

SOUND POLITICKS

*The Official Undergraduate Journal
of Political Science at the
University of Pennsylvania*

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**“MAY THE FIRST PRINCIPLES OF SOUND
POLITICKS BE FIX’D IN THE MINDS OF YOUTH”
– BENJAMIN FRANKLIN (1749)**

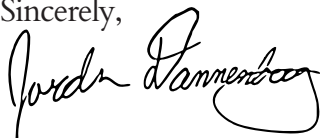
LETTER FROM THE EDITOR

The theme of the 2015–2016 academic year at the University of Pennsylvania was discovery. As we embraced the opportunity to explore, in greater depth, one another's academic endeavors, we developed a greater appreciation for shared intellectual experience. As the academic year draws to a close, this journal provides one more opportunity to engage with the robust intellectual life at Penn. It reflects the passion of the members of Penn's political science community and their commitment to contributing to the intellectual life that Benjamin Franklin sought to inspire. In the spirit of this year's academic theme, I invite you to discover the contributions within *Sound Politicks*.

The articles in this year's issue address diverse topics and fall within several subfields of the political science discipline. The first article, by Rebecca Heilweil, examines the connections between criminal records, race, and college admission. Her research is timely and comprehensive. The second article, by Jillian Moely, takes a comparative look at the "resource curse," studying the different economic conditions in Saudi Arabia and Norway. Together, the final two articles of the issue consider the evolution and functioning of political spectrums at home and abroad. Sean Foley's piece provides a nuanced examination of the conservative legal revolution in the United States, while Natasha Kadlec's article traces the recent rise of Europe's radical left.

The following articles are laudable pieces of research by undergraduates here at Penn. I hope they challenge your assumptions and provoke discussion. May you find pleasure in the process of discovery.

Sincerely,



Jordan Dannenberg

SOUND POLITICKS is the official undergraduate journal of political science at the University of Pennsylvania. It is published annually and covers a wide range of political topics.

Sound Politicks accepts submissions year-round from undergraduates of any class or major. Articles must include footnote citations and be approximately 4,000 words in length. Each year, the author of the best article receives a \$100 prize.

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COLLEGE ADMISSIONS AND CRIMINAL RECORDS

BANNING THE BOX AGAIN

BY **REBECCA HEILWEIL** (C'18)

MAJORS: POLITICAL SCIENCE & HISTORY

ABSTRACT

This paper explores the implications of college application questions regarding criminal records. More specifically, it examines how class and race are implicated through asking such questions, as well as the historical justifications for why numerous relevant problematic policies remain in place. First, the paper explores how the American education system's structural challenges and inequities can affect the likelihood that a student receives a criminal record in high school. Second, the paper looks at how criminal record questions can manifest on college applications, and their effect on both student application deterrence and admissions policies. Finally, the paper concludes by addressing potential policies to increase college applications among students with criminal records, more fairly approach these records, and how to better represent criminal record application questions.

INTRODUCTION

In 2007, the University of Pennsylvania discovered that a twenty-five-year-old sex offender had been attending graduate courses while serving time for a felony sentence. Kurt E. Mitman, who had won a Marshall Scholarship to study at Oxford, was charged in 2004 with sexual assault of a minor after having sex with a fourteen-year-old boy. According to Jeff Price of the *Philadelphia Inquirer*, "Mitman testified he had not told Penn officials of his criminal

record when he applied in December 2005, nor when he met with them after his acceptance."¹ When the mother of his victim discovered his attendance at Penn, Judge C. Theodore Fritsch Jr. suspended Mitman's participation in the Bucks County academic-release program.

While the criminal justice system's procedure was clear, Penn's response was almost indiscernible. Penn spokeswoman Phyllis Holtzman told the *Daily Free Press* that, "If [Mitman] asked to re-enroll, we would consider it, but it would be dependent on him maintaining certain conditions."² Like many universities, Penn's approach to student criminal records is murky and context-oriented; there are no policies regarding particular crimes. "Everybody is individually evaluated," she said. By 2014, Mitman had earned a PhD in Economics from Penn, ten years after his initial charge.³ Penn's policy regarding disclosure of criminal records on its application remains vague.

In 2007, Ohio State's student newspaper, *The Lantern*, reported that the university had admitted

1 Jeff Price, "Molester went from jail to Penn Until last week, the college didn't know that grad student Kurt E. Mitman was a sex offender, held in a Bucks prison." *Philadelphia Inquirer*, January 18, 2007.

2 David Brand and Jessica Li, "Penn weighs readmitting sex offender," *Daily Free Press*, October 3, 2007.

3 Kurt Mitman CV. Accessed December 12, 2015, at: <https://www.dropbox.com/s/n70h6f2jivp3iz2/KurtMitmanCV.pdf?dl=0>

three sex offenders charged with downloading and creating child pornography and sexual battery. A subsequent investigation revealed that five undergraduates were also registered sex offenders, whose charges included “importuning, gross sexual imposition, unlawful sexual conduct with a minor, sexual battery, and attempted sexual conduct with a minor.”⁴ The college scrambled to respond; it was legally unclear whether the students had done anything wrong in failing to report their past mistakes.

While significant research has been done on required criminal background checks for job applicants, the same is not true for college applicants. Admissions committees are notoriously secretive, and collecting aggregate data on students applying to multiple schools, often from across the country, is incredibly difficult.

This research, nonetheless, is very important. First, given ongoing discussions about the over-criminalization of minorities, the school-to-prison pipeline, and

mass incarceration, it may be illustrative to examine the essentially ignored phenomenon of student criminal background checks. Next, a comprehensive understanding of how criminal backgrounds affect the college admissions process is important due to the workforce implications of education. The ability to attend college and succeed is correlated with an increased earning potential.⁵ In addition, estimates project that the United States will be short millions of workers for jobs that require college degrees by

the year 2020.⁶ It is important to understand, therefore, how a criminal background affects the likelihood of college admissions. Also, the impact of a criminal record on the likelihood of admissions may be changing. In a new world of “holistic admissions,” in which officers take into account personal qualities and qualitative talents, criminal records can take on a new role.⁷

Examining the influence of criminal records on the college admissions process may also provide further insight into the state of discrimination in the United States. While a more inclusive and dynamic admissions process potentially allows students with criminal records to overcome their pasts and demonstrate personal growth, admissions committees may place greater value on an applicant’s future com-

munity participation, disposition, and personality; this preference may result in a bias against those with criminal records. And, while employment discrimination is often studied, reg-

ulated, and investigated by the Equal Employment Opportunity Commission (EEOC), the federal government has invested little, if any, resources into investigating inequities among college admissions.

The debate over admission of those with criminal pasts is complicated; institutions maintain two primary motives for considering criminal records, which are often justified in tandem. Schools defend requiring the disclosure of past criminal records with the arguments that the records are a useful indication

“While significant research has been done on required criminal background checks for job applicants, the same is not true for college applicants.”

4 Amanda Dolanksi, “Admitted,” *The Lantern*, November 13, 2007.

5 Brian Bursed, “How Higher Education Affects Life-time Salary,” *U.S. News and World Report*, August 5, 2011.

6 Patricia McDonough, “Counseling and College Counseling in America’s High Schools,” *National Association for College Admissions Counseling*, accessed December 21, 2015 at http://www.nacacnet.org/research/research-data/Documents/WhitePaper_McDonough.pdf

7 Phoebe Matlz Bovy, “The False Promise of Holistic College Admissions,” *The Atlantic*, December 17, 2013.

of student character or of potential threat to campus safety. However, both of these arguments are based on questionable assumptions and an imperfect method of retrieving criminal record information. For instance, on March 14, 2015, the *New York Times* called for an end to criminal background checks for college applications. The Editorial Board wrote, “people who check ‘yes’ on the felony box can find themselves trapped in a Kafkaesque world where they are peppered with Inquisition-style questions and repeatedly asked to find documents that do not exist or are impossible to provide.”

Some trace the origin of student criminal background check questions to the 1990 Clery Campus Security Act, which was considered a victory for both campus security and consumer protection. After a nineteen-year-old Lehigh University student was murdered by a classmate, Congress passed the statute to ensure public reporting of on-campus violence by universities. According to the Clery Center for Security on Campus, the Act mandates that “all colleges and universities who receive federal funding to share information about crime on campus and their efforts to improve campus safety as well as inform the public of crime in or around campus.”⁸ This information is made publicly accessible through the university’s annual security report. The Act has taken on a new importance in the context of growing on-campus sexual assault awareness.⁹

The debate about criminal records, safety, and personal character is rich. Darby Dickerson of Stetson University, for example, contends, “background checks will not prevent all crime or injury on campus.¹⁰ But they likely will prevent some, and also will impact the culture by signaling that the university is concerned about student safety and is working to

create a reasonably safe learning and living environment.” Others argue that inquiring about criminal records dissuades a large number of applicants who pose no danger to others, are unlikely to recidivate, and can academically flourish.¹¹

Campaigns against these criminal record inquiries have developed. In 2014, students at Princeton University began petitioning for their university to remove questions about criminal history. Students for Prison and Education Reform (SPEAR) argued:

The United States criminal justice system is inequitable and ineffective. In light of the racial and economic discrimination perpetuated by U.S. justice institutions, we believe that past involvement with the justice system should not be used to evaluate personal character or academic potential. We call upon Princeton University to remove the question about past involvement with the justice system from applications for undergraduate admission.¹²

Noting that “Approximately one-quarter of U.S. adults have a criminal record,” SPEAR further argued that:

A lack of interaction with this stigmatized population fosters deep misunderstandings about the nature of the criminal justice system and those affected by it. We believe that by eliminating questions related to past involvement with the justice system, Princeton can open the door to increased diversity of experience and perspective among the student body without compromising its academic quality or moral character.¹³

Other groups have noted that looking at previous arrests or convictions does not predict crime on campus. According to the Center for Community Alternatives, no study has shown that screening for criminal records increases safety on campus.¹⁴ More-

8 “Summary of the Jeanne Clery Act,” The Clery Center for Security on Campus, accessed December 21, 2015, <http://clerycenter.org/summary-jeanne-clery-act>.

9 Ibid.

10 Darby Dickerson, “Background Checks and the University Admissions Process,” presented at the National Association of College and University Attorneys Convention, June 27-30, accessed November 15, 2015, http://www-local.legal.uillinois.edu/nacua10/presentations/9F_handout.pdf.

11 New York Times Editorial Board, “College Applications and Criminal Records,” *The New York Times*, March 15, 2015.

12 “Fact Sheet,” Princeton Students for Prison and Education Reform, accessed December 20, 2015, <http://princetonspear.com/fact-sheet/>.

13 Ibid.

14 “The Use of Criminal History Records in College Applications: Reconsidered,” The Center for Community Alternatives, Nov. 2010, 6.

over, it is unlikely that precollege criminal activity is a good predictor of undergraduate misconduct. A study from the University of Colorado found that “only 3.3 percent of college seniors engaging in college misconduct had reported precollege criminal behaviors on their applications, and 8.5 percent ... of applicants with a criminal history engaged in misconduct during college.”¹⁵ Not only do previous convictions not predict conduct on campus, but research also suggests that although white students are more likely to report drug use before and during college, black students are more often arrested and incarcerated for drug crimes.¹⁶ Meanwhile, research strongly suggests that educational opportunities can significantly reduce recidivism. A study from the *Journal of Correctional Education* demonstrated that inmates who earned associate and baccalaureate degrees while incarcerated tend to become law-abiding individuals significantly more often after their release from prison than inmates who had not advanced their education while incarcerated.¹⁷

In October 2014, New York’s Attorney General Eric Schneiderman convinced three colleges to remove a criminal record question from their applications.¹⁸ “An arrest or police stop that did not result in a conviction, or a criminal record that was sealed or expunged, should not—indeed must not—be a standard question on a college application. ... Such a question can serve only to discourage New Yorkers from seeking a higher education,” he said. St. John’s University, Five Towns College, and Dowling College agreed to remove the inquiry, prompting fur-

ther discussion of the necessity of disclosure.¹⁹ Despite the back-and-forth regarding the question of criminal pasts and college admissions, many schools have yet to produce transparent and consistent policy for evaluating these applications.

This paper will examine how and which young people tend to acquire criminal records and explore the multiple layers of racial inequity. First, it will analyze the nature of youth crime and divergent approaches to punishment across racial groups. Second, it will explain the nuances and meanings of “criminal record” and “criminal pasts,” and how they complicate the application process. Third, it will examine factors that influence and deter those with criminal pasts from applying to college. Fourth, it will consider how admissions committees handle criminal records. A conclusion will look at policy alternatives already in effect at some universities and future areas of study.

METHODOLOGY AND CONTEXT

Thus far, there have been two notable, yet relatively broad, studies of criminal record questions in college admissions—one by the Center for Community Alternatives (CCA) and another by Darby Dickerson of Stetson University, whose research was connected to a small-scale survey conducted by American Association of Collegiate Registrars and Admissions Officers. Neither of these studies examined the question of race. SPEAR at Princeton University has examined the relationships between race, criminal records, and college admissions, but produced only a qualitative collection of accounts of undergraduates’ experiences with the criminal justice system.

Using an intersectional approach, this study expands upon existing research by providing further insight into how race and criminal record inquiries among college applicants are related. It utilizes information gathered from several interviews and secondary analysis. Unfortunately, little aggregate data on the topic of interest is available. Educational insti-

15 Runyan et al., “Can student-perpetrated college crime be predicted based on precollege misconduct.” Feb 2013. *Injury Prevention*, accessed at <http://injuryprevention.bmj.com/content/early/2013/02/22/injuryprev-2012-040644>.

16 “Race/Ethnicity and Gender Differences in Drug Use and Abuse Among College Students,” U.S. National Library of Medicine, May 13, 2008, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2377408/>.

17 Daniel J. Stevens and Charles S. Ward, “College Education and Recidivism: Educating Criminals is Meritorious,” *Journal of Correctional Education* Vol. 48, I. 3 (September, 1997), 1.

18 Ariel Kaminer, “3 New York Colleges to Drop Crime Queries for Applicants” *New York Times*, October 26, 2014.

19 Ibid.

tutions often have little incentive to reveal confidential admissions data. While this study cannot provide a definitive explanation for all the ways in which college admissions, youth, criminal records, and race are related, it provides important insight into the college application process and the exacerbation of racial inequalities.

PRE-APPLICATION INEQUITIES

When analyzing the racial dynamics of college application criminal record inquiries, it is important to acknowledge educational disparities in the secondary school system. Due to a combination of structural disadvantages, strict policies, and bigotry—often termed the school-to-prison pipeline—black and other minority students are significantly more likely to be arrested. Arrest rates are higher for minorities both in and out of school, even though white students have a similar rate of criminal activity.

High rates of in-school arrests of black students are part of a larger web of excessive, racially targeted punishment (As explained later, poor and minority schools are more likely to have police officers on duty during academic hours). According to the American Civil Liberties Union (ACLU), black students are expelled three times more often than white students.²⁰ These students are then three times more likely to engage with the juvenile justice system in the following year.²¹ Black students comprise 31 percent of school-related arrests; together black and Latino

students comprise 70 percent of in-school arrests.²² Nationally, black and Latino students are suspended significantly more often than their white peers. This gap is important as suspension has potentially life-changing implications for a child's education. A study by Attendance Works found that "missing three days of school in the month before taking the National Assessment of Educational Progress translated into fourth graders scoring a full grade level lower in reading on this test."²³ A Texas study found that a single suspension or expulsion almost tripled the likelihood that a student would become involved

"When analyzing the racial dynamics of college application criminal record inquiries, it is important to acknowledge educational disparities in the secondary school system."

with the juvenile justice system within the same year. The ACLU report explained:

Many under-resourced schools become pipeline gateways by placing increased reliance on police rather than

teachers and administrators to maintain discipline. Growing numbers of districts employ school resource officers to patrol school hallways, often with little or no training in working with youth. As a result, children are far more likely to be subject to school-based arrests—the majority of which are for non-violent offenses, such as disruptive behavior—than they were a generation ago. The rise in school-based arrests, the quickest route from the classroom to the jailhouse, most directly exemplifies the crimi-

20 "School to Prison Pipeline Infographic," American Civil Liberties Union, accessed December 19, 2015, <https://www.aclu.org/infographic/school-prison-pipeline-infographic>.

21 Ibid.

22 Ibid; "School to Prison Pipeline Fact Sheet," PBS, December 21, 2015, <http://www.pbs.org/wnet/tavissmiley/tsr/education-under-arrest/school-to-prison-pipeline-fact-sheet/>.

23 Daniel Losen et al., "Are We Closing the School Discipline Gap," *The Civil Rights Project*, February 23, 2015, <http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap>.

nalization of school children.²⁴

Schools in urban areas have attracted the heightened attention of researchers. According to the New York Civil Liberties Union, “At the start of the 2008–2009 school year there were 5,055 school safety agents (SSAs) and 191 armed police officers in New York City’s public schools. These numbers would make the NYPD’s School Safety Division the fifth largest police force in the country—larger than the police forces of Washington D.C., Detroit, Boston or Las Vegas.” According to these numbers, New York has more SSAs per student than many cities have police officers per citizen. During the same school year, almost 100,000 students passed through metal detectors to go to school, and 77 percent of incidents involving police at schools with permanent metal detectors were non-violent. Schools with metal detectors also consistently receive less funding per student than schools without them. These schools also issued 48 percent more suspensions.²⁵

These concerning statistics apply to other major urban areas as well. In the year 2009, the Los Angeles Unified School district reported that 62 percent of out-of-school suspensions were of Hispanic students, 33 percent were of black students, and only 5 percent were of either white or Asian students. The LAUSD also reported that of its students expelled, 67 percent of Hispanic students and 5 percent of black students were not offered alternative educational services.²⁶ The numbers were just as staggering in New Orleans, which reported that 67 percent of its school-related arrests were of black students.²⁷

Zero tolerance policies, which result in many suspensions and expulsions, are important to study when investigating how secondary school structures affect college applications. Zero tolerance programs were intended to guarantee school safety by mitigat-

ing the threat of gun violence. These policies require suspension or expulsion for violating codes of conduct, even when students are non-violent. Evidence, however, strongly supports that zero tolerance policies disproportionately affect minority students. In Los Angeles, over three-quarters of expulsions were of Hispanic students under zero tolerance policies.²⁸

Critiques of zero tolerance are abundant. Many cite the racial bias associated with such policies. According to the Vera Institute, “White students who were referred for disciplinary action received a higher percentage of in-school suspensions and a lower percentage of more serious exclusionary consequences.”²⁹ Zero tolerance policies do not allow for situational-based decisions and are often disproportionate responses to the offense committed. The Vera Institute notes that for “culturally and linguistically diverse students, the perceived bias on the part of teachers easily translates into yet another symbol of the barriers to mainstream success they must endure.”³⁰ And when minority students are expelled or suspended, they are subject to the mass policing and racial profiling often rampant in urban communities, worsening existing racial disparities.

DIVERSITY IN CRIMINAL RECORD INQUIRY FORMATTING AND IMPLICATIONS

Before continuing, it is important to clarify colleges’ typical requirements of criminal past disclosure. Usually, a school mandates that students take it upon themselves to disclose a criminal record but rarely conducts independent background checks.³¹ Further investigation is then only triggered if an applicant has disclosed a criminal record, which can require substantial secondary documentation. While few schools automatically reject students with criminal records, most will take records into consideration. Though it is relatively uncommon for a col-

24 “School to Prison Pipeline Infographic,” American Civil Liberties Union, accessed December 19, 2015, <https://www.aclu.org/infographic/school-prison-pipeline-infographic>.

25 Ibid.

26 “School to Prison Pipeline Fact Sheet,” PBS, December 21, 2015, <http://www.pbs.org/wnet/tavissmiley/tsr/education-under-arrest/school-to-prison-pipeline-fact-sheet/>.

27 Ibid.

28 Ibid.

29 The Vera Institute of Justice, “A Generation Later: What We’ve Learned about Zero Tolerance in Schools,” December, 2013, 2.

30 Ibid, 3.

31 Dickinson, 1.

lege to deviate from the norm of self-disclosure, St. Augustine’s College in Raleigh, North Carolina, for instance, has continued to require applicants to “to produce a statement from their hometown police department certifying whether they have a criminal record.”³²

The American Association of College Registrars and Admissions Officers (AACRA) and the Center for Community Alternatives (CCA) conducted a study of the process and evaluation of applicant criminal background checks. While the study could not account for all American universities, it provides a view into the landscape of how criminal past information is used and how approaches differ based on institutional preference. Of 247 schools, 58.3 percent reported collecting criminal justice information from all applicants, and inquiries were significantly more likely at private and four-year institutions than other institutions.³³ According to the study, more than 18 percent of institutions collected information that goes “beyond self-disclosure and conduct[ing] criminal background checks on any applicants.”³⁴ Sixty-two percent of surveyed schools consider criminal justice information in their decision, while 13 percent of institutions maintained an automatic bar for some type of crime.³⁵ More than 8 percent of 125 schools with an automatic admissions bar are oriented toward felony convictions, while 12.2 percent automatically reject sex offense convictions. More than 10 percent of these schools reject students with violent convictions, and only 0.4 percent of schools reject misdemeanor convictions.³⁶ The study also examined how type of crime, arrest, and conviction affected an application.³⁷ The results are reported in

the table below:

Violent crime conviction	86.3
Sex offense conviction	86.3
Felony conviction	81.5
Violent crime pending	70.2
Drug or alcohol-related conviction	69.4
Sex offense pending	67.2
Felony pending	64.5
Violent crime arrest	62.9
Sex offense arrest	60.0
Felony arrest	56.5
Sex offense youthful offender adjudication	54.4
Violent crime youthful offender adjudication	54.0
Drug or alcohol-related pending	52.4
Drug or alcohol-related arrest	48.0
Misdemeanor conviction	40.8
Misdemeanor pending	32.3
Drug or alcohol-related youthful offender adjudication	32.3
Misdemeanor arrest	28.0
Misdemeanor youthful offender adjudication	21.0
Lesser offense conviction	16.9
Lesser offense pending	14.6
Lesser offense arrest	13.8
Lesser offense youthful offender adjudication	10.6

[Note: “other responses are not yet coded]
Source: Q.27 (includes only those that did not answer “We do not ask the applicant about such records or findings in Q.2)

There is no standard timeline for criminal record revelation. Rarely, students are required to provide criminal background information before they apply. For many institutions, self-disclosure through the Common Application, a program that aggregates and standardizes hundreds of applications to simplify the application process, is the norm. Other schools may run criminal background checks after applications are submitted.³⁸ These approaches are the hard-

32 “Prospective Students, Additional Admissions Forms, Police Record Check, visited December 24, 2007, http://www.st-aug.edu/prospective/pdfs/Police_Record_Check.pdf.

