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EDITORIAL FOREWORD

Eireann Maybach

As this year's Editor in Chief, I am honored to introduce the fourth edition of the Kellogg Center's Philosophy, Politics, and Economics Review (PPER) Undergraduate Journal, which was possible through the culmination of the tireless efforts and dedication of seven talented authors and their student and faculty editorial teams.

This edition showcases five articles from students at Creighton University, the University of Arizona, the University of California, the University of Maryland, and the University of Pennsylvania. These articles were chosen after lengthy discussion from a competitive pool of submissions for their scholarly excellence, relevance, and synergies. The following works address themes of epistemic responsibility, influences on voter behavior, and varying constitutional interpretation—topics that I hope you find as engaging, pertinent, and thought-provoking to read as I did.

Serving as Editor in Chief has been an incredibly rewarding experience. In both my previous role as a student editor, and my current one, I have deeply valued this time to continue to learn more about and further engage with the world of Philosophy, Politics, and Economics, while also providing an opportunity to highlight the contributions of undergraduate researchers. I extend my deepest appreciation to our authors and editorial teams, whose months of dedication, intellectual rigor, and passion for research have been a constant source of inspiration. It is my hope that this edition reflects their hard work and continues to maintain the excellence established by previous iterations of this journal.

I would like to thank Dr. Gil Hersch and Dr. Michael Moehler for their continued support of this journal. Additionally, I want to extend my gratitude to Dr. Daniel Gibbs, my faculty advisor, for introducing me to the Kellogg Center, and likewise the PPER journal, and for guiding me through the editorial process. Finally, I wish to acknowledge Ms. Delaney Moran, whose mentorship and friendship have been a wonderful support throughout the year.

It has been a privilege to collaborate with such brilliant and dedicated authors, student editors, and faculty members over the past year. Their shared passion for research and commitment to excellence is something I will continue to reflect on.

Eireann Maybach

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PPER. **Maddox Larson, *The Philosophy, Politics, and Economics Review* 4 (2025): 5-14.**

RESPONSIBILITY TO REFLECT: REFLECTION AS EPISTEMIC RESPONSIBILITY IN DEMOCRACY

Maddox Larson

In this article, I argue that responsible knowers are responsive to critical feedback that their reasons for believing in a given proposition or using certain principles of reasoning are inadequate. The project of democracy expects that agents can provide reasons for their beliefs during testimonial exchange. Voters provide reasons to representatives. Representatives provide reasons to voters. Voters provide reasons to each other. And representatives provide reasons to each other. This means that when voters or representatives cannot provide reasons, democratic mechanisms are obstructed. However, not all beliefs are adopted autonomously through reflection, but rather by social-institutional context. I argue, then, that responsible agents reflect on the reasons for their belief when their reasons are inadequate. They are attuned to the nature of expertise and evaluate expert testimony with this in mind. In full, democracy requires that agents hold beliefs autonomously and be cognizant of the nature of expertise.

1. Introduction

Discursive exchange in a democratic society requires the provision of reasons. Indeed, political equality seems to presuppose that all citizens are (at least *potentially*) capable of contributing to deliberation and governance. The presupposition runs like this: if a rationally autonomous agent came to a decision that others do not accept, then he must surely be capable of explaining himself. In light of this, voters provide reasons to representatives. Representatives provide reasons to voters. Voters provide reasons to each other. And representatives provide reasons to each other. This means that when voters or representatives cannot provide reasons, democratic mechanisms are obstructed. And because of this, democratic mechanisms such as vote, talk, and dissent are built around the idea that agents can provide reasons.[1]

The focus of this article is the plurality of situations in which one is unable to provide reasons for their beliefs. Following Catherine Elgin's Kantian account of epistemic normativity, I call these sorts of beliefs *heteronomous*. Because heteronomous beliefs are not adopted on the basis of reflection but are adopted because of the agent's situatedness in a given epistemic environment, agents do not necessarily have a reason for believing them. When one reflects to form a belief,

1. These specific democratic mechanisms—vote, talk, and dissent—are distinctively epistemic as pointed out by Elizabeth Anderson (2006).

they adopt the belief on the basis that they have reasoned through it and, ultimately, found it to be a reasonable position to take. When one has not reflected on a belief, one might still take the belief to be reasonable but not know why it is reasonable (i.e., lack second-order endorsement). Heteronomous beliefs are adopted unreflectively, and this prevents agents from giving reasons.

In this article, I argue that agents in democratic societies are epistemically responsible when they reflect on their beliefs and are responsive to criticism regarding their beliefs.[2] In this sense, the desired state for the responsible democratic agent is one in which their beliefs are held autonomously and not heteronomously. This means that the agent in question has reasons for believing. In order to argue that there are epistemic responsibilities specific to the context of democracy, Section 2 argues that the interdependent relation of epistemic agents to one another combined with democracy's assumption of potential epistemic contribution provides a basis for epistemic normativity. That is to say that the democratic system of governance puts forward epistemic expectations for its citizens that, when met, allow for deliberation. Section 3 argues that when agents hold beliefs they have not reflectively endorsed, democratic deliberation is frustrated. To elaborate on the trouble that heteronomous beliefs pose for democracy, I offer background religious beliefs as an example of beliefs that may be adopted without reflection and ultimately impact deliberation.

Following Elgin, I argue that one cannot fulfill the Epistemic Imperative—that one should only use beliefs or principles for deliberation that they could validate as a member of a larger community—when they possess heteronomous beliefs. This also means that heteronomous beliefs frustrate democratic deliberation. Section 4 draws on the Epistemic Imperative to present one specific responsibility: doxastic reflection. Specifically, this section considers a paradigmatic case in which one agent has a heteronomous religious belief and another has a heteronomous scientific belief. I consider whether or not seeking out experts is enough to move these beliefs from heteronomous to autonomous. And I conclude that, within the context of democratic society, a belief may be said to be autonomous if the agent in question has ascertained whether their beliefs are actually acceptable from the perspectives of others. In democratic society, this typically occurs through testimonial exchange and discourse.

2. Democracy as a Source of Epistemic Normativity

Catherine Elgin (2017, 2021) argues that an agent is epistemically responsible when they use only beliefs or principles for reasoning which they could advocate and endorse in a community of epistemic equals (call this the Epistemic Imperative). This conception of epistemic normativity is derived from an interdependent understanding of epistemic communities—viz., groups of agents rely on one another's testimony and truth-telling. In this section, my aim is to first review Elgin's argument in favor of the Epistemic Imperative and follow this with an application to democratic societies. That is, I wish to show that one's ability to use reasons to justify their beliefs is constrained by the epistemic conduct of those around them.

Catherine Elgin's Account of Epistemic Normativity

Groups of agents rely on one another's testimony and it is precisely this *interdependence* of individual knowers in communities that fuels epistemic normativity. For, in one's own internal deliberation and in thought in general, they are constrained. Agents are constrained by those

2. My aim in this article is primarily epistemological. I do not seek to make an explicitly or solely moral case for the sort of doxastic reflection that I describe. Rather, I want to suggest that insofar as one agent is an epistemic agent, then if he is in a democratic society he has—at least in an ideal sense—a responsibility to reflect on his beliefs.

considerations (thoughts) which they take to be reasons that support their belief or even their use of a certain deliberative principle. These constraints—epistemic norms—result from one's epistemic community (Elgin 2021). Should one violate these norms, those in their community will detract epistemic trust or credibility from their testimony (Kauppinen 2018, Fricker 2007).

And these norms are necessary enforcement mechanisms. Individual agents are limited and fallible, so testimonial mechanisms such as instruction are epistemically risky. When one is instructed by another, the truth of his beliefs becomes subject to the instructor. In a strong sense, the hearer is dependent on the speaker to tell the truth. Here, the risk is that the hearer might not be able to achieve the desired end state if the speaker conducts himself in an epistemically careless way. If the speaker reasons haphazardly and testifies to the hearer, then the hearer adopts a false belief. So, the enforcement of epistemic norms is necessary such that both the aims of the group and its individuals may be realized.

Crucial to Elgin's account of epistemic normativity is the idea that the reasons that deem a belief acceptable are public. An agent accepts a belief because the principles and standards they use to deliberate deem it fitting. But we must acknowledge that, during discourse, a statement is only said to support a conclusion if other competent individuals could not reasonably reject the implication. This means that agents are constrained by the available reasons they can take as supporting their belief. A given agent might have already concluded that her belief was reasonable, yet be met with opposition when she brings it forward to others who are competent on the matter. She rethinks the matter and presents it again to others to see if it holds muster. This is the sense in which Elgin says that we assess our beliefs in light of the standards that an epistemic community has designed to filter out confirmation bias (Elgin 2021, 109).

It is because the reasons which are accessible to justify one's belief are public that one should consult a principle analogous to Kant's Categorical Imperative—Elgin's Epistemic Imperative. To derive this principle, Elgin takes epistemic analogs of Kant's three formulations of the Categorical Imperative. In what follows, I will only present the epistemic analogs and their justification.[3]

The first principle leading to the Epistemic Imperative is that an epistemic agent should accept a consideration only if it would be universally acceptable (Elgin 2021, 65). In fact, Elgin's suggestion is that, as a pragmatic matter, any given agent cannot avoid doing this. When he accepts a consideration as appropriate for use in his own decision-making processes, he deems it to be a reasonable position to make—for he has reasoned to it. The trouble with only having this principle is that an agent might already find that the principles he uses are universally acceptable because he might assume that others think just as he does. For this reason, he might also expect that this consideration is one that other members of his community ought to use as well.

To find our way around this trouble, Elgin (2021, 66) suggests a second principle: that the epistemic agent should ascertain whether, from the perspectives of his peers, a given belief appears acceptable. While one may find his own principles to be universally acceptable, he must take these to the group to see if his expectation is fulfilled or not. However, surely an agent should not just accept a consideration because the majority agrees since this would not be evidence that it is correct but that it is popular? But "majority rules" is not the rule that we are aiming for—just because a principle of deliberation wins out among many does not make it the right one. For this reason, an epistemic agent should use only a consideration that they can endorse as a legislating member of a realm of ends (Elgin 2021, 66). The legislation analogy may lead one to think that whether or not one should use a given reason to support their belief is up to the vote of a given legislative body, but this is not the case. Both for Elgin and for Kant, the key point is that when

3. If the reader wishes to see the contours of this argument in greater detail, see Elgin (2021).

one is part of a legislative body, they must support their assertions and claims with reasons in order that their peers might be convinced.

Having understood Elgin's account of epistemic normativity—insofar as one is bound by those around them—we may formulate the Epistemic Imperative as follows:

> **Epistemic Imperative (EI)**: An agent should use only beliefs or principles for reasoning which they could advocate and endorse in a community of epistemic equals.

The Epistemic Imperative outlines what sort of epistemic conduct is responsible. Responsible knowers use considerations for deliberation that they could advocate for in a larger community. Those considerations that they use are those that they have considered from the perspectives of others and which they find to be reasonable and defensible. Should they fail to meet any criteria of EI, they will be held accountable by their peers.

Let us briefly consider an example. Suppose Theodore is an arbitrary epistemic agent. One day, Theodore comes to believe that dogs may grow to be over 20 feet tall—for he has recently read a book that featured Clifford the Big Red Dog. The next day, he approaches his friends and asserts that dogs can grow to be over 20 feet tall. His friends are quite surprised by his utterance and, in response, ask "How did you come to believe this?" Answering their questions Theodore explains that he read a book which featured a dog over 20 feet tall. In our terminology, Theodore's belief has the content "Dogs can grow to be over 20 feet tall" and his reason is that a trusted source says so. His friends then explain to him that when evaluating sources for credibility, he ought not take empirical information from sources of the type that he has. And, in the future, they might be less trusting of Theodore's assertions. I take this to be an unrealistic example, but it clearly demonstrates the sort of concepts previously described.

Let us take stock. In this section, I have reviewed Catherine Elgin's argument that epistemic normativity comes from the interdependent relation of individuals within a given epistemic community. Each individual is limited in his pursuit of his own epistemic ends and comes to rely on others either directly or through testimony. He might seek out an instructor or consult a book that another has written—either way he is now dependent on their testimony or instruction in order to pursue his own epistemic end. In light of a community's interdependence, norms and other accountability mechanisms emerge as checks on behavior that prevents either individuals or the whole group from realizing their ends. Thus, we stated that an agent is said to be epistemically responsible when they use only beliefs or principles for reasoning which they could advocate and endorse in a community of epistemic equals.

Norms of the Democratic State

In this section, I argue that democracy constitutes a particular epistemic community. This is because, in ideal democracy, each citizen is able to participate in the process of deliberation because he is viewed as equal.[4] This political thesis that all constituents of a democracy are entitled to equal participation in the governance process entails an implicit epistemological assumption—namely, that those members are equally able to evaluate information and participate in group deliberation. For if these members were not assumed to be equally epistemically able, then there would be no point in allowing them to participate.[5] Citizens are epistemically able in the

4. Here, I follow Robert Dahl (1998) in defining democracy as the system of popular governance characterized by political equality. This allows me to focus on the epistemic end of political equality.

5. This point may move one to begin to wonder what certain prohibitions on voting mean for certain segments assumed epistemic autonomy (e.g., felons, non-residents, etc.).

sense that, given the relevant information, they could deliberate and reach a decision. This is what Robert Dahl calls enlightened understanding: each citizen must have—within reasonable time limits—equal and effective opportunities to learn about the relevant alternative policies and their likely consequences (see Dahl 1998, 35-43). Enlightened understanding is a criterion of ideal democracy but is not worthwhile unless we assume that citizens are capable of consuming information, evaluating evidence, and reaching a decision.

Broadly construed, the epistemic mechanisms that allow democracy to function in accordance with the ideal of political equality are talk, vote, and dissent (Anderson 2006). Talk accounts for the discourse among citizens. They discuss news, elections, and policy in an effort to get a better idea of how they would like to participate in the political sphere. Vote and dissent constitute the mechanisms by which citizens communicate with elected officials.[6] These are carried out by formal processes such as elections or ballot measures. Vote and dissent convey information about voter preferences and beliefs to elected officials. Officials can use this information to make decisions that align with the interests of their constituents.

Following Alexis de Tocqueville ([1835] 2003), however, it is important to discuss not just democracy as a process of governance, but democracy as a "social state." Tocqueville notes that the formal processes of democracy are supported by informal processes. This is what makes talk such an important epistemic mechanism. But this is also what makes democratic society a community. Tocqueville observed that when elected officials failed to meet the responsibilities of their roles, then their constituents would hold them responsible. This might mean that the elected official is voted out of office, but Tocqueville had in mind the way that individuals are held personally responsible. Crucially, these responsibilities extend beyond the official constituent relationship and they are not just political or legal, but also epistemic. When individual citizens falsify testimony, portray false information as true, or otherwise act epistemically irresponsibly, they are held accountable by their community members.

It is because democracy is an epistemic community with expectations of responsibility that it is a source of epistemic normativity. The normative force of these epistemic norms comes from social expectation resulting from interdependence. Citizens are dependent on one another in order to achieve their epistemic ends and expect that others are sensitive to their epistemic vulnerability. All are vulnerable to adopting false beliefs or ignorance and this is what motivates epistemic responsibility within the epistemic community broadly. In a sense, what makes EI truly an imperative is that failure to comply—that is, failure to use only considerations which one can advocate and endorse in a larger community—often results in negative social-epistemic consequences such as losing credibility as a speaker. But one's credibility as a speaker or hearer is so crucial to one's status as a knower at all that this is enough to warrant the normative force of epistemic norms—at least from the agent's perspective.

3. Heteronomous Beliefs and the Epistemic Imperative

By the epistemic norms of democracy, responsible knowers confirm the viability of their beliefs and deliberative principles with those around them. This is because of the uncertainty and risk they face on their own. For they do not know why the price of eggs has increased or why their doctor prescribed amoxicillin instead of penicillin. Knowers are limited, fallible, take risks, and subject to luck and, oftentimes, they are required to act on the basis of uncertain information. But what keeps the epistemic system from collapsing under the weight of risk and luck is epistemic

6. There is an open question of whether citizens might communicate with elected officials in other ways (i.e., cash transfers), but I am concerned with the ideal case of democracy. And so, non-ideal circumstances are outside of the scope of this article.

responsibility.[7] Responsible epistemic conduct prevents knowers from acting solely on the basis of risky (fallible) information.[8] Responsible knowers seek out additional perspectives to make informed decisions. This much I have made obvious. But the trouble for political processes that rely so heavily on knowers having reliable testimony or responsibly forming beliefs—as democracy does—is that not all beliefs are formed autonomously.

Two key accounts of belief are doxastic voluntarism and doxastic involuntarism. The voluntarist argues that at least *some* beliefs are formed voluntarily (autonomously). William James ([1897] 2008) suggests that an individual may choose to believe so long as there is no evidence to the contrary. By contrast, the doxastic involuntarist contends that the mental state which describes belief cannot be reached by an agent choosing to believe a given proposition (e.g., Williams 1973, Bennett 1990, Qu 2017). Belief is not voluntary because one cannot induce the required mental state in another without giving evidence or support (Bennett 1990).

In arguing for a voluntarist position, Catherine Elgin (2017) demonstrates that just as voluntary actions are subject to constraints, so too are voluntary beliefs. An agent's epistemic conduct is subject to her will since she can choose when to stop gathering evidence, investigating other perspectives, or checking inferences (Elgin 2017, 97). She is constrained, however, by the reasons that she can take as justifying her epistemic conduct. Recall that we have previously explored the ways in which agents are held accountable for the reasons they take by their epistemic communities. Thus, to Elgin, when an agent is not compliant with EI and does not adopt a belief autonomously, they adopt it heteronomously (involuntarily). In what follows, I present two cases of religious belief that differ in terms of epistemic autonomy. The key point is not to take religious beliefs as adversarial to democracy, but to point to a common case in which social-institutional context contributes to the adoption of heteronomous beliefs.[9]

Case 1: Suppose there is an agent *A* who is raised in a religious environment. They are raised to adhere to the religious ethical code taught by their parents. They attend regular gatherings and engage in the corresponding practices. They adhere to these rules and expectations on account of being expected to and, frankly, not knowing any different. They behave in a way that is congruent with the belief *q*, which is a foundational tenet of the religion.[10] The belief *q* is adopted into their inferential map and they use *q* as a basis for inference—deriving ethical theses from it without hesitation.[11] If, however, *A* were asked how they know *q* or what made *q* a viable basis for inference, they would not be able to provide any reflectively considered answer. Thus, *A* acts and

7. This notion of the importance of responsible behavior in epistemic systems is drawn from Astrid Wagner's (2023) conception of equilibrium in an epistemic system as balance between trust, uncertainty, and responsibility.

8. When knowers act irresponsibly, accountability mechanisms act to constrain their behavior (Kauppinen 2018). Further, the social nature of norms means that knowers face not just epistemic sanctions such as loss of credence or credibility, but also more distinctly social constraints such as ostracism or alienation (Bicchieri 2017).

9. What I have in mind when I reference "institutions" are, per North (1991), the humanly-devised constraints that structure interactions. As will be seen later, understanding what institutions are will allow us to better understand the social-epistemic implications of institutions as retaining, enforcing, or instilling beliefs.

10. Some argue that as long as observed behavior would reasonably lead one to conclude that an agent believes p, then we can conclude they believe p (see Schwitzgebel 2024). In specifying that A's behavior is congruent with the belief q, I am to show that the matter is more complicated. Whether or not the agent can support their belief through second- order endorsement is the subject of autonomy, which is our focus here.

11. What I have in mind when I refer to inferential maps is akin to Quine's web of beliefs (Quine 1951, Quine and Ullian 1970). Agents will determine whether or not a belief is acceptable and reasonable based in part on how well it adheres with their previously adopted beliefs. These previously adopted beliefs form a sort of web or schema where any given two beliefs are connected by a coherence relation.

reasons on *q* and seems strongly committed to *q*, yet cannot provide reasons to support their use of *q*.

