COLUMBIA UNDERGRADUATE LAW REVIEW

Volume XVI | Spring 2020 | Issue II

ARTICLES

COLUMBIA UNDERGRADUATE LAW REVIEW

VOLUME XVI | ISSUE II | Spring 2020

LETTER FROM THE EDITORS-IN-CHIEF

Dear Reader,

As we wrap up the spring semester during these extraordinary times, the Editors-in-Chief are proud to present the Spring 2020 issue of the *Columbia Undergraduate Law Review*. These four articles were impressive for their breadth of discussion and analytical rigor. They cover a range of timely issues, from campaign financing to colonial and Aboriginal law.

In addition to our print articles, the *Columbia Undergraduate Law Review* rekindled its collaborative effort with Columbia Law School students in our law journal panel event. In March, we welcomed current law students in senior editing roles from the *Columbia Law Review*, *Columbia Human Rights Law Review*, and *Columbia Business Law Review*, among others, to speak about managing law school classes alongside a publication. The event received overall positive feedback, and we look forward to future collaborative events with Columbia Law School.

We also successfully incorporated the Director of Communications role into our Executive Board, launched a weekly newsletter for members, and developed a summer publishing program for our Print division, which will begin this June.

Lastly, after the transition to a virtual semester in light of the COVID-19 pandemic, we must acknowledge the tremendous efforts of our Executive Board in adhering to publication timelines and maintaining contact with our membership. This marks the first time in CULR history that our Print and Online publications have been produced remotely. We will also continue to serve our members by crowdsourcing summer opportunities for those whose internship and research plans have been upended by the current crisis.

Without your readership and the incredible work of our Print, Online, and Business teams, CULR would not exist. We hope you enjoy leafing through our Spring 2020 issue, and we look forward to your continued readership of the *Columbia Undergraduate Law Review*.

Sincerely,
Zain Athar and Sonia Mahajan
Editors-in-Chief

LETTER FROM THE EXECUTIVE EDITOR

Dear Reader,

On behalf of the Editorial Board, I am proud to present the Spring 2020 issue of the *Columbia Undergraduate Law Review*'s print journal. We are excited to publish the following articles, which offer fresh perspectives on familiar legal problems.

In "Campaign Finance and the Fundamental Right of Political Equality: How the Court Failed in *Buckley v Valeo*," Tiernaur Anderson explores the constitutional basis of political equality. She argues that the Supreme Court's ruling in *Buckley v Valeo* subverted the model of prioritizing political equality.

In his article "'They're Grabbing At Straws!': *Bowman v Monsanto*, Genetically Modified Organisms, and the Consequences of Patented Life," Bronson Ford investigates the application of the patent exhaustion doctrine to genetically modified soybeans. He argues that the Supreme Court's ruling in *Bowman v Monsanto* subjects farmer and consumer autonomy to corporate authority.

Xiaoyu Huang, in "'Our Home and Native Land': Aboriginal Land Title in British Columbia, 1763-2020," examines the interaction between colonial and Aboriginal law in the contestation for fee-simple land ownership and sovereignty under Canadian common law. He shows that Aboriginal sovereignty is intimately tied to land ownership in practice.

Finally, in "Identity Speech—A Not So Risky Argument," Griffin Jones argues that First Amendment claims for protection of "identity speech" can be used to protect LGBTQ+ individuals. He finds that the use of identity speech is consistent with Supreme Court decisions and liberty jurisprudence.

With each successive publication, the *Columbia Undergraduate Law Review* strives to cultivate debate of legal issues, especially among undergraduates. We hope that you enjoy reading our print journal.

Sincerely,
Matthew Sidler
Executive Editor, Print

MISSION STATEMENT

The goal of the *Columbia Undergraduate Law Review* is to provide Columbia University, and the public, with an opportunity for the discussion of law-related ideas and the publication of undergraduate legal scholarship. It is our mission to enrich the academic life of our undergraduate community by providing a forum where intellectual debate, augmented by scholarly research, can flourish. To accomplish this, it is essential that we:

i) Provide the necessary resources by which all undergraduate students who are interested in scholarly debate can express their views in an outlet that reaches the Columbia community.

ii) Be an organization that uplifts each of its individual members through communal support. Our editorial process is collaborative and encourages all members to explore the fullest extent of their ideas in writing.

iii) Encourage submissions of articles, research papers, and essays that embrace a wide range of topics and viewpoints related to the field of law. When appropriate, interesting diversions into related fields such as sociology, economics, philosophy, history, and political science will also be considered.

iv) Uphold the spirit of intellectual discourse, scholarly research, and academic integrity in the finest traditions of our alma mater, Columbia University.

SUBMISSIONS

The submissions of articles must adhere to the following guidelines:

i) All work must be original.

ii) We will consider submissions of any length. Quantity is never a substitute for quality.

iii) All work must include a title and author biography (including name, college, year of graduation, and major).

iv) We accept articles on a continuing basis.

Please send inquiries to culreboard@columbia.edu and visit our website at www.culawreview.org.

TABLE OF CONTENTS

Campaign Finance and the Fundamental Right of Political Equality: How the Court Failed in Buckley v Valeo

Tiernaur Anderson | Columbia University

Edited By: Grace Protasiewicz, John David Cobb, Sarah Howard, Joyce Liu

Abstract

Campaign finance law is a complicated and technical area of politics; though it is highly specific, its implications are far-reaching. In the 1976 case of *Buckley v Valeo*, the Supreme Court made clear its stance on political contributions in campaigns, prioritizing the right to contribute and to receive contributions over another, better-established and more integral right: political equality. This paper lays out the constitutional basis of political equality, and considers the way the Court has upheld political equality through litigation of more specific rights, namely, the right to vote and the right of ballot access. Using legal precedent from such litigation as evidence, this paper argues that the *Buckley* ruling subverted the long-standing model of prioritizing political equality, putting the very underpinnings of the republic at stake and leaving the electoral process exposed to the corrupting influences of wealth.

I. Introduction and Background

To date, campaign finance regulation has occasionally been constitutionally permitted in the name of preventing corruption or the appearance of corruption but never in the interest of protecting political equality. Although the Constitution does not explicitly enumerate this right, political equality is strongly implied by the Preamble, Articles One and Four, and the Fourteenth Amendment. Furthermore, its status as a fundamental right has been substantiated

by the Supreme Court over the last several decades, most notably through cases regarding voting rights and ballot access. In the seminal campaign finance case of *Buckley v Valeo*, the Court failed to protect political equality as a fundamental right that is just as indispensable as those enumerated in the First Amendment, contravening the legislature and the judiciary's long history of upholding political equality through the protection of the right to vote and the right to ballot access. The Court's ruling in *Buckley*, together with the unequivocal establishment of the exigency of political equality, demonstrates the urgent need for campaign finance reform that *appropriately* balances the tension between First Amendment freedoms and the guarantee of political equality.

In *Buckley v Valeo,* the Federal Elections Campaigns Act (FECA), which regulated contributions and expenditures in federal campaigns, was challenged by a group of elected officials who claimed that several of the Act's provisions violated the First Amendment. In turn, the state had to defend FECA and its reasons for enacting it. In its defense, the state listed three interests. Its primary interest, which the Court accepted as legitimate, was to protect against corruption in elections. Its two ancillary interests were to protect the political influence of citizens and increase the accessibility of elections by slowing or reversing the rising costs of campaigning. The state's two ancillary interests line up exactly with the two principal methods of political participation—voting and running for election. Yet in *Buckley,* the Supreme Court rejected both of these ancillary interests, ruling that neither one was compelling enough for the state to regulate campaigns to the degree which it had in FECA. The Court's dismissal of these interests contravened decades of precedent that protected political participation and, instead, protected the freedom of campaign finance transactions at the expense of political equality.

While the argument of this paper is focused on political equality as it applies to campaign finance, a considerable amount of time is spent assessing political equality as it has been established

through voting rights and ballot access. This fairly comprehensive survey of political participation litigation is necessary to demonstrate the deeply rooted nature of the right to vote and the right to access a ballot, and that any interest in protecting these rights is neither illegitimate nor uncompelling. Furthermore, this history exhibits that despite not being expressly granted like many other constitutional rights, political equality is critical to the endurance of the republic. Understanding the establishment of precedent for protecting political equality is necessary to appreciate the gravity of the Court's decision to forfeit political equality in its adjudication of campaign finance regulations in *Buckley v Valeo*.

II. Political Equality

Political Equality in the Constitution

Though the Constitution does not explicitly establish the right to political equality, three of its other prominent features suggest that political equality is crucial to the functioning of the nation. First, the Constitution asserts a standard of equality as a basic principle—though it should be said that the standard itself did not amount to true equality in either theory or practice, as it was limited to white, property-owning men. Second, the Constitution makes a strong commitment to a republican form of government. Third, it implies a right to political participation by laying out a framework for elections.

Equality, though arguably intrinsic to the institutions engineered by the Constitution, is not explicitly invoked in the original document. Still, the importance of equality is evident by its explicit appearance in another founding document, the Declaration of Independence, which boldly asserts the 'self-evident truth' that "all men are created equal."[1] While this document is neither part of the Constitution nor holds the same legal power as the Constitution,

it is highly representative of the ideals and principles on which the United States government was constructed. Although this initial, deficient view of equality was highly exclusionary, the United States has moved closer to attaining the ideal of true equality over the course of the nation's history through social movements and constitutional amendments alike. For example, the Fourteenth Amendment contains the first explicit mention of equality in the Constitution. While it was not ratified until 1868, its endorsement of equality is unambiguous: "No state shall…deny to any person within its jurisdiction the equal protection of the laws."[2] It must be said, however, that even after the passage of the Fourteenth Amendment, the boundaries of this equality were confined to a select group because of rampant, intentional discrimination at every level of the government. Even today, the battle for equality is still being fought. Still, though the interpretation has varied, the Constitution's commitment to some model of equality has always been clear.

Secondly, the Constitution establishes a republican form of government. This intention is clear in two particular places. The Preamble of the Constitution—which is the only place where the Framers state their general goals—asserts that the entities establishing these institutions are "[w]e the people of the United States."[3] By definition, the authority of a republican government hinges on the participation of the people it governs through selected representation.[4] The subject that opens the Preamble has been historically understood as encompassing the people governed by the federal government, thus indicating that it is, in fact, a republic. The Constitution also establishes this form of government at the state level, asserting that "[t]he United States shall guarantee to every State in this Union a Republican Form of government."[5] From these two excerpts, the Constitution's aim of establishing a republican form of government is undeniable.

Finally, the Constitution indirectly establishes the right to political participation. Broadly, the act of political participation is

implied by a republican form of government, as political participation is the mechanism by which the governed can give their consent. The Constitution also elaborates upon the creation of a framework for elections, which are the primary instrument of political participation. For instance, Article One specifies that states control the "times, places, and manner" of federal elections, but Congress can regulate these conditions, among other stipulations.[6] The fact that such provisions were included in the original Constitution confirms that political participation is a necessary ingredient for sustaining republican government.

Together, the Constitution's pledge to equality, its guarantee of a republican form of government, and its implied assurance of political participation signify a commitment to political equality. Since political participation is the most concrete of the three factors that constitute political equality, it is the factor whose litigation best illustrates the precedent of protecting political equality.

