted in multiple decisions targeting immigrants in a variety of aspects. The issue that aroused both domestic and international criticism was the policy of immigrant family separations and the standards of care for minors in immigration custody. In May 2017, President Trump announced that every parent crossing the border illegally would be prosecuted and if migrating with a child or children, they

[52] Helen T. Boursier, *Desperately Seeking Asylum: Testimonies of Trauma, Courage, and Love* (Lanham, Boulder, New York, London: Rowman & Littlefield, 2019), 59.

[53] *Flores v. Lynch*, 212 F. Supp. 3d 907 (C.D. Cal. 2015), 21.08.2015, Casetext, Smarter Legal Research, accessed January 6, 2023, https://bit.ly/3ItBDaQ.

[54] *Flores v. Lynch*.

[55] Reis, "Codifying Flores: A Call to Congress to Protect Migrant Families from Deterrent Border Policies," 44.

[56] *Flores v. Lynch*.

would be separated and minors would be processed as UACs. The effect of this policy was unfortunate. About 5,000 children were separated from their parents with no records that would allow the parents to reunite with their children. Public and international pressure to end the policy of family separations resulted in President Trump's decision to keep detained families together, but it soon transpired that the solution proposed by the President could conflict with the FSA regulations. Immigration courts were overloaded with cases and migrants were waiting weeks and often months for their hearings. This meant that children who stayed with detained parents would spend more time in detention than the FSA's regulation allowed. The federal courts' interpretation of the 1997 Agreement said that minors could not be detained for more than twenty days.[57] The Trump administration sought to modify this and filed a request in the federal district court to change the terms of the FSA, proposing a new standard that would allow minors to be held with their parents throughout the pendency of their immigration proceedings. That case, known as *Flores v. Sessions*, was decided by Judge Dolly M. Gee, who supported the FSA standards in the ruling in *Flores v. Lynch* (2015). On July 9, 2018, she issued an order denying the request to change FSA standards and commented on the government's action as "a cynical attempt . . . to shift responsibility to the judiciary for over 20 years of Congressional inaction and ill-considered executive action that have led to the current stalemate. . . . In summary, defendants have not shown that applying the *Flores* Agreement 'prospectively is no longer equitable,' or that 'manifest injustice' will result if the Agreement is not modified."[58] The government response, announced by the spokesman of the US Department of Justice, Devin O'Malley, shifted the responsibility for the prolonged detention of minors to their parents, as they are the ones who have to decide whether they want their children to be separated and then released to a sponsor or remain together in detention.[59]

Along with the growing number of immigrant families and UACs apprehended by Border Patrol, the problem of adhering to the FSA regulations increased. There was insufficient personnel nor the necessary infrastructure to process these cases on time. Although the government had some "flexibility to reasonably exceed the standard five-day requirement so long as the minor is placed with an authorized adult or in a non-secure licensed facility, in order of preference under Paragraph 14, 'as expeditiously as possible.' . . . especially if the brief extension of time will permit

[57] Laurie Collier Hillstrom, *Family Separation and the U.S.-Mexico Border Crisis* (Santa Barbara: ABC-CLIO, 2020), 43; Nancy Kassop, "Legal Challenges to Trump Administration Policies: The Risks of Executive Branch Lawmaking That Fails to 'Take Care,'" in *Presidential Leadership and the Trump Presidency: Executive Power and Democratic Government*, eds. Charles M. Lamb and Jacob R. Neiheisel (Cham: Springer, 2019), 68.

[58] *Flores v. Sessions*, No. 17-55208 (9th Cir. 2017), United States District Court, Central District of California, accessed January 4, 2023, https://politi.co/2L3zF0t.

[59] Andrew Hay, "Judge Rejects Trump Request for Long-Term Detention of Immigrant Children," Reuters, July 10, 2018, https://reut.rs/2KXfyEk.

the DHS to keep the family unit together,"[60] the situation at the border and in detention facilities seriously challenged these regulations designed for emergency issues. The media reported on overcrowded facilities called "influx shelters," created ad hoc when the standard network was at or near capacity. The *Flores* Settlement Agreement allowed such a solution to be used in an emergency, despite the fact that they were not licensed and did not fully meet the required standards. The ORR could only place minors in influx facilities who were thirteen–seventeen years old, had no known medical or behavioral issues, spoke English or Spanish, and were expected to be released to a sponsor within thirty days. Since 2019, the ORR has changed its policy and required influx facilities to meet at least the minimum standards of the FSA and to comply to the greatest extent possible with applicable state child welfare laws and regulations.[61] Despite their bad reputation, influx shelters were still used by immigration officials.

The Covid-19 pandemic significantly challenged the standards of care in immigration facilities. Due to health measures, the number of beds in already overcrowded facilities was reduced by half. Trump's new law, known as Title 42, announced in March 2021 to prevent the spread of Covid-19 not only limited essential travel but also suspended asylum processing for refugees and unaccompanied minors and expelled them immediately to the country of the last transit, usually Mexico.[62] The Mexican authorities sent them back to their home countries despite their expressed fears of torture and abuse upon their return. In some cases, desperate families decided to cross the US-Mexico border illegally, which most often resulted in their deaths. To protect minors, parents who were denied asylum often decided to self-separate from their children and made them cross the border alone. They hoped that minors, as UACs, would be released into sponsor's custody and granted asylum. However, the policy of immediate expulsion without proper asylum screening resulted in situations where children were not placed in ORR custody but were isolated in hotel rooms waiting for their removal.[63] The immigration advocates expressed alarm that this violated not only the FSA standards but also the regulations of the TVPRA. Once again, Judge Dolly M. Gee of the US District Court for the Central District of California was required to decide whether immigration officials were correct in claiming that the FSA did not preclude the detention of UACs in

[60] *Flores v. Sessions*.

[61] "'Influx' Facilities for Unaccompanied Immigrant Children: Why They Can Be Needed & How They Can Be Improved," Justice for Immigrants, accessed January 4, 2023, https://perma.cc/9RFH-YEL7.

[62] Jo-Anne Wilson-Keenan, *Children at the Border: An American Human Rights Crisis* (Jefferson: McFarland & Company, Inc., Publishers, 2021), 147; Denise Gilman, "Barricading the Border: COVID-19 and the Exclusion of Asylum Seekers at the U.S. Southern Border," in *Migration in the Time of COVID-19: Comparative Law and Policy Responses*, eds. Jaya Ramji-Nogales and Iris Goldner Lang (Lausanne: Frontiers Media SA, 2021), 54–56.

[63] Richard Vadasy, "The Trump Administration's War on the Flores Settlement Agreement Renewed Amid COVID-19 Pandemic," *Children Legal Rights Journal* 41, no. 11 (2021).

hotel rooms. In addition, the Covid-19 pandemic made it difficult to find places in ORR-licensed facilities and therefore they had to find alternative ways of detention that complied with the FSA.[64] The court ordered that the ICE and ORR must strictly follow the Covid-19 protocols to ensure sanitary conditions, social distancing, masking, and enhanced testing. It also ordered the ICE to transfer migrant children held in ICE Family Residential Centers (FRCs) to their families or sponsors by July 17, 2020. Before that date, the ICE appealed to the US Court of Appeals for the Ninth Circuit (on June 23, 2020). In *Flores v. Barr* (a complaint filed on March 26, 2020), immigration advocates argued that detaining UACs in hotels for a prolonged period of time violated their best interests and that unaccompanied minors should be excluded from Title 42 because immigration officials could not provide proper care for detained children.[65] The Ninth Circuit Court held that the district court appropriately interpreted it as consistent with both the INA and this court's prior interpretation of the Agreement.[66] In November 2020, another court's decision strengthened the FSA. In *P.J.E.S. v. Wolf*, when the plaintiff's attorneys sought to receive a preliminary injunction to halt the expulsion of children pursuant to Title 42, United States District Judge Emmet G. Sullivan agreed that the detention of children in hotel facilities violated the standards of care set forth in the FSA.[67]

CONCLUSIONS

Thanks to *Flores v. Barr* and *P.J.E.S. v. Wolf*, Trump's Title 42 no longer applies to unaccompanied minors but it does not solve the problem of the lack of comprehensive legislation securing the best interests of a child apprehended for illegally crossing the American border. The history of Flores litigations clearly proved that the document was weak, which is not surprising, since settlement agreements are generally not supposed to be long-term solutions. The FSA did not provide oversight that would prevent immigration officials from implementing the 'self-interpreting' policy of its standards. It resulted in lawsuits brought to the courts which confirmed that despite the critics of DHS' policy towards UACs, it did not violate their constitutional rights. The detention of minors was interpreted as 'legal custody' of an administrative and civil character, and the procedure should not be considered criminal, as the children were not placed in correctional institutions.

[64] Barrera, "How a 35-Year-Old Case of a Migrant Girl from El Salvador Still Fuels the Border Debate."

[65] *Flores v. Barr*, No. 17-56297 (9th Cir. 2019), Justia. US Law, accessed January 12, 2023, https://bit.ly/3XBpy7F.

[66] *Flores v. Barr*.

[67] *P.J.E.S. v. Wolf*, 502 F. Supp. 3d 492 (D.D.C. 2020), Casetext, Smarter Legal Research, accessed January 12, 2023, https://bit.ly/3Xw7VpZ.

Furthermore, the issue with the family separations policy showed that children's rights are not well protected and depend on the vagaries of a given presidential administration. As with immigration policy, the policy addressing children migrating without authorization is created on a day-to-day basis. Until recently, courts have been the most active part of this process. Congress remains idle despite the fact that the history of the Flores litigations clearly showed that the need for action is urgent. Codifying the provisions of the FSA would ensure the best interest of the child. Immigration advocates also note that such legislation should also address the United Nations Convention on the Rights of the Child, which the United States has yet to ratify, despite the fact that they are the only member of the UN not to have done so.

Since 1997, when the *Flores* Agreement was settled, the United States has come a long way in terms of the policy regarding the treatment of minors in immigration custody. Thanks to the court battles fought over recent decades, children in immigration custody are no longer treated as adults. The standards of detention have been established and require immigration officials to treat minors' detention as the last resort and to place those whose release is pending (or no release option is available) in the least restrictive setting. It is required that a stay at the border facilities does not exceed seventy-two hours and twenty days in federal detention. The government's obligations include following nutrition guidelines, providing appropriate educational services, full-time health care, or supplying toys and books.

Unfortunately, the Biden administration had to deal with the situation of the growing number of UACs apprehended at the US-Mexican border. His critics blamed that significant increase on his liberal stance on immigration and excluding unaccompanied minors from Title 42. In order to process cases of detained children more effectively, the Biden administration opened previously closed facilities and new temporary shelters. In particular, these new facilities raised concerns about the standard of care they offered to minors. They were often run by private contractors who hired personnel with very limited or no Spanish language skills and/or were not adequately trained to take care of children. Again, the FSA and its standards became an issue. It is worth noting that this situation will probably repeat until Congress proposes legislation addressing the problem in a comprehensive manner. Although its members debated the issue of increasing the number of UACs crossing the border without authorization on several occasions, so far no significant legislation proposal has been introduced. Immigration advocates remark that there is no political interest in challenging that situation due to the fact that UACs and their parents do not vote and thus do not represent a valuable electorate.

Summary: The United States of America has been one of the most popular destinations for migrants. American immigration policy has to face many challenges, and one of the most difficult is illegal immigration. This issue becomes even more complicated when there are

minors among unauthorized immigrants apprehended by Border Patrol. Current migration trends show that the number of detained migrant children, mainly from Central America, is growing constantly. Insecurity, poverty, violence, abuse, and gang activity are the main reasons that make them flee. The increasing number of minors, especially unaccompanied, apprehended by immigration officials revealed the weakness of the existing American immigration policy. Procedures, detention facilities, and immigration personnel were not adjusted as appropriate to secure the best interest of the child. The *Flores* Settlement Agreement (1997) was the first step taken on a bumpy road to introduce a set of regulations securing the rights of unauthorized migrant children. Despite critical voices condemning the policy of federal immigration agencies, Congress did not act, and little progress has been made to protect the rights of detained minors we owe courts. The judges consequently widened the interpretation of standards settled in the *Flores* Agreement and blocked attempts by executive power to narrow the meaning of the document. This paper explains the evolution of the rights of unaccompanied migrant minors and shows the role of courts in shaping immigration policy. The author concludes that no significant progress has been made, despite efforts by immigration advocates to change the situation for decades.

Keywords: unaccompanied minors, illegal immigration, the rights of a child, American immigration policy, detention facilities

BIBLIOGRAPHY

"Asylum Representation Rates Have Fallen Amid Rising Denial Rates." TRAC Syracuse University, November 28, 2017, https://bit.ly/3Npttkl.

Aguilera, Jasmine. "Body Cavity Searches, Indefinite Detention, and No Visitations Allowed: What Conditions Were Like for Migrant Kids Before the Flores Agreement." Time, August 21, 2019, https://bit.ly/2HmLzT0.

Amnesty International. "Key Facts about the Migrant and Refugee Caravans Making Their Way to the USA." November 16, 2018, https://bit.ly/3Nj9eot.

"Barbershop: Border Separations." NPR, June 16, 2018, https://n.pr/3Gpi8il.

Barrera, Jorge. "How a 35-Year-Old Case of a Migrant Girl from El Salvador Still Fuels the Border Debate." CBC Radio, June 28, 2019, https://bit.ly/2kTsj7E.

Boursier, Helen T. *Desperately Seeking Asylum: Testimonies of Trauma, Courage, and Love*. Lanham, Boulder, New York, London: Rowman & Littlefield, 2019.

Briggs, Laura. *Taking Children: A History of American Terror*. Oakland: University of California Press, 2021.

"Case Summary in the ACLU's Challenge to the Hutto Detention Center." ACLU, accessed December 30, 2022, https://bit.ly/3vyArez.

Clemens, Michael, and Kate Gough. "Child Migration from Central America." Center for Global Development, June 20, 2018, https://bit.ly/3FAr8B4.

Demata, Massimiliano. "'A Great and Beautiful Wall': Donald Trump's Populist Discourse on Immigration." *Journal of Language Aggression and Conflict* 5, no. 2 (2017): 274–94. https://doi.org/10.1075/jlac.5.2.06dem.

Gilman, Denise. "Barricading the Border: COVID-19 and the Exclusion of Asylum Seekers at the U.S. Southern Border." In *Migration in the Time of COVID-19: Comparative Law and Policy Responses*, edited by Jaya Ramji-Nogales and Iris Goldner Lang, 1–10. Lausanne: Frontiers Media SA, 2021.

Hay, Andrew. "Judge Rejects Trump Request for Long-Term Detention of Immigrant Children." Reuters, July 10, 2018, https://reut.rs/2KXfyEk.

Hillstrom, Laurie Collier. *Family Separation and the U.S.-Mexico Border Crisis*. Santa Barbara: ABC-CLIO, 2020.

Hing, Bill O. *American Presidents, Deportations, and Human Rights Violations: From Carter to Trump*. Cambridge: Cambridge University Press, 2018.

"The History Of The Flores Settlement And Its Effects On Immigration." NPR, June 22, 2018, https://n.pr/2ETRxvZ.

"'Influx' Facilities for Unaccompanied Immigrant Children: Why They Can Be Needed & How They Can Be Improved." Justice for Immigrants, accessed January 4, 2023, https://perma.cc/9RFH-YEL7.

Isaacs, Mark. "Migrant Caravan." *Journal of Paediatrics and Child Health* 55, no. 10 (2019): 1280–82. https://doi.org/10.1111/jpc.14589.

Kandel, William A. *Unaccompanied Alien Children: An Overview*. CRS 2017, no. R43599, accessed December 30, 2022, https://bit.ly/3vrTU0A.

Karoly, Richard A. "*Flores v. Meese*: INS' Blanket Detention of Minors Invalidated." *Golden Gate University Law Review* 22, no. 1 (1992): 183–97.

Kassop, Nancy. "Legal Challenges to Trump Administration Policies: The Risks of Executive Branch Lawmaking That Fails to 'Take Care.'" In *Presidential Leadership and the Trump Presidency: Executive Power and Democratic Government*, edited by Charles M. Lamb and Jacob R. Neiheisel, 41–90. Cham: Springer, 2019.

Lakosil, Natalie. "The Flores Settlement: Ripping Families Apart under the Law." *Golden Gate University Law Review* 48, no. 1 (2018): 31–62.

Lind, Dara. "The Migrant Caravan, Explained." Vox.com, October 25, 2018, https://bit.ly/2yz8jef.

Lopez, Rebeca M. "Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody." *Marquette Law Review* 95, no. 4 (2012): 1635–78.

Martin, Susan F. *A Nation of Immigrants*. Cambridge: Cambridge University Press, 2021.

McCluskey, Michael. "Profanity and the President: News Use of Trump's Shithole Comment." *Newspaper Research Journal* 40, no. 4 (2019): 415–30. https://doi.org/10.1177/0739532919855782.

McNamara, Robert H. *The Criminalization of Immigration: Truth, Lies, Tragedy, and Consequences*. Santa Barbara: ABC-CLIO, 2020.

Medina, Ennely, "From Flores to Title 42: Unaccompanied Children in Detention." *Harvard Human Rights Journal* 35 (2022): online journal, April 20, 2022, https://bit.ly/3WnVywm.

Pilkington, Ed. "Parents of 545 Children Still Not Found Three Years after Trump Separation Policy." The Guardian, October 21, 2020, https://bit.ly/3DmFVN2.

Platt, Tony. "Insecurity Syndrome. The Challenges of Trump's Carceral State." In *Crimmigrant Nations: Resurgent Nationalism and the Closing of Borders*, edited by Robert

Koulish and Maartje van der Woude, 33–49. Fordham: Fordham University Press, 2020.

Preston, Julia. "Detention Center Presented as Deterrent to Border Crossings." New York Times, December 14, 2014, https://nyti.ms/3Ck703C.

Reis, Amanda V. "Codifying Flores: A Call to Congress to Protect Migrant Families from Deterrent Border Policies." *Roger Williams University Law Review* 7, no. 1 (2022): 140–58.

Roldan, Riane, and Alana Rocha. "Migrant Children Are Still Being Separated from Parents, Data Shows." The Texas Tribune, July 12, 2019, https://bit.ly/2kyonJw.

Sepúlveda, J. J. Mulligan. *No Human Is Illegal: An Attorney on the Front Lines of the Immigration War*. New York: Melville House, 2019.

Terrio, Susan J. *Whose Child Am I?: Unaccompanied, Undocumented Children in U.S. Immigration Custody*. Oakland: University of California Press, 2015.

Vadasy, Richard. "The Trump Administration's War on the Flores Settlement Agreement Renewed Amid COVID-19 Pandemic." *Children Legal Rights Journal* 41, no. 11 (2021): 84–88.

Walsh, Mark. "High Court Upholds I.N.S. Detention Of Suspected Illegal Alien Children." EducationWeek, March 31, 1993, https://bit.ly/3v2A4c8.

Wilson-Keenan, Jo-Anne. *Children at the Border: An American Human Rights Crisis*. Jefferson: McFarland & Company, Inc., Publishers, 2021.

Acts of Law and Regulations

Fourth Amendment, Constitution Annotated, accessed November 22, 2022, https://bit.ly/3tf1JFQ.

Homeland Security Act of 2002, PUBLIC LAW 107–296—NOV. 25, 2002 116 STAT. 2135, Department of Homeland Security, accessed December 30, 2022, https://bit.ly/2t4j9p7.

Public Law 93-415, 93rd Congress, September 7, 1974, (online), accessed December 19, 2022, https://bit.ly/3FHiaQU.

William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, PUBLIC LAW 110–457—DEC. 23, 2008, 122 STAT. 5044, US Government Information, accessed December 30, 2022, https://bit.ly/3Gb21Dw.

Case Citations

Bell v. Wolfish, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979).

Bunikyte, ex rel. Bunikiene v. Chertoff, No. A-07-CA-164-SS, 2007 WL 1074070 (W.D. Tex. Apr. 9, 2007), ACLU, accessed December 30, 2022, https://bit.ly/3jEZ1HY.

Flores v. Barr, No. 17-56297 (9th Cir. 2019).

Flores v. Lynch, 212 F. Supp. 3d 907 (C.D. Cal. 2015).

Flores v. Lynch, No. 15-56434 (9th Cir. 2016).

Flores v. Meese, 681 F. Supp. 665 (C.D. Cal. 1988).

Flores by Galvez-Maldonado v. Meese, U.S. Court of Appeals for the Ninth Circuit – 942 F.2d 1352 (9th Cir. 1991).

Flores v. Sessions, No. 17-55208 (9th Cir. 2017).

Giles v. Ackerman, 746 F.2d 614 (9th Cir. 1984), cert. denied, 471 U.S. 1053, 105 S. Ct. 2114, 85 L. Ed. 2d 479 (1985).

Kirkpatrick v. City of Los Angeles, 803 F.2d 485, 489 (9th Cir. 1986).

Logan v. Shealy, 660 F.2d 1007 (4th Cir. 1981), cert. denied, 455 U.S. 942, 102 S. Ct. 1435, 71 L. Ed. 2d 653 (1982).

Mathews v. Diaz, 426 U.S. 67, 77, 96 S. Ct. 1883, 1890, 48 L. Ed. 2d 478 (1975).

Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1272 (7th Cir. 1983).

P.J.E.S. v. Wolf, 502 F. Supp. 3d 492 (D.D.C. 2020).

Plyler v. Doe, 457 U.S. 202, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982).

Reno v. Flores, 507 U.S. 292 (1993).

Stewart v. Lubbock County, Texas, 767 F.2d 153 (5th Cir. 1985), cert. denied, 475 U.S. 1066, 106 S. Ct. 1378, 89 L. Ed. 2d 604 (1986).

Terry v. Ohio, 392 U.S. 1, 18 n. 15, 88 S. Ct. 1868, 1878, n. 15, 20 L. Ed. 2d 889 (1968).

United States v. Handy, 788 F.2d 1419, 1420-21 (9th Cir. 1986).

US District Court Stipulated Settlement Agreement in Flores v. Reno (1997), American Immigration Lawyers Association (AILA), accessed December 29, 2022, https://bit.ly/2Ei7t9m.

Wong Wing v. United States, 163 U.S. 228, 238, 16 S. Ct. 977, 981, 41 L. Ed. 140 (1896).

Chapter 11

Student Loans, Politics, and the Crisis of Legal Education in the United States

Izabela Kraśnicka and Patryk Topolski***

INTRODUCTION

US law does not guarantee access to free higher education. As a result, anyone who aspires to pursue their studies beyond high school is aware that such a decision ordinarily involves a financial investment.[1]

American legal education is carried on the graduate level, future lawyers must first obtain a bachelor's degree (through college, usually in four-year, tuition-based programs), study hard and get satisfactory grades, pass the Law School Admission Test and only then enter the law school they are accepted by and, in many ways, can afford.

The costs of studying law in the United States are very high, and the better the school, the more expensive it becomes. In addition to tuition, students have to pay for a place in a dormitory on campus or rent an apartment and cover other living expenses (room and board). Annual tuition at top universities fluctuates even around $70,000. For example, in 2020/2021 Yale University the winner of the ranking of the top one hundred law schools valued annual tuition at $68,117. At the University of Pennsylvania, which is number six in the ranking, tuition was $68,130, and at Columbia University, ranked fourth—$74,995. At these schools, tuition is the same for all applicants. Other universities tempt their state residents with cheaper fees. For example, William and Mary Law School (thirty-fifth place in the ranking) charges tuition fees of $44,620 to

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[1] Options of free education are currently limited to tuition-free colleges. Brianna McGurran, "What Are Tuition-Free Colleges?", Forbes, September 30, 2022, https://www.forbes.com/advisor/student-loans/tuition-free-college/.

Izabela Kraśnick and Patryk Topolski, "Student Loans, Politics, and the Crisis of Legal Education in the United States." In *Enlightenment Traditions and the Legal and Political System of the United States of America*, edited by Michał Urbańczyk, Kamil Gaweł, and Fatma Mejri, 209–27. Poznań: Adam Mickiewicz University Press, 2024.
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out-of-state students and $35,000 to in-state residents, while Florida State University (forty-eighth place in the ranking) offers tuition at $30,334 and $25,834, respectively.[2]

On top of the cost of tuition, there is also the cost of living, the aforementioned room, and board, which means an additional minimum of several thousand dollars a year. As a point of reference, let's take the average annual earnings of American citizens, which in 2019 amounted to $51,916.[3]

These rates do not necessarily limit access to legal education solely to wealthy candidates, as the long-time tradition proves that taking student loans (in various forms, mostly deriving from federal funds) to cover education expenses is the most popular way to pursue a legal education career.

Throughout the United States, there is an ongoing, and in recent years particularly lively and heated, debate over the need to reform and strengthen the system of educating future lawyers. This necessity is dictated by the growing crisis in the legal education sector. First of all, college and then law school are extremely expensive, and the education gained no longer guarantees a properly paid job, or sometimes even any job at all, especially after the 2008 economic crisis.[4] It is worth adding that student loans do not qualify as grounds for bankruptcy for an individual, which also raises many controversies and legal problems.[5] The knowledge of having taken a student loan fundamentally affects the decisions made by young lawyers in the financial, personal, and professional spheres.[6]

In 2011, *The New York Times* declared that American legal education was in crisis, pointing to the economic downturn that had left graduates with loans and "bleak job prospects" that in turn led to lawsuits against law schools.[7]

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[2] "Best Law Schools 2022," US News and World Report, accessed December 22, 2022, https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings.

[3] "Measures Of Central Tendency For Wage Data," Social Security Administration, accessed December 22, 2022, https://www.ssa.gov/oact/cola/central.html.

[4] The debate is taking place in major US media outlets such as *The New York Times* and *The Washington Post*, as well as among the profession and faculty in a series of articles published in US legal periodicals. See "Legal Education Reform," *The New York Times*, November 26, 2011, Section A, 18, David Lat, "Law School Is Way Too Expensive. And Only the Federal Government Can Fix That," *The Washington Post*, April 8, 2015, A12, David Barnhizer, "Redesigning the American Law School," *Michigan State Law Review* 249 (2010): 250–310; Mary B. Beazley, "Finishing the Job of Legal Education Reform," *Wake Forest Law Review* 51, no. 101 (2016): 275–323.

[5] John A. E. Pottow, "The Nondischargeability of Student Loans in Personal Bankruptcy Proceedings: The Search for a Theory," *Canadian Business Law Journal* 44, no. 2 (2006); Preston Mueller, "The Non-Dischargeability of Private Student Loans: A Looming Financial Crisis," *Emory Bankruptcy Development Journal* 32, no. 1 (2015); John P. Hunt, "Help or Hardship?: Income-Driven Repayment in Student-Loan Bankruptcies," *Georgetown Law Journal* 106, no. 5 (2018).