33 American Association of Collegiate Registrars and Admissions Officers and Center for Community Alternatives Survey, accessed at http://www-local.legal.uillinois.edu/nacua10/presentations/9F_handout.pdf, 2.

34 Ibid, 2.

35 Ibid, 5, Table 8.

36 Ibid 5, Table 8.

37 Ibid, 7.

38 Ibid, 1.

est to study as admissions committees are unlikely to publicize how they pursue these checks. According to Dickerson, “if an applicant answers ‘no’ to questions related to criminal and disciplinary history, the inquiry ends; if the applicant answers ‘yes,’ then additional explanation or documentation is required. A majority of respondents to the AACRAO/CCA study indicated that they considered criminal-justice information in making admissions decision, but only a small percentage considered a criminal background as an automatic bar to admission.”³⁹ Many universities, hoping to balance efficiency and student privacy, look for specific “red flags,” such as unexplained gaps between high school graduation and college application. Red flags help committees to determine whether a student’s criminal past should be further investigated.⁴⁰ According to the AACRAO/CCA study, 15.4 percent of institutions will run background checks on “any applicants within distinct categories.”⁴¹ Others require criminal background checks only for students living in dormitories. Meanwhile, international students often bypass the entire process.⁴²

Some universities specifically inquire as to whether applicants are registered sex offenders. Often, these schools have instituted a codified ban on sex offenders taking courses with other students without considering individual context.⁴³ It is perhaps important to note, here, the diversity of situations that can manifest in requiring an individual to register for a sex offender registry. Taking naked photos of oneself as a minor, visiting a prostitute, public urination,

flashing one’s breasts, having consensual sex with a teenager, sleeping with a sibling, and even embracing minors can all qualify as a sexual offense.⁴⁴

While it is unclear whether a student will become aware of a college application denial based on his or her criminal record, Dickerson identifies multiple relevant, potential legal concerns, some of which are of particular relevance to race.⁴⁵ Consideration of criminal records often intersects with issues of arbitrary selection processes and discrimination.⁴⁶ She notes that “background-check poli-

cies that have a disparate impact on protected classes might be subject information related to arrests that did not lead to conviction have been shown to have a disparate impact on African Americans.”⁴⁷ It is unlikely, however, that young minority students would have the legal ability or information regarding the rationale of their rejection to pursue a legal challenge to an admissions decision, leaving little room for redress. Still, courts have generally upheld the permissibility of university admissions criminal background checks, citing their accordant with federal and state statutes.⁴⁸ The manner in which information on juvenile records is revealed may vary depending on the state. Various state laws can affect how juvenile records are processed by background checks. Dickerson explains:

Sealed and expunged records pose particular problems. ‘The federal government and nearly every state have enacted some type of statute providing for either the sealing, expungement, or limited access to juvenile records.’ The primary goal underlying these

“Consideration of criminal records often intersects with issues of arbitrary selection processes and discrimination.”

39 Ibid, 2.
40 Ibid, 6.
41 Ibid, 2, Table 4.
42 Ibid, 8.
43 Ibid, 2.

44 Erin Fuchs, “7 Surprising Things that could make you a Sex Offender,” *Business Insider*, October 9, 2013.

45 Dickerson, 14.
46 Ibid, 15.
47 Ibid, 15.
48 Ibid, 15.

statutes is to allow offenders to start anew by removing the stigma associated with a criminal record. But state laws differ regarding “the procedure, criteria, and intended effect of sealing juvenile records.”⁴⁹

No state bars universities from asking about juvenile records, though “some states...prohibit questioning about expunged records, regardless of context.”⁵⁰ The variation of rules across states can deter students from applying college. Some universities ask for all criminal background information, even expunged records. Students are often confused as to whether omitting information regarding an expunged, sealed, or juvenile record on a college application qualifies as application misrepresentation or falsification.⁵¹ It is not difficult to imagine how, for minority and financially disadvantaged applicants, these questions and legal gray areas can be severely discouraging.

DETERRENCE AND THE BOX

For many minority students, approaching and completing a college application poses unique challenges. And Americans who have criminal histories are often discouraged from submitting an application when the applications ask if they have ever been convicted of a crime. The process, which often attracts greater scrutiny of people who answer “yes,” drives away large numbers of people who present no danger to campus safety and are capable of succeeding academically.

It is difficult to empirically measure how much a question regarding history deters college applicants. Collecting data on applications never submitted involves heavy surveying and presents several structural challenges. It is even harder to determine a student’s reason for not applying to a specific university. Moreover, in a country where some schools unilaterally reject students with records, while others actively encourage students with past criminal activity to

“In addition to the deterrent of criminal background questions on applications, incarcerated students and students with criminal records are also financially disadvantaged; they have limited access to federal financial aid.”

apply, navigating the college application process can be especially confusing. Despite the limitations of measuring how questions on applications influence the likelihood of application submission, one organization has looked into the problem of college applicants from stu-

dents with criminal records. A broad study of sixty state universities in New York by the CCA found that nearly two-thirds of students who begin college applications and answer yes to having committed a felony will never finish them

In addition to the deterrent of criminal background questions on applications, incarcerated students and students with criminal records are also financially disadvantaged; they have limited access to federal financial aid.⁵² If an applicant is currently serving time in a federal or state institution, he or she is ineligible for a Pell Grant or federal student loans.⁵³ According to the Department of the Education, “if

49 Ibid, 17.

50 Ibid, 17.

51 Ibid, 18.

52 “Students with criminal convictions have limited eligibility for federal student aid,” Federal Student Aid, accessed December 21, 2015, <https://studentaid.ed.gov/sa/eligibility/criminal-convictions#incarcerated>.

53 Federal Student Aid.

you were convicted of a drug-related offense or if you are subject to an involuntary civil commitment for a sexual offense, your eligibility may be limited.”⁵⁴ Adding to financial disadvantages, some institutions ask students to pay for their own criminal background checks. The University of North Carolina at Wilmington, for example, requires the ten percent of students who raise the previously discussed “red flags” to pay approximately twenty dollars to fund their own criminal background checks.

It is important to contextualize the financial disadvantages of student criminal records with the socioeconomic status of those likely to engage with the juvenile justice and prison system at an early age. These economic inequalities have a ripple effect. Students attending the richest ten percent of institutions pay only a fifth of every dollar spent on them, while the at the bottom ten percent, students pay almost 78 percent of funds invested on them.⁵⁵

Criminal background questions on college applications may also disadvantage those with a quality that is typically appealing to admissions committees: honesty. Some argue that because many schools only run background checks on students who admit to past criminal activity, the system punishes those who are forthright about their pasts. According to one survey, the most common way of getting criminal record information “was through questions on self-disclosure questions on their own applications or on the Common Application. Of the 144 institutions that reported collecting criminal justice information from all applicants, only ten said they used criminal background checks.” Though students who have lied on applications have been caught in the past, many are likely to graduate without their university ever

discovering their criminal records. Applicants are put in a double-bind: students can be honest about their pasts and face damaging their chances for acceptance or lie and risk being caught for falsifying documents

later while pursuing an undergraduate education. In this way, the self-disclosure approach is problematic.

Unequal access to college advising and guidance may also

“Unequal access to college advising and guidance may also affect how students approach questions about criminal records on applications.”

affect how students approach questions about criminal records on applications. Since the mid-1950s, the world of college admissions has pivoted. While a minority of students once pursued higher education, now over 65 percent of young people apply to college.⁵⁶ With admissions standards becoming increasingly indiscernible, and the process growing more complicated, the benefit of a college advisor is immeasurable. According to the National Association for College Admissions Counseling, “repeated studies have found that improving counseling would have a significant impact on college access for low-income, rural, and urban students as well as students of color.”⁵⁷ Counselors can play a crucial role for students with criminal records; advisors can serve as guides through a logistically and emotionally grueling admissions process and can improve students’ odds for admission by writing letters of recommendation.

Of 125 institutions included in ACCRAO’s study, 87 have special requirements for students with criminal records. These regulations can include interviews, letters of explanation, letters of reference

54 Ibid.

55 Mettler, 21.

56 “The Institutionalization of Racial Profiling Policy: An Examination of Antiprofiling Policy Adoption Among Large Law Enforcement Agencies,” *Crime & Delinquency* February 2013, 59, accessed December 20, 2015, <http://cad.sagepub.com/content/59/1/32.refs>.

57 McDonough.

from probation and corrections officers, completion of community service, residency periods, extra documentation, meetings with school personnel, and official documents. Of the 98 schools that allow students to address criminal record concerns during the admissions process, 61.1 percent require written or oral statements, 9.2 percent require official documentation, and 12.2 percent require something else.⁵⁸ Students who attend poorly funded and over-policed schools often do not have adequate access to a college counselor, one of the most influential individuals in the college admissions process.

PROBLEMS

Racial inequities persist beyond simply filling out the past criminal activity box or self-reporting interactions with the justice system. Current practices exacerbate racial biases. Few admissions committees are trained to properly handle criminal records, and many lack the necessary understanding of the criminal justice system to evaluate candidates.

Scott Jaschik's article "Checking Up on Your Past," helps to illuminate the issues that arise when non-experts evaluate information from the criminal justice system.⁵⁹ He explained that many schools struggle to properly use the information they receive from criminal background checks. While universities are eager to collect as much material as possible, administrators are usually unsure of how to use it. Ann Franke, a higher education legal risk advisor, has argued that, "Lots of schools are eager to collect the info but then not adept at using it." Furthermore, she asks:

Who will evaluate the information and make decisions about individuals' suitability for employment or enrollment? What is the impact of a conviction more than 10 years old? How do you judge the relative severity of different types of crimes and plea agreements? I picked up a glossary the other day of terms commonly used in criminal background

checks. Do evaluators know the difference between community service and community supervision?⁶⁰

Just as university human resource departments struggle to handle the results of a criminal background check, so too do admissions committees.

According to the ACCRAO Study, of 150 institutions, 65.5 percent of admissions decisions involving criminal records are made only after a review of a special panel or committee, while 19.1 percent will only come to a decision after a background check.⁶¹ About a quarter of 247 schools make decisions using only standard admissions officers, while 74.7 percent consult external actors for at least some applicants with criminal records. More than 37 percent of the institutions consult campus security, and 44 percent of institutions assembled a special committee. Institutions also often consult housing directors; academic officers, including provosts and deans; legal counsel; risk assessment personnel; and counseling and mental health staff.⁶²

When perceived through a racial lens, the stigma of crime is often exacerbated. Researchers speaking on National Public Radio noted that those who evaluate applications tend to have preconceived notions of African Americans, as well as overestimate the age of black individuals.⁶³ One 2009 study found that compared to white Americans with criminal records, black American with a clean slate and identical resumes were offered jobs at the same rate. While the issue of bias against black applicants with criminal records has not been quantitatively considered within the context of undergraduate admissions committees, it is unlikely that admissions officers are immune to common and deeply ingrained social prejudices.

Devah Prager of Northwestern University contends that this bias is the result of pervasive "media images of black criminals" and high rates of African

60 Ibid.

61 American Association of Collegiate Registrars and Admissions Officers and Center for Community Alternatives Survey, 6, Table 9.

62 Ibid.

63 Michael Martin, "Fear of the Black Man: How Racial Bias Could Affect Crime, Labor Rates," *National Public Radio*, March 30, 2015.

58 American Association of Collegiate Registrars and Admissions Officers and Center for Community Alternatives Survey, 7.

59 Epstein.

American incarceration. In her study analyzing the effect of race on job applications with noted criminal activity, she found that white applicants with criminal records received more favorable treatment than black applicants with a clean slate. She explained:

Employers, already reluctant to hire Blacks, appear even more wary of Blacks with proven criminal involvement. Despite the fact that these testers [job applicants] were bright articulate college students with effective styles of self-presentation, the cursory review of entry-level applicants leaves little room for these qualities to be noticed. Instead, the employment barriers of minority status and criminal record are compounded, intensifying the stigma toward this group.⁶⁴

Problems are exacerbated by untrained admissions committees. According to the *New York Times*:

Many schools reacted by taking into account minor offenses like alcohol convictions by applicants, who are often asked to produce official rap sheets. These records can contain inaccurate information and show juvenile offenses that have been sealed by the courts, which means they should never be viewed publicly or used in such a process. Schools often fail to train their staff members in how to weigh criminal history information.⁶⁵

The procedural complications of background checks should also elicit concerns about the racial of considering criminal records. Some schools have now begun to rely on criminal background checks by private contractors because the process became increasingly inexpensive after the September 11th attacks.⁶⁶ Recently, *The Atlantic* investigated and summarized several structural challenges to routine background checks. They found that these investigations frequently contain misinformation. They

often identify the wrong person due to similarities of names, misreport old offenses, and classify misdemeanors as felonies or vice versa.⁶⁷ Because college applications have limited fluidity beyond the acceptance-denial binary, it is unclear whether students would have an opportunity to rectify a criminal background check mistake or even understand the reason for their rejection. Moreover, criminal record databases are often incomplete. According to a 2013 National Employment Law Project report, roughly 50 percent of the FBI's criminal history records are incomplete and fail to include information on the final disposition on an arrest.

Colleges do not check student backgrounds using a uniform system. According to the AC-CRAO/CCA study, of 43 institutions, 20.9 percent used "a state-operated database that is accessible to the public," 20.9 percent used a "single-state [method] requested from a law enforcement agency," 20.9 percent used "multi-state [method] requested from a law enforcement agency," 20.9 percent conducted a public information search, 16.3 percent checked an official state repository, and 9.3 percent relied on a private company.⁶⁸

The process is problematic and seems to lack future solvency, partly because it applies to so few students in the grand scheme of college admissions. Through March 6th of the 2013-14 admissions cycle, 3,765 applicants using the Common Application noted that they did have some form of criminal past—a total of 0.48 percent of applicants. The Director of Communications for the Common Application added that the number was annually incredibly small. The Common Application representative posited that in the same way the SAT was potentially racist, criminal record inquiries could be perceived similarly. However, the representative noted that the college application provides an essay to explain disciplinary issues and speculated that experiences with the criminal justice system could speak to an appli-

64 Devah Prager, "The Mark of a Criminal Record," *American Journal of Sociology*, Volume 108 Number 5 (March 2003), 943.

65 New York Times Editorial Board.

66 Michelle Natividad Rodriguez and Maurice Emsellem, "64 Million 'Need Not Apply': THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT," *The National Employment Law Project*, March 23, 2011.

67 Bovy.

68 American Association of Collegiate Registrars and Admissions Officers and Center for Community Alternatives Survey, 3, Table 6.

cant's unique experiences. While those thoughts are optimistic, and certainly echoed by racial equality advocates, structural barriers to minority applicants with criminal records likely overwhelm the chances that their pasts will be considered fairly.⁶⁹

FUTURE STUDY AND ALTERNATIVE POLICY

In the spring of 2015, New York University announced that it would no longer have its admissions officers review student criminal history.⁷⁰ Instead, a special, separate committee was formed to review records, in hopes that doing so would remove any potential for bias on the part of admissions officers. The admissions committee would only be notified if an applicant's record demonstrated potential for being a danger to his or her future classmates.⁷¹ The University of North Carolina system pursues a similar process, as explained by Dickerson.

In October 2006, the University of North Carolina System, drawing heavily from the task force's recommendations, adopted a detailed "Regulation on Student Applicant Background Checks." The Regulation provides that certain checks, such as cross-referencing enrollment at other UNC campuses, be conducted for all admitted applicants or all admitted applicants who indicate...intent to attend. With limited exceptions, the Regulation also provides that background checks should be conducted when triggers or "red flags" are raised. If a background check is positive, the Regulation provides guidance about how admissions officers should evaluate the data and emphasizes the importance of attempting to determine whether the applicant poses "a significant threat to campus safety."

Policies like these represent important steps toward improving admissions processing of applications with criminal record applications.⁷²

Other procedures could also alleviate the racialized effects of criminal record questioning. Simple bias training has proven useful in other realms of higher education, and might be useful in an admissions context.⁷³ To help mitigate bias, criminal record information could also be revealed to admissions officers after a student's application has already been considered. Another solution might be to consider criminal backgrounds using a more dynamic approach to affirmative action, in which an applicant's experience with the criminal justice system is seen as another way of attaining an experientially diverse class.

One of the easiest ways to ameliorate the problem of potential racialization of criminal records is to improve transparency. Student ignorance as to how their criminal records are addressed and handled by various institutions likely increases deterrence and applicant pessimism. Creating a clear process for students to both explain past criminal activity and to understand how that information might affect their applications may help to mitigate the deterrents that may keep many of the country's most disadvantaged high school students from applying to college. Moreover, it is unfair, perhaps, to assume that students with little knowledge of the legal nuances of the criminal justice system implicitly understand what should and should not be revealed on a college application. Advertising positive role models of students who attended college with criminal pasts could also decrease application deterrence.

Another approach could be to improve the clarity and specificity of Common Application questions. Rather than asking about crime, inquiries could only ask about violent felonies or sex offenses. For instance, the Georgia College and State University specifically asks, "Have you ever been convicted of a crime other than a traffic offense, or are

69 Jasmine Garsd, "NYU Changes Its Policy On Reviewing Applicants' Criminal Background," *National Public Radio*, May 26, 2015.

70 Ibid.

71 Ibid.

72 Dickerson, pg. 7-8.

73 Mark E. Engberg, "Improving Intergroup Relations in Higher Education: A Critical Examination of the Influence of Educational Interventions on Racial Bias," *Review of Educational Research*, Vol. 74, No. 4, (Winter, 2004), 474.

any criminal charges now pending against you?”⁷⁴ Improving the clarity of questions would reduce the chance of discouraging students with minor misdemeanor records, and who are unlikely to recommit, from applying to college. Moreover, it would create a space for institutional preference and reduce the cost of criminal background checks for universities since the number of “red flag” applications would be filtered and reduced.

Transparency also involves informing students of the reason of their rejection should it be based on a criminal background check. According to the ACCRAO/CCA study, only 47 percent of 247 schools reported that applicants are informed of the reason for their denial, while a little less than half of 144 schools provide a mechanism for an appealing a decision.⁷⁵ Full transparency regarding the reason for rejection would allow students to more accurately appeal a decision and explain their criminal record.

CONCLUSION

There is an unfortunate gap between the students that criminal record inquiries seek to weed out and the applicants that they end up dissuading from applying. While these questions are often aimed at sex offenders and violent criminals, they disproportionately affect minority applicants. These barriers then play into pre-existing complicated and unfair structural barriers for many black students in secondary and higher educational institutions. It is more than likely that criminal past inquiries exacerbate inequality while doing little to protect student safety.

This paper’s analysis is not all encompassing; rather, it identifies a context for how racial inequity is likely magnified during the college admissions process. Future evaluation using admissions data would be challenging. Colleges would need to reveal the processes they currently use to evaluate criminal

records. Moreover, a more expansive study would need to account for problems of measuring student application deterrence. Nevertheless, improving the approach to criminal record is advisable from a utilitarian and social perspective. Therefore, further research is also worthwhile. Individuals with criminal records who apply and are accepted to college are significantly less likely to reoffend and more likely to become active and contributing members of their communities. Moreover, they carry with them experiences that add important diversity to university and social discourse.

74 “Ga. Coll. & State Univ., Undergraduate Application for Admission at 10,” http://www.gcsu.edu/admissions/undergraduate/PDF/Undergrad_appl.pdf (last visited Dec. 24, 2007).

75 American Association of Collegiate Registrars and Admissions Officers and Center for Community Alternatives, 9, Table 14.

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FROM THE CLASSROOM TO THE SUPREME COURT

THE FEDERALIST SOCIETY, ORIGINALISM, AND THE CONSERVATIVE LEGAL REVOLUTION

BY **SEAN CADDEN FOLEY** (C'16)
MAJORS: POLITICAL SCIENCE & HISTORY

ABSTRACT

Today, the Federalist Society is a prominent and powerful conservative institution, one that the Republican Party reveres and the Democratic Party reviles. Yet prior to its founding in 1982, the elite consensus was that liberalism had a hegemonic presence in the field of law. That year, however, a group of conservative law students formed the Federalist Society to challenge the liberal orthodoxy. This paper argues that the creation of this organization inaugurated a conservative legal revolution that has continued to the present day. Before long, membership in the Federalist Society became a prerequisite for appointment to key legal positions in Republican presidential administrations, and the Federalist Society's fundamentalist judicial philosophy of originalism began to reorient the federal courts toward a more conservative direction. Since its formation, the Federalist Society has fundamentally reshaped the Republican Party, the federal judiciary, and American jurisprudence.

THE FOUNDING

In 1982, Steven Calabresi, Lee Liberman, and David McIntosh, a group of young, conservative law students, formed the Federalist Society in an endeavor to take on the liberal domination of the American legal world. Although these ambitious leaders faced

immensely difficult odds, their organization quickly achieved a level of legitimacy that they could not have imagined. Within a few years, the Society had infiltrated the Reagan Administration, taking control of the White House's legal team. The subsequent Republican administrations of George H.W. Bush and George W. Bush only increased the Society's significance, making it the clearinghouse for the conservative legal network. Aside from building a pool of conservative legal talent, the Society also waged an effective campaign to place its members in the White House and the federal courts. Along the way, the organization successfully propagated its judicial philosophy of originalism, moving it from the fringes of academia to the mainstream of jurisprudence. Throughout this process, the Society became a target of the Democratic Party, which criticized the organization for its immense power and the influence of its conservative philosophy, indicating the tremendous success the organization enjoyed. Ultimately, since its inception, the Federalist Society has come to control legal appointments for Republican presidents and has fundamentally transformed the American legal apparatus and the jurisprudence of the federal courts through its effective propagation of the theory of originalism. Although they might not have realized it in 1982, Calabresi, Liberman, and McIntosh had begun a crusade that would revolutionize American law.