Establishing the Precedent of Political Equality: Voting Rights

The two principal features of political participation—voting and ballot access—are not explicitly framed as fundamental rights in the original Constitution. However, just as political equality is implicitly established as a fundamental right, both voting and ballot access are implicitly established through constitutional amendments and legal doctrines derived from cases in the Supreme Court. Specifically, voting rights have been confirmed through cases where the Court has adjudicated poll taxes, residency requirements, grandfather clauses, literacy tests, voter ID laws, primary voting rights, and legislative apportionment. Voting as an instrument of political participation does not merely mean that a person has the right to cast a vote, but that, in accordance with political equality, the vote is counted with equal weight as every other. Casting a vote that is not counted equally or at all does not amount to the kind of

political participation guaranteed by political equality.

Voting Rights through Constitutional Amendment

One particularly validating expansion of the right to vote was the thread of constitutional amendments that extended suffrage by lessening restrictions, first on race, then on sex, and then on age. The Fifteenth Amendment, ratified in 1870, protects the right to vote regardless of race, color, or previous condition of servitude. The Nineteenth Amendment, which came in 1920, extended suffrage to people of all sexes. Finally, the Twenty-Sixth Amendment, which was ratified in 1971, lowered the voting age to eighteen. Importantly, in each of these amendments, the language is explicit: "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State."[7] Not only did these amendments bring political equality closer to true equality, but they codified the right to vote as just that—a right.

Establishing the Precedent of Political Equality: Ballot Access

A republican form of government requires not only that people can vote, but that people can vote for their preferred choice of representative, chosen *from the people*. By this standard, ballot access is a critical aspect of political participation. Like voting, ballot access must be protected equally in order to achieve political participation that upholds political equality. However, for ballot access, practicality is a more salient issue than it is for voting rights; the administrative costs are much higher for each additional candidate than they are for each additional voter, and too many candidates on a ballot may reach a tipping point where political participation on the part of the voter is actually hampered. That is to say, the state has many legitimate interests in limiting ballot access. Thus, the establishment of what amounts to equal protection of ballot access

has been a far thornier path than it has been for voting rights. Over the years, it has been clarified and established through court cases that considered filing fees and minor party access restrictions as impediments to ballot access.

While the practical application of the right to vote generally lends itself to the protection of political equality, the reverse is true for application of ballot access. The state may have several motivations for restricting the number of candidates listed on a ballot. Firstly, the state wants to maintain ballot integrity by listing competent candidates who are legitimately fit for office.[8] The state also has an interest in preventing voter confusion by simplifying the ballot and by limiting the number of choices for the voter.[9] In addition, the state benefits from the administrative convenience of a more restricted ballot; it is easier to design, easier to administer, and easier to count.[10] These interests are legitimate, as evidenced by a great deal of political science research, as well as historical examples of how much power ballot administration holds. One study found that, faced with a greater number of decisions, a voter is likely to experience "choice fatigue," which can lead to abstentions or reliance on "decision shortcuts," causing voters to cast ballots that don't actually reflect their true preferences.[11] Other analyses found that there is a positive relationship between ballot length and voter roll-off, which is when a voter intentionally abstains from filling out the entirety of a ballot.[12,13] Even ballot design itself is a crucial aspect of protecting elections. After all, the entire country felt the effects of poorly designed ballots in 2000, when voter confusion in Palm Beach, Florida, reversed the outcome of a presidential election, arguably setting the country on a drastically different course.[14] Whereas the tension in protecting political equality when regulating voting rights is external (the tension between protecting the electoral process and protecting personal freedoms), the tension in protecting political equality when it comes to ballot access is an internal one: too much regulation could compromise the electoral

process, but so could too little.

The main concern of ballot access litigation has been one of financial accessibility. A filing fee is a technique used to minimize the number of candidates on a ballot. Although this is a legitimate interest, the question of how regulating candidacy based on financial status interferes with the electoral process and infringes on candidate rights remains. Two filing fee cases in particular stand out for the doctrines and precedence they generated. In the 1972 case of *Bullock v Carter*, three Texas residents who sought to be candidates for three separate offices and who met all the specified qualifications were unable to pay the respective filing fees. In response, they petitioned against the state of Texas, claiming the filing fee scheme to be unconstitutionally discriminatory. In its opinion, the Court framed the presented question as potential discrimination against "the candidates so excluded *or* the voters who wish to support them," framing ballot access and voting rights as interconnected issues [emphasis added].[15] This association will become crucial when considering political equality in campaign finance, as it serves as the Court's acknowledgement that limiting the type and number of candidates who are on the ballot inherently affects the rights of the voters who must choose among the candidates that remain.

Next, in considering what level of scrutiny to apply to the usage of filing fees, the justices recognized that this case was not exactly comparable to poll taxes in *Harper* because the Court had not attached as fundamental a status to the rights of a candidate as to those of a voter. Still, the Court conceded that "because the Texas filing-fee scheme has a real and appreciable impact on the exercise of the franchise [which] is related to the resources of the voters supporting a particular candidate, we conclude, as in *Harper*, that the laws must be 'closely scrutinized' and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster."[16] In this case, the Court determined that while the interest of regulating a ballot is legitimate, the remedy

was not minimal enough under strict scrutiny because the fees were so excessive. This factor made the Court suspect that the state's *real* interest was in having candidates foot the bill of the primary elections. Thus, Texas's specific statute did not pass constitutional muster, and excessive filing fees were struck down.

Two years later, the Supreme Court again adjudicated on filing fees in *Lubin v Panish.* In this case, a California state statute that required candidates for county supervisor positions to pay a $701.60 filing fee was contested by Lubin, a California citizen seeking candidacy.[17] Though the Court again recognized that limiting ballot size is a legitimate state interest, it qualified its recognition by ruling that this interest cannot burden the interest of a candidate, namely, pursuing political opportunity.[18] Again, the Court recognized that ballot access is inherently related to voting rights, skillfully elaborating on this relationship:

> The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance. The right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters. This must also mean that the right to vote is 'heavily burdened' if that vote may be cast only for one of two candidates in a primary election at a time when other candidates are clamoring for a place on the ballot. It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues. This does not mean every voter can be assured that a candidate to his liking will be on the ballot, but the process of qualifying candidates for a place on the ballot may

not constitutionally be measured solely in dollars.[19]

Ultimately, because the state's interest did not appropriately account for voter's rights, and because the remedy for the interest was not narrowly-tailored (in that, wealth discrimination could have been avoided if an additional means of ballot access was provided), the Court struck down filing fees as sole means of ballot access. This ruling established the precedent that wealth status is not indicative of a candidate's qualification or public support.[20]

The Court has even adjudicated ballot impediments to minor parties, recognizing that the voter's rights are also affected when the ballot does not include candidates that represent their ideologies. In *Williams v Rhodes*, two minor parties were denied ballot access due to an Ohio statute that made it "virtually impossible" for any parties other than the Democratic or Republican party from being listed on the ballot.[21] In the majority opinion, Justice Black clarified once again that the states' power to regulate elections is significant, but it cannot violate any existing constitutional provision, including the Fourteenth Amendment.[22] He notes that the distinctions between minor and major parties made in the statute "places burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively."[23] The involvement of these rights triggers strict scrutiny, and because the state failed to show a compelling, narrowly-tailoring interest, the Court deemed the statute unconstitutional. This ruling is meaningful in the context of political equality in campaign finance because it signifies the Court's willingness to understand the degree to which voters see their views represented on the ballot as interwoven with the voters' right to cast an effective vote. Indeed, these rights are intertwined, as they are both mechanisms of political participation, and both cannot be infringed upon baselessly under the constitutional guarantee of

political equality.

III. Political Equality in Campaign Finance

Although the evolution of campaign finance in America has taken a long and circuitous path, there is one specific moment in this history that best exhibits the legislature's commitment to political equality and the judiciary's adverse response. The passage of the Federal Election Campaign Act (FECA) in 1971 and its subsequent litigation in *Buckley v Valeo* demonstrated the Court's hesitation to uphold political equality for fear of infringing upon First Amendment freedoms. This debate became the central tension that has driven campaign finance regulation since *Buckley* was decided in 1976, a decision which injured the status of political equality and posed a threat to the republic.

Buckley v Valeo

The reason *Buckley* is such an apt illustration of the legislature's commitment to political equality lies in the explicit interests laid out by the state in its argument. Its primary interest in passing FECA, and the only one deemed sufficient by the Court, was to prevent corruption or the appearance of corruption. Its two ancillary interests were to protect the equal ability of all citizens to influence elections and to slow rising costs of campaigns in order to equalize ballot access. Because these ancillary interests line up so clearly with the two rights implied by the constitutional guarantee to political participation under a framework of political equality, it is clear that *Buckley* served as the defining moment in which the Court could confirm or reject the government's commitment to political equality. However, to understand the significance of the Court's response to the state's asserted interests, one must first understand the legislation at issue and the arguments presented in the case.

For nearly a century, Congress had sought to enact campaign finance reform, starting with an urging from Theodore Roosevelt in 1905, who wanted to eradicate corruption. Finally, in 1971, Congress decided to centralize the regulations by writing the Federal Elections Campaign Act (FECA). Initially, the Act focused mainly on implementing strict disclosure requirements for contributors. Following the corruption scandals of the 1972 Presidential election, Congress strengthened campaign finance law by amending the Act, supplementing it with more rigorous regulations.[24] Among other changes, these amendments placed limits on contributions to campaigns; placed limits on expenditures by campaigns, affiliates, and individuals; mandated additional disclosure requirements; created a campaign subsidy scheme for candidates; and established the Federal Election Commission as the enforcing agency of these regulations. These amendments were enacted in October of 1974; in January of 1975, Senator James Buckley (R-NY) and former Senator Eugene McCarthy (D-MN) challenged several of the Act's main provisions as unconstitutional in the suit they filed against Francis Valeo, the Secretary of the Senate.[25] This response, a near-immediate and bipartisan effort, exhibited the strong resistance to regulations on the processes by which those in power could stay in power.

Principally, six features of FECA's campaign finance regulation schema were challenged in the lawsuit. Three of these sections concerned contribution ceilings: §608(b)(1), a $1 thousand limitation on individual contributions to a single candidate; §608(b)(2), a $5 thousand limitation on contributions by a political committee to a single candidate; and §608(b)(3), a $25 thousand limitation on total contribution by an individual in one calendar year. The other three sections concerned expenditure ceilings: §608(a), a limitation on a candidate's expenditure from their own personal funds; §608(c), a ceiling on overall campaign expenditures by candidates; and §608(e)(1), a $1 thousand limit on independent expenditures for

a singular candidate.

The Supreme Court deliberated whether contributing or spending money for the benefit of a candidate constituted a form of conduct, or a form of speech. The distinction has major implications: regulation of speech puts restraints on First Amendment rights, triggering the use of strict scrutiny. However, regulation of conduct is not necessarily an infringement on fundamental freedoms and thus does not automatically warrant such a strict standard of review. The Court found that neither party's claim was completely accurate. After all, "some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two."[26] When the Court cannot deem whether a provision necessarily regulates a fundamental right or not, it looks at the practical application and actual impacts of the regulation to deem how it affects the fundamental rights of the regulated entity.[27] This is the approach the Court chose to take in *Buckley*.

This approach, however, left unclear exactly how the contribution or expenditure of money in a campaign is to be categorized. So, before evaluating the plaintiffs' specific claims, the Court clarified this point, making a faint and arguably unfounded distinction between expenditures and contributions that would generate unremitting criticism that continues even today. The justices asserted that political speech made by campaign expenditures is directly proportional to the amount of money spent; in other words, the more money spent, the more speech made. Thus, in the Court's view, regulating expenditures directly regulates speech. Separately, speech made by campaign contributions is symbolic: it is the *act* of contributing that constitutes making speech, not the *amount* contributed. Thus, to the Court, regulating contributions does not amount to regulating speech.[28] In reality, though, money is money; whether it is raised and spent directly by a campaign, or it is spent by someone else on the campaign's behalf, it has the same power.