[6] Recent surveys show, for example, that nearly half of young law students are postponing decisions to expand their families precisely because of this loan and just over half are giving up on buying their own home. American Bar Association, *ABA Profile of the Legal Profession 2020* (2020), 24, accessed December 22, 2022, https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf.

[7] "Legal Education Reform," The New York Times, November 26, 2011, https://www.nytimes.com/2011/11/26/opinion/legal-education-reform.html.

Over a decade later, it is hard to discern any optimistic scenario, and *The New York Times* declaration seems to constitute a relevant warning to applicants considering legal education or any higher education in general and to the politicians hearing the frustrated voices.

This chapter will provide an overview of the financing system of higher education in the United States, show the numbers concerning law student loans, together with the major problems associated with those numbers in practice, and point to the political aspects of addressing the problem, with a particular focus on the most recent solutions offered by the Biden administration. The aim of the chapter is to analyze the issue of law student debts and try to see whether and to what extent they influence the legal education crisis. Factual and legal state of affairs in the chapter is current as of December 30, 2022.

FINANCING HIGHER EDUCATION IN THE USA

The possibilities of financing higher education in the USA can be generally divided into three groups: (1) own/family funds, (2) grant programs/scholarships, and (3) student loans.

The first group covers situations where funds are provided by students themselves or are organized within the family, meaning that no outside resources are necessary.

The second group concerns a wide variety of options, depending on the state where the university is located, as well as on the scholarship programs that can be offered by the school, by the state, by private or public institutions and organizations, and in which the money granted does not have to be repaid.[8]

The third group is the key one for this chapter and refers to loans provided primarily by the federal government. Since the mid-1960s, over 90% of the total money loaned for education purposes has come from the federal government through the US Department of Education offering fixed-rate loan programs.[9]

The federal law basis for the loans is the 1965 Higher Education Act[10] (HEA) governing the administration of federal higher education programs, including the provision of financial assistance to students. Title IV covers Students Assistance and includes several loan programs, including the William D. Ford Federal Direct Loan Program (Direct Loan), which, according to the data, is the largest program, and several smaller ones, for example, Federal Family Education Loans or Perkins Loans, with

[8] Federal Student Aid website provides a search options for all kinds of scholarship programs, December 22, 2022, https://studentaid.gov/understand-aid/types/scholarships.

[9] US Department of Education, accessed December 22, 2022, https://www2.ed.gov/fund/grants-college.html?src=rn.

[10] Higher Education Act, Pub. L. 89–329.

the latter currently operating.[11] Direct Loan allows students and also their parents to borrow money directly from the Department of Education in various forms of loans.

It needs to be underlined that there are also very popular non-loan (and as a result, with no repayment obligation) support programs offered by the Department of Education. These are known as Pell Grants and are addressed to candidates who display exceptional financial need and have not gained a bachelor's, graduate, or professional degree.[12]

In addition to the federal loan options, the remaining borrowing possibilities consist of loans coming from private institutions and banks with various interest rate proposals.

The federal grant or loan option is chosen by the majority of students, including those from families that could never raise the required sum for higher education, but also from wealthier families deciding that a long-term loan is a better option. The consequences of those decisions are reflected in the long-term obligations to repay the money. In fact, famous American politicians, including lawyers, have publicly admitted to their struggles with paying off their student debts.[13]

The general rules of higher education financing apply also to financing legal education. As shown in the Introduction, an investment in becoming a lawyer is a serious one and requires a good planning strategy.

FINANCING LEGAL EDUCATION IN THE USA

According to the Law Insider Dictionary, legal education means education at an accredited law school and any bar review preparation courses for the state bar examination.[14] To become a practicing lawyer in the United States, a JD (doctor of jurisprudence) degree is required, followed by passing the bar exam. In most states, a JD degree must be obtained from an ABA-accredited law school. Such a requirement is obligatory for those seeking to take the bar exam in a particular state.[15] The bar exam is based on the knowledge acquired in the course of legal education provided

[11] Alexandra Hegji, Kyle D. Shohfi, and Rita R. Zota, *Federal Student Loan Debt Cancellation: Policy Considerations*, CRS Report 2022, no. R47196, 4.

[12] Federal Pell Grant Program, accessed December 22, 2022, https://www2.ed.gov/programs/fpg/index.html.

[13] Barack Obama, graduate of The Harvard Law School finished paying off his debt in his forties. See "Remarks by the President on College Affordability—Buffalo, NY," The White House, August 22, 2013, https://obamawhitehouse.archives.gov/the-press-office/2013/08/22/remarks-president-college-affordability-buffalo-ny.

[14] "Legal education," in *Law Insider Dictionary* (online), https://www.lawinsider.com/dictionary/legal-education.

[15] "Approval of Law Schools," American Bar Association, accessed December 22, 2022, https://www.americanbar.org/groups/legal_education/resources/frequently_asked_questions/.

by law schools, which is usually in the form of a three-year JD program consisting of a particular number of credits assigned to courses. Each credit costs a certain amount of money, which adds to the tuition costs.

Law students, as graduate students, continue their higher education at law school and seek ways to finance their studies, they usually choose the possibilities summarized below.

The first one is scholarships and grants. As indicated earlier, a scholarship or grant is an award that does not require repayment. It may be awarded based on need, merit, or both. Although most scholarships are conferred by individual law schools, some organizations may also have scholarships to offer. Among these are local bar associations, fraternities, sororities, and other social clubs, religious or business organizations, and the US Department of Veterans Affairs. The availability of scholarships and grants varies and is usually quite limited, but certainly worth researching. Law school admission and financial aid offices can provide information about the resources available. It has to be noted that many scholarships and grants are merit-based and may require a certain level of academic performance. Some schools award merit money shortly after admission, while others may require separate scholarship application forms, and others award need-based institutional aid. Several companies also offer tuition reimbursement benefits to their employees and to their employees' dependents.[16]

Another option that allows law students in the United States to cover the costs of starting or continuing their studies is federal loans deriving from the general federal programs based on HEA through the Direct Loan. For legal education, we can distinguish between Federal Direct Unsubsidized Loan and Federal Direct PLUS Loan for Graduate Students (Grad PLUS).[17]

According to Federal Direct Unsubsidized Loan, law students may borrow up to a total of $20,500 each year through the Federal Direct Unsubsidized Loan program from the US Department of Education. Information about the interest rate and fee structure for this loan is available at studentaid.gov. Interest starts accruing as "simple" interest (it is not compound interest while studying in law school) once the loan is disbursed. This loan has a six-month grace period before repayment begins. Flexible repayment plans exist, including options based on household income; payment relief (deferment or forbearance) is available when experiencing financial hardship during repayment, and refinancing is possible through the Federal Direct Consolidation Loan program. This loan also qualifies for inclusion in the Public Service Loan Forgiveness (PSLF) program.[18]

[16] Based on: Law School Admission Council, *Financial Aid for Law School: A Preliminary Guide* (2016), 4, accessed December 22, 2022, https://cas.nyu.edu/content/dam/nyu-as/casPrelaw/documents/financial-aid-brochure.pdf.

[17] The terms "subsidized" and "unsubsidized" refer to the terms of the loans, as all federal loans incur subsidy costs on the part of the federal government.

[18] Law School Admission Council, *Financial Aid for Law School: A Preliminary Guide*, 5.

Significantly different from the Federal Direct Unsubsidized Loan is the Federal Direct PLUS Loan for Graduate Students (Grad PLUS). The Graduate Federal PLUS Loan is a credit-based loan to assist students with the costs of higher education. Eligible graduate loan borrowers are those who are enrolled at least part-time (six credits) per semester in a graduate or professional degree program that leads to a master's, law, or medical degree. The credits must be accepted towards the degree program. The student must be a US citizen or permanent resident, must not have an outstanding balance from a prior period of enrollment, and must be making satisfactory academic progress per the school guidelines.[19]

Summing up, the two main types of federal student loans offered by the US Department of Education are Direct Loans and Direct PLUS Loans with the former offering limited amounts and the latter providing unlimited borrowing opportunities.[20] It is worth pointing out how taking a loan translates statistically into installment repayment by students

Table 1. Example of monthly repayment amounts for different borrowing totals over ten- and twenty-year terms at a 5% interest rate

Borrowing Total ($)	**Monthly Payment ($) (ten-year term)**	**Monthly Payment ($) (twenty-year term)**
10,000	106	66
20,000	212	132
30,000	318	198
40,000	424	264
50,000	530	330
60,000	636	396
70,000	742	462

Source: Data from Trustco Bank, *Federal Student Loans: Direct and PLUS Loans*. Accessed: December 22, 2022, https://www.trustcobank.com/pdf/Financial%20Literacy/Education%20Planning/Federal%20Student%20Loans%20Direct%20and%20PLUS%20Loans.pdf.

[19] Boston University Financial Assistance, accessed December 22, 2022, https://www.bu.edu/finaid/files/2021/05/plusrequest_grad.pdf.

[20] For dependent undergraduate students, the Direct Loan limits are $5,500 for freshmen (including up to $3,500 subsidized); $6,500 for sophomores (including up to $4,500 subsidized); and $7,500 for juniors and seniors (including up to $5,500 subsidized), with a maximum loan limit of $31,000. For independent undergraduate students and dependent students whose parents are unable to obtain a PLUS Loan, the Direct Loan limits are $9,500 for freshmen (including up to $3,500 subsidized); $10,500 for sophomores (including up to $4,500 subsidized); and $12,500 for juniors and seniors (including up to $5,500 subsidized), with a maximum loan limit of $57,500. For graduate students, the Direct Loan limits are $20,500 per year (or $40,500 for certain medical training), with a maximum loan limit of $138,500 (or $224,000 for certain medical training), including undergraduate borrowing. PLUS Loans have no dollar borrowing limits per year; graduate students and parents are able to borrow up to the full cost of attendance (minus other financial aid received).

Federal student loans offer deferment options, fixed interest rates, subsidization in some cases, and, in most cases, students will not be required to have a co-signer. These options available with federal student loans are intended to assist borrowers and prevent them from entering default on their loans. Private loans, on the other hand, do not provide many of these protections and are more expensive for borrowers.[21]

Often, private student loans have variable interest rates, require a co-signer, and do not offer forbearance or deferment options. These differences make federal loans the better option for most student borrowers. However, some students still require private loans to cover additional costs not covered by federal loans, grants, or scholarships, or choose private loans because they are uninformed of the risks.[22]

The options above are not exclusive ways to cover the costs of legal education. An example of another possibility to settle for financial assistance (at least to some extent) is The Federal Work-Study Program (FWS). The FWS is a federal needs-based financial aid program that provides funds for students to work within the school or outside of the school with a non-profit organization or government agency.[23] Many students work within the law school as research assistants, while other students work for outside non-profit organizations and government agencies.[24]

A recently established financial aid opportunity for law students in the United States is Veterans Educational Assistance. The US Department of Veterans Affairs administers several educational benefit programs for veterans. These include, but are not limited to, the Montgomery GI Bill and the Post-9/11 GI Bill (9/11 GI Bill). The 9/11 GI Bill assists eligible individuals with tuition and fees, a monthly housing allowance, an annual books and supplies stipend, and a one-time rural benefit payment for eligible individuals. In addition to the 9/11 GI Bill providing an education benefit for eligible veterans, the education benefit may also be transferred to dependents under certain conditions. The 9/11 GI Bill also has a provision that established the Yellow Ribbon Program. This program assists with funding tuition and fee expenses not covered by the 9/11 GI Bill. The benefits of this program are exclusively for eligible veterans.[25]

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[21] Wyndham Hubbard, "Understanding the Modern Private Student Loan," *Review of Baking & Financial Law* 37, no. 1 (2017): 20.

[22] "What Are the Different Ways to Pay For College or Graduate School?", Consumer Financial Protection Bureau, August 4, 2017, https://www.consumerfinance.gov/ask-cfpb/what-are-the-different-ways-to-pay-for-college-or-graduate-school-en-545/.

[23] Authorized under Title IV of the 2008 Higher Education Opportunity Act (HEOA), Public Law 110-315.

[24] An example of such a program is well described by the "Financial Aid. Federal Work Study Program," Temple University Beasley School of Law, accessed December 22, 2022, https://law.temple.edu/resources/financial-aid/work-study/.

[25] Law School Admission Council, *Financial Aid for Law School: A Preliminary Guide*, 5. For more information on veterans' educational assistance, check with the US Department of Veterans Affairs and the Offices of Veterans Affairs on the campuses of the law schools that students are applying to.

Even though the list of options is quite extensive, reality and statistics prove that the vast majority of law students (or students choosing different majors on both the undergraduate and graduate levels) apply for student loans from the federal government.[26]

IMPACT OF STUDENT LOANS ON LEGAL EDUCATION IN THE UNITED STATES

Research conducted by the American Bar Association between 2003 and 2020 reveals that the amount borrowed by many law students exceeds $80,000. It went on to point out that in the last ten years, the cost of living in the US has risen 28%, while the cost of tuition for public law schools has risen one hundred 34% (for residents) and 100% (for non-residents) and private law school tuition has increased 76%. The same research indicates that the average total debt of a law school graduate is around $145,000.[27] The survey showed that in 2020 more than 75% of respondents had at least $100,000 in student loans on graduating; over half had more than $150,000; more than one in four owes $200,000 or more; over 85% of our lawyers had more than $80,000 at graduation.[28] It is appalling that more than 90% of respondents came out of law school with at least $65,000 in student loan debt. Student loan debt is a barrier to entry into the profession that nearly every law school graduate is forced to deal with. The research conducted leads to several conclusions.

Firstly, all law school graduates are impacted by student loan debt, with few exceptions. As mentioned above, after completing their legal education only about 5% of students are not obligated to repay their student loans, which is due to the lack of need to finance their studies with them.

What is more, for many, their law school debt grows after graduation. Student debt in general is increasing as more students attend college. In the late 1980s and early 1990s, most high school students did not enroll in college or university; of those who did, less than half borrowed money to do so. By 2021, nearly two-thirds of recent high school graduates were enrolled in college, and most had taken out student loans.

[26] According to most recent statistics, about 92% of all student debt are federal student loans. Alicia Hahn and Jordan Traver, "2022 Student Loan Debt Statistics: Average Student Loan Debt," Forbes, September 19, 2022, https://www.forbes.com/advisor/student-loans/average-student-loan-statistics/.

[27] American Bar Association. Lifting the Burden: Law Student Debt as a Barrier to Public Service—The Final Report of the ABA Commission on Loan Repayment and Forgiveness (American Bar Association, 2021).

[28] Even accounting for inflation, $80,000 in 2003 would now be about $114,000. In short, a four conscious-shocking debt load for new attorneys in the early 2000s would be a windfall blessing for today's graduates.

The American Bar Association has also deduced the following from its research: student loans deeply impact the personal lives and the decisions taken by new lawyers; student loans force lawyers to take unwanted career paths; student loans take a disproportionate toll on lawyers of color; student loans negatively affect mental health; all law school graduates are impacted by student loan debt, with few exceptions; and student loans take a disproportionate toll on lawyers of color.[29]

Whether at public or private law schools, many students incur life-changing debt to attend. While borrowing averages provide information about the entire population, they do not aptly convey the challenges faced by individual students. Some have undergraduate debt, others take out private loans to cover expenses related to taking the bar exam. Further, a vast borrowing range that lurks beneath school-wide and nationwide averages obscures students who borrow more than $250,000. Salary outcomes differ by law school and geography, but most graduates who borrow will face some level of financial difficulty. The monthly payments are based on the resultant debt from the average amount borrowed across all law schools ($120,000), as well as the tenth and ninety percentile law schools ($77,000 and $153,000, respectively). Four incomes are based on the 55%+ of law schools that publicly disclose 2016 graduate salary incomes. Each is the median value of the respondent schools for the given statistic (twenty-fifth, fiftieth, seventy-fifth, mean). The fifth income is the very high-end of 2016 salary outcomes.[30]

According to the Average Law School Debt research carried out by the Education Data Initiative, the average debt among law school graduates is presented as follows in table 2.

Table 2. Average debt among law school graduates

Year	**Contemporary ($)**	**Adjusted for Inflation ($)**
2000	57,500	102,100
2004	82,100	132,000
2008	94,400	134,800
2012	140,400	183,900
2016	142,900	172,000
2020	160,000	182,700

Source: Data from "Average Law School Debt," Education Data Initiative, June 15, 2023, https://educationdata.org/average-law-school-debt.

[29] "Survey Reveals the Extent and Negative Effects of Law Student Debt, Recommends Solutions," American Bar Association, October 26, 2020, https://www.americanbar.org/news/abanews/aba-news-archives/2020/10/survey-reveals-the-extent-and-ill-effects-of-law-student-debt--r/.

[30] "Cost of Attendance," Law School Transparency, accessed December 22, 2022, https://www.lawschooltransparency.com/trends/costs/debt.

The research conducted by the Education Data Initiative yields the following findings:

– 45% of law school students begin their post-secondary education in debt,

– 41.9% of indebted law school graduates say they owe as much or more than they did at graduation,

– 39% of indebted lawyers have postponed or decided not to have children due to their law school debt,

– 26.7% of new lawyers decided to postpone marriage or remain unwed as a result of their debts, and 51.8% have put off purchasing property,

– 25.9% of indebted law school graduates choose a job that will give them a better chance of loan forgiveness than the job they actually wanted,

– 100% of law school graduates from Western New England University are in debt,

– Law school graduates from the University of Detroit Mercy are least likely to graduate in debt,

– Law school graduates from Southwestern Law School in Los Angeles borrow the most, at an average of $188,160 each,

– $46,010 is the lowest average debt among new lawyers, which is owned by 64% of graduates from Brigham Young University.[31]

In addition to the raw numbers, the voice of the students themselves who have taken advantage of the student loan option is important. In a survey conducted by the American Bar Association, we can find student statements that allow us to reflect on the statistics on the real life of young lawyers and legal education. Students comment on student loans and their impact on their lives as follows: "I am not able to help people who really need it because I have to focus on helping people who can pay the most. Those people typically are not the most deserving"; "Dramatically effects (sic) my everyday decisions in my career. I have NO flexibility in my career path because I am saddled with this debt"; "I chose a job in public interest because I wanted it but now have limited options for career advancement before the ten years is up"; "I chose and stayed in a job for years that was a bad environment and turned down a good job that didn't pay enough"; "I don't plan to leave my Big Law position until I am in a comfortable position with debt, homeownership, etc."; "I took a job in a totally different career to make $75,000 per year with benefits rather than earning $50,000 per year as an attorney with zero benefits"; "Though I want to do public service, I am open to other opportunities. But I have restricted my jobs to only public service jobs for loan forgiveness purposes."[32]

[31] "Average Law School Debt."

[32] American Bar Association—Young Lawyers Division, *2020 Law School Student Loan Debt*, accessed December 22, 2022, https://www.americanbar.org/content/dam/aba/administrative/young_lawyers/2020-student-loan-survey.pdf.

It is also important to look at the number of students in the United States, both those associated with legal education and those studying in other majors. According to College Enrollment & Student Demographic Statistics, the total number of students in the United States is shown in table 3.

Table 3. Historical student enrollment

Year	Undergraduate (in millions)	Graduate (in millions)	Total (in millions)
2010	18.1	2.9	21.0
2015	17.0	3.2	20.0
2016	16.9	2.9	19.8
2017	16.8	3.0	19.8
2018	16.6	3.0	19.6
2019	16.6	3.1	19.6
2020	15.9	3.1	19.0

Source: Data from "Collage Enrollment & Student Demographic Statistics," Education Data Initiative, accessed December 22, 2022, https://educationdata.org/college-enrollment-statistics.

Three main conclusions can be drawn from the above table. First, the number of undergraduate students declined from 2010 to 2020. Second, the number of graduate students from 2010 from 2010 to 2020 remained stable, with a noticeable slight increase. Third, the total number of students from 2010 to 2020 fell by about two million. The number of law students in the United States is shown in table 4.

Table 4. Number of laws first-year students and JD students

Year	First-Year Students	JD Students
2010	52,404	147,525
2011	47,556	145,265
2012	43,171	138,081
2013	39,678	127,626
2014	37,917	118,833
2015	37,104	114, 961
2016	37,105	111,095
2017	37,320	110,183
2018	38,391	111,620
2019	38,286	112,878

Source: Data from "Enrollment and Admission Standards," Law School Transparency, accessed December 22, 2022, https://www.lawschooltransparency.com/trends/enrollment/all.

As law schools were pressured to become more transparent about job outcomes beginning in 2010, the media and prospective law students took notice of inflated enrollment, inadequate job prospects, and high prices—and enrollment dropped. After 1L enrollment peaked in 2010 at 52,404 new students, enrollment fell dramatically in each of the next three years, which was then followed by four years of even lower, but steady, enrollment between 37,000 and 38,000 new 1Ls. Then, in 2018, following a modest increase in demand for law school, 1L enrollment increased by 2.7% (992 students). In 2019, 1L enrollment decreased by 108 students, or 3%.

Declining enrollment may provide advantages for prospective law students. Fewer applicants means it is easier to get into a more prestigious school. With law schools competing to attract qualified applicants, strong students have more generous scholarship offers. At graduation, lower enrollment means fewer graduates to compete with for entry-level jobs. For law schools, however, drastically lower enrollment spells financial trouble when they cannot quickly shed costs or raise revenue, whether through tuition increases, fundraising, or borrowing. A law school that faces an unplanned or unwanted drop in first-year enrollment will feel the financial effect for three (or four) years. When first-year enrollment falls in sequential years, those effects multiply. Today, overall JD enrollment has roughly stabilized at a level not seen in over forty years. Compared to the peak in JD enrollment in 2010 (147,525 students), overall JD enrollment was down 23.5% in 2019. To say the least, law schools are facing incredible financial pressure, especially as the average price paid declines.[33]

STUDENT LOANS AND CURRENT POLITICS

In March 2020, in the light of Covid-19 pandemic, President Trump announced a temporary suspension of all student loans as one of the anti-pandemic mechanisms through the Coronavirus Aid, Relief, and Economic Security Act[34] (CARES) passed by Congress. The law provided for temporary relief on federal student loans owned by the Department of Education through the suspension of loan payments, stopped collections on defaulted loans, and a 0% Interest rate. The extensions of the relief were further granted several times by executive orders of Presidents Trump and Biden.[35]

[33] Enrollment data come from the American Bar Association. All Non-JD totals were computed by the ABA. Total JD enrollment totals before 2011 were computed by the ABA, but the totals in 2011 or later were totaled by LST, which aggregates individual school JD enrollment as reported by the ABA. First-year enrollment totals before 2010 were computed by the ABA, but the totals in 2010 or later were totaled by LST, which aggregates individual school first-year enrollment as reported by the ABA.

[34] Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116–136.

[35] "How Did Provisions of the 2020 Coronavirus Aid, Relief, and Economic Security Act (CARES) Act Related to Student Loan Debt Affect BEA's Estimates of Personal Interest Payments?", Bureau of

Student loans became a highly regarded political topic, especially within the Democrat party, only in the 2020 presidential primaries as the problem grew and more people found themselves struggling to find money to invest in their children's higher education. Student debt concerns about 15% of the adult population in the United States, which is around 45 million people, equalling the same number of possible voters. The estimation shows a total of $1.6 trillion in student debts.[36]

All serious democratic candidates were raising the issue in their public debates: from Bernie Saunders calling for total forgiveness of all student debts and for free education, through Elizabeth Warren's promise to forgive debts up to $50,000, to the more moderate position of Joe Biden, who supported education in community colleges but was far from promising total forgiveness of the debts, instead leaning toward smaller sums in relief.[37]

As the presidential candidate, Joe Biden had to address the issue in his campaign. He kept extending the suspension of the loan payments granted in 2020 but eventually had to come up with a final solution. Three ideas brought by various institutions and organizations appeared on the table during campaign discussions: (1) to forgive student debts up to $10,000, (2) to forgive student debts up to $50,000, and (3) to eliminate the entire student debt in the country.[38]

In addition, the question of whether the debt should be forgiven for all or only those in a worse economic situation needed to be answered. The best way to do this would be for Congress to act again and decide (through the amendment of existing law or through a new act). However, in the solidly divided House of Representatives and Senate, there was no political consensus to pass the relevant law. Even Democrats were divided between those believing that only part of the debt should be forgiven and only under some circumstances, and those who argued for total and unconditional forgiveness.[39] President Biden had to act on his own, under pressure that his actions would be subject to legal claims, and that the cases would be taken to courts as presidential actions in violation of the law.

The final move came in August 2022, along with the latest extension of the pay-off relief. President Biden decided to act based on the Higher Education Relief

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Economic Analysis, US Department of Commerce, accessed December 22, 2022, https://www.bea.gov/help/faq/1407.

[36] Hegji, Shohfi, and Zota, *Federal Student Loan Debt Cancellation: Policy Considerations*, 1.

[37] "2020 presidential candidates on student loan debt," in *Ballotpedia—Encyclopedia for American Politics* (online), accessed December 22, 2022, https://ballotpedia.org/2020_presidential_candidates_on_student_loan_debt.

[38] Zack Freidman, "Student Loan Forgiveness of $50,000 Gets Renewed Push," Forbes, June 4, 2022, https://www.forbes.com/sites/zackfriedman/2022/06/04/student-loan-forgiveness-would-cancel-student-loans-for-this-many-borrowers/?sh=2cf559756588.

[39] Douglas N. Harris, "Democrats' high-wire act on student loan forgiveness," Brookings, September 20, 2022, https://www.brookings.edu/blog/brown-center-chalkboard/2022/09/20/democrats-high-wire-act-on-student-loan-forgiveness/.

Opportunities for Students Act[40] (HEROES) of 2003 granting the Education Department the power to “alleviate hardship” in a time of national emergency. The presidential three-part plan on student debt relief is based on actions that will provide up to $20,000 in debt cancellation to the recipients of Pell Grants with loans held by the Department of Education and up to $10,000 to all non-Pell Grant recipients. In addition, there is an income eligibility criterion set at a maximum of $125,000 ($250,000 for married couples).[41]

In other words, idea number one has been chosen, extended, and doubled for those with the most difficult financial situation who benefitted from the federal grant programs.

In addition, a new repayment plan is proposed by the Department of Education protecting low-income borrowers by cutting monthly payments in half for undergraduate loans. The President also announced a larger increase in Pell Grants and argued for future free education at community colleges.[42]

The decision on the forgiveness program sparked a heated debate with strong arguments against its content and projecting immediate court rulings suspending its application, especially in Republican states which argue that Biden does not have the power to decide on student loans (the 2003 law allowed to act only in national emergencies) and call it “illegal executive overreach.”[43]

Indeed, the lawsuits came through. In November 2022, a federal judge in Texas struck down the program in the case of a borrower who did not qualify for the full $20,000 in debt relief and another one who was not eligible at all. The lawsuit was based on the argumentation that the presidential order violated federal procedures by denying borrowers the opportunity to provide public comment before unveiling the forgiveness program.[44]

Even though the Department of Justice had filed the appeal, the Department of Education suspended acceptance of applications for the relief (with more than 26 million already filed).[45] The White House administration decided that the suspen-

[40] The Higher Education Relief Opportunities For Students (HEROES) Act, Pub. L. 108–76.