Case 2: Suppose there is an agent *B* who is not raised in a religious environment. They are not raised to adhere to a specific religious ethical code, but rather a common-sense morality that their parents adopt from their community. They do not attend any religious gatherings or engage in any corresponding practices. Later in life, however, *B* encounters *A*'s religion. They spend time with the religious code, reflecting on each tenet of the religion's belief system as it arises. Their inferential map had not accounted for *q*, so they spend time working to understand how their inferential map might be impacted from adopting *q* as a basis for inference. They confront any confusion that arises by discussing matters with religious officials. Over time, they come to behave in a way that is congruent with the belief *q* and use *q* as a basis for inference. If *B* were asked how they know *q* or if *B* were asked what makes *q* a viable basis for inference, they would be able to present a clear and reflectively considered answer.

In what sense, if any, can we say that the Cases 1 and 2 differ? According to Elgin's distinction between heteronomy and autonomy we may say that Case 1 is a case of heteronomous belief since *A* lacks the second-order endorsement of *q*. In other words, *A* is not able to provide reasons for supporting *q* as a basis for inference and this is the mark of a heteronomous belief. This is because *A*'s belief is dependent on their epistemic environment. If *A* had been raised in a different family or if their parents had different commitments, etc., then *A* would not have come to act in a way conducive with *q*. But *A* lacks the second-order endorsement that proves crucial to epistemic agency. This means that *A* cannot provide reasons justifying their belief if they were prompted in a larger group. This is the definition of EI. Thus, *A*'s inability to give reasons prevents them from participating in the deliberation of the larger epistemic community (so long as the belief in question is relevant). In other words, they fail to satisfy EI.

4. Epistemically Responsible Conduct in Democratic Society

Testimonial exchange in democratic society expects compliance with the Epistemic Imperative (EI). That is to say that in everyday discourse, we expect our interlocutors to have reasons for believing what they do and even to have reasons justifying their use of certain deliberative principles.[12] We expect as much, in part, because decisions regarding governance can only be reached via democracy's epistemic mechanisms when agents use principles and beliefs which they can provide reasons for. However, I have demonstrated that some beliefs are not held as a matter of reflective endorsement. So, the relevant question is how responsible knowers behave with respect to their heteronomous beliefs. In the remainder of the article, I argue that responsible knowers are responsive to critical feedback that their reasons are inadequate. Further, this specific responsibility follows from EI.

Consider again agents *A* and *B* from the previous section. Both agents harbor a religious belief *q*. The first agent *A* is not able to provide reflectively considered reasons justifying their use of *q* while *B* is. I have previously established that this means that *A* believes *q heteronomously* while *B* believes *q autonomously*. Further, I demonstrated that when *A* is questioned by another agent *C* regarding theses derived from *q*, *A*'s inability to provide reasons prevents them from fulfilling EI. In holding the belief *q* heteronomously, *A* does not consider whether it would be acceptable from the perspective of others (EI2). Further, they cannot adequately participate in group deliberation

12. This is not exclusive to democracy. However, I find that the framework of democracy provides a realistic and more explicit framework for why we would expect our interlocutors to have reasons. Perhaps an argument could be made that the social expectation of having-reasons is not exclusive to democratic testimonial exchange, but rather is more generally true. This is outside the scope of the current article.

because they have no reasons for believing *q*. Suppose further that during their discussion with *A*, *C* identifies *A*'s belief *q* as heteronomous because *A*'s reasons are inadequate. (We suppose that *C* is not acting out of malice, but genuinely. And *A* receives this as it was intended.)

We might be tempted, in this scenario, to ask how *A* should revise their belief. After all, *C* has pointed out that *A*'s reasons for believing *q* are inadequate. But before *A* can revise their belief, they must identify whether it really is held heteronomously or not. That is, *A* must reflect on their beliefs in order to identify the reasons that they take as supporting *q*. Since these reasons were inadequate to *C*, *A* must consider *C*'s objections and determine if there is cause to retain these reasons as supporting *q*. But *A* is not necessarily an expert in the set of religious beliefs *Q* (which includes *q*) that he holds, so he might seek out religious officials who have considered these matters more closely. The religious official might illuminate the relations within *Q* and how *q* is supported.[13] This is well and good, but the value of taking an outsider's opinion to heed is that they are not bound by the same biases.

It seems that we have reached an impasse. For *A* has received critical feedback from *C* that their reasons for believing *q* and using it for inference are insufficient. *A* then went to an expert on the matter (a religious official) and sought counsel. The religious official then explains to *A* the reasons that the official takes as supporting use of *q*. Further, *q* is supported by the relations within *Q*, the full set of beliefs characterizing this religion. But now, when *A* returns to *C*, it seems that they will simply regurgitate the reasons that the official had given them. It is not clear that, in seeking out expert opinion, *A* has fully adopted those reasons as their own.

Let us consider a separate scenario in which two agents, *D* and *E*, are discussing a specific policy matter when it becomes apparent that they disagree on the veracity of a scientific claim *s*. In short, *D* finds *E*'s reasons for believing *s* to be inadequate. *E*'s reasons for believing *s* include evidence featured in scientific studies that they are familiar with as well as some experiments that *E* has conducted on their own. Thus, to *E*, *s* seems to be quite veracious and using *s* as a basis for inference does not seem troubling at all. But *E*, being responsible, seeks out additional information by contacting an expert, a scientist specializing in an *s*-related field. This scientist validates *E*'s reasons for believing *s*. The scientist explains the relations that *s* has to other scientific beliefs in set *S*.

What can be said of these two cases? In the first, *A* sought out an official on the belief *q* to identify whether or not their reasons for believing it were legitimate. And in the second case *E* did the same but with respect to a scientific claim *s*. Despite their structural similarity, these cases differ in at least two crucial ways. Recall William James's argument that *absent evidence either way* belief in God can be willed (James [1897] 2008). The difference between these two cases hinges on evidence and the nature of expertise. The domain of science is empirical, observable phenomena and this means that the nature of the evidence they are concerned with is distinctly *a posteriori*. Meanwhile, in religious studies evidence is typically of the *a priori* kind since empirical reality does not seem to lean either way.[14] This means that experts in science and experts in religion differ starkly. The scientist is well-versed in empirical methods and making inferences

13. There is an interesting question of whether or not A now holds their beliefs autonomously because an official has explained the relations within Q to them. You might think that they do not necessarily possess a belief q autonomously because they can elaborate on the relations on Q. This would be argued because if A were quizzed on why q is a viable belief, they would regurgitate answers from the official. They would not grasp the relations.

14. There are some who would argue against this claim because they find that science validates the existence of a god or deity. Werner Heisenberg is attributed with saying that the first gulp of natural science will lead you to atheism, but God is waiting for you at the bottom of the glass. But we cannot ignore that the majority of philosophy of religion has been interested in arguing a priori that a god exists. Consider Aquinas's five proofs, Plantinga's modal argument, or Descartes's and Anselm's ontological argument.

from observations. The religious official or religious scholar, by contrast, is typically accustomed to inferring from *a priori* axioms. He starts with the proposition 'God exists' and aims to deduce theses about the nature of experience and nature of the world. The two experts employ different methods because they have different aims.

Without diving deeper into the difference between religious knowledge and scientific knowledge, we have made all the advances we can. All epistemic agents form beliefs on the basis of experience and inference. Responsible agents ascertain whether their beliefs are *actually* acceptable from the perspectives of others (EI2) and, in democratic society, this typically occurs through testimonial exchange and discourse. When an agent's reasons for believing *p* or using deliberative principles are inadequate, the responsible agent reflects on the nature of the belief in question. If this belief was formed autonomously (as a matter of reflective endorsement), then the agent has nothing to fear for he is aware of the reasons he possesses and has a second-order endorsement of the belief in question. On the other hand, if the belief was formed heteronomously, then he has no reflectively-considered reasons for believing it.

Regardless of the state of autonomy of the belief, the agent reflects on his reasons for believing. If the belief is autonomous then he likely sides with his own reasons and continues to discuss the matter. If the belief is heteronomous, then he may seek out expert testimony in order to help revise his belief. But, as we have seen, the responsible agent must be cognizant of the nature of the belief and of the experts in question. All beliefs are responsive to the truth and the world, but the state of the world or the truth are not always evident. Cognizance of the nature of expertise allows the agent to form beliefs and revise his reasons while maintaining autonomy.[15]

5. Conclusion

An agent raised in a democratic society will form beliefs about the nature of democracy and some specific beliefs they will have no control over per se. For instance, a belief that "democratic freedom entails freedom of speech" might be formed by way of who one is around during formative years (social context) or the education and activities that one partakes in (institutional context). The key point is that agents might form beliefs as a matter of reflective endorsement (autonomous belief) or as a matter of social-institutional context (heteronomous belief).

However, democracy requires us to be aware of our beliefs and how they influence our contributions to the broader project of popular governance. This means that the project of democracy expects that agents can provide reasons for believing a given belief during testimonial exchange. When agents cannot provide reasons for believing that others find acceptable, reasonable, or otherwise adequate, they are unable to engage in the collective process of rational, autonomous deliberation. Because the ideal of political equality—democracy's defining characteristic—presupposes that all citizens are at least potentially capable of contributing to deliberation.

I demonstrated that the responsible epistemic agent reflects on the reasons for their beliefs when it is brought to their attention that their reasons might be inadequate. This responsiveness to critical feedback not only follows from the Epistemic Imperative, but further supports autonomous testimonial exchange in democracy. When agents reflect on their beliefs, they consult experts and must, I argue, be cognizant of the differences between experts.

Religious experts and scientific experts employ different methods to arrive at different results and this is because of their different aims. Yet still one might have a religious belief which they

15. It is worth noting that I have said nothing of the so-called superiority of one's religious or scientific claim. My key concern in this article is whether one holds beliefs—regardless of content—autonomously or heteronomously. One may hold religious or scientific beliefs in either manner. I have chosen this example because they are paradigmatic examples of beliefs that may be held heteronomously in contemporary American democracy.

find relevant to discourse. But if their reasons are inadequate then they must reflect and contact experts—being attuned to the nature of expertise.

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EMOTIONAL APPEALS IN POLITICAL DEBATES: HOW LANGUAGE EMOTIONS SHAPE VOTER BEHAVIOR

Mohammed Alharthi; Mustafa Gillani; and Ariyanna Aimen

Do emotional appeals in political debates sway the electorate? This article examines the influence of candidates' emotional appeals during U.S. Presidential Debates on polling outcomes between 2004 and 2020. Despite the significance of debates in shaping voter perceptions, the specific impact of emotional appeals, defined in terms of negativity and positivity in candidates' language, remains underexplored. Utilizing a mixed-methods approach, we analyze debate transcripts with the Linguistic Inquiry and Word Count (LIWC-22) tool to quantify emotional appeals and correlated these findings with polling data from RealClearPolitics. Our study diverges from traditional analyses by concentrating on the emotional appeals present in debates and their subsequent effects on voter preferences. Our findings indicate that neither negativity nor positivity in debates significantly alter voter behavior, suggesting the need for a broader understanding of factors influencing voter decisions. This research contributes to the field of political communication by highlighting the limited impact of debate aggressiveness on polling results and by encouraging future studies to explore the relationship between political discourse and electoral outcomes.

1. Introduction

Elections in a democratic society embody the collective voice of the electorate, with political debates providing a powerful forum for candidates to connect with and influence voters. Beyond the articulation of policies, debates showcase candidates' emotional appeals, both positive and negative, which can shape public perception. This article investigates how these emotional tones in language, specifically positivity and negativity, correlate with changes in voter preferences during U.S. presidential debates from 2004 to 2020.

While existing research has examined the general influence of debates on voter perception, the impact of candidates' emotional expressions remains less explored. In particular, our study examines whether positive or negative language in debates significantly affects voter polling, aiming to clarify if emotional appeal sways electoral behavior. By focusing on emotional tones beyond aggressiveness alone, this article contributes nuanced insights into political communication, offering practical implications for campaign strategies.

Our analysis draws on a literature review of past studies on debate influence, followed by a context section that clarifies key components of our research question. Using the Linguistic Inquiry

and Word Count (LIWC-22) tool, we qualitatively assess emotional tones in debate language, allowing for a precise measurement of positive and negative expressions. Our mixed-methods approach integrates quantitative and qualitative methods to analyze debate transcripts and RealClearPolitics polling data.

Our findings suggest that while positivity in debates may show a slight association with changes in voter preferences, the relationship is not statistically significant. This result challenges the assumption that emotional tone strongly impacts voter behavior, indicating that other, unexplored factors might play a more significant role in shaping electoral decisions. Through our study, we contribute to a deeper understanding of the nuanced relationship between candidates' emotional language and voter behavior.

2. Literature Review

Impact of Debate Format on Voter Perception and Candidate Evaluation

Mitchell S. Mckinney and Benjamin R. Warner (2013) discussed a similar topic, where they studied how presidential debates function in different campaign contexts, and the election years they looked at are 2000, 2004, 2008, and 2012. In total, their analysis included 6,775 debate viewers, of which 4,308 were general election presidential viewers, 880 vice presidential debate viewers, and 1,587 primary debate viewers. 58% of respondents were female, 41% were male, and 1% did not disclose their gender. The participants consisted of undergraduate students from schools all across the United States, and they were recruited by faculty members. The participants would view the presidential debates in a group setting and would fill out pre and post-debate surveys which asked about their attitudes towards politics.

Mckinney and Warner broke the results down based on the measures that were used to evaluate. For candidate preference/voter choice, they saw that the general election debate had little effect on voter choice with 86% of participants still choosing their original candidate. However, the primary debates had a greater influence on voter choice, with 35% of participants switching their candidate choice. For candidate evaluation, post-debate, there was a positive increase in score for Democratic candidates in all three types of debates, but only a significant increase in score for Republican candidates in the primary and vice presidential debates. Once exposed to all three debate types, there was a significant increase in the participants' political information efficacy, or PIE: voters' perceived ability to understand and influence political processes. Finally, the study showed that after viewing the debates, there was an overall decrease in participants' cynicism (McKinney and Warner 2013).

Furthermore, Diana B. Carlin, Eric Morris, and Shawna Smith (2001) studied how the debate format influences clash between candidates. They specifically studied the 2000 election and used transcripts from the Bush-Gore debates to analyze this topic. They divided the transcripts up into units, where each segment where the candidate spoke uninterrupted was considered a unit. After analyzing these units using nine different category schemes, they found that presidential debates do produce clash, and that each debate format produced different forms of clash (Carlin et al. 2001). Moreover, not only does the debate format influence how the debate goes, general election debates versus primary debates also each have different effects on viewers. Benoit, McKinney, and Stephenson (2002) found that primary debates have a much greater effect than general election debates on change in voter preference (Benoit et al. 2002).

Effects of Emotional Tone and Aggressiveness on Candidate Evaluation and Voter Attitudes

Research has also been done focusing on the aggressiveness of candidates during the election debates. Daniel John Montez and Pamela Jo Brubaker (2019) explored which Republican and Democratic candidates were more punished for showing aggression in primary debates. The authors utilized content analysis and divided the study into two phases. In the first phase, they analyzed and compared two 2016 presidential primary debates from each party, and in the second, they chose two of the three 2016 general election debates. Overall, their results showed that front-runners in the race were the greatest victims of aggression, and that aggression increased as each debate progressed (Montez and Brubaker 2019).

Shelly S. Hinck, Robert S. Hinck, and Edward A. Hinck (2013) coded debate scripts from nine 2012 Republican primary debates according to level of face threat, target of message, and subject of disagreement. It was found that the 2012 Republican primary debates were overall less threatening than general campaign debates, however, when Republican candidates did utilize face threats against each other in the primary debates, their attacks were more intense. Furthermore, it was found that a candidate's standings in the polls also determines how likely they are to be victims of attacks from other candidates (Hinck et al. 2013). Similarly, McKinney, Kaid, and Robertson (2001) also found that front-runners in the race usually end up receiving the most attacks during the debates (McKinney et al. 2001).

Influence of Debate Exposure on Knowledge, Perception of Candidate Character, and Voting Preference

Kenneth Winneg and Kathleen Hall Jamieson (2017) utilized panel survey data from viewers of the first and third debates to measure their changes in knowledge on policy issues, their belief about a candidate's character, and how much of a potential threat to the nation each one would be if elected. The researchers ran paired sample t-tests for the tests of the knowledge hypothesis and research questions, as well as to measure any changes in the evaluation of presidential qualification and potential threat to the nation's well-being. Furthermore, they ran a logistic regression to control for education to further answer the questions about the effect of viewing post-debate coverage.

As for the results, the researchers recorded a positive knowledge gain among viewers regarding issue stances after the first debate. There was little movement of viewers' assessments of whether each candidate was qualified to serve as president and if elected, would pose a threat to the well-being of the nation (Jamieson and Winneg 2017). On a broader scale, extensive debate research has found that exposure to debates does affect viewer perceptions of candidates. Katz and Feldman (1962), explored the 1960 Kennedy-Nixon debates, where they found that the audience was significantly more focused on analyzing the character of the candidates and their presentations, as compared to their actual stances on policies (Katz and Feldman 1962). Furthermore, Mike Yawn, Kevin Ellsworth, Bob Beatty, and Kim Kahn (1998) focused on a 1996 Arizona Republican primary debate and how it affected voters' attitudes. They conducted a pretest-posttest quasi-experimental design and they found that the debate led respondents to change their electability and viability assessments of the candidates, which resulted in significant changes in the respondents' vote preferences (Beatty et al. 1998).

Moderation of Partisan Attitudes Through Debate Exposure

Sarah Brierly, Eric Kramon, and George Kwaku Ofosu (2020) explored the effects of the parliamentary debates on the 2016 Ghana election. Their main research question focused on why debates influence voters' attitudes. For their sample, they selected 1,991 participants from

three different constituencies in Ghana. They randomly assigned participants to different segments of the debate (their treatment) which corresponded with different potential causal channels. The five treatments that each participant could be assigned to were a placebo video, a personal background segment, a policy segment, a full debate video, and a full debate audio. Their outcomes were measured through surveys given to each person immediately after they received their treatment. The most important result from this study concluded that debates moderated the political attitudes of partisans, which made them more favorable towards members of another party as opposed to wanting to vote for co-partisan candidates from their own party (Brierley et al. 2020).

Context

All of these studies explore important issues surrounding presidential debates and have done a tremendous job in providing more insight as to the effects these debates truly have. Much of the research mentioned above focuses on the broader aspect of how presidential debates (general or primary) swing voter opinions, while some of the research hones in on specific characteristics and mannerisms of presidential candidates participating in the debates.

Contrary to a lot of these studies, Vincent Pons and Caroline Le Pennec (2019) offer a different perspective on the influence of debates, arguing that debates may have limited impact on voters' final decisions. Their study contends that while debates are high-profile events, they often do not change voter preferences significantly due to the existing familiarity voters have with candidates and their positions. They suggest that dramatic moments in debates are unlikely to sway undecided voters significantly, and other, non-debate factors such as campaign messaging and broader political events likely play a more substantial role (Pons and Le Pennec 2019). This contradiction indicates more research is needed.

In our research, we are eager to explore how aggressive mannerisms displayed by a candidate impact the support they garner from voters that view the debates. Although prior research has explored the aggressiveness of candidates on the debate floor, it has mostly focused on why aggressiveness occurs during debates and who ends up falling victim to it the most. There has yet to be substantial research on the overarching issue of how aggressiveness affects polling numbers post-debate, something that we believe is an important and pressing topic that needs to be explored.

Our research is situated within the broader context of political communication, an area that has garnered significant interest for its profound impact on voter behavior and decision-making. In recent years, the nature of political discourse, especially in presidential debates, has evolved, prompting a re-evaluation of its effects on the electorate. Presidential debates, serving as pivotal platforms for candidates to present their policies and personalities, have a profound influence on shaping public opinion and voter preferences.

The concept of positive and negative emotions in political debates is not new, yet it remains a relatively underexplored dimension in political science research. Historically, debates have been analyzed for their content, rhetorical strategies, and overall impact on election outcomes. However, the specific role of emotional expression in debates—defined in terms of the tone, language, and assertiveness of candidates—has not been thoroughly examined, particularly in relation to its direct impact on voter preferences.

This gap in the literature becomes even more pronounced when considering the changing landscape of political communication. The rise of social media, the 24-hour news cycle, and the increasingly polarized political environment have transformed how candidates communicate and

how their messages are received by the public. These changes have made it imperative to re-examine traditional assumptions about political discourse, including the effectiveness of aggressive tactics in debates.