Furthermore, there are many ways to speak without spending money, and although financial resources do aid in the amplification of speech, equalizing those resources does not cut anyone off from their freedom to speak out. The distinction made here is a weak one and diminishes the Court's authority on the issue of whether this case truly presents a speech issue or merely presents an issue for wealthy donors and those in power. Nonetheless, this was the distinction the Court made, and given this distinction, some of FECA's regulations infringed on freedom of speech to a greater extent than others, in that limits on expenditures actually restrict the amount of speech, while limits on contributions merely involve but do not restrict the freedom of speech.

Since both types of limits at least *involve* a fundamental freedom, the Court settled on using a strict standard of review. Accordingly, the Court laid out the interests claimed by the state (as listed above) so that it could subsequently determine whether the interests were compelling, and whether the regulations of the Act were narrowly-tailored to those interests. Analysis of the Court's evaluation of each of the three interests as they apply to each of the six provisions challenged in the suit reveals how the Court's *Buckley* decision implicitly introduced a new, regressive position on political equality.

First, the Court responded to the state's primary interest of "prevent[ing] corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office."[29] This interest was the only one deemed sufficient by the Court, though only for regulation of contribution ceilings and not for expenditure ceilings. Out of the three provisions establishing contribution ceilings, state interest was relevant for two of them: §608(b)(1), the limit on an individual's contribution per candidate, and §608(b)(3), the limit on an individual's aggregate contribution per year. For §608 (b)(2), the limit on committee contribution per candidate, state's interest was not relevant because the appellants claimed that this limit unconstitutionally discriminated against

certain groups, a claim which the Court simply stated was "without merit."[30] The Court considered the state's primary interest to be sufficient for both of the relevant provisions.

For §608(b)(1), the limit on an individual's contribution per candidate, the Court found that "it is unnecessary to look beyond the Act's primary purpose in order to find a constitutionally sufficient justification" for the limit.[31] The Court reasoned that candidates who cannot personally fund elections rely on contributions for effective campaigning, so recipients of large contributions are highly susceptible to engaging in *quid pro quo*—a claim for which the Court cited the 1972 presidential election as evidence. Further, the Court explained that this threat "undermine[s] the integrity of our system of representative democracy."[32] For §608(b)(3), the limit on an individual's aggregate contribution per year, the Court argued that the same logic applies because the restriction imposed by this aggregate limit is "no more than a corollary" of the §608(b)(1) limit.[33]

For the three provisions establishing expenditure ceilings—§608(a), §608(c), and §608(e)(1)—the Court rejected the state's primary interest on the grounds that spending money on behalf of someone does not pose the same threat of corruption that giving money to someone does. This claim seems to be another arbitrary distinction for which the Court provides no substantiation: spending money for someone's benefit creates effectively the same political power dynamic as giving that money directly to the beneficiary. For §608(e)(1), at least, this baselessness is immaterial, as the Court asserted that this independent expenditure ceiling does not sufficiently relate to the interest of *quid pro quo* anyhow because it only prevents *some* large expenditures, since the regulation applies to neither political parties nor campaign organizations.[34] For §608(a), a limitation on a candidate's expenditure of their own funds, the Court ruled similarly that "the primary governmental interest served by the Act…does not support the limitation on the

candidate's expenditure of his own personal funds."[35] Finally, for §608(c), the Court also found that limiting candidate expenditures would not serve the aim of preventing corruption any more than the Act's disclosure requirements, which had been deemed constitutional, already did. The justices refuted the Appeals Court's argument that unchecked expenditures could be used as a loophole for contribution limits, arguing that criminal penalties and "political repercussion" for such a violation would be enough to deter any attempts.[36] Thus, while the state interest of preventing corruption is a compelling one, §608(c) is not narrowly tailored enough to this interest to be a constitutional infringement on the freedom of speech.

Next, the Court turned to the state's two ancillary interests—equalizing voting power and equalizing ballot access—both of which the Court found to be either irrelevant or insufficient for each of the six ceiling provisions. Because the Court found the state's primary interest of preventing corruption to be sufficient (or irrelevant in the case of §608(b)(2)) for the contribution limitations, it did not address these regulations in terms of either of the state's ancillary interests. However, it did address these ancillary interests for each expenditure limitations that it deemed relevant.

The state's first ancillary interest was using "limits [that] serve to mute the voices of affluent persons and groups in the election process [to thereby] equalize the relative ability of all citizens to affect the outcome of elections."[37] For both §608(a), a limitation on a candidate's expenditure of their own funds, and §608(c), an aggregate limit on campaign expenditures, the Court deemed this ancillary interest as irrelevant, likely because both provisions only concerned the candidates and not the voters, that is, 'the citizens who affect the outcome of elections.' However, for §608(e)(1), which does concern expenditures by these individual voters and citizens, the state argued that this interest is served because limiting the wealthy from speaking more in campaigns decreases the disparity in political speech and allows for less affluent voices to be heard. The

Court was not persuaded by this argument, though, remarking that "the restrict[ion of] the speech of some [members] of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure 'the widest possible dissemination of information from diverse and antagonistic sources,' and 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[38]

It is here that the Court blatantly favors the protection of alleged First Amendment freedoms over political equality, forsaking its previous commitment to the equal protection of political participation, including in cases of discrimination based on wealth status. Of course, the notion of free speech is just as integral to the ideals of this nation as political equality; in fact, these two ideals often go hand in hand. The Court's prioritization of free speech is not the issue, but rather, it is that the Court has categorized this provision as a regulation on speech in the first place. Were this, for example, a restriction on the number of words an individual could publicly expend on a single candidate during an election cycle, the Court's condemnation of the regulation would be understandable. However, this is not the case; while the provision in question limits the amount of money an individual can spend in support of the candidate, they would still have every right to speak freely about that candidate once they had reached the expenditure limit. Moreover, the Court has equated independent expenditure to speech while insisting that contribution is merely a form of conduct. A supporter spending money on behalf of a candidate is essentially the same as if the supporter had donated money to the candidate; both are financial signals of support. Since, to the Court, a contribution is an action whose monetary amount does not correlate with speech amount, there is no clear reason why the monetary amount of an individual expenditure *would* correlate with the amount of speech made. The Court claims this provision is wholly foreign to the First Amendment, when in fact it is the Court's ruling that

is wholly foreign to the Constitution and to its own precedent.

The state's second ancillary interest was "to [put] a brake on the skyrocketing cost of political campaigns [to thereby] open the political system more widely to candidates without access to sources of large amounts of money."[39] Though the Court stated that this interest is relevant to §608(a), the limit on use of personal funds, it deemed the interest insufficient because it is not actually guaranteed to make equal the funds of candidates (since other factors, such as effective fundraising and volunteer efforts, may propel one candidate ahead of another financially, even if the use of personal funds is limited). Additionally, the Court asserted that prohibiting a person from spending money to speak about themselves is wholly unconstitutional.[40] The Court responded similarly to §608(c), the limitation on overall candidate expenditures, asserting that this regulation may not even have an equalizing effect because it could actually handicap lesser-known candidates since they would need to spend more money than their better-known counterparts to "catch up." Furthermore, the Court observed that expenditures are mainly the spending of contributions, which have already been limited, and "there is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate."[41] In responding to §608(e)(1), the Court merely chose not frame this regulation in terms of the second ancillary interest at all. This is likely because this limit of $1 thousand expenditure per individual per candidate is encompassed in the aggregate individual expenditure limit, which the Court had already addressed and refuted in the terms of the second ancillary interest.

In summary, the only state interest the Court found sufficient was that of preventing corruption. Because the Court deemed early on that only contributions, not expenditures, are susceptible to corruption, this primary interest was only sufficient for three of the six challenged provisions. This distinction has been highly scrutinized and criticized over the years, although it is not of great

relevance to the argument that the Court squandered its chance in *Buckley* to confirm the fundamental status of political equality. What is of relevance to this argument is that the Court found neither of the interests that concerned the protection of political equality sufficient.

IV. Impacts of the Failure to Protect Political Equality

The impacts of the Court's failure to recognize protection of political equality as a sufficient state interest for regulating campaign finance are threatening to the very functioning of our republic. This statement may sound sensational, but considering that political equality as a fundamental right is derived from constitutional and founding values, it is clear that political equality is instrumental to the preservation of representative government.

The string of primary litigation that dealt with how far Congressional authority could constitutionally reach into election regulation serves as a prime example for how the Court can recognize that even freedoms like speech and association have limits. In these cases, the Court demonstrated that one must identify the real-world impacts that failing to regulate these freedoms has on political processes in order to ascertain the exact limits of these freedoms. For example, preservation of political equality through equal voting rights was at stake in *Terry v Adams*[42], just as it was in *Buckley*. The Court ultimately ruled in *Terry* that freedom of association met its limits when it tried to perform a state function (running primary elections) but did not abide by the Constitution. Campaign finance is roughly parallel to this case: campaign communication involves speech but is also highly related to a state function of running elections and facilitating influence on the political process by the electorate. Although protection of the freedom of speech is important, so is the protection of the political process. In *Terry,* some infringement on the freedom of association was allowed in order to preserve the equality of the political process being affected

by that association; yet, in *Buckley*, the Court was unwilling to allow minimal infringement on the freedom of speech in order to preserve the equality of the same political process. The Court's ruling in *Buckley*, therefore, was inconsistent with its own, earlier reasoning.

In *Bullock v Carter*[43], the Court explicitly recognized that it is impossible to impede ballot access without also interfering with voting rights, as it asserted that "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters."[44] Although campaign finance law may be tailored to legitimate state interests in ways that incidentally restrict ballot access, there are few state interests that justify interfering with voting rights. Since the two are inherently connected, even if ballot access restriction can pass constitutional muster for its infringement on political equality, the impacts of that infringement on voting rights make it difficult for the restriction to retain its constitutional status. Specifically, by failing to uphold expenditure limits that decrease the overall price of a campaign, the Court is allowing poorer candidates to be restricted from ballot access. The ballot restriction itself is already constitutionally questionable, as it "qualif[ies a] candidate[']s place on the ballot [by] measur[ing them] solely in dollars," which the Court ruled was unconstitutional in *Lubin v Panish.*[45] After all, Justice Douglas, concurring, noted: "What we do today thus involves no new principle, nor any novel application…Voting is clearly a fundamental right. But the right to vote would be empty if the State could arbitrarily deny the right to stand for election."[46]

While the question of whether or not financial status is the *sole* qualification for ballot access when campaign finance regulations are absent may be debated, the impact of this ballot access impediment has its own clear precedent of unconstitutionality. In preventing poor people from being able to run a campaign that puts them effectively in the race and on the ballot, the Court is preventing the representation of a demonstrated community of interest—the poor—an impediment

which precedent from *Williams v Rhodes*[47] says is unconstitutional.

The Court even said itself in *Buckley* that it is willing to impede on constitutional freedoms when the integrity of the system of representative democracy is undermined. That the Court deemed corruption as a threat to the integrity of this system is not incorrect, but it is certainly not the only threat presented to the justices in *Buckley*—the two ancillary state interests indicate that failing to allow for equal voter influence and ballot access can be just as threatening. Indeed, the need for political equality in the implementation of political processes is critical. Nothing is more integral to a system of representative democracy than true and complete representation, a truth which has been established again and again in the Supreme Court. In the case of *Reynolds v Sims*, in which the Court struck down an Alabama legislative apportionment scheme that diluted votes in some counties by a factor of forty, Justice Warren remarked: "Since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."[48] As Justice Warren points out, other freedoms are automatically protected when political equality is secured in political processes; this inheritance serves as all the more reason why the Court should have allowed minimal, constitutional infringement on the freedom of speech in order to protect the larger, more fundamental right of political equality.