[41] “President Biden Announces Student Loan Relief for Borrowers Who Need It Most,” The White House Statement Release, August 24, 2022, https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/.

[42] “President Biden Announces Student Loan Relief for Borrowers Who Need It Most.”

[43] Jeff Stein and Danielle Douglas-Gabriel, “GOP States Sue Biden Administration to Overturn Student Debt Relief,” The Washington Post, September 29, 2022, https://www.washingtonpost.com/us-policy/2022/09/29/republicans-student-loan-forgiveness-lawsuit/.

[44] “No one can plausibly deny that it is either one of the largest delegations of legislative power to the executive branch, or one of the largest exercises of legislative power without congressional authority in the history of the United States,” argued Judge Mark Pittman of the Northern District of Texas in his legal opinion. See *Myra Brown, et al. v. U.S. Department of Education, et al.*, Order No. 4:22-cv-0908-P (November 10, 2022).

[45] Information on the Federal Student Aid website: https://studentaid.gov/.

sion of the payments would be extended beyond December 31, 2022, until the legal battles are resolved.[46]

Moreover, the Supreme Court of the United States, based on the Department of Justice's application to intervene in another case originating in Nebraska, granted certiorari and agreed to hear the arguments in expedited review already in February 2023 to decide if the lower courts' decisions withholding the presidential program will be upheld or not.[47]

CONCLUSIONS

What do the above numbers and political moves mean for the situation of law students and law graduates who borrowed federal money to pursue their plans to become lawyers?

In the United States, students can take advantage of the following financial support options for legal education: scholarships and grants, federal loans (Federal Direct Unsubsidized Loan and Federal Direct Plus Loan for Graduate Students), private loans, the Federal Work-Study Program and Veterans Educational Assistance. The most popular of these continues to be the student loan. Recent analysis shows the average debt of a law school graduate stands at around $145,000. Taking out such a loan involves not only the obligation to repay it, but, as the American Bar Association has pointed out, also several ailments in the form of deep impact on personal lives, taking unwanted career paths, a disproportionate toll on lawyers of color, and a negative effect on mental health.

As indicated by studies conducted in the United States and presented in the article, the number of student loans is increasing, with the size of the loan itself also increasing. The study also shows that the cost of a legal education is higher in larger cities such as Los Angeles, where the cost of a law degree stands at around $190,000 than in small cities, where the cost is around $60,000.

The political response from the White House to the overall crisis with student loans will be eventually evaluated by the judiciary. If the US Supreme Court (controlled by the Republican presidents' nominees) joins the arguments provided by lower courts opposing the presidential loan forgiveness program, repaying these debts will be suspended temporarily, and then either a new program will be announced or no forgiveness policy will enter the scene until Congress is ready to act and pass relevant laws through bipartisan agreement. Law school students and

[46] Stacy Cowley and Zolan Kanno-Youngs, "White House Extends Pause on Student Loan Payments," The New York Times, November 22, 2022, https://www.nytimes.com/2022/11/22/business/white-house-student-loan-payments.html.

[47] *Biden, President of U.S., et al. v. Nebraska, et al.*, 22-506 (22A444), December 1, 2022.

graduates burdened with loans will have slim chances of seeing the new program contain forgiveness scopes applicable to the highest amounts.

Even in the less likely scenario, when the US Supreme Court rejects the arguments and provides a "green light" for the Biden program, then the limits of relief included there remain well below the numbers of the law school costs, as was proved in this chapter, and hardly any of the students and graduates will be eligible to apply and reduce the debt.

With all of the above, can we talk about a crisis in legal education and blame it exclusively on students' use of student loans? The answer is: yes, we can observe the crisis in legal education, but it is linked only partly to the financial disadvantages. Student loans are crucial but are only one of the elements that affect the decline in the overall number of students in the United States, as well as the decline in law students. Other factors, such as prospects on the job market, societal attitudes towards the legal profession, and overall satisfaction with one's own work must be considered when presenting the current picture of law education.

Summary: Higher education in the United States is not guaranteed for free. Legal education in the United States is expensive and requires future lawyers a serious financial investment—usually deriving from a loan program. This chapter will provide an overview of the financing system of higher education in the United States, show the numbers concerning law student loans together with major problems associated with those numbers in practice, and point to the political aspects addressing the problem, with particular focus on the most recent solutions offered by the Biden administration. The chapter aims to analyze the issue of law student debts and try to see if and to what extent they influence the legal education crisis.

Keywords: American law, student loans, legal education

BIBLIOGRAPHY

"2020 presidential candidates on student loan debt." In *Ballotpedia—Encyclopedia for American Politics* (online). Accessed December 22, 2022, https://ballotpedia.org/2020_presidential_candidates_on_student_loan_debt.

American Bar Association. *ABA Profile of the Legal Profession 2020*. 2020. Accessed December 22, 2022, https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf.

American Bar Association. *Lifting the Burden: Law Student Debt as a Barrier to Public Service—The Final Report of the ABA Commission on Loan Repayment and Forgiveness*. American Bar Association, 2021.

American Bar Association—Young Lawyers Division. *2020 Law School Student Loan Debt*. Accessed December 22, 2022, https://www.americanbar.org/content/dam/aba/administrative/young_lawyers/2020-student-loan-survey.pdf.

"Approval of Law Schools." American Bar Association. Accessed December 22, 2022, https://www.americanbar.org/groups/legal_education/resources/frequently_asked_questions/.

"Average Law School Debt." Education Data Initiative, June 15, 2023, https://educationdata.org/average-law-school-debt.

Barnhizer, David. "Redesigning the American Law School." *Michigan State Law Review* 249 (2010): 250–310.

Beazley, Mary B. "Finishing the Job of Legal Education Reform." *Wake Forest Law Review* 51, no. 101 (2016): 275–323.

"Best Law Schools 2022." US News and World Report. Accessed December 22, 2022, https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings.

"Collage Enrollment & Student Demographic Statistics." Education Data Initiative. Accessed December 22, 2022, https://educationdata.org/college-enrollment-statistics.

"Cost of Attendance." Law School Transparency. Accessed December 22, 2022, https://www.lawschooltransparency.com/trends/costs/debt.

Cowley Stacy, and Zolan Kanno-Youngs. "White House Extends Pause on Student Loan Payments." The New York Times, November 22, 2022, https://www.nytimes.com/2022/11/22/business/white-house-student-loan-payments.html.

"Enrollment and Admission Standards." Law School Transparency. Accessed December 22, 2022, https://www.lawschooltransparency.com/trends/enrollment/all.

"Financial Aid. Federal Work-Study Program." Temple University Beasley School of Law. Accessed December 22, 2022, https://law.temple.edu/resources/financial-aid/work-study/.

Freidman, Zack. "Student Loan Forgiveness of $50.000 Gets Renewed Push." Forbes, June 4, 2022, https://www.forbes.com/sites/zackfriedman/2022/06/04/student-loan-forgiveness-would-cancel-student-loans-for-this-many-borrowers/?sh=2cf559756588.

Hahn, Alicia, and Jordan Traver. "2022 Student Loan Debt Statistics: Average Student Loan Debt." Forbes, September 19, 2022, https://www.forbes.com/advisor/student-loans/average-student-loan-statistics/.

Harris, Douglas N. "Democrats' high-wire act on student loan forgiveness." Brookings, September 20, 2022, https://www.brookings.edu/blog/brown-center-chalkboard/2022/09/20/democrats-high-wire-act-on-student-loan-forgiveness/.

Hegji, Alexandra, Kyle D. Shohfi, and Rita R. Zota. *Federal Student Loan Debt Cancellation: Policy Considerations*. CRS Report 2022, no. R47196.

"How Did Provisions of the 2020 Coronavirus Aid, Relief, and Economic Security Act (CARES) Act Related to Student Loan Debt Affect BEA's Estimates of Personal Interest Payments?". Bureau of Economic Analysis, US Department of Commerce. Accessed December 22, 2022, https://www.bea.gov/help/faq/1407.

Hubbard, Wyndham. "Understanding the Modern Private Student Loan." *Review of Baking & Financial Law* 37, no. 1 (2017): 18–34.

Hunt, John P. "Help or Hardship?: Income-Driven Repayment in Student-Loan Bankruptcies." *Georgetown Law Journal* 106, no. 5 (2018): 1287–351.

Lat, David. "Law School Is Way Too Expensive. And Only the Federal Government Can Fix That." *The Washington Post*, April 8, 2015.

Law School Admission Council. *Financial Aid for Law School: A Preliminary Guide* (2016). Accessed December 22, 2022, https://cas.nyu.edu/content/dam/nyu-as/casPrelaw/documents/financial-aid-brochure.pdf.

"Legal Education Reform." *The New York Times*, November 26, 2011.

"Legal education." In *Law Insider Dictionary* (online). Accessed December 22, 2022, https://www.lawinsider.com/dictionary/legal-education.

McGurran, Brianna. "What Are Tuition-Free Colleges?". Forbes, September 30, 2022, https://www.forbes.com/advisor/student-loans/tuition-free-college/.

"Measures Of Central Tendency For Wage Data." Social Security Administration. Accessed December 22, 2022, https://www.ssa.gov/oact/cola/central.html.

Mueller, Preston. "The Non-Dischargeability of Private Student Loans: A Looming Financial Crisis." *Emory Bankruptcy Development Journal* 32, no. 1 (2015): 229–64.

Pottow, John A. E. "The Nondischargeability of Student Loans in Personal Bankruptcy Proceedings: The Search for a Theory." *Canadian Business Law Journal* 44, no. 2 (2006): 245–78.

"President Biden Announces Student Loan Relief for Borrowers Who Need It Most." The White House Statement Release, August 24, 2022, https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/.

"Remarks by the President on College Affordability—Buffalo, NY." The White House, August 22, 2013, https://obamawhitehouse.archives.gov/the-press-office/2013/08/22/remarks-president-college-affordability-buffalo-ny.

Stein, Jeff, and Danielle Douglas-Gabriel. "GOP States Sue Biden Administration to Overturn Student Debt Relief." The Washington Post, September 29, 2022, https://www.washingtonpost.com/us-policy/2022/09/29/republicans-student-loan-forgiveness-lawsuit/.

"Survey Reveals the Extent and Negative Effects of Law Student Debt, Recommends Solutions." American Bar Association, October 26, 2020, https://www.americanbar.org/news/abanews/aba-news-archives/2020/10/survey-reveals-the-extent-and-ill-effects-of-law-student-debt--r/.

Trustco Bank. *Federal Student Loans: Direct and PLUS Loans*. Accessed December 22, 2022, https://www.trustcobank.com/pdf/Financial%20Literacy/Education%20Planning/Federal%20Student%20Loans%20Direct%20and%20PLUS%20Loans.pdf.

"What Are the Different Ways to Pay For College or Graduate School?". Consumer Financial Protection Bureau, August 4, 2017, https://www.consumerfinance.gov/ask-cfpb/what-are-the-different-ways-to-pay-for-college-or-graduate-school-en-545/.

Acts of Laws and Regulations

Coronavirus Aid, Relief, and Economic Security Act, Public Law, 116–136.

The Higher Education Opportunity Act, Public Law, 110–315.

The Higher Education Relief Opportunities For Students (HEROES) Act, Public Law, 108–76.

Case Citations

Biden, President of U.S., et al. v. Nebraska, et al., 22-506 (22A444), December 1, 2022.

Brown M., et al. v. U.S. Department of Education, et al., Order No. 4:22-cv-0908-P (November 10, 2022).

Websites

Boston University Financial Assistance. Accessed December 22, 2022, https://www.bu.edu/finaid/files/2021/05/plusrequest_grad.pdf.
Federal Pell Grant Program. Accessed December 22, 2022, https://www2.ed.gov/programs/fpg/index.html.
Federal Student Aid. Accessed December 22, 2022, https://studentaid.gov/understand-aid/types/scholarships.
US Department of Education. Accessed December 22, 2022, https://www2.ed.gov/fund/grants-college.html?src=rn.

Chapter 12

A Few Musings on the *Dobbs v. Jackson Women's Health Organization* Case

*Anna Demenko**

INTRODUCTION

According to the statistics available online, the US Supreme Court delivers an average of seventy-five rulings per year.[1] Rarely do its adjudications make the headlines in American newspapers, news outlets, or social networks. Even less frequently do they capture the attention of European media and their audience. However, against this backdrop, the judgment in *Dobbs v. Jackson Women's Health Organization*, issued on June 24, 2022, achieved significant global recognition, especially within the Euro-Atlantic sphere.[2] The case concerned abortion and its admissibility under the US Constitution. Ultimately, the Supreme Court overruled previous precedents set in *Jane Roe et al. v. Henry Wade*[3] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[4] holding that the US Constitution does not guarantee the right to terminate pregnancy. This ruling will undoubtedly provide rich material for numerous analyses and studies, focusing not only on the right to abortion alone but also—or perhaps above all—on the limits of judicial activism. This paper briefly outlines the arguments presented in the reasoning to the aforementioned rulings

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[1] "Number of Cases Decided by the Supreme Court of the United States from 2010 to 2023, by Term," Statista, accessed February, 25, 2024, https://www.statista.com/statistics/1326129/number-supreme-court-cases-decided-term-us/.

[2] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. (2022), hereinafter as *Dobbs*.

[3] *Roe v. Wade*, 410 U.S. 113 (1973), hereinafter as *Roe*.

[4] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), hereinafter as *Casey*.

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and offers certain reflections arising in the context of the Polish reader, specifically with regard to the legitimacy of the adjudication in *Dobbs*, the various methods of interpretation adopted by the Supreme Court and the ruling of the Polish Constitutional Tribunal of October 22, 2020.[5]

FROM *ROE* TO *DOBBS*—THE COURT'S ARGUMENTATION

In *Roe*, the Supreme Court found that state abortion laws that prohibited abortion at any stage of pregnancy on pain of criminal liability, except when the woman's life was at risk, violate the so-called due process clause of the Fourteenth Amendment to the Constitution. According to the latter, "nor shall any State deprive any person of life, liberty, or property, without due process of law." In essence, the ruling recognized that, within the scope of this provision, the concept of "liberty" encompasses the right to privacy, which, in turn, includes the right to decide whether to terminate pregnancy. Drawing upon the history of abortion laws, the majority opinion authored by Justice Blackmun asserted that restrictive criminal abortion laws are 'of relatively recent vintage'. In common and statutory law, distinctions were made between pre-quickening and post-quickening abortions, and at the time of the Constitution's adoption and throughout much of the nineteenth century, abortion was treated more leniently than in the prevailing state laws at the time of the ruling. It emphasized that in previous case law, the right to privacy had been derived from various constitutional provisions, Amendments: First, Fifth, Ninth, and Fourteenth, in particular. Building on precedents that, based on the right to privacy, granted protection to decisions relating to marriage, procreation, contraception, family relations, or children's education, it was recognized that only personal rights deemed "fundamental" or "implicit in the concept of ordered liberty," are included in the guarantee of personal privacy. Subsequently, it was affirmed that the right to privacy is expansive enough to encompass a woman's decision on whether or not to terminate her pregnancy. Since depriving her of the ability to make such a decision could significantly impact her physical and psychological well-being, particularly by inducing the stress of giving birth to an unwanted offspring. However, it was noted that the right to decide on abortion is not absolute and may face restrictions. As it is a fundamental right, the interest of the state has to be compelling in order to prevail. After considering the rationales behind the criminalization of abortion, the various phases of fetal development, and the mortality statistics in pregnant women, the court found that compelling interest in protecting the health and life of the

[5] Judgment of the Constitutional Tribunal of the Republic of Poland of October 22, 2020, K 1/20, OTK-A 2021, no. 1.

woman arises following the first trimester. At the point of viability—indicating the fetus' ability to survive outside the mother's body—the State's compelling interest shifts toward protecting potential life, thereby justifying a potential ban on abortion.

The second precedent overruled by *Dobbs* was the ruling issued in *Casey*, in which, among other things, the obligation of the pregnant woman to give formal consent—preceded by an adequate consultation she was to receive at least twenty-four hours prior to the procedure—was found to be constitutional. While the case reaffirmed and, in principle, upheld the essential premises adopted in *Roe*, this affirmation was less a reflection of the justices' personal belief in its correctness and more a result of the binding principle of *stare decisis*[6] and the imperative to preserve the integrity and credibility of the Supreme Court as an institution.[7] According to the Court, the prerequisites for overruling a precedent were not met.[8] The Court emphasized that post-*Roe*, individuals had organized their intimate lives and made choices that shaped their views of their roles in society by relying on the availability of abortion. Therefore, even though proscribing abortion directly would not violate 'reliance interests,' a change in the legal status quo was inadmissible. The Court argued that even if the *Roe* ruling was erroneous, the consequences of that error were deemed less severe than if women were deprived of the right to decide whether to continue a pregnancy and give birth. Considering the prevalent socio-political situation in the US, the Court believed that deviating from the assertions made in *Roe* could be perceived as yielding to political pressure. This, in turn, would undermine the tenet of judicial independence and erode public trust in the judiciary. Addressing the substance of the argument advanced in *Roe*, the Court reaffirmed that the due process clause in the Fourteenth Amendment protects against state interference in all those fundamental rights inherent in the notion of "liberty," which broadly speaking, includes freedom from all substantial arbitrary impositions and purposeless restraints. Invoking the case law referred to in *Roe* and the role of history and tradition in determining the balance between liberty and state interest, it was concluded that termination of pregnancy was highly a controversial issue and that it was not the state's prerogative to deny women the right to choose. However, in approving

[6] According to the principle of *stare decisis*, decisions of higher courts are binding on lower courts in all similar cases, while a change of ruling at the same level must be justified by a valid and compelling reasons; thus Diana Pustuła, "Znaczenie doktryny stare decisis dla sądowej kontroli konstytucyjności prawa USA—między stabilnością orzecznictwa a instrumentalizmem," *Przegląd Prawa Konstytucyjnego* 49, no. 3 (2019), 80.

[7] Here, one cannot fail to note that the judges who drafted the principal opinion asserted no need to elaborate on how they would have weighed the interests of the State if they had ruled in Roe and whether they would have reached the same conclusions, as that was not the subject of their deliberations.

[8] Moreover, the Supreme Court observed that the jurisprudential line may be legitimately altered if: (1) the ruling has proved unworkable, (2) a change in legislation has caused the ruling to be perceived as anachronistic or (3) the state of fact which provided grounds for the holding has changed and, simultaneously, and (4) a potential change would not have a major impact on such interests of individuals to which the precedent has contributed.

the ruling in *Webster v. Reproductive Health Services*[9] the Supreme Court rejected the trimester paradigm and replaced it with the category of so-called undue burden. Legal constraints on the right to terminate pregnancy shall be found invalid if their purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability.

In *Dobbs*, a Mississippi state law that prohibited abortion after fifteen weeks of pregnancy, except in a medical emergency or in the case of a severe fetal abnormality, was declared constitutional by a vote of six to three. At the same time, it was held that the rulings in *Roe* and *Casey* should be overruled in their entirety because the constitutional guarantees do not extend to the right to terminate pregnancy. A reversal of the precedents and departure from the principle of stare decisis was expounded in the majority opinion written by Justice Alito, which in the first place argued that *Roe* was egregiously wrong. The ruling inaccurately assessed the historical background; it imposed a certain viewpoint on a proportion of the public without regard for democratic procedures; it failed to identify relevant legal grounds and instances of using the criterion of viability, which was informed solely by medical advances and the specific situation of the woman concerned, whether in the constitutional provisions, the history of abortion law or in precedents. Moreover, the criterion of undue burden introduced in *Casey* was deemed too general and subjective, which made it unworkable and difficult to apply uniformly. The Court did not share the view formulated in *Casey*, namely that change in jurisprudence violates reliance interests since abortion as such is always unplanned and the possible impact of the right to abortion on the public and women's lives is an empirical question that is hard for a court to assess. In the deliberations concerning the termination of pregnancy itself, it was particularly emphasized that the Constitution makes no express reference to a right to obtain abortion, nor can such right be inferred indirectly from any of its provisions, in particular, the due process clause. As regards previous precedents, it was noted that the Constitution protects rights that are not expressly stated there only if they are rooted in the Nation's history and tradition and are an essential component of "ordered liberty."[10] The Court asserted that having been developed and established in the doctrine, such criteria should guide the interpretation in order to prevent subjective determinations based on the notions espoused by individual members of the bench as to how a given liberty should be construed. Extensive historical analysis prompted the Supreme Court to reach a somewhat different conclusion than in *Roe*. It was observed that although both common law and American colonial statutes differed on the severity of punishment for abortions committed at different points in pregnancy, it was not an endorsed practice. It is likely that the distinction between pre- and post-quickening

[9] *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

[10] Interestingly, such "conservative" criteria (see below) were, in fact, employed by the liberal-leaning Justice R. B. Ginsburg in the majority opinion she formulated in *Timbs v. Indiana*, 586 U.S. (2019).

arose from the impossibility of detecting early-stage pregnancy and was therefore abandoned in the nineteenth century. At the time when the Court ruled in *Roe*, as a general rule abortion at all stages was prohibited in thirty states. Hence, the right to abortion cannot be regarded as deeply rooted in tradition and history. Neither does the historically based notion of ordered liberty prevent the people's elected representatives from deciding how abortion should be regulated. In *Roe*, the Court struck a particular balance between the interests of a woman who wants an abortion and the interests of "potential life," but the people of the various States may evaluate those interests differently. Regarding the precedents that define the notion of liberty, it was demonstrated that the right to abortion cannot be compared with the right to contraception or the decision to marry a person of one's choice, as they involve distinct situations, in which the fundamental element of destroying a potential life is lacking.

Assuming that no limitations arise from the Constitution, the Supreme Court left the issue to the democratic legislative process, in which women can and should seek appropriate guarantees. In doing so, however, it maintained that any legislation governing abortion, just like any other healthcare legislation, is entitled to a "strong presumption of validity" and should be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests.[11]

Three justices presented dissenting opinions, focusing primarily on the potential legal and factual ramifications of the judgment. Their central concern was that any future restrictions on the right to abortion might be deemed reasonable, leading to women being deprived of the ability to terminate pregnancies, even in cases of rape or medical conditions. Additionally, they expressed worries that certain states could enforce restrictions on 'abortion tourism,' preventing individuals from traveling to have terminations performed elsewhere. Moreover, the judgment might jeopardize other rights previously acknowledged by the Supreme Court as constitutionally protected, including the right to same-sex unions.

ROE V. DOBBS—WHICH IS MORE COMPELLING?

In an overall evaluation of the rationales behind the mentioned rulings, it is crucial to emphasize that the Supreme Court's role in cases like *Roe*, *Casey*, or *Dobbs* was to ascertain the constitutionality of specific state laws. Its responsibility was not to prescribe the correct resolution of an issue but to discern how it should be

[11] Specific examples of such interests were, in fact, enumerated, including respect for and preservation of prenatal life at all stages of development, the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fatal pain; and the prevention of discrimination on the basis of race, sex, or disability.

resolved in accordance with the Constitution, meaning its text and the associated body of case law. While the assertion made by abortion advocates, stating that the Constitution 'must protect a woman's decision whether or not to terminate her pregnancy,' may have merit, it is not synonymous with the assertion of what the Constitution actually safeguards. Therefore, it was imperative to establish the guarantees that do arise from the Constitution, not those that should. Otherwise, any amendment to the Constitution would be superfluous, as it would always be possible to broaden its scope to encompass specific conduct deemed expedient at the time.

Therefore, upon closer examination, one might not fully agree with the supporters of the *Roe* ruling.[12] Firstly, the Supreme Court allocated relatively little attention in this case to the doctrinal analysis of the Constitution, specific statutes, and earlier precedents. The pivotal assertion that the Constitution protects the right to privacy, encompassing a woman's decision whether to terminate pregnancy, is based only on a brief analysis, with the substantial part contained in a footnote and an acknowledgment of the self-evident nature of the non-absoluteness of this right. Moreover, the newly introduced trimester paradigm lacks explicit links to normative provisions or precedents and seems to be a creative attempt by the Court to address a perceived need, seeking regulation in the absence of pertinent guidelines. Rather than delving into legal texts, the Court predominantly engaged in historical, contextual, and purposive deliberations, with the interpretation primarily focused on the consequences of adopting a particular solution.

Similar reservations can be raised about the dissenting opinion in *Dobbs*, where the judges also prioritize the foreseeable consequences of the ruling. Some of the judges' concerns may be well-founded, as the danger they anticipated is becoming a reality in many states that enact highly restrictive abortion statutes.[13] These statutes may ultimately be declared unconstitutional, but they remain in force, impacting the lives of many women pending review. Justice Thomas' literal reading of the Fourteenth Amendment, confining its application to procedural rather than substantive rights, also adds legitimacy to concerns about the prospective jurisprudence related to substantive rights, which were derived from the due process clause.[14] On the other hand, apprehensions about a potential ban on

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[12] Significantly, the ruling and its reasoning were quite extensively critiqued by Justice R. B. Ginsburg, who can hardly be claimed to be an opponent of women's rights. Cf., for example, Ruth B. Ginsburg, "Speaking in a Judicial Voice," *New York University Law Review* 67, no. 6 (1992): 1198–208.

[13] "After Roe Fell: Abortion Laws by State," Center for Reproductive Rights, accessed February, 25, 2024 https://reproductiverights.org/maps/abortion-laws-by-state/.

[14] Justice Thomas asserted that "because the Due Process Clause does not secure any substantive rights, it does not secure a right to abortion." Incidentally, it should be noted that in the linguistic interpretation, which continues to predominate in continental legal doctrine and has a limiting effect on the systemic and teleological interpretation, the application of the due process clause to substantive rights may be subject to objections. The wording "nor shall any State deprive any person of life, liberty,

'abortion trips' appear unfounded. As Justice Kavanaugh, in supporting the majority, aptly noted, such a ban would contradict the constitutional right to interstate travel.

The trajectory of prospective legislation and Supreme Court case law remains uncertain. Even if it turns out to be as restrictive as feared by the authors of the dissenting opinion, significantly limiting the possibility of terminating pregnancies in certain states, one cannot solely on these grounds assert that the right to abortion is subject to constitutional guarantees.