Our study aims to bridge this gap by focusing on recent U.S. Presidential Debates, specifically the debates chosen for their relevance in today's political climate and the availability of extensive data, including debate transcripts and voter preference surveys (Martherus 2020). By analyzing these debates, we seek to understand how the aggressive rhetoric used by candidates influences voter opinions in the context of contemporary political dynamics.

3. Design

This study is structured around a pivotal aspect of political communication: the interplay between a candidate's emotional expression in presidential debates and the electorate's subsequent voting behavior. Central to our investigation is the hypothesis: "Does the emotional tone conveyed in presidential debates correlate with shifts in voter preferences?" Our objective is to illuminate the potential causal relationships between the emotional tenor of candidates during debates—specifically, their use of negative versus positive language—and changes in voter intention.

We looked at general debates from 2004 – 2020 because that is when Real Clear Politics (Real Clear Politics 2019) started their polling on general elections. We also used some, but not all, primary debates from 2008 – 2020 because the transcripts dataset (Martherus 2020) did not cover them all, and Real Clear Politics (RCP) did not start their polling on primaries until 2008. The selection of debates within our dataset was ultimately subject to the constraints of our RCP polling and debate transcripts. The total entries analyzed were 183 (where 153 were primary and 28 were general) from 39 debates.

Table 1: Data Description

Year	Type	Coverage in Dataset	RCP Polling Availability	Notes
2004	General	Yes	Yes	First year of RCP polling on general elections
2008	General	Yes	Yes	Full RCP polling and transcripts available
2008	Primary	Partial	Yes	Limited transcripts coverage for primaries
2012	General	Yes	Yes	Complete coverage
2012	Primary	Partial	Yes	Limited transcripts coverage for primaries
2016	General	Yes	Yes	Complete coverage
2016	Primary	Partial	Yes	Limited transcripts coverage for primaries
2020	General	Yes	Yes	Complete coverage
2020	Primary	Partial	Yes	Limited transcripts coverage for primaries

The debate selection is therefore focused on periods when the proliferation of the internet and social media was expanding, though at different rates over the years. Consequently, the impact of debates on voting intentions may have evolved across this time. As a result, the conclusions of this article, like those of many studies in political communication, are subject to potential bias stemming from the increasing role of social media.

We operationalize emotional expression using the Linguistic Inquiry and Word Count (LIWC-22) tool, which serves as a robust instrument for parsing psychological constructs within spoken or written text. The LIWC-22 (Linguistic Inquiry and Word Count) tool is a text analysis software designed to quantify emotional, cognitive, and structural components of language. It works by comparing input text to an internal dictionary with thousands of words categorized by psychological and linguistic attributes, allowing it to identify and measure tone, emotions, and topics within text. Commonly used in psychology, social sciences, and marketing, LIWC-22 analyzes tone in political speech by identifying word categories like positive (e.g., "success," "achieve") and negative (e.g., "failure," "risk"). By applying LIWC-22 to the transcripts of the U.S. Presidential Debates, we quantify the levels of negativity and positivity, thereby offering a measurable proxy for the candidates' aggressiveness and positivity in their debate performances. We define aggressiveness as the prevalence of negative emotional words relative to the total word count, while positivity is measured similarly through the incidence of positive emotional expressions. In other words, aggressiveness is equated to the negativity score.

In our analysis of the dataset (Martherus 2020), we considered the dynamics between debate sentiments and voting behavior changes. Our analysis began with a focus on the role of negativity in political debates. Within the context of this study, our use of the word 'negativity' refers to the use of critical or negative words, critical language, or sentiments by participants in a political

debate. Using language that criticizes opponents, draws attention to shortcomings, or highlights the negative elements of ideas or initiatives is considered negative language.

The dataset constructed for this research, PS169 Dataset: Real Clear Politics, encompasses variables such as the date of the debate, type (primary or general), the order of the debate, candidate names, polling figures before and after the debates, and the calculated negativity, positivity, and combined emotional tone scores. Polling data, reflecting voter sentiment 24 hours prior and 48 hours subsequent to each debate, were sourced from RealClearPolitics daily averages. This time frame was chosen to ensure a sufficiently responsive window for capturing the influence of debates on the electorate's preferences.

Our analysis employs a mixed-method approach. The core of our quantitative strategy involves a series of regression analyses—specifically focusing on *negativity*, *positivity*, and their aggregated impact (*negativity* + *positivity*)—to investigate their correlation with the change in votes. We used a linear regression model to find general trends in correlation. We did not investigate other models given the small magnitude of data points.

Qualitatively, we supplement our analysis by examining the emotional outliers found in political debates. As we analyze and interpret the quantitative data to see whether or not changes in voter preferences are correlated with the emotional tone of discussions, we evaluate the tone, vocabulary, and general emotional content of the comments made by the candidates during debates. The qualitative method involves identifying and analyzing situations in which the emotional tone of debates deviates from the typical range. Finding outliers encourages more qualitative research into certain situations affecting candidates' speech: emphasizing associations found in candidates' language use and emotional expression categories such as "power," and "family". These approaches allow readers to juxtapose the quantitative LIWC-22 findings with the qualitative narratives emerging from the coverage. The integration of these perspectives will enable us to present a comprehensive view of the extent to which debate sentiments sway voter decisions.

Our research is backed by a qualitative evaluation of the findings of scholars who have studied the function of language in political discourse and its possible influence on voter behavior. As we discussed earlier, the experts that we have chosen as an instrument to strengthen our findings are Pons and Le Pennec (Pons and Le Pennec 2019). The experts were chosen on the basis of their political science specialization, academic connections, and particular contributions to research on the influence of political disputes. The purpose of the qualitative assessment is to determine whether the conclusions of the chosen experts corroborate our theory.

4. Results

Contrary to the initial hypothesis, our findings revealed that negativity in debates did not significantly influence voting changes, as evidenced by a p-value of 0.731. Using a linear regression model to find a basic correlation trend, the estimated coefficient of -0.02734 hinted at a slight negative impact on vote changes with increased negativity, but the statistical insignificance of this result, coupled with a low R-squared value (0.001364), suggested limited explanatory power of negativity alone. This was visually corroborated in Figure 1, which depicted no discernible trend.

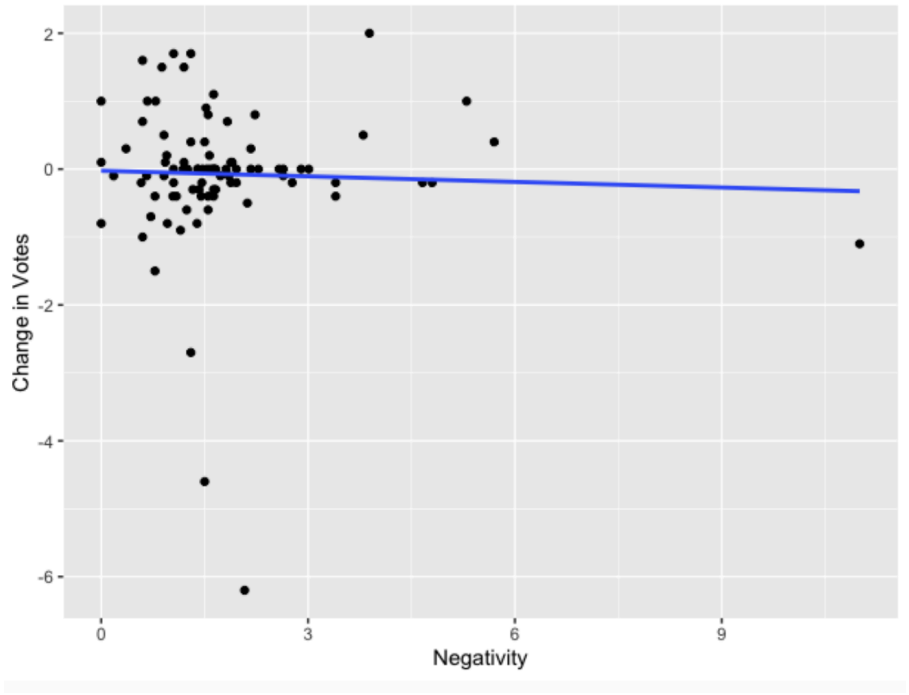

Figure 1: Effect of Negativity on Change in Votes

Shifting our focus to positivity, we investigated its potential effects on voting behavior changes using that model. Intriguingly, the positivity coefficient of 0.08297 indicated a mild positive correlation with changes in votes. However, the non-significant p-value of 0.290 and a negligible adjusted R-squared value (0.001511) emphasized the lack of robust statistical backing for positivity's influence on voting changes— despite a minor correlation as seen in Figure 2.

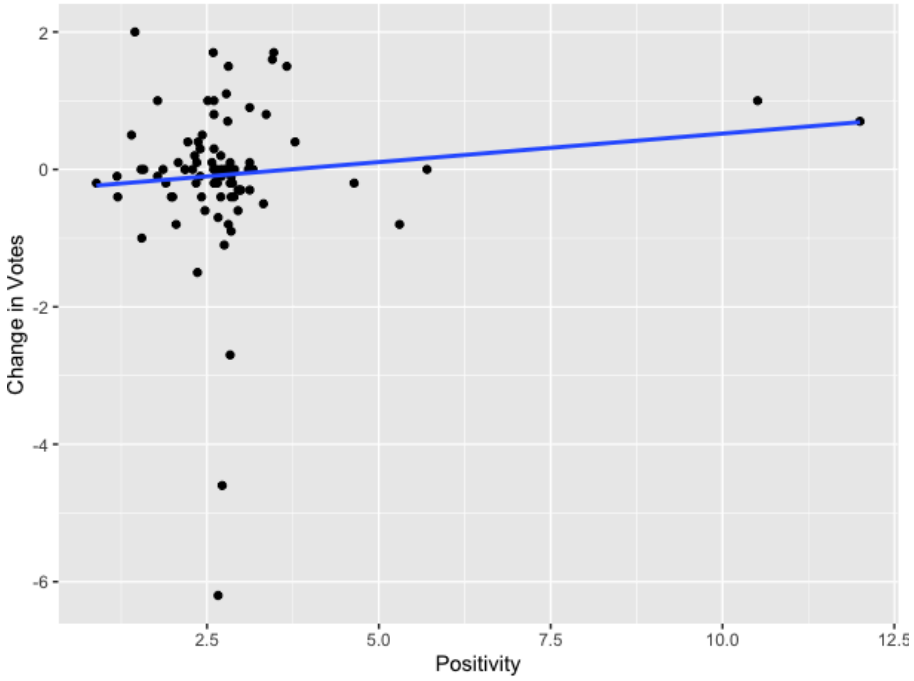

Figure 2: Effect of Positivity on Change in Votes

Our exploration extended to understanding the combined effect of negativity and positivity on voting behaviors. Recognizing that emotional tones in debates often interplay, impacting audience perceptions in a multifaceted manner, we summed these two variables to capture the overall

sentiment expressed. This approach was underpinned by the rationale that the cumulative emotional tone, encompassing both positive and negative elements, might offer a more holistic view of the debate's emotional landscape and its potential influence on voter decisions. The sum of these sentiments, represented by a coefficient of 0.03420, however, did not significantly affect voting changes (p-value: 0.577). The adjusted R-squared value remained low (-0.00786), indicating that even when considering the combined sentiment factors, the model could not adequately explain the variance in voting changes. This was visually corroborated in Figure 3, which did not display any clear trend, reinforcing the notion that other factors, possibly beyond the scope of debate sentiments, play a more crucial role in influencing voting behavior.

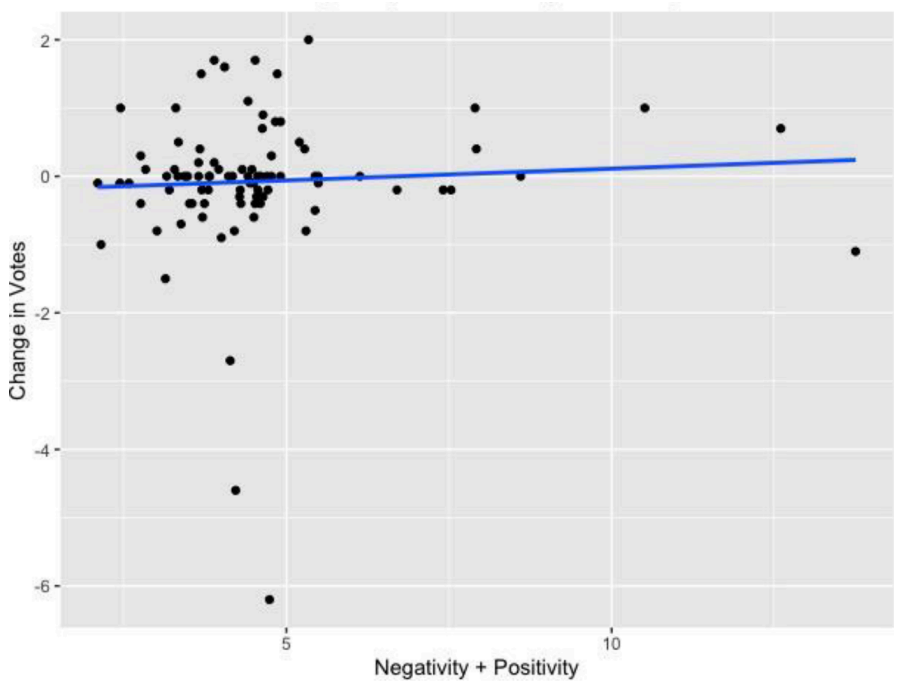

Figure 3: Effect of Combined Negativity and Positivity on Change in Votes

Lastly, we investigated whether the effects of negativity and positivity varied between primary and general debates. Through models incorporating interaction terms between debate types and the sentiment variables, we found no significant differences in effects across debate types. The p-values for the interaction terms (0.230, 0.730, 0.557) indicated that the relationship between debate sentiments and voting changes was consistent, irrespective of the debate being primary or general. This was visually echoed in Figures 4 – 6, where no distinct patterns emerged.

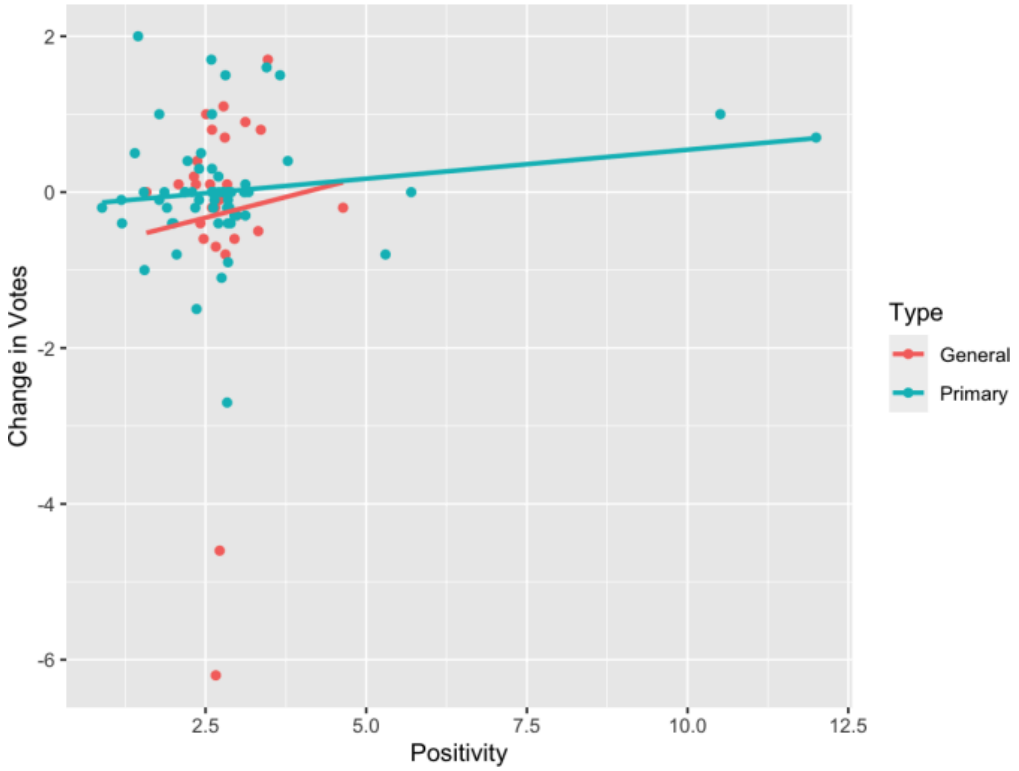

Figure 4: Effect of Positivity on Change in Votes by Debate Type

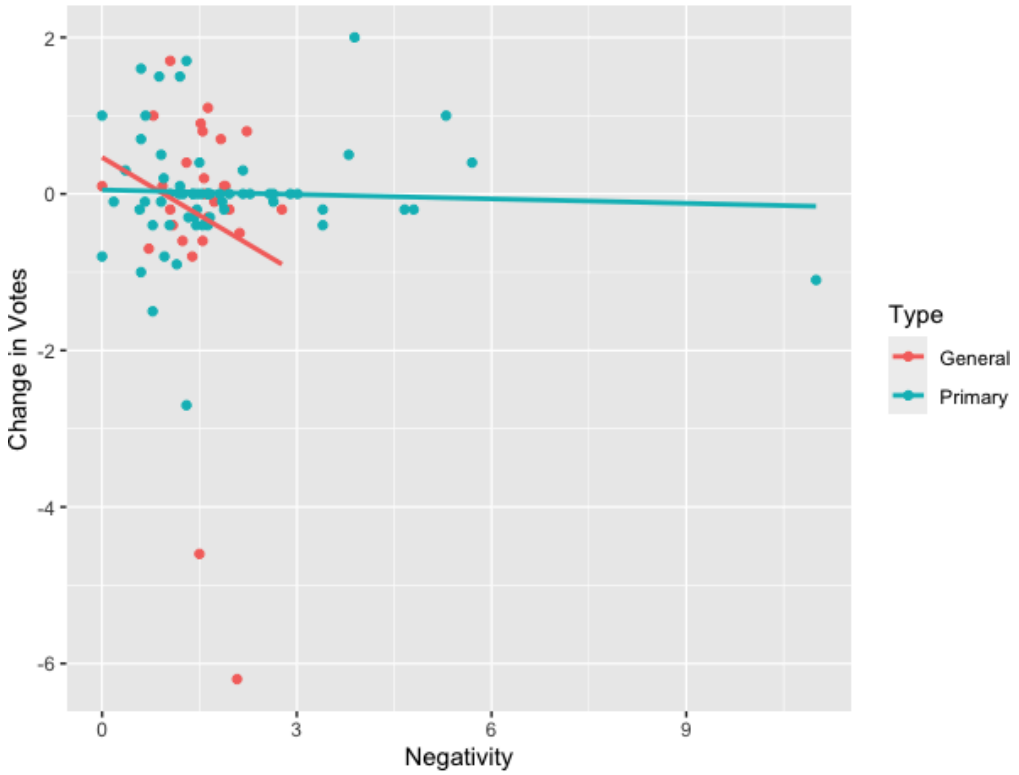

Figure 5: Effect of Negativity on Change in Votes by Debate Type

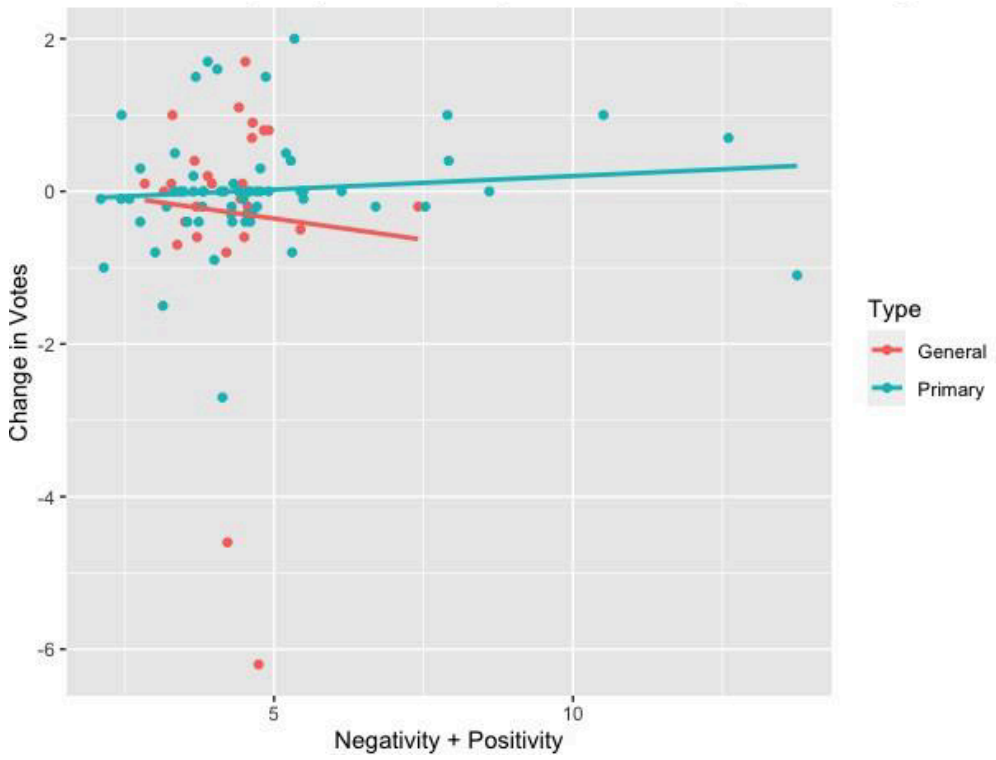

Figure 6: Effect of Combined Negativity and Positivity on Change in Votes by Debate Type

5. Discussion

We find compelling evidence that neither negativity nor positivity nor their combination significantly influences changes in voting patterns. This consistency was observed across both primary and general debates. The findings underscore the likelihood of other, unexplored factors playing a more decisive role in swaying voting behaviors. These results encourage a broader perspective in political science research, acknowledging the complex and multifaceted nature of political discourse and its impact on voter decisions. Future research may benefit from incorporating a wider array of variables and embracing diverse analytical approaches to unravel the nuanced layers of political influence on voter behavior.