Political equality has been plainly established through the founding promise of equality, the constitutional commitment to a republican government, and the constitutional guarantee of political participation through elections. The precedent of prioritizing political equality has been made just as clear through decades of Supreme Court cases which have upheld the equal protection of voting rights and ballot access as instruments of political participation. In *Buckley*, the government stated its interests in using campaign finance regulations to explicitly defend the equal protection of these

two instruments—interests which the Court found, erroneously, to be insufficient. It is clear that without campaign finance regulations, non-wealthy people cannot be represented in government the same way as wealthy people are, a disparity which undermines the basic notion of equality, the authentic implementation of a republican government, and the enjoyment of fair elections alike. As a result, the *Buckley* decision is a threat to political equality. Without political equality, the vision of the government formed early on in our nation's history cannot be fulfilled. Therefore, the Court must overturn its decision in *Buckley* and the abandonment of political equality it signified.

[1] Declaration of Independence, 1776
[2] US Const. amend. XIV, sec. 1
[3] US Const.
[4] Ginsberg et al., *We the People*, 12
[5] US Const. article IV, sec. 4
[6] US Const. article I, sec. 2, 4, 5
[7] US Const. amend. XV, XIX, XXVI
[8] Jardine, "Ballot Access Rights", 304, 306
[9] Ibid*,* 305
[10] Ibid*,* 307
[11] Augenblick and Nicholson, "Ballot Position, Choice Fatigue, and Voter Behaviour"
[12] Bowler, "Ballot Propositions and Information Costs"
[13] Selb, "Supersized Votes"
[14] Mebane, "The Wrong Man Is President!"
[15] *Bullock v. Carter,* 405 U.S. 134 (1972) at 141
[16] Ibid, 144
[17] *Lubin v. Panish* 415 U.S. 709 (1974) at 711
[18] Ibid*,* 712, 716
[19] Ibid*,* 716
[20] Ibid*,* 717
[21] *Williams v. Rhodes* 393 U.S. 23 (1968) at 25
[22] Ibid, 29
[23] Ibid, 30
[24] "The FEC and the Federal Campaign Finance Law"
[25] "S.3044"; "The Federal Election Campaign Laws"
[26] *Buckley v. Valeo,* 424 U.S. 1 (1976) at 15
[27] Ibid*,* 17, 16
[28] Goldberg, "Writing Reform: A Guide to Drafting State & Local Campaign Finance Laws", 1
[29] Ibid*,* 21
[30] Ibid*,* 25-26
[31] Ibid, 36
[32] Ibid*,* 27
[33] Ibid*,* 27
[34] Ibid*,* 38
[35] Ibid*,* 45
[36] Ibid*,* 53

[37] Ibid, 55-56
[38] Ibid, 26
[39] Ibid, 49
[40] Ibid, 26
[41] Ibid, 54
[42] *Terry v. Adams*, 345 U.S. 461 (1953)
[43] *Bullock v. Carter,* 405 U.S. 134 (1972) at 141
[44] Ibid, 56-57
[45] *Lubin v. Panish, supra*, at 716
[46] Ibid, 721-722
[47] *Williams v. Rhodes* 393 U.S. 23 (1968)
[48] *Reynolds v. Sims, supra* at 561-562

Works Cited

93rd Congress. 1974. *S.3044 - 93rd Congress, 1973-1974.* October 15. Accessed November 28, 2020. www.congress.gov/bill/93rd-congress/senate-bill/3044.

Augenblick, Ned, and Scott Nicholson. 2015. "Ballot Position, Choice Fatigue, and Voter Behavior." *The Review of Economic Studies* 83 (2): 460-480.

Bloch, Matthew, and et al. 2014. "Mapping Poverty in America." *The New York Times.* New York: The New York Times, January 4.

Bowler, Shaun, and et al. 1992. "Ballot Propositions and Information Costs: Direct Democracy and the Fatigued Voter." *The Western Political Quarterly* 45 (2): 559.

Carp, Robert A. 1987. "Juifical Conflict and Consensus: Behavioral Studies of American Appellate Courts." Edited by CHarles M. Lamb Sheldon Goldman. *American Political Science Review* (Lexington: University Press of Kentucky) 81 (2): 633-634.

Ginsburg, Benjamin, and et al. 2019. *We the People: An Introduction to American Politics.* W. W. Norton & Company.

Goldberg, Deborah. 2004. *Writing Reform: A Guide to Drafting State & Local Campaign Finance Laws.* May 6. Accessed December 3, 2019. www.brennancenter/org/sites/default/files/legacy/d/ch.1 2004.final.pdf.

Jardine, James. 1974. "Ballot Access Rights: The Constitutional Status of the Right to Run for Office." *Utah Law Review*(2): 290-332.

Mebane, Walter R. 2004. "The Wrong Man Is President! Overvotes in the 2000 Presidential Election in Florida." *Perspectives on Politics* 2 (3): 525-535.

Minnite, Lorraine C. 2007. *The Politics of Voter Fraud.* New York: Demos.

O'Brien, David M. 2017. *Constitutional Law and Politics.* W. W. Norton & Company.

Rhodes, Jesse H. 2017. *Ballot Blocked: The Political Erosion of the Voting Rights Act.* Stanford University Press.

Selb, Peter. 2007. "Supersized Votes: Ballot Length, Uncertainty, and CHoice in Direct Legislation Elections." *Public Choice* 135 (3-4): 319-336.

Stewart, Charles. 2013. "Voter ID: Who Has Them; Who Shows Them." *Oklahoma Law Review* 66 (1): 21-52.

1776. "The Declaration of Independence."

2019. *The FEC and the Federal Campaign Finance Law.* February. Accessed November 25, 2020. https://transition.fec.gov/pages/brochures/fecfeca.shtml#Historical_Backgroun.

The Federal Election Campaign Laws: A Short History. https://transition.fec.

gov/info/appfour.htm.
1789. "The United States Constitution."
2019. *Voting Rights Advancement Act of 2019 (H.R. 4)*. www.govtrack.us/congress/bills/116/hr4.

"They're Grabbing At Straws!": Bowman v Monsanto, Genetically Modified Organisms, and the Consequences of Patented Life

Bronson Ford | Pennsylvania State University

Edited by: Kay Barber, Giorgia Fujita, Christopher Hudson, Ohad Klopman

Abstract

Vernon Bowman, an elderly farmer from Indiana, stored excess soybean seeds for future planting seasons throughout the early 2000s. Monsanto held patents on those seeds because the company had genetically modified the seeds to be resistant to glyphosate, an herbicide Monsanto produced and sold under the brand name Round Up. Upon learning that Bowman had saved seeds, Monsanto filed suit in federal court against the farmer for violating the company's leasing agreement and patent rights. Bowman contended that the doctrine of patent exhaustion applied to all progeny grown after the second generation of soybeans. In *Bowman v Monsanto*, the Supreme Court unanimously ruled in favor of Monsanto in a narrow decision limited exclusively to the patents being questioned and maintained precedent that patents on living organisms cannot be exhausted, along with upholding an $84,456 fine on Bowman. Although the press and pundits gave little consideration to the case at the time, the Court's decision may likely lead to significant economic and environmental consequences, along with protracted antitrust and patent law litigation, for the foreseeable future.

I. Introduction and Background

Looking out upon the rolling hills of tobacco plants on his family's Shadwell farm, a budding Thomas Jefferson began to cultivate a deep-rooted appreciation of agriculture.[1] This sprouting

fondness grew in his mind throughout his life, so much so that when elected to government, Jefferson—who described himself as "entirely a farmer, soul and body"[2]—sought to plant his agrarian ideals among his fellow citizens, as he declared that "while we have land to labour then, let us never wish to see our citizens occupied at a workbench" and to "let our workshops remain in Europe."[3] Jefferson sewed along with these agrarian ideals the first patent law, tended so that inventors could reap the bounties of their product.[4]

But, could the brilliant, albeit mythologized, Jefferson foresee these two clashing once the nation blossomed? Would the yeoman always be happy? It seemed unthinkable that the courts would have to determine the legal owner of a crop. Whether he could foresee such a future or not, that conflict met its apex in February 2013 at the Supreme Court of the United States.

Within the first two minutes of oral arguments from farmer Vernon Bowman's attorney, Chief Justice John Roberts inquired about that peculiar relationship between agriculture and patent law: "Why in the world would anybody spend any money to try to improve the seed if as soon as they sold the first one anybody could grow more and have as many of those seeds as they want?"[5] Though seemingly straightforward, the question is indicative of the rather esoteric debate in which *Bowman v Monsanto* transpired.

The lawsuit contested whether Monsanto's patent rights became exhausted once soybeans that Bowman grew produced new progeny, but the Supreme Court unanimously ruled in favor of the company.

Despite a seemingly conclusive decision that maintained the status quo interpretation of the doctrine of patent exhaustion, controversy persists over this case and the broader influence of genetically modified organisms. The Court's decision effectively yet subtly turned the issue into a question of economic and environmental sustainability. With the DNA of the most common agricultural crops being patented by a consolidated industry without

objection, farmers and consumers may have reason to worry that food prices could increase due to oligopolistic market control and that food supply chain security could become unstable in the coming decades due to environmental degradation. There are, however, alternative property rights that the seed industry can adopt to avoid antitrust violations and gain public trust, though patent rights for similar crops will likely face litigation for the foreseeable future. Accordingly, this decision may become one of the most influential in the history of biotechnology.

II. Genetically Modified Soybeans

To understand the issue in this case is to understand the business and science behind Monsanto's glyphosate-resistant soybeans. The relatively new variety has been deemed both a financial and agricultural success for the exponential growth in its usage in just a few years.

Founded in 1901 by John F. Queeny in St. Louis, Missouri, Monsanto initially produced foodstuffs such as saccharin.[6] The company first produced agricultural chemicals—including 2,4-D, later used as an active ingredient in Agent Orange—in the 1940s, but the firm did not establish its Agricultural Division until 1960.[7] Two decades later, company scientists began experimenting with genetic modification of plant cells and conducted field trials of genetically modified seeds, along with acquiring several small seed firms.[8] In 2000, the original Monsanto, which consisted of both agricultural and medical technology sectors, merged with pharmaceutical company Upjohn to become Pharmacia.[9] The agricultural division was subsequently spun off into the new Monsanto Company, of which Pharmacia—now a subsidiary of Pfizer—has no equity.[10] In 2018, the U.S. Department of Justice approved Monsanto's sale to German pharmaceutical company Bayer for $66 billion, contingent upon Bayer selling its seed and herbicide divisions to BASF.[11]

Worth approximately $55 billion at the time of the Supreme Court's ruling, Monsanto owned dozens of seed and chemical brands and holds over 1,700 patents.[12] Of its $14 billion in average yearly revenue originating from sales of agricultural products, genetically modified seeds generated $10 billion.[13] Monsanto acted as the dominant firm in the seed market; however, the firm faced competition from a few firms, primarily from DuPont, Syngenta, and Dow.[14] At the time the case was argued in appellate court in 2009, these four firms controlled 53.9% of the seed and biotechnology industry,[15] which is defined by the concentration ratio as being oligopolistic.[16]

Only recently has the seed industry grown to be dominated by these few firms. Prior to the 1970s, small distributors comprised most of the industry.[17] The Plant Variety Protection Act (PVPA) of 1970, written to encourage more private firms to enter the seed market, enabled patent rights of twenty years for genetically modified seed varieties.[18] In addition, the Supreme Court's decision in *Diamond v Chakrabarty* in 1980 found that "a live, human-made micro-organism is patentable."[19] *Diamond* and the PVPA gave firms an incentive to invest more resources in research and development of plant species. As firms began to compete in the biotechnology market, innovation became necessary for financial success. Genetic science, along with consolidation, soon arose as essential for reaching economies of scale.