The Federalist Society formed in 1982 to challenge what its founders perceived as the liberal hegemony in law schools and the legal profession. Calabresi, McIntosh, and Liberman believed that these institutions were “strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society.”¹ Calabresi’s inspiration to form the organization came a day after the 1980 presidential election. When a Yale law professor asked the eighty-eight-student first-year law class who had voted for Ronald Reagan, Calabresi recalled that only he and one other student raised their hands.² Given that Reagan had won in a landslide, Calabresi assumed that others had to have also voted for the Republican candidate. He consequently surmised that the school’s liberal orthodoxy had intimidated Reagan voters into silence, causing him to recognize the need for “an organization to at least encourage [other conservatives] to come forward.”³ McIntosh and Liberman felt that a similar problem existed at the University of Chicago. Although Reagan’s dominant victory suggested a nationwide conservative shift, a perplexed Liberman insisted that at the University of Chicago “every sin-

gle organization we saw was on the left.”⁴ Liberman and McIntosh, who had both maintained a close relationship with Calabresi from their undergraduate years at Yale, therefore established their own chapter of the Society at Chicago.⁵ With the inauguration of the Society, the three co-founders set out to promote the conservative cause in the legal world. Their task would not be easy. The degree of liberal dominance was so significant that Ralph Winter, a conservative Yale Law School professor, agreed to become a faculty advisor for the group despite believing their cause to be “hopeless.”⁶

In short order, Winter’s claim would prove to be mistaken.

Since its inception, the Federalist Society has espoused the theory of originalism, which despite having little traction in the legal establishment in

“Although they might not have realized it in 1982, Calabresi, Liberman, and McIntosh had begun a crusade that would revolutionize American law.”

1982 posed a direct challenge to prevailing constitutional theory. This theory stood firmly opposed to what many conservative legal minds deemed “judicial activism,” whereby judges, beginning with the Warren Court in the 1960s, would incorporate changing cultural norms and other outside influences into their reading of the Constitution.⁷ Scholar Jonathan O’Neill defines originalism as holding “that although interpretation begins with the text [of the Constitu-

1 “Our Background,” The Federalist Society, accessed May 11, 2015, <http://www.fed-soc.org/aboutus/page/our-background>.

2 Terry Carter, “The In Crowd: Conservatives who sought refuge in the Federalist Society gain clout,” *ABA Journal* 87 (2001): 47, accessed May 11, 2015, <http://www.jstor.org/stable/27842087>.

3 Ibid, 47-48.

4 George W. Hicks, Jr., “The Conservative Influence of the Federalist Society on the Harvard Law School Student Body,” *Harvard Journal of Law & Public Policy* 29 (2006): 649, accessed May 11, 2015, http://heinonline.org/HOL/Page?handle=hein.journals/hjlp29&g_sent=1&id=631.

5 Ibid.

6 Ibid, 648.

7 Lorraine Wollert, “Inside Bush’s Supreme Team,” *Business Week*, April 25, 2005, accessed May 11, 2015, <https://proxy.library.upenn.edu/login?url=http://search.ebscohost.com/login.aspx?direct=true&db=keh&AN=16763385&site=ehost-live>.

tion], the meaning of the text can be further elucidated by...evidence from those who drafted the text in convention as well as from the public debates and commentary surrounding its ratification.”⁸ In the Society’s original statement of principles, the founders articulated a commitment to this theory, stating their belief “that it is emphatically the duty of the judiciary to say what the law is, not what it should be.”⁹ Importantly, this theory’s mandate for an application of original intent requires a corollary belief: that the Supreme Court should attempt to overrule any improper decisions, the “derelicts of constitutional law,” that did not adhere to originalism.¹⁰ Expounding on this principle, Calabresi recently wrote that according to “originalist arguments,” uncritically “following precedent is wrong” because it is “necessary to be able to correct [the Court’s] mistakes by getting them overruled.”¹¹ Reflecting these originalist underpinnings, two of the Society’s first faculty advisors, Robert Bork and Antonin Scalia, were prominent proponents of originalism. In a 1971 essay in the *Indiana Law Journal*, Bork wrote, “the [Supreme] Court’s power is legitimate only if it has...a valid theory, derived from the Constitution.”¹² Forty years later, Bork more clearly defined his originalist philosophy, “which,” he said, “holds that the Constitution should be read as it was originally understood by the framers and ratifiers.”¹³ Scalia, too, adhered to the gospel of originalism since his time as a student at Harvard Law School.¹⁴

The Society’s founders and their faculty advisors, though, were decidedly in the minority with regard to their legal philosophy. Bork recalled that throughout the 1960s and 1970s, he was the only member of the Yale faculty who maintained “an originalist outlook.”¹⁵ Thus, the Federalist Society began its work of promoting an originalist philosophy at a distinct disadvantage. However, in only a few short years, its ideas took hold in the Reagan Administration, thereby inaugurating the Society’s transformation of the conservative legal apparatus and the national legal establishment.

JOINING THE RANKS OF THE REPUBLICAN ESTABLISHMENT UNDER RONALD REAGAN

After Ed Meese became U.S. Attorney General under Ronald Reagan in 1985, the Reagan Administration adopted the Federalist Society’s ideas, particularly originalism, as well as its members, thereby transforming the Justice Department (DOJ) into a de facto extension of the Society. A few months in to his tenure as attorney general, Meese gave two speeches in which he declared that the original intent of the Constitution’s framers must guide judges.¹⁶ This originalist ideology that Meese preached was “the stuff of Federalist Society debates,” asserted a staff reporter for the journal of the American Bar Association (ABA).¹⁷ In an interview in the *ABA Journal* in July 1985, Meese further echoed the Society’s statement of principles, stating, “[the Reagan Administration] want judges who are interpreters of the law, not makers of new law.”¹⁸ But Meese went beyond merely championing the Society’s principles; he effectively turned the DOJ into a “Federalist Society shop,” according to Thomas Smith, one of the Soci-

8 Amanda Hollis-Brusky, *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution* (New York: Oxford, 2015), 19.

9 “Our Background,” The Federalist Society, <http://www.fed-soc.org/aboutus/page/our-background>.

10 Steven G. Calabresi, ed., *Originalism: A Quarter-Century of Debate* (Washington: Regnery Publishing, 2007), 21.

11 *Ibid.*, 200-207.

12 Robert H. Bork, “Neutral Principles and Some First Amendment Problems,” *Indiana Law Journal* (1971): 3, accessed May 11, 2015, http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4149&context=fss_papers.

13 Robert H. Bork, “The Growth of Originalism,” Hudson Institute, accessed May 11, 2015, <http://hudson.org/research/8111-the-growth-of-originalism>.

14 Bruce Allen Murphy, *Scalia: A Court of One* (New York, Simon & Schuster, 2014), 38.

15 Bork, “The Growth of Originalism.”

16 Debra Cassen Moss, “The Policy and Rhetoric of Ed Meese,” *ABA Journal* 73 (1987): 64, accessed May 11, 2015, <http://www.jstor.org/stable/27842087>.

17 *Ibid.*, 65.

18 *Ibid.*, 66.

ety's first members.¹⁹ Meese encouraged all lawyers at the Justice Department to join the Society,²⁰ which had developed a lawyers division in 1983.²¹ He also hired Calabresi, at the urging of Bork, as well as the Society's two other founders—Lieberman and McIntosh—to work in the DOJ.²² Moreover, he gave them a mandate to develop a Society network within the department, whose task would be to organize lists of conservative attorneys as candidates for political jobs and federal judgeships.²³ Lieberman became Meese's special assistant for judicial selection,²⁴ and another Society member, Steven Markman, led the Office of Legal Policy, which screened judicial candidates.²⁵ By 1986, half of the political appointees in the DOJ were members of the Society.²⁶ And in 1987, the DOJ published a "Report to the Attorney General," which insisted that judges interpret the Constitution by adhering to the original meaning of the document when the framers drafted it and won its ratification.²⁷ Thus, within roughly two years of becoming Attorney General, Ed Meese had organized the DOJ into a virtual arm of the Federalist Society that was committed to its originalist creed.

Meese's integration of the Federalist Society and its conservative judicial philosophy into the DOJ amounted to an unprecedented politicization of the federal legal establishment. This emphasis on ideology was something new, according to University of Virginia Professor David O'Brien. "Up until this administration, with the exception of the solicitor

general, all the Justice Department appointments were career lawyers," he said.²⁸ Under Meese and his Society deputies, however, candidates' conservative ideology made them more likely to receive a job in the DOJ.²⁹ Edward Lazarus, a former Supreme Court clerk, said that membership in the conservative Society was a "prerequisite for law students seeking clerkships with many Reagan judicial appointees as well as for employment in the upper ranks of the Justice Department and the White House" during the Reagan Administration.³⁰ Because Society membership carried a stigma in legal academia in these early years of its existence, the willingness to avow membership signaled a true commitment to the conservative principles that the Society espoused.³¹ The Reagan Administration therefore eagerly accepted the card-carrying members of the Federalist Society.

Moreover, the department's thorough screening of judicial candidates for a conservative ideology was also unprecedented. Former U.S. Attorney General Nicholas Katzenbach, who served under President Lyndon Johnson, recalled, "Inquiring into somebody's jurisprudence or ideology was never done with us."³² Meese, however, was forthcoming about the DOJ's intention to select judges based on ideological purity. The DOJ, he insisted, only wanted judges "who have the proper judicial philosophy and approach to the bench, which precludes judicial activism."³³ That is, they wanted originalists. Thus, Ronald Reagan nominated many Federalist Society members to appeals court positions, including Ralph Winter and Richard Posner, who were original faculty advisors to the Society chapters at Yale and Chicago, respectively.³⁴ And when Reagan had the opportunity to fill two Supreme Court vacancies in his second term, notwithstanding the appointment of Associate Justice William Rehnquist as Chief Jus-

19 Michael Avery and Danielle McLaughlin, *The Federalist Society: How Conservatives Took the Law Back from Liberals* (Nashville, TN: Vanderbilt University Press, 2013), 27.

20 Nancy Scherer and Banks Miller, "The Federalist Society's Influence on the Federal Judiciary," *Political Research Quarterly* 62 (2009): 367, accessed May 11, 2015, <http://www.jstor.org/stable/27759874>.

21 Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton, NJ: Princeton University Press, 2008), 167.

22 Ibid, 141.

23 Murphy, *Scalia*, 87.

24 Ibid, 123.

25 Avery and McLaughlin, *The Federalist Society*, 25.

26 Murphy, *Scalia*, 88n31.

27 Ibid, 146.

28 Moss, "The Policy and Rhetoric of Ed Meese," 67.

29 Ibid.

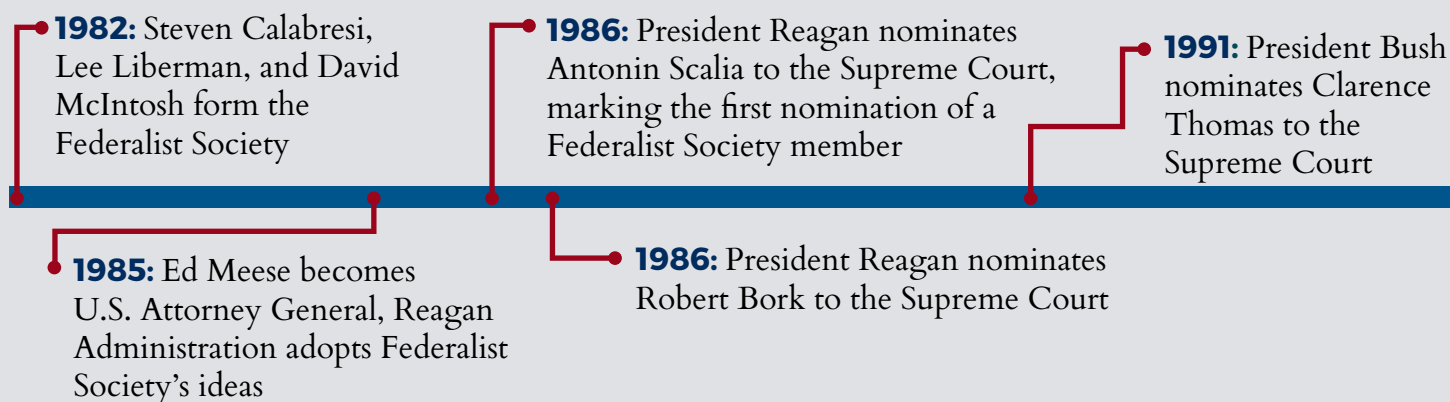
30 Avery and McLaughlin, *The Federalist Society*, 23.

31 Teles, *The Rise of the Conservative Legal Movement*, 142.

32 Moss, "The Policy and Rhetoric of Ed Meese," 69.

33 Ibid, 66.

34 Avery and McLaughlin, *The Federalist Society*, 22.



tice, he first nominated prominent Federalist Society members for each open seat on the Court.

ACCESSION TO THE SUPREME COURT

In 1986, President Reagan nominated Antonin Scalia, the original faculty advisor for the Federalist Society at the Chicago and an avowed originalist, to the Supreme Court, marking the first nomination of a Society member for the Supreme Court. Scalia's conservative, originalist bona fides were the primary basis for his appointment. In a 1986 Justice Department memo, Scalia received recognition as "an articulate and devoted adherent to the interpretivist [original intent] theory of adjudication."³⁵ Additionally, his Society connections played a key role in his appointment, just as he had played an instrumental role in the early development of the organization. According to Stephen Teles, Scalia was "perhaps the most elite sponsor of the Society in its early years."³⁶ When Liberman and McIntosh were forming the Federalist Society chapter at Chicago, Scalia, then a professor there, agreed to assist them. Now, a few years later, Liberman, who was working on judicial selection at the DOJ, returned the favor by concluding her review of his candidacy with an enthusiastic endorsement. After she reviewed his judicial decisions as a federal appeals court judge, Liberman determined

that "he understands that [the Constitution] is a written document, and that its meaning is tied to what its Framers intended."³⁷ Scalia had passed the originalist test. Overall, she concluded, "his philosophical compass points correctly" toward core conservative principles.³⁸ After Scalia had made his commitment to originalism clear, Reagan decided to nominate him.³⁹ When the Senate confirmed his nomination unanimously, Scalia became the Court's only originalist.⁴⁰ Thus, a founder of the Society had helped place one of the group's original faculty advisors on the Supreme Court to serve as its first originalist jurist. With this momentum, the Federalist Society's adherents in the DOJ soon selected another originalist to serve on the Court, but this nomination would have a different outcome.

Following Scalia's successful confirmation in 1986, President Reagan nominated Robert Bork. Bork, like Scalia, was an original faculty advisor to the Federalist Society and a prominent originalist. His nomination furthered the push to place originalist jurists on the Court. Bork, whom Calabresi called "the intellectual godfather of originalism," was chosen principally for his originalist views.⁴¹ A 1986 Justice Department memo lauded him as "the leading spokes-

35 Murphy, *Scalia*, 122.

36 Teles, *The Rise of the Conservative Legal Movement*, 139.

37 Murphy, *Scalia*, 123.

38 Ibid.

39 Ibid, 126-127.

40 Murphy, *Scalia*, 131.

41 Calabresi, *Originalism: A Quarter-Century of Debate*, 14.

man for an interpretivist [original intent] theory of constitutional law and judicial restraint for over the [previous] 20 years.”⁴² The DOJ also appreciated that Bork accepted the corollary of originalism, which is “a healthy lack of respect for unprincipled precedent” that did not adhere to original intent.⁴³ And, like Scalia, Bork benefitted from his relationship with the Society. When Calabresi formed the Society at Yale Law School, Bork, then a professor there, agreed to help him organize the group and served as a faculty advisor.⁴⁴

Although the Senate confirmed him for a seat on the federal D.C. Court of Appeals in February 1982 as the Society was forming, he nonetheless played an enormous role in the organization’s development and success. Bork’s involvement began with his keynote address at the group’s first national symposium in April 1982,⁴⁵ which attracted enormous attention for the Society.⁴⁶ Perhaps his most important contribution to the Society was convincing Calabresi to develop the fledgling group into a national organization through which conservative legal minds could challenge liberal control over the federal judiciary, a strategy that already appeared to be working in light of Scalia’s confirmation and Bork’s nomination.⁴⁷ Years later, Calabresi said Bork “did more than anyone else...to help create, nourish, and legitimize the Federalist Society,” and insisted that “he was, and is, our inspiration, our teacher, and our hero.”⁴⁸ Furthermore, during Bork’s Senate confirmation hearings, a University of Chicago professor testified on the influence that the Society had on Bork’s nomination. “Bork’s appointment would substantially help to effect the constitutional revolution that has been part of the Reagan plan since he entered office,” he said. “Indeed,” he continued, “it is on the commitment to such special interest groups as...the Federalist Soci-

ety...that the Bork nomination was predicated.”⁴⁹ Unsurprisingly, then, the chief advocates of Bork’s Supreme Court nomination were Federalist Society members, including founders Liberman and McIntosh.⁵⁰ Despite their efforts, though, the Democratic-controlled Senate rejected Bork’s nomination.⁵¹ After another failed nomination, Reagan wanted to choose a non-controversial candidate without ideological baggage. He successfully nominated an appeals court judge from the Ninth Circuit, Anthony Kennedy, who had displayed a conservative ideology on the bench but whose commitment to originalism was unclear.⁵² Thus, the Bork nomination failure dealt a blow to the Reagan Administration’s effort to put another originalist on the Court.

In light of Attorney General Ed Meese’s insistence on judges adhering to original intent, Democrats in the Senate, who were wary of the implications of originalist doctrine for Supreme Court precedents, rigorously questioned both Scalia and Bork about their judicial philosophy. Key factors differed between their respective confirmation proceedings, however, which led to different results. As previously documented, the legal consensus at the time was opposed to originalism, and Bork and Scalia were consequently outliers, threats to the existing legal norms. The Democrats thus raised serious questions about their fitness for the Supreme Court, fearing that they might threaten sacred precedents, from *Brown v. Board* to *Roe v. Wade*. Although the Democrats’ concerns about originalism were not unique to Bork, there were three key differences between the Scalia and Bork confirmation processes: one, Republicans controlled the Senate during Scalia’s nomination,

42 Murphy, *Scalia*, 121.

43 Ibid, 121.

44 Avery and McLaughlin, *The Federalist Society*, 2.

45 Murphy, *Scalia*, 85-86.

46 Teles, *The Rise of the Conservative Legal Movement*, 138.

47 Murphy, *Scalia*, 85.

48 Ibid.

49 U.S. Congress, Senate, Committee on the Judiciary, *Hearings on the Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States, Part 3 Before the Committee on the Judiciary, United States Senate*, 100th Cong. 2840 (1987), accessed May 11, 2015, <http://www.loc.gov/law/find/nominations/bork/hearing-pt3.pdf>.

50 Avery and McLaughlin, *The Federalist Society*, 27.

51 Murphy, *Scalia*, 150.

52 Ibid, 151-152.

whereas Democrats were in power for Bork's;⁵³ two, Scalia shied away from answering how his originalist adherence would affect his handling of precedent, while Bork openly stated his disagreements with key Court precedent; and three, Scalia received unanimous support from the ABA's Steering Committee on the Federal Judiciary, whereas the committee split on Bork's qualifications.

With a Republican majority in the Senate supporting him, Scalia handled his confirmation hearing before the Senate Judiciary Committee smoothly. Democratic Senator Joe Biden, reacting to the "debate recently involving several members of the Court and Attorney General Meese about the so called original intent doctrine," questioned Scalia about his originalist views and their implications for key precedent.⁵⁴ "What would this [originalist theory] have meant to the Court that wrote *Brown v. Board*," and "what should it mean to a Court which is going to face reconsideration of *Roe v. Wade*?"⁵⁵ Senator Edward Kennedy, also a Democrat, likewise asked directly, "Do you expect to overrule the *Roe v. Wade* decision if you are confirmed?" Scalia responded to such questions with tactful evasion, insisting that he "would be in a very bad position to adjudicate the case without being accused of having a less than impartial view of the matter."⁵⁶ And although he admitted that he was "more inclined to the original meaning" theory than a more activist approach, Scalia stated that he "strongly believe[s]" in "the doctrine of *stare decisis*," the observation of precedent, while noting that the Court's decisions "are sometimes overruled."⁵⁷ Ul-

timately, Scalia declared that he had "no agenda."⁵⁸ Furthermore, the ABA highly recommended Scalia, stating he was "among the best available" candidates for the Court.⁵⁹ The Senate approved his nomination unanimously.⁶⁰ Thus, due to the Republicans' control of the Senate and his careful evasion of tough questions, Scalia was confirmed.

Bork, however, was less convincing and more honest in the face of stricter scrutiny about his originalist views. In a speech Bork gave earlier in 1987, he said, "original intent...will sweep the...pretentious and toxic [practice] of non-originalism out to sea." Democratic Senator Howell Heflin suggested that this speech "could be construed as...an agenda if [Bork] got on the Court."⁶¹ Then-chairman of the Judiciary Committee, Senator Biden asked Bork about the "dozens of cases" that he supposedly had said the Court should reconsider. And Senator Kennedy documented a previous statement by Bork in which he said, "[A]n originalist judge would have no problem whatever in overruling a non-originalist precedent, because that precedent by the very basis of his judicial philosophy, has no legitimacy."⁶² In response to these concerns, Bork stated that he recognized that "*stare decisis* or the theory of precedent is important," but he nonetheless later asserted that "the Court has got to work out a better theory" of the principle.⁶³ And Bork did not completely evade hot-button issues such as *Roe v. Wade*, a decision, he argued, that "contains almost no legal reasoning."⁶⁴ Democrats attacked this view and Bork's previous controversial statements. In his opening statement during the hearing, Sen-

53 Editorial Board, "The Great Robert Bork," *Wall Street Journal*, December 20, 2012, accessed May 5, 2015, <http://search.proquest.com/docview/1240874240>.

54 U.S. Congress, Senate, Committee on the Judiciary, *Hearings on the Nomination of Judge Antonin Scalia, to be Associate Justice of the Supreme Court of the United States, Before the Committee on the Judiciary, United States Senate, 99th Cong.* 48 (1986), accessed May 11, 2015, <http://www.gpo.gov/fdsys/pkg/GPO-CHRG-SCALIA/pdf/GPO-CHRG-SCALIA.pdf>.

55 *Hearings on the Nomination of Judge Antonin Scalia, to be Associate Justice of the Supreme Court of the United States*, 6.

56 *Ibid*, 37.

57 *Ibid*, 32, 37.

58 *Ibid*, 38.

59 *Ibid*, 15.

60 Murphy, *Scalia*, 131.

61 *Hearings on the Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States, Part 3*, 449.