The results of our analysis have provided valuable insights into the complex relationship between emotional sentiments expressed in political debates and changes in voting behavior. While our findings did not yield significant correlations between negativity, positivity, or their combination and shifts in voter preferences, they raise important questions and offer opportunities for a nuanced understanding of political communication and its impact on electoral outcomes.

As for the studies that came before ours, none of them truly explored how much of a factor the overall aggressiveness of a candidate plays in their polling numbers. Although we found that aggressiveness plays no significant influence on voting patterns, it helps further the studies conducted by previous researchers on this topic, particularly by helping researchers such as McKinney and Warner realize that the shift in voting patterns they saw in their studies is likely not correlated to the negativity or positivity of candidates. Our findings illustrate that although some candidates might be more prone to direct attacks, or may even be the ones doing the attacking, it provides them with no significant boost in the polling numbers. This information can inform research on the mannerisms and characteristics of candidates, such as the study conducted by Carlin, Morris, and Smith.

Moreover, it is crucial to acknowledge the multifaceted nature of political discourse. The absence of a strong connection between negativity and changes in voting patterns challenges the prevailing notion that a candidate's use of negative language in debates directly sways the electorate. This suggests that voters may be more discerning and resilient in the face of adversarial rhetoric, with their choices driven by a broader array of considerations. It prompts us to question whether the electorate is becoming desensitized to negativity or if other factors, such as policy positions, candidate credibility, or external events, play more significant roles in influencing their decisions.

The lack of a statistically significant impact of positivity on voting changes also invites further scrutiny. While our analysis hinted at a mild positive correlation, it was not strong enough to draw concrete conclusions. This result may suggest that voters prioritize other aspects of a candidate's performance or message over the level of positivity displayed during debates. It prompts us to explore whether voters are more responsive to substantive policy proposals, relatability, or authenticity in candidates, rather than their overall tone. Additionally, the absence of a clear distinction between primary and general debates in our findings raises questions about the extent to which different debate contexts influence voter responses to positivity.

Our investigation into the combined effect of negativity and positivity highlights the complexity of emotional expression in debates. The lack of a significant impact suggests that the interplay between these emotional dimensions does not strongly shape voter preferences. However, this outcome encourages us to delve deeper into the nuances of emotional discourse. Are certain combinations of negativity and positivity more impactful than others? Do voters respond differently when candidates balance negative and positive messages? These questions prompt us to consider the subtleties of emotional expression and how they may affect voter decision-making.

We were able to support our claim using the findings of Vincent Pons and Caroline Le Pennec. Before an election, candidates in the United States campaign for several months, providing voters enough time to make up their minds (Pons and Le Pennec 2019). Any dramatic moments during a discussion usually have a limited impact and disappear before election time. We also discovered that debates tend to be brief affairs with little bearing on people's decisions. Voters take into consideration a wider range of information, of which the material from debates is only one part. Since voters are already familiar with the candidates, the final presidential debate will have less significance. In summary, our findings juxtaposed with those of these experts, indicating that although a candidate may exhibit aggressive language during a debate, the overall impact of debates on election results is very small, with other, non-debate factors exerting a more significant influence.

Notably, the visual data exhibited a greater spread of outliers in terms of emotional expression levels during primary debates as compared to general elections. This could be indicative of a more polarized or energized discussion within primary debates, possibly reflecting the strategic behavior of candidates aiming to appeal to more partisan subsections of the electorate, in line with the Median Voter Theory. The Median Voter Theory explains that candidates tend to moderate their positions in general elections to appeal to a broader voter base, whereas in primaries, they may adopt more extreme positions to galvanize the base within their own party (Cukierman and Spiegel 2019).

The observed outliers in our analysis potentially signal instances where the emotional intensity of debates diverges from the expected norm, offering fertile ground for further investigation. These atypical cases might shed light on the circumstances under which candidates depart from the median voter theorem's predictions, perhaps due to the perceived benefits of energizing their core supporters or the influence of contemporary political dynamics. Further insights from the

Linguistic Inquiry and Word Count (LIWC) program should be included into research studies in order to get a more sophisticated comprehension of qualitative data. By offering a methodical and quantitative examination of language, LIWC enables scholars to explore the complexities of communication in more detail. Beyond conventional qualitative techniques, LIWC provides a methodical way to find patterns in texts about emotional tone, social behavior, and cognitive processes. We are able to improve the integrity of our findings by adding objective language metrics to the study by incorporating LIWC insights into the research publications. As we examine intricate subjects like social dynamics, sentiment analysis, or the psychological components of language, this tool becomes quite helpful.

Throughout this study, we were able to achieve insights regarding our candidates using the Linguistic Inquiry and Word Count (LIWC) program which provided a sophisticated analysis of qualitative data. By offering a methodical and quantitative examination of language, LIWC enables scholars to explore the complexities of communication in more detail. Beyond conventional qualitative techniques, LIWC provides a methodical way to find patterns in texts about emotional tone, social behavior, and cognitive processes. As we examine intricate subjects like social dynamics, sentiment analysis, or the psychological components of language, this tool becomes quite helpful.

The LIWC data showcased various attributes of debates that are worth mentioning. Within our data from the LIWC program, we noticed that some political candidates stood out in various categories compared to others. For example, John Kasich, a Republican candidate in the 2016 primaries, had a notably larger score in the 'family' category (score of .48) compared to his opponents. Language related to familial responsibilities, relationships, feelings, and activities tend to fall under this category. A political candidate's deliberate attempt to establish a personal and emotional connection with people is usually seen when they bring up family issues repeatedly in their speeches or other communications. By showcasing relevant parts of their life and ideals, political candidates may humanize themselves through family-related discussions.

Former President Barack Obama was shown to have the highest average in the 'pro-social' section compared to the other candidates within the same category. In LIWC, language that exhibits empathetic characteristics is classified as 'pro-social'. Obama may decide to take a pro-social position during debates for a variety of calculated reasons, frequently as an effort to win over supporters. This ties in with his overall stances as he frequently discusses topics pertaining to economic and social inequality. His policies supported social programs that help disadvantaged populations, fought for a fair tax system, and attempted to reduce economic disparity.

Another candidate score that we thought was worth mentioning was John Kerry, a Democratic candidate for the 2004 general election. He received a high average in the 'power' category compared to other candidates, and according to a journal posted by Yla Tausczik and James Pennebaker on the meaning of words in LIWC, the power category is intended to record expressions and vocabulary related to authority, control, and influence (Tausczik et al. 2010). The 2004 presidential election was a close race between Kerry and former President George W. Bush, and many citizens were in search of a powerful leader as the United States was at the head front of the Iraq War.

Applying language that is associated with power can convey a sense of assertiveness and leadership. It's possible that Kerry had to project a strong, assured image in order to reassure people about his capacity for effective management. Although our results did not find a significant connection between the use of various types of emotional affect and shifts in voter preferences, it was interesting for us to discuss the various correlations we found along the way, inviting future researchers to investigate them.

It is worth noting that our study focused on a specific time frame, primarily examining debates between 2004 and 2020. Future research should expand this temporal scope to capture evolving trends in political communication. The rise of social media and the changing media landscape have transformed the ways in which candidates communicate with the public. Exploring the impact of emotional sentiments in televised debates prior to this evolving context could yield different results.

Furthermore, we recommend that future researchers explore the other variables that the Linguistic Inquiry and Word Count (LIWC-22) tool can produce, building on the aggregate dataset we have constructed. LIWC-22 offers a wide range of linguistic and psychological constructs beyond negativity and positivity. Investigating variables such as cognitive processes, social dynamics, or even more granular emotional categories could provide deeper insights into the relationship between language, emotions, and voting behavior. Building on the foundation of our dataset, researchers can uncover new dimensions of political communication that may influence voter decisions.

6. Conclusion

In conclusion, our research on the impact of a candidate's emotional expressions in debates on polling outcomes has produced findings that advance our knowledge of the dynamics of political communication. Our findings disproved conventional thinking by showing that changes in voting patterns were not significantly affected by the negativity or positivity stated by candidates. Although there was very little positive association between positivity and changes in votes, the absence of statistical significance calls into question the assumed impact of emotional tone on voter choices.

Within the broader context of political communication research, our work filled a crucial gap by concentrating on the role that emotional expressions have in debates. We used regression analysis concentrating on the years 2004 to 2020 and using the Linguistic Inquiry and Word Count (LIWC-22) tool. A thorough investigation of the emotional terrain of discussions and its possible influence on voter intentions was made possible by this research approach. The lack of noticeable effects of negativity, positivity, or their combination of changes in voting patterns raises the possibility that other, unidentified factors may be more important in determining voter behavior.

We backed this finding with our qualitative analysis drawn from the literature of Pons and Le Pennec (Pons and Le Pennec 2019). Our findings cast doubt on beliefs regarding the direct influence of emotional language on voters and motivate future investigators to explore the diverse aspects of political conversation. This emphasizes the necessity of more research into the developing patterns in political communication, particularly in light of the shifting media environment and the emergence of social media, as well as the applicability of sentiment analysis tools in social science: a contribution this study advances. Our research opens the door for more investigation and improvement of our knowledge of political communication in democracies by offering insightful contributions to the current conversation on how presidential debates affect voters' judgments.

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THE U.S. RULE OF RECOGNITION: A HARTIAN OBJECTION TO PRESIDENTIAL SELF-PARDONING

Robert Joseph McCann

The problem of presidential self-pardoning has made its way into public discourse, especially after Trump's presidency. Can a President pardon him or herself? This article argues that a President cannot self-pardon. It is hard to see by solely reading the constitution why this is the case, however. To remedy this problem, I invoke H.L.A Hart's legal philosophy, specifically his concept of the Rule of Recognition. I argue the Rule of Recognition includes the idea that no one is above the law, including the president. To provide evidence for why this is the case, this article turns to a structural reading of the constitution, in which the whole can only be understood through its constituent parts.

1. Introduction

This article takes the perspective that Presidential self-pardoning ultimately concerns the range of application of the law: namely, does the law apply to those who make it? Intuitively, it seems like the answer is yes, the President is not above the law. Beyond the simple fact that the framers of the constitution did not want another King to rule them, the constitution allows for impeachment and prosecution of officials. I claim that it would be contradictory for a president to self-pardon because that would imply that they are above the law.

It is not so easy to see which laws apply to the President in the case of pardoning. Restrictions on self-dealing provide a clue. I argue, along with Kalt, for a structural reading of the constitution, which might indicate that prohibitions against overt self-benefiting actions are analogous to self-pardons (Kalt 1996). A structural reading, according to Bobbit, utilizes "inferences from the existence of constitutional structures and the relationships that the Constitution ordains among the structures of government" (Bobbit 1980, 721). A structural reading, then, holistically examines the constitution. Instead of focusing on only one of its parts, it reads the parts through the whole. However, as Perry states, it is very difficult to prove beyond a doubt that self-pardons are disallowed under the constitution (Perry 2019). To remedy this problem, I utilize an idea from Hart, namely that there are rules which grant authority. While these rules are often implicit, I claim they show that self-pardons are prohibited.

I draw principally from Hart's distinction between primary and secondary rules. Primary rules are either laws that people are under an obligation to follow or laws that help facilitate wishes. Primary rules essentially say what citizens can and cannot do in different situations. Secondary

rules are laws that provide for the creation, modification, identification, and adjudication of primary rules (Hart 1961).

These secondary rules are tied up with certain problems that confront a legal system with only primary rules. Importantly, it is not the case that these secondary rules are written down, though in determining what a secondary rule is, one might indeed reference written documents. Hart writes in the context of the 'rule of recognition', "For the most part the rule of recognition is not stated, but its existence is shown in the way in which particular rules are identified…" (Hart 1961, 98).

This article will first lay out Hart's primary and secondary rules, the focus of which will be what Hart calls the 'rule of recognition.' Then, I will aim to show how a structural reading of the constitution might hint at the existence of a feature of the rule of recognition, namely an implicit—but explicable—norm that the President is not above the law. Finally, this article will conclude with the claim that presidential self-pardons are disallowed, as they are inconsistent with the Rule of Recognition of the United States.

2. Primary and Secondary Rules

In conceiving "law as the union of primary and secondary rules," Hart is building upon and responding to previous legal positivist philosophers, most prominently Austin, who looked at social facts to identify what law is. By emphasizing social facts, legal positivists do not judge the content of law against some standard of morality, but rather look at the standards which those under a legal system follow. Despite this common ground with previous positivists, Hart takes his distinction of primary and secondary rules to solve many problems in analyzing features of law, where Austin and others might have gone wrong (Hart 1961).

In particular, Hart is responding to Austin's claim that 'coercive orders' form the key to legal philosophy. This is the idea that "Every law or rule . . . is a command" (Hart 1961, 79, Austin 1832, 5). A command, in Austin's usage, means a wish under threat of sanction that one should do or forbear from some act (Austin 1832). A law, which is a type of command that applies generally to a class of certain acts, is given from a political superior to a political inferior (Austin 1832). In many ways, this conception of law corresponds to what Hart dubs primary rules, which may "impose duties" on a citizen that place them under an obligation (Hart 1961).[1] However, Hart's conception of primary rules is more expansive, including non-coercive rules that do not impose duties. For example, the laws surrounding the creation of marriages and wills, which instead "provide individuals with facilities for realizing their wishes, by conferring procedures and subject to certain conditions…within the coercive framework of the law" (Hart 1962, 27). These facilitative rules are still rules for Hart, because they provide standards that guide conduct in a certain manner.

For Hart, rules are not merely the "convergence in behavior between members of a social group," but rather must guide conduct (Hart 1961, 9). Consequently, if a rule is deviated from, not only is there a prediction as to a "hostile" reaction, but also given is a "reason or justification" for such a reaction (Hart 1961, 82). If the rule indeed places one under an obligation, then it must include three main features: 1) The existence of social pressure to follow the rules. 2) The rules are perceived to be important or necessary for the "maintenance of social life or some highly prized feature of it." 3) The conduct required by the rules may benefit some and conflict with the wishes of others (Hart 1961, 84-5).

1. Hart himself says "rules of criminal law" or rules that "impose duties" are "analogous" or "resemble backed by threats" (Hart 1961, 31-2).

An important difference between Hart's conception of primary rules with Austin's conception of laws as commands is that Hart emphasizes the 'internal point of view.' The internal point of view, or the view as if one was a citizen within a specific legal system, shows "the manner in which members of the group who accept the rules view their own regular behaviour" (Hart 1961, 87). For example, the internal point of view can show the motivations behind stopping at a red light, as opposed to running through it. Hart believes that an observer, without an account of the internal point of view, cannot provide a "description of their life…in terms of rules at all, and so not in the terms of the rule-dependent notions of obligation or duty" (Hart 1961, 87).

This is because a purely external point of view, in which the observer merely notes regularities of conduct, cannot say why it is that this conduct is regular. To return to the traffic example, the external observer can say that when there is a red light, "there is a high probability that the traffic will stop" (Hart 1961, 87). Thus, the red light becomes a sign which correlates to certain behavior. From the internal point of view, however, the light is not "merely a sign that others will stop" but it is a "signal for" stopping (Hart 1961, 87). Hart takes the internal point of view to show why certain regularities in social behavior are rules, using the metaphor that social behavior functions like a game: when playing a game, one accepts the rules as guiding, and when something is in dispute, one might say 'It is a rule of the game that…'(see Hart 1961, 99). If a situation falls under a certain rule, then there is a reason from the perspective of those in that situation to match their social behavior accordingly.

If there is a rule that does not impose an obligation, for example, the creation or modification of wills, it is still the case that one might be in a situation in which a rule guides conduct for a wish to be rendered valid. In this situation, the analogy of rules still applies, because, from the internal point of view, there is reason to behave in certain ways that facilitate a wish.[2] This perspective sharply contrasts with Austin's view, who did not look from the internal point of view, but rather the external one. This means Austin's account was unable to show why behaviors were rules in the first place, which give reasons and justifications for certain actions and reactions, as opposed to merely "observable regularities of conduct, predictions, probabilities, and signs" (Hart 1961, 87).

Hart does not take all rules to be legal rules: for example, dinner table etiquette might have certain rules attached to it. But it is not a law to eat in a certain way. A rule can only be determined to be a law, even if it is a widely followed rule, in reference to a secondary rule. There are three defects from which a society would suffer if they only had primary rules. The first, and the one which has the most bearing on this article, is called uncertainty and arises when there are doubts about the existence or scope of a rule (Hart, 1961).[3] In this case, there would not exist a way of determining whether a rule does or does not apply to a certain case. Whatever procedure is used to settle the doubt would utilize other rules than the primary rules that society has at their disposal.

This problem of uncertainty is solved by the "rule of recognition" which specifies some "feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts" (Hart 1961, 92). In

2. Hart points out that these rules are better conceived as "limited legislative powers." These "private power-conferring rules" allow individuals to "vary their initial positions under the primary rules." These laws then, according to Hart, have a specific relationship to the 'rule of change' (See footnote 3). Hart (1961, 94).

3. See Hart (1961, 90-91) for an explication of the other defects. Briefly, here, the second defect is the "static" character of rules and has to do with the changing or adapting of already existing rules, which would be impossible without secondary rules to change laws to fit new situations and respond to different factors. The third defect is inefficiency, which arises from disputes about whether a rule "has or has not been violated," which could continue indefinitely.

other words, does the primary rule in question have a feature/features that cause it to be recognized as a law of the society? If yes, then the primary rule is a law. If not, then it is not a law. In relation to a question about a primary rule, the rule of recognition would take into account "some general characteristic possessed by the primary rules," including "their having been enacted by a specific body, or their long customary practice, or their relation to judicial decisions" (Hart 1961, 92). If any of these features conflict with each other, the features will be ranked in order of superiority to settle the conflict.

The presidential self-pardon question must be settled by the rule of recognition, as it is a question of whether the possibility of a certain action falls under a law. That is, the procedure to remedy uncertainty must be undertaken.