To remain competitive in the seed market, Monsanto invested heavily in genetic research in the late 1980s and early 1990s.[20] Its research intended to create plants resistant to the herbicide glyphosate, which is utilized to kill destructive weeds. Coincidentally, Monsanto developed and brought glyphosate to the market under the brand name Roundup[21] in 1976.[22] The company's scientists pioneered recombinant DNA technology to perform their research on genetic modification of plants.[23] As a crop versatile as an intermediate good or a raw food, soybeans (*Glycine max)* were

among the first crops to undergo genetic modification research and development and are currently cultivated on nearly 75 million acres of agricultural land in the US.[24,25] After perfecting herbicide-resistance in soybeans by the 1990s, Monsanto obtained intellectual property rights on its invention, namely the '605[26] and '247E patents.[27] In 1996, the company introduced the "Roundup Ready" soybean seed to the market.[28] Farmers rapidly adopted use of these herbicide-resistant seeds, so much so that ninety percent of soybeans grown in the United States in 2014 contained genetic traits patented by Monsanto.[29]

Controversy has arisen with these patents on biological life. For hundreds of years, farmers have traditionally saved seeds from their crops for planting in future years without any second thought because seeds are commonly thought of as a quasi-common resource.[30] While food itself is a rivalrous and excludable private good, all people depend on food for survival. Therein lies a problem: if a market for a particular agricultural product is dominated by an oligopoly and some type of natural disaster ruins the entire supply chain for that product, a *tragedy of the commons* situation may likely occur on a societal-scale. Such a situation could likely deplete reserves and cause shortages, or worse, mass starvation. When a private good is necessary for society's existence, it should not only be described as exclusively private: seeds should be considered a commons. Seed saving practices have enabled farmers to save money and grow crops with favorable traits highly demanded by consumers. According to Bowman himself, "All my life, myself and other farmers have been able to go to grain elevators and buy grain and plant it."[31] Over the past two decades, however, Monsanto has launched lawsuits against farmers who have saved seeds containing patented genetic traits.

III. Bowman's Farming Practices

Three years after Monsanto introduced glyphosate-resistant soybean seeds to the market, Bowman began purchasing the seeds through Monsanto's licensed affiliate seed producer Pioneer Hi-Bred.[32] Along with the base price for the seeds, Pioneer Hi-Bred charged a licensing fee and required that Bowman sign a Technology Agreement, which stipulated that the grower agreed:

> 1) to use the seed containing Monsanto gene technologies for planting a commercial crop only in a single season;
> 2) to not supply any of this seed to any other person or entity for planting;
> 3) to not save any crop produced from this seed for replanting, or supply saved seed to anyone for replanting;
> 4) to not use this seed or provide it to anyone for crop breeding, research, generation of herbicide registration data, or seed production.[33]

Bowman, a 76-year-old who had been farming his land for forty years in Knox County, Indiana, grew these seeds for the first of his two soybean plantings on separate fields beginning in 2000.[34] After the harvest, Bowman sold the crop to a local grain elevator, which would subsequently sell and distribute the product to food processors.[35] At this juncture, Bowman still complied with the rules of the Technology Agreement.

The legal issue soon arose with his second planting on fields where he utilized the technique of double cropping. Intended to minimize the necessity of cropland expansion, reduce fertilizer usage, protect soil from water and wind erosion, and increase yields and revenues, the technique has been adopted on millions of acres of

American farmland as part of new sustainability efforts.[36] Bowman followed his first planting of winter wheat with a second planting of soybeans.[37]

Averse to the risk of losing the second planting to early onset wintry weather, in this second planting of soybeans, Bowman effectively produced another harvest without having to pay another licensing fee to Pioneer Hi-Bred and Monsanto or sign another Technology Agreement. Bowman had purchased soybean seeds intended for human and animal consumption from a local grain elevator for half price.[38] After applying glyphosate to a small sample of the seeds and confirming that most of the second crop consisted of the patented genetically modified seeds, he saved some seeds for his second cropping in the following year but sold most back to the grain elevator.[39]

Bowman continued this practice from 2000 until 2007.[40] In 2006, however, Monsanto inquired about Bowman's planting practices. Upon reviewing his purchases and harvests, Monsanto discovered a discrepancy that could have only arisen from seed saving or unauthorized purchase. Pressing further, Monsanto learned that Bowman both made unauthorized purchases from the grain elevators without licenses and saved seeds, though both parties had exchanged correspondence for years over the legality of these purchases and savings.[41]

IV. The Case

Suit in the District and Appeals Courts

In October 2007, Monsanto filed suit against Bowman in the U.S. District Court for the Southern District of Indiana.[42] The company claimed that the farmer's actions infringed upon its rights on its '605 and '247E genetically modified soybean patents.[43] The following September, Monsanto moved for a summary judgment

to determine Bowman's liability and damages, but Bowman argued that the company's patent rights were exhausted—defined by the federal government's doctrine of patent exhaustion as "the initial authorized sale of a patented item terminates all patent rights to that item"[44]—by the time he purchased the seeds from the grain elevator.[45]

The court asked both parties to further address the issue of patent exhaustion, specifically regarding the precedents set in *Quanta Computer v LG Electronics*, in which the Supreme Court upheld the doctrine of patent exhaustion's applicability to technology in 2008.[46] In response, Bowman and Monsanto filed additional briefs, but Bowman only submitted an affidavit and did not provide a greater defense with more evidence.[47] On the basis of federal circuit law,[48] the district court ruled in favor of Monsanto in an order issued in September 2009.[49] The order found that Bowman violated the first and third stipulations of the Technology Agreement, stating that "the exhaustion doctrine was inapplicable because Monsanto had never authorized any sale of the soybeans petitioner harvested, or any unrestricted sale of soybeans containing its patented technology."[50]

Accordingly, the court ordered Bowman to pay Monsanto $84,456 in damages based on the number of acres planted with the company's soybeans.[51] Yet, the court defended Bowman in saying that "despite Bowman's compelling policy arguments addressing the monopolizing effect of the introduction of patented genetic modifications to seed producing plants on an entire crop species, he has not overcome the patent law precedent which breaks in favor of Monsanto,"[52] meaning they found his case's merits overcome by the legal precedents.

On September 21, 2011, the United States Court of Appeals for the Federal Circuit affirmed the district court's ruling.[53]

Appeal to the Supreme Court

Once more, Bowman appealed the decision when his legal team filed a writ of certiorari with the Supreme Court of the United States in December 2011.[54] Bowman presented the following two reasons for granting the petition:

> I. The federal circuit's decision conflicts with the doctrine of patent exhaustion as defined by this court.[55]
> II. This case is an appropriate vehicle to resolve the specific and important question presented regarding the applicability of patent exhaustion to self-replicating technologies.[56]

Two months later, Monsanto filed its opposition to the appeal.[57] Directly contrasting Bowman's reasoning, the company argued the following:

> I. This case does not present an appropriate vehicle to consider the continuing validity of the federal circuit's conditional-sale decisions, because the federal circuit did not rely on that rationale.[58]
> II. The federal circuit's actual basis for its decision is correct.[59]

Nonetheless, the Supreme Court agreed to hear *Bowman v Monsanto* in the upcoming spring[60] and announced the question at hand as the following:

> Patent exhaustion delimits rights of patent holders by eliminating the right to control or prohibit use of the invention after an authorized sale. In this case, the

> Federal Circuit refused to find exhaustion where a farmer used seeds purchased in an authorized sale for their natural and foreseeable purpose-namely, for planting. The question presented is:
>
> > Whether the Federal Circuit erred by (1) refusing to find patent exhaustion in patented seeds even after an authorized sale and by (2) creating an exception to the doctrine of patent exhaustion for self-replicating technologies?[61]

Bowman's brief asserted that the authorized sale of patented seeds exhausted Monsanto's rights,[62] therefore granting the farmer to use any progeny as he wished. Monsanto's brief counter argued that purchasers of patented items do not have the right to make, use, or sell copies of the purchased item.[63] While that perception of patent law, as established in *Diamond*, readily applies to a non-living object, organic material naturally "makes" copies of itself through reproduction. This case could have set a precedent serving to differentiate the applicability of the doctrine of patent exhaustion between inanimate, non-self-replicating versus organic, self-replicating items.

The federal government sided with Monsanto's interpretation of the exhaustion doctrine and called for the Supreme Court to affirm the appeals court ruling, arguing that "the authorized sale of one generation of a patented plant seed does not exhaust a patentee's right to control subsequent generations of that seed."[64] Specifically, the government cited patent law as holding that an article embodying a patented invention sold under an authorized transaction "does not exhaust the patentee's exclusive right to control the creation of other articles embodying the same invention."[65]

The Final Decision

On May 13, 2013, the Court unanimously decided in favor of Monsanto.[66] Justice Clarence Thomas, who previously worked as a corporate attorney for Monsanto in the 1970s, did not recuse himself from the case.[67] The opinion, written by Justice Elena Kagan, held that "Patent exhaustion does not permit a farmer to reproduce patented seeds through planting and harvesting without the patent holder's permission."[68] Kagan, who serves as the Court's patent law jurisprudence thought leader, affirmed the lower court ruling that the patent exhaustion doctrine did not protect Bowman's cost-saving farming techniques because he had "created a newly infringing article."[69]

The ruling additionally held that the authorized sale did not permit Bowman to "construct an essentially new article on the template of the original, for the right to make the article remains with the patentee."[70] Although the Court maintained that the doctrine of patent exhaustion only applied to the original item sold, it did not find that the buyer received any right to replicate the patented item.[71] If the buyer did receive that right, then the patentee would only have protection for one sale of the patented item.[72] Given that the doctrine did "not enable Bowman to make *additional* patented soybeans without Monsanto's permission (either express or implied)," the doctrine of patent exhaustion itself is what "unfortunately" decided the case against him.[73] To prove the benefit of maintaining the patent law in favor of Monsanto, Kagan speculated that:

> Were the matter otherwise, Monsanto's patent would provide scant benefit. After inventing the Roundup Ready trait, Monsanto would, to be sure "receiv[e] [its] reward" for the first seed it sells. *Univis,* 316 U.S., at 251. But in short order, other seed companies could reproduce the product and market it to

> growers, thus depriving Monsanto of its monopoly. And farmers themselves need only buy the seed once, whether from Monsanto, a competitor, or (as here) a grain elevator. The grower could multiply his initial purcahse, and then multiply that new creation, ad infinitum— each time profiting from the patented seed without compensating its inventor.[74]

The justices found it difficult to support Bowman's case with their prior rulings in *Quanta* or *J. E. M. AgSupply Inc. v Pioneer Hi-Bred*, as "it is really Bowman who is asking for an unprecedented exception—to what he concedes is the "well settled" rule that "the exhaustion doctrine does not extend to the right to 'make' a new product.""[75] The Court also did not support the farmer's claim that upholding this law "will prevent farmers from making appropriate use of the Roundup Ready seed they buy" since "Bowman himself stands in a peculiarly poor position to assert such a claim" due to his uncommon purchase of seeds for growing from the grain elevator.[76]