The interpretative approach adopted in *Dobbs*, which aimed to discern the protection arising under the Constitution rather than prescribing what should be protected, appears compelling. When determining the compatibility of an abortion statute with the Constitution, the Supreme Court was well within its rights to find that the law is silent on the subject—neither explicitly prohibiting nor permitting the termination of pregnancy. The question of whether the Supreme Court accurately determined this silence and employed an accurate method to infer protected liberties from the Constitution is a separate matter beyond the scope of this study. However, examining the Supreme Court's jurisprudence post-*Roe*, one might be inclined to question whether the right to abortion meets the basic premise invoked by both liberal and conservative justices: that it must be grounded in history and tradition. Despite *Roe*'s unequivocal declaration of abortion as a fundamental right, the Supreme Court's subsequent position on how this right should be exercised has been notably conservative. In principle, the Court has often assumed a stance accepting legal solutions that while not expressly prescribing the termination of pregnancy, significantly limit the possibility of undergoing the procedure.[15] Despite criticism from women's and pro-choice groups, the option of terminating pregnancies was effectively suspended in numerous states, primarily due to the procedural requirements and significant financial obstacles. The pivotal judgment in *Webster v. Reproductive Health Services* on July 3, 1989, declared constitutional the ban on public healthcare professionals performing terminations of pregnancies that did not pose a threat to the life of the mother, as well as the prohibition on using public facilities for this purpose.[16] The departure from the liberal premises adopted in *Roe* is also

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or property, without due process of law" explicitly states no more than the need to follow due process of law before imposing the restriction in question.

[15] Cf. Anna Demenko, "Aborcja w orzecznictwie Sądu Najwyższego USA," *Czasopismo Prawa Karnego i Nauk Penalnych* 24, no. 4 (2020): 12–16 with the literature cited there.

[16] This is because said prohibitions "place(d) no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but l(eft) her with the same choices as if the State had decided not to operate any hospitals at all." See *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). As early as 1977, in *Maher v. Roe*, 432 U.S. 464 (1977), the Supreme Court determined that the ban on funding medically unjustified abortions adopted by the State of Connecticut was constitutional. In 1980, in *Harris v. McRae*, 448 U.S. 297 (1980), the Supreme Court endorsed the so-called Hyde Amendment, a provision first introduced in 1976 to the budget bill of the Department of Health

evident in *Casey*, as described above.[17] The seemingly undemanding requirement to precede the procedure with a consultation and a sufficient period of reflection significantly prolonged the entire process, posing a tangible obstacle in American realities. This hurdle was especially burdensome for poorer women, as it led to additional costs associated with accommodation or leave. Despite occasional liberal rulings from the Court, as in *Akron v. Akron Center For Reproductive Health*[18] and *Whole Woman's Health v. Hellerstedt*,[19] continual attempts to toughen abortion laws in some states underscore that the issue of termination of pregnancy has not been conclusively resolved in favor of its admissibility.

FEMINIST V. TRADITIONAL METHODS OF ARGUMENTATION

In both *Roe* and *Dobbs*, Supreme Court judges operated under the presumption that their rulings were neutral reflections of existing law rather than influenced by personal views and beliefs. This kind of modernist presumption, rightly criticized in feminist jurisprudence, is counterfactual. While research into various legal systems has not definitively confirmed the impact of personal factors (such as gender or origin) on adjudication,[20] it is undeniable that interpreting legal texts is not a value-

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for 1977, which prohibited abortions under Medicaid in pregnancies which did not endanger the life of the mother.

[17] It is rightly observed in the rationale in Dobbs that "paradoxically, the judgment in *Casey* did a fair amount of overruling."

[18] In 462 U.S. 416 (1983), incompatibility with the Constitution was determined with regard to the requirement that following the end of the third-trimester terminations be performed at a hospital; the stipulation that one has to obtain consent of the woman concerned after she has been advised of, for example, potential complications and adoption possibilities was found unconstitutional as well.

[19] In 579 U.S. __ (2016), the requirements that were deemed contrary to the Constitution included performance or induction of abortion by a physician entitled to admit patients at a hospital located up to thirty miles from the abortion facility, and conducting the same at a facility whose standards are equivalent to the so-called ambulatory surgical centers.

[20] Allison P. Harris and Maya Sen, "Bias and Judging," *Annual Review of Political Science* 22 (2019): 251–52; Christina L. Boyd, Lee Epstein, and Andrew D. Martin, "Untangling the Causal Effects on Sex on Judging," *American Journal of Political Science* 54, no. 2 (2010): 390, 406; Phyllis Coontz, "Gender and Judicial Decisions: Do Female Judges Decide Cases Differently than Male Judges?", *Gender Issues* 18 (2000): 62; Cécile Bourreau-Dubois et al., "Does Gender Diversity in Panels of Judges Matter? Evidence from French Child Support Cases," *International Review of Law and Economics* no. 63, (2020): 1; Michael E. Solimine and Susan E. Wheatley, "Rethinking Feminist Judging," *Indiana Law Journal* 70, no. 3 (1995): 898; Susan B. Haire and Laura P. Moyer, *Diversity Matters: Judicial Policy Making in the U.S. Courts of Appeals* (Charlottesville, University of Virginia Press, 2015), 47–48; Ulrike Schultz, "Do Female Judges Judge Differently? Empirical Realities of a Theoretical Debate," in *Women Judges in the Muslim World: A Comparative Study of Discourse and Practice*, eds. Nadia Sonneveld and Monika Lindbekk (Leiden, Boston: Brill, 2017), 43.

neutral process aimed solely at discovering inherent truths waiting to be elucidated.[21] The application of different modes of interpretation can yield entirely distinct conclusions, and these conclusions cannot be assessed in terms of truth or falsity. The acceptable boundaries of interpretation are determined by linguistic conventions and purposive assumptions. Notably, the rulings in *Roe* and *Dobbs* demonstrate that a shift in emphasis, even with the same legal and factual grounds (given the persistent societal division in American society on abortion since the 1970s), can lead to divergent conclusions.

Based on the social context and the aftermath, the approach taken in *Roe* (and, to some extent, in *Casey*) appears characteristic of the so-called feminist interpretation of the law, which is typified by the increased involvement of women in the contextual analysis and consideration of a broad range of factors.[22] In a pivotal 1990 paper on the subject, Katharine Bartlett notes that feminists, in addition to conventional methods of doing law, such as deduction, induction, analogy, and policy, use other specific methods, which attempt to reveal features of a legal issue which more traditional methods tend to overlook.[23] According to her, the distinctive traits of feminist jurisprudence are: firstly, asking 'the woman question', in order to expose how the substance of law may silently and without justification submerge the perspectives of women and other excluded groups. Secondly, it is feminist practical reasoning, expanding traditional notions of legal relevance to make decision-making more sensitive to the features of a case not already reflected in the legal doctrine. Thirdly, it tests the validity of accepted legal principles through the lens of the personal experience of those directly affected by those principles.[24]

Already at the stage of checking the admissibility of the complaint to be examined, the reasoning in *Roe* is indicative of the feminist approach. The Court, taking into account the duration of pregnancy and the potential length of court proceedings, departed from the general criterion—the existence of an actual controversy at the stage of appellate review. Substantively, the Court's deliberations focused prominently on the aftermath of the decision, particularly its implications for women and their families. To support its position, the Court invoked various

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[21] On this issue cf. Anna Demenko, *Przestępstwa popełniane przez wypowiedź* (Warszawa: Wydawnictwo C. H. Beck, 2021), xiv–xv; Thomas M. J. Möllers, *Juristische Methodenlehre* (Munich: C. H. Beck, 2017), 448, 473–75; Stanley Fish, "Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law," *Cardozo Law Review* 29, no. 3 (2008): 1111–12; Jerzy Leszczyński, "O charakterze dyrektyw wykładni prawa," *Państwo i Prawo* 3 (2007).

[22] Solimine and Wheatley, "Rethinking Feminist Judging," 891; Dianne Otto, "Feminist Judging in Action: Reflecting on the *Feminist Judgments in International Law* Project: Loveday Hodson and Troy Lavers (eds.): *Feminist Judgments in International Law*, Hart Publishing, Oxford, 2019," *Feminist Legal Studies* 28 (2020): 207–10.

[23] Katharine T. Bartlett, "Feminist Legal Methods," *Harvard Law Review* 103, no. 4 (1990): 836.

[24] Bartlett, "Feminist Legal Methods," 836–37.

non-legal arguments. The historical analysis delved into antiquity, exploring abortion attitudes in ancient Greece and Rome, referencing works of philosophers like Plato and Aristotle, and examining concepts such as the Hippocratic oath and ideas on the origins of human life in philosophical and religious theories, including Stoicism, Judaism, and Christianity. The Court also considered the positions of reputable organizations such as the American Medical Association, the American Public Health Association, and the American Bar Council. Current medical knowledge played a crucial role, notably in the introduction of the trimester paradigm. In essence, the Court's comprehensive approach to the matter acknowledged and considered various aspects, emphasizing its commitment to a holistic understanding of the issue at hand.[25]

However, that multifaceted approach was not embraced in *Dobbs*. On the contrary, one of the criticisms against the rationale for the overruling precedent was precisely that it invoked circumstances irrelevant to the final decision, failing to specify their contribution to the interpretation of the Constitution.[26] With a significant emphasis on prioritizing the latter, the majority opinion in *Dobbs* reflects the hallmarks of a modernist approach to legal interpretation. To identify the constitutional provisions supporting the right to abortion, the majority opinion in *Dobbs* focuses on two premises from earlier case law: whether the right is rooted in the nation's history and tradition, and whether it is an essential component of ordered liberty. As a rule, history, and tradition do not readily accommodate the introduction of new, previously unrecognized rights aligned with ongoing societal processes. The reliance on such criteria is grounded in the conviction that a given law possesses an inherent, immutable, and objective substance, devoid of subjective value judgments from the court at a particular moment and possessing certain timeless quality. While the concept of ordered liberty allows for more flexibility in deriving new guarantees that consider current social circumstances, the Court in this case chose not to take full advantage of this discretion. Its analysis was confined to determining whether 'the right is somehow implicit in the constitutional text.' The actual aftermath of the judgment was largely disregarded, as the Court, by leaving the abortion issue to be resolved by the lawmaker, did not deliberate on the realistic decisions that could follow. When assessing the legitimacy of overruling precedent in terms of reliance interest, the Court narrowly defined that premise as concrete reliance interest, overlooking the indirect impact that the *Roe* ruling might have on the functioning of society.

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[25] Interestingly, the application of feminist methods led the Court to a male-centric, "paternalistic" solution: in the first trimester of pregnancy, the decision to terminate the pregnancy should, according to the Supreme Court, be made by the pregnant woman's physician, meaning a male, in the Court's assumption. Cf. Nadine Strossen, "Reproducing Women's Rights: All Over Again," *Vermont Law Review* 31, no. 1 (2006): 32.

[26] "The Court Did Not Explain Why These Sources Shed Light on the Meaning of the Constitution."

THE DECISION OF THE CONSTITUTIONAL TRIBUNAL OF OCTOBER 22, 2020—THE POLISH PERSPECTIVE

The holding in *Dobbs*, particularly its chief conclusion that the US Constitution is silent on the issue of abortion, deferring the matter to the discretion of the legislature, is particularly interesting in light of the widely commented, and fraught with consequences, decision of the Polish Constitutional Tribunal of October 22, 2020. The Tribunal found that certain injunctions or prohibitions concerning the protection of conceived life or, using probably the most fitting terminology of the ECHR, potential life,[27] can indeed be derived from the Polish Constitution. In essence, the approach of the Constitutional Tribunal aligns with the approach of the US Supreme Court in *Roe*, as both institutions acknowledged that their respective Constitutions contain certain injunctions/prohibitions, even though neither the Polish nor the American Constitution explicitly addresses the admissibility of terminating pregnancy. The legislative process in Poland demonstrates even a deliberate choice by the lawmakers not to resolve the abortion issue explicitly. A provision on protecting life from the moment of conception was indeed considered, but ultimately it was not introduced precisely because of the existing divergence of worldview among the public.[28] A compromise solution was adopted instead, leaving it "to the public consciousness and also to what will transpire in the following years."[29] Nevertheless, the Constitutional Tribunal reached a conclusion contrary to the will of the Polish legislator and to the US Supreme Court's stance in *Roe*. Despite no significant changes in public attitudes towards abortion since the enactment of the Constitution, the Tribunal inferred a virtually total prohibition of abortion from its provisions. Thus, the contention raised against *Roe* and taken into account in *Dobbs*, namely that a particular point of view is imposed on the public which is not accepted by a substantial proportion of that public, also applies to the Polish ruling. Similar to the US Supreme Court in *Dobbs*, the Constitutional Tribunal should have recognized that the Constitution does not explicitly regulate the issue of abortion, leaving the protection of potential life and its scope to the legislature. As Wiesław Skrzydło aptly observes, it is not the purpose of the Constitution to resolve issues that are disputed and debated by philosophers, medical professionals, and adherents of various religions and worldviews. Its task is to institute the principle of legal protection of human life. The admissibility of abortion should be decided and regulated in current legislation.[30]

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[27] *Vo v. France*, judgment of the ECHR of July 8, 2004, Application no. 53924/00.

[28] Cf., for example, Szymon Tarapata and Witold Zontek, "Prawnokarne skutki wyroku TK z 22.10.2020 r., K 1/20 (zagadnienia wybrane)," *Państwo i Prawo* no. 8 (2021): 213.

[29] Komisja Konstytucyjna Zgromadzenia Narodowego, *Biuletyn nr XLV* (Warszawa: Wydawnictwo Sejmowe, 1997), 46.

[30] Wiesław Skrzydło, "Article 38," in *Konstytucja Rzeczypospolitej Polskiej. Komentarz* (Warszawa: Lex a Wolters Kluwer business, 2013). Likewise, P. Sarnecki observes that "on the grounds of this provision

CONCLUSIONS

In summary, despite criticisms directed at the *Dobbs* ruling, particularly from supporters of a liberal approach to abortion, it appears that the direction adopted to arrive at that decision is, overall, correct. It would have been most welcome if the Polish Constitutional Tribunal had embraced a similar approach to that of the US Supreme Court. Naturally, the analysis of the reasoning behind *Dobbs* reveals a lack of broader contextual considerations and the absence of methods from the feminist interpretation of the law, which would have been most advisable, particularly when adjudicating matters pertaining to women. On the other hand, relying almost exclusively on purposive reasoning, as in *Roe*, may not be entirely justified either. Although drawing on teleological arguments when interpreting the law is most desirable, they should not be the sole basis for substantiating a solution derived from the wording of the legal act in question. Purposive and contextual interpretation, which considers the non-legal aspects of the case, should be complemented by arguments linking the outcome with the legal text. In a situation where the text of the Constitution provides no express prohibitions or injunctions related to the termination of pregnancy, a legitimate assertion could be made that the issue should be decided by the public through its representatives, who can undertake appropriate legislative action.

Summary: This article presents some reflections relating to the highly controversial US Supreme Court decision in *Dobbs v. Jackson Women's Health Organization*, which overruled the precedents set in *Jane Roe et al. v. Henry Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*. First, the author briefly outlines the reasoning that supported the rulings in question. Against this background, the subsequent text offers a number of observations that a Polish perspective might prompt, with regard to the legitimacy of the holding in *Dobbs*, the various methods of interpretation applied by the US Supreme Court, and the decision of the Polish Constitutional Tribunal of October 22, 2020.

Keywords: US Supreme Court, abortion laws, Polish Constitutional Tribunal, feminist jurisprudence, interpretation methods

BIBLIOGRAPHY

"After Roe Fell: Abortion Laws by State," Center for Reproductive Rights, accessed February 25, 2024, https://reproductiverights.org/maps/abortion-laws-by-state/.

Bartlett, Katharine T. "Feminist Legal Methods." *Harvard Law Review* 103, no. 4 (1990): 829–88. https://doi.org/10.2307/1341478.

alone [i.e., Article 38 of the Constitution], it will not be possible to find an answer to the question of admissibility of pregnancy termination." See Paweł Sarnecki, in *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 2, *Art. 30–86*, eds. Leszek Garlicki and Marek Zubik (Warszawa: Wydawnictwo Sejmowe, 2016).

Bourreau-Dubois, Cécile, Myriam Doriat-Duban, Bruno Jeandidier, and Jean-Claude Ray. "Does Gender Diversity in Panels of Judges Matter? Evidence from French Child Support Cases." *International Review of Law and Economics* no. 63, (2020): 105929. https://doi.org/10.1016/j.irle.2020.105929.

Boyd, Christina L., Lee Epstein, and Andrew D. Martin. "Untangling the Causal Effects on Sex on Judging." *American Journal of Political Science* 54, no. 2 (2010): 389–411. https://doi.org/10.1111/j.1540-5907.2010.00437.x.

Coontz, Phyllis. "Gender and Judicial Decisions: Do Female Judges Decide Cases Differently than Male Judges?". *Gender Issues* 18 (2000): 59–73.

Demenko, Anna. "Aborcja w orzecznictwie Sądu Najwyższego USA." *Czasopismo Prawa Karnego i Nauk Penalnych* 24, no. 4 (2020): 5–23.

Demenko, Anna. *Przestępstwa popełniane przez wypowiedź*. Warszawa: Wydawnictwo C. H. Beck, 2021.

Fish, Stanley. "Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law." *Cardozo Law Review* 29, no. 3 (2008): 1109–46.

Ginsburg, Ruth B. "Speaking in a Judicial Voice." *New York University Law Review* 67, no. 6 (1992): 1198–208.

Haire, Susan B., and Laura P. Moyer. *Diversity Matters: Judicial Policy Making in the U.S. Courts of Appeals*. Charlottesville, University of Virginia Press, 2015.

Harris, Allison P., and Maya Sen. "Bias and Judging." *Annual Review of Political Science* 22 (2019): 241–59. https://doi.org/10.1146/annurev-polisci-051617-090650.

Komisja Konstytucyjna Zgromadzenia Narodowego. *Biuletyn nr XLV*. Warszawa: Wydawnictwo Sejmowe, 1997.

Leszczyński, Jerzy. "O charakterze dyrektyw wykładni prawa." *Państwo i Prawo* 3 (2007): 28–44.

Möllers, Thomas M. J. *Juristische Methodenlehre*. Munich: C. H. Beck, 2017.

"Number of Cases Decided by the Supreme Court of the United States from 2010 to 2023, by Term," Statista, accessed February 25, 2024, https://www.statista.com/statistics/1326129/number-supreme-court-cases-decided-term-us/.

Otto, Dianne. "Feminist Judging in Action: Reflecting on the *Feminist Judgments in International Law* Project: Loveday Hodson and Troy Lavers (eds.): *Feminist Judgments in International Law*, Hart Publishing, Oxford, 2019." *Feminist Legal Studies* 28 (2020): 205–16.

Pustuła, Diana. "Znaczenie doktryny stare decisis dla sądowej kontroli konstytucyjności prawa USA—między stabilnością orzecznictwa a instrumentalizmem." *Przegląd Prawa Konstytucyjnego* 49, no. 3 (2019): 79–91. https://doi.org/10.15804/ppk.2019.03.04.

Sarnecki, Paweł. In *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 2, *Art. 30–86*, edited by Leszek Garlicki and Marek Zubik. Warszawa: Wydawnictwo Sejmowe, 2016.

Schultz, Ulrike. "Do Female Judges Judge Differently? Empirical Realities of a Theoretical Debate." In *Women Judges in the Muslim World: A Comparative Study of Discourse and Practice*, edited by Nadia Sonneveld and Monika Lindbekk, 23–50. Leiden, Boston: Brill, 2017.

Wiesław, Skrzydło. "Article 38." In *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. Warszawa: Lex a Wolters Kluwer business, 2013.

Solimine, Michael E., and Susan E. Wheatley. "Rethinking Feminist Judging." *Indiana Law Journal* 70, no. 3 (1995): 891–920.
Strossen, Nadine. "Reproducing Women's Rights: All over Again." *Vermont Law Review* 31, no. 1 (2006): 1–38.
Tarapata, Szymon, and Witold Zontek. "Prawnokarne skutki wyroku TK z 22.10.2020 r., K 1/20 (zagadnienia wybrane)." *Państwo i Prawo* no. 8 (2021): 211–25.

Case Citations

Akron v. Akron Center For Reproductive Health, 462 U.S. 416 (1983).
Dobbs v. Jackson Women's Health Organization, 597 U.S. (2022).
Harris v. McRae, 448 U.S. 297 (1980).
Maher v. Roe, 432 U.S. 464 (1977).
Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).
Roe v. Wade, 410 U.S. 113 (1973).
Timbs v. Indiana, 586 U.S. (2019).
Webster v. Reproductive Health Services, 492 U.S. 490 (1989).
Whole Woman's Health v. Hellerstedt, 579 U.S. __ (2016).

Judgment of the Constitutional Tribunal of the Republic of Poland of October 22, 2020, K 1/20, OTK-A 2021, no. 1.
Vo v. France, Judgment of the ECHR of July 8, 2004. Application No. 53924/00.

Chapter 13

Freedom of Testamentary Disposition in American Law from the Comparative Perspective

*Wojciech Bańczyk**

INTRODUCTION[1]

In its national anthem, the United States of America is referred to as 'the land of the free.'[2] Acknowledgment of such freedom takes place within numerous legal instruments, from what are almost stereotypical ones (as perceived, for example, in Poland) such as access to weapons, to less obvious ones, such as freedom of testamentary disposition. As this chapter reflects, the liberal and individualistic attitude as derived, for example, from Locke, Bentham, and Jefferson[3] encompasses American inheritance law so deeply that it allows for nearly unlimited freedom of testamentary disposition, a feature unique among the laws of the Western world.[4] Also,

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[1] The chapter is part of research within the project "Question of monopoly of the inheritance law on the formation of the post-mortal succession—about 'inheritance law without inheritance' in a comparative perspective" financed by Narodowe Centrum Nauki (NCN) [National Science Center] in Kraków, Poland, with no. 2017/25/N/HS5/00934.

[2] Francis S. Key, "The Star-Spangled Banner" (1814).

[3] Rosalind Croucher, "How Free is Free? Testamentary Freedom and the Battle between 'Family' and 'Property,'" *Australian Journal of Legal Philosophy* no. 37 (2012): 13; Ronald J. Scalise, "Family Protection in the United States of America," in *Comparative Succession Law*, vol. 3, *Mandatory Family Protection*, eds. Kenneth G. C. Reid, Marius J. de Waal, and Reinhard Zimmermann (Oxford: Oxford University Press, 2020), 538.

[4] Scalise, "Family Protection in the United States of America," 534.

Wojciech Bańczyk, "Freedom of Testamentary Disposition in American Law from the Comparative Perspective." In *Enlightenment Traditions and the Legal and Political System of the United States of America*, edited by Michał Urbańczyk, Kamil Gaweł, and Fatma Mejri, 243–54. Poznań: Adam Mickiewicz University Press, 2024. © Wojciech Bańczyk 2024. DOI: 10.14746/amup.9788323242543.14.

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such a position has been traditional for American law since it was based on English law at a point when English law also did not limit such freedom.[5]

Therefore, this chapter firstly invokes the general position of American law on freedom of testamentary disposition and its justification, as well as positioning it against other available solutions restricting this freedom across the jurisdictions. Secondly, it refers to the various instruments of American law that may restrict freedom of testamentary disposition and explains their legal nature, proving that freedom of testamentary disposition is, despite these restrictions, truly nearly unlimited. Thirdly, it observes the extent to which the American solution may (or may not) appear useful for adoption in other countries when their existing mandatory family protection system is disputed.

GENERAL POSITION OF AMERICAN LAW ON FREEDOM OF TESTAMENTARY DISPOSITION

As mentioned in the introduction to the Restatement of Law (a core systemic description of American law), the freedom of dispositions is the 'organizing principle' of the law of testaments and lifetime donations.[6] It goes on to state that eventually property owners are 'nearly unrestricted' in their dispositions, both lifetime (*inter vivos*), and with the effect on death (*mortis causa*). The legal doctrine supplements this position, invoking the 'extreme tolerance for individual control over property,'[7] which results in 'unfettered freedom of testation.'[8]

To some extent, this meaning of freedom of testamentary disposition is reflected in the inheritance law terminology. Thus, the statutory inheritance taking place in case of a lack of a valid testament, in American law is referred to as 'intestate' (e.g., Section 2-101(a) Uniform Probate Code, hereinafter as UPC), clearly prioritizing testation against statutory inheritance. It is even more clearly expressed by the doctrine meaningfully referring to statutory inheritance as a case when 'the state will write your will for you.'[9]

Such freedom of disposition is reflected in lacking mandatory family protection after the death of the disposing party in American law, contrary to what is seen in all European and nearly all jurisdictions or the Western world as well as beyond, as proven in the complex comparative research on mandatory family protection ed-

[5] Scalise, "Family Protection in the United States of America," 538.

[6] *Restatement of Law, Restatement Third of Property*, Westlaw 2022, Introduction, para. 3.

[7] Ronald Chester, "Should American Children Be Protected Against Disinheritance?", *Real Property, Probate and Trust Journal* 32, no. 3 (1997): 406.

[8] Scalise, "Family Protection in the United States of America," 545.

[9] Norman F. Dacey, *How to Avoid Probate?* (New York: Crown, 1983), 13.

ited by Kenneth G.C. Reid, Marius J. de Waal, and Reinhard Zimmermann.[10] Their work indicated the utmost common existence of such protection either in the form of fixed share (forced share), namely of (1) forced heirship, or (2) compulsory portion (legitim claim), or (3) no longer fixed, but discretionary family provision. In those systems, at least spouses and children[11] are guaranteed any of the following: aa (1) forced status of heir in a certain share as, for example, traditionally in French law and still currently in Italian law, or (2) a claim amounting to the value of a certain share (legitim claim) as in, for example, Polish or German law, or (3) a claim subject to further alimony-based premises analyzed by the court as in English law, for example. Therefore, from the perspective of European lawyers, this solution in American law may come as a surprise.[12]

At the same time, such a unique attitude of American law not granting mandatory family protection is accepted in nearly all its states. Inheritance law is thus the subject of states' legislative power, but in cases of mandatory family protection, the particular legislative solutions are significantly similar, and in this case, it is not yet the result of unifying state inheritance laws by means of the UPC from the second half of the twentieth century[13] but derives from much more traditional development.[14] Therefore, this chapter will primarily refer to UPC as a model legislation commonly used among states, as well as the example of New Jersey law, which appears to be exemplary, given the existence of all instruments known to American law that may restrict freedom of testamentary disposition. The only exception is the law of Louisiana (articles 1493–1514 of Louisiana Civil Code) with the forced heirship-based system derived mostly from French and also Spanish law.[15]

The lack of mandatory family protection of spouses raises doubts due to the legal character of elective shares. Still, as shown in the analysis later, this instrument should not be perceived as the limitation of freedom of testamentary disposition.[16]

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[10] Kenneth G.C. Reid, Marius J. de Waal, and Reinhard Zimmermann, "Comparative Perspective," in *Comparative Succession Law*, vol. 3, *Mandatory Family Protection*, 742.

[11] Reid, de Waal, and Zimmermann, "Comparative Perspective," 753.