62 *Hearings on the Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States, Part 3*, 370.

63 *Ibid*, 112, 293.

64 U.S. Congress, Senate, Committee on the Judiciary, *Hearings on the Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States, Part 1 Before the Committee on the Judiciary, United States Senate, 100th Cong.* 184 (1987), accessed May 11, 2015, <http://www.loc.gov/law/find/nominations/bork/hearing-pt1.pdf>

ator Kennedy castigated Bork as a dangerous ideologue who would impose his radical theories on the American people. “In Robert Bork’s America,” Kennedy famously stated, “there is no room at the inn for blacks and no place in the Constitution for women, and in our America should be no seat on the Supreme Court for Robert Bork.”⁶⁵ Ultimately, Bork’s honesty about his unpopular views contributed to his defeat.⁶⁶ He failed to assuage the skeptical Democrats that he would not serve as a right-wing ideologue.

Furthermore, Bork suffered from a divided recommendation from the ABA. A key blow to Bork’s nomination was the ABA Standing Committee on the Federal Judiciary’s report to the Senate on Bork’s qualifications for the Supreme Court. Although the report recognized that a majority found Bork “well qualified,” it mentioned that a significant “minority concluded that the candidate is Not Qualified” due, in part, to his “comparatively extreme views respecting Constitutional principles or their application” and concerns “that he would vote to reverse important precedent.”⁶⁷ Thus, the combination of Democrats’ deep concerns about Bork’s originalist views and their implications for Court precedents and the ABA’s divided recommendation contributed to the Senate’s rejection of Bork’s nomination. This loss, and the ABA’s role in it, galvanized the Federalist Society to provide a conservative alternative to the ABA.

Although the Federalist Society had been opposed to the ABA since its earliest days, the failed Bork nomination encouraged the Society to redouble its efforts to become a conservative counterweight to the ABA, which the Society saw as a liberal institution and a primary cause of Bork’s defeat. In 1983, a Society proposal criticized the ABA and state bar associations for playing “crucial roles in developing a legal agenda which sometimes strangles dissent” under the cover of non-partisanship.⁶⁸ A year later, the Society’s

leaders, recognizing that attempting to change the ABA to be more balanced from the inside would be ineffective, expressed their hope to “use the Federalist Society as a national conservative legal organization which would [perform many of the functions of the ABA, including] “pronouncements or ratings concerning appointments to legal positions.”⁶⁹ In 1987, following the Bork debacle, the Society’s efforts to counter the ABA increased. Calabresi reflected on this uptick, saying, “I think we became much more interested in being a conservative alternative to the ABA after the Bork fight in part because” the ABA’s split review was one of the key factors in his rejection.⁷⁰ Immediately, the Society-dominated Reagan White House ended the practice of consulting with the ABA on judicial candidates.⁷¹ Over time, the Society’s influence would continue to contribute to a diminished role for the ABA in the judicial selection process, just as it would continue to dominate Republican administrations.

THE GEORGE H.W. BUSH PRESIDENCY

In the George H.W. Bush Administration, the Federalist Society maintained the tremendous influence that it had had during Ed Meese’s tenure as attorney general in the Reagan Administration. In this administration, the leading person for judicial nominations was White House Counsel C. Boyden Gray, who served simultaneously as a member of the Society’s board of directors.⁷² Among his key staff members was Society co-founder Lee Liberman, the top staffer for judicial nominations.⁷³ With a Society-dominated legal apparatus, every judicial candidate that Bush appointed either was a Society member or received approval from the organization.⁷⁴ Moreover, the Bush Administration picked up the mantle of the Society’s counter-ABA effort. Although the Reagan

65 Ibid, 34.

66 Andrew Peyton Thomas, *Clarence Thomas: A Biography* (San Francisco: Encounter Books, 2001), 310.

67 *Hearings on the Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States, Part 1*, 1233.

68 Teles, *The Rise of the Conservative Legal Movement*, 167.

69 Ibid, 168.

70 Teles, *The Rise of the Conservative Legal Movement*, 170.

71 Tinsley E. Yarbrough, *David Hackett Souter: Traditional Republican on the Rehnquist Court* (New York: Oxford, 2005), 125.

72 Avery and McLaughlin, *The Federalist Society*, 30.

73 Ibid.

74 Ibid, 2.

Administration had stopped consulting with the ABA following the Bork nomination, the Bush Administration said it would reinstate the practice if the ABA explicitly indicated that it would not consider ideology or political affiliation when reviewing candidates' qualifications, a consideration which was the basis for the ABA's split Bork review.⁷⁵ The ABA eventually agreed to this stipulation. Although the Bush Administration did not want the ABA to consider judicial candidates' ideology, Bush's team continued the Reagan Administration's policy of thoroughly screening the judicial candidates. The Society staff members, led by Liberman, extensively researched the candidates' judicial philosophy to ensure they met the Administration's—that is, the Society's—conservative standards.⁷⁶ Reflecting on the Society's immense power in the Bush White House, Second Circuit Court of Appeals Judge Robert Miner lamented that judicial selection was “in the hands of those who profess a blind adherence to the doctrine of original intent.”⁷⁷ It was “well known,” he said, that the Liberman had to approve every federal judicial appointment.⁷⁸ Grey's White House Counsel office, he added, burned with “the hot flame of ideology,” which the Society staffers tended.⁷⁹ Thus, the Federalist Society largely controlled the George H.W. Bush Administration's legal apparatus, just as it had the Reagan Administration's previously.

“Over time, the Society’s influence would continue to contribute to a diminished role for the ABA in the judicial selection process, just as it would continue to dominate Republican administrations.”

Although Bush selected David Souter, a moderate, for the first open Supreme Court seat during his term, he then nominated Clarence Thomas, a committed conservative and Federalist Society member, to the Court. When Bush had the opportunity to nominate a judge to the Supreme Court in 1990, he hoped to nominate a conservative but instead selected a moderate to preserve his political capital, which a taxing nomination fight for a conservative judge would have depleted.⁸⁰ Souter was not a staunch con-

servative, but Bush appointed him with the plan to nominate a bold conservative for the next Court vacancy.⁸¹ Although some conservative activists were skeptical of Bush's choice of Souter,⁸² Bush honored his promise to appoint a conservative the next time by selecting Thomas, a

judge for the D.C. Court of Appeals.⁸³ Like Scalia and Bork before him, Thomas benefitted from his commitment to originalism and his ties to the Federalist Society. When Thomas testified before the Senate Judiciary Committee in 1990 for his appeals court nomination, he revealed his originalist philosophy, stating that he would look to “the text of the [Constitution], to the history, to the debates at the signing or in the ratification process.”⁸⁴ Moreover, the administration's Society members, notably Boyd and Liberman, highly respected Thomas.⁸⁵ And conservatives identified him as their champion. Tom Jipping of the conser-

75 Ibid, 31.
76 Avery and McLaughlin, *The Federalist Society*, 31.
77 Avery and McLaughlin, *The Federalist Society*, 31.
78 Ibid.
79 Ibid.

80 Thomas, *Clarence Thomas*, 342.
81 Ibid, 342, 353.
82 Yarbrough, *David Hackett Souter*, 124.
83 Thomas, *Clarence Thomas*, 319.
84 Thomas, *Clarence Thomas*, 323.
85 Ibid, 317.

vative Free Congress Foundation wrote a memo to the Bush White House, saying, “Judge Thomas is our first choice,” adding, “the entire conservative movement not only supports him, but believes in him.”⁸⁶ With the approval of the conservative movement, particularly the Federalist Society, Bush nominated Thomas for the Supreme Court.

Just as they had done to Scalia and Bork, Democrats in the Senate relentlessly questioned Clarence Thomas about his originalist philosophy and its implications for Court precedent. During the confirmation hearing before the Senate Committee on the Judiciary, Republican Senator Orrin Hatch, himself a Federalist Society member, endorsed Thomas, stating, “Based on a careful review of Judge Thomas’s writings and judicial opinions and my personal knowledge of the man, I am confident that Judge Thomas will interpret the law according to its original meaning, rather than substitute his own policy preferences for the law.”⁸⁷ But it was this commitment to originalism that frightened Democrats. When Democratic Senator Joseph Biden pressed Thomas on his originalist philosophy, Thomas said, “the important starting point has to be with the debates [the Framers] were involved in and their statements surrounding that debate.”⁸⁸ But he nonetheless insisted that he respected precedent, stating, “My sentiments would be toward a preference for recognizing that there is significant weight to be given to existing case law and that the burden is on the judge who wants to change that precedent, to not only show why it is wrong, but why stare decisis should not apply.”⁸⁹ When Democratic Senator Patrick Leahy questioned him on *Roe v. Wade*, Thomas deflected just as Scalia had during his hearing, stating, “I think, for me to respond to

what my views are on those particular issues would undermine my ability to be impartial in those cases.”⁹⁰ Although the Judiciary Committee initially split 7-7 on his vote, due in part to Biden and other Democrats’ opposition to placing another conservative on the Court, the Senate ultimately confirmed Thomas narrowly, 52-48.⁹¹ Bush had kept his promise to conservatives, and Thomas likewise proved worthy of their support. By 1996, he was a hero on the right, and the Society honored him as a true champion of their originalist cause.⁹² Thus, Bush was victorious in the difficult battle he knew he would face by selecting an originalist for the Court. With Thomas on the Supreme Court and other Federalist Society members on the lower courts, Bush left office in 1993 having bolstered the Society’s influence.

THE GEORGE W. BUSH PRESIDENCY

After the interlude of the Clinton Administration, the Federalist Society returned to power in full force in the George W. Bush Administration. When Bush took office, the Society dominated his administration to a degree that surpassed its control of the Reagan and George H.W. Bush administrations. The George W. Bush White House placed paramount importance on membership in the Society selecting judges and key administration officials. At the beginning of the administration, Bush nominated Society members to three cabinet positions, including John Ashcroft as Attorney General, while Ted Olson, a devotee of the organization, became the solicitor general.⁹³ A former administration official recalled that when he was hiring at an executive agency, “we would not only look for whether someone was in the Federalist Society but also whether he or she actually attended monthly Society lunches.”⁹⁴ And Society member Daniel Troy insisted, “everybody, I mean everybody who got a job [in the Bush Administration] who was a lawyer

86 Ibid, 342.

87 U.S. Congress, Senate, Committee on the Judiciary, *Hearings on the Nomination of Clarence Thomas to be Associate Justice of the Supreme Court of the United States, Part I Before the Committee on the Judiciary, United States Senate*, 102nd Cong. 40 (1991), accessed May 11, 2015, <http://www.loc.gov/law/find/nominations/thomas/hearing-pt1.pdf>.

88 Ibid, 274.

89 *Hearings on the Nomination of Clarence Thomas to be Associate Justice of the Supreme Court of the United States, Part I*, 420.

90 Ibid, 220.

91 Thomas, *Clarence Thomas*, 382, 450.

92 Ibid, 527.

93 Avery and McLaughlin, *The Federalist Society*, 11.

94 Teles, *The Rise of the Conservative Legal Movement*, 159.

was involved with the Federalist Society.”⁹⁵ Moreover, Leonard Leo, the Society’s executive vice president, took a leave of absence to advise the administration on judicial nominees.⁹⁶ Every federal judge that Bush appointed was either a member of the Society or someone whom Society members had approved.⁹⁷ Additionally, the Bush White House embraced the Federalist Society’s counter-ABA effort. During Bush’s first year in office, White House Counsel Alberto Gonzalez announced that the administration would no longer consult with the ABA on judicial candidates,⁹⁸ thereby culminating the Society’s campaign to end the ABA’s role in the nomination process, at least for Republican administrations. In fact, the Society received credit for the White House’s decision.⁹⁹ Thus, Federalist Society members, from cabinet members to key legal staffers, wielded tremendous influence in the Bush White House, and the Society’s influence was particularly important for Bush’s judicial nominees.

By the time George W. Bush entered the White House, Democrats had begun to attack the Federalist Society and to question its impact on the nomination process for federal legal appointments. As they had been during the Scalia, Bork, and Thomas nominations, Democrats were skeptical of the originalist judicial philosophy with which the Society had become

synonymous when Bush took office, and they also suspected that it exerted undue influence over the nomination process, particularly in light of the Bush Administration’s decision to stop consulting with the ABA. Membership in the Society for judicial nominees had become a red flag for Democrats. From the outset of Bush’s tenure, Democrats questioned Federalist Society judicial nominees about the organization and its philosophy.¹⁰⁰ In one Senate confirmation hearing, Democratic Senator Richard Durbin observed, “As we try to monitor the DNA of President Bush’s nominees, we find repeatedly the Federalist Society chromosome.” He asked Jeffrey Sutton, a

Bush judicial nominee and Society member, “Why is it that membership in the Federalist Society has become the secret handshake of the Bush nominees for the Federal court?”¹⁰¹ In another hearing, Senator Durbin insisted that “from what I have read...[the Federalist Society has]

a very conservative philosophy...I think they have an agenda.”¹⁰² Then, questioning the motivation behind the White House’s decision to remove the ABA from the nomination process, Durbin asserted, “it troubles some of us to believe that the [ABA]...is being cast aside by the White House now

“With Thomas on the Supreme Court and other Federalist Society members on the lower courts, Bush left office in 1993 having bolstered the Society’s influence.”

95 Hollis-Brusky, *Ideas with Consequences*, 154.
 96 Teles, *The Rise of the Conservative Legal Movement*, 160.
 97 Avery and McLaughlin, *The Federalist Society*, 2.
 98 Ann Southworth, *Lawyers of the Right: Professionalizing the Conservative Coalition* (Chicago: University of Chicago Press, 2008), 140
 99 Carter, “The In Crowd,” 46.

100 Teles, *The Rise of the Conservative Legal Movement*, 152.
 101 U.S. Congress, Senate, Committee on the Judiciary, *Hearing on Federal Appointments, Before the Committee on the Judiciary, United States Senate*, 108th Cong. (2003), accessed May 11, 2015, <http://www.gpo.gov/fdsys/pkg/CHRG-108shrg89324/html/CHRG-108shrg89324.htm>.
 102 U.S. Congress, Senate, Committee on the Judiciary, *Hearing on the Nominations of Michael Chertoff and Viet D. Dinh to be Assistant Attorneys General, Before the Committee on the Judiciary, United States Senate*, 107th Cong. (2001), accessed May 11, 2015, <http://www.gpo.gov/fdsys/pkg/CHRG-107shrg77953/html/CHRG-107shrg77953.htm>.

when it comes to the judicial process. And, instead, we find that many people who are associated with the Federalist Society are now seeking prominent positions in the administration of justice. I don't think it is a coincidence."¹⁰³ Durbin demanded an explanation. "[I]f the Federalist Society is now going to be the filter for nominations to the Department of Justice as well as judicial nominations," he declared, "I hope that [Federalist Society nominees] will come forward...and clearly state what [their] goal is."¹⁰⁴ In light of the extensive influence of the Federalist Society on the Bush's nominations to key federal positions, both in the administration and in the courts, Democrats attempted to expose what they perceived as the Society's excessive and improper control of the Bush Administration and its agenda for the courts.

Despite Democrats' dogged questions to Bush's Federalist Society nominees about the philosophy of the organization, the nominees routinely denied that the Society had any particular ideology. Nonetheless, they openly articulated their commitment to an originalist interpretation of the Constitution, which was the guiding philosophy of the Society. In Jeffery Sutton's confirmation hearing, Senator Durbin questioned him about the group's philosophy, asking, "What in your mind is the Federalist Society philosophy that draws so many Bush nominees to the Federal bench to its membership?" Sutton responded, "I have no idea what their philosophy is."¹⁰⁵ In another hearing, Viet Dinh, Bush's nominee for Assistant Attorney General for Legal Policy and a Society member, also denied that the Society had any philosophy, stating, "I do not think it does have a stated philosophy, to my knowledge." And in a questionnaire, Bush nominee and Society member, Karen Caldwell, declared, "I am not aware that the Federalist Society has a judicial philosophy."¹⁰⁶ Nonetheless, she stated, "However, in its promotional material, the Federalist Society as-

serts, '...that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be.' To the extent that [this statement] suggests that judges should not legislate from the bench, I agree with that interpretation."¹⁰⁷ Dinh likewise articulated this philosophy in his hearing, asserting that he believes "the judges are there to interpret the law, not to make law."¹⁰⁸ Thus, despite their protestations to the contrary, as Caldwell's and Dinh's testimonies shows, Bush's Federalist Society nominees adhered to the organization's doctrine of originalism.

Building off his appointments of Federalist Society members such as Dinh and Caldwell to key federal legal positions, President Bush nominated two committed originalists with Federalist Society credentials—John Roberts and Samuel Alito—to the Supreme Court. The Society's influence contributed significantly to these nominations. At the time, two of the key administration officials for judicial selection were Kate Comerford Todd and Rachel Brand, both important Federalist Society members.¹⁰⁹ And in 2005, Federalist Society members Leonard Leo, Ed Meese, and C. Boyden Gray began to prepare for any potential vacancies on the Supreme Court and to assist Bush judicial nominees.¹¹⁰ The group produced a list of eighteen potential nominees, which included both Roberts and Alito.¹¹¹ Leo, the executive vice president of the Federalist Society, briefly left the Society and the group with Meese and Boyden to assist the White House in judicial selection, where he played a critical role in the nominations of Roberts and Alito.¹¹²

Although Roberts insisted that he did not re-

103 Ibid.

104 *Hearing on the Nominations of Michael Chertoff and Viet D. Dinh to be Assistant Attorneys General.*

105 *Hearing on Federal Appointments*, 108th Cong.

106 *Hearing on the Nominations of Michael Chertoff and Viet D. Dinh to be Assistant Attorneys General.*

107 U.S. Congress, Senate, Committee on the Judiciary, *Hearing on Federal Appointments, Before the Committee on the Judiciary, United States Senate*, 107th Cong. (2001), accessed May 11, 2015, <http://www.gpo.gov/fdsys/pkg/CHRG-107shrg80915/html/CHRG-107shrg80915.htm>.

108 *Hearing on the Nominations of Michael Chertoff and Viet D. Dinh to be Assistant Attorneys General.*

109 Michael Avery and Danielle McLaughlin, "How Conservatives Captured the Law," *Chronicle of Higher Education* 59 (2013): B6-B9, *EBSCO MegaFILE*, EBSCOhost (accessed May 11, 2015).

110 Ibid.

111 Avery and McLaughlin, *The Federalist Society*, 33.

112 Teles, *The Rise of the Conservative Legal Movement*, 160.

member ever being a member of the Federalist Society, the organization’s 1997–1998 leadership directory listed him as a member of the steering committee of the D.C. chapter.¹¹³ Regardless of his contested membership status, however, Roberts received the support of the Society. Unlike Roberts, Alito was an avowed member of the Society who had declared his membership on an application to the Reagan White House in 1985.¹¹⁴ Before nominating Alito, though, Bush nominated then–White House Counsel Harriet Miers to the Supreme Court, but her nomination failed, in large part due to opposition from Federalist Society members, most notably Robert Bork.¹¹⁵ Society member Tony Cotto stated bluntly, “No Fed Society credentials, that’s going to hurt you. It hurt Harriet a lot.”¹¹⁶ Thus, notwithstanding the intermittent failed Miers nomination, Bush nominated two devout originalists with ties to the Federalist Society to the Court, thereby increasing the number of originalists to four.

Like the Federalist Society nominees to the Supreme Court who preceded them, both Roberts and Alito faced questioning as to their views on original intent. In his confirmation hearings, Roberts expressed his commitment for an originalist approach, saying, “I resist the labels,” but he nonetheless expressed the originalist philosophy. “[Judges] are supposed to... interpret the Constitution according to the rule of law, not their own preferences, not their own per-

sonal beliefs. That’s the ideal,” he said.¹¹⁷ When judges “go beyond their confined limits,” he added, echoing Bork’s 1971 article, “they lose their legitimacy.”¹¹⁸ But Roberts proclaimed his “respect for precedent that forms part of the rule of law that the judge is obliged to apply under principles of stare decisis.” Alito faced similar questions and gave comparable responses. Answering a question about his judicial philosophy, despite not accepting a particular label, he expressed the originalist doctrine. “I think we should look to the text of the Constitution,” he said, “and we should look to

“In the end, despite the Democrats’ best efforts, Roberts and Alito joined their originalist compatriots, Scalia and Thomas, on the Court.”

the meaning that someone would have taken from the text of the Constitution at the time of its adoption.”¹¹⁹ Regarding precedent,

Alito asserted, “the presumption is that the Court will follow its prior precedents. There needs to be a special justification for overruling a prior precedent.” With regard to the Society, Roberts claimed that he did not remember ever becoming a member,¹²⁰ and Alito received few questions about the organization. Senator Durbin said to Alito, “I will not get into the Federalist Society, because every time I say those words [conservatives] go into a rage that I am somehow guilty of McCarthy-like tactics, asking who are these peo-

113 Avery and McLaughlin, *The Federalist Society*, 22.
 114 *Hearings on the Nomination of Samuel Alito to be Associate Justice of the Supreme Court of the United States, Part I Before the Committee on the Judiciary, United States Senate*, 109th Cong. 456, 756 (2006), accessed May 11, 2015, <http://www.loc.gov/law/find/alito.php>.
 115 Teles, *The Rise of the Conservative Legal Movement*, 160.
 116 Hollis-Brusky, *Ideas with Consequences*, 153.

117 U.S. Congress, Senate, Committee on the Judiciary, *Hearings on the Nomination of John G. Roberts, Jr. to be Chief Justice of the Supreme Court of the United States, Part I Before the Committee on the Judiciary, United States Senate*, 109th Cong. (2006), accessed May 11, 2015, <http://www.gpo.gov/fdsys/search/pagedetails.action?granuleId=&packageId=GPO-CHRG-ROBERTS&fromBrowse=true>.
 118 *Ibid.*
 119 *Hearings on the Nomination of Samuel Alito to be Associate Justice of the Supreme Court of the United States, Part I*, 465.
 120 Avery and McLaughlin, *The Federalist Society*, 22.

ple in the Federalist Society? I will not touch it.”¹²¹ Thus, although the Democrats in the Senate asked few explicit questions about the Society, they continued the tradition of quizzing Society nominees about their thoughts on originalism and Court precedent. In the end, despite the Democrats’ best efforts, Roberts and Alito joined their originalist compatriots, Scalia and Thomas, on the Court.