Along with this, Bowman's "blame-the-bean" defense failed to sway the justices. Bowman's petition claimed "that soybeans naturally "self-replicate or 'sprout' unless stored in a controlled manner," and thus "it was the planted soybean, not Bowman" himself, that made replicas of Monsanto's patented invention."[77] The Court found such an argument to "be tough to credit," because Bowman, "was not a passive observer of his soybeans' multiplication; or put another way, the seeds he purchased (miraculous though they might be in other respects) did not spontaneously create eight successive soybean crops."[78]

Due to the complexity of this science, the Court stated, "Our holding today is limited—addressing the situation before us, rather than every one involving a self replicating product. We recognize that such inventions are becoming ever more prevalent, complex, and diverse. In another case, the article's self-replication might

occur outside the purchaser's control."[79] As each case on this subject includes differing variables, the Court felt "We need not address here whether or how the doctrine of patent exhaustion would apply in such circumstances."[80]

Reactions to the Case

When the *Huffington Post* asked an exasperated Bowman to explain the case, he protested the charge he violated Monsanto's patent rights, declaring that "They're grabbing at straws!"[81]

On the day of oral arguments, Debbie Barker and George Kimbrell of the Center for Food Safety published an op-ed in the *Los Angeles Times* in which they criticized the "patent system that, since the mid-1980s, has allowed corporations to own products of life."[82] In comparing the case to the *Quanta* decision, the two contended:

> Monsanto's logic is troubling to many who point out that it is the nature of seeds and all living things, whether patented or not, to replicate. Monsanto's claim that it has rights over a self-replicating natural product should raise concern. Seeds, unlike computer chips, for example, are essential to life. If people are denied a computer chip, they don't go hungry. If people are denied seeds, the potential consequences are much more threatening.[83]

Barker went on to declare that the case "is a microcosm of a bigger issue"[84] and that Monsanto's suits against hundreds of farmers has "implications not only for farmers but rural America, and as well as the question of who should be owning seeds."[85]

V. Consequences of the Decision

Yet, more remains aside from these immediate reactions of satisfaction and disappointment. While the Court's decision followed the letter of the law and precedent, the decision could potentially spurn undue economic and environmental injustices for decades to come, along with protracted litigation.

The Seed Industry Oligopoly

The Supreme Court's deference to Monsanto, and to a greater extent big agribusiness, in its *Bowman* decision failed to upend the status quo. Instead, the decision will result in further consolidation of the seed industry. Given the industry's majority concentration among Monsanto and its competitors DuPont, Syngenta, and Dow, reinforced patent protection will enable these companies to usurp the remaining small suppliers. These patents are legal and do expire after twenty years without the possibility of renewal. Nonetheless, Monsanto has already demonstrated its regard for maintaining the patents. Prior to a patent on a certain genetically modified plant expiring, the company will develop a similar variety and acquire patent protection on it. For instance, this has already occurred with the '605 patent contested in *Bowman*. Knowing that the patent would expire in 2015, Monsanto developed the Genuity® Roundup Ready 2 Yield® soybean, received patent rights, and introduced it to the market in 2009.[86] This variety has now replaced the former as Monsanto's predominant soybean product, but the company remains vigilant in reminding farmers that the original beans may still be subjected to remaining contractual rights and variety patents.[87]

Positing that "the importance of this case does not lie in the narrow interpretation of patent laws but in the context of the basic and fundamental aspects of human survival," Elsadig Elsheikh of the University of California, Berkeley, reiterated this idea of further

market consolidation, saying, "A victory for Monsanto in this case will mean that multinational corporations will have more control and monopoly over public human heritage that has been in the making for centuries all over the world."[88] Accompanying this view, some legal scholars, such as Mark D. Janis of the University of Iowa College of Law, have contended that companies do not need patents to protect their modified product, but rather could solidify their economic power through contracts:

> In the plant area, there are a number of additional protection options that are less attractive (from the innovator's perspective) than utility patent protection, but more attractive than simply dedicating the innovation to the public domain: for example, plant variety protection, trade secret protection, and, for some types of plant innovation, plant patent protection. Moreover, plant breeders may seek protections that do not depend on the intellectual property statutes at all-for example, through the use of genetic use restriction technologies, which may confer sterility or incorporate other genetic mechanisms for controlling expression of various agronomic traits.[89]

Had the Supreme Court applied the spirit of the doctrine differently, perhaps it would have justified the idea of seeds being a common good instead of an exclusively private good, and with that suggested, the seed industry adopt rights like those Janis described. The Court could have amended precedents set in *Diamond* and *Quanta* to differentiate interpretations for the doctrine of patent exhaustion. Non-self-replicating inanimate objects should remain subject to the existing understanding of the doctrine, whereas a new variant of the doctrine could be applied to self-replicating organic

life in which patents become exhausted after a certain generation of progeny. With the power that the Court's decision effectively granted to the industry, Monsanto and its competitors may acquire the ability to effectively control certain food markets—such as that for soybeans.

Future Litigation

The decision's narrowness will undoubtedly prompt future litigation to resolve similar issues. Justice Kagan limited the opinion's scope solely to Vernon Bowman's farming practices and the patents on the soybeans he used due to the variability of scientific and agricultural factors involved with genetically modified plants.[90] Josh Haugo in the *Journal of Corporate Law* speculated that "it is difficult to predict how the Court will rule in future cases," when using *Bowman v Monsanto*'s ruling as a criteria.[91] The problem, he postulated, is that each future case will include different actions and intents by both active and passive infringers, with the former including Bowman.[92] With these incompatible variables relative to *Bowman*, the court could interpret infringing use under different policies.[93] William Lesser of Cornell University's Dyson School reflected this stance, as he questioned whether future cases would focus on contract or infringement issues.[94]

Had the Court issued an authoritative ruling against intellectual property rights for plants, any future case could have been conclusively determined before needing to be appealed through the federal courts. Antitrust class action lawsuits have already been filed against Monsanto under the Sherman Antitrust Act due to the company "charging supra-competitive prices because it possesses, and for several years has possessed, dominance and monopoly power in the herbicide-tolerant traits market" with respect to its new Dicamba-proof soybean.[95] A broader interpretation of patent law's applicability to living organisms would have reduced the need

for these nearly identical lawsuits. Instead, courts will waste time and resources relitigating the same issue time and again. That issue began later in 2013 when the Supreme Court opined on additional challenges to Monsanto's patent regime in *Organic Seed Growers & Trade Association v Monsanto Co.*[96]

Major seed suppliers may also continue facing lawsuits for mistreatment of farmers. The World Health Organization's International Agency for Research on Cancer concluded that "glyphosate is probably carcinogenic to humans."[97] Food crops remain resistant to death from increased Roundup applications, but some glyphosate can accumulate on the surface of and within the plant.[98] If consumed throughout a lifetime, these toxins can also accumulate in the human body and cause ailments such as cancer.[99] Dewayne Johnson, a groundskeeper from California who regularly applied Roundup to keep grass and fields at the school that employed him free of weeds was awarded $289 million in 2018 by a California jury that found that Monsanto's glyphosate herbicide most likely caused his non-Hodgkin's lymphoma.[100] In the wake of the WHO report, farmers and agricultural workers have filed nearly 5,000 lawsuits for potentially jeopardizing their health and wellbeing,[101] and the company has endured significant reputational risk as a result.

Small farmers and seed suppliers are dependent on one another for achieving the economies of scale needed to meet food demand as the human population swells to nearly 10 billion. Under the current regime in which farmers, working under contract for big agricultural producers, sell crops to larger distributors, farmers bear most costs. The farmers pay for their land, seed, equipment, insurance, etc., whereas the distributors need only worry about locating food processors to sell and transport the crops to. This system has left most farmers with substantial debt.[102] In 2019, the USDA projected that "Farm sector debt is forecast to rise 3.4 percent to $415.5 billion, with real estate debt forecast to rise 4.6 percent to $256.9 billion. Debt-to-asset levels for the sector are forecast to rise

again in future years, continuing an annual upward trend in place since 2013."[103]

The increase in debt is not a new phenomenon, and the U.S.-China trade war of 2018-2020 has only exacerbated farmers' economic stress by driving down prices and demand.[104] Between low margins and strenuous labor, farming is a stressful occupation—the suicide among farmers has soared to 44.9 premature deaths per 100,000 individuals in recent years,[105] which is greater than that of military veterans.[106] Farmers pushed to the economic and mental brink may resort to resolving their distress by faulting the seed suppliers in court as liable for the farmers' plight.

To the contrary, Monsanto has defended its business practices as legal and economically fair. With a public relations campaign seeking to dispel 'myths,' Monsanto has insisted that its plants are safe since "GMO crops have been tested more than any crop in the history of agriculture."[107] Specifically justifying the economics of their patents, the company stated, "These protections help to ensure we are paid for our products and for the investments we put into developing them. We sell these proprietary products in the market using business models that reinforce our obligations to reinvest, provide a return to our shareowners, and provide for our employees."[108] Critically reading Monsanto's claims ultimately raises one question: at what point does financial prosperity trump environmental conservation and prudent jurisprudence?

Sustainable Agriculture

For over three decades, agronomists have strived to implement more sustainable practices in the agricultural system.[109] Prompted by environmental degradation from conventional farming techniques, scholars have sought to define practices that mitigate damage.[110] Some have posited that sustainable agriculture should be simply a management strategy to reduce economic and environmental costs,

while others think emphasizing ecological protection would produce better harvests, but holistically they sought to stop the damage.[111] These efforts have been impeded, however, by the prevalence of existing techniques.

Due to near universal adoption of genetically modified soybeans, farmers have virtually no conventional alternatives.[112] As opposed to non-modified seeds, "Roundup Ready" soybeans depend on regular applications of glyphosate to ensure their survival against weeds. While the glyphosate potently kills a majority of targeted weeds, dozens of varieties now living on almost six million acres have managed to survive and genetically adapt immunity to the herbicide.[113] To kill these stronger weeds, farmers need to apply more of the herbicide to their crops, effectively creating a cyclical effect that grows in magnitude as weeds become more resistant.[114] This unsustainable problem has caused herbicide costs to increase from fifty to one hundred percent on infected fields.[115]

Higher costs for farmers and human health is not alone in facing threats from glyphosate since studies have shown that its presence impairs soil microbes, minerals, nitrogen concentration, and micronutrients, all of which are necessary for properly cultivating plants.[116] The herbicide easily infiltrates water as well, which has caused algae blooms and reduced bird and insect populations.[117]

It should be noted that not all genetically modified organisms and crops are inherently unhealthy. In this case, the genetically modified soybeans may pose drastic risks to human health due to the toxicity of traces of glyphosate that remain on the plant after harvesting. That the plant itself has had its genes changed is not a risk—its DNA is simply different. To be a Luddite with respect to genetically modified organisms and biotechnology as a whole would be to err, but to appropriately question where economic, environmental, and health risks may arise would be prudent.

The most practical way to lessen glyphosate's environmental consequences would be to reduce the number of glyphosate-resistant

soybeans in the market. Doing so would diminish the cyclical weed resistance dilemma, the incidence rate of glyphosate-caused cancers, and microbiome pollution, but the patent regime that the Court upheld will stymie progress toward protecting the environment from these consequences. The company's market power effectively prevents farmers from using any other seed and weed-control combination that might be more hospitable toward the environment.