[12] Wojciech Bańczyk, *Opinia prawna biegłego sądowego ad hoc w przedmiocie 1) roszczeń, jakie dzieci spadkodawcy mogą zgłaszać wobec majątku spadkowego lub spadkobierców, jeżeli nie uzyskały przysporzenia z takiego majątku inter vivos albo mortis causa oraz w przedmiocie 2) wydziedziczenia dzieci—obydwu w stanie New Jersey*, Circuit Court of Wrocław-Śródmieście in Wrocław, case no. IX C 8/19 (2021), 1.

[13] Richard V. Wellman, "Recent Developments in the Struggle for Probate Reform," *Michigan Law Review* 79, no. 3 (1981): 501–02.

[14] Scalise, "Family Protection in the United States of America," 538.

[15] Jacqueline Asadorian, "Disinheritance of Minor Children: A Proposal to Amend the Uniform Probate Code," *Boston College Third World Journal* 31, no. 1 (2011): 108; Deborah A. Batts, "I Didn't Ask to Be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance," *Hastings Law Journal* 41, no. 5 (1990): 1210; Scalise, "Family Protection in the United States of America," 556, 561.

[16] See here, part 2.

At the same time, it is the example of disinheritance[17] of children admissible in all jurisdictions but Louisiana's that underlines the utmost specificity of American law, which 'nearly alone among modern nations allows parents to disinherit their children,'[18] a fact well proven by the abovementioned comparative research.[19] This position is perceived as traditional and since as early as in 1877 New Jersey judicature permitting to disinherit a child absolutely[20] has been explicitly kept in the much more modern jurisprudence.[21] Yet this approach happened to be criticized.[22] Said critique was partly grounded in the position of Locke, who (despite being liberal) still had faith in family inheritance.[23] Sometimes even adopting the Louisiana approach to family mandatory protection in American law is suggested more broadly.[24]

INSTRUMENTS OF AMERICAN LAW THAT MAY RESTRICT FREEDOM OF TESTAMENTARY DISPOSITION

The first instrument of family protection in American law is elective share. This allows (section 2-202(a) and 203(b) UPC) for the surviving spouse of a decedent to elect (instead of the testamentary share)[25] to take an elective share of up to 50% of the value of the marital property portion of the estate depending on the duration of the marriage. For example, in New Jersey law, the instrument serves to protect the domestic partner, too (section 3B:8-1 of Administration of Estate). This is frequently underlined as a solution available in the systems of separation of marital property that substitute a marital community system in which the surviving spouse, follow-

[17] Although disinheritance in Polish law may be associated with deprivation of legitim only, see Paweł Księżak, *Zachowek w polskim prawie spadkowym* (Warszawa: LexisNexis, 2010), 62–64, from the perspective of American law it means deprivation of all benefits in a testament, see Scalise, "Family Protection in the United States of America," 536.

[18] Chester, "Should American Children Be Protected Against Disinheritance?", 406.

[19] Reid, de Waal, and Zimmermann, "Comparative Perspective," 759.

[20] Judgment of Court of Chancery of New Jersey from October 1, 1877 in the case *Stevens v. Shippen*, 28 N.J. Eq. 487, 535.

[21] Judgment of Superior Court of New Jersey, Appellate Division from November 13, 1992 in the case *Matter of Will of Liebl*, 260 N.J. Super. 519, 529.

[22] Batts, "I Didn't Ask to Be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance," 1269; Ralph C. Brashier, "Protecting the Child From Disinheritance: Must Louisiana Stand Alone?", *Louisiana Law Review* 57, no. 1 (1996): 26; Chester, "Should American Children Be Protected Against Disinheritance?", 436.

[23] Asadorian, "Disinheritance of Minor Children: A Proposal to Amend the Uniform Probate Code," 101.

[24] Asadorian, "Disinheritance of Minor Children: A Proposal to Amend the Uniform Probate Code," 127.

[25] Scalise, "Family Protection in the United States of America," 542.

ing the death of their spouse, is left with half of the community estate.[26] Then, the marital assets are equalized.[27] At the same time, for example, in Polish law, which is a community marital property system, the death of the other spouse provides the surviving spouse with both the community property share[28] and the fixed share of the remainder of the estate. Therefore, this instrument of American law should not be mistaken for forced heirship, as even one significant comparative work does.[29]

The second instrument refers to the omitted or, otherwise speaking, pretermitted heir. According to section 2-301 (a) (1) and (2) UPC, relating directly to premarital testament (premarital will), if the testator marries after execution of the testament in which such a testator fails to provide for this spouse, such a spouse is in most cases entitled to a share in the estate unless, for example, the testament was made in contemplation of this marriage, or intended to be effective notwithstanding any subsequent marriage. Similarly, section 2-302 (a) and (b) UPC on omitted children refers to the same share of an omitted child if a testator becomes their parent after the execution of the testament, unless the omission was intentional, for example. This prevents unintentional disinheritance of children, resorting to the presumed will of the testator to benefit the subsequently born child.[30] At the same time, the intentional disinheritance is fully admissible. This instrument is present, for example, in New Jersey law (section 3B:5-15 and 16 of Administration of Estate), in which it additionally protects domestic partners regarding testaments executed before the formation of said partnership. Moreover, it corresponds with the Roman law of formal inheritance against the will (*contra tabulas*)[31] that demanded that the testator list particular persons that were their statutory heirs only in order to disinherit them (proving that the disinheritance was not only accidental and that the consequences of the disinheriting testament were at least considered by the testator).[32]

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[26] *Restatement…*, para. 9.1, Comment a; John H. Langbein and Lawrence W. Waggoner, "Redesigning the Spouse's Forced Share," *Real Property, Probate and Trust Journal* 22, no. 2 (1987): 305; Frank G. Opton, *Decedents' Estates, Wills and Trusts in the U.S.A.* (Deventer: Springer Netherlands, 1987), 62; Scalise, "Family Protection in the United States of America," 543; Robert H. Sitkoff and Jesse Dukeminer, *Wills, Trusts, and Estates* (Los Angeles: Aspen Publishing, 2022), 532. See also Wojciech Bańczyk, "Pozaspadkowe sposoby kształtowania następstwa na wypadek śmierci—o przełamaniu monopolu prawa spadkowego" (unpublished PhD thesis, Jagiellonian University, 2021), 448; Wojciech Bańczyk, *Postmortal Succession on the Example of Polish Law in a Comparative Perspective. Between Inheritance Law and Nonprobate Transfers* (Göttingen: Vandenhoeck & Ruprecht Verlage-Universitätsverlag Osnabrück, 2023), 60.

[27] *Restatement…*, para. 9.1, Comment b.

[28] Bańczyk, "Pozaspadkowe sposoby kształtowania następstwa na wypadek śmierci—o przełamaniu monopolu prawa spadkowego," 352.

[29] Reid, de Waal, and Zimmermann, "Comparative Perspective," 744.

[30] Scalise, "Family Protection in the United States of America," 548.

[31] Judgment of New York County Surrogate's Court from January 22, 1915 in the case *In re Sauer's Estate*, 89 Misc. 105, 107.

[32] Franciszek Longchamps de Bérier, "Spadki," in *Prawo rzymskie. U podstaw prawa prywatnego*, eds. Wojciech Dajczak, Tomasz. Giaro, and Franciszek Longchamps de Bérier (Warszawa:

The third group instrument comprises numerous family allowances which are, at the same time, of distinctly 'American origin.'[33] These ensure very basic (referred to even as 'absurdly small'[34]) but still socially important[35] protection of the closest family members against numerous economic difficulties caused by testation in favor of the other person and liability for inheritance debts[36] that could mostly affect their continued existence in the household. Among the possible options according to the UPC is an allowance for the surviving spouse or minor or dependent children in the form of a homestead allowance up to the value of $22,500 (2-402 UPC), in addition to household furniture, automobiles, furnishings, appliances, and personal effects to a value not exceeding $15,000 (2-403 UPC), as well as an additional reasonable allowance in the form of money during the period of the external administration of the estate but no longer than a year (2-404 (a) UPC). Those rights are also prioritized against creditors' claims to the estate (2-402 sentence 3; 2-403 sentence 4; 2-404 (a) sentence 5 UPC). Then, New Jersey law regulates the **e**xemption for the benefit of the decedent's family (section 3B:16-5 Administration of Estate), which includes wearing apparel and personal property up to the limit of $5,000.

The fourth group of instruments serves as restrictions on the freedom of testamentary dispositions only de facto since protecting the family is not their fundamental aim. Thus, the lack of adequate recognition of the family (especially of children) in the testament is even referred to as an 'invitation' to contest the will on the basis of flexible instruments, according to which judges challenge any improper expression of the testator's will by means of lacking testamentary capacity or of defects in consent, such as undue influence or fraud.[37] Thus, such testaments are at least 'susceptible' to such challenges.[38] This does not mean, though, that similar challenges are automatic, and in New Jersey judicature it was proven that even disinheritance of a family member due to 'hatred for bad reasons' including 'unreasonable discriminatory prejudice' still allows for testation as long as there were no above-mentioned grounds for invalidity.[39] Then, the American law solution appears to be similar to the *querela inofficiosi testament*,[40] which was a Roman law

Wydawnictwo Prawnicze PWN, 2009), 328; Reinhard Zimmermann, "Protection against Being Passed Over or Disinherited in Roman Law," in Comparative Succession Law, vol. 3, *Mandatory Family Protection*, 4.

[33] Scalise, "Family Protection in the United States of America," 549.

[34] Sitkoff and Dukeminer, *Wills, Trusts, and Estates*, 575.

[35] Opton, *Decedents' Estates, Wills and Trusts in the U.S.A.*, 55.

[36] Scalise, "Family Protection in the United States of America," 549.

[37] Sitkoff and Dukeminer, *Wills, Trusts, and Estates*, 577.

[38] Scalise, "Family Protection in the United States of America," 545.

[39] Judgment of Superior Court of New Jersey, Appellate Division from November 13, 1992 in case of *Matter of Will of Liebl*, 260 N.J.Super. 519, 530.

[40] Scalise, "Family Protection in the United States of America," 545.

solution for challenging testaments lacking the effectuation of the family's 'duty of care' (*officium pietatis*).[41]

At the same time, the frequent analysis of such circumstances during the probate proceeding makes the latter much more complex and long-term, which is one of the reasons for searching out opportunities to avoid it (by non-probate mechanisms).[42] It has also been argued that the freedom of testamentary disposition in American law is too broad.[43]

THE USEFULNESS OF COMPARATIVE RESEARCH ON AMERICAN FREEDOM OF DISPOSITION

Such a position of American law supposedly calls for wider adoption to support voices against mandatory family protection in other countries, including Poland. Thus, societal and family changes call for reconsideration of primarily fixed share systems in numerous jurisdictions.[44]

Polish law contains numerous positions against the legitim system, not as far-reaching as rejecting any such protection but being in favor of limiting mandatory family protection and adopting discretionary family provision instead, which especially underlines the changing societal and family structure.[45] However, there are voices in favor of broadening such protection and introducing forced heirship, too,[46] as well as calling for retaining the current solution.[47] This shows that the legitim system in Poland is not commonly accepted. At the same time, in German law, for

[41] Longchamps de Bérier, "Spadki," 328; Zimmermann, "Protection against Being Passed Over or Disinherited in Roman Law," 7.

[42] Dacey, *How to Avoid Probate?*, 14; John H. Langbein, "The Nonprobate Revolution and the Future of the Law of Succession," *Harvard Law Review* 97, no. 5 (1983–1984): 1117. See also Bańczyk, "Pozaspadkowe sposoby kształtowania następstwa na wypadek śmierci—o przełamaniu monopolu prawa spadkowego," 639–40; Bańczyk, *Postmortal Succession on the Example of Polish Law in a Comparative Perspective. Between Inheritance Law and Nonprobate Transfers*, 25–26.

[43] Ronald J. Scalise, "New Developments in Succession Law: The U.S. Report," *Electronic Journal of Comparative Law* 14, no. 2 (2010): 9.

[44] Reid, de Waal, and Zimmermann, "Comparative Perspective," 776.

[45] Anna Paluch, "System zachowku w prawie polskim—uwagi de lege lata i de lege ferenda," *Transformacje Prawa Prywatnego* no. 2 (2015): 28; Mariusz Załucki, "Przyszłość zachowku w prawie polskim," *Kwartalnik Prawa Prywatnego* no. 2 (2012): 558–61. As in Maksymilian Pazdan in *Zielona księga. Optymalna wizja Kodeksu cywilnego w Rzeczypospolitej Polskiej*, ed. Zbigniew Radwański (Warszawa: Oficyna Wydawnicza MS, 2006), 192; Mariusz Załucki, *Wydziedziczenie w prawie polskim na tle porównawczym* (Warszawa: Oficyna a Wolters Kluwer business, 2010), 469–70.

[46] Jakub Biernat, *Ochrona osób bliskich spadkodawcy w prawie spadkowym* (Toruń: Adam Marszałek, 2002), 134; Maria A. Zachariasiewicz, "Zachowek czy rezerwa? Głos w dyskusji nad potrzebami i kierunkami zmian polskiego prawa spadkowego," *Rejent* no. 2 (2006): 199.

[47] Księżak, *Zachowek w polskim prawie spadkowym*, 97; Teresa Mróz, "O potrzebie i kierunkach zmian przepisów prawa spadkowego," *Przegląd Sądowy* no. 1 (2008): 90; Konrad Osajda, *Ustanowienie*

example, there is rather no such far-reaching criticism of the legitim system per se, but if so, this is only of its detailed solutions.[48]

However, it may need to be borne in mind that Polish law traditionally (tracing back from the period before 1795) did not recognize freedom of testamentary disposition, and for a long time only provided for forced inheritance in favor of family members (not in a different way to numerous European laws of the time).[49] Modern Polish law of legitim, shaped by nineteenth-century European codifications, does not fully follow this development, however.[50] Yet the choice of a legitim system,[51] and not of forced heirship, which was also widely supported,[52] was subject to vivid discussion prior to the adoption of the Polish Civil Code of 1964. Thus, even though the 1946 Polish Decree on Inheritance Law chose the legitim system (Article 145, however, the naming was more similar to the forced heirship system), the 1954 Draft of the Polish Civil Code moved towards the forced heirship system (Article 788, however the naming here was similar to the legitim system). Moreover, the choice of legitim is not demanded under the Polish constitution[53] (unlike Germany's[54]). Then, there are no obstacles to changing the legitim system in Poland.

As proven above, the legitim claim system is not the only available solution that might be considered for Polish law and is itself not well-grounded enough in its legal history or current needs. However, placing Poland among the legal cultures of Europe demands some form of mandatory family protection. Partly it is because it dates back to the late development of Roman law that eventually introduced a system similar to mandatory family protection.[55] Primarily, though, the reason therefore lies in fact that the laws after the collapse of the Roman empire fully disregard-

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spadkobiercy w testamencie w systemach prawnych common law i civil law (Warszawa: Wydawnictwo C. H. Beck, 2009), 218.

[48] Reinhard Zimmermann, "Compulsory portion in Germany," in *Comparative Succession Law*, vol. 3, *Mandatory Family Protection*, 316.

[49] Wojciech Bańczyk, "Entailed Estate in Polish Law from late 15th to the 20th Century: Exception from General Succession Law and Perpetuation of Estate," *Studia Iuridica* no. 80 (2019): 18; Stanisław Płaza, *Historia prawa w Polsce na tle porównawczym*, vol. 1, *X–XVIII w.* (Kraków: Księgarnia Akademicka, 1997), 296–304.

[50] Załucki, *Wydziedziczenie w prawie polskim na tle porównawczym*, Zakończenie, footnote 80.

[51] Jan Gwiazdomorski, "Rezerwa czy zachowek?", *Prawo i Życie* no. 12 (1959): 3.

[52] Kazimierz Przybyłowski, "Rezerwa czy zachowek?", *Gazeta Sądowa Warszawska* no. 21 (1939): 291; Seweryn Szer, *Prawo spadkowe* (Warszawa: Państwowe Wydawnictwo Naukowe, 1955), 101. See also Anna Moszyńska, *Geneza prawa spadkowego w polskim kodeksie cywilnym z 1964 roku* (Toruń: Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika, 2019), 322.

[53] Judgment of Polish Constitutional Tribunal from January 31, 2011 in case of P 4/99, no. 133.

[54] Judgment of German Federal Constitutional Court from April 19, 2005 in joint cases of BvR 1644/00 and 188/03.

[55] Longchamps de Bérier, "Spadki," 330; Zimmermann, "Protection against Being Passed Over or Disinherited in Roman Law," 18.

ed testaments[56] and favored far-reaching family protection in the form of forced inheritance. Eventually, traditionally family protection prevails beyond freedom of testamentary disposition under Polish law and many continental European laws. Thus, within civil law jurisdictions, it is even referred to (but still probably in a too far-reaching way) as family property-oriented, and not as individual property-oriented as in common law.[57]

After all, introducing a system similar to the American one in terms of freedom of testamentary disposition into Polish law is not justified. Moreover, it should be doubted whether undeniably valid reasons to rethink particular solutions of legitim law in Poland already justify suggestions that this system (grounded in the legal system) as a whole should be changed. When the legitim system was chosen under Polish law, it was primarily an exception from further-reaching family protection and not an exception from the freedom of testamentary disposition. Of course, the legitim system is an exception from the full freedom of testamentary disposition, too,[58] but historically this system aimed rather to broaden such freedom.

CONCLUSIONS

American law shows an interesting example of uniquely favoring freedom of testamentary disposition to such an extent that it has no mandatory family protection. Thus, even instruments that may restrict this freedom do not have a function similar to mandatory family protection as seen in all laws of the Western world.

At the same time, even though mandatory family protection in its current shape is currently doubted, the adoption of an American-law-based solution is not justified. The example of Polish law proves that even though the legitim system is not the only admissible one, it rather should be retained. However, even if it is rejected, the development of Polish law within the legal cultures of Continental Europe demands some mandatory family protection to be guaranteed, and the traditional development favors rather more far-reaching family protection than greater support towards freedom of testamentary disposition as under American law.

Summary: The chapter addresses the issue of fundamental conflict in inheritance law values—the freedom of disposition of own property, as well as the protection of close relatives. Typically, state regulations in the United States (with the exception of Louisiana law)

[56] Thomas Rüfner, "Customary Mechanisms of Family Protection: Late Medieval and Early-Modern Law," in *Comparative Succession Law*, vol. 3, *Mandatory Family Protection*, 40.

[57] Croucher, "How Free is Free? Testamentary Freedom and the Battle between 'Family' and 'Property,'" 26.

[58] Księżak, *Zachowek w polskim prawie spadkowym*, 33.

do not envisage institutions similar to the continental law's concepts of legitim or forced heirship, but rather a significantly different so-called elective share as a solution from marital property law or protection against the accidental omission of children (omitted children), corresponding to the Roman formal will contestation. This leads to a very broad protection of the testator's freedom of disposition in American law, yet close relatives still seek alternative solutions to protect their rights (e.g., challenging the validity of wills that overlook them due to lacking testamentary capacity or defects in consent). Although the regulation of American law may seem foreign to continental legal systems, which protect the freedom of disposition, but only within limits of family protection, it could be viewed differently when the institutions of legitim or forced heirship are increasingly questioned in contemporary socio-economic realities. However, the history of continental law should not be overlooked.

Keywords: American law, inheritance law, testamentary freedom, elective share, mandatory family protection

BIBLIOGRAPHY

Asadorian, Jacqueline. "Disinheritance of Minor Children: A Proposal to Amend the Uniform Probate Code." *Boston College Third World Journal* 31, no. 1 (2011): 101–27.

Bańczyk, Wojciech. "Entailed Estate in Polish Law from late 15th to the 20th Century: Exception from General Succession Law and Perpetuation of Estate." *Studia Iuridica* no. 80 (2019): 9–28. https://doi.org/10.5604/01.3001.0013.4694.

Bańczyk, Wojciech. *Opinia prawna biegłego sądowego ad hoc w przedmiocie 1) roszczeń, jakie dzieci spadkodawcy mogą zgłaszać wobec majątku spadkowego lub spadkobierców, jeżeli nie uzyskały przysporzenia z takiego majątku inter vivos albo mortis causa oraz w przedmiocie 2) wydziedziczenia dzieci—obydwu w stanie New Jersey*. Circuit Court of Wrocław-Śródmieście in Wrocław, case no. IX C 8/19 (2021).

Bańczyk, Wojciech. *Postmortal Succession on the Example of Polish Law in a Comparative Perspective. Between Inheritance Law and Nonprobate Transfers*. Göttingen: Vandenhoeck & Ruprecht Verlage-Universitätsverlag Osnabrück, 2023.

Bańczyk, Wojciech. "Pozaspadkowe sposoby kształtowania następstwa na wypadek śmierci—o przełamaniu monopolu prawa spadkowego." Unpublished PhD thesis, Jagiellonian University, 2021.

Batts, Deborah A. "I Didn't Ask to Be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance." *Hastings Law Journal* 41, no. 5 (1990): 1197–270.

Biernat, Jakub. *Ochrona osób bliskich spadkodawcy w prawie spadkowym*. Toruń: Adam Marszałek, 2002.

Brashier, Ralph C. "Protecting the Child From Disinheritance: Must Louisiana Stand Alone?". *Louisiana Law Review* 57, no. 1 (1996): 1–26.

Chester, Ronald. "Should American Children Be Protected Against Disinheritance?". *Real Property, Probate and Trust Journal* 32, no. 3 (1997): 405–53.

Croucher, Rosalind. "How Free is Free? Testamentary Freedom and the Battle between 'Family' and 'Property.'" *Australian Journal of Legal Philosophy* no. 37 (2012): 9–27.

Dacey, Norman F. *How to Avoid Probate?*. New York: Crown, 1983.

Gwiazdomorski, Jan. "Rezerwa czy zachowek?". *Prawo i Życie* no. 12 (1959): 3.

Key, Francis S. "The Star-Spangled Banner." 1814.

Księżak, Paweł. *Zachowek w polskim prawie spadkowym*. Warszawa: LexisNexis, 2010.

Langbein, John H., and Lawrence W. Waggoner. "Redesigning the Spouse's Forced Share." *Real Property, Probate and Trust Journal* 22, no. 2 (1987): 303–28.

Langbein, John H. "The Nonprobate Revolution and the Future of the Law of Succession." *Harvard Law Review* 97, no. 5 (1983–1984): 1108–41. https://doi.org/10.2307/1340825.

Longchamps de Bérier, Franciszek. "Spadki." In *Prawo rzymskie. U podstaw prawa prywatnego*, edited by Wojciech Dajczak, Tomasz. Giaro, and Franciszek Longchamps de Bérier, 241–347. Warszawa: Wydawnictwo Prawnicze PWN, 2009.

Moszyńska, Anna. *Geneza prawa spadkowego w polskim kodeksie cywilnym z 1964 roku*. Toruń: Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika, 2019.

Mróz, Teresa. "O potrzebie i kierunkach zmian przepisów prawa spadkowego." *Przegląd Sądowy* no. 1 (2008): 81–93.

Opton, Frank G. *Decedents' Estates, Wills and Trusts in the U.S.A.* Deventer: Springer Netherlands, 1987.

Osajda, Konrad. *Ustanowienie spadkobiercy w testamencie w systemach prawnych common law i civil law*. Warszawa: Wydawnictwo C. H. Beck, 2009.

Paluch, Anna. "System zachowku w prawie polskim—uwagi de lege lata i de lege ferenda." *Transformacje Prawa Prywatnego* no. 2 (2015): 5–30.

Pazdan, Maksymilian. In *Zielona księga. Optymalna wizja Kodeksu cywilnego w Rzeczypospolitej Polskiej*, edited by Zbigniew Radwański. Warszawa: Oficyna Wydawnicza MS, 2006.

Płaza, Stanisław. *Historia prawa w Polsce na tle porównawczym*, vol. 1, *X–XVIII w.* Kraków: Księgarnia Akademicka, 1997.

Przybyłowski, Kazimierz. "Rezerwa czy zachowek?". *Gazeta Sądowa Warszawska* no. 21 (1939): 289–292.

Reid Kenneth G.C., Marius J. de Waal, and Reinhard Zimmermann, "Comparative Perspective." In *Comparative Succession Law*, vol. 3, *Mandatory Family Protection*, edited by Kenneth G.C. Reid, Marius J. de Waal, and Reinhard Zimmermann, 740–76. Oxford: Oxford University Press, 2020.

Restatement of Law, Restatement Third of Property. Philadelphia: American Law Institute, 2022.

Rüfner, Thomas. "Customary Mechanisms of Family Protection: Late Medieval and Early- Modern Law." In *Comparative Succession Law*, vol. 3, *Mandatory Family Protection*, edited by Kenneth G.C. Reid, Marius J. de Waal, and Reinhard Zimmermann, 39–77. Oxford: Oxford University Press, 2020.

Scalise, Ronald J. "Family Protection in the United States of America." In *Comparative Succession Law*, vol. 3, *Mandatory Family Protection*, edited by Kenneth G.C. Reid, Marius J. de Waal, and Reinhard Zimmermann, 534–62. Oxford: Oxford University Press, 2020.

Scalise, Ronald J. "New Developments in Succession Law: The U.S. Report." *Electronic Journal of Comparative Law* 14, no. 2 (2010): 1–17.
Sitkoff, Robert H., and Jesse Dukeminer, *Wills, Trusts, and Estates*. Los Angeles: Aspen Publishing, 2022.
Szer, Seweryn. *Prawo spadkowe*. Warszawa: Państwowe Wydawnictwo Naukowe, 1955.
Wellman, Richard V. "Recent Developments in the Struggle for Probate Reform." *Michigan Law Review* 79, no. 3 (1981): 501–49.
Zachariasiewicz, Maria A. "Zachowek czy rezerwa? Głos w dyskusji nad potrzebami i kierunkami zmian polskiego prawa spadkowego." *Rejent* no. 2 (2006): 180–202.
Załucki, Mariusz. "Przyszłość zachowku w prawie polskim," *Kwartalnik Prawa Prywatnego* no. 2 (2012): 529–62.
Załucki, Mariusz. *Wydziedziczenie w prawie polskim na tle porównawczym*. Warszawa: Oficyna a Wolters Kluwer business, 2010.
Zimmermann, Reinhard. "Compulsory Portion in Germany." In *Comparative Succession Law*, vol. 3, *Mandatory Family Protection*, edited by Kenneth G.C. Reid, Marius J. de Waal, and Reinhard Zimmermann, 268–318. Oxford: Oxford University Press, 2020.
Zimmermann, Reinhard. "Protection against Being Passed Over or Disinherited in Roman Law." In *Comparative Succession Law*, vol. 3, *Mandatory Family Protection*, edited by Kenneth G.C. Reid, Marius J. de Waal, and Reinhard Zimmermann, 1–19. Oxford: Oxford University Press, 2020.