3. The Rule of Recognition and Moral Norms

The above discussion leads naturally to the question of the status of the rule of recognition in the United States. In seeking out the rule, it will be possible to determine whether the president is precluded or allowed from self-pardoning. While Hart points out that the complexity of some legal systems makes it difficult to infer a rule of recognition from one document, drawing from the constitution will provide a solid starting point.[4] Ultimately, the rule of recognition will be presented as detailed by Carey, described according to the complex interactive process between the constitution, government officials, and moral norms (Carey 2009). However, to present the rule in full, it will be necessary to first elaborate on what a rule of recognition in the United States would have to contain.

The Rule of Recognition in any given legal system must contain the three following features—as a matter of legal fact—to be the correct rule of recognition. 1) The rule is not subject to any other test for validity. It has the final say on whether a norm is law or not law. 2) The citizenry obeys the norms indicated by the rule. If the citizens of a state did not show behavior in line with the norms outlined by the rule of recognition, as a matter of empirical fact, the rule could not be the rule of recognition. 3) Government officials regard the rule as setting the standard of behavior, and actively seek to adhere to it. This is perhaps one of the more important features and has the utmost bearing on actually determining the rule in a given legal system. Here the relevance of the internal point of view comes in again: if the officials were to not recognize the rule of recognition as binding and actively seek to carry it out, the rule, as a matter of empirical fact, could not be the rule of recognition (Carey 2009).

Any account of the rule in the United States would need to fulfill all three of these criteria. But it seems necessary to mention a critique of Hart's positivism to do so. For Hart, law takes its point of departure from social facts: there are standards that guide behavior that are viewed as binding from the perspective of those in that society. One might wonder, however, if moral norms are able to be incorporated in the rule of recognition. For example, there are cases where judges have seemingly run out of guidance on what to do from the law itself and must appeal to other standards, namely moral ones. For example, should a criminal be able to benefit monetarily from his crime?[5] Would a moral standard such as this be part of the law? This is a question Dworkin

4. Indeed, there are "myriad complexities (e.g., how to account for state sovereignty, constitutional amendments, popular sovereignty, and judicial review and precedent), the idea that our legal system could be reduced to one simple rule seems prohibitively difficult" (Stephen V. Carey 2009, 1175). However, the importance of the constitution is supported by previous attempts to formulate the rule of recognition. E.g., Greenawalt (1987, 621-71) and Kramer (2008).

5. This is an allusion to the case of Riggs v. Palmer which Dworkin makes use of. See Court of Appeals of New York (n.d.). See also Dworkin (1967).

poses to Hart, which amounts to a critique of positivism as based exclusively or predominantly on social facts (Dworkin 1967).

Responses to Dworkin's contentions come in two main camps. For 'inclusive' positivists, principles that are not rules in Hart's sense, but are nonetheless appealed to in the practice of law, can be accounted for by positivism without abandoning its main tenets. Inclusive positivists maintain that there is no necessity that morality and law are linked (Shapiro 2007). This position is known as the "separability thesis" (Shapiro 2007, 33). A further position that inclusive positivists take is known as the "social fact thesis," which holds that despite an appeal to moral facts, as in the case of certain discretionary choices by judges, it remains the case that social practices ultimately underlie law (Shapiro 2007, 33). Shapiro writes, "The Social Fact Thesis would be satisfied, on this view, just in case such tests of legality themselves have social pedigrees" (Shapiro 2007, 33). The rule of recognition, as a test of legality, is grounded in social, not moral, practices. Thus, the inclusive positivist is able to include moral norms in the rule of recognition while preserving its fundamentally social character.

In the second camp are the "exclusive" positivists, who deny that the principles which judges apply when the law "runs out" are moral at all (Shapiro 2007). They claim that many times when a judge appeals to such a principle that might be considered moral, they are following a social history of interpreting the law in such a way (Shapiro 2007). Thus, their decision remains based on social facts. If the principles do not seem to have a history of social use, then these principles are not law (Shapiro 2007). In this case, the principles invoked are not seen as "legislation from the bench" because exclusive positivists hold that judges are under an obligation under the law to use a moral principle to decide the case (Shapiro 2007). This does not mean that the moral principle itself is a part of the law.

These initial responses from both camps still face further challenges, despite their effectiveness at countering some of Dworkin's initial critiques. A further problem for positivism lies in the fact that disputes about the grounds of the law, such as the procedures and institutions in which laws are made, cannot be accounted for (Dworkin 1986). A law itself is subject to true or false judgements: was the law passed by Congress? If it was, then it is a law, if it was not, then it is not a law. But it might be the case that there are disagreements about the grounds of the law. The example Shapiro gives is a dispute about the authority of Congress to legislate at all (Shapiro 2007). If there is a dispute of this kind, otherwise known as a "theoretical disagreement," the positivist position—either exclusive or inclusive—would have a problem. The problem arises because positivists suppose that there is consensus on the grounds of the law because these grounds are social conventions and are binding (Shapiro 2007). If Dworkin is right, one must concede that since the settling of theoretical disagreements involves invoking principles, such as moral norms, that are not in the law itself, that morality is necessarily linked to law. This would undermine the positivist position.

Shapiro thinks that this critique does not destroy positivism, because it is possible to have a form of positivism in which social facts still determine the grounds of law and which can deal with theoretical disagreements on these grounds (Shapiro 2007). Shapiro theorizes that this form of positivism could account for both when "a consensus exists about the factors that ultimately determine interpretive methodology" (Shapiro 2007, 48). The factors that determine the correct interpretive methodology include "if the current designers agree about the basic objectives of the system, the competence and character of participants, and the proper distribution of roles" (Shapiro 2007, 48). Since these factors are social facts, Shapiro hopes to continue to ground law in social facts, thus saving positivism.

While the Hart-Dworkin debate is extensive and cannot be presented in full here, it bears on

the discussion of the Rule of Recognition in the United States. This is because when determining if the President can self-pardon, it might seem plausible to appeal to moral norms in deciding on its legality. I contend that Shapiro's solution is a plausible one, but it still leaves open the decision between exclusive and inclusive positivism. For the rule of recognition to interpret moral norms as law, it seems like an inclusive positivist position is necessary. Alternatively, if through the rule of recognition one merely appeals to moral norms, exclusive positivism could work also. Since the rule of recognition, as presented in the next section, speaks of moral norms, the inclusive position will be favored.

While I cannot defend the inclusive position completely from the exclusive one, there are reasons to favor it. For one, exclusive positivists take for granted Dworkin's characterization of positivism, which is at least contestable. One part of Dworkin's critique that Hart explicitly rejects is the "Pedigree thesis," which has to do with the necessary reference of the rule of recognition to social facts only (Shapiro 2007). However, Hart himself notes that "In some systems, as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral values" (Hart 1961, 199). This indicates that Hart acknowledges moral norms being incorporated into the rule of recognition and does not see the inclusion of moral norms as contradictory for a philosophy based on social facts. The exclusive positivist's acceptance of Dworkin's "pedigree thesis," despite Hart's rejection of it is puzzling, and precludes moral norms from the start.

4. The U.S. Rule of Recognition

Three major attempts have been made to formulate the rule of recognition in the United States.[6] Carey argues for a synthesis of all three as the most plausible formulation. Each view speaks to an important feature of the American legal system: the constitution, the Supreme Court (and other officials), the ability to amend the constitution, state laws, and importantly, moral norms. Due to the inclusion of moral norms, the formulation Carey presents adheres to the inclusive positivist position. This synthesis has the following features, excepting the features pertaining to state laws as they do not impact Presidential pardons (Carey 2009, 1192-4):[7]

1. All duly enacted norms that do not conflict with the objectively best interpretation of the appropriate part(s) of the Federal Constitution, which interpretation has not lost its legal force and does not derive its present legal force from enactment by a proscribed constitutional procedure, are law,

a. the objectively best interpretation of the Federal Constitution shall be determined by:

i. existing Supreme Court precedent, unless such precedent is rejected through proscribed constitutional amendment procedures, or

ii. the interpretation of any and all appropriate United States officials, administrative bodies, or lower-court judges if Supreme Court precedent does not apply or existing Supreme Court precedent has lost legal force due to longstanding official practice.

2. The above norms are law unless:

a. such norms conflict with existing Supreme Court precedent that has not lost its legal force due to longstanding official acceptance, or

b. such norms conflict with duly enacted norms as described in (1).

The rule thus accounts for the power of the Supreme Court in making decisions on laws, the

6. First Greenawalt (cited above), then Himma (2003, 2005), then Kramer (cited above). See Carey (2009, 1176-1192) for the full timeline.

7. Adapted and abbreviated slightly for brevity.

power of Congress to check the Court through amendments, and the activities of all officials in interpreting the law. In the section on the interpretation of the state constitution, Carey retains the language of "best moral interpretation" (Carey 2009, 1193-4). It is puzzling that he should not do so in the case of the Federal Constitution. Carey writes later that "Under this rule, a duly enacted norm will only be law if it does not conflict with the objectively best moral interpretation of the Constitution and if consistency with the moral norms contained in the Constitution is a necessary condition of a norm's legal validity" (Carey 2009, 1194). It seems straightforward that Carey does want to speak of both moral norms and moral interpretation. I see this coming in most plausibly in the actions of the officials in interpretation of the law, who often appeal to moral norms that are not laws.

This inclusion means that moral norms can and do count as law. This means that a duly enacted norm cannot be law if it conflicts with the "best moral interpretation of the Constitution" (Carey 2009, 1194). The legal validity of Presidential self-pardons, then, where the law has seemingly "run out"—where we can't determine a decisive answer either way—must look to moral norms (specifically those that speak to the best ways to interpret the constitution) to test whether they are/are not allowed.[8] In other words, the question of Presidential self-pardons will be resolved through reference to a moral norm.

5. Presidential Self-Pardoning

Does the Rule of Recognition elaborated above give us a definitive answer for claiming that a presidential self-pardon is an impossibility? This section lays out why it does, considering an objection at the end. While the constitution alone may not be definitive either way, the rule of recognition in totality gives the requisite resources to disallow self-pardons. Further, it is claimed that through a structural reading of the constitution, it is possible to gain hints of the additional moral norms present in the rule of recognition.

First, what does a structural reading look like? For one, it means that one does not only analyze the pardon clause itself. One must find the limits of the power "in the constitution itself" (Kalt 1996, 790). But what exactly does it mean for something to be "in the constitution"? Kalt argues that for something to be considered a part of the constitution, "it does not need to be spelled out explicitly in the text. Concepts like the separation of powers, checks and balances, and…disfavor for self-dealing, are implicit in the Constitution" (Kalt 1996, Footnote 86). This holistic—structural—reading that includes implicit concepts like a (moral) reprobation of self-dealing seems very compatible with the rule of recognition laid out by Carey. Recall that the rule includes the "best moral interpretation" of the constitution, which includes implicit moral norms.

In the case of the constitution, it seems likely that a self-pardon is implicitly disallowed, because "In other parts of the Constitution… government officials are kept from acting as decisionmakers in matters that directly, materially, and uniquely affect them" (Kalt 1996, 796). A self-pardon is exactly this kind of decision making. Why allow impeachments if not to prohibit a politician from abusing their power? And why prohibit self-dealing in other instances but not prohibit self-pardons? It seems structurally more consistent if this was implicitly forbidden, because of the simple fact that no one is above the law. But as the rule of recognition states, this

8. This premise is important and deserves a brief explanation as to why I believe the law has "run out." If I were wrong on this point, and in fact using the existing law, there was a way to make a decision, then the rest of my argument would be cast into doubt. Here are a few reasons why I believe the law does not decisively answer the question. 1) Legal scholars—the experts of interpretation—cannot agree upon the Constitutional validity of self-pardons. For example, contrast the arguments of Kalt and Perry (cited above). 2) It seems intuitively wrong, as Presidents and officials can be impeached. Why have this power if the President can just self-pardon? Further, the Rule of Law is baked into the United States ethos. It would be contradictory to have a blatant denial of this fact through a self-pardon.

might not be enough. The constitution is only one of the ways through which legal norms are valid. One main question to ask is: do the officials that judge the law see it this way? And further, does the disavowal of self-pardons directly conflict with norms that are already in place through constitutional amendment or otherwise?

To answer the first question: as a matter of empirical fact, officials tend to uphold the idea that no one is above the law. If one is impeached and removed from office, the decision is accepted. In the history of the United States impeachment proceedings, 8 officials have been found guilty on impeachment charges, 7 of which were subsequently removed and 1 who was prevented from holding public office again (U.S. Senate, accessed 2024, Price 2024). All of these officials were removed from office, and none advocated that they should stay in office—except for those with positive biases towards the aforementioned officials. As for the Supreme Court, it is well known that they are committed to enforcing equal treatment under the law.[9] In addition, justices view themselves also as falling under the rule of law, which includes "constraining" themselves to preclude biases in discretionary rulings and setting forth clear and general—non arbitrary—principles (Scalia 1989). In other words, justices make sure that the principles used to arbitrate unclear cases are rigorous and as unbiased as possible.

To answer the second question: it does not seem that there are direct conflicts with other valid norms if Presidents were disallowed from self-pardons. Even protections like so-called "presidential immunity" only count for civil charges, not criminal charges or charges against the United States (the latter of which are the only things that a presidential pardon applies to anyway) (Palma 2024).

6. Conclusion

This article has argued that presidential self-pardoning is not consistent with the rule of recognition in the United States, as the best moral interpretation of the constitution—which was in turn supported by a holistic or "structural" reading—would disallow such an act that would effectively put one "above the law." This argument drew from the (inclusive) positivist tradition of looking at the social facts of the legal system to explain its structures, without neglecting moral norms.

In the context of the Hart-Dworkin debate, the choice between exclusive and inclusive positivism threatened difficulty. If the exclusive position were favored, the thesis that moral norms, including ones that might disallow Presidential self-pardoning, would crumble. It was through a return to Hart that the exclusive position was claimed to have a weakness, namely that it excepted uncritically Dworkin's presentation of the "pedigree thesis." In a different interpretation, the positivist would not need to accept this thesis, thus leaving open the possibility of moral norms being incorporated into law.

With a contentious 2024 election behind us, it seems important to get straight that Trump—or any other potential president in the future—cannot appropriate the pardon power towards freeing themselves from charges against the United States.

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PPER. **Matthew Zinno, *The Philosophy, Politics, and Economics Review* 4 (2025): 39-53.**

AFFIRMATIVE ACTION: JUDGING ON THE MERITS AND MORALS

Matthew Zinno

Political scientists and journalists alike routinely conduct surveys to gauge public support for the Supreme Court's rulings. It is not clear, however, whether the general public understands that the Supreme Court is the arbiter of constitutionality, not morals or policy efficacy. Most scholarly research has found that the public has a low understanding of the Court, its duty, and how to interpret its rulings. Therefore, survey results on the Court should be viewed with caution. Complex legal precedent makes it easy to conflate constitutionality with morality. Using the concept of affirmative action, I demonstrate how a policy can be unconstitutional but still considered to be moral or efficacious. I argue that such understanding is critical for future researchers to improve understanding of the public's (mis)interpretations of the Supreme Court's rulings and its role.

1. Introduction

"To expect the court to roam in the field of morals may indicate a failure to take into account the limitations placed upon the Court both by our federal system and by the division of powers."

Samuel Stumpf (1952, 41)

The United States Supreme Court makes pivotal decisions that shape national law. While one could argue that it may be necessary to make judicial decisions with broad morals and values in mind, the Court's duty is to make decisions that correctly interpret the Constitution, not to make moral decisions for the public to interpret and adopt (Stumpf 1952). The Framers of the Constitution intended for the judiciary to be insulated from politics because of the dangers associated with politically motivated judicial decisions, such as majoritarianism or tyranny (Hamilton 1788). Increased public scrutiny may have implications for the Court's functioning, although the Court's purpose has not changed, and understanding that the Court's rulings are only to be interpreted on their constitutionality is important. Ideological politicization of the Court's decisions poses a significant threat to the integrity of our legal system and the balance of power in our democracy (Clark et al. 2005), because it decreases the legitimacy of the Court's ruling and leads to rulings based on ideology rather than constitutionality.

In this article, I will demonstrate why the public should not take Supreme Court rulings as decisions on morality or policy evaluations. In Section 2, I will establish that the public has limited knowledge of the Supreme Court and often misinterprets its duties. Based on survey results, I will show that the public routinely evaluates the Court based on their personal morals. In Sec-

tion 3, with reference to the case of *Plessy v. Ferguson*, I will provide a historical example of why the Court's decisions should not be seen as moral or policy evaluations. In Section 4, referring to several Supreme Court cases, I will detail key legal precedents of affirmative action over the past 80 years and show that the Court's complicated history cannot be evaluated solely on constitutionality. In Section 5, I will examine the case of *Students for Fair Admissions v. Harvard* by evaluating the Supreme Court's legal framework. Then, I will demonstrate that a commonly suggested alternative to affirmative action, diversity essays, is not suitable in university admissions, even though it is constitutional. Finally, in Section 6, I will conclude by providing a recommendation on how the public and other actors, such as politicians and policymakers, should evaluate policies, if not just on constitutionality. Additionally, I will emphasize the negative implications of evaluating policy solely based on its constitutionality for polling outcomes.

2. The Public and the Court

Since its inception, the Supreme Court has had the highest level of public support compared to other federal branches of government (Gallup 2024, Gibson et al. 2003, Ura and Wohlfarth 2010). The Court's widespread popularity, however, has begun to waver since the turn of the century (Gallup 2024, Ura and Merrill 2017). While it may be enticing to blame politically polarized rulings for the Court's wavering public support, many scholars attribute this more recent trend of wavering support to increased public awareness of Supreme Court rulings compared to prior decades (Baird and Gangl 2006). The increased accessibility to various news sources through the internet and hyper-politicization of these sources is a driving factor in causing the Court's approval to decline (Hitt and Searles 2018). Diverging from historical norms, "the media now scrutinize[s] the machinations of justices' decision-making" (Sinozich 2017, 190), but it remains "crucial for the Court to maintain a reputation from the public as impartial, trustworthy, and above the politics and bargaining that characterize Congress and the presidency" (Bartels and Johnson 2013, 184).

The growingly unfavorable view of the Court by the general public is not aided by the public's lack of understanding of the Court's duty. Most Americans have little knowledge of how the Supreme Court operates and what constitutes precedent (Gibson and Caldeira 2009). Article III, Section 2 of the United States Constitution outlines the scope of the judiciary: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority" (U.S. Const. art. III § 2). As applied, it vests the power of determining the constitutionality of actions in the federal court system, consisting of district courts, appellate courts, and the Supreme Court.

This is how the Supreme Court was designed to work. The Court has never been about judging morals or policy efficacy. Instead, its central question is always about constitutionality. While this function was clear to the Framers, this important nuance appears to be lost on the public. Instead, people tend to evaluate the Court based on shared ideology and whether the Court's opinion aligns with individual moral beliefs about an issue (Hoekstra 2000, Mishler and Sheehan 1993, Mishler and Sheehan 1996, Mondak and Smithey 1997). As such, pollsters routinely ask questions about whether individuals support the Court's rulings. It is common for surveyors to ask questions such as, "Would you like to see the Supreme Court overturn its decision?"[1] The information gleaned from such polling ought to be viewed with dubiety.

1. In a poll conducted by YouGov (2022), pollsters asked respondents: "As you may know, the Supreme Court's decision in the 1978 case Regents of the University of California v. Bakke held that colleges and universities are permitted to use an applicant's race as one of several criteria in admitting them to the institution. Would you like to see the Supreme Court overturn its University of California v. Bakke decision, or not?" (YouGov 2022).

Given respondents' low awareness, one might expect high rates of nonresponse, but this is not the case. People freely give their opinion on Supreme Court rulings, and most scholarly research points to the fact that individuals' assessments of the Court rely on their ideological alignment with the Court's rulings.[2] While it may seem inconsequential to emphasize that many Americans have little understanding of Supreme Court functionality, bench appointments and court rulings have been long campaigned by politicians. As such, Americans frequently form an opinion on judicial rulings of which they have little understanding. In the face of such opaque legal procedure, citizens must rely upon their existing values to assess policy. This makes it more likely that people assert the Supreme Court as the arbiter of morals, yet nowhere in Article III does the Constitution purport to grant the courts the power to make moral or policy evaluations.