THE LEGACY

Republican presidents’ efforts to pack the federal judiciary with Federalist Society members has had a significant impact on moving the courts to the right. The Society’s members are contributing to the

realization of the group’s original goal of reorienting the federal judiciary in a more conservative direction toward originalism. Although Society members protest that their membership means nothing in partic-

ular about their judicial philosophy, Society members do exhibit common voting behavior. In a 2009 study, political scientists Nancy Scherer and Banks Miller published a study on the impact of Federalist Society membership on federal judges’ voting records. They found that, even controlling for political ideology, Society members had more conservative voting records than nonmembers, confirming Democrats’ fears.¹²² The report explains two possible reasons for this result: one, the Society attracts an already very conservative membership, or two, that the Society converts Republican attorneys who join

to originalists.¹²³ Although the report did not establish a causal relationship, its results nonetheless speak to the success of the Society in providing a platform for conservative judicial philosophy and in moving the federal courts to the right. Moreover, Scherer and Miller identified long-term implications of the study. Republican presidents will likely increasingly select the majority of their federal judges from the membership of the Society, they predict, because Society membership “eliminates...the uncertainty surrounding a nominee’s ideology.”¹²⁴ Ultimately, they contend, if the trend of Republican presidents nominating Society members continues, the Society will gradually move closer to “its original goal to

change the way we, as Americans, interpret the Constitution.”¹²⁵ Originalism, consequently, will become an even more formidable theory, and its practitioners, as they grow in number, will likewise become

“The Society’s members are contributing to the realization of the group’s original goal of reorienting the federal judiciary in a more conservative direction toward originalism.”

even more powerful attorneys and jurists.

By 2006, when Alito joined the Supreme Court, the Federalist Society had established a strong network of conservative lawyers and judges and had acquired complete control over the Republican legal establishment. Importantly, the Society had expanded the pool of conservative talent for Republican administrations to draw from for federal judgeships.¹²⁶ Society member Randy Barnett stated, “The Federalist Society is the only source of conservative and libertarian intellectual activity in the United States. Given that, of course Republican administrations rely

121 *Hearings on the Nomination of Samuel Alito to be Associate Justice of the Supreme Court of the United States, Part I*, 455-456.

122 Scherer and Miller, “The Federalist Society’s Influence on the Federal Judiciary,” 371.

123 *Ibid*, 373.

124 *Ibid*, 375.

125 *Ibid*, 376.

126 Teles, *The Rise of the Conservative Legal Movement*, 158.

on the [organization] for talent.”¹²⁷ Beyond providing a conservative talent pool, the Society completely dictated who would be eligible for federal positions. Membership in its ranks was a sine qua non for conservatives aspiring to federal appointments. One Society member stated, “You cannot have a conversation in Washington about judges without the Federalist Society being part of it.”¹²⁸ Another member claimed, “the Federalist Society has a de facto monopoly on the credentialing of rising stars.”¹²⁹ Thus, by the George W. Bush Administration, the Federalist Society had become the pinnacle of conservative legal networking for ambitious conservative lawyers and Republican administrations alike.

The Federalist Society succeeded in making its doctrine of originalism a respected, mainstream judicial philosophy with which it has become synonymous. Since its founding, the Society set out to provide a counterweight to the “liberal jurisprudence” that predominated in legal academia at the time, principally by promoting the theory of originalism.¹³⁰ Whereas originalism had been a fringe theory when the Society first formed, by the George W. Bush years it had become an accepted alternative to the liberal theory of a “living Constitution,” which had been the dominant philosophy. Justice Scalia, speaking at a Society convention, remarked, “I used to be able to say with a good deal of truth, that one could fire a cannon loaded with grape-shot in the faculty lounge of any law school in the country and not strike an origi-

nalist. That’s no longer true,” he continued. “Originalism, which was once orthodoxy, at least has now been returned to the status of respectability.”¹³¹ In 2011, Robert Bork wrote that originalism was not only now a respectable theory, but that it was growing and approaching preeminence. “[I]t is clear,” he contended, “that originalism is gaining adherents and may be close to dominance in constitutional scholarship.” And he specifically attributed this success to the group that he had helped form in 1982, stating,

“The Federalist Society succeeded in making its doctrine of originalism a respected, mainstream judicial philosophy with which it has become synonymous.”

“One reason [for the rise of originalism] is the phenomenal success of the Federalist Society.”¹³² Indeed, Federalist Society member John Yoo said that if he had to identify the single most important thing that the

Federalist Society stood for, it would be “commitment to Originalism.”¹³³ And the Society’s relationship to originalism explains why Democrats evolved from questioning Society judicial nominees solely about originalism to quizzing many of them about their membership in the organization and its philosophy as well. Thus, the Federalist Society prevailed in its effort to make originalism a formidable competitor to liberal judicial orthodoxy, and had consequently become the scourge of the Democratic Party and the liberal legal establishment.

Furthermore, through its role in the appointment of originalist judges to the federal courts, the Federalist Society contributed to the realization of its original goal of reorienting the federal judiciary in a more conservative direction. As Scherer and Miller proved, its members who became federal judges exhibited more reliably conservative voting behavior

127 Hollis-Brusky, *Ideas with Consequences*, 154.

128 Hollis-Brusky, *Ideas with Consequences*, 153.

129 *Ibid.*, 152.

130 Scherer and Miller, “The Federalist Society’s Influence on the Federal Judiciary,” 366.

131 Murphy, *Scalia*, 401.

132 Bork, “The Growth of Originalism,” 136.

133 Hollis-Brusky, *Ideas with Consequences*, 20.

than even other conservative appointees who were not members. In 2008, Society co-founder David McIntosh reflected satisfactorily on the ideological shift of the courts, saying that the federal appeals courts were more oriented toward conservative judicial philosophy than ever before.¹³⁴ This conservative reorientation of the appeals courts had been a long-developing process, and the effort yielded significant victories in the appointments of Roberts and Alito to the Supreme Court. After the confirmations of Roberts and Alito, the *Wall Street Journal* wrote, “The Alito-Roberts ascendancy also marks a victory for the generation of legal conservatives who earned their stripes in the Reagan Administration. The new justices are both stars of that generation—many others are scattered throughout the lower courts—and they are now poised to influence law and culture for 20 years or more. All those Federalist Society seminars may have finally paid off. Call it Ed Meese’s revenge.”¹³⁵ Similarly, David Kirkpatrick of the *New York Times* added that the confirmations of Roberts and Alito were “the culmination of a disciplined campaign begun by the Reagan administration to seed the lower federal judiciary with like-minded jurists who could reorient the federal courts” toward the philosophy of originalism.¹³⁶ With three originalists now on the Supreme Court and many others in the lower courts, the Society’s crusade to move the federal judiciary to the right had succeeded.

Thus, between the Federalist Society’s official beginning in 1982 and the confirmation of Society stalwart Samuel Alito in 2006, the Federalist Society has radically transformed the American legal landscape from academia to the federal court system by infiltrating Republican administrations and the federal judiciary. During Justice Roberts’ confirmation hearing, Senator Lindsay Graham asked him, “When it comes to the law, what does the term Reagan rev-

olution mean to you?” Roberts replied, “I think it means a belief that we should interpret the Constitution according to its terms.”¹³⁷ And so this conservative crusade does mean originalism in the courts. Graham just had its name wrong. It was a conservative legal organization, which the Reagan Administration first adopted, that had made originalism a dominant counterweight to liberal theories of jurisprudence. And ultimately, it was this organization whose members placed John Roberts and his originalism-oriented legal mind on the Supreme Court. A revolution had, indeed, swept the legal word. It went by the name of the Federalist Society.

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- 135 Avery and McLaughlin, *The Federalist Society*, 12.
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DEGREES OF THE “RESOURCE CURSE”

THE CASES OF NORWAY AND SAUDI ARABIA

BY **JILLIAN MOELY** (N'18)

MAJOR: NURSING

ABSTRACT

The “resource curse,” a phenomenon in which the possession of natural resources impedes a nation’s economic growth, has been widely researched and discussed. The idea that natural resource revenues can detract from the development of a healthy manufacturing sector, encourage cyclical fiscal policy, and make governments less responsive to the needs and wishes of its people is well established. However, much research on the subject fails to recognize that not all nations experience the “curse” in the same way or to the same degree. This paper explores how history, institutions, policy, and cultural practices surrounding the use of natural resource revenues determine how or if the resource curse affects various states. To highlight these differences, the paper compares the treatment of natural resource revenues by two major hydrocarbon-exporters: Norway and Saudi Arabia.

INTRODUCTION

The “resource curse,” a phenomenon in which natural resource endowments harm, rather than help, the nations that possess them, has been the subject of much discussion and scholarly research. The “curse” occurs when the ready availability of natural resource revenue weakens a country’s drive to strengthen its manufacturing sector and to diversify its economy. Although the basic tenets of the theory are fairly uncontroversial, it should be noted that not all countries

experience the “curse” to the same extent. The presence of natural resources is not necessarily a death knell for a nation’s manufacturing sector and overall economic health. A country’s quality of public institutions, history, investment of oil revenues, and human capital all dictate the extent to which the “curse” affects its economy. A direct comparison of two well established oil exporters, Norway and Saudi Arabia, confirms this variability. This paper will investigate the differences between the two nations and assess the degree to which each has fallen prey to the “resource curse.”

SAUDI ARABIA

Global Significance

As the world’s top oil producer and exporter, the Kingdom of Saudi Arabia has a significant influence on global oil trade. Furthermore, the nation holds massive reserves—its crude oil reserves make up about sixteen percent of existing reserves worldwide, and its gas reserves are the fourth largest in the world.¹ These holdings provide a buffer against fluctuations in production, and allow Saudi Arabia to play a large role in global energy supply—the country can moderate energy prices and act as “swing

1 “Saudi Arabia.” U.S. Energy Information Administration - EIA - Independent Statistics and Analysis.

producer” in times of oil shortage.² This influence on the global market can be observed in the current landscape of the energy economy: despite a run of lower oil prices, the Kingdom has not opted to cut production. This strategy, some analysts posit, is designed to drive prices so low that other producers will cease to profit and cut production.³ Here, the Kingdom’s low production costs (about four to five USD per barrel as of late 2014, according to Minister of Petroleum and Mineral Resources Ali Al-Naimi) also work in its favor.⁴

The Kingdom holds additional sway over the global energy market as a founding member of the Organization of the Petroleum Exporting Countries (OPEC). The organization, which aims to “devise ways and means of ensuring the stabilization of prices in international oil markets with a view to eliminating harmful and unnecessary fluctuations,” sets production quotas for its member countries and plays an integral part in controlling world oil supply and prices.⁵

Supply

Although some figures conflict, most industry experts estimate that Saudi Arabian extracted oil reserves alone can last anywhere from 65 to 100 years.⁶ To increase the production period, the Kingdom seeks new oil fields on a continuous basis, having done so with considerable success in the Red Sea.⁷ Saudi Arabia also plans to start investigating the prospects of shale gas, and some estimates place its

reserve of this resource at third largest in the world.⁸ Although extracting this windfall may be difficult (the process requires large amounts of water), Saudi Aramco commissioned the first successful use of a fracking technique that uses carbon dioxide in place of water in 2014.⁹ Whether this process can realistically be used on a large scale remains to be seen.

Government Involvement in the Energy Sector

Although oil production in Saudi Arabia was controlled by the Arabian American Oil Company (Aramco) after its initial discovery, the Saudi Arabian government obtained full ownership of the company by 1988. State purchase of Aramco, which was subsequently renamed the Saudi Arabian Oil Company or Saudi Aramco, introduced a direct channel for collection of oil revenues (previously, the government had derived profits via taxes and monetary concessions paid by foreign oil companies). The Saudi state relies heavily upon oil revenues; in 2013, oil accounted for about 90 percent of the government budget.¹⁰ This dependence is partly due to the Kingdom’s limited ability to collect tax revenue: citizens pay only a 2.5 percent religious tax, or zakat, and foreign-owned corporations pay a 20 percent tax on profits.¹¹

Economic Diversity and the “Resource Curse”

Saudi Arabia is the least economically diversified state in the Gulf region, and the overall health of its economy is unclear. Some analysts note that the state’s dependence on oil revenue is unsustainable, as oil prices cannot feasibly keep up with future spending needs: in order to do so, it is estimated that

2 Fattouh, Bassam, and Laura El-Katiri. *Energy and Arab Economic Development*. United Nations Development Programme, Regional Bureau for Arab States. 2012. 9.

3 “Industry Trend Analysis – OPEC Maintains Production: First Thoughts.” Business Monitor Online. 2014.

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7 Fattouh, *Energy and Arab Economic Development*, 35.; “Annual Review 2013.” Saudi Aramco. 2013. 19.

8 Author calculation

9 “Saudi Aramco Turns Its Sights on Shale.” Shale Gas International. Accessed June 26, 2015.; “Annual Review 2014.” Saudi Aramco. 2014. 25.

10 “Saudi Arabia: 2014 Article IV Consultation – Staff Report; Press Release” International Monetary Fund, 2014 (plus author’s own calculations).

11 Alsweilem, Khalid A. “A Stable and Efficient Fiscal Framework for Saudi Arabia: The Role of Sovereign Funds in Decoupling Spending from Oil Revenue and Creating a Permanent Source of Income.” The Belfer Center for Science and International Affairs, Harvard Kennedy School. 2015. 4.

they would need to recover to over \$100 per barrel in the short term, and continue to rise beyond this level by roughly 5 to 7 percent in the long-term.¹² When considering other indicators of economic health, it should be noted that the Kingdom has experienced a fairly high average annual GDP growth of 5.7 percent since 1970. However, this growth is highly volatile from year to year and reflective of the Kingdom's status as a developing country.

Fiscal policy also betrays the nation's dependence. The state prioritizes socially significant spending projects—Saudi Arabia has a history of strong education, wage, and infrastructure spending—and public expenditure has historically ebbed and flowed with oil prices.¹³ The Saudi government has taken steps to address this issue, however. The Saudi Arabian Monetary Agency (SAMA) Vice-Governor Abdulrahman Al-Hamidy claimed that there was steady state spending throughout the 2008 financial crisis, and the Kingdom's 2015 projected budget outlines a record expenditure of \$229 billion with a planned 5 percent deficit (despite a 16 percent drop in revenue from 2014).¹⁴ The 2015 national budget allots 80 percent of all spending to defense, education, healthcare, and other social af-

fairs; across these categories, a public sector wage bill accounts for 40 percent of spending. Saudi spending on social programs and healthcare has also risen in absolute and per capita terms in recent years.¹⁵

Reining in cyclical fiscal policy places the Saudi government at risk of large deficits during periods of low oil prices. Some have suggested that Saudi Arabia might stabilize spending and revenues by instituting a Sovereign Wealth Fund (SWF), which would indefinitely preserve oil revenues for posterity. Although the country's national bank saves and invests surplus oil revenues in a Foreign Holdings fund, it is utilized without restrictions to negate any planned deficit. The fund, which is currently valued at about \$733 billion, is probably invested in low-risk, low-return offerings such as U.S. Treasury bonds (lit-

tle is known about its exact composition or governing guidelines).¹⁶ Saudi Arabia also has a Public Investment Fund, which injects excess oil revenue into the local economy via

commercial business loans.¹⁷ Neither of these options, however, allows for the untouched growth of revenues. In response to complaints about the current investment policy, the Kingdom's Finance Minister Ibrahim Alassaf reportedly said that the Kingdom had no plans to create a traditional SWF; in December 2014, he stated that he "believe[s] the Kingdom's

“The ultimate concern, however, is a scenario in which natural resource revenues decline indefinitely.”

12 “Saudi Arabia’s Economic Diversification: Progress in the Context of the GCC and Challenges.” Apicorp Research. Economic Commentary Vol. 8 No. 6 June 2013. 1.; Asweilem, A Stable and Efficient Fiscal Framework for Saudi Arabia: The Role of Sovereign Funds in Decoupling Spending from Oil Revenue and Creating a Permanent Source of Income,” 3.

13 “Labor Market Reforms to Boost Employment and Productivity in the GCC- An Update.” International Monetary Fund. 2014. 16.; Fattouh, *Energy and Arab Economic Development*, 21.

14 Al-Hamidy, Abdulrahman. “Aspects of fiscal/debt management and monetary policy interaction: the recent experience of Saudi Arabia.” *BIS Paper 67v* (2012). 305.; “Press Release: Recent Economic Developments and Highlights of Fiscal Years 1435/1436 (2014) & 1436/1437 (2015)” Kingdom of Saudi Arabia Ministry of Finance, 2014. 1.

15 Asweilem, “A Stable and Efficient Fiscal Framework for Saudi Arabia: The Role of Sovereign Funds in Decoupling Spending from Oil Revenue and Creating a Permanent Source of Income,” 9.

16 Ayoub, Joseph. “Saudi Arabia insulated from effects of lower oil prices.” United States Energy Information Agency. 2015.

17 “Public Investment Fund (PIF)” Kingdom of Saudi Arabia Ministry of Finance. 2015.

policy is most suitable for its circumstances.”¹⁸

Fiscal policy is not the only means through which the Saudi government seeks to diversify and strengthen its economy: in an attempt to develop forward linkages, Saudi Arabia refines part of its enormous natural resource boon into various petrochemicals. The state-owned Saudi Basic Industries Company (SABIC) was created in 1976 to oversee this component of the oil and gas sector, and was the world’s fourth largest chemical producer in 2013.¹⁹ The rapid growth and development of the petrochemical industry rendered it a valuable asset to the Saudi economy—in 2010, petrochemicals accounted for more than 60 percent of the Kingdom’s non-oil exports.²⁰ Saudi Aramco currently has the sixth largest refining capacity in the world, and has recently partnered with foreign oil companies in ownership and development of new refineries that will bring total chemical production capacity to more than 15 million tons per year.²¹

The ultimate concern, however, is a scenario in which natural resource revenues decline indefinitely. Although Saudi Arabia has the advantage of low-cost production levels, the future may see a prolonged decrease in oil prices: the rise of renewable energy sources, as well as new producers and improved (i.e., cheaper) extraction techniques for unconventional resources could threaten Saudi economic health.²²

Social/Civil Aspects of Oil Consumption and Revenue Use

Saudi Arabia’s labor sector is a major component of federal spending. Many entry-level private sector jobs are filled by expatriate and immigrant

workers, while more than 80 percent of employed Saudi nationals work in the public sector (which offers superior pay and benefits).²³ Although the government strives to create public sector jobs for its citizens, 11.725 percent of Saudi nationals was unemployed in 2014 as compared to only 0.45 percent of non-Saudis, who constitute about a third of the population.²⁴

The Kingdom also spends oil revenue on fuel subsidies for residents. In June 2015, one gallon of gasoline cost about \$0.60 in Saudi Arabia (in comparison, the world average was about \$4.2 per gallon in the same period).²⁵ In 2013, the International Monetary Fund (IMF) estimated that government losses to subsidies amounted to approximately 10 percent of Saudi Arabia’s GDP, and other analysts state that such subsidies not only cut into revenue but also distort market signals and encourage wasteful energy use.²⁶ The latter is particularly problematic, as Saudi per capita energy consumption rates are among the highest in the Gulf region and twelfth highest in the world. Concern has been expressed over this ranking; a controversial 2012 Citibank report suggested that the country could be a net oil importer by 2030 if demand continues to grow.²⁷ Chief Executive Officer of Saudi Aramco Khalid Al-Falih stated (perhaps more realistically) that demand could be 2.75 higher than present levels by 2030 if no improvements in energy efficiency are made.²⁸

18 Rashad, Marwa, and Andrew Torchia. “Saudi Finance Minister Says No Need to Create Sovereign Wealth Fund.” Reuters. December 26, 2014.

19 “C&EN’s Global Top 50 Chemical Firms For 2014.” Chemical & Engineering News.

20 Fattouh, *Energy and Arab Economic Development*, 34.

21 “Refining and Chemicals.” Saudi Aramco. Accessed June 26, 2015.

22 Asweilem, “A Stable and Efficient Fiscal Framework for Saudi Arabia: The Role of Sovereign Funds in Decoupling Spending from Oil Revenue and Creating a Permanent Source of Income,” 10-11.

23 Ibid, 9.

24 “Estimates of Population by Sex and Nationality,” Kingdom of Saudi Arabia Central Department of Statistics and Information. 2014.; “Quarterly Unemployment Rates 2014.” Kingdom of Saudi Arabia Central Department of Statistics and Information, 2014.; “Labor Market Reforms to Boost Employment and Productivity in the GCC- An Update.” International Monetary Fund. 2014.

25 “Saudi Arabia.” U.S. Energy Information Administration - EIA - Independent Statistics and Analysis.; “Gasoline prices, July 6, 2015.” GlobalPetrolPrices.com

26 “Saudi Arabia: 2014 Article IV Consultation – Staff Report; Press Release,” 13.; Fattouh, *Energy and Arab Economic Development*, 27.

27 Ibid., 58.

28 “Saudi Arabia.” U.S. Energy Information Administration - EIA - Independent Statistics and Analysis.

These factors, among others, account for the spending and investment patterns of Saudi Arabia’s oil revenue. Although some are more potentially damaging than others (i.e., high unemployment and energy consumption rates), all contribute to the Kingdom’s current economic state.

NORWAY

Global Significance

Norway, Europe’s largest oil exporter and reserve-holder, was the world’s twelfth largest net exporter of oil in 2013 and the third largest exporter of natural gas in the world following Russia and Qatar. Norway’s fuel exports (most of which go to European countries and the United States) play a particularly important part in the European Union’s energy supply. Because one of Norway’s major refineries operates in compliance with strict EU environmental controls, it serves as a main source of gasoline and diesel to member countries.²⁹ Furthermore, Norway possesses an extensive subsea pipeline system that transports oil domestically and abroad to various European consumers. Pipelines transport products from fields to refineries, as well; one international pipeline, Norpipe, boasts a capacity of 913,000 bbl/day and serves as a direct line to a refinery in Teesside, England.