Case Citations

Judgment of Court of Chancery of New Jersey from October 1, 1877, in *Stevens v. Shippen*, 28 N.J. Eq. 487.
Judgment of German Federal Constitutional Court from April 19, 2005, in joint cases of BvR 1644/00 and 188/03.
Judgment of New York County Surrogate's Court from January 22, 1915, in *In re Sauer's Estate*, 89 Misc. 105.
Judgment of the Polish Constitutional Tribunal from January 31, 2011, in the case of P 4/99, no. 133.
Judgment of Superior Court of New Jersey, Appellate Division from November 13, 1992 in the case *Matter of Will of Liebl*, 260 N.J.Super. 519.

Chapter 14

Human Dignity, the Eighth Amendment, and the Death Penalty

*Michał Urbańczyk**

INTRODUCTION[1]

According to the Eighth Amendment, excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.[2] American legal scholars emphasize that reference to human dignity plays a very important role in cases involving this amendment. In cases involving only the death penalty, however, this normative impact of human dignity is sometimes referred to as weak and meaningless.[3] This position is probably justified by the fact that the United States is one of the few countries that still has capital punishment. In 2018, thirty-one state codes provided for it. The only period of time when the death penalty was not carried out in the US was from 1972 to 1976, and that was a result of *Furman v. Georgia*.[4] This was because the ruling forced Congress and state legislatures to make changes to ensure that the death penalty was not imposed and carried out in an arbitrary and discriminatorily manner.

To put the following discussion into a broader context, it is helpful to look at statistics on the death penalty. In 2017, twenty-three executions were carried out

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[1] The chapter is an expanded version of Chapter II.4 of author's monograph entitled *Idea godności człowieka w orzecznictwie Sądu Najwyższego Stanów Zjednoczonych Ameryki* (Poznań: Wydawnictwo Naukowe UAM, 2019).

[2] Constitution of the United States, United States Senate, accessed June 5, 2022, https://www.senate.gov/civics/constitution_item/constitution.htm#amdt_13_(1865).

[3] Maxine D. Goodman, "Human Dignity in Supreme Court Constitutional Jurisprudence," *Nebraska Law Review* 84, no. 3 (2006): 773.

[4] *Furman v. Georgia*, 408 U.S. 238 (1972).

Michał Urbańczyk, "Human Dignity, the Eighth Amendment, and the Death Penalty." In *Enlightenment Traditions and the Legal and Political System of the United States of America*, edited by Michał Urbańczyk, Kamil Gaweł, and Fatma Mejri, 255–87. Poznań: Adam Mickiewicz University Press, 2024. © Michał Urbańczyk 2024. DOI: 10.14746/amup.9788323242543.15.

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in the United States, and until July 18, 2018—fourteen. A total of 1474[5] executions have been carried out in the United States since 1976. At the same time, it is worth pointing out for comparison purposes that the abolition of the death penalty (in peacetime) was provided for in 1983 in Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms, in which Article 1 states that the death penalty shall be abolished, and no-one shall be sentenced to such penalty or executed. The second document dealing with this issue is Protocol No. 13 of 2002, which provides for the abolition of the death penalty also during war.

The equivalent of the Eighth Amendment in the Polish legal system is Article 40 of the Polish Constitution, which states that no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment. At the same time, it prohibits the use of corporal punishment. As emphasized in the doctrine of constitutional law and criminal law, the prohibitions contained therein also apply to the imposition and enforcement of punishments by the competent state authorities, such as courts. As for the death penalty, it should be recalled that after Second World War, the death penalty was provided for in the 1969 Criminal Code in Poland (it was carried out by hanging). However, since 1988, death sentences have not been carried out, and since 1995 there has been a moratorium on executions. With the entry into force of the new Penal Code of 1997, it was abolished and replaced by life imprisonment.

Undoubtedly, the issue of the compliance of the death penalty with the idea of human dignity is extremely important and the debate on its admissibility is difficult on both sides of the Atlantic. However, the subject matter of the Eighth Amendment is broader. Therefore, first, the issues of the normative influence of human dignity on the understanding of the concept of cruel and unusual punishment are discussed, followed by the normative influence of human dignity on decisions and methods of executing the death penalty.

HUMAN DIGNITY AS A VALUE THAT DEFINES THE ESSENCE OF CRUEL AND UNUSUAL PUNISHMENT

One of the most significant rulings for the research problem in the context of the Eighth Amendment must be considered to be *Trop v. Dulles*[6] from 1958. The Supreme Court stated that it was the idea of human dignity that underpinned the Eighth Amendment's prohibition of cruel and unusual punishment. In addition, it defined standards that shape the jurisprudence to this day in matters relating to the way criminals are punished.

[5] Death Penalty Information Center, "Facts about the Death Penalty," accessed July 30, 2023, https://deathpenaltyinfo.org/documents/FactSheet.pdf.

[6] *Trop v. Dulles*, 356 U.S. 86 (1958).

The case involved Albert Trop, who served as a private in the US Army during Second World War. In 1944, his unit was stationed in Casablanca, Morocco. Trop was punished for disciplinary violations with detention, from which he escaped. However, just one day later, he surrendered to an American military patrol he encountered. For his act, he was charged with desertion and sentenced to three years of hard labor, loss of pay, and disciplinary expulsion from the army. In 1952, Trop applied for his passport. His application was denied under the Citizenship Act of 1940. Under its provisions, a person who is a citizen of the United States, whether by birth or naturalization, loses citizenship as a result of desertion from the United States forces in a war, provided that he is convicted by a martial law court and, as a result of such conviction, is discharged or disciplinarily discharged from service with the United States forces. Both the Court of First Instance and the Court of Second Instance refused to issue a verdict confirming that Trop is still a citizen of the United States on the basis of the aforementioned provisions. As a result of Trop's appeal, the case reached the Supreme Court, which had to answer the question of whether a provision of the amended Citizenship Act authorized an unconstitutional penalty by allowing a person convicted of desertion during wartime to be stripped of citizenship.

By a five to four majority, the Supreme Court held that the penalty of deprivation of citizenship provided by the provisions of the 1940 Act was a cruel and unusual punishment within the meaning of the Eighth Amendment and was therefore unconstitutional. The Court began its reasoning by noting that the precise scope of the phrase "cruel and unusual punishment" has not been defined in depth in case law. However, its interpretation is firmly rooted in the Anglo-American criminal justice tradition. Indeed, the phrase in the Constitution is directly derived from the English Bill of Rights of 1688,[7] and the principle it represents derives from as far back as the Magna Carta. The court firmly stated that the fundamental concept underlying the Eighth Amendment is the dignity of man. The state has the power to punish, but the purpose of the amendment is to ensure that this power is exercised within civilized standards. Depending on the nature of the crime, fines, imprisonment, and even execution may be imposed, but any technique that goes beyond the bounds of these traditional punishments is constitutionally suspect.[8]

At the same time, the Supreme Court noted that until that point it had rarely dealt with explaining and interpreting the Eighth Amendment. According to the justices, this was due to the fact that the United States is an enlightened democracy. The court emphasized that the wording of the amendment is not precise and

[7] Section 10 of the Bill of Rights of 1688, entitled "Excessive Bail," established that no exorbitant bail shall be demanded, nor exorbitant fines imposed, nor cruel and unusual punishments inflicted. Bill of Rights (1688), Legislation.gov.uk, accessed September 6, 2023, https://www.legislation.gov.uk/aep/WillandMarSess2/1/2/data.pdf.

[8] *Trop v. Dulles*.

its scope is not static. Therefore, the content of the Eighth Amendment must be interpreted in accordance with the evolving standards of decency which determine the civilization progress of a developing society. The majority opinion referred to the opinion of Justice Charles Clark,[9] which he included in a dissenting opinion at the level of the federal Court of Appeals for the Second District.[10] He indicated that he agreed with those comments of legal doctrine[11] that the penalty of deprivation of citizenship against a person of no other nationality is an example of cruel and unusual punishment and, as such, is inconsistent with the Eighth Amendment. Importantly, Justice Clark expressed his belief that this type of punishment is not consistent with the American concept of man's dignity.[12]

The majority opinion provided detailed reasoning as to why a sentence of deprivation of citizenship should be considered cruel and unusual. It was emphasized how obvious it was that in this case there was no question of physical abuse or the use of common torture. Nevertheless, the effect of deprivation of citizenship is the complete destruction of the individual's status which enables him to function in society. The court held that this is a more primitive punishment than torture because it destroys the individual's entitlements, developed over centuries, which he has in the public sphere. Such punishment deprives the citizen of his status in both the national and international community. In practice, its existence becomes burdensome for the country in which it resides. While any country can grant him certain rights, and it is likely that he will enjoy limited alien rights as long as he is in that country, no country has to do so because he is stateless. Moreover, the exercise of even the limited rights of a foreigner may be terminated at any time due to deportation. In short, a stateless person loses the right to have any rights.[13]

Referring to the very essence of citizenship, the Court pointed out that it was not "a license that would expire in the event of misconduct." An essential component of citizenship is the numerous obligations, the fulfillment of which is essential for the security and well-being of society as a whole. However, the court questioned whether citizenship can be removed for evading basic civic obligations, even when the behavior of a citizen is highly reprehensible, as in the case of desertion. For example, those who do not pay taxes or do not comply with the rules that guarantee the fairness of elections also cause dangerous damage to their country, and yet such

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[9] Charles Edward Clark (1889–1963)—Justice of the federal Court of Appeals for the Second Circuit from 1939 to 1963, Dean of Yale Law School (1929–1939).

[10] *Trop v. Dulles*.

[11] "The Expatriation Act of 1954," *The Yale Law Journal* 64, no. 8 (1955): 1164–200. In this extensive commentary on the deprivation of Citizenship Act, we also find several references to human dignity, including pp. 1189, 1191, 1198, 1199.

[12] *Trop v. Dulles*: "In my faith, the American concept of man's dignity does not comport with making even those we would punish completely 'stateless'—fair game for the despoiler at home and the oppressor abroad, if indeed there is any place which will tolerate them at all."

[13] *Trop v. Dulles*.

cases do not provide for such an exceptional penalty. The court ruled that deprivation of citizenship cannot be a tool that the public authorities will use to express dissatisfaction with a citizen's behavior. In the majority opinion, the fundamental entitlement of citizenship is inviolable as long as a person does not renounce it himself.

The four remaining justices disagreed with the majority position. Justice Felix Frankfurter, in a dissenting opinion (joined by the other justices), noted that desertion in wartime is also punishable by death. In view of this, he rhetorically asked whether "the constitutional dialectic is so far beyond reason that one can seriously argue that loss of citizenship is worse than death." This objection, however, was addressed in the majority opinion. It was pointed out that the death penalty has been used throughout American history, it is still widely accepted, and thus it cannot be said to violate the constitutional concept of cruel and unusual punishment. Furthermore, it was taken for granted that the existence of the death penalty does not imply condoning the infliction of punishments that do not deprive life but are inconsistent with the Eighth Amendment, such as physical mistreatment or torture.[14]

Summarizing the above considerations, it is necessary to emphasize the clear confirmation of the law-making nature of human dignity, which was explicitly referred to as the source of the Eighth Amendment. At the same time, the reference to the idea of human dignity had an impact on the range of punishments that could be imposed by the court. Moreover, the changing standards of decency in this regard were pointed out. This was understood as a situation in which, along with social development, views on a particular punishment may change (which will be quite relevant to the issue of capital punishment). As a side note, it is also worth noting that the penalty of deprivation of citizenship has been compared to medieval punishments of dishonor, such as banishment or outlawry (i.e., medieval forms of civil death, which were also directed against the honor, honor, and dignity of the convicted person).

In the context of the research problem of this work, the *Jackson v. Bishop*[15] ruling of 1968 should be considered important. Even though it is a federal appellate court ruling, it is extremely important due to the content, social reception of this ruling, and the justice who wrote it. First, the ruling outlawed corporal punishment, which until its issuance had been used in Arkansas state prisons. Second, the justification was very well received by both the public and the US jurisprudence[16] itself. Finally, the author of this judgment, Justice Harry Blackmun,[17] became a justice of the Su-

[14] *Trop v. Dulles*.

[15] *Jackson v. Bishop*, 404 F.2d 571, 576 (8th Cir. 1968).

[16] Linda Greenhouse, *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey* (New York: Times Books, Henry Holt and Company, 2005), 31.

[17] Harry A. Blackmun (1908–1999)—Supreme Court justice from 1970 to 1994, nominated to the Court by President Nixon, initially voted in line with other conservative judges, but wrote the majority opinion in *Roe v. Wade* in 1973; retired in 1994; see more "Harry A. Blackmun. United States Jurist," in *Encyclopaedia Britannica* [online], accessed August 6, 2023, https://www.britannica.com/biography/Harry-A-Blackmun.

preme Court in 1970 (he was until 1994) and to this day is considered one of the most influential justices, inter alia as the author of the rationale for the *Roe v. Wade* judgment (granting women the right to terminate pregnancy) and for his position in cases concerning the death penalty.

Jackson v. Bishop involved the use of corporal punishment in an Arkansas state prison and the application of the Eighth Amendment's prohibition against cruel and unusual punishment to that practice. The regulations in force in the state of Arkansas allowed the prison authorities to use whipping on prisoners. This was performed by the guards using a leather whip over 1.5 meters (5 feet) in length, commonly known as a bull hide. After several independent complaints by inmates seeking to ban the use of bull hide as a disciplinary measure, the case went to a federal appeals court.

The appellate court indicated that whipping is the primary disciplinary measure used in the Arkansas state correctional system. Segregation and solitary confinement are limited. In addition, prisoners have only a few privileges, the revocation of which may be considered a punishment or disciplinary measure other than whipping. Justice Blackmun described in detail the procedure for imposing this punishment. He also pointed out that due to the abuses, new rules for the application of this penalty were introduced, which did not eliminate all the controversy, however. He emphasized that the court has divergent testimonies on the effectiveness of this punishment. On the one hand, it is indicated that its use fosters discipline and improves the general level of work and security in the prison; on the other, whipping generates hate in the inmate who is whipped, and this hate flows toward the whipper, the institution, and the system.[18]

In the justification, there were significant references to earlier judgments of this court (including the judgments of *Carey v. Settle*[19] and *Lee v. Tahash*[20]) and judgments of the Supreme Court (especially the *Trop v. Dulles* case). Pursuant to these regulations, the appellate court indicated that final imprisonment may lead to the deprivation of certain rights that the convict could otherwise exercise (e.g., voting rights). On the other hand, a prisoner may not lose all civil rights during and because of imprisonment. The court recalled the key statements made in *Trop v. Dulles*. First, human dignity is at the heart of the Eighth Amendment; second, the Eighth Amendment ensures that the punishment of criminals is carried out within the bounds of civilized standards and that any technique beyond those standards is constitutionally suspect. On this basis, Justice Blackmun held that the scope of the Eighth Amendment is not static and must take into account "the evolving standards of decency that mark the progress of a maturing society."[21] Having defined the rules of interpretation, the Court indicated the values that must be taken into account when defining the nature of the regulations at issue. Among these, the Court pointed out man's basic dignity

[18] *Jackson v. Bishop*.

[19] *Carey v. Settle*, 351 F.2d 483 (8th Cir. 1965).

[20] *Lee v. Tahash*, 352 F.2d 970, 971 (8th Cir. 1965).

[21] *Jackson v. Bishop*.

as the most important and requiring emphasis in the first place. The appellate court acknowledged that the restrictions contained in the Eighth Amendment's prohibition are not precise or easy to identify. On the other hand, he emphasized that when defining them, he was guided by such clear rules as disproportions between individual penalties and between the penalty and the crime itself, as well as broad and idealistic concepts of dignity, civilization standards, as well as humanity, and decency.[22]

In view of the foregoing principles and values, the court unquestionably concluded that the use of "bull hide" in Arkansas prisons in the second half of the twentieth century is a punishment that is inconsistent with the Eighth Amendment. Regardless of its possible preventative effects, its use violates the essence of contemporary concepts of decency and human dignity and the principles of civilized society that Americans recognize as valid in their society. Finally, the use of "bull hide" also violates the standards of good conscience and fundamental fairness set forth in *Carey v. Settle* and *Lee v. Tahash*.

In conclusion, it is important to note the issues fundamental to the question of the idea of human dignity. Its legislative character was confirmed in the context of the Eighth Amendment, as it was considered to be the basis of this amendment. The processes of ethical and moral changes taking place in society, which the law should follow, were also indicated. It is also worth noting that the Court wrote about multiple concepts of human dignity, not one.

The rules set forth in *Jackson v. Bishop* at the Supreme Court level were cited in its 1976 decision in *Estelle v. Gamble*[23] which concerned J. W. Gamble, an inmate serving time in a Texas prison. He was crushed by a more than 272-kilogram (600-pound) bale of cotton while working. He was taken to the hospital and sent back to prison after he was given painkillers. As his condition worsened, he was again taken to the hospital. As a result of his injuries and pain, Gamble repeatedly refused to continue working, causing prison authorities to punish him with administrative measures. Gamble eventually concluded that the lack of proper medical care resulted in a significant deterioration of his condition, which should be considered tantamount to an Eighth Amendment violation.

The court ruled by an eight to one majority that the prison treatment described by Gamble did not violate the Constitution or constitute cruel and unusual punishment within the meaning of the Eighth Amendment. What is significant, however, is that it was in this case that the Supreme Court established the standards that a prisoner must rely on in order to effectively report a violation of the Eighth Amendment.[24] The reasoning behind the ruling included a reminder that the Eighth

[22] *Jackson v. Bishop*.

[23] *Estelle v. Gamble*, 429 U.S. 97 (1976).

[24] As an aside, it is only worth noting that it was not until 1993, in *Helling v. McKinney*, that the Supreme Court expanded the requirements of proper medical care beyond what it established as the standard in *Estelle v. Gamble*.

Amendment contains "broad and idealistic concepts of dignity, civilized standards, humanity, and decency against which we must evaluate penal measures." Accordingly, the Court held that punishments that are inconsistent with "the evolving standards of decency that mark the progress of a mature society" or that "involve the unnecessary and wanton infliction of pain."[25]

Justice Thurgood Marshall, who wrote the majority opinion, admitted that the Eighth and Fourteenth Amendments required Texas authorities to provide prisoners with adequate medical care. At the same time, however, he emphasized that the negligent or unintentional failure to provide adequate medical care does not constitute prisoner abuse prohibited by the Eighth Amendment. In contrast, it would be a violation of the amendment if prison staff were deliberately indifferent and failed to respond to a prisoner's serious illness or injury. The court noted that in the case at hand, Gamble received various medical treatment seventeen times over a three-month period. As Justice Marshall acknowledged, failure to take X-rays or use additional diagnostic techniques may be medical malpractice at best. It is not cruel or unusual punishment because "medical malpractice does not become a constitutional violation merely because the victim is a prisoner."[26]

Another case relevant to this discussion was *United States v. Bailey*[27] in 1980. The case concerned prisoners who had escaped from the federal prison in the District of Columbia. During their trial, in which they were being held accountable for committing the federal crime of escape from prison, the inmates cited very poor prison conditions as their reason for escaping and described a series of events that occurred there that violated their human rights. They also emphasized that they were willing to turn themselves into the authorities on condition that they were assured of serving their prison sentence in another prison.

Important statements about the law-making role of human dignity were made in this case, not in the majority opinion (which rejected the prisoners' argument), but in a dissenting opinion by Justice Blackmun, joined by Justice William Brennan. Justice Blackmun stressed that the majority opinion is logically correct and an example of excellent legal reasoning. However, it fails to take into account the broader social context, particularly the conditions that prevail in American prisons. The justice pointed out that the majority opinion would be appropriate if it were decided in an ideal world in which US prisons were places of humane treatment for the re-education and rehabilitation of prisoners.[28]

Nevertheless, as Justice Blackmun noted, the case is not about an imaginary reality, but about the actual state and real conditions of American prisons. He recalled that both the Supreme Court and a number of other US courts receive many

[25] *Estelle v. Gamble*.

[26] *Estelle v. Gamble*.

[27] *United States v. Bailey*, 444 U.S. 394 (1980).

[28] *United States v. Bailey*.

complaints about prison conditions every day. He acknowledged that the filth, homosexual rape, and brutality reported in them are not always expressions of the purely malcontent. He then emphasized that the Supreme Court itself had admitted, in the majority opinion, that the circumstances which the prisoners had complained about had indeed occurred. According to Justice Blackmun, it is in the light of this stark truth that this case must be judged. The justice was extremely harsh in his assessment of the conditions in which the prisoners were held. He wrote that: "the atrocities and inhuman conditions of prison life in America are almost unbelievable; surely they are nothing less than shocking." The justice referred in detail to the testimony and evidence he had collected. He wrote that "a youthful inmate can expect to be subjected to homosexual gang rape his first night in jail, or, it has been said, even in the van on the way to jail." Weaker prisoners immediately become the property of the stronger or entire prison gangs, who sell their sexual services. Due to the limited resources that society devotes to the prison system, prison officers are either not interested in ending such practices or are unable to do so. In this way, the prison guard is often indifferent to the serious health and safety needs of prisoners.[29]

Meanwhile, as Justice Blackmun emphasized, it is society's responsibility to protect the lives and health of prisoners. There can be no doubt that excessive or unprovoked violence and brutality by prison guards against prisoners violates the Eighth Amendment. At the same time, given past case law, particularly the rules established in *Estelle v. Gamble*, the justice found that failure to use reasonable measures to protect inmates from violence by other inmates also constitutes cruel and unusual punishment. As Justice Blackmun wrote, "rape or other violence serves no penological purpose. Such brutality is the equivalent of torture and is offensive to any modern standard of human dignity.[30] The justice also emphasized that prisoners are forced to rely on the prison authorities for protection against such abuses, and prison authorities should meet the resulting obligations. The justice acknowledged that US prisons experience many problems, including overcrowding and poor-quality food. All this leads to many shortcomings in the entire penitentiary system. Nevertheless, the above situation cannot justify tolerating such places that do not meet the minimum standards of safety and decency. In evaluating prisons in the United States, Justice Blackmun referred to the experience of other countries, writing that: "the contrast between our indifference and the programs in some countries of Europe—Holland and the Scandinavian countries in particular—is not a happy one for us." On the other hand, he acknowledged that the practices he cited show that improvements are possible in America itself.[31] In concluding his argument, Justice Blackmun held that the real question presented in this case is whether the prisoner should be punished for helping to extricate himself from a situation where society

[29] *United States v. Bailey*.
[30] *United States v. Bailey*.
[31] *United States v. Bailey*.

has completely abdicated its basic responsibility for providing an environment free of life-threatening conditions such as beatings, fires, lack of essential medical care, and sexual attacks.[32]

The direction of the evolving understanding of the standard of cruel and unusual punishment and the standard of decency in society in the context of human dignity continued in the 2002 case of *Hope v. Pelzer*,[33] in which the important normative nature of human dignity was again emphasized. Larry Hope, while serving time in a prison in the state of Alabama, was punished twice by being handcuffed to a post (formerly used to tie horses, known as a hitching post). It was a punishment applied to prisoners who disturbed the order. Each time, prison guards handcuffed Hope in such a way that the handcuffs would cut into the prisoner's hands if he tried to change position. Additionally, the second time Hope was undressed and left in the sun for seven hours. During this time, he was only given something to drink but was not allowed to use the toilet. Hope filed a complaint, and the courts had to decide two questions: whether the prison guards' conduct violated the Eighth Amendment and whether they could be held accountable for it by the courts, or whether they were protected by qualified immunity.[34] The Federal Court of Appeals for the Eleventh District held that the punishment of being chained to a pole for tying up horses was cruel and unusual punishment within the meaning of the Eighth Amendment. Nevertheless, it confirmed that the defendants were granted immunity because, in its view, handcuffing to a post did not meet the criterion of infringement of the 'clearly established law' required to waive immunity.

As a result of Hope's appeal, the case was brought before the Supreme Court. By a six to three majority, the Court held that prison guards could not escape liability in this case. According to Justice John Paul Stevens, who drafted the majority opinion, a reasonable prison guard should know that using a post to tie up horses as punishment is unlawful because such practices constitute obvious cruelty.

Justice Stevens referred at several points in his argument to prior rules established based on the normative nature of human dignity. First, he referred to the text of an appellate court decision that relied on precedent from the 1974 case *Gates v. Collier*,[35] in which similar practices of punishment of prisoners were held to be inconsistent with the Eighth Amendment. In that case, handcuffing prisoners in cells or on fences surrounding buildings and leaving them so for many hours was considered a violation of contemporary concepts of decency, human dignity, and

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[32] *United States v. Bailey*.

[33] *Hope v. Pelzer*, 536 U.S. 730 (2002).

[34] In case *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) the Supreme Court has held that, where appropriate, qualified immunity protects state officials from liability unless their actions violate a person's federal constitutional rights. This immunity applies to state or federal employees when their actions, even if later found to be unlawful, do not violate a clearly established right.

[35] *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974).

the precepts of civilization that American society adheres to. In addition, the court recalled that the American justice system had abandoned the pillory as a means of punishment over one hundred years ago. Justice Stevens then concluded that handcuffing the prisoner to a hitching post for seven hours, leaving him there in full sunlight, and not being able to use the restroom, "created a risk of particular discomfort and humiliation." Such circumstances of punishment violate, as defined in *Trop v. Dulles*, the dignity of man, the basic idea underlying the Eighth Amendment.[36]

The court held that the obvious cruelty inherent in this practice should have provided guards with some notice that their conduct violated Hope's constitutional protection against cruel and unusual punishment. Indeed, Hope was being treated in a manner contrary to the concept of human dignity because he was being held in a painful position for an extended period of time, and under circumstances that were both degrading and dangerous. Finally, this was not done out of necessity, but as punishment for prior conduct. It was also pointed out that this type of punishment was condemned in the US Department of Justice report, which found the systematic use by prison officers of Alabama of the penalty of being chained to a hitching post to be an inappropriate corporal punishment.[37]

FURMAN V. GEORGIA

One of the most important cases concerning the death penalty was the 1972 judgment in *Furman v. Georgia*.[38] This judgment resulted in a four-year interruption in the administering of capital punishment in the United States. It forced Congress and state legislatures to introduce changes that would ensure that it would not be adjudicated and carried out in an arbitrary and discriminatory manner against black defendants.

William Furman shot the owner of the apartment during a burglary. During the police questioning, he testified that he shot blindly. During his testimony before the court, he stated that the weapon was fired accidentally when he stumbled while fleeing. Furman was found guilty of murder (according to felony murder rule) and sentenced to death. The appeal brought the case before the Supreme Court. The court, together with Furman's case, considered two other cases: *Jackson v. Georgia* and *Branch v. Texas* (both sentenced to death for rape). The Supreme Court had to decide whether the adjudication and execution of the death penalty in these cases constitutes a cruel and unusual punishment, which violates the Eighth and Fourteenth Amendments.

[36] *Hope v. Pelzer*.
[37] *Hope v. Pelzer*.
[38] *Furman v. Georgia*.