3. Good Policies, Bad Policies, and Affirmative Action

Assessing if a policy is 'good' or 'bad' solely based on its constitutional determination by the Supreme Court has proven inadequate for centuries, and that trend persists today.[3] While this may seem purely theoretical, this consideration is highlighted in issues of race relations, such as in *Plessy v. Ferguson*. In 1896, the Supreme Court crafted the "separate but equal" doctrine in *Plessy v. Ferguson*, which constitutionally permitted governmental segregation, as long as the separate accommodations provided for different racial groups were "equal."[4] This doctrine formally legalized separate bus seats, water fountains, restrooms, and public schools for use by Black people. The "equal" facilities that Black Americans were forced to use proved to be anything but equal.

The "separate but equal" doctrine was constitutional, yet it led to further discrimination against racial minorities and was inarguably a morally corrupt policy. It further perpetuated segregation, social stigmas, and the denial of civil rights to Black people. In practice, only separation, not equality, was achieved, and resources allocated to segregated facilities and services for African Americans were disproportionately less than those for white Americans. It was not until six decades later that the Supreme Court ruled that the principle of "separate but equal" was unconstitutional. In the landmark case of *Brown v. Board of Education of Topeka,* the Supreme Court ruled that "separate but equal" school segregation violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution because the facilities under the "separate but equal" doctrine were "inherently unequal" (*Brown v. Board* 1954, 11). Does this change of precedent mean that the "separate but equal" doctrine was good for six decades until the later Supreme Court decision rendered it bad? Clearly, the answer to this question is no. The notion of "separate but equal" did not change in its prescriptions, nor did its effects on society. The sole factor that changed was its relative constitutionality.[5]

Questions of race and discrimination did not end with *Brown*. Legal challenges have persisted

2. See Mondak and Spithey (1997) and Scheb and Lyons (2000), for example.

3. When I use the terms 'good' or 'bad', I am referring to their relative effect on the 'social fabric' of society. In other words, whether they are harming or benefiting democratic, pluralistic norms in society in the abstract. This is highly subjective and often prone to ideological bias. Later in this article, I will detail why this moral relativism has very little to do with constitutionality.

4. Related to this case, there is also a more nuanced discussion on the notion of equality itself. Mansbridge (1988, 138), for example, says "equal opportunity thus applies in two situations – when we want to reward only desire (which may be measured by effort) and when we want to reward both effort and ability." While it is beyond the scope of this article to address questions of what constitutes equality, it is important to consider these arguments in a broader public policy context.

5. I do not argue here that there were no societal changes associated with the Court's ruling. Rather, I am pointing out that whether or not the Supreme Court permitted it, segregation was a moral evil.

through the subsequent seven decades since the *Brown* ruling, ranging from questions about voting to those of school admissions, such as affirmative action. If *Brown* is the most famous example of morally bad policy being corrected, a similar but reversed scenario is present in the more recent Supreme Court case of *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (or *"Harvard"* for short). While the public may see *Brown* as a step forward in terms of progress and *Harvard* as a step back, the Supreme Court did not rule on how the policies in these cases advance or regress societal progress, but solely on constitutionality.

In 2023, the Supreme Court ruled in favor of the petitioner that affirmative action is unconstitutional in university admissions.[6] However, that does not inherently mean that affirmative action is a bad policy. A dichotomous relationship where constitutional policies are good and unconstitutional policies are bad should *not* be established, even when the Supreme Court is the determiner of constitutionality. When ruling in *Harvard,* like the vast majority of cases, the Court's duty was to determine whether affirmative action in university admissions is constitutional, not to decide whether it is a good or bad policy.

While the Supreme Court relies most prominently on constitutionality to dictate its rulings, in some rare instances, there are times when the Court must rely on moral philosophy to interpret the Constitution. As I demonstrated with *Plessy* and *Brown*, the Court can make decisions that we later evaluate as morally dubious at best because of the ever-changing tendencies of society. It follows that the inverse relationship is true. While reading the Court's ruling in *Harvard*, individuals should bear in mind that the ruling does not inherently mean that affirmative action is bad, nor does it mean that the prior use of affirmative action was bad. The ruling simply asserts that affirmative action is now unconstitutional.

4. Origins of Affirmative Action and Its History in Court

Affirmative action is generally defined as the policy of favoring underprivileged societal groups to remedy the effects of past discrimination within higher education and the workforce.[7] Since the 1960s, equity in higher education has been furthered through affirmative action policies. Throughout its history, scholarly debate surrounding affirmative action has focused on its constitutionality and effectiveness. Yet, at the same time, the general public tends to focus on a simpler notion of fairness to the applicants. Affirmative action being struck down as unconstitutional in *Harvard* has only led to more spirited political discourse, as evidenced by numerous public opinion polls.

In 1961, President John F. Kennedy issued Executive Order 10925 that required government contractors to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin" (Executive Order No. 10,925, 1961).[8] This Executive Order protected the rights of the disadvantaged and minority workers employed by government contractors, but more importantly, it marked the implementation of affirmative action in the United States.

6. The petitioner, Students for Fair Admissions, is a nonprofit organization founded in 2014 with the goal of advocating for and legally challenging the use of race in the college admissions process. Students for Fair Admissions was the plaintiff in the case that resulted in affirmative action being declared unconstitutional (Harvard 2023). In an earlier organization, key members aided applicants, challenging universities' affirmative action policies (Fisher v. University of Texas 2016).

7. See David Oppenheimer (1996), who asserts that there are five types of affirmative action policies: quotas, preferences, self-studies, outreach and counseling, and anti-discrimination (Bacchi 1996). When I refer to affirmative action in this article, the term pertains to preferences, unless specified otherwise.

8. This represents the first time that affirmative action was used in the context of policy, but the term first appeared in the 1935 Wagner Act (Bacchi 1996, 32).

After Kennedy's assassination, President Lyndon B. Johnson signed into law the Civil Rights Act of 1964, which had widespread public support (Kohut, 2020). In 1965, President Johnson signed Executive Order 11246 that "require[d] Government contractors to take affirmative action to ensure that equal opportunity is provided in all aspects of their employment" (Executive Order No. 11,246, 1965). This executive order was a "key landmark" in federal efforts to end racial discrimination (U.S. Department of Labor, n.d.).

While originally concerned with racial preference policies in the workforce, political debate around affirmative action eventually shifted toward its context in university admissions. The rise of affirmative action in the workforce bled into university admissions processes in the late 1960s (Steeh and Krysan 1996). Affirmative action gained more traction in higher education in the 1970s, being used by more universities. As a result, legal challenges arose over the constitutionality of affirmative action (Steeh and Krysan 1996).

The first legal challenge to affirmative action came when Marco Defunis sued the University of Washington Law School in 1971 after being denied admission. Defunis claimed that he was not accepted due to the university's policy of "reverse racism" (Legal Information Institute, n.d.).[9] The case rose through the court system to the Supreme Court; however, the case was moot because Defunis was allowed to attend and receive a degree from the law school (Legal Information Institute, n.d.). This case calls into question how people who conflate the ideas of good and constitutional policy would evaluate the University of Washington's affirmative action policy because the case was resolved without a ruling on the policy's constitutionality.

In 1978, the Supreme Court heard a similar case: *Regents of the University of California v. Bakke*. Alan Bakke was denied admission to the University of California Medical School at Davis twice, even though in both years he had a higher grade point average and test score than the vast majority of racial minority applicants admitted. Bakke claimed that he was denied admission solely due to his race and that the university's racial quota system violated the Equal Protection Clause of the Fourteenth Amendment and the Civil Rights Act. The Supreme Court ruled in favor of Bakke, citing that the university's racial quota system was unconstitutional.[10] However, the Court also noted in their ruling that "the remedial use of race" as one of several admission factors is constitutionally permissible (*Regents of the University of California v. Bakke* 1978, 350). When ruling, the Court established that affirmative action would be evaluated under a strict scrutiny review, requiring the government to demonstrate narrowly tailored means to achieve their compelling interest (*Regents of the University of California v. Bakke* 1978).[11] The Court's ruling in the case of *Regents of the University of California v. Bakke* set the precedent of affirmative action's relative constitutionality under strict scrutiny for decades.

Establishing a synonymous relationship between constitutionality and good policy is problematic for the case of *Regents of the University of California v. Bakke*. While the Supreme Court determined that stringent racial quotas are unconstitutional, many universities' affirmative action policies after the ruling aimed to create a student body racially proportionate to the United States population.[12] It would be flawed to say that post-*Bakke* affirmative action policies are good

9. Here reverse racism refers to the idea that a privileged majority is being negatively impacted by policies solely due to their race. Many scholars debate whether this phenomenon actually exists given the necessity of a power differential between races.

10. For more information regarding setting precedent, see Nelson (2001) for a discussion on "stare decisis."

11. Courts are given wide latitude in determining what constitutes a compelling government interest, but it generally must be of significant importance to public/societal welfare. See Barron and Dienes (2024) for a more thorough discussion.

12. In Harvard, Students for Fair Admissions argued that Harvard's affirmative action policies effectively enacted a quota

because they are constitutional and racial quotas are bad, because the intentions of the policies are the same. In *Harvard,* Students for Fair Admissions argued that Harvard discriminated against Asian Americans by admitting a low percentage of Asian Americans, and the Court agreed that the university's policy embraced a racial quota (*Harvard* 2023).

Until the Supreme Court sweepingly ruled affirmative action unconstitutional in 2023, universities had been more or less attempting to enact racial quotas without using that term. Yet, because these policies were constitutional for five decades, did that make them good? This example makes it apparent why the constitutionality of a policy cannot determine if the policy is good or bad. Racial quotas and affirmative action have nearly identical intentions, but for decades, their constitutionality differed.

The constitutionality of affirmative action was put in front of the Supreme Court in another instance in the case of *Grutter v. Bollinger* in 2003. Barbara Grutter sued after she was denied admission to the University of Michigan law school, claiming that the university's affirmative action policy, which asserted racial diversity as a "compelling interest," violated the Equal Protection Clause of the Fourteenth Amendment (*Grutter v. Bollinger* 2003).[13] The Supreme Court upheld the constitutionality of the University of Michigan law school's "race-conscious admissions program [because it] does not unduly harm nonminority applicants" (*Grutter v. Bollinger* 2003, p. 309). The Court's opinion noted that the University of Michigan law school's compelling interest satisfies a strict scrutiny review. However, at the time of the ruling, they noted, "[t]he Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today" (*Grutter v. Bollinger* 2003, p. 310). The early 2000s mark the beginning of a time of stark divide of public opinion on affirmative action. Nonetheless, the Court upheld the precedent set in *Regents of the University of California v. Bakke* (Saad 2021).

In a similar case, in 2012, the Supreme Court heard the case of *Fisher v. University of Texas*. Abigail Fisher, an instate resident,[14] sued the University of Texas after being denied admission, arguing that the affirmative action policies violated the Fourteenth Amendment's Equal Protection Clause (*Fisher v. University of Texas* 2013). The Supreme Court determined that policies needed to be "precisely tailored to serve a compelling governmental interest," and thus did not rule on their constitutionality because the lower courts had not done so. The Supreme Court remanded the case for a strict scrutiny review, which the lower courts had previously not done (*Fisher v. University of Texas* 2013). The case was reheard and eventually appealed to the Supreme Court in 2016. In a narrow 4-3 decision, the Court ruled that the university's race-conscious admission policies did not violate the Equal Protection Clause (*Fisher v. University of Texas* 2016). They upheld the previous precedent that educational diversity is a compelling government interest. They also stated that no race-neutral alternatives could achieve the same interest.

The Supreme Court's ruling in *Fisher v. Texas* once again outlines the issues associated with determining whether a policy is good or bad based on the policy's constitutionality. The Court's ruling in 2013 did not determine whether the University of Texas's affirmative action policy was

by preventing more than a few percent of the student body to be Asian American due to their low representation in the United States Population.

13. The Equal Protection Clause reads states, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" (U.S. Const. Amend. XIV).

14. Abigail Fisher was a Texas resident and attended a Texas high school. However, she did not qualify for automatic admission to the University of Texas in accordance with a 1997 law, which guaranteed admission to all students who finish in the top 10% of their graduating class.

constitutional because it was not reviewed properly. The lower courts' improper application of the constitutional test for strict scrutiny furthers why one should not conflate *good* and *constitutional*. Accordingly, this raises the question of whether the policy is good or bad, as the Supreme Court's ruling solely determined that the lower courts failed to properly apply the test. Like lower courts, the Supreme Court is comprised of imperfect individuals. It is not unreasonable to expect that imperfect people can err in judgment from time to time, similar to how the lower courts did in *Fisher*. For instance, the Court may decide a policy to be constitutional when it truly is not, making those who conflate constitutionality with goodness believe it is a good policy when it is not. Like *Bakke and Defunis, Fisher* demonstrates the complicated and problematic questions that arise when affirming that constitutional policies are good and unconstitutional policies are bad.

5. Further Analysis of Students for Fair Admissions v. Harvard

Justice O'Connor opined on behalf of the majority in *Grutter* (2003 p. 310) that race preferences would no longer be necessary in 25 years. The Supreme Court struck down race-conscious admission policies and affirmative action as unconstitutional in the cases of *Harvard* and *Students for Fair Admissions v. University of North Carolina* after 20 years of contradicting precedent. The Supreme Court ruled that the race-based affirmative action policies in these cases were unconstitutional because the policies violated the Equal Protection Clause (*Harvard* 2023). Chief Justice John Roberts wrote in the Court's opinion that the policies were not sufficient under a strict scrutiny review because they "lack[ed] sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points" *(Harvard* 2023, 39). The Supreme Court's decision in these cases upended nearly five decades of precedent established in 1978.

For Harvard University's policies to be deemed constitutional, as in previous cases, the Supreme Court had to determine whether the school's affirmative action program satisfied strict judicial scrutiny. Ultimately, the Court ruled it did not. Because race-based affirmative action gives preference based on race, it seemingly violates the Equal Protection Clause, thus making it subject to strict judicial scrutiny. For race to be constitutionally accepted as a factor in university admissions, policies must be both narrowly tailored and furthering a compelling governmental interest (see *United States v. Carolene Products Co.* 1938, 152, fn. 4).

To be narrowly tailored, affirmative action policies must have no "race-neutral alternatives" that can achieve the compelling governmental interest (Sotomayor, dissenting, *Harvard* 2023, 28). In addition, even if the race-conscious policy is narrowly tailored to serve that interest, the policy must be a "temporary matter" (*Grutter v. Bollinger* 2003, 342) that is "limited in time" (309). Previously, courts have ruled that correcting for past governmental discrimination is a compelling government interest that satisfies a strict scrutiny review. This ruling allowed universities nationwide to use race-based affirmative action (*Congressional Research Service* 2023). On the contrary, courts have also ruled that rectifying past "societal discrimination" is not a compelling government interest that satisfies a strict scrutiny review (*Congressional Research Service* 2023).

The Supreme Court effectively determined in *Harvard* that university student body diversity is no longer a compelling governmental interest. While the majority did not explicitly state that it was no longer a compelling interest, the Court did state that:

> [T]he interests that respondents view as compelling cannot be subjected to meaningful judicial review. Those interests include training future leaders, acquiring new knowledge based on diverse outlooks, promoting a robust marketplace of ideas, and preparing engaged and productive citizens. … It is unclear how courts are supposed to measure any of these goals, or if they could, to know when they

> have been reached so that racial preferences can end. The elusiveness of respondents' asserted goals is further illustrated by comparing them to recognized compelling interests (*Harvard* 2023, 6).

Justice Neil Gorsuch's concurring opinion specifically details how universities' affirmative action policies violate Title VI of the 1964 Civil Rights Act, in addition to the Equal Protection Clause. Title VI "prohibits discrimination based on race, color, or national origin" in organizations that receive federal funding (Civil Rights Act 1964). Both public and private universities receive federal funding through student financial aid, research grants, work-study grants, veterans' benefits, and more. The significant majority of universities nationwide that receive this funding cannot constitutionally use affirmative action policies because these policies violate Title VI, regardless of the policy's motive.

The Supreme Court noted this finding in 1991 in the case of *United Automobile Workers v. Johnson Controls, Inc.,* and Justice Gorsuch cites it in his opinion: "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect" (*United Automobile Workers v. Johnson Controls, Inc* 1991). Justice Gorsuch also argues that the race-based affirmative action policies of Harvard University and the University of North Carolina violate Title VI, because neither university is debating whether these universities receive federal funding, consider race in admissions, and "intentionally treat some applicants worse than others at least in part because of their race" (Gorsuch, concurring, *Harvard* 2023, 5). Justice Gorsuch distinctly outlines these three elements, which show how universities' affirmative action policies discriminate against some applicants due to their race and, therefore, violate Title VI of the Civil Rights Act.

How should universities' past use of affirmative action be viewed? This question is naturally raised when assessing affirmative action based on its constitutionality in light of *Harvard*. The Supreme Court emphasized in past cases and in *Harvard* that policies that pass strict judicial scrutiny are not permanent (Grutter v. Bollinger 2003). Determining if a policy is good or bad on its constitutionality is troublesome when evaluating any policy with a limited lifetime due to the legal constraints of a strict scrutiny review. Affirmative action in university admissions was constitutional for decades and no longer is because the court ruled that student body diversity in universities is no longer a compelling interest. If one were to judge affirmative action solely on constitutionality, do they support affirmative action prior to it being ruled unconstitutional and oppose it afterward? This calls into question the legitimacy of determining if affirmative action is good or bad on its constitutionality because of the timeliness of strict scrutiny review.

6. Affirmative Action Alternatives

Chief Justice John Roberts noted in the majority opinion that an "applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise," is constitutionally permissible (*Harvard* 2023). Diversity essays will allow applicants to discuss how they bring unique perspectives to college campuses through discussion of their race, religion, socioeconomic status, and other factors. Although applicants' discussions of lived experiences are constitutional, this does not mean that it will be an efficient or effective policy, even if universities allow applicants to write diversity statements or essays.

One may wonder about the suitability of diversity statements as a replacement for affirmative action because of the Supreme Court's constitutional ruling and administrative difficulties associated with diversity statements. Universities like Harvard and the University of North Carolina receive tens of thousands of applications from students annually, and having each applicant submit an extra essay creates a significant burden on admissions officers when reviewing appli-

cations in addition to the current exhaustive list of information the university evaluates when making admissions decisions. In past years, universities have identified an applicant's race by the checkbox they selected, which is simpler to assess in comparison to diversity essays. Moreover, most universities will find it administratively unfeasible to incorporate diversity essays without expanding the number of admission officers or fundamentally altering their application review procedures in order to gauge the impact of an applicant's background.

On the contrary, universities may interpret this constitutional alternative as an invitation to extrapolate an applicant's race from diversity statements and use this information as a "plus" factor when making admission decisions (*Harvard* 2023, 2). If universities were to do so, diversity essays would effectively serve no purpose other than identifying an applicant's race. The Supreme Court clearly expressed in its ruling that no proxies to race could be used, which then raises clear questions over the constitutionality of diversity essays because of how universities could use them in practice. If universities meritocratically and stylistically evaluated diversity statements and did not simply extrapolate an applicant's race from them, then clear socioeconomic equity issues would be raised. Socioeconomically advantaged students and those in highly funded school districts have access to college counselors, who may aid applicants in advantageously crafting their diversity statements to show their societal disadvantages, regardless of whether the applicant indeed faces societal barriers due to their race.

While diversity essays may overcome baseline constitutional hurdles, it is unlikely that this approach will accomplish the main goals that affirmative action sought to achieve, namely, equity and diversity. In the context of university admissions, equity can be defined as ensuring equal opportunity to disadvantaged applicants to create an equal starting point, and diversity can be defined as the inclusion of students from varying backgrounds, experiences, and perspectives. Many universities have diversity, equity, and inclusion offices on their campuses to promote these values.[15] Universities care about a diverse student body because it enhances the learning environment by allowing students to hear perspectives of students from different backgrounds. Affirmative action has promoted these values for decades. Although diversity essays will aim to achieve similar results, the inclusion of these essays hinders the application review process and has the potential to harm applicants with low socioeconomic status. Additionally, some applicants, like racial minorities, may not be comfortable sharing how they have been affected by societal disadvantages or how it has changed their lived experience because of peer pressure, privacy concerns, and other social pressures.