Norway’s strong domestic refining presence works in tandem with its international refining activities. It possesses two major refineries with a combined crude oil refining capacity of 319,000 barrels per day.³⁰ Liquefied natural gas (LNG) is produced at Statoil’s Melkoya facility, which the U.S. EIA describes as “the first large-scale LNG export terminal in Europe.” Melkoya produces at capacity—200 bil-

lion cubic feet/year—and as of December 2014 Statoil planned to invest about \$2.9 billion in expansions that would link the refinery to two additional wells.³¹

Supply

Data from the Norway Petroleum Directorate (NPD) show that Norway’s oil production peaked in the early 2000s and will stay at its current levels until 2030. Natural gas production, on the other hand, has generally risen since its initial discovery. As of 2013, recoverable reserves were estimated at 14.1 billion Sm³ boe (66 percent of which has already been extracted).³²

Norway continues in its exploration efforts today, with sustained exploratory drilling in the North Norwegian and Barents seas. Potential well sites increased in number after the nation resolved a decades-long maritime border dispute with Russia in 2011. The two countries decided to split the disputed

“Norway has frequently been hailed as a paragon of natural resource governance in scholarship on the ‘resource curse.’”

175,000 km² area of the Barents Sea nearly equally, and Norway consequently gained access to an additional 54,000 square miles of continental shelf.³³

Exploration is ongoing in other areas of the Barents Sea, as well; somewhat controversially, Norway offered new leases for exploration of the Arctic region in early 2015. This occurred after the announcement that Arctic ice ledges have receded, opening up more territory for drilling. However, opponents of the move have expressed concern over further drilling in the face of receding ice levels. A study published

29 Ibid.
30 Ibid.

31 “Statoil plans Hammerfest LNG investment.” LNG World News. December 2014.

32 “Recoverable reserves per 31.12.2014,” Norwegian Petroleum Directorate. 2015.

33 “Norway.” U.S. Energy Information Administration - EIA - Independent Statistics and Analysis.; “Norway and Russia officially split Barents sea.” World Oil. 2011.

in January 2015 found that extraction of Arctic oil reserves (which could contain up to 22 percent of the world's undiscovered conventional oil and natural gas resources) would cause global warming beyond the set 2°C limit.³⁴

Observing its unconventionally extracted resources, Norway is fairly undeveloped. The prevalence of conventional supply limits development of other forms of oil and gas at the moment.³⁵

Government Involvement in the Energy Sector

The central government of Norway has historically played a strong role in its country's energy sector. The government proclaimed sovereignty over the Norwegian continental shelf after the first discoveries and required that all oil companies procure exploratory and production licenses from the King.³⁶ After oil was eventually discovered by foreign corporations, the Norwegian government increased its share of natural resource revenues by creating state-owned oil company Statoil in 1972. Today, the government owns 67 percent of the company.

Due to instability in oil revenues throughout the 1970s and 1980s, the Norwegian government decided to institute a sovereign wealth fund: legislation creating what is now known as the Government Pension Fund Global (GPF) was signed into law in 1990. All of the fund's investments are abroad, and only its real return (approximately 4 percent) is spent on paying the structural non-oil deficit; this way, the government spends none of the actual oil revenue and uses only investment returns to balance the economy.^{37 38}

Economic Diversity and the "Resource Curse"

Norway has frequently been hailed as a para-

gon of natural resource governance in scholarship on the "resource curse." Although crude oil, natural gas, and pipeline services accounted for 52 percent of Norway's exports in 2012, they constituted less than a third of government revenues and only 23 percent of GDP.³⁹ Furthermore, Norway's fiscal policy is minimally volatile due to its 4 percent spending rule. The nation also displays higher-than-average GDP growth: GDP per capita measured in purchasing power parities has increased from 5 percent below the OECD average in 1970 to 70 percent above the average in 2010, and Norway's GDP per capita has been higher than that of its highly-similar neighbor Sweden since the 1970s. Oil, it appears, is at least somewhat responsible for these figures; some economists estimate that oil and gas revenues account for 20 percent of Norway's GDP per capita growth.⁴⁰ With a robust economy, a stable central government, and a top ranking on the U.N. Human Development Index, Norway's use of natural resource revenues seems paradigmatic.⁴¹

However, some oil-related issues can be detected upon closer study of the nation. While Norway shows undeniable signs of health, some symptoms of the so-called "resource curse" are present. In contrast to its Danish, Finnish, and Swedish neighbors, Norway has failed to develop large technological companies such as Bang & Olufsen, Nokia, LM Ericsson, and Volvo. Furthermore, the nation has an "almost stagnant" ratio of exports of goods and services to GDP (implying that oil exports have encroached upon other exports).⁴² A typical system of the "resource curse"—the appreciation of currency due to increased public consumption of both foreign and domestic goods in an economy receiving stimulus from oil revenues—is observable when analyzing

34 McGlade, C. and P. Ekins, *The geographical distribution of fossil fuels unused when limiting global warming to 2°C*, Nature. DOI: 10.1038/nature14016.; "Arctic Oil and Natural Gas Potential", U.S. Energy Information Administration. 2009.

35 "Table 1: Europe shale statistics." *Petroleum Economist*.

36 "Norway's oil history in 5 minutes."

37 "History", Norges Bank Investment Management.

38 "About the Fund," Norges Bank Investment Management.

39 "Norway." U.S. Energy Information Administration - EIA - Independent Statistics and Analysis.

40 Mideksa, T. The economic impact of natural resources. *Journal of Environmental Economics and Management* 65 (2), 277- 289. 2012. 1.

41 "Norway." United Nations Human Development Reports. 2014.

42 Gylfason, Thorvaldur, "Norway's wealth: Not just oil." VOX, CEPR's Policy Portal. 2008.

NORWAY SAUDI ARABIA

EXPORTS

Mineral products (i.e. hydrocarbons and byproducts) accounted for 63% of exports in 2013; petrochemicals made up 3%

Mineral products made up 90% of exports in 2013; petrochemicals and plastics made up an additional 6%

The remaining 34% of exports were largely in fish, nuclear reactor parts, ships, aluminum products, electrical machinery, medical equipment, and various food, clothing and animal products

The remaining 4% was in aluminum products, electrical machinery, ships, vehicles, nuclear reactors, precious stones, and miscellaneous food and household products

PRODUCTION OUTLOOK

Gas production/exports rising, oil production and exports peaked around 2001

Oil supply ample; production more reliant upon political/economic needs and OPEC participation. Gas production rising, but none is exported

GLOBAL POSITION

World's third-largest exporter of both dry natural gas and crude oil; hold's the world's 19th largest oil reserve and 14th largest natural gas reserve.

OPEC member and world's top exporter; hold's the world's largest crude oil reserve and 5th largest natural gas reserve.

UNCONVENTIONAL RESOURCES

Minimal Fracking with carbon dioxide replacement offshore

DEPENDENCE ON OIL REVENUE

Hydrocarbon revenue accounted for 30% of government revenue in 2012

Hydrocarbon revenue accounted for 90% of government revenue in 2012

SOVEREIGN WEALTH FUND

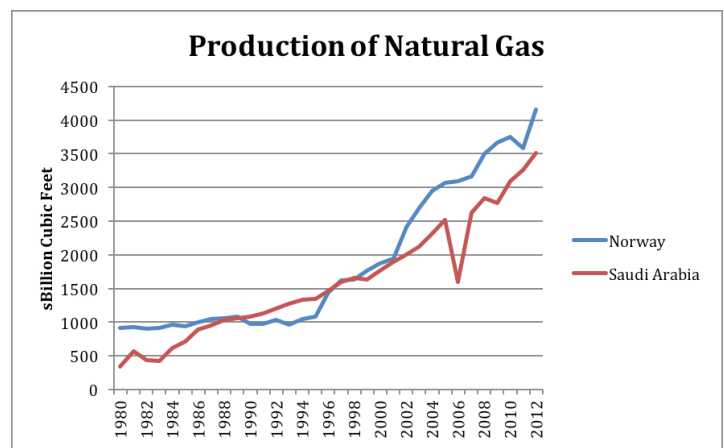
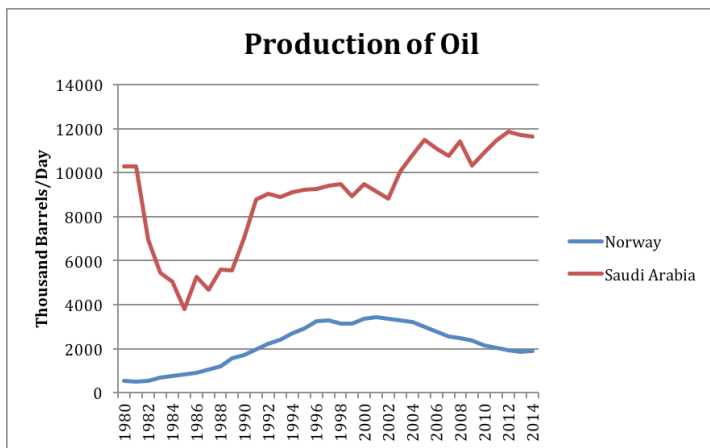
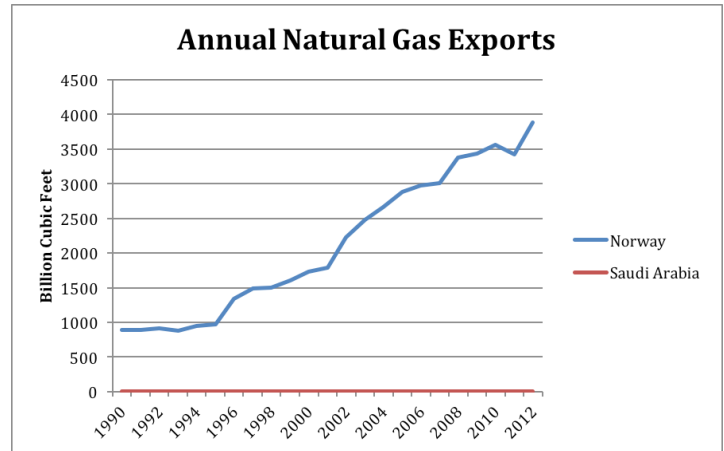
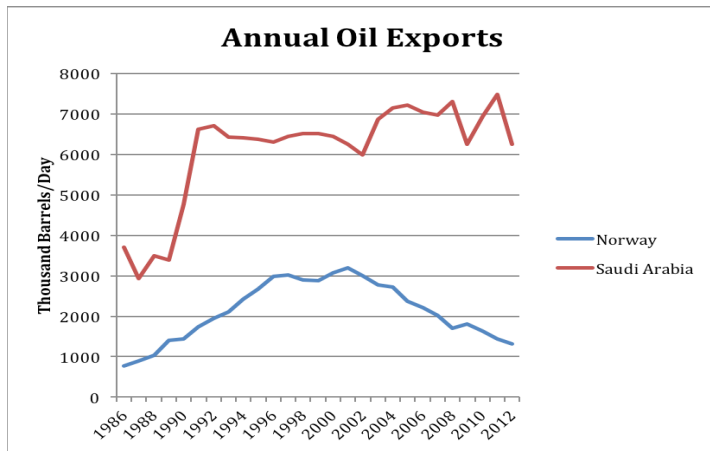
GPFG – no more than 4% of the fund (i.e. the real return) spent annually to balance structural non-oil deficit

The Foreign Holdings Fund invests oil surpluses abroad, but has no spending rule and sees minimal returns

FISCAL POLICY

Spending has been minimally cyclical; money from the GPFG's real return (not direct oil revenue) balances budget

Spending historically has been cyclical, although recently expenditures have remained constant or even increased in downturns



Norway's wage levels. In 2012, hourly wage costs in the manufacturing sector were 69 percent higher than those of Norway's EU trading partners. The manufacturing sector has also contracted somewhat in past years, although there is some evidence suggesting the same contraction can be observed in countries such as the United States and Germany and is not, therefore, indicative of the oil sector's influence.⁴³ Finally, Bjørnland and Thorsrud found evidence of a "two-speed economy" within Norway, with "non-tradeables growing at a much faster pace than tradeables." They did not, however, find any evidence of "Dutch disease;" i.e., the "resource curse."⁴⁴

Other concerns about the dominance of extractive industries in the Norwegian economy extend to the prevalence of forward and backward linkages. Norway quickly repurposed its pre-oil industry staples (shipping, etc.) to support the petroleum sector after the discovery of oil and gas deposits. Although the oil sector itself supplies only 2 percent of the country's employment, related industries account for roughly four times as many jobs. Beside their role in employment, oil and gas prices are crucially connected to Norwegian consumer confidence. "The return from the Fund cannot compensate for the reduction in domestic demand for input to the petroleum sector," one 2013 University of Oslo report stated. The report continues: "In that sense, the gradual increase over time in deliveries to the petroleum sector in Norway has made the Norwegian economy more vulnerable to the reduction in petroleum

43 Holden, "Avoiding the Resource Curse: The Case Norway," 5.

44 Bjørnland, Hilde C. and Leif Anders Thorsrud. "Boom or gloom? Examining the Dutch disease in a two-speed economy" Center for Applied Macro- and Petroleum Economics, Norwegian Business School. 2013.

NORWAY SAUDI ARABIA

EMPLOYMENT ISSUES

Wage appreciation in attempt to keep up with oil sector salary rate

Expatriate hiring outpaces hiring of nationals

MANUFACTURING SECTOR

Slightly shrunken, not appreciably more than those of industrialized countries such as Germany and the U.S.

Exclusively built on oil sector forward linkages – large refining presence, and petrochemicals represent a large portion of non-oil exports

HUMAN CAPITAL

High (constituting up to 80% of total national wealth, according to Lindholt article)

Low/moderate: education rates are rising quickly, but the workforce still underequipped

activity which inevitably will come.”⁴⁵ The IMF also noted that falling oil prices could reduce demand for goods and services, as well as cause a “significant reduction in housing prices.”⁴⁶

Finally, the IMF has raised concerns about the effectiveness of Norway’s recent fiscal policy. Because Norway’s structural non-oil deficit has recently amounted to less than the 4 percent real return on the GPF, IMF officials noted that introducing stimulus into an economy that is near capacity is not ideal. In 2014’s Article IV Report, they recommend that Norway spend only the amount necessary to balance the budget in order to “set a neutral fiscal stance.” According to the report, Norwegian authorities “recognize[d] the risk of excessive fiscal stimulus from spending too large a fraction of GPF assets... however, they placed greater emphasis on reducing the overall tax burden as a means of promoting competitiveness.”⁴⁷

In order to combat some of these symptoms and shift from reliance on oil and gas demand, the

IMF has suggested several structural reforms. Staff members suggest that Norway simplify its income tax system to encourage non-oil sector investment, reform pensions to boost labor force participation, and remove labor market rigidities (among others). According to the 2014 Article IV report, Norwegian officials agreed that these reforms would increase competitiveness and facilitate the move away from oil and gas driven demand in the nation’s economy; currently, compliance with the recommended actions is being planned.⁴⁸

Social/Civil Aspects of Oil Consumption and Revenue Use

Despite the issues outlined above, Norway is an important example of efficient resource management. Part of its success is likely attributable to the nation’s economic status prior to the introduction of oil revenue into the economy: Norway already had a strong central government and welfare state in place before the discovery of oil, as well as a model for treatment of natural resource revenues. Before petroleum and natural gas, Norway was highly dependent on exports of fish and lumber and possessed a

45 Holden, “Avoiding the Resource Curse: the Case Norway,” 15.

46 “Norway: 2014 Article IV Consultation – Staff Report; Press Release,” 15.

47 Ibid., 16.

48 Ibid., 24.

well-developed shipping sector.⁴⁹

However, some economists argue that its pre-existing economic structure did not have as much to do with Norway's success in managing oil resources as did the role of its human capital. Lars Lindholt wrote in a 2000 report on total national wealth that "the most important economic resource throughout the period [1930-95] was a highly qualified labour force, varying from 60 to 80 percent of the total national wealth in most years."⁵⁰ Gylfason, in a similar argument, points out that surrounding Scandinavian countries have demonstrated fiscal growth almost as great as Norway's despite their lack of oil and gas deposits. This growth, it has been suggested, is a direct result of a highly educated labor force; Norway's success can be attributed not only to oil but also to the skills of its population. Thanks to the combination of its natural resource endowments and human capital, Norway's economy is slightly stronger than those of its peers despite the fact that the average Norwegians work fewer hours than their Scandinavian counterparts.⁵¹

COMPARISON

The fiscal policies of Saudi Arabia and Norway are, and have been, strongly influenced by the considerable presence of considerable natural resource deposits. There are some similarities between the two nations, but differing production volumes, histories, and fiscal policies account for their disparate economic conditions.

Global Significance

Saudi Arabia and Norway each play large roles in the global oil market, but differ in both the type and

volume of oil they produce. Saudi Arabia produces about 6.1 times and exports about 4.7 times the amount of oil Norway does in a day and, therefore, plays a larger part in the world's total energy supply. As indicated earlier in this study, the nation often acts as a swing producer and has considerable sway over global pricing. Norway's oil and gas reserves stand at 2.2 and 25 percent of Saudi Arabia's holdings respectively, and pale in comparison.⁵² However, Norway has the upper hand in production of natural gas.⁵³

The price of production in each country differs as well. The Saudi production cost of \$4 to \$5 per barrel is slightly lower than the average cost within Norway, which is about \$6.57 before transportation expenses.⁵⁴ This variance also allows Saudi Arabia to play a larger role in global oil pricing. That is, it can act as a "swing producer" and continue to produce during periods of lower prices without sustaining losses as great as those experienced by countries with higher production costs.

Government Involvement in Energy Sector

Despite the differences between their natural resource sectors, the two nations share basic government structures: both are monarchies and welfare states with expansive public sectors. Both provide universal health care, an extensive social security system, and free or highly subsidized education. Furthermore, each government employs roughly a third of its employed citizens. In Norway 34.6 percent of the employed work for the public sector; about 30 percent do in Saudi Arabia.⁵⁵ Rates and volumes of public expenditure vary, given the differing population and development levels between the two countries. Saudi Arabia plans to spend about 63 percent of its budget of \$144.1 billion on ser-

49 Cappelen, Ådne and Mjøset, Lars. "Can Norway Be a Role Model for Natural Resource Abundant Countries?" in *Development Success: Historical Accounts from More Advanced Countries*, edited by Augustin K. Fosu. 44-72. Oxford: Oxford University Press. 2013. 50.

50 Lindholt, Lars. "On Natural Resource Rent and the Wealth of a Nation: A Study Based on National Accounts in Norway 1930-95." Statistics Norway, Research Department. *Discussion Papers No. 281*, August 2000.

51 Gylfason, "Norway's wealth: Not just oil."

52 Author calculations from EIA Country pages

53 Ibid.

54 Mufson, Steven. "How Low Can Oil Prices Go? Welcome to the Oil Market's Old Normal." *Washington Post*. Accessed June 26, 2015.; "2014 Annual Report on Form 20-F." Statoil. 2014.

55 "Country Fact Sheet: Norway." OECD, *Government at a Glance*. 2015; "Labor Market Reforms to Boost Employment and Productivity in the GCC – An Update," 9.

vices such as education and healthcare in 2015, while Norway has scheduled out 72 percent of its total of \$106.74 billion worth of expenditures for the same use.⁵⁶ However, the two nations collect their revenue from different sources. Oil revenues provide Saudi Arabia with about 90 percent of its total government revenue, so money for civil expenditures is directly supplied by the energy sector. In Norway, however, the opposite is true: revenues for public expenditure are largely collected from other areas (notably via the comprehensive tax system applied by central and local governments), and essentially no oil revenues are spent. Instead, these monies are funneled into the Government Pension Fund Global, of which only the real return is spent. Norway, then, spends essentially none of its oil revenues and collects revenues through taxes, while Saudi Arabia taxes its citizens essentially nothing beyond the zakat and spends its SAMA Foreign Holdings reserves whenever and in whatever degree required. This crucial difference accounts for the cyclical nature of Saudi Arabia's fiscal policy.

Economic Diversity and the Resource Curse

Both nations have relatively strong economies at the moment, but the sustainability of their respective fiscal policy is questionable. Furthermore, each faces specific oil-related economic issues.

Norway and Saudi Arabia both display worrying employment trends. Norway's issue is directly related to oil; because wages for workers in the oil sector rise much more quickly than wages in other sectors, overall salaries have increased as other employers attempt to match petroleum sector compensation. Wage appreciation hampers Norway's competitiveness as a nation and discourages international business interests, hurting any attempts to move away from an oil-based growth model in the long term. Saudi Arabia struggles with its own set of employment issues. Given the oil boom early in the

nation's history and the consequent growth of the "intergenerational equity" concept, Saudi nationals prefer public sector jobs, which offer excellent salaries and benefits, while expatriates tend to fill most private sector jobs. Today, almost 12 percent of Saudi nationals remain unemployed, while less than half of a percent of expatriates do.

GDP growth is another area in which oil can affect the economy of oil-exporting states. While Norway's GDP growth has generally been consistent and healthy since the creation of the GPFG, Saudi Arabia has experienced comparatively large swings in GDP growth. In 2011, for instance, Saudi Arabia's annual GDP growth was 10 percent; in 2013, it had fallen to 2.7 percent. In contrast, Norway's growth in the same years was 1 and 0.7 percent. It should be noted, however, that Saudi Arabia's status as a more recently developed country plays a part in this phenomenon.

Finally, each country struggles with shrunken and/or oil-dependent manufacturing sectors. Unlike neighboring Scandinavian countries, Norway lacks large, globally known companies. Furthermore, demand in its mainland economy depends heavily on oil prices. Saudi Arabia faces its own set of challenges: almost all of its manufacturing is oil-based. This extreme dependence on oil resources is not necessarily sustainable in the long run, and contributes to oil pricing-dependent economic health.

In order to solve these issues and move away from oil dependence, the IMF recommends that both countries take steps to make their economies globally competitive. Norway has been advised to simplify its income tax system, reform pensions so as to boost labor force participation, and remove labor market rigidities to encourage outside investment and business prospects. Saudi Arabia has received similar recommendations: the Kingdom should invest further in both human capital and infrastructure, and work toward the creation of a more transparent and secure business environment.