In a five to four decision, the Supreme Court declared that the death penalty in these cases constitutes a cruel and unusual punishment, which violates the constitutional guarantees of protection of rights. The Court considered that the death penalty could not be imposed by proceedings that create the risk of arbitrary and discriminatory imposition and execution of the death penalty and thus assessed the circumstances of these cases. The majority opinion was prepared per curiam, and each of the five justices issued a separate opinion on the justification, which indicates the uniqueness of this case. The key to the research topic is the opinion of Justice Brennan, who based the inference and justification on the idea of human dignity, recognizing the death penalty per se as being unconstitutional (similar to Justice Marshall). Other justices indicated the issues of arbitrariness in its adjudication and discrimination against black defendants as the grounds for the judgment. In addition, a reference to the idea of human dignity appeared in the dissenting opinion of Justice Blackmun, who opposed the final sentence of the judgment.

Justice Brennan stated that the *Furman v. Georgia* case is a general question as to whether nowadays death is a penalty which is a cruel and unusual punishment, and, consequently, under the Eighth and Fourteenth Amendments, whether it is outside the powers of public authority. The fundamental role in his argument was played by the emphasis on the need to protect the internal value of intrinsic worth as human beings and the normative nature of human dignity. Justice Brennan's entire argument can be divided into two parts. In the first, he presented his point of view on issues regarding the interpretation of the Constitution, rejecting an interpretation solely based on historical premises and the original understanding of the text. In addition, he presented the characteristics of four standards that form an integral part of the Eighth Amendment and define whether a given punishment is "cruel and unusual." Firstly, is death a severe punishment? Secondly, is it likely to be measured arbitrarily? Thirdly, whether as a punishment for a crime was completely rejected by modern society? Fourthly, are there arguments to conclude that less severe imprisonment serves the purpose of punishment more effectively? In the second part of his argument, based on the four principles described above, he assessed the constitutionality of the death penalty. According to Justice Brennan, in connection with the death penalty, each of the above questions must be answered in the affirmative. This, in turn, leads to the recognition of the death penalty as incompatible with human dignity.[39]

However, before proceeding to characterize the principles of interpretation of these four rules, Justice Brennan put forward the argument in which he rejected the theory that the Eighth Amendment should be interpreted only in the way that the Founding Fathers were doing it in their times. Brennan started by trying to define what the creators of the Constitution and the United States Bill of Rights were

[39] *Furman v. Georgia*.

guided by. He stressed that the Founding Fathers were particularly concerned about the scope of the legislative authority, and the Eighth Amendment was included in the Bill of Rights so that the legislator did not have an unlimited right to enact penalties for offenses. He rejected the statement that the sole purpose of the Eighth Amendment was to counteract penalties that were already considered cruel and essentially torture at that time (e.g., burning at the stake, crucifixion, or breaking the wheel). He believed, among other things, that this is why the content of the amendment is so general. What is more, as Justice Brennan reiterated, such a narrow and historical interpretation of the Eighth Amendment was rejected in the judgment of *Weems v. United States* of 1910.[40] While the creators of the Bill of Rights were sure that democratic power would not imitate the punishment of an arbitrary monarchy, they saw the possibility of other abuses of power that could shock people's sensitivity. That is why the Eighth Amendment should protect against any abuse of any authority in the sphere of punishment. Therefore, the right to freedom from cruel and unusual punishments, like other guarantees of the Bill of Rights, cannot be put to a vote or depend on the outcome of the election. The Bill was supposed to eliminate the regulation of the issues identified in it, by politicians by enacting the law. Putting the rights of citizens beyond the reach of the decisions of the majority or representatives of the executive branch and establishing these rules as legal principles for the courts served to liberate citizens from volatility and political controversy.

Afterward, Justice Brennan recalled the current rules regarding the interpretation of the Eighth Amendment, from the judgment of *Trop v. Dulles*. As stated in this judgment, the terms used in the text of the amendment are not precise and its scope is not static. While interpreting, one must first of all use the meaning defined by the evolving standards of decency that determine the progress of a mature society. Secondly, it is necessary to think about whether the punishment does not expose the individual to a situation that is excluded by the rules recognized by civilized society. This means that the clause on cruel and unusual punishments prohibits the imposition of uncivilized and inhuman punishments. The authorities must treat their citizens (including convicted criminals) with respect for their intrinsic worth as human beings. Therefore, punishment is cruel and unusual, if not compatible with human dignity. However, this approach does not in itself constitute the rules to assess the constitutional validity of respective penalties. To determine this, it is necessary to check whether the penalty is compatible with the four above-mentioned rules for the application of the Eighth Amendment.

The first rule in clause VIII of the amendment in question is that punishment cannot be so severe as to degrade the dignity of human beings. In assessing this, physical pain associated with punishment will be extremely important. Extreme harsh punishment brings physical suffering. However, one cannot ignore the issue

[40] *Weems v. United States*, 217 U.S. 349, 376 (1910).

of mental pain, which may also accompany some punishments and as such may be more serious than physical ones. Brennan recalled that such a belief was the basis of the *Trop v. Dulles* ruling. Moreover, the joint occurrence of physical and mental suffering was a premise for recognizing the unconstitutionality of the cadena temporal[41] punishment in the judgment of *Weems v. United States*.

However, the severity of punishment can be more humiliating for the dignity of human beings than the pain. Certain punishments, and tortures, in fact, have been rejected in the past not only because of pain. As Brennan emphasized: "The real meaning of these punishments is that they treat members of the human race as non-human, but as objects to play with and to throw away. They are therefore contrary to the fundamental assumption of the clause that even the most despicable criminal remains a human being possessing common human dignity." In addition, Brennan noted that the imposition of an extremely severe punishment may reflect the conviction that the person being punished is not entitled to be recognized as a fellow human being. This attitude can be seen regardless of the severity of the punishment itself. In some situations, punishment, like torture, can be so humiliating and indecent that in practice it means negating human status in relation to the offender. That is why Brennan decided that punishment can be degrading to human dignity simply because it is a punishment. As an example, Justice Brennan stressed that the state cannot punish someone for being sick, for example, suffering from venereal disease, being mentally ill, or addicted to drugs.[42] In practice, in a situation like that, punishing for being ill means treating the individual as an object of illness, and not as a sick person. In concluding this part of his reasoning, Brennan pointed out that the punishment could simply be degrading because of its immensity and gave an example of the deprivation of citizenship in the case of *Trop v. Dulles*.

While discussing the second issue, Brennan analyzed the idea of the arbitrariness of punishment. This principle is derived from the view that the state does not respect human dignity when it imposes a severe punishment on some which it does not impose on others. Brennan referred to earlier judgments in which this principle was interpreted in detail. In the *Wilkerson v. Utah*[43] case, the Supreme Court dealt with the constitutionality of execution by firing squad during the war. He assumed that, during the war, shooting was a common method of serving the death penalty and, on this basis, considered it constitutionally permissible. From this, Brennan concluded that when a severe punishment is imposed in the vast majority of cases where it is legally available, the likelihood of it being arbitrarily imposed by the state is low. At the same time, however, if in a given case the imposition of a severe penalty

[41] Cadena temporal—a punishment derived from the from the Spanish penal code and adopted by the colonies in America, involving imprisonment for at least twelve years and one day in shackles, hard and painful labor and the loss of many basic civil rights.

[42] *Furman v. Georgia*.

[43] *Wilkerson v. Utah*, 99 U.S. 130 (1878).

is something other than what is commonly executed, there is a high probability that the state, contrary to the requirements of regularity and integrity contained in this clause, arbitrarily imposes the penalty. Therefore, if in other cases an equally severe penalty is not imposed or more severe crimes are punished less severely, there is an important premise that the state enjoys arbitrary and unrestrained power.[44]

The third argument on which Justice Brennan based his argument concerned the attitude of society towards imposing punishment: punishment must be accepted by modern society. He took for granted that the rejection of a given punishment by the public is clear evidence that such a punishment is not compatible with human dignity. He considered the judges' duty to be objective in making such an assessment of social sentiment as a key element. He emphasized that no court could follow its own opinions. The judge cannot (and here Brennan referred to the concurrent opinion of Justice Frankfurter in the Louisiana case ex rel. *Francis v. Resweber*[45]) seek confirmation of his own disapproval in the opinion of only part of society, or force his own views, instead of following the consensus of public opinion, which, for the purposes of due process of law, is a standard mandated in the Constitution. The court must therefore use certain objective indicators, on the basis of which it can conclude that modern society recognizes this severe punishment as inadmissible. Brennan considered such objective activities to review the history of the application of contested punishment and examine current practices. He emphasized, however, that the mere existence of punishment in law obviously does not mean its acceptance by the public. As he noted, at some point the punishment may simply become unacceptable to society, which is why the admissibility of severe punishment is not measured by its availability but by its use.[46]

The last rule contained in this clause is that severe punishment cannot be excessive. Under this principle, punishment is excessive if it is unnecessary. A severe punishment imposed by the courts cannot be reconciled with human dignity when it is only the senseless infliction of suffering. If there is a significantly less severe penalty, but also suitable to achieve the purpose of the penalty, a more severe penalty is unnecessary and therefore excessive. In this context, Justice Brennan recalled the rule contained in the 1892 judgment of *O'Neil v. Vermont*,[47] according to which the clause is directed not only against punishments of a torture nature but against all penalties which, due to excessive length or severity, excessive length or severity are greatly disproportioned to the offenses charged.[48]

To sum up the above description of the rules contained in the Eighth Amendment, Justice Brennan emphasized that, in his opinion, the main principle that is

[44] *Furman v. Georgia*.

[45] *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947).

[46] *Furman v. Georgia*.

[47] *O'Neil v. Vermont*, 144 U.S. 323 (1892).

[48] *Furman v. Georgia*.

a necessary condition for applying other rules is that punishment, due to its severity, cannot be degrading to human dignity. He pointed out that since the adoption of the Bill of Rights, the Supreme Court had ruled only in three cases that the penalty imposed was contrary to a clause of the Eighth Amendment: cadena temporal, i.e., twelve years of hard labor in shackles (*Weems v. United States*), deprivation of citizenship (*Trop v. Dulles*), and imprisonment for drug addiction (*Robinson v. California*). Each of these penalties was clearly contrary to human dignity, but this conclusion cannot be drawn solely on the basis of the violation of one of the principles cited. These "cruel and unusual punishments" seriously violated several principles, and it was their combined application that resulted in a final judgment. This is how Brennan saw the purpose of their application: they should provide the court with tools to confirm that the questioned punishment is contrary to human dignity. If the punishment is extremely severe, there is a high probability of being imposed arbitrarily, and if it is significantly rejected by modern society or there is no reason to believe that it serves the purpose of punishing more effectively than any less severe punishment, then its further inflicting constitutes a violation of the prohibition of cruel and unusual punishments.[49]

Justice Brennan then moved from applying the principles described above to characterizing the death penalty. First, he referred to the issue of exceptional severity. He emphasized that the death penalty is, in his opinion, an exceptional punishment. Moreover, although the previous rulings emphasize that death is a "traditional" punishment, which "has been used throughout our history," a point evidenced by its uniqueness, even the Fifth Amendment states that a person accused of a crime punishable by death has the right to specific procedural protection. However, it cannot be presumed (there is no evidence for this) that it should be treated equally in the context of the Eighth Amendment, i.e., that the prohibition of cruel and unusual punishments should not apply to it. Furthermore, Justice Brennan pointed out that so far only the constitutionality of certain forms of execution of this sentence was questioned: execution by shooting in the *Wilkerson v. Utah* case and repeated execution in an electric chair in the *Louisiana ex rel. Francis v. Resweber*.[50] However, the death penalty's compliance with the Constitution has not yet been the subject of consideration by the Supreme Court. Moreover, the death penalty, widely recognized as the ultimate sanction, raises many doubts. Brennan pointed out that only in the case of this punishment does a nationwide debate take place: the application of any other penalty is not as procedurally restricted as capital punishment. In addition, no other punishment has been banned in so many states, and in those in

[49] *Furman v. Georgia*.

[50] Willie Francis, who was sentenced to death for murder, survived execution in the electric chair in 1946. As a result, his attorney objected to its repetition, pointing out that the twofold execution is cruel and elaborate punishment. The Supreme Court denied the request, and in 1947 Francis was subjected to a second execution, this time ending in his death.

which it remains in the catalog of available penalties, it is envisaged only for the most heinous crimes. According to Brennan, the only explanation that can be offered for the exceptional nature of the death penalty is its extreme severity.[51] This exceptional severity manifests itself in three aspects: caused pain, finality, and enormity. For Brennan, the planned killing of a man by the state is essentially nothing else but a denial of the executed person's humanity. Therefore, the deliberate deprivation of human life by the state must now be seen as extremely humiliating for human dignity, especially in comparison with any punishment used today.[52]

Secondly, Justice Brennan dealt with the issue of the arbitrariness of the death penalty—that is, the State cannot arbitrarily impose an extremely severe penalty. In this respect, it relied on detailed statistical data. He pointed out that the death penalty could be imposed in the case of several crimes that are committed in the United States every year (mainly murders and rapes). Meanwhile, death is adjudicated in only a few dozen cases. Therefore, if death is pronounced in such a small number of cases where it is possible to judge, it must be pronounced arbitrarily. Brennan even stated that its adjudication was more like a lottery. At the same time, he rejected the position of advocates of maintaining this punishment that the rarity of its adjudication means deliberate selection, according to the principle that it is adjudicated only in extreme cases. According to Brennan, the Furman case proves quite the opposite. If his murder is considered to be an extreme case, then "nearly all murderers and their murders are also extreme."[53]

Then Brennan moved on to the third rule and, by analyzing the history and contemporary functioning of the American practice of punishing criminals, recognized that the death penalty was almost completely rejected by modern society. He also referred to the opinion of Justice Marshall, who presented the problem in detail. Brennan only noted that since the beginning of the existence of the United States, the death penalty has generated controversy in society for ethical reasons. There is still debate whether a society for which the dignity of the individual is the highest value can, without a fundamental inconsistency, apply the practice of intentionally killing some of its members. The justice recognized that in the United States, as in other Western countries, the fight for this punishment is between old and deeply rooted beliefs about retaliation, compensation, and revenge, and beliefs about the personal value and dignity of the common man, as well as beliefs about the scientific approach to understanding human behavior.[54]

According to Justice Brennan, these ethical disputes resulted in constant changes and the evolution of America's practice of the death penalty. Execution methods

[51] *Furman v. Georgia*.

[52] *Furman v. Georgia*.

[53] *Furman v. Georgia*.

[54] Brennan here cited the work of Thorsten Sellin, *The Death Penalty: A Report for the Model Penal Code of the American Law Institute* (Philadelphia: Executive Office, American Law Institute, 1959).

perceived as more humane (electric chair and gas) displaced traditional methods such as hanging and shooting, which were burdened with the stigma of cruelty. In addition, concern for decency and human dignity forced a change in the circumstances of the execution itself. A public execution has also been abandoned as something humiliating and depraving to the general public.[55]

Therefore, even though "the death penalty has been used throughout our history," as stated in *Trop v. Dulles*, the true story of this punishment is the story of its continuous reduction. Brennan noted that what was once a common punishment is becoming increasingly rare in the context of ongoing moral debate. The evolution of this punishment shows that it is not an inevitable part of the American identity, and also that in the general public perception, it is becoming increasingly burdensome. Brennan concluded that the progressive decline in executions and the current rarity prove that American society is seriously questioning the legitimacy of this punishment today.

The last rule to be considered is that extremely severe and degrading punishment must not be excessive in relation to the purpose for which it was imposed. To clarify this clause, Brennan analyzed the extent to which other penalties could serve the same purpose as the death penalty. At this point, he again referred to the arguments presented more broadly in the opinion of Justice Marshall, in which he argued that imprisonment is more likely to achieve the intended aims of the sentence. Brennan considered that in the light of the principles set out above and their joint occurrence, it must be concluded that "arbitrarily subjecting a person to extremely severe punishment by the state is a deprivation of human dignity, which society considers as unacceptable, and it cannot be said to be more effective than much less severe punishment. According to these principles and tests, today, death is a cruel and unusual punishment. Brennan finished his conclusion by saying that death is an exceptional and extremely severe punishment and should be considered as profoundly offensive to human dignity."[56]

To sum up the above, two additional points should be noted. First, the impact of the idea of human dignity is not diminished by the fact that it appeared only in one of five opinions against the death penalty, because the author of each opinion referred to a different type of justification against the death penalty. Secondly, it should be pointed out that human dignity also appeared as an argument in the dissenting opinion of Justice Lewis F. Powell (joined by the Chief of Justice of the Court Warren E. Burger and Justices Harry Blackmun and William Rehnquist). However, it only appeared in relation to one of the arguments, that is, in the context of the unconstitutionality of the death penalty for rape. Justice Powell found it completely impossible to consider the death penalty grossly excessive in all crimes of this type.

[55] *Furman v. Georgia*.
[56] *Furman v. Georgia*.

He recalled that rape is widely recognized as one of the most serious violent crimes, and that is why in sixteen states it is punishable by the death penalty, and in most other states by life imprisonment. According to Justice Powell, there are several reasons why rape is so high on the list of serious crimes. Among them, he pointed out that rape is regarded as the cruelest form of interference with the privacy and dignity of the victim and is never a crime committed accidentally; often the victim suffers serious physical injury, and mental damages can be equally serious. Given the above, Justice Powell stated that in such cases the death penalty cannot be considered to be an excessively cruel penalty in connection to all of the crimes as such.[57]

GREGG V. GEORGIA

The judgment in *Furman v. Georgia* resulted in a de facto moratorium on the death penalty. During this time, the authorities of individual states introduced changes to their provisions regarding its implementation, to implement the guidelines contained in the opinions of justices (it should be remembered that only Justices Brennan and Marshall found the death penalty entirely unconstitutional). The issue of the compliance of the death penalty with the Constitution was, however, on the Supreme Court's agenda four years later due to five cases: *Gregg v. Georgia*,[58] *Proffitt v. Florida*,[59] *Jurek v. Texas*,[60] *Woodson v. North Carolina*,[61] and *Roberts v. Louisiana*.[62] New laws introduced after the *Furman v. United States* judgment were applied in all trials regarding these cases, and five defendants were sentenced to death in the first instance and the conviction was upheld in the appeal instance. The convicts appealed to the Supreme Court for their verdict to declare the death penalty incompatible with the Eighth Amendment. The convicts argued that punishment is contrary to the idea of human dignity, deviates from the current social consensus on this issue, and is disproportionate to the crimes committed. These five cases were consolidated and heard together.

The Supreme Court pronounced its verdicts in these cases on the same day—July 2, 1976. In *Gregg v. Georgia*, *Proffitt v. Florida*, and *Jurek v. Texas*, the Supreme Court found that the new legal regulations met the criteria set out in the *Furman v. Georgia* judgment. However, in the other two cases, which challenged the constitutionality of North Carolina and Louisiana state laws, the court found that state laws violated the Eighth Amendment because they introduced the obligation to im-

[57] *Furman v. Georgia*.
[58] *Gregg v. Georgia*, 428 U.S. 153 (1976).
[59] *Proffitt v. Florida*, 428 U.S. 242 (1976).
[60] *Jurek v. Texas*, 428 U.S. 262 (1976).
[61] *Woodson v. North Carolina*, 428 U.S. 280 (1976).
[62] *Roberts v. Louisiana*, 428 U.S. 325 (1976).

pose the death penalty in the event of a conviction for committing certain crimes. In both of these judgments, there were indirect signs of the idea of human dignity.

In *Woodson v. North Carolina*, James Woodson was found guilty of first-degree murder. State laws provided for a mandatory death penalty in this situation. Woodson appealed, but the North Carolina Supreme Court upheld the judgment. The Supreme Court ruled by a majority of five to four votes on the conflict of state regulations with constitutional clauses. The court pointed out three problems related to the new law. First, the law "departs markedly from contemporary standards" regarding death sentences. Historical documents show that public opinion has rejected mandatory death sentences. Secondly, the law did not provide for any standards that judges could use when exercising "the power to decide which first-degree killers would live and who would die." Thirdly, the law did not allow consideration of the nature and history of individual defendants before the death penalty. The court noted that the "fundamental respect for humanity," which underpins the Eighth Amendment, requires such consideration. Meanwhile, North Carolina regulations treat all individuals convicted of a particular crime unacceptably not as individual human beings but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.[63]

Similarly, in the *Roberts v. Louisiana* case, the court found provisions ordering the death penalty for certain offenses to be unconstitutional. The court held that the new procedure did not provide the Louisiana courts with a constitutionally required opportunity to consider any mitigating circumstances related to the circumstances of the crime or the individual nature of the offender. The Supreme Court concluded its findings by stating that the act on the death penalty is unconstitutional under the Eighth Amendment because it introduces the imposition of the death penalty in the case of many different crimes of varying severity.[64]

For research on the idea of human dignity in the Supreme Court's jurisprudence in connection to the death penalty, the most important judgment regarding the case of *Gregg v. Georgia*, which went down in history as one of the landmark cases. The case concerned Troy Leon Gregg, convicted of robbery and two counts of murder using firearms.[65] During the trial, it was found that Troy Gregg and Floyd Allen were hitchhiking in Florida; on November 21, 1973, they were picked up by Fred Simmons and Bob Moore. During the trip, the car driver Simmons decided to give a ride to

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[63] *Woodson v. North Carolina*.

[64] *Roberts v. Louisiana*.

[65] A detailed description of the circumstances of the crime and the contested criminal procedure contains, among other things, the article Magdalena Abu Gholen, "Dopuszczalność kary śmierci w kontekście Ósmej Poprawki a orzeczenie *Gregg v. Georgia* (1976)," in *Identyfikacja granic wolności i praw jednostki. Prawnoporównawcza analiza tożsamego przypadku pod kątem praktyki stosowania prawa amerykańskiego i polskiego*, ed. Mariusz Jabłoński (Wrocław: E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa. Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego, 2016), 83–103.

another hitchhiker, Dennis Weaver. Late in the evening, when they reached Atlanta, Weaver parted with all four. The next morning, Simmons and Moore's bodies were discovered in a ditch by the highway. On November 23, after reading the news of a double homicide in the newspaper, Weaver contacted the police and gave them information about his trip with the victims, including a description of the suspects. The next afternoon, Gregg and Allen were arrested. During the search, a gun was found in Gregg's pocket, which later turned out to be the one used to shoot Simmons and Moore. Gregg confessed to shooting and robbing the victims but said he did it in an act of self-defense. The courts of both instances found Gregg guilty of the crime he was accused of and sentenced him to death. Given the allegations made by Gregg's defense, the Supreme Court had to answer the question of whether the death penalty is per se inconsistent with the Eighth and Fourteenth Amendments.

The court ruled by a majority of seven to two votes that the death penalty did not violate these two amendments. Dissenting opinions were expressed by Justices Brennan and Marshall, who maintained their positions on the total unconstitutionality of the death penalty contained in opinions in the *Furman v. Georgia* case.

On the other hand, the majority of justices considered that in exceptional situations, for example, intentionally ending someone's life, careful and reasonable application of the death penalty may be appropriate if the judgment is issued using the appropriate court procedures. The court regarded the Eighth Amendment, which is interpreted in a flexible and dynamic way in order to adapt to the changing standards of decency, as only prohibiting the application of an excessively severe penalty. Such a punishment results in unnecessary and unwanted inflicting pain or is grossly disproportionate to the seriousness of the crime. On the other hand, neither does the legislator have to pass a resolution, nor does the court have to impose the least severe penalty. The Supreme Court emphasized that death had already been recognized as one of the acceptable penalties by the Founding Fathers and that throughout the entire existence of the United States, the Supreme Court had never found the death penalty to be unconstitutional by its very nature. The majority opinion pointed out that certain categories of penalties could not be annulled simply because other less severe ones served the purposes of punishment better. At the same time, it was acknowledged that punishment cannot be imposed without any justification, only to inflict unnecessary gratuitous infliction of suffering. However, it is clear that the death penalty has specific functions. The function of retribution and deterrence of potential future criminals are not unlawful factors that the legislator cannot consider when adopting the law. As the Court put it, just retribution is not the main purpose of criminal law (as stated in *Williams v. New York*[66]), but nor is it a forbidden objective inconsistent with the respect for the dignity of men. Finally, the concerns expressed in *Furman v. Georgia* regarding

[66] *Williams v. New York*, 337 U.S. 241, 248 (1949).

the arbitrary or capricious sentencing for the death penalty may be considered by developing a proper criminal procedure.[67]

In addition, the court emphasized the existence of a social consensus to maintain the death penalty. It found that this was confirmed by both political tendencies and jury decisions declaring this punishment. Furthermore, there is no conclusive evidence that the death penalty does not fulfill its purpose of stopping crime. Finally, it stated that the death penalty does not violate human dignity because some crimes are so serious that the only correct response is the death penalty. In addition, it cannot be considered disproportionate to the crime of murder.

Justices Brennan and Marshall delivered dissenting opinions, which related to the idea of human dignity. Brennan based his arguments on the concept of changing standards of decency in the context of the conflict of moral values, about which Sellin, quoted by him four years earlier, had written. He also recognized that the Supreme Court, as the final interpreter of the Constitution, has a duty to state that today's moral and ethical beliefs require us to recognize the death penalty as intolerable for society, as happened with a series of sophisticated tortures in the past. In addition, referring to his earlier opinions, he emphasized that among these concepts recognized in our cases and inherent in the Eighth Amendment is the basic moral principle, according to which the state, even if it administers punishment, must treat its citizens in a manner consistent with their internal value as human beings and the punishment cannot be so severe as to demeans human dignity. The judicial determination as to whether the death penalty is in line with the idea of human dignity is therefore not only allowed but also necessitated by the Eighth Amendment. Brennan expressed his incredulity in the Supreme Court's disagreement with the statement in *Furman v. Georgia* that "compared to all other punishments today . . . the deliberate extinguishment of human life the State is uniquely degrading to human dignity." Finally, Brennan recalled that, in his opinion, in the *Furman v. Georgia* case, American civilization and law had developed sufficiently to recognize the death penalty as a "cruel and unusual" punishment, no matter what crime was committed or what were the circumstances, and that it is always a violation of the Eighth and Fourteenth Amendments.[68]

Justice Marshall issued a similar criticism of the majority opinion. He noted that the mere fact that society "demands the life of a murderer in exchange for the evil he has done" cannot justify the constitutionality of the death penalty. As stated in the opinion of Justices Potter Stewart, Powell, and Stevens in the *Furman v. Georgia* case: "The Eighth Amendment requires more than the questioned punishment to be acceptable by the contemporary society." In order for the death penalty to be considered compatible with the Eighth Amendment, it first has to be "in line with the

[67] *Gregg v. Georgia*.