Affirmative action gave racial minorities a benefit in the application process to overcome historical barriers and inequities imposed on them due to their race. However, other disadvantaged groups who are prevented from going to universities, especially elite universities like Harvard, do not have affirmative action to help remove these obstacles. For example, socioeconomically challenged applicants face numerous disadvantages, including attending lower-funded school districts. In addition, socioeconomic status is a high determinant in a student's Scholastic Aptitude Test scores and academic achievement was not the only factor that determined students' scores (Dixon-Román et al. 2013). Discussion of an applicant's socioeconomic status and how it challenged them can allow universities to enact policies, like socioeconomic status-based affirmative action, which the Supreme Court did not rule unconstitutional. However, for diversity essays to benefit a broader range of students than just racial minorities, universities would need not simply to use it as a proxy for race. Regardless of how universities implement diversity essays into

15. Some state legislatures, including Texas, Florida, and South Carolina, have passed legislation that bans DEI offices in universities, prohibiting DEI statements in applications and affirmative action in hiring.

their admissions processes, their efficiency and/or effectiveness will be hindered because of the complexities that arise when evaluating application essays.

Although productive arguments can be made by supporters and opponents of diversity essays, it cannot be definitively said that requesting such essays in university admissions is a good policy simply due to its constitutionality. As stated before, implementing diversity essays is administratively unfeasible and will likely not effectively promote university diversity comparably to affirmative, in addition to raising more equity concerns. If only evaluating affirmative action and diversity essays by their intended purpose, which is to promote diversity and equity in admissions, affirmative action is the better policy. The merits of diversity essays can be debated. However, they are less effective and efficient in promoting racial diversity and equity compared to affirmative action. Yet, affirmative action is unconstitutional, while diversity essays are constitutional. Affirmative action and other policies cannot solely be evaluated on their constitutionality because of the current politics within the judicial system, especially in regard to highly contested policies. It is evident through this comparison that deeming affirmative action a bad policy and diversity essays as a good policy is not easily justifiable.

7. The Case for Military Academies

The Supreme Court ruling in *Harvard* ended affirmative action in private universities, and their ruling in *Students for Fair Admissions v. University of North Carolina* ended affirmative action in public universities. However, neither of these cases made a definitive ruling on the future of affirmative action in military academies. The Supreme Court noted in their opinion that "[n]o military academy is a party to these cases, however, and none of the courts below addressed the propriety of race-based admissions systems in that context. This opinion also does not address the issue, in light of the potentially distinct interests that military academies may present" (*Harvard* 2023, 22). One may wonder why the Court decided to exempt five universities out of thousands in such an all-encompassing ruling, considering that all prior rulings on affirmative action only applied to individual universities. There is not a clear explanation for the rulings' vast applicability in the majority opinion.

Justice Sotomayor questions the Court's exemption in her dissenting opinion, contesting that national security interests "cannot explain the Court's narrow exemption, as [they] are also implicated at civilian universities" (Sotomayor, dissenting, *Harvard* 2023, 40). The Justice further argues that there being no military academy as a party in these cases is not a justification for this exemption because religious schools, like Georgetown University, are also not a party in these cases, yet "the Court does not similarly exempt [them] from its sweeping opinion" (Sotomayor, dissenting, *Harvard* 2023, 40). One could argue that religious universities satisfy a strict scrutiny review because their policies increase diversity and further their religious missions. Regardless of whether religious universities should have been exempt from the Court's ruling, the military academies' exemption from this ruling begs the question of whether the Supreme Court would rule affirmative action in that venue unconstitutional given the opportunity, especially considering that there is no prior precedent differentiating between public universities, private universities, and military academies.

In September 2023, Students for Fair Admissions sued the United States Military Academy at West Point, claiming that their affirmative action policies violated the Equal Protection Clause, similarly to many previous challenges to affirmative action. While the trial dates are pending, Students for Fair Admissions filed a request for an emergency injunction with the Supreme Court, which would prohibit West Point from considering race as a factor in admissions for the class of 2028. Their legal grounding for the injunction primarily relies on the Court's ruling in *Harvard*.

Moreover, Students for Fair Admissions claimed that West Point's affirmative action policies discriminate more egregiously than Harvard's policies. They note in their application that "West Point uses race to determine which office reviews applications, how many early offers it makes, and what scores applicants need to get" (Mortara et al. 2024, 3).

The government's response from the Solicitor General argues that racial diversity is necessary to create an "effective fighting force" (Prelogar 2024, 3). The Solicitor General further argues that the civilian applications of *Harvard* do not apply to the military academies because West Point's affirmative action policies serve the unique compelling public and government interest of national security (Prelogar 2024). In early February 2024, Justice Sotomayor referred the emergency request for injunction to the full Court, and later the same day the Court denied the request, stating that "the record before this Court is underdeveloped."[16] However, the Supreme Court noted in their denial that this "should not be construed as expressing any view on the merits of the constitutional question," ultimately choosing not to answer the constitutional question placed before them.

Students for Fair Admissions also filed a lawsuit against the United States Naval Academy, claiming that the Naval Academy's affirmative action policies are similarly unconstitutional. Unlike the lawsuit against West Point, the lawsuit against the Naval Academy will be heard in federal court in the latter half of 2024. Regardless of the district court's ruling, the salience of the case means it will most likely be appealed to the circuit court and then the Supreme Court. Because of the Supreme Court's explicit indecision (see footnote 4 in the majority opinion of *Harvard*) on affirmative action's constitutionality for military academies in *Harvard*, this issue is especially ripe for review. The Court's exemption in *Harvard* and subsequent dismissal of Students for Fair Admissions' injunction request with West Point raises important questions about why diversity in the military academies differs from public and private universities and whether it is more valuable in that context.

Those that conflate constitutionality with goodness cannot adequately determine whether affirmative action is good or bad because it is unconstitutional in private and public universities but not in military academies. This raises the question of whether affirmative action is a good policy in military academies but a bad policy when in place at private and public universities. One can argue that national security is a compelling interest that would satisfy a strict judicial review for affirmative action. However, that does not speak to whether affirmative action in military academies is good or bad. Although the context of a policy can change whether it is viewed as a good or bad policy, affirmative action would advance diversity and equity in all university admissions, considering that the vast majority of university student bodies underrepresent racial minorities – especially in the graduating student population (Bowman and Denson 2022, Karabel 2006). Changing from constitutional to unconstitutional does not inherently change if a policy is good or bad or the reverse, especially when the policy has the same effects, only varying in degree. One can argue that national security is a compelling interest that would satisfy a strict judicial review for affirmative action. However, that does not speak to whether affirmative action in military academies is good or bad.

8. Conclusion

While affirmative action was constitutional for decades, starting with *Bakke's* ruling, and continuing in *Grutter, Fisher 2013, and Fisher 2016*, *Harvard* undid this precedent. The Supreme

16. The Court did not publish an official opinion, but their rejection of the appeal is recorded on the official case record available at: https://www.supremecourt.gov/docket/docketfiles/html/public/23a696.html.

Court's ruling determined that Harvard University's affirmative policies did not satisfy a strict scrutiny review because the policies were not timely, nor were the policies narrowly tailored. The Court's ruling must not be construed as one based on morality or policy efficacy, as it is not consistent with their ruling in *Harvard* and the prior cases. It is crucial to realize that *Harvard* was the newest case in the Supreme Court's never-ending affirmative action saga, though it will most likely not be the last due to the highly contested nature of affirmative action. Universities are uniquely positioned to foster diverse environments, which the Court has previously recognized as constitutional. However, now, they must seek alternative approaches that align with the Court's strict scrutiny standard in *Harvard*.

As an individual, I may normatively disagree with the Court's decisions on moral grounds – i.e., I can hold the opinion that affirmative action is a good policy, and it is a detriment to society to see it effectively outlawed.[17] However, I can also hold the view that the constitutional backing of such policies is relatively thin. These are not mutually exclusive positions. Affirmative action, when in effect, was a morally good policy. It promoted diversity, "leveling the playing field" for underrepresented groups. However, as Justice O'Connor wrote in 2003, its constitutional limitations were defined by time and progress. It should not be surprising, then, that the practice has been overturned.

The Court has a sound legal framework to rule affirmative action unconstitutional. It violates the Equal Protection Clause and the Civil Rights Act. Regardless of one's opinion on affirmative action, it is essential to understand the Supreme Court's duty when evaluating the institution and their rulings. Decoupling the idea of the Court from the arbiter of morality will allow for more nuanced public activism that does not depend on the (sometimes unpredictable) decisions of an unelected body of nine people.

The general public, policymakers, and leaders should assess if a policy is good or bad on numerous criteria, including effectiveness, efficiency, feasibility, underlying values, etc. The constitutionality of policies is a crucial factor when evaluating policy, and it should be considered. However, it must be considered alongside a plethora of other evaluative, sometimes moral, criteria. Doing this will prevent the Supreme Court from taking on the role of legislators and unduly swaying voters' opinions when assessing referendums and candidates for office.

Pollsters across the country have gauged public opinions on affirmative action. However, there has been a concerningly broad range of levels of public support for the policies. Because of this plurality of opinions, it is difficult to say what Americans really think about the issues. A potential cause is the lack of uniformity. There is a wide variety of terminology and question-wording used to gauge public support. Some pollsters ask if the Supreme Court made the right decision in *Harvard*. This question will most likely gauge whether respondents agree with the Supreme Court decisions, but it tells us nothing about whether respondents think affirmative action is a good or bad policy. Some respondents may disagree with the Supreme Court's ruling on moral objections but still acknowledge that their legal reasoning is sound. Other respondents may disagree with the Court's ruling due to legal objections but still oppose affirmative action.

This is not good for survey research where consistency is key. When conducting future surveys on affirmative action and other court-related policies, pollsters should refrain from conflating support for the Supreme Court's decision with support for the underlying policy in order to obtain an accurate understanding of public support. In addition, future scholars should examine how terminology and question-wording affect affirmative action polling due to the significant variance in survey results.

17. See Wijesundara (2024), for example.

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AMENDING THEORY: EPISTEMOLOGY AND CONSTITUTIONAL POPULISM

Hunter Alexander

Judicial review has a rich history of debate surrounding its effectiveness, necessity, and legitimacy. Today, the Supreme Court is as controversial as ever, given the recent developments on affirmative action and abortion rights. In Taking the Constitution Away from the Courts, Mark Tushnet argues for the abolishment of judicial review and provides a novel framework through which to understand the role the people hold in interpreting the supreme law of the land. However, Tushnet's blurry duality of thick and thin Constitution opens an epistemological can of worms that completely undermines his project. This article will defend Mark Tushnet's argument against judicial review by amending his theory of a dual Constitution. It will first briefly explain Tushnet's argument. It will then explain the philosophical issues with dividing the Constitution. Finally, it will discuss the means through which Tushnet can address these flaws by tackling the blurriness in his duality head-on.

1. Introduction

Polling shows that the judicial branch, headed by the Supreme Court, is currently the most favorable of the three primary branches of government of the United States among the American public. However, its popularity is waning (Jones 2023a). In fact, since the recent overturning of the landmark *Roe v. Wade* case, the Supreme Court is now further from its average popularity than it ever has been (Jones 2023b). In the current landscape, Mark Tushnet's seminal work *Taking the Constitution Away from the Courts* appears strikingly prescient, as Democrats are especially dissatisfied with the consequences of judicial review. However, Tushnet's theory regarding the abolishment of judicial review, *constitutional populism*, faces its own challenges. These challenges, epistemic in nature, stem from the dual Constitution he presents within his book. This article will defend Mark Tushnet's argument against judicial review from a crippling epistemological issue by amending (and further clarifying) his dual theory of the Constitution.

First, this article will provide a brief explanation of Tushnet's theory. Constitutional populism is as it sounds: populism as a method for constitutional interpretation. Tushnet seeks to assign the responsibility of constitutional law to the public rather than to the Justices of the Supreme Court (Tushnet 2000). In policy terms, he aims to eliminate judicial review. Tushnet would rather the public decide on the constitutionality of laws or actions by the state. The average American citizen obviously does not have the legal background that the typical Court Justice has, but, according to Tushnet, they do share a commitment to preserving the founding ideals of their nation (Tushnet 2000, 14).

To Tushnet, these ideals are above all else the preservation of the universal human rights of the population (Tushnet 2000, 181). These universal rights, and the means to protect them, are laid out in what Tushnet calls the thin Constitution. This thin Constitution is best understood as what it is not: undiscussed, undebatable, and clear in text (Tushnet 2000, 9-11). The thin Constitution is made up of all those constitutional provisions that are harshly contested (especially those concerning individual rights), highly discussed, and with text that insists on value-laden interpretation.[1] Many of the original Amendments could be classified as such, the First and Second being the most famous examples. Tushnet believes that the thin Constitution is what truly unites the American public. Thus, they are already capable of interpreting it and deciding how it applies to lawmaking and state action (Tushnet 2000, 12-13). If this is the case, judicial review only serves to deprive the people of this power.

However, Tushnet does not only speak of the thin Constitution. Tushnet believes in a dualism within the Constitution. There is a thick Constitution to complement his thin. The thick Constitution can be understood as the plain, rarely debated text of the Constitution which largely exists to organize the government (Tushnet 2000, 9-11). The Emoluments Clause, which prevents Congress from raising the president's salary during their term, would be a clear example. That is not to say that the more structuralist provisions of the Constitution are not important: Tushnet concedes that they are. They are not, however, inherently linked to the founding ideals of the nation.

This article will next go over the trouble that comes in attempting to draw a line between the thick and thin Constitution. Some extreme examples exist for each, but there are certainly some provisions that are not so black and white. This article will go into examples of such provisions, including a thorough discussion of the Supremacy Clause. This clause, and others like it, exemplify how the line between Tushnet's constitutional components is often quite blurred.

Drawing that line is important to Tushnet's case. The thick Constitution does not concern the founding principles of the nation and is thus not necessarily entrusted to the people. It is more akin to plain statutory text, which is entrusted to lawyers and legal scholars. Those with backgrounds in legal education will be epistemically superior in discussions of the law as opposed to legal laymen. If it can not be decided which parts of the Constitution belong to the people and which specifically belong to those with a legal education, it appears that legal scholars would be best fit to interpret the entire Constitution. These legal scholars would be epistemically qualified as both citizens of the country and as experts of the judicial system, whereas the public is only qualified in the former. Average citizens may make crucial errors in interpretation on provisions that are not so thin. A qualified body of justices would be less likely to make such errors. Thus, judicial review seems necessary.

This article will then argue that the existence of tension between the thick and thin Constitution is not enough to defeat Tushnet's ideas, at least not entirely. Though it is true that gray areas exist pertaining to certain provisions (the aforementioned Supremacy Clause will be the prime example of this article), the existence of these gray areas warrants public attention. As mentioned before, public attention is at odds with anything that could be considered within the thick Constitution. American citizens can and should be the ultimate arbiters when it comes to which parts of the Constitution are up for interpretation before them. Thus, in-between provisions would belong to public interpretation. Tushnet's theory is called constitutional *populism*. It rests on the people deciding how their Constitution must function. If tension between the thick and thin Constitution reveals itself on any given provision, the people can address that tension themselves. This article will conclude with a brief discussion of how the judicial system could still

1. Each of these descriptors will be elaborated on in the discussion of the "thin constitution" below.

play a role in constitutional review. The justices of the Supreme Court do have invaluable legal knowledge that Congress could make use of. Further, opinions of the Court may be useful for the American public in cases of horizontal constitutional review.

2. Constitutional Populism Redux

Goals of Constitutional Populism

Mark Tushnet's landmark book seeks to do exactly what its title espouses: take the Constitution away from the courts. He argues that "the public generally should participate in shaping constitutional law more directly and openly" (Tushnet 2000, 194). He views judicial review (constitutional review handled by the unelected Justices of the Supreme Court) as being antithetical to the notion espoused by American giants like Abraham Lincoln: that the nation, and its institutions, belong to the people of the nation. The people do, by indirect means, get some say in how their Constitution is interpreted. They vote for the President who appoints the justices of the Court.

However, lifelong terms and inconsistent blockages from the Senate make it hard for Americans to have any tangible say in what their Constitution means outside of certain crucial Presidential elections.[2] The current system for citizen involvement can hardly be considered *democratic*.

This still does not quite explain what exactly constitutional populism is or how it operates. Tushnet describes it as "a law committed to the principle of universal human rights justifiable by reason in the service of self-government" (Tushnet 2000, 181). This conception plays off the founding ideals of the country within the Declaration of Independence. Universal human rights are implied by the discussion of "inalienable rights," and of course the famous "all men are created equal." Tushnet believes that the national character is defined by a commitment to this fundamental principle; thus, the people possess the capability to interpret a text designed around it.

How We Get There

The policy that backs constitutional populism, at least within Tushnet's book, is straightforward. He argues that rather than the Supreme Court merely ceding their control via public statement or even through some overruling of *Marbury v. Madison* (the case that granted the power of judicial review to the Court) the Constitution would need to be amended to truly return the document back to the people. Tushnet claims that some amendment could be passed that places constitutional provisions outside of judicial jurisdiction (Tushnet 2000, 175). The theory seems to purport that the Supreme Court would now serve only as the highest appellate court. Congress would be left in charge of passing judgment on the constitutionality of laws. Tushnet is unconcerned by the possibility of rogue senators or representatives acting unconstitutionally. Rather, he believes that there are ways to render the founding document "self-enforcing."

The Thin Constitution

Though his ideas regarding universal human rights certainly apply to the language of the Declaration, Tushnet needs to demonstrate the direct overlap within the text of the Constitution. This seems daunting, at first, because many of the provisions within the document are structural or orderly in nature. Critics might wonder how a text so like the often referred to *legalese* of statutes

2. President Obama's near appointment of Merrick Garland serves as an example for Senate blockages.

can be understood as anything resembling the sort of philosophical piece that Tushnet presents it as. He does have an answer, albeit a controversial one.

Tushnet divides the Constitution into two parts: the *thin* and *thick* Constitution. This section of the article will concern the former, with the following section tackling the latter. The distinction between these parts is not quite the hard line that Tushnet might hope it is, but that will be discussed later in this article.

The thin Constitution encompasses provisions that are thoroughly debated, often discussed, and/or are unclear in writing (Tushnet 2000, 10-14).[3] Obviously, much of the archaic language of the Constitution is *unclear* by modern writing standards, but this refers to those provisions that feature particularly vague language or terms that are obviously open to interpretation. The Necessary and Proper Clause, which grants Congress the power to pass laws required for fulfilling its ultimate duties, immediately comes to mind. What is *necessary* or *proper* in the context of Congressional power is fundamentally a value-laden question. Debate over the meaning of *necessary* here is storied, to say the least (Gressman 2000).

This rigorous debate is what motivates another characteristic of the thin Constitution. Debate, here, not only refers to judicial debate but also to debate among the population. The hot topic of the *Right to Privacy*, for example, and what it means for the legality of abortion, has once again become a point of national contention following the controversial overturning of federal abortion rights in *Dobbs v. Jackson Women's Health Organization* (Palosky 2024). Discussion around this topic has become massively politicized, whether the justices of the Supreme Court like it or not. The nation, and by extension the justices (*Dobbs v. Jackson* was not a unanimous ruling) are divided on the constitutionality of issues such as these. Tushnet argues that provisions subject to such debate and massive discourse fall within the thin Constitution's purview.

What then is the purpose of this thin Constitution in Tushnet's broader theory? He argues that constitutional populist law "vindicates" the thin Constitution (Tushnet 2000, 12). That is, the thin Constitution might be understood as those provisions that encompass this nation's commitment to universal human rights. As mentioned before, to Tushnet, this thin Constitution is what America's national character is truly based on. The thin Constitution is highly debated and unclear because it concerns fundamentally political ideas of how this country ought to operate. Thus, constitutional populist law liberates the debate and interpretation of these provisions from the Supreme Court and returns it to its rightful owners: the people.