Had the Supreme Court ruled against Monsanto, restrictions placed on the company's patent regime by the ruling could have reduced the company's incentives to keep selling the product and subsequently the amount of genetically modified soybeans in the market. Of course, that did not occur, and Monsanto's oligopolistic power prevents non-GMO alternatives from gaining any share of the market, leaving the company's seeds and herbicides as the ostensibly popular choice.

VI. Conclusion

The loss of farmer and consumer autonomy to corporate authority is the fundamental issue in *Bowman v Monsanto*. Monsanto, the dominant firm of the oligopolistic seed industry, has conducted its business of developing, selling, and restricting plant life with impunity. While the company's genetically modified seeds and herbicides have transformed the efficiency of farming practices across the world, the proliferation of the two complementary products has ushered in new legal and environmental dilemmas.

The elderly Vernon Bowman skirted Monsanto's patent regime to save money for himself, not to ruin the company's finances. The farmer's saved beans were but of only a small fraction of the billions in the world, yet the company found this threatening. The Supreme Court agreed and safeguarded the existing patent system.

For Monsanto, this afforded the company persistent protection of their dominant business. For Bowman, this cost

thousands of unaffordable dollars. However, the consequences continue to permeate further. Efforts toward adopting sustainable agricultural practices lost ground against the permitted omnipresence of herbicides, unfair competition out competed equitable economics, and the legal system was denied a definitive precedent. The philosophy espoused by the agrarian ideal—that farming affords prosperity through carefree work—remains a myth. When the early history of genetically modified organisms is written decades from now, scholars will look to the *Bowman v Monsanto* decision as an untaken opportunity to impede the unintended consequences of the patented life.

[1] *Crops at Monticello*, 2015, online at https://www.monticello.org/site/plantation-and-slavery/crops-monticello (visited Apr 9, 2020).
[2] Thomas Jefferson, "Extract from Thomas Jefferson to Thomas Pinckney," 8 September 1796, Thomas Jefferson Foundation, Charlottesville, VA, online at http://tjrs.monticello.org/letter/159 (visited Apr 9, 2020).
[3] *Notes on the State of Virginia*, Query XIX.
[4] *Plants, Patents, Property, and Pirates Part I: Luther Burbank versus Thomas Jefferson*, 2007, online at http://www.bioethics.iastate.edu/Bioethics_in_Brief/mar07.html (visited Apr 9, 2020).
[5] *Bowman v Monsanto*, Transcript of Oral Arguments (2013), *Supreme Court of the United*. Online, 3.
[6] *Company History*, 2015, http://www.monsanto.com/whoweare/pages/monsanto-history.aspx
[7] Ibid.
[8] Ibid.
[9] *Corporate Relationships Among Monsanto Company, Pharmacia LLC, Pfizer Inc., Solutia Inc., and Eastman Chemical Company*, 2015, http://www.monsanto.com/whoweare/pages/monsanto-relationships-pfizer-solutia.aspx
[10] Ibid.
[11] Varinsky, Dana. *The $66 billion Bayer-Monsanto merger just got a major green light—but farmers are terrified*, May 29, 2018, https://www.businessinsider.com/bayer-monsanto-merger-has-farmers-worried-2018-4
[12] *Products Overview*, 2015, http://www.monsanto.com/products/pages/default.aspx
[13] *Monsanto on the Forbes Global 2000 List*, 2015, http://www.forbes.com/companies/monsanto/
[14] *Company History.*
[15] Fuglie, Keith, Paul Heisey, John King, and David Schimmelpfennig, *Rising Concentration in Agricultural Input Industries Influences New Farm Technologies*, 2012.
[16] *The Concentration Ratio and the Herfindahl Index*, 2015, http://www.investopedia.com/exam-guide/cfa-level-1/equity-investments/concentration-ratio-herfindahl-index.asp.
[17] Jorge Fernandez-Cornejo, *The Seed Industry in U.S. Agriculture: An Exploration of Data and Information on Crop Seed Markets, Regulation, Industry Structure, and Research and Development* (Washington, DC: U.S. Department of Agriculture, Economic Research Service, 2004), 26.
[18] Ibid, 26.
[19] *Diamond v Chakrabarty*, 447 U.S. 303 (1980)

[20] *Company History*.
[21] The names glyphosate and Roundup refer to the same herbicide, and they will be used interchangeably throughout this paper.
[22] *Company History*.
[23] Querci M., and M. Mazzara, *The Analysis of Food Samples for the Presence of Genetically Modified Organisms,* Online.
[24] Gibson, Lance; Garren Benson; Origin, History, and Uses of Soybean (*Glycine max*), (2005), https://web.archive.org/web/20150911011716/http://agron-www.agron.iastate.edu/Courses/agron212/Readings/Soy_history.htm.
[25] Fernandez-Cornejo, Jorge. *The Seed Industry in U.S. Agriculture: An Exploration of Data and Information on Crop Seed Markets, Regulation, Industry Structure, and Research and Development* (Washington, DC: U.S. Department of Agriculture, Economic Research Service, 2004), 26.
[26] Fraley, Robert T., et al. 1993. Chimeric genes for transforming plant cells using viral promoters. United States. 5,352,605, filed (October 28, 1993), and issued (October 4, 1994).
[27] Barry, Gerald F., et al. 2003. Glyphosate-tolerant 5-enolpyruvylshikimate-3-phosphate synthases. United States. RE39,247, filed (July 18, 2003), and issued (August 22, 2006).
[28] *Company History*.
[29] Mitchell, Dan. "Why Monsanto always wins," *Fortune*, 26 June 2014: http://fortune.com/2014/06/26/monsanto-gmo-crops/
[30] Wirtz, Johannes, Peter Kunz, and Ueli Hurter. "Seed as a Commons: Breeding as a Source for Real Economy, Law and Culture." Section for Agriculture – Goetheanum, October 2017. https://www.sektion-landwirtschaft.org/fileadmin/SLW/Literatur/Saatgutstudie/seeds_as_a_commons.pdf
[31] "Monsanto takes over farmer in Supreme Court," *Russia Today*, 14 May 2013: https://www.youtube.com/watch?v=Q8hoyO72NOg
[32] Brief of Petitioner, Bowman v Monsanto, No. 11-796, (Supreme Court of the United States filed December 3, 2012), 7.
[33] *Bowman v Monsanto Co.*, 657 F.3d 1341 (7th Cir. 2011), 6.
[34] Brief of Petitioner, 6.
[35] Ibid, 7.
[36] Borchers, Allison, Elizabeth Truex-Powell, Steven Wallander, and Cynthia Nickerson. *Multi-Cropping Practices: Recent Trends in Double Cropping*, 2014, USDA: Economic Research Service.
[37] Brief of Petitioner, 6.
[38] Federal circuit decision, 8.
[39] Federal circuit decision, 8.

[40] Brief for Respondents, Bowman v Monsanto, No. 11-796, (Supreme Court of the United States filed January 16, 2013), 5.
[41] Brief of Petitioner, 7-8.
[42] Ibid, 8.
[43] Ibid, 9.
[44] *Quanta Computer v LG Electronics*, 553 U.S. 617 (2008), 5.
[45] Ibid, 9.
[46] Brief for Respondents, 8.
[47] Ibid, 8.
[48] Brief of Petitioner, 9.
[49] Ibid, 9.
[50] Brief for Respondents, 8.
[51] Brief of Petitioner, 9.
[52] Ibid, 9.
[53] Ibid, 15.
[54] Petition for a Writ of Certiorari, No. 11-796, (Supreme Court of the United States filed December 20, 2011), 21.
[55] Ibid, 10.
[56] Ibid, 20.
[57] Brief in Opposition, Bowman v Monsanto, No. 11-796, (Supreme Court of the United States filed February 27, 2012)., 1.
[58] Ibid, 8.
[59] Ibid, 11.
[60] *Bowman v Monsanto*, Question Presented (2013), 1.
[61] Ibid, 1.
[62] Brief of Petitioner, 17.
[63] Brief for Respondents, 55.
[64] Brief for the United States Serving As Amicus Curiae Supporting Affirmance, No. 11 796 (Supreme Court of the United States filed January 8, 2013), 8.
[65] Ibid, 9.
[66] Federal Court Review of Petition for Writ of Certiorari in Bowman v Monsanto. Supreme Court of the United States, 2013, 2.
[67] Boschma, Janie. "Monsanto: Big Guy on the Block When It Comes to Friends in Washington." OpenSecrets, February 19, 2013. https://www.opensecrets.org/news/2013/02/monsanto/.
[68] Ibid, 1.
[69] Supreme Court's Decision, 3.
[70] Ibid, 4.
[71] Ibid, 5.

[72] Ibid, 5.
[73] Ibid, 5.
[74] Ibid, 6.
[75] Ibid, 6-8.
[76] Ibid, 8-9.
[77] Ibid, 9.
[78] Supreme Court's Decision, 9.
[79] Ibid, 10.
[80] Ibid, 10.
[81] "Vernon Bowman, Indiana Grain Farmer: Monsanto 'Grabbing at Straws'," *The Huffington Post*, 20 February 2013: http://www.huffingtonpost.com/2013/02/20/vernon-bowman-farmer-vs-monsanto_n_2727067.html
[82] Barker, Debbie, and George Kimbrell. "Monsanto, the court and the seeds of dissent," *Los Angeles Times*, 19 February 2013: http://articles.latimes.com/2013/feb/19/opinion/la-oe-kimbrell-monsanto-supreme-court-seed-20130219
[83] Ibid.
[84] Ibid.
[85] Ibid.
[86] *Roundup Ready Soybean Patent Expiration, April 9 2017, online at* {https://monsanto.com/company/media/statements/roundup-ready-soybean-patent-expiration/} (visited April 10, 2020)
[87] Ibid.
[88] Elsheikh, Elsadig. "Bowman v. Monsanto: The monopoly over the global food system," *Berkeley Diversity*, (2013): http://diversity.berkeley.edu/bowman-v-monsanto-monopoly-over-global-food-system
[89] Janis, Mark D. "Sustainable Agriculture, Patent Rights, and Plant Innovation," *Indiana Journal of Global Legal Studies*, (2001): 103-104.
[90] Supreme Court's Decision, 5.
[91] Haugo, Josh. "The Future of Farming After *Bowman v. Monsanto*." *Journal of Corporation Law*, (2014): 747. *HeinOnline*, Online.
[92] Ibid, 747-750.
[93] Ibid, 750-752.
[94] Lesser, William. "Bowman v. Monsanto and Self-Replicating Seeds; David v. Goliath or Don Quixote v. Windmills?" *Journal of High Technology Law*, (2013): 555. *HeinOnline*, Online.
[95] In Re: Dicamba Herbicides Litigation, MDL No. 2820
[96] *Organic Seed Growers & Trade Ass'n v. Monsanto Co.*, 718 F.3d 1350
[97] "Glyphosate." World Health Organization, International Agency for Research on Cancer, June 2018. https://monographs.iarc.fr/wp-content/uploads/2018/06/