[68] *Gregg v. Georgia*.

basic concept of human dignity, which is the essence of the amendment," as stated in the *Furman v. Georgia* case. In addition, the purpose of the punishment must also be consistent with "our respect for the dignity of other people," as stated in the *Trop v. Dulles* case. Justice Marshall declared that according to these norms, taking a life just because a criminal deserves it is certainly contrary to the Eighth Amendment because it is justified by a complete denial of the wrongdoer's dignity and worth.[69]

EVOLUTION OF THE SENTENCING AND APPLICATION OF THE DEATH PENALTY IN THE LATE TWENTIETH AND EARLY TWENTY-FIRST CENTURIES

In the *Gregg v. Georgia* ruling, the Supreme Court affirmed the constitutionality of the death penalty. It is worth noting that human dignity was a theme in both judgments and served as an important normative argument for both supporters and opponents of the death penalty. However, just as the *Gregg v. Georgia* decision did not end the debate over the death penalty, the concept of human dignity continued to leave its normative mark on judgments in this area. Its influence is evident in subsequent decisions. This time, however, the rulings being discussed did not concern the constitutionality of the death penalty itself but addressed the compatibility of execution methods with the Eighth Amendment and the permissibility of its application in specific cases, in the context of the constitutionality of execution methods.

In terms of whether the methods of execution are in compliance with the Constitution, the judgment in *Glass v. Louisiana*[70] of 1985 should be considered significant. The case concerned Jimmy L. Glass. While serving a prison sentence for previous offenses, Glass and his inmate escaped from a state prison. During their escape from their pursuers, they attacked and murdered a married couple in their own home. For this double murder, Glass was sentenced to death, which in Louisiana was carried out by execution in the electric chair.[71] Glass appealed against the convictions, criticizing this method of execution as inhumane: "Electricity causes unjustified infliction of unnecessary pain and suffering and is not in line with evolving standards of human dignity." The Supreme Court refused to consider the case, de facto maintaining the judgment of the lower instance. However, a dissenting opinion was expressed by Justice Brennan (joined by Justice Marshall). In the context of the research problem, two points should be highlighted. First, it should be noted that

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[69] *Gregg v. Georgia*.

[70] *Glass v. Louisiana*, 471 U.S. 1080 (1985).

[71] Such a method of execution was allowed by the Supreme Court in 1890 in *In re Kemmler*, 136 U.S. 436 (1890). The first electro-execution was carried out in New York State.

the applicant denounced execution by electric chair not so much as contravening the Eighth Amendment itself, but the very idea of human dignity. Secondly, Brennan's opinion, written with passion and commitment, is entirely devoted to proving the thesis that execution in the electric chair as a method of executing the death penalty is incompatible with human dignity.[72]

Justice Brennan reiterated that the scope of protection of human dignity resulting from the Eighth Amendment goes beyond the prohibition of unnecessary infliction of pain during punishment. Therefore, civilized standards require the minimization of physical violence during execution, regardless of the pain that this violence may inflict on convicts. Similarly, basic notions of human dignity require minimizing mutilation and distortion of the body of a convicted prisoner. These principles explain the prohibition of barbaric practices such as horse drawing and quartering in the Eighth Amendment. Generally speaking, the Eight Amendment requires that within the limits of human possibilities, the chosen method of execution should minimize the risk of unnecessary pain, violence, and mutilation.[73]

Meanwhile, as Justice Brennan noted, the evidence gathered so far suggests that electrocution is unusually violent and causes pain and humiliation far beyond "the mere annihilation of life." Witnesses routinely report that after turning on the power, the convict "shakes," "jumps," and "fights belts with extraordinary strength." The hands turn red, then white, and "the veins around the neck stand out like steel bands." The limbs, fingers, and hands, as well as the face of the prisoner, is severely deformed. The strength of the electric current is so powerful that sometimes the prisoner's eyeballs "rest on the cheeks." The prisoner often "defecates, urinates, and vomits blood and drool." In addition, Justice Brennan referred to the opinions of experts who are more frequently expressing opinions that other currently available means of execution, for example, the use of poisonous gas or lethal injection, causes the death of the convict in a more reliable, faster, less violent, and more humane manner. Given the above arguments, Justice Brennan emphasized that in his opinion, the arguments in favor of the methods of execution used regarding humanity and dignity are contradictory in themselves in terms of their conformity with the Constitution. Brennan ended his argument with a rhetorical question of whether execution in an electric chair is actually a "humane" method of depriving an individual of their life or whether it is nothing more than the modern technological equivalent of burning people at the stake.[74]

Another ruling regarding the compliance of the method of execution with human dignity was the judgment of the Federal Court of Appeal in the case of *Campbell*

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[72] Justice Brennan recalled that in *Gregg v. Georgia*, he held that the death penalty is a under all circumstances a cruel and unusual punishment, making it prohibited by the Eighth and the Fourteenth Amendment.

[73] *Glass v. Louisiana*.

[74] *Glass v. Louisiana*.

v. Wood from 1994.[75] Charles Campbell was sentenced to death in 1982, for crimes including rape and triple first-degree murder. The court found him guilty of raping and murdering Renae Wicklund and murdering her nine-year-old daughter Shannah and their neighbor Barbara Hendrickson. It is only worth mentioning that in 1977 Campbell was sentenced for raping Renae Wicklund, but in 1981 was released due to good behavior. After exercising all rights to appeal, Campbell was hanged (May 27, 1994).

In the judgment of the Federal Court of Appeal discussed here, one can find a dissenting and concurring opinion from Judge Reinhardt,[76] containing detailed argumentation regarding the incompatibility of executing the death penalty by hanging with human dignity. He noted that almost all states had abandoned this form of execution,[77] thus concluding that death by hanging ceased to be in line with the developing standards of decency. He also found it unjustified that this form of execution was clearly incompatible with respect for human dignity, which is the mark of a civilized nation.[78]

Judge Reinhardt admitted that for many Americans the death penalty is not contrary to their social and religious values. Even those who recognize the constitutionality of executions by way of court rulings must admit that hanging is a savage and barbaric method of ending human life. The judge expressed his conviction that execution by hanging is a nasty remnant of less civilized times when science had not yet developed medically appropriate methods to end human life. Judge Reinhardt deemed hanging to be a primitive, harsh, and senseless action aimed at tearing the spine. Such a procedure is unnecessarily brutal and invasive, deliberately degrading and dehumanizing. The result is that the convict suffers great fear beyond the fear of death itself, and the consequences of hanging are often humiliating and disgusting. The judge cited evidence of a complete detachment of the head from the convict's torso and decided that this type of execution was undoubtedly a remnant of an earlier, more difficult period in which, when imposing punishment, people cared much less for human dignity and decency. In those states where hanging is still acceptable, it is referred to as a barbaric anachronism. Judge Reinhardt also stressed that the Constitution forces the state to carry out executions with as much dignity as possible. In the case of hanging, however, we are dealing with indignity resulting not from unnecessarily inflicted pain, but from "relatively painless degradation, savagery, and

[75] *Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994).

[76] Stephen Reinhardt (1931–2018)—Justice on the federal Court of Appeals for the Ninth District, known for his extremely tolerant and progressive views (called the "progressive lion of the Ninth District").

[77] Since the reinstatement of the death penalty in 1976, the states: Washington, Delaware, and New Hampshire have returned to hanging as an available method of execution. In Washington state, it was it (in 1994) and is still one of the two methods of execution, along with poison injection, used exclusively at the request of the condemned. Washington is the last American state with a working gallows.

[78] *Campbell v. Wood*.

brutality." Meanwhile, the Constitution orders the death penalty to be enforced in the most civilized way possible. He emphasized that the use of this method of execution threatens not only the individual's dignity but also the dignity of the entire nation and society. Judge Reinhardt noted that in order to implement the constitutional requirements in practice, it is necessary to eliminate as far as possible all degrading, brutal, and violent methods of execution and replace them with a scientifically developed and recognized method of ending life, i.e., using the appropriate medical procedures in the appropriate conditions. If the medical sciences have developed a method of ending life relatively painlessly and guaranteeing comparative dignity to a greater extent than before, then that new method should be used. In conclusion, Judge Reinhardt recalled that hanging is a brutal and barbaric procedure that had been strongly rejected in some states more than one hundred years ago when it began to be replaced by the electric chair. Even ignoring the risk of decapitation and the lack of immediate death, hanging is simply incompatible with the dignity of man. He remarked that the State of Washington, which permits death by hanging, has absolutely no respect for human dignity when it seeks to execute a man in this way.[79]

In the context of the evolution of ways of executing the death penalty and the role that the idea of human dignity played in this process, it is worth mentioning one issue. Nowadays, injection with a lethal mixture of substances has become the dominant method of execution in the United States. This is the method considered to be the most humane, and as the rulings of the Supreme Court analyzed above state, it is also the most compatible with the idea of human dignity.

The twenty-first century has brought further changes in the context of the use of the death penalty. The direction in which case law is evolving in these cases is quite clear—the Supreme Court limits the use of the death penalty. In 2002, the Supreme Court ruled out the possibility of sentencing people with intellectual disabilities to death (*Atkins v. Virginia*[80]), and in 2005, also minors (*Roper v. Simmons*[81]). In 2008, the Supreme Court restricted the use of the death penalty for child rape (*Kennedy v. Louisiana*[82]), regarding the provisions providing for the death penalty as contrary to the Eighth Amendment.

In 2002, the Supreme Court issued a judgment in the *Atkins v. Virginia* case. Daryl Atkins was convicted of kidnapping, armed robbery, and first-degree murder. He attacked Eric Nesbitt along with William Jones. When it transpired that Nesbitt had only $60 in his wallet, he kidnapped him and forced him to withdraw another $200 from the ATM. Subsequently, both perpetrators took Nesbitt to a remote location and killed him, shooting him eight times. The perpetrators were arrested, inter alia thanks to security camera footage. During interrogation, they accused each

[79] *Campbell v. Wood*.
[80] *Atkins v. Virginia*, 536 U.S. 304 (2002).
[81] *Roper v. Simmons*, 543 U.S. 551 (2005).
[82] *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

other of shooting Nesbitt, but Atkins' testimony was less credible. In addition, Atkins was incriminated by a cellmate who testified that Atkins had confessed to the murder. In exchange for a life sentence, Jones agreed to incriminate Atkins in court. During the trial, the jury found his version of events more consistent and reliable. The defense raised the argument that Atkins is mildly mentally retarded, and as evidence, they provided his IQ test result of fifty-nine, testimony from a psychologist, and documentation of his results from school. Despite this, Atkins was convicted of murder and received the death sentence.

The judgment was repealed by the Virginia Supreme Court for procedural reasons. During the re-trial, the prosecutor's office sought the help of its own psychology expert, who said that Atkins' vocabulary, general knowledge, and behavior suggested that he was of at least average intelligence. The prosecution also put forward two arguments recognized by the jury. Firstly, due to his current behavior, Atkins poses a danger to society. Secondly, the manner in which the crime was committed was particularly reprehensible. According to the law, these were both issues that would increase the sentence and support the death sentence. Atkins was again sentenced to death. Virginia's Supreme Court this time upheld the lower court's verdict. Therefore, the Supreme Court had to decide whether the execution of a person with an intellectual disability is a "cruel and unusual" punishment and, under the Eighth Amendment, is contrary to the Constitution.

The Supreme Court ruled six to three that the execution of persons with intellectual disabilities is contrary to the Eighth Amendment. The majority opinion was made by Justice Stevens. The starting point was a reminder of the rule from the *Trop v. Dulles* judgment that the basic concept on which this amendment is based is human dignity, and the interpretation of this amendment must be in accordance with evolving standards of decency that mark progress in a mature society. Further argumentation, however, dealt with the issue of excessive punishment and disproportion. The justice recalled that the assessment of proportionality under these changing standards of decency should be based on the most objective indicators and as such the legislative case law recognizes the legislative activity of state legislatures. In practice, therefore, this means following changes in state regulations. In the context of the death penalty for people with intellectual disabilities, Justice Stevens pointed out that two-thirds of state legislatures that maintain the death penalty have banned its use against such criminals. Justice Stevens summed up the opinion by saying that the interpretation and application of the Eighth Amendment in light of American changing standards of decency allows the conclusion that the death penalty is excessive and that the Constitution imposes significant restrictions on the state's right to take the life of criminals recognized as persons with mental disabilities.[83] At the same time, the Supreme Court declared that states are free to

[83] *Atkins v. Virginia*.

determine the definition of a person with mental disabilities, which still gives them some control over who can qualify for the death penalty (in 2014, the scope of this freedom was the subject of the case of *Hall v. Florida*[84]).

In 2005, the Supreme Court issued a judgment in the case of *Roper v. Simmons*. Christopher Lee Simmons was accused of murdering Shirley Crook. Her body was found on September 9, 1993. She had been murdered, tied with an electric cable, leather straps, and duct tape. She had broken ribs and bruises all over her body. The cause of death was determined as drowning. Simmons was sentenced to death in 1993 (he was seventeen at the time), yet the appeals to state and federal courts lasted until 2002. It was in 2002 that the Missouri Supreme Court suspended the execution of Simmons until the verdict was delivered in the *Atkins v. Virginia* case.

After this verdict, employing the arguments used in it, the Supreme Court of Missouri ruled that the Supreme Court ruling of 1989 in the *Stanford v. Kentucky*[85] case, in which the execution of minors was found not to be unconstitutional, was no longer valid. The court, referring to numerous acts issued since 1989, which limited the scope of the death penalty, decided that the views of society changed. While acknowledging that most Americans are currently opposed to the execution of minors, it found such executions to be unconstitutional. As a result of this judgment, the case was brought before the Supreme Court, which was required to answer the question of whether the execution of minors violates the prohibition of "cruel and unusual punishments" contained in the Eighth Amendment.

With a majority of five to four votes, it was ruled that decency standards changed in such a way that the execution of minors is a cruel and unusual penalty prohibited by the Eighth Amendment. Justice Anthony Kennedy wrote the majority opinion. Firstly, he recalled that because it protects even those convicted of heinous crimes, the Eighth Amendment confirms the government's duty to respect the dignity of all persons. In the rest of his reasoning, Justice Kennedy referred to the issue of non-acceptance of the use of the death penalty for minors. He cited evidence of public consensus on this issue, indicating that most state legislatures had abolished this type of legislation.[86]

An important role in the justification of this judgment was also played by reference to the experience of other countries and the regulation of international law. Justice Kennedy recalled that since 1990 only seven countries other than the United States had executed juvenile offenders: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, The Democratic Republic of Congo, and China. Since then, each of these countries has either abolished the death penalty for minors or has introduced a moratorium on its implementation. The justice said: "It is fair to say that the United States is now alone in a world that has turned its backs on the death penalty for minors." In the fol-

[84] *Hall v. Florida*, 572 U.S. 701 (2014).

[85] *Stanford v. Kentucky*, 492 U.S. 361 (1989).

[86] *Roper v. Simmons*.

lowing, Justice Kennedy argued that it is necessary to consider the fact that "young people's instability and emotional imbalances can often be a factor in crime." Justice Kennedy defined the normative nature of human dignity and its place in the Constitution, in the entire political system, and in all American social and political thought. He emphasized that the Constitution "defined and based on innovative principles that were original for the American experience, such as federalism, a proven balance in political mechanisms through separation of powers; specific guarantees for the accused in criminal cases; and broad provisions to secure individual freedom and preserve human dignity." The above principles and concepts "are central to the American experience and remain essential to our present-day self-definition and national identity." At the end of the opinion, Justice Kennedy pointed out that these rules had first been applied in practice in the American political system, and that "affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom."[87]

A reference to the idea of human dignity in the context of the impact of international law on American law was also found in a separate opinion given by Justice Sandra Day O'Connor.[88] The justice, though disagreeing with the majority opinion on the sentence, agreed with the argument about the importance of solutions contained in international law. She emphasized that over the last half-century, the Supreme Court had consistently referred to international law and regulations of other countries as an important source in terms of assessing evolving standards of decency. Such comparisons reflect the special nature of the Eighth Amendment, which derives its significance directly from the mature values of civilized society.[89]

Justice O'Connor admitted that in many respects American law is separate. However, the American nation's evolving understanding of human dignity is certainly not completely isolated from the values prevailing in other countries, or inherently contrary to those values. The justice concluded that this form of punishment is incompatible with fundamental human rights. This should not be surprising, bearing in mind the compliance with national and international values expressed in international law or in the national law of individual countries, especially where the international community was in clear agreement. In any case, the existence of such an international consensus could serve to confirm the veracity and legitimacy of the consensus existing in American society. However, as Justice O'Connor firmly stated, in this case, there is no national consensus in the United States.[90]

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[87] *Roper v. Simmons.*

[88] Sandra Day O'Connor (born March 26, 1930)—Supreme Court justice from 1981 to 2006, the first female Supreme Court justice, described as a moderate conservative; she was known for her dispassionate and meticulously prepared opinions; see more widely "Sandra Day O'Connor. United States Jurist," in *Encyclopaedia Britannica* [online], accessed August 6, 2023, https://www.britannica.com/biography/Sandra-Day-OConnor.

[89] *Roper v. Simmons.*

[90] *Roper v. Simmons.*

One of the last rulings of this type is the judgment in the *Kennedy v. Louisiana*[91] case from 2008. Patrick Kennedy was convicted of raping his eight-year-old stepdaughter. The circumstances of the rape were very violent. The raped girl needed immediate medical attention and surgery. The Supreme Court ruled that Kennedy's act was "one that cannot be recounted in these pages in a way sufficient to capture in full the hurt and horror inflicted on his victim." Emphasis was placed on the opinion of an expert in forensic medicine and pediatrics, who testified that these were the most severe injuries he had seen as a result of sexual assault during his four years of practice. He mentioned that a laceration to the left wall of the vagina had separated her cervix from the back of her vagina, causing her rectum to protrude into the vaginal structure. Her entire perineum was torn from the posterior fourchette to the anus. Kennedy consistently protested his innocence, but other evidence and subsequent testimonies by his stepdaughter refuted this (although she initially confirmed Kennedy's version). The court sentenced him to death and the sentence was upheld by the Louisiana Supreme Court. The case was brought before the Supreme Court, which had to answer the question of whether state regulations providing for the death penalty in the event of child rape were in accordance with the Constitution.

The court ruled by a majority of five to four votes that the Eighth Amendment prohibits the imposition of the death penalty for rape of a child if the offense did not result in the death of the child or the offender did not act with the intention of killing the rape victim. Evolving standards of decency must include and express respect for the dignity of the person, and the punishment of criminals must comply with this principle. The use of the death penalty in such a case would constitute the execution of a cruel and unusual punishment, and this would violate the national consensus in this case.[92]

It is worth mentioning that this judgment caused huge controversy, both due to the circumstances of the rape by Kennedy and due to a mistake in the factual findings, which were central to the justification of the majority opinion. The judgment was criticized by both presidential candidates at that time: Barack Obama[93] and John McCain.[94] The focal point of the forensic analysis was the notion that child rape was treated as a crime of special importance in only six states and that no other state or federal jurisdiction allows the death penalty for that crime. However, the Supreme Court did not consider an amendment to the military penal code, which provided for the death penalty in such cases. The above information was published very quickly and appeared in such media as the New York Times. Therefore, the Supreme Court received several requests for re-examination. However, the Court refused to

[91] *Kennedy v. Louisiana*.

[92] *Kennedy v. Louisiana*.

[93] Patrick Martin, "Obama Attacks US Supreme Court Decision Barring Death Penalty for Child Rape," World Socialist Web Site, June 26, 2008, http://www.wsws.org/en/articles/2008/06/obam-j26.html.

[94] "Obama Disagrees with High Court on Child Rape Case," 19 News, June 26, 2008, http://www.cleveland19.com/story/8559181/obama-disagrees-with-high-court-on-child-rape-case.

reconsider it, arguing that in any event, consent to the death penalty in the military sphere does not mean that it is compatible with the Constitution in a civil context, which renders any reconsideration of the case pointless.

CONCLUSIONS

To sum up these considerations regarding the normative impact of the idea of human dignity on the Supreme Court's jurisprudence regarding the death penalty, it is difficult to agree with the statements that can be found in the doctrine of American law that human dignity has left a mark that is too weak in matters concerning the Eighth Amendment. While analyzing the evolution in the use of the death penalty, which has been so limited in recent decades, it is not easy to find a legal sphere in which the impact of the idea of human dignity would be more significant. Firstly, the idea of human dignity was recognized as a value directly protected by the prohibition of cruel and unusual punishments. Such a declaration completely changed the jurisprudence in this area. Secondly, the idea of human dignity was identified as a factor influencing the interpretation rules developed by the Supreme Court in the context of interpreting the standards applied, for example, the changing standards of decency. Thirdly, the order to respect human dignity has become an important element defining the understanding of the clauses contained in the Eighth Amendment itself. The fact is that the death penalty has not been abolished and that its compliance with the Constitution has ultimately not been questioned. However, it exists only in some states, and the direction of evolution in this area is quite clear, both in state and federal legislation.

Summary: The chapter critically examines the Eighth Amendment of the US Constitution, particularly its prohibition of cruel and unusual punishment, through the lens of human dignity. The paper aims to understand how the concept of human dignity influences the interpretation and application of this amendment, especially in the context of the death penalty. Key themes include historical and contemporary jurisprudence and the evolving standards of decency. The article concludes that human dignity has played a significant role in shaping the Supreme Court's approach to cruel and unusual punishment, leading to a more humane and just criminal justice system.

Keywords: Supreme Court, American law, human dignity, Eight Amendment, death penalty

BIBLIOGRAPHY

Abu Gholen, Magdalena. "Dopuszczalność kary śmierci w kontekście Ósmej Poprawki a orzeczenie *Gregg v. Georgia* (1976)." In *Identyfikacja granic wolności i praw jednostki. Prawnoporównawcza analiza tożsamego przypadku pod kątem praktyki sto-*

sowania prawa amerykańskiego i polskiego, edited by Mariusz Jabłoński, 83–103. Wrocław: E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa. Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego, 2016.
Death Penalty Information Center. "Facts about the Death Penalty." Accessed July 30, 2023, https://deathpenaltyinfo.org/documents/FactSheet.pdf.
"The Expatriation Act of 1954." *The Yale Law Journal* 64, no. 8 (1955): 1164–1200. https://doi.org/10.2307/794190.
Goodman, Maxine D. "Human Dignity in Supreme Court Constitutional Jurisprudence." *Nebraska Law Review* 84, no. 3 (2006): 740–94.
Greenhouse, Linda. *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey*. New York: Times Books, Henry Holt and Company, 2005.
"Harry A. Blackmun. United States Jurist." In *Encyclopaedia Britannica* [online]. Accessed August 6, 2023, https://www.britannica.com/biography/Harry-A-Blackmun https://www.britannica.com/biography/Byron-R-White.
Martin, Patrick. "Obama Attacks US Supreme Court Decision Barring Death Penalty for Child Rape." World Socialist Web Site, June 26, 2008, http://www.wsws.org/en/articles/2008/06/obam-j26.html.
"Obama Disagrees with High Court on Child Rape Case." 19 News, June 26, 2008, http://www.cleveland19.com/story/8559181/obama-disagrees-with-high-court-on-child-rape-case.
"Sandra Day O'Connor. United States Jurist." In *Encyclopaedia Britannica* [online]. Accessed August 6, 2023, https://www.britannica.com/biography/Sandra-Day-OConnor.
Sellin, Thorsten. *The Death Penalty: A Report for the Model Penal Code of the American Law Institute*. Philadelphia: Executive Office, American Law Institute, 1959.
Urbańczyk, Michał. *Idea godności człowieka w orzecznictwie Sądu Najwyższego Stanów Zjednoczonych Ameryki*. Poznań: Wydawnictwo Naukowe UAM, 2019.

Acts of Laws and Regulations

Bill of Rights (1688), Legislation.gov.uk, accessed September 6, 2023, https://www.legislation.gov.uk/aep/WillandMarSess2/1/2/data.pdf.
Constitution of the United States. United States Senate. Accessed June 5, 2022, https://www.senate.gov/civics/constitution_item/constitution.htm#amdt_13_(1865).

Case Citations

Atkins v. Virginia, 536 U.S. 304 (2002).
Campbell v. Wood, 18 F.3d 662 (9th Cir. 1994).
Carey v. Settle, 351 F.2d 483 (8th Cir. 1965).
Estelle v. Gamble, 429 U.S. 97 (1976).
Furman v. Georgia, 408 U.S. 238 (1972).
Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974).
Glass v. Louisiana, 471 U.S. 1080 (1985).
Gregg v. Georgia, 428 U.S. 153 (1976).
Hall v. Florida, 572 U.S. 701 (2014).
Harlow v. Fitzgerald, 457 U.S. 800 (1982).
Hope v. Pelzer, 536 U.S. 730 (2002).

In re Kemmler, 136 U.S.436 (1890).
Jackson v. Bishop, 404 F.2d 571, 576 (8th Cir. 1968).
Jurek v. Texas, 428 U.S. 262 (1976).
Kennedy v. Louisiana, 554 U.S. 407 (2008).
Lee v. Tahash, 352 F.2d 970, 971 (8th Cir. 1965).
Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947).
O'Neil v. Vermont, 144 U.S. 323 (1892).
Proffitt v. Florida, 428 U.S. 242 (1976).
Roberts v. Louisiana, 428 U.S. 325 (1976).
Roper v. Simmons, 543 U.S. 551 (2005).
Stanford v. Kentucky, 492 U.S. 361 (1989).
Trop v. Dulles, 239 F.2d 527 (2d Cir. 1956).
Trop v. Dulles, 356 U.S. 86 (1958).
United States v. Bailey, 444 U.S. 394 (1980).
Weems v. United States, 217 U.S. 349, 376 (1910).
Wilkerson v. Utah, 99 U.S. 130 (1878).
Williams v. New York, 337 U.S. 241, 248 (1949).
Woodson v. North Carolina, 428 U.S. 280 (1976).

It is worth highlighting the maturity of the authors' interpretations of the issues analyzed and described here, the good correlation of the articles included in this publication and both their scientific and didactically useful character.
The individual sections are written in depth with extensive scientific and conceptual apparatus based on a wide range of the literature and, in this case, numerous case studies as well and, regardless of the authors' experience, constitute not only an extremely good description and analysis but also useful reading for all those dealing with contemporary legal systems, public law, human rights.

Prof. Dr hab. Adam Bosiacki

The book *Enlightenment Traditions and the Legal and Political System of the United States of America* provides an interesting analysis of the impact of Enlightenment ideas on the development of the American state and its law. The choice of topics and the careful examination of various aspects of the American system, from the constitution and civil rights to detailed human institutional arrangements, results in a comprehensive overview.
The authors present a diverse catalogue of content, facilitating a deeper understanding of the Enlightenment legacy in the contemporary context. Examining both the historical roots and current challenges of American law and politics, the book is certain to prove to be a valuable resource for scholars of the American legal system and institutions but also for law and political science students interested in American legal culture.
Importantly, the authors' reflections do not focus solely on the Enlightenment heritage in a narrow sense but seek instead to present the American legal and political system and its individual institutions in the broader context of how it functions in the changing world of the twenty-first century.

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