The Thick Constitution

The thick Constitution contrasts with the thin in that its provisions are not highly debated or discussed by the public or justices. Further, they are not usually touched by justices in Court rulings as changes to them often end up ignored or lead to broader unintended consequences. Article Two, Section One is a good example of this. There is no debate over the notion that the Vice President will be elected at the same time as the President so that they preside over the same term. The text is relatively clear: there are no value terms in the section that cover the way Presidential terms function. That does not mean this section is unimportant. The more structural provisions of the thick Constitution are necessary for the organization and operation of the government. However, they can hardly be understood as having anything to do with what Tushnet believes to be the national character.

The thick Constitution is much more akin to plain statutory text than the thin is. Where the

3. Tushnet himself does not provide these criteria, however, they can be inferred from his description of the thick Constitution and from the way he presents the thin.

thin concerns the values of the people reading (and writing) it, the thick Constitution is plain, clear, and closer to traditional legal literature. The line that creates this dualism, however, may not be so defined upon further examination.

3. Tension in Duality

Though it would be best for Tushnet's argument to only examine the most clearly thick and thin provisions within the Constitution, doing so ignores the reality of the founding document. Key sections of the text can easily be interpreted as either, or perhaps both. A clause might be clear, in that it might lack obviously value-laden language, yet be debated nonetheless. It might be discussed often in some circles, yet hardly argued about in others. Further, what exact issues concern universal human rights is certainly up for debate. The relativity of the terms by which Tushnet defines his thin Constitution becomes ever apparent when going into the weeds of the more structural sections of the document.

The Supremacy Clause

Article VI, Clause 2, better known as the 'Supremacy Clause,' elucidates these ideas nicely. The clause states that "laws… made in Pursuance [of the Constitution]… shall be the supreme law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The text is relatively clear, at least when compared with the text within the Second Amendment, for example. Though a bit archaic in its prose, the language is mostly dry. Nothing within its wording is as necessarily reliant on value-based interpretation as the Fourteenth Amendment is with its restrictions on infringements of "privileges" or "liberties" of U.S. citizens. Readers of this article would be hard-pressed to find any interest in the Supremacy Clause outside of niche legal circles. By all accounts, it seems like this structural provision of the Constitution is best understood as part of the thick Constitution.

And yet, it is not so simple. The Supremacy Clause is foundational for establishing federalism in the United States. Without such a clause, states are theoretically their own legal entities, beholden not to some federal body of law, but to pre-established territorial law and common law within said states. How, then, is the First Amendment meant to safeguard the universal right of expression of the public? How, legally, can it be ensured that "no soldier… be quartered… without consent of the Owner?" The Supremacy Clause is structural in nature, yet the federalist principle it upholds necessarily interacts with the founding ideals of the nation.

Though true, the Clause is hardly debated *directly* amongst the general public, it is tangentially related to a great number of political and legal questions that are. Professor Bradford Clark writes that "there is express textual basis for judicial review federal statutes alleged to exceed Congress' enumerated powers" (Bradford 2003, 2-3). He argues that the Supremacy Clause is a necessary component of the legal framework that allows for the Court to check Congress, not just lower state courts, for having passed laws beyond the scope of their power. Professor Clark interprets the Clause as saying that only those laws made in "pursuance" of the Constitution are truly supreme. Thus, the Court must be willing to strike down Congressional legislation that goes beyond the Constitution's scope. By this conception of it, the Supremacy Clause is often debated and discussed indirectly by the public. The Affordable Care Act has famously been scrutinized for its constitutionality, and Republicans broadly dislike the themes of the policy (Dalen, Waterbrook, and Alpert 2015). In this case, as in others, the power of the federal government is questioned. Power becomes a concern for the weary citizen, as concentrated power can threaten the universal human rights that Tushnet is so enthralled by. Thus, though the principle of federalism

is typically reserved for the cold, structuralist parts of the Constitution, it can not be so easily divorced from the thin Constitution's vibrant drama.

Creeping Thickness

As the thick Constitution can not be separated from the thin, neither can the thin escape the creep of the thick. Even extremely value-laden provisions such as the First Amendment can be viewed as being about the allocation of power more so than the safeguarding of universal human rights.

Professor Steven Gey argues that the First Amendment is better interpreted in a "structural-rights" manner than in an "individual-rights" manner" (Gey 2008). He notes that as there are many kinds of political speech that basically lack any social merit (or, further, damage the social fabric), it is hard to conceptualize how the First Amendment can protect the speech of Holocaust deniers if it is solely understood as protecting individual rights. If the First Amendment is meant to protect the rights of Jewish Americans, for example, to feel secure in expressing their religious beliefs, then it seems odd not to outlaw speech that decries the plights of their ancestors as falsified. Such claims may lead to violence against Jewish Americans. However, if the First Amendment is thought to be about preventing temporary, powerful majorities from deciding that which is true or couth, the legality of Holocaust denialism in the United States becomes clearer.

The amendments regarding individual liberties can be interpreted in similar ways. The Second Amendment can be regarded as functioning to ensure the right to own firearms. It can also be thought of as ensuring that violence is not monopolized (at least, not entirely) by the state. Otherwise, detractors of the Second Amendment cite the power afforded to marginalized communities to defend themselves, rather than needing to rely on the state to do it for them, as an example of the importance of understanding the right (Cottrol and Humphrey 1999, 6). The thin Constitution may be often discussed, but the structuralist underpinnings of much of what constitutes it rarely are. Thus, even the thinnest of provisions can have complicated relationships with the thick Constitution.

Epistemic Superiority

To go over anything close to the entirety of the theory published on epistemic superiority/inferiority would be far beyond the scope of this article and unnecessary. Rather, a brief example and list of criteria for determining it will suffice. Say, for example, that a mother and daughter are arguing over whether or not they can afford to go out to dinner. The daughter argues that because they have not gone out in the last three days, they should have the money saved up to be able to afford dining at Red Lobster tonight. Though the daughter might be very persuasive in her rhetoric, the mother is ultimately the financier of the household. The mother possesses knowledge about the money the family has available (as she is the one laboring for it) and understands how costly eating out can be. Further, she realizes that not eating out this one time is not the end of the world as her daughter makes it out to be. The mother is epistemically superior to the daughter in this instance.

The formal factors that make someone an epistemic superior over another are debatable but can be summarized as the data/evidence available to such a person, the time the person can spend on understanding the issue at hand, the cognitive ability of the person, the background knowledge already available to the person on the subject in question, and the circumstances of investigation that the person employs to understand the matter (Frances 2014). Most of these factors speak for themselves. Obviously, someone can hardly be considered an *epistemic author-*

ity on a matter they have no data/evidence on or one that they lack any background knowledge on. The "circumstances of investigation" are the conditions present when examining the subject. Was the person distracted while attaining information of the subject, or while forming their belief on the topic? These both would contribute to them being less epistemically sound on the matter.

One need not be sound on all factors to be considered epistemically superior to another. Instead, these factors (and their weight in determining superiority) are contingent upon the topic in question. In the mother-and-daughter example from before, the mother might be on the phone with a relative while arguing with her daughter about going out. Her circumstances of investigation are relatively poor compared to her daughter's, as she is not giving the proposition as much immediate thought as her daughter is. The mother is still, however, the epistemic authority on the matter. The daughter's lack of knowledge of the family finances and young age prevents her from having as sound a judgment on the matter as her parent.

Finally, if two people of otherwise equal epistemic capability have even one instance in which one is more proficient than the other, that person should be considered epistemically superior. An example: assume that rather than the mother and daughter arguing about going out to dinner, it is instead the mother and father of the family. Both parents are intimately aware of the financial situation of the household. Both are old enough to properly evaluate the benefit of eating out versus cooking dinner at home. Yet, the mother has already spent a half hour in the car arguing with her daughter about going out, and the father is making his decision spontaneously as the mother and daughter get home. Even though on all other factors the mother and father are epistemic peers, the mother has had more time to consider the proposition. In this instance, she is the epistemic superior.

Authority Over the Thick and Thin Constitution

As discussed before, the thick Constitution is very similar to statutory law. With regard to legal matters, lawyers, legal scholars, and justices are epistemically superior to the layman.

The layman has received no legal education. They have not been trained to study the history of a statute's application in the way lawyers have. They may lack the tools necessary to familiarize themselves with the relevant information on the statute in question (lawyers should have immediate access to databases/casebooks relevant to the legal question at hand). Further, practicing lawyers have demonstrated the necessary cognitive ability to interpret the law (in graduating from law school and passing a bar exam). Finally, the layman does not have the time to study the law in the way that a lawyer does. The layman must spend their time providing for themself, whereas the lawyer pays the bills by dedicating time to the law. The lawyer is plainly epistemically superior on typical legal writing. If the thick Constitution is so similar to such statutory text, the lawyer is clearly epistemically superior in that domain as well.

If the thin Constitution can possess a great many characteristics of the thick Constitution, and if there is not a clear way to separate the two, lawyers might be epistemically superior in its domain as well. After all, constitutional lawyers have dedicated their lives to studying the text, where the layman only has a relatively cursory knowledge on the subject. Tushnet argues in his book that a kind of "judicial overhang" exists within the States: that the mere existence of judicial review leads to people (and Congress, by extension) being less acquainted with the Constitution (Tushnet 2000, 57-65). Critics of Tushnet's theory point out the obvious. The state of the country in the absence of judicial review can not be measured (Chemerinsky 2019). While it would strengthen Tushnet's argument if it is assumed that the reason for the layman's epistemic

inferiority with regard to the Constitution is entirely a consequence of judicial review as an institution, this claim is only as convincing as one allows it to be. Lawyers are epistemically superior to laymen on the law. If the thick Constitution is hardly distinguishable from the law, it seems like they are epistemically superior over it as well. If the thin Constitution is not divorceable from the thick, then lawyers also reign supreme in that domain.

Superiority in the In-Between

The philosopher Hilary Putnam is probably most famous for his *Twin-Earth* hypothetical, which he employs to argue that the meaning of words exists outside of human psychology (Putnam 1973). In his argument, he argues for a "division of linguistic labor," claiming that just because everyone uses a word like "gold", they do not need the epistemic tools necessary for determining what gold actually is (Putnam 1973, 705). That is to say, he feels it would be both unnecessary and inefficient to expect everyone to be able to articulate the true meaning of gold as opposed to pyrite, in the same way that it would be inefficient to expect the average person to be able to distinguish between the two metals. That does not mean that the words *gold* and *pyrite* mean the same thing. Instead, experts who can truly determine the difference can be expected to articulate the differences in meaning.

A simpler example might be Putnam's elm and beech example. He notes that just because he personally can not tell the difference between the two trees does not mean, in fact, that there is not a difference. Putnam would be wrong if he were to call an elm a beech tree. He simply lacks the epistemic tools necessary to both make the distinction and know the true meaning of the words.

A legal layman lacks the epistemic tools necessary to make the distinction between the thick and thin Constitution. Though they may be capable of understanding the values of the thin, they can not be expected to understand the structural necessities of the thick. If the layman can not tell the difference between the two, is unaware of when they overlap, and, finally, lacks the epistemic tools to interpret one of those halves, then how can review of either the thick or thin Constitution be entrusted to that layman? They can still make use of their Constitution, semantically and functionally, as does Putnam with gold or beech trees, but they are not capable of properly analyzing it. In his article on how the Constitution ought to be considered *hard law*, Michael Moore posits that, ultimately, the Constitution being so like "ordinary law" is what justifies judicial review (Moore 1989). He is correct. The layman and lawyer are, on average, epistemically peers on matters political, but lawyers are superior on matters legal. Thus, constitutional review must be entrusted to the highest Court in the land, the alleged ultimate experts on constitutionality. Tushnet's constitutional populism is seemingly dismantled.

4. The Necessary Response

To maintain constitutional populist law in the face of the problems created by Tushnet's duality, he needs to address the tension at the center of it directly. Rather than arguing that his two halves are distinct and that only the thin encompasses the national character, he instead needs to argue that the tension between the two is evidence of their need to belong to the people. He should be arguing that the debate over how the characteristics of the thin Constitution overlap with the thick Constitution, and vice versa, is a debate that belongs to the people. This section will explore this possible response and provide some changes to the policy that Tushnet provides that better works with this more refined theory.

On Public Debate

As stated before, those provisions that are hotly discussed/debated by the public should be considered part of the thin Constitution. The nature of the argument in question is hardly material. Rather, the public's interest in the topic is what lends it its thinness. Thus, even though a provision's status as either part of the thick or thin Constitution may be questionable, the public's interest implies that it ought to be considered part of the thin.

Rather than treating the thick Constitution as something that must be set in stone (that what constitutes it must be decided at some arbitrary earlier point), it should rather be treated as a set of structural guidelines that can be claimed by the people based on their needs. Though legal experts might possess epistemic tools that aid them in interpreting the thick Constitution, thinness creeping into it does not then give them expertise over those thin values. This can be illustrated through the earlier structuralist interpretation of rights. Though yes, there are legal scholars that espouse the necessity of such an interpretation, this most certainly is not the common conception of the rights guaranteed within the Constitution (Calvert et al. 2018, Gey 2008). If it were to be presumed that the evidence of thickness within the thin Constitution could be invented by lawyers for the purpose of reconciling legal doctrine, then of course any provision within the Constitution could be considered thick. If some sizable portion of the public feels the need to argue over something typically considered part of the uninteresting thick Constitution, it seems that the public has changed its mind about how uninteresting that particular provision is. The people pluck the provision in question from the hands of legal scholars and place it into the domain of politics by virtue of making it politically relevant. Laws are necessarily downstream from politics after all.

Who Gets to Build the Ship?

To further expound on the point, it might help to reexamine some of the philosophy discussed earlier. Specifically, the combination of epistemic superiority and Putnam's examples regarding experts and meaning.

Firstly, it should be noted that whether or not epistemic superiors are totally beyond questioning from inferiors is not a settled matter (Jager 2025). There are obvious times when such doubts would be necessary. A person without a driver's license should not trust the capability of a drunk with one getting behind the wheel. If the Supreme Court sufficiently demonstrated itself to be compromised in its legal capabilities (perhaps by being shown to be overtly politically biased), it would be fair to suggest that their epistemic superiority on matters constitutional be reconsidered.

Secondly, what role experts play in the Putnam example from earlier is also up for debate. Putnam argues that words can be thought of as cooperative tools. He says that words should be thought of as more "steamship" than "screwdriver" (Putnam 1973, 706). Steamships can not be driven by a sole operator. Rather, they require the collaborative effort of a crew. Further, they are used by more than just crew members. The general public rides along within steamships. After discussing the epistemic superiority of lawyers, and their capability to distinguish thick from thin, it seems that they would be the crew members in this analogy. The American citizen would be relegated to a mere passenger in the journey to interpret the Constitution.

This conception of the analogy and how it maps to constitutional interpretation is faulty in multiple ways. The Constitution would be useless without some participation in understanding it from the American public. For instance, consider a candidate for Congress who intends to pass a law that entirely illegalizes firearm ownership. Clearly, this law would be in violation of the Second Amendment. On their own, this candidate has no power to do so. Even if they somehow win

their Congressional seat, the rest of Congress would surely not aid them in their clearly unconstitutional crusade. Further, the Supreme Court would invalidate any law passed that so flagrantly violated the Bill of Rights. However, if a massive political movement behind the law came to fruition and enough political power was consolidated to not only pass the law but also amend the Constitution to overcome the Supreme Court's inevitable review of it, the Bill of Rights protections would obviously be overcome. In this scenario, the Constitution guarantees very little protection of inalienable rights. This scenario has never occurred not because it can not happen, but because the people of this country are not interested in it happening. The political capital is not there to completely overturn the Second Amendment, or anything other amendment for that matter.

Now, to reexamine the steamship analogy. If tomorrow, the passengers on a steamship decide not to aid the crew members in the running of the steamship, nothing changes. The ship's ability to transport cargo and passengers is unaffected by participation from the passengers. So long as the passengers do not violently revolt against the crew, the ship can operate with just participation from the crew. The Constitution does require participation from the passengers (the American people) to function. Inalienable rights are meaningless to a populace uninterested in preserving them. Thus, the American people can be considered as part of the crew in this steamship example. The interpretation of the Constitution is meaningless without a public that lives by and upholds it. The document and its amendments were not originally drafted exclusively by lawyers and legal scholars. Rather, they were produced by politicians: stand-ins for the American public. To pretend that it could function as intended (to secure the rights of the people and allow for the creation and functioning of a democratic government) without the participation of the public would be absurd. Thus, to pretend that said public is not part of the *crew* of experts would be just as ridiculous.

The New Role of the Court

The above defense does not entirely save Tushnet's theory. In his book, he claims that the thick Constitution is better left untouched by the Supreme Court, as interpretations they provide regarding it often result in unforeseen negative consequences (Tushnet 2000, 9-11). If the Supreme Court should not address matters within the thick Constitution, and the American public only tangentially cares about it, how are matters regarding it meant to be solved? Further, if the Court does possess epistemic superiority on matters that the thick Constitution deals with, how can any other body but the Supreme Court be entrusted with interpreting it?

Tushnet has half-answers, at best. In discussing how legal bodies might handle lower-level governments or government agents (police officers, for example) blatantly violating constitutional principles, Tushnet claims that the courts could find certain actions to be "ultra vires," or beyond the scope of the actor in question's power (Tushnet 2000, 163-165). The astute reader will immediately recognize this as judicial review in everything but name. Scholars far more qualified than the author of this article certainly have (Chemerinsky 2019, 1433). Whether or not Tushnet's "ultra vires" test would even apply to horizontal review (that is, whether or not the courts could invoke it in response to Congress) is not touched on within his book. None of this addresses the thick Constitution directly, but one can imagine that Tushnet intends for it to. If Congress tried to raise the presidential salary during a president's term, violating the Emoluments Clause, for example, Tushnet would likely argue that the Court could label Congress's action as beyond its constitutional scope. Again, in this instance, it seems like Tushnet is very much in favor of the

Supreme Court ruling on the constitutionality of laws, including those within the scope of the thick Constitution. How can any of this be reconciled within his broader theory?

There are modifications that can be made to his base ideas, but their effectiveness may be questionable. The Supreme Court could serve a dual role, as both an advisor for Congress as well as a canary in the coal mine for the general public. The Court could write briefs on the constitutionality of laws passed by the current session of Congress for the President, who could in turn opt to veto provisions that were off-base. The key to a system such as this would be that these briefs would be public so that the American public could be clued into obvious violations of their rights before they are enacted. A national referendum could be ordered by the Court on specific provisions of new legislation, allowing for the masses to check Congress before having to wait for an election year. The Court would possess more power as a guiding force for constitutional discussion than Tushnet might want under his constitutional populism, but this solution does a better job of addressing the epistemic gap that currently exists between the public and legal scholars on the Constitution. It would be beyond the scope of this article to provide an entirely new system for Congress and the Court that could amend Tushnet's theory, but some change is clearly necessary for constitutional populism to remain plausible.

5. Conclusion

At its core, *Taking the Constitution Away from the Courts* is not really about solutions. Though Tushnet does provide some threadbare ideas on how judicial review might be abolished practically, the themes of the book get at something a bit more intangible. Constitutional populism is about being unafraid to call the founding document of your nation your own rather than treating it as the property of one unelected government entity. Yes, his dualism is vague.

True, his necessary assumption that the public can make rational decisions on its Constitution in the same way (or better) than the Court can is maybe a lofty ideal. It would be wise to remember that this nation was founded on the lofty ideals of would-be politicians, not on the doctrine of the legal elite.

The thick Constitution may contain some thinness (and vice versa), and that tension does raise questions about the viability of Tushnet's argument. However, it does not defeat the theory entirely. The tension between the thick and thin Constitution says more about the thinness of the document as a whole than it does about the need for legal scholars to interpret it. Tushnet claims that his theory is legal in nature, rather than political or philosophical. It might be stronger if it were framed as the latter two subjects rather than the former. Perhaps further work could be done to demonstrate the Constitution as being fundamentally political, rather than legal, in nature. Developing constitutional populism in this way would alleviate concerns about the tension between the thick and thin Constitution, and may make the theory more convincing for the layman. The United States is a democracy. Politics are already entrusted to the whole public. Maybe the whole Constitution should be, too.

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