Historical and Social Context of Oil Development

The vast historical differences between the Kingdom of Saudi Arabia and Norway can perhaps

56 "Budget 2015." Royal Norwegian Ministry of Finance. 2014.; "Press Release: Recent Economic Developments and Highlights of Fiscal Years 1435/1436 (2014) & 1436/1437 (2015)," 2.

account for their varying fiscal policies. Norway was a well-established (if relatively poor) nation when oil was discovered; its small yet well-functioning economy exported natural resources such as fish and timber, and featured a developed shipping industry. Perhaps most importantly, the nation already had an extensive welfare system in place prior to oil and natural gas extraction: the newfound resources introduced a new source of revenue into a smoothly functioning fiscal and political system. In addition, some economists believe that Norway's well-educated population was an important factor in efficient use of the natural resource boon.⁵⁷

Saudi Arabia, however, faced a different state of affairs when oil was discovered. The nation had only been formally united for six years, and was mostly reliant on scant revenues from agriculture and tourism. Oil-driven prosperity set an early precedent for energy sector revenues as a vehicle for economic growth. This approach is evident in social policy: the concept of state responsibility to its citizenry is an integral part of Saudi political philosophy.⁵⁸ Furthermore, Saudi Arabia has not developed its human capital to the extent that Norway has. Although the IMF reports that the number of Saudi graduates with tertiary education has doubled in the last decade, it also notes that providing these graduates with "the skills needed by the private sector has proved challenging." To combat this issue, training programs have been developed to teach skills to workers currently in the labor force.⁵⁹

CONCLUSION

Historical context, differing cost and volumes of production, and distinct treatment of oil revenues can perhaps explain why Norway has managed to minimize dependence on its oil revenues while Saudi Arabia has struggled to do the same. However, the two nations have undeniably experienced symptoms

of the "resource curse" to differing extents: Saudi Arabia's unstable GDP growth, unemployment issues, and worrisome reliance on one type of revenue are somewhat more problematic than the wage appreciation and oil and gas reliant mainland economy demand Norway has experienced. As the respective cases of Saudi Arabia and Norway show, it is wise to differentiate between individual countries when speaking of the "resource curse."

57 Gylfason, "Norway's wealth: Not just oil."

58 *The Basic Law of Governance*. The Kingdom of Saudi Arabia. 1992.

59 "Saudi Arabia: 2014 Article IV Consultation – Staff Report; Press Release," 18.

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THE SPECTRE OF SYRIZA

THE EUROPEAN UNION DEBT CRISIS AND THE RADICAL LEFT

BY **NATASHA KADLEC** (C'19)

MAJOR: INTERNATIONAL RELATIONS

ABSTRACT

Europe's radical left has enjoyed a resurgence during the European debt crisis. This paper seeks to explain why this resurgence has occurred. It argues that protest sentiment regarding EU policy toward debtor countries, combined with centrism and a "democratic deficit" in the EU, drove an explosion of support for radical left parties in Greece, Spain, and elsewhere. Reflecting upon the experiences of radical left parties in the EU, this paper concludes that in order to maintain their strength beyond the crisis, the radical left must now paradoxically accept a degree of moderation.

INTRODUCTION

For the first time since the fall of "actually existing socialism" in the Eastern Bloc, Europe faces an actually existing radical left. Today's iteration of the radical left, however, is not a neighboring geopolitical rival, but a part of the European Union (EU) itself. Although Northern European leaders are quick to criticize and dismiss radical leftist movements as folly, they should exercise caution. Greece's Syriza party has taken power with a platform focused almost exclusively on opposing the EU's imposition of austerity on Greece during the ongoing debt crisis. Other radical left parties across southern Europe have achieved greater prominence during the crisis as well. Central European leaders remain firmly opposed to these parties, which actively challenge EU

policy.¹ It is crucial that European leaders understand the relationship between austerity policy and the radical left. If EU policy is truly driving the resurgence of the left, the Troika may be creating its own worst enemy.

On average, European political parties are radicalizing in both directions. In general, trends in the European Parliament serve as a good indicator of national-level developments. While in the 2004 Parliament elections, only 20 percent of successful candidates came from the far left or far right, this number had increased to 29.6 percent by 2014.² The growing success of radical candidates is also evident at the national level. Most notably, Greece's Syriza Party assumed control of the Greek government in January 2015. Spain's radical left-wing Podemos, meanwhile, has also enjoyed sweeping popularity, and other leftist parties have experienced moderate gains during the debt crisis as well. Several factors can explain the success of the radical left, including discontent with the current political system, protest sentiment about the EU or national governments, and a lack of real choice within the mainstream political system.³

1 Seumas Milne, "Syriza can't just cave in. Europe's elites want regime change in Greece." *The Guardian*, July 1, 2015.

2 Pelinka, Anton. *Die unehelige Allianz: die rechten und die linken Extremisten gegen Europa* (Wien: Böhlau Verlag, 2015), 41.

3 Luke March. *Contemporary Far Left Parties in Europe: From Marxism to the Mainstream?* (Berlin: Friedrich-Ebert-Stiftung, 2008), 18.

In this paper, I will explain how EU policy toward debtor countries during the debt crisis catalyzed the recent success of the national-level radical left. In addition, I will explain how the convergence of protest sentiment with other factors allowed radical left parties (RLPs) to enjoy sustained success and legitimacy. I will begin by defining Europe's radical left and placing it in a historical context. Then, I will discuss the EU's policy during the debt crisis and its effect on radical left parties. Next, I will address additional causes of the resurgence of the radical left and will conclude with a discussion of the radical left's potential. Ultimately, I argue that today's radical left can, in the long term, achieve only a paradoxical success: in order to succeed, it will have to moderate itself to the point of losing its radical character.

DEFINING AND CONTEXTUALIZING THE RADICAL LEFT

Parties of the radical left are radical in that they see themselves as an alternative lying outside of the typical political spectrum. They “defin[e] themselves as to the left of and not merely on the left of social democracy [emphasis added].”⁴ Today's radical left parties run on policy programs that would fundamentally change their governments' internal functions and external relations, especially relations with the EU.⁵ In general, RLPs are “in favor of public intervention in economic affairs and...opposed to privatization of public services and economic deregulation. These are among its many differences—major and minor—with social democracy, which has long been won over to the market economy.”⁶

At the same time, today's radical left—as op-

posed to today's “extreme left”—is willing to work within existing systems of government. This definition excludes most of today's formal communist parties. While RLPs during the Cold War were distrustful of political institutions, they have, since 1989, generally agreed to form governing coalitions with moderate parties, accepting existing political structures. The radical left parties of today “no longer view bourgeois parliaments as simply designed to ‘dupe’ the working class.”⁷ Although, “Podemos leaders have often resisted the designation of ‘radical left,’ saying the group exists too far outside of the mainstream to be right or left,” the group's behavior mirrors that of a typical radical left party.⁸ It offers an alternative to mainstream politics that does not require an overthrow of existing institutions.

Today's RLPs have only recently recovered from near collapse after the fall of the Soviet Union. In the post-1989 period, Europe's RLPs underwent a “decline and mutation.” After losing the central organization provided by the existence of communist state, they gained flexibility in their policy approaches.⁹ One notable legacy of the communist era was RLPs' avoidance of international organization, especially in their “failure to create a [transnational party] in the 1990s....”¹⁰ Thus, Europe's radical left remained isolated and largely impotent in the years following the collapse of the Soviet Union. Beginning in the 2000s, however, European RLPs began to recover. They participated in coalitions “in Iceland, France, Italy, Finland, and Ukraine” and became “dominant governing parties in Moldova and

4 Richard Dunphy and Luke March, “Seven Year Itch? The European Left Party: Struggling to Transform the EU,” *Perspectives on European Politics and Society* 14, no. 4 (2013): 520.

5 Alexis Tsipras, “Greece: What a SYRIZA government will do,” *Links International Journal of Socialist Renewal*, September 15, 2014.

6 Luke March, “Beyond Syriza and Podemos, Other Radical Left Parties Are Threatening to Break into the Mainstream of European Politics,” *European Politics and Policy*, March 24, 2015.

7 Luke March, *Contemporary Far Left Parties in Europe: From Marxism to the Mainstream?* (Berlin: Friedrich-Ebert-Stiftung, 2008), 13.

8 Jess McHugh, “European Anti-Austerity 2015: Podemos, Spain's Protest Party, Looks To An Uncertain Future After Tsipras Resignation, Dips In The Polls,” *International Business Times*, September 2, 2015.

9 Luke March and Cas Mudde, “What's Left of the Radical Left? The European Radical Left After 1989: Decline and Mutation,” *Comparative European Politics*, no. 3 (2005): 23.

10 Richard Dunphy and Luke March, “Seven Year Itch? The European Left Party: Struggling to Transform the EU,” *Perspectives on European Politics and Society* 14, no. 4 (2013): 523.

Cyprus....” Overall, the radical left has recovered from its impotency in the 1990s.¹¹ By 2009, Europe’s radical left parties were comparatively well poised to exploit the debt crisis.

EU AUSTERITY POLICY AND THE RADICAL LEFT RESPONSE

The year 2008 began optimistically for the Eurozone, with German finance minister Peer Steinbrück declaring, “my feeling about the Euro’s success is close to euphoric.”¹² Yet several dangerously linked problems were brewing. Several peripheral European countries ran up consistently large current account deficits, which necessitated dependence on foreign capital and led to budget deficits and debt. Asset bubbles further exacerbated the problem, and led to bank solvency risks.¹³ These growing problems became impossible to ignore. The newly elected Greek prime minister George Papandreou of the social-democratic left-wing PASOK party admitted that Greece had been covering up excessive deficit spending, using borrowed money that was easy to obtain due to Greece’s Eurozone membership.¹⁴ As markets reacted to the news of Greece’s insolvency, the crisis spread to other European countries that had over-borrowed, collectively known as the PIIGS: Portugal, Ireland, Italy, Greece, and Spain.

The EU, led by Germany, portrayed the ensuing financial crisis as not only a financial failure, but also a moral failure. Italian prime minister and former European commissioner Mario Monti joked, “for Ger-

many ‘economics is a branch of moral philosophy.’”¹⁵ The “Troika” of the International Monetary Fund, European Central Bank, and European Commission eventually developed bailout packages, accompanied by harsh conditions of austerity applicable to Greece as well as to Portugal and Ireland. The impact on everyday life was dramatic. In the midst of austerity in 2011, Greece had the “highest rate of those at risk of poverty or social exclusion in the Eurozone,” a rate that rose by 3.3 percent in 2011 alone.¹⁶ The suicide rate rose by 26.5 percent, the proportion of households with no income more than doubled to nearly 20 percent, and the homeless population rose by 25 percent.¹⁷

While Portugal and Ireland have somewhat recovered from their crises, Greece has not.¹⁸ It has required a total of three bailouts, including one in the summer of 2015. However, the bailouts and the accompanying austerity have appeared to worsen Greece’s problems, turning public sentiment against EU policy. As current Greek prime minister Alexis Tsipras explained in 2013, “when the Troika came to Greece, the public debt was 110 percent of the GDP, and now the public debt is more than 160 percent of the GDP. ... They saved the banks and destroyed the society.”¹⁹ After two more years of the Troika regime, public debt climbed further, reaching 180

“By 2009, Europe’s radical left parties were comparatively well poised to exploit the debt crisis.”

11 Luke March. *Radical Left Parties in Europe*. (Abingdon: Routledge, 2011), 4.

12 Johan van Overtveldt. *The End of the Euro: The Uneasy Future of the European Union*. (Chicago: B2 Books, 2011), 77.

13 Ibid., 80.

14 Ibid., 83.

15 John Peet and Anton LaGuardia. *Unhappy Union*. (Great Britain: Profile Books Ltd., 2014), 156.

16 Gonzalo Caverro and Irene Martín Cortés, “The True Cost of Austerity and Inequality: Greece Case Study,” *Oxfam International*, September 2013.

17 Ibid.

18 “Three Little Piggies,” *The Economist*, February 16, 2015.

19 Slavoj Žižek and Srećko Horvat, *What Does Europe Want?* (New York: Columbia University Press, 2015), 160.

percent of Greece's GDP in 2015.²⁰

As a marginal political movement, the radical left was well positioned to capitalize on the evolving anti-establishment sentiment, in Greece and elsewhere. Not only was the crisis itself a catastrophe for the working class, but the existing political system also failed to respond to its needs. As Troika-imposed austerity and stabilization programs made conditions worse, "widespread dissatisfactions with the prevailing crisis management strategies" grew, and "dissatisfaction rooted in these developments could not find its way into the political agendas of established political organizations."²¹ Both average citizens and critical theorists exhibited dissatisfaction and seized the opportunity to attack the EU's hierarchical structure. In response to the crisis, Slovenian theorist Slavoj Žižek wrote:

Today's global capitalism brings the relationship of debtor/creditor to its extreme and simultaneously undermines it: debt becomes an openly ridiculous excess. We thus enter the domain of obscenity: when a credit is accorded, the debtor is not even expected to return it—debt is directly treated as a means of control and domination...the Greek failure is part of the game.²²

“As a marginal political movement, the radical left was well positioned to capitalize on the evolving anti-establishment sentiment, in Greece and elsewhere.”

In Žižek's view, creditor countries knew what they were getting into by loaning to poorer southern countries, purposely creating a situation in which

they could control foreign economic policy with perceived legitimacy. Whatever the merits of Žižek's contention, arguments such as his helped feed growing nega-

tive sentiment regarding the system of the Troika, the EU, and domestic governance in debtor countries. This rising popular sentiment provided a catalyst for the rise of the radical left. Luke March, for example, found that "support for RLPs seems strongly related to [fears of globalization] and deep dissatisfaction with the effects of neo-liberalism associated with globalization and 'market power Europe.'"²³

Austerity measures and resulting negative public sentiment were particularly impactful in Greece. The imposition of austerity in Greece "induced an economic and social situation comparable only to the 1929 financial crash in the United States: GDP contracted by 20 percent between 2008 and 2012, and unemployment soared to 27 percent, with youth unemployment reaching 60 percent."²⁴ The Syriza Party's leader Alexis Tsipras, then the leader of the opposition, was quick to exploit the crisis, arguing that the collapse was the precise goal of the policy implemented in Greece.²⁵ Tsipras and his party attracted increasing support. Syriza members canvassed Greece's most rural areas, spoke with farmers ignored

20 Pan Pylas and David McHugh, "The Case for Greece: When It Forgave Germany's Debt," *Associated Press*, July 2, 2015.

21 Sümercan Bozkurt-Güngen, "Crisis and Search for Political Alternatives in Southern Europe: SYRIZA, Indignados and Five Stars Movement," *METU Studies in Development* 41 (2014): 486.

22 Slavoj Žižek and Srećko Horvat, *What Does Europe Want?* (New York: Columbia University Press, 2015), 124.

23 Luke March, *Radical Left Parties in Europe*, (Abingdon: Routledge, 2011), 200.

24 Yannis Stavrakakis, "Populism in Power: Syriza's Challenge to Europe." *Juncture* 21, no. 4 (2015): 276.

25 Slavoj Žižek and Srećko Horvat, *What Does Europe Want?* (New York: Columbia University Press, 2015), 152.

by other political parties, set up food banks, and even ran suicide help centers. Desperation in Greece also allowed Syriza to overcome an ideological barrier. In the recent past, radical left views were least popular in Greece.²⁶ Yet following the crisis, “even traditional right wingers...voted Syriza.”²⁷ Without the crisis as a catalyst, it is unlikely that a Greek RLP could have surmounted the strong sentiment against the radical left in Greece. In January 2015, the Syriza Party won the Greek elections. In one decade, it had gone from a marginal party polling at only 4 percent to a party leading the Greek parliament.²⁸

Spain's Podemos party also rode the wave of anti-establishment sentiment; in fact, Podemos was specifically born out of the economic crisis, establishing itself in January 2014.²⁹ As its founder, Pablo Iglesias, explains, “the crisis itself has helped to forge new political forces.”³⁰ Iglesias's harsh rhetoric helped incite further anger in Spain. As Iglesias spoke of the Troika's “colonization” of Southern Europe, crowds of hundreds of thousands rallied for Podemos in Madrid's Plaza del Sol.³¹ The crisis proved to be particularly exploitable in Spain, with its long history of corrupt and authoritarian rule. Podemos's criticism of the current crisis came in the context of the “unreformable ‘regime of 78’... which is in thrall to the troika and their friends in the bailed-out banks.”³² As in Greece, the growing protest sentiment benefited the radical left's favor. By mid-2015, local election results seemed to promise a future Podemos victo-

ry at the national level.³³ Yet by late 2015, the outlook had changed. In October 2015, voter support for Podemos dropped to approximately 15 percent.³⁴ Despite having roots in the same crisis as Syriza, Podemos has failed thus far to achieve the same degree of success.

Other European radical left parties have benefited from the crisis to varying degrees. As of January 2014, European RLPs had, on average, gained a 2.1 percent share of domestic votes—a relatively large increase considering RLPs have traditionally occupied a fringe position where they expect less than 10 percent of votes.³⁵ Beside Greece and Spain, radical left movements have been most active in Portugal and Italy: both PIIGS were affected by the crisis, although Portugal received an official bailout package and Italy did not. In Portugal, the Socialist Party included Portugal's radical left party, the Left Bloc, in its governing coalition formed in November 2015, creating “an anti-austerity alliance.”³⁶ Italy's Five Stars Movement (M5S) took a different path, refusing to join a “grand coalition government” in order to maintain its status as the leading opposition party, despite receiving the highest number of votes for a single party.³⁷ Nonetheless, M5S “managed to capitalize on the window of opportunity offered by the economic crisis and the social discontent about the new government's austerity measures.”³⁸

Key differences between the radical left in Greece and elsewhere can help to explain RLPs' differing degrees of success. In several ways, Syriza and

26 Mark Visser, Marcel Lubbers, Gerbert Kraaykamp, and Eva Jaspers, “Support for Radical Left Ideologies in Europe,” *European Journal of Political Research* 53 (2014): 555.

27 Paul Mason, “‘Hope Begins Today’: The inside Story of Syriza's Rise to Power,” *The Guardian*, January 28, 2015.

28 Ibid.

29 Bécquer Seguin, “Podemos and Its Critics,” *Radical Philosophy*, no. 193 (October 2015), n.p.

30 Pablo Iglesias, “Understanding Podemos,” *New Left Review*, no. 93 (June 2015), n.p.

31 Omar Encarnación, “Can the Far-Left Sweep Spain?” *Foreign Affairs*, February 6, 2015.

32 Dan Hancox, “Why Ernesto Laclau Is the Intellectual Figurehead for Syriza and Podemos,” *The Guardian*, February 9, 2015.

33 “Spain local elections: Podemos leader hails success,” *BBC News*, May 25, 2015.

34 Pablo Simón. “Why Is Podemos Losing Ground?” *El Pais*, October 28, 2015.

35 Luke March, “Beyond Syriza and Podemos, Other Radical Left Parties Are Threatening to Break into the Mainstream of European Politics,” *European Politics and Policy*, March 24, 2015.

36 Associated Press, “Portugal's Socialists to Take Power, Backed by Radicals,” *Boston Herald*, November 24, 2015.

37 Sümercan Bozkurt-Güngen, “Crisis and Search for Political Alternatives in Southern Europe: SYRIZA, Indignados and Five Stars Movement,” *METU Studies in Development* 41 (2014): 496.

38 Ibid., 497.

the conditions in Greece were unique, making the success of the radical left difficult to repeat.³⁹ Other European countries “weathered the economic recession in better shape than Greece,” which has required three bailouts as opposed to one or none.⁴⁰ With the Greek people suffering far more under imposed austerity measures, protest sentiment was naturally greater in Greece. However, there were also other factors at play. Syriza, its name an abbreviation for the Greek “Coalition of the Radical Left,” gained legitimacy because of its foundation as a coalition that combined Greece’s left-wing political players. Meanwhile, Podemos, M5S, and other RLPs compete with other left-wing opposition parties. In Spain, for example, the Socialist Party has joined forces with the ruling People’s Party to “declare... war on Podemos, hoping to cripple the movement before it can begin in earnest.”⁴¹ Given the differing degrees of RLP success in Europe, it is clear that factors beyond protest sentiment alone are necessary to produce victories for radical left parties.

OTHER FACTORS IN THE RADICAL LEFT RESURGENCE

If protest sentiment is not enough, factors beside EU austerity policy must have played a role in the rise of the European radical left. Indeed, by 2009, Europe was at an ideal juncture for a radical left resurgence. After decades of European integration, during the first of which RLPs resisted internationalization in an effort to distance themselves from Moscow, European RLPs finally began to organize into an international network by the early 2000s. The European Left, an organization that functions as a rudimentary transnational party (TNP), “now performs (even if sub-optimally) some of most basic aims of a TNP, including co-ordination and information exchange,

some policy formulation and reinforcing the party family through decantation, legitimation and socialization.”⁴²

Cooperation between national RLPs can have several benefits. Transnational parties “help iron out disagreements, distil common understandings and party cultures,” “decant” parties to sort out the authentic radical left, and “compensate for domestic marginality or defeats.”⁴³ The growing linkages between European RLPs were clear during the debt crisis. For example, Podemos’s hundred-thousand-strong Madrid rally on January 30th, 2015 was a direct response to Syriza’s election on January 25th.⁴⁴ At the same time, “even the largest TNPs... have only indirect effects on national parties,” and the European Left has historically chosen its member parties poorly, rendering its “potential to significantly further integration of European RLPs... very doubtful.”⁴⁵ Despite its weaknesses and “mosaic” nature, recent integration of the radical left has allowed for a degree of cooperation between RLPs unprecedented in recent European history.⁴⁶

Beyond the practical mechanisms that have allowed for radical left success, the centrist convergence of European politics during integration has left Europeans eager for a “real choice” outside of mainstream politics. This desire transcends the current crisis. Anton Pelinka argues that we can view “the EU as a product of the political center.”⁴⁷ Since large-scale

39 Luke March, “Beyond Syriza and Podemos, Other Radical Left Parties Are Threatening to Break into the Mainstream of European Politics,” *European Politics and Policy*, March 24, 2015.

40 Omar Encarnación, “Can the Far-Left Sweep Spain?” *Foreign Affairs*, February 6, 2015.

41 Ibid.

42 Richard Dunphy and Luke March, “Seven Year Itch? The European Left Party: Struggling to Transform the EU,” *Perspectives on European Politics and Society* 14, no. 4 (2013): 534.

43 Ibid, 521-522.

44 Omar Encarnación, “Can the Far-Left Sweep Spain?” *Foreign Affairs*, February 6, 2015.

45 Richard Dunphy and Luke March, “Seven Year Itch? The European Left Party: Struggling to Transform the EU,” *Perspectives on European Politics and Society* 14, no. 4 (2013): 521-522.

46 Luke March, “Beyond Syriza and Podemos, Other Radical Left Parties Are Threatening to Break into the Mainstream of European Politics,” *European Politics and Policy*, March 24, 2015.

47 Anton Pelinka, *Die unehelige Allianz: die rechten und die linken Extremisten gegen Europa*, (Wien: Böhlau Verlag, 2015), 38.

cooperation and agreement were required for European integration, the resulting union was necessarily near the political center. Both at the European and national level, “the centre polices the boundaries of political thought,” and the traditional left and right have both moderated themselves to the point of convergence.⁴⁸ The lack of real choice within European politics has combined with other perceived problems regarding governance, from the “democratic deficit” to fear of technocratic rule. These concerns, coupled with the absence of real alternative political choices, caused a “legitimacy crisis” [marked by] increasing exclusion of parliamentary mechanisms and public deliberation from political decision-making processes.⁴⁹

With traditional parties offering only a choice between seemingly identical policies, voters sought out an alternative. This was ideal for the radical left, since “an important factor in producing protest parties is a ‘convergent party system,’ [which can] increase the propensity for mobilization around ‘anti-establishment’ themes.”⁵⁰ Voters who perceived convergence as “cartelization,” the effect when key political actors monopolize party competition and exclude political challengers, were more likely to

48 Dan Hancox, “Why Ernesto Laclau Is the Intellectual Figurehead for Syriza and Podemos,” *The Guardian*, February 9, 2015.

49 Sümercan Bozkurt-Güngen, “Crisis and Search for Political Alternatives in Southern Europe: SYRIZA, Indignados and Five Stars Movement,” *METU Studies in Development* 41 (2014): 484.

50 Luke March, *Contemporary Far Left Parties in Europe: From Marxism to the Mainstream?* (Berlin: Friedrich-Ebert-Stiftung, 2008), 11.

search for nontraditional political alternatives.⁵¹

While “convergent party systems appear to help anti-establishment parties in general, rather than the far left in particular,” modern Europe presents a unique case.⁵² As a centrist consensus has emerged in European politics, the center has itself shifted right, opening up political space on the left. Even left-

wing politicians enforce traditionally right-wing economic policy. For example, it was Greece’s Socialist Party that imposed a domestic austerity program.⁵³ While Europe’s right has also been active during the debt crisis, the larger political

space open on the left helps explain RLPs’ somewhat greater success.

CONCLUSION

While the EU’s imposition of austerity on European debtor countries catalyzed the resurgence of the European radical left, the resurgence was only possible due to additional converging factors in the European political context. Protest sentiment resulting from EU-imposed austerity, and the crisis in general, built upon the framework of a relatively well organized radical left that benefitted from a lack of real choice in European politics.

However, even with Europeans relatively open to radical left politics, RLPs must develop their protest-based platforms into “a persuasive econom-

51 Ibid., 11.

52 Ibid., 11.

53 Dan Hancox, “Why Ernesto Laclau Is the Intellectual Figurehead for Syriza and Podemos,” *The Guardian*, February 9, 2015.

“Ultimately, politicians of the radical left have a choice: they must accept the ongoing moderation of their platforms as the price of electoral success or accept an eternal position on the political fringe.”

ic program that could resolve the crisis and lead to growth, while improving the condition of working people”—something that European RLPs have largely failed to do.⁵⁴ Though it is often EU and Troika intervention that have made domestic politicians unable to realize their economic programs, RLPs can only succeed in the medium- to long-term if they can implement a feasible program even in difficult times. They must act now to fully capitalize on protest sentiment following the debt crisis and ensuing austerity.

Yet working with the political center and implementing feasible programs—the steps RLPs must take to survive—could themselves jeopardize the radical nature of the radical left. For the radical left, success is a paradox: winning European national elections means that radical left parties must moderate themselves to the point of losing their radical character. Conversely, the radical left cannot achieve lasting lasting success within the current system, so long as it remains a truly radical left. Indeed, for the truly radical, the recent success of the radical left has not been a success at all, but a “deep crisis,” in which RLPs have abandoned “the Marxist-Leninist tradition” to pursue “electoralist” platforms.⁵⁵ Indeed, to gain electoral success, RLPs must appeal to a wide base, and “the most successful far left parties... try to encapsulate all radical left trends under umbrella opposition.”⁵⁶ Moderation has already manifested itself in today’s radical left, as the Troika forced Syriza to accept harsher austerity than ever under a third bailout,⁵⁷ and Podemos made over its economic program in an effort “to make itself less threatening to

the middle class.”⁵⁸

Ultimately, politicians of the radical left have a choice: they must accept the ongoing moderation of their platforms as the price of electoral success or accept an eternal position on the political fringe. While many write off moderation as perfidy, only a radical left that holds power, even a relatively moderate RLP, will have the chance to make real change. If the radical left wants to engage in real world politics over the long-term, it seems that it must accept a degree of moderation.

54 Heiner Flassbeck and Costas Lapavistas, *Against the Troika: Crisis and Austerity in the Eurozone*, (New York: Verso, 2015), 73.

55 Luke March, “Beyond Syriza and Podemos, Other Radical Left Parties Are Threatening to Break into the Mainstream of European Politics,” *European Politics and Policy*, March 24, 2015.

56 Luke March, *Contemporary Far Left Parties in Europe: From Marxism to the Mainstream?* (Berlin: Friedrich-Ebert-Stiftung, 2008), 137.

57 Krishnadev Calamur. “The Latest Victim of the Greek Crisis.” *The Atlantic*, August 20, 2015.

58 Omar Encarnación, “Can the Far-Left Sweep Spain?” *Foreign Affairs*, February 6, 2015.

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AN INTERVIEW WITH PROFESSOR JESSICA STANTON



CONDUCTED BY JORDAN DANNENBERG

JD: Tell us about your forthcoming book *Violence and Restraint in Civil War: Civilian Targeting in the Shadow of International Law*.

JS: The book project came out of my dissertation research when I was in graduate school. The main research question driving the book is why governments and rebel groups deliberately attack civilians in some civil wars and not in others. In the book, I frame this question in the context of international humanitarian law. I think about why, in some cases, governments and rebel groups commit severe abuses against civilian populations in violation of international humanitarian law, whereas in other cases they largely refrain from violence against civilians. I'm especially interested in the cases in which governments and rebel groups don't attack civilian populations. I think there is a tendency—and this was part of the motivation for the book—to assume that all civil wars involve egregious atrocities against civilian populations. Media attention to civil wars tends to focus on cases like Rwanda and Bosnia, in which there was extreme violence against civilians, and this leads people to think that all civil wars involve extreme violence against civilians. But, when you actually look at the data, you see that a little more than 40 percent of rebel groups and almost half of governments do not engage in large-scale, deliberate attacks on civilian populations. That doesn't mean there is no violence against civilians at all in those conflicts. If you look across civil wars, you see that almost all civil wars involve violence against civilians. Governments and

rebel groups regularly target individual civilians who they think are aiding the other side. If a government or rebel group thinks that someone is collaborating with the enemy, it goes and finds that person, interrogates him or her, and, in some cases, kills that person. That kind of violence is pervasive. What I'm interested in is larger scale, more collective forms of violence in which large groups of civilians are targeted at once.

The basic argument that I make in the book is that violence against civilians is often strategic. Governments and rebel groups use violence against civilians because they believe that it will help them to achieve their strategic objectives in the conflict. They make cost-benefit calculations about the use of violence, but these cost-benefit calculations take place in what I call "the shadow of international law." This is where part of the book's title comes from. This is the idea that, especially in the period since World War II, international humanitarian law has grown in strength, with the signing of the 1949 Geneva Conventions, the Additional Protocols to the Geneva Conventions that were signed in the 1970s, and then, more recently, the Rome Statute of the International Criminal Court. So you see a growth in international humanitarian law in the post-World War II period, and then with the end of the Cold War you also see an increasing role for international institutions and for international actors to enforce international humanitarian law. Even so, international law does not have a direct impact on state behavior or rebel group behavior; it is not as simple as a state signing onto an

international treaty regarding international humanitarian law and then automatically complying with the terms of the treaty. Rather, I argue that this body of international humanitarian law creates a framework that shapes the calculations governments and rebel groups make about how to behave during civil war. Governments and rebel groups weigh the costs and benefits of violence. They weigh the benefits of violence by thinking about their opponent and their opponent's relationship with its civilian constituents—how their opponent is likely to respond to violence, and how violence might undermine popular support for their opponent. Governments and rebel groups also weigh the costs of violence, based on an evaluation of their own relationship with their own civilian constituencies. One of the main arguments I make in the book is that for the governments and rebel groups that need to build broad domestic and international constituencies—that need a broad base of support—the costs of engaging in violence are high. These governments and rebel groups worry about the risk of backlash if they attack civilians. So these are the governments and rebel groups that are most likely to refrain from using violence against civilians and are most likely to exercise what I call “restraint” in the book.

JD: Can you describe your field research in Indonesia and Uganda. What were these experiences like, and what unique insight did they provide?

JS: As I said, the book project came out of my dissertation research, which I did when I was in graduate school. So as part of my dissertation research I did field research in Uganda and Indonesia. In Uganda I was researching the conflict with the Lord's Resistance Army (LRA) and its fight against the Ugandan government. In Indonesia I was researching two conflicts: the conflict in Aceh between the Free Aceh Movement (also called GAM), which was fighting for autonomy or independence for the northern tip of Indonesia right near Malaysia, a region called Aceh, and the East Timor conflict involving a rebel group that was fighting for autonomy or indepen-

dence for East Timor. The LRA case was a case of high rebel group violence and lower government violence. The LRA engaged in severe attacks against civilian populations, which is part of what drew the attention of the Kony 2012 campaign as well as other recent media attention. Joseph Kony, the leader of the LRA, as well as several other high-level LRA members have been indicted by the International Criminal Court (ICC). The cases in Indonesia were the counterpoint to Uganda, in terms of level of violence. These are cases of low rebel group violence and higher government violence. The government violence in Indonesia mainly happened during the period of Suharto's rule. He was a dictator who ran Indonesia for a number of decades. In the late 1990s, Indonesia underwent a political transition to democracy; but the civil wars continued during the period of political transition. After the end of the Cold War, only one other country transitions to democracy while a civil war is ongoing. One of the things I was interested in regarding the Indonesia case was thinking about how that process of political transition influences the government's behavior and policies toward the rebel groups in those regions. In particular, I looked at how domestic and international pressures to reign in human rights abuses influenced the newly democratizing Indonesian government's policies toward Aceh and East Timor.

In both countries I was trying to interview as many people as I could both from the government side and the rebel group side: former members of the military, former or current political officials in the government, former members of rebel groups, human rights activists and leaders of NGOs, and observers who were living in those regions while the conflicts were ongoing and who could tell me about the details. I wanted to do field research mainly because I felt uncomfortable writing a dissertation and then a book about civil wars without having been somewhere that has recently experienced a civil war. Certainly, I could read primary and secondary sources available on these conflicts, but I felt that there was a limit to the information I could gather in terms of really getting a sense of the details and the context. A lot of the argument that I end up making in the

book is about strategic calculations that governments and rebel groups make, and I felt that that was hard to truly understand just from reading secondary and background information.

JD: Why have we witnessed civil wars become more prevalent as compared to interstate wars? Do you believe this altered pattern of conflict will persist?

JS: It's a tough question. If you think about the trajectory over time in terms of civil wars first, you see a peak in the number of civil wars in the early 1990s—just in terms of the number of ongoing civil wars in the international system. When scholars recognized this, there was a lot of debate about why we saw this peak in the number of civil wars in the early 1990s. Did the end of the Cold War cause outbreaks of civil war? Scholars found that the end of the Cold War and the breakup of the Soviet Union, as well as the fall of other Communist governments, like the former Yugoslavia, was part of the story. But this peak was also related to the large number of civil wars that began during the Cold War period, and then continued after the end of the Cold War. So you end up in the early 1990s with this very large number of civil wars—in part new conflicts and in part civil wars that hadn't ended.

Since the early 1990s, the total number of civil wars ongoing in the international system has declined somewhat. I think we are likely to continue to see a significant number of civil wars in the international system, but I doubt that we'll again reach that peak that we had in the early 1990s. One reason why I don't think we'll see such a large number of ongoing conflicts again is that the pattern of international involvement in civil wars has changed dramatically after the end of the Cold War. In the post-Cold War period, about 70 percent of conflicts end through negotiated settlements; whereas from the end of World War II up until about 1989, about 80 percent of conflicts ended through a military victory, and only about 20 percent through some sort of negotiated settlement. After the end of the Cold War this flips; about 70 percent of conflicts end through negotiated

settlements, and only about 30 percent end through military victory. The other change that happens is that you also see increased international intervention. During the Cold War, the institutional structure of the United Nations and the Security Council, with the ability of the U.S. and the Soviet Union to veto any kind of UN intervention, makes it such that you don't see much UN involvement in civil wars. After the end of the Cold War, space opens up for UN intervention. During this period, the UN has intervened to try to end civil wars in about 65 percent of cases. By comparison, the UN was involved in less than 20 percent of civil wars during the Cold War. This gets to your question about change over time in that I think it's increasingly the case that if you have an intense or long-running civil war, the UN often does try to get involved—for example, by trying to mediate some kind of resolution to the conflict. International intervention is not always successful, obviously, and there are conflicts like the one in Syria that are going to be intense and long running, but I think this increased UN involvement works against the likelihood that we would ever see a peak in the number of ongoing civil wars like we saw in the early 1990s.

In terms of the difference between interstate wars and civil wars, it's hard to say. I think part of it has to be a story about the development of nuclear weapons and the potential for nuclear weapons to strengthen deterrence among the major powers in the international system, which decreases the likelihood that you'll have war among the major powers in the international system. Other factors like economic interdependence or the spread of democracy might also be contributing to the decline in interstate war among major powers. In terms of civil wars, I think we'll continue to see contestation over how power should be shared and over power dynamics within countries. I don't see that necessarily dramatically changing in the next several decades.

JD: You talked about how international involvement in civil war has changed over time. Could you elaborate on how the international community's approach to conflict, more gener-

ally, has changed over time? And, in the wakes of the Arab Spring and the wars in Libya and Syria, do you foresee any significant changes in international response in the near future?

JS: As I mentioned, I think you see a shift after the end of the Cold War certainly in terms of increased UN involvement. But this involvement takes the form of not only helping to negotiate and mediate settlements to conflict, but also of sending peacekeeping missions to help enforce those settlements, monitor the terms of cease fires, and implement peace agreements. And, increasingly, those peacekeeping missions are becoming expansive. The UN is not just there to monitor the terms of the ceasefire, but it's also going to help install and create new political institutions, monitor the huge process of political transition, support economic development, and all sorts of other things that come along with that. So I think we not only see a change in the likelihood of UN involvement in civil wars, but also a change in the character of UN involvement—an expansion of UN activities.

Where are we likely to see this go in the wakes of the Arab Spring and Syria? I think what Syria teaches us is that despite the increased involvement of the UN after the end of the Cold War, power still matters in international relations, and there are limits to what the UN can do. The structure of UN institutions does matter. We have a UN structure in which the U.S. and Russia are permanent members of the Security Council and can veto Security Council resolutions, getting in the way of attempts to create UN peacekeeping missions in some cases, such as Syria. I think the lesson of Syria, again, is that power still matters and powerful countries, if they have a vested interest in a particular ongoing civil war, can either make it difficult to reach a negotiated resolution to the conflict—or easier—if they find that to be in their interests. Yet, major power interest in countries with ongoing civil wars is relatively rare. We haven't seen very many civil wars after the end of the Cold War in which major powers like the U.S. and Russia have had such a strong influence in the conflict. Maybe Bosnia would be somewhat similar, in that European

countries had a strong interest in addressing that conflict. But major power involvement is relatively rare, which has created this space for UN involvement in trying to resolve civil wars. So I think the UN will continue to play a role in civil war, particularly in cases in which major powers don't have a strong strategic interest at stake. Still, there will be limits to the possibility for UN intervention. Contrast Syria with the Congo where you have a massive UN operation that's been ongoing for many decades. Would that have been possible if a major power was strongly against that kind of intervention? Probably not.

JD: Your research has examined strategies employed by rebel groups in civil wars. How does someone who studies civil conflict approach ISIS—a group that does not necessarily fit neatly into the same category as the PKK or FARC, for example. What makes ISIS similar and different to other rebel groups?

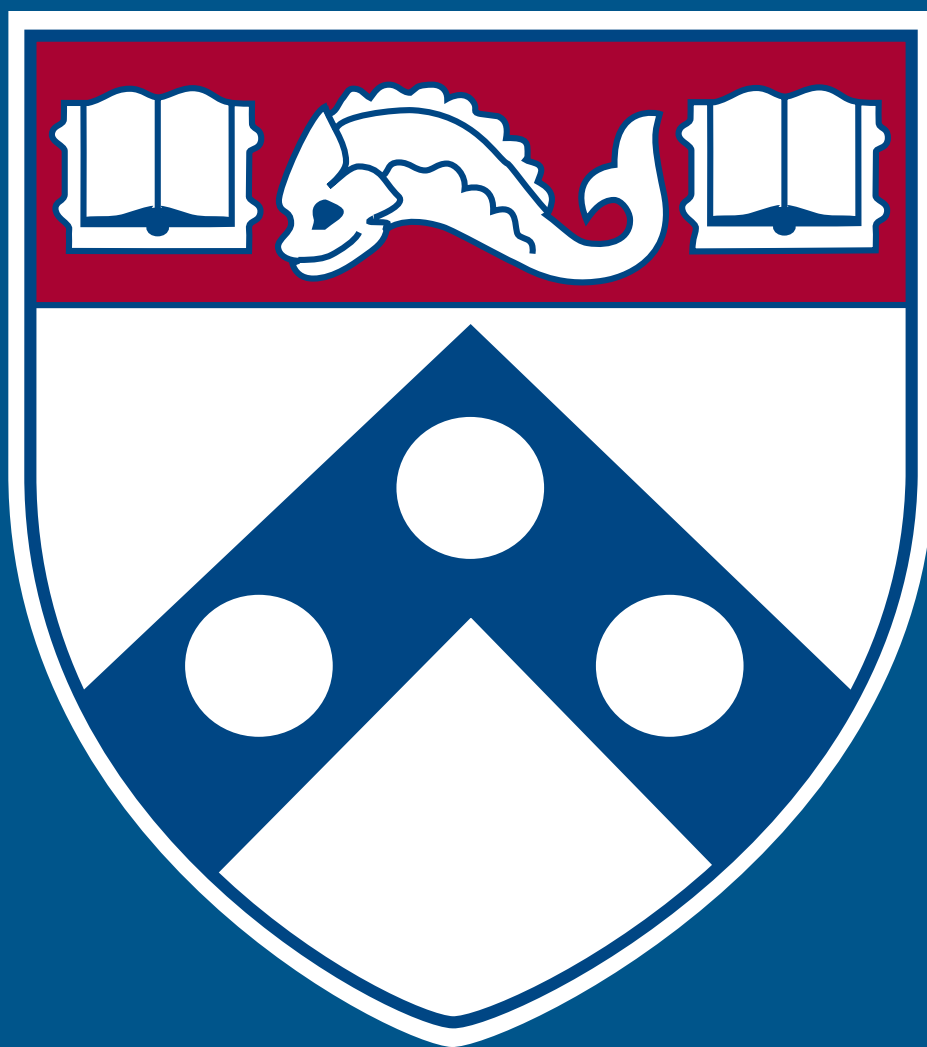
JS: I think this is a really interesting question. Basically, I think ISIS is a group that strains the definitions that we as political scientists have for rebel groups active in civil wars and also the definitions we use to identify transnational terrorist groups. A transnational terrorist group is a group that has operations in a particular country, but its political goals and its activities span borders. So a group like al Qaeda might have its bases in Afghanistan, but its political objectives are directed at the United States and other Western governments. Political scientists often distinguish between transnational terrorist groups or transnational insurgencies and domestic insurgencies. Domestic insurgencies are insurgent groups or rebel groups that have political objectives that are directed at the government in charge of the territory where the group is operating. You gave the example of the PKK, which is a group whose goal is to achieve autonomy or independence for the Kurdish region or Turkey—its goals are directed at the Turkish government and its mainly carries out attacks within Turkey.

ISIS is challenging because it has characteristics of both of these types groups. It currently controls

territory in Syria and Iraq and, in some respects, appears to be like a rebel group fighting against two different governments at the same time, which also makes it unusual. ISIS controls territory in Syria, and has political objectives that are relevant to and directed at the Syrian government. It says that it wants to establish an Islamic caliphate in the region, which would involve changing the nature of the Syrian government. But because ISIS has political goals directed at both the Syrian government and the Iraqi government, it looks almost like a “double civil war.” In addition, ISIS is carrying out transnational attacks, recently in various European cities. In that respect, ISIS looks a lot like a transnational insurgency, more like al Qaeda because it’s now carrying out attacks across borders and, perhaps, has goals that span borders, given its desire to establish a caliphate and its desire to deter Russia, the US, and European governments from getting in the way of this. ISIS is not envisioning that it would remain within the territory of what is now Syria and Iraq. Its vision for political change involves much broader political change that moves beyond Syria and Iraq. I think this is part of what has made ISIS so difficult to deal with from a policy perspective, and also so difficult for academics to fully understand—because it doesn’t fit neatly into these categories that we have created and that we use to understand and organize the political world that we see. It makes ISIS really difficult to figure out.

In terms of how you address ISIS, this challenge in categorizing ISIS also makes it difficult to know whether to think about this in terms of counterinsurgency—fighting against ISIS like you would fight against a rebel group or insurgent group that’s trying to topple a government—or whether to think about this in terms of launching counterterrorism operations that involve trying to locate and disperse ISIS cells that are operating in various countries. Policymakers seem to have been trying to do both—conducting air strikes against the territory that ISIS controls to try to eat away at that territorial control, but also trying to round up, detain, and interrogate members of ISIS that living in Europe and elsewhere. I think this has made the process feel very unwieldy, that you’re trying to do these things simultaneously.

It’s possible that as you’re focusing on one of these efforts that you might impede the other. For example, perhaps part of the reason why ISIS might be carrying out attacks in Europe is related to the fact that ISIS is feeling pressured militarily in Syria and Iraq. ISIS sees its territory getting eaten away by air attacks and other military assaults on its territorial control, and it’s lashing out against the Russian government, as well as against European governments that have been involved in those attacks. Again, it’s unclear how to balance the two strategies. I think that’s what has been so challenging both for academics and for policymakers.



SOUND POLITICKS

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