mono112-10.pdf.
[98] Ibid, 5.
[99] Ibid, 5.
[100] Bellon, Tina. *Monsanto ordered to pay $289 million in world's first Roundup cancer trial*, Reuters, August 10, 2018, online at https://www.reuters.com/article/us-monsanto-cancer-lawsuit/monsanto-ordered-to-pay-289-million-in-worlds-first-roundup-cancer-trial-idUSKBN1KV2HB
[101] Ibid.
[102] Gowen, Annie. "I'm gonna lose everything," *The Washington Post,* November 9, 2019, https://www.washingtonpost.com/nation/2019/11/09/im-gonna-lose-everything/?arc404=true
[103] United States Department of Agriculture Economic Research Service. *2020 Farm Sector Income Forecast.* https://www.ers.usda.gov/topics/farm-economy/farm-sector-income-finances/farm-sector-income-forecast/
[104] Wiltermuth, Joy. "U.S. farmers, battered by low commodity prices and trade war, brace for things to get worse," *MarketWatch,* September 11, 2019. https://www.marketwatch.com/story/us-farmers-battered-by-low-commodity-prices-and-trade-war-brace-for-things-to-get-much-worse-2019-09-11
[105] "Suicide Increasing Among American Workers." Centers for Disease Control and Prevention, November 15, 2018. https://www.cdc.gov/media/releases/2018/p1115-Suicide-american-workers.html.
[106] U.S. Department of Veterans Affairs. 2019 National Veteran Suicide Prevention Report. https://www.mentalhealth.va.gov/docs/data-sheets/2019/2019_National_Veteran_Suicide_Prevention_Annual_Report_508.pdf
[107] *Myths About Monsanto*, 2015, https://www.monsantoglobal.com/global/uk/newsviews/Documents/myths-and-facts.pdf.
[108] Patents, 2015, online at {http://www.monsanto.com/newsviews/pages/patents.aspx} (visited April 10, 2020)
[109] Edwards, Clive, Rattan Lal, Patrick Madden, Robert H. Miller, and Gar House. *Sustainable Agriculture Systems* (Boca Raton, FL: St. Lucie Press, 1990), 3.
[110] Ibid, 3.
[111] Allen, Patricia, Debra Van Dusen, Jackelyn Lundy, and Stephen Gliessman. "Integrating Social, Environmental, and Economic Issues in Sustainable Agriculture." American Journal of Alternative Agriculture 6, no. 1 (March 1991), 35-36.
[112] Benbrook, Charles M. "Impacts of genetically engineered crops on pesticide use in the U.S. – the first sixteen years," (2012), online at http://www.

biomedcentral.com/content/pdf/2190-4715-24-24.pdf (visited Apr 9, 2020).
[113] Ibid, 4.
[114] Ibid, 4.
[115] Ibid, 5.
[116] Ibid, 6.
[117] Ibid, 6.

Works Cited

Allen, Patricia, Debra Van Dusen, Jackelyn Lundy, and Stephen Gliessman. "Integrating Social, Environmental, and Economic Issues in Sustainable Agriculture." American Journal of Alternative Agriculture 6, no. 1 (March 1991).

Barker, Debbie; George Kimbrell; "Monsanto, the court and the seeds of dissent," *Los Angeles Times*, (19 February 2013): http://articles.latimes.com/2013/feb/19/opinion/la-oe-kimbrell-monsanto-supreme-court-seed-20130219.

Barry, Gerald F., et al. 2003. Glyphosate-tolerant 5-enolpyruvylshikimate-3-phosphate synthases. United States. RE39,247, filed (July 18, 2003), and issued (August 22, 2006).

Bellon, Tina; "*Monsanto ordered to pay $289 million in world's first Roundup cancer trial*," Reuters, August 10, 2018, https://www.reuters.com/article/us-monsanto-cancer-lawsuit/monsanto-ordered-to-pay-289-million-in-worlds-first-roundup-cancer-trial-idUSKBN1KV2HB.

Benbrook, Charles M. "Impacts of genetically engineered crops on pesticide use in the U.S. – the first sixteen years," (2012), http://www.biomedcentral.com/content/pdf/2190-4715-24-24.pdf.

Boschma, Janie. "Monsanto: Big Guy on the Block When It Comes to Friends in Washington." OpenSecrets, February 19, 2013. https://www.opensecrets.org/news/2013/02/monsanto/.

Borchers, Allison; Elizabeth Truex-Powell; Steven Wallander; Cynthia Nickerson; "Multi-Cropping Practices: Recent Trends in Double Cropping," 2014, *USDA, Economic Research Service*: http://www.ers.usda.gov/media/1437476/eib125.pdf.

Brief in Opposition, Bowman v Monsanto, No. 11-796, (Supreme Court of the United States filed February 27, 2012).

Brief of Petitioner, Bowman v Monsanto, No. 11-796, (Supreme Court of the United States filed December 3, 2012).

Brief for Respondents, Bowman v Monsanto, No. 11-796, (Supreme Court of the United States filed January 16, 2013).

Brief for the United States Serving As Amicus Curiae Supporting Affirmance, No. 11-796, (Supreme Court of the United States filed January 8, 2013).

Bowman v Monsanto Co., 657 F.3d 1341 (7th Cir. 2011)

Bowman v Monsanto, Question Presented (2013), http://www.supremecourt.gov/qp/11-00796qp.pdf.

Bowman v Monsanto, Transcript of Oral Arguments (2013),

https://www.supremecourt.gov/oral_arguments/argument_transcripts/2012/11-796-1j43.pdf

Petition for a Writ of Certiorari, No. 11-796, (Supreme Court of the United States filed December 20, 2011).

"Bowman v. Monsanto: Indiana Farmer's Supreme Court Challenge to Corporate Control of Food Supply," *Democracy Now!*, (21 February 2013): https://www.youtube.com/watch?v=uhtZ9GkAqJQ.

Company History, (2015), http://www.monsanto.com/whoweare/pages/monsanto-history.aspx.

Corporate Relationships Among Monsanto Company, Pharmacia LLC, Pfizer Inc., Solutia Inc.,and Eastman Chemical Company, (2015), http://www.monsanto.com/whoweare/pages/monsanto-relationships-pfizer-solutia.aspx.

Crops at Monticello, (2015), https://www.monticello.org/site/plantation-and-slavery/crops-monticello.

Diamond v Chakrabarty, 447 U.S. 303 (1980)

Edwards, Clive; Rattan Lal; Patrick Madden; Robert H. Miller; Gar House; *Sustainable Agriculture Systems* (Boca Raton, FL: St. Lucie Press, 1990).

Elsheikh, Elsadig. "Bowman v. Monsanto: The monopoly over the global food system," *Berkeley Diversity*, (2013): http://diversity.berkeley.edu/bowman-v-monsanto-monopoly-over-global-food-system.

Federal Court Review of Petition for Writ of Certiorari in Bowman v Monsanto. Supreme Court of the United States, 2013.

Fernandez-Cornejo, Jorge; *The Seed Industry in U.S. Agriculture: An Exploration of Data and Information on Crop Seed Markets, Regulation, Industry Structure, and Research and Development* (Washington, DC: U.S. Department of Agriculture, Economic Research Service, 2004).

Fraley, Robert T., et al. 1993. Chimeric genes for transforming plant cells using viral promoters. United States. 5,352,605, filed (October 28, 1993), and issued (October 4, 1994).

Fuglie, Keith; Paul Heisey; John King; David Schimmelpfennig; *Rising Concentration in Agricultural Input Industries Influences New Farm Technologies*, (2012),https://www.researchgate.net/publication/235341940_Rising_Concentration_in_Agricultural_Input_Industries_Influences_New_Farm_Technologies.

Gibson, Lance; Garren Benson; Origin, History, and Uses of Soybean (*Glycine max*), (2005), https://web.archive.org/web/20150911011716/http://

agron-www.agron.iastate.edu/Courses/agron212/Readings/Soy_history.htm.

Gowen, Annie. "I'm gonna lose everything," *The Washington Post,* November 9, 2019, https://www.washingtonpost.com/nation/2019/11/09/im-gonna-lose-everything/?arc404=true.

"Glyphosate." World Health Organization, International Agency for Research on Cancer, June 2018. https://monographs.iarc.fr/wp-content/uploads/2018/06/mono112-10.pdf.

Haugo, Josh. "The Future of Farming After *Bowman v. Monsanto*." *Journal of Corporation Law*,(2014): 747. *HeinOnline*, Online. http://heinonline.org/HOL/Page?handle=hein.journals/jcorl40&div=30&start_page=739&collection=journals&set_as_cursor=1&men_tab=srchresults.

In Re: Dicamba Herbicides Litigation, MDL No. 2820 https://www.grgpc.com/wp-content/uploads/2018/08/Master-Antitrust-Class-Action-Complaint.pdf

Janis, Mark D. "Sustainable Agriculture, Patent Rights, and Plant Innovation," *Indiana Journalof Global Legal Studies*, (2001).http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1229&context=ijgls

Lesser, William. "Bowman v. Monsanto and Self-Replicating Seeds; David v. Goliath or Don Quixote v. Windmills?" *Journal of High Technology Law*, (2013): *HeinOnline*, Online. http://heinonline.org/HOL/Page?handle=hein.journals/jhtl13&div=12&start_page=508&collection=journals&set_as_cursor=2&men_tab=srchresults.

Mitchell, Dan. "Why Monsanto always wins," *Fortune*, (26 June 2014) http://fortune.com/2014/06/26/monsanto-gmo-crops/.

Monsanto on the Forbes Global 2000 List, (2015), http://www.forbes.com/companies/monsanto/.

Jefferson, Thomas; "Extract from Thomas Jefferson to Thomas Pinckney," 8 September 1796,Thomas Jefferson Foundation, Charlottesville, VA. http://tjrs.monticello.org/letter/159.

Jefferson, Thomas; *Notes on the State of Virginia* (1787), Query XIX. https://teachingamericanhistory.org/library/document/notes-on-the-state-of-virginia-query-xix-manufactures/.

"Monsanto takes over farmer in Supreme Court," *Russia Today*, (14 May 2013): https://www.youtube.com/watch?v=Q8hoyO72NOg.

Myths About Monsanto, (2015), https://www.monsantoglobal.com/global/uk/newsviews/Documents/ myths-and-facts.pdf.

Organic Seed Growers & Trade Ass'n v. Monsanto Co., 718 F.3d 1350 Patents, 2015, online at {http://www.monsanto.com/newsviews/pages/patents.aspx} (visited April 10, 2020)

Plants, Patents, Property, and Pirates Part I: Luther Burbank versus Thomas Jefferson, (2007), http://www.bioethics.iastate.edu/Bioethics_in_Brief/mar07.html.

Products Overview, (2015), http://www.monsanto.com/products/pages/default.aspx.

Quanta Computer v LG Electronics, 553 U.S. 617 (2008)

Querci, M.; M. Mazzara; *The Analysis of Food Samples for the Presence of Genetically Modified Organisms,*http://gmo-crl.jrc.ec.europa.eu/capacitybuilding/manuals/Manual%20EN/Session07.pdf**.**

Roundup Ready Soybean Patent Expiration, April 9 2017, online at {https://monsanto.com/company/media/statements/roundup-ready-soybean-patent-expiration/} (visited April 10, 2019)

"Suicide Increasing Among American Workers." Centers for Disease Control and Prevention, November 15, 2018. https://www.cdc.gov/media/releases/2018/p1115-Suicide-american-workers.html.

The Concentration Ratio and the Herfindahl Index, (2015), http://www.investopedia.com/exam-guide/cfa-level-1/equity-investments/concentration-ratio-herfindahl-index.asp.

U.S. Department of Veterans Affairs. *2019 National Veteran Suicide Prevention Report.* https://www.mentalhealth.va.gov/docs/data-sheets/2019/2019_National_Veteran_Suicide_Prevention_Annual_Report_508.pdf.

United States Department of Agriculture Economic Research Service. *2020 Farm Sector Income Forecast.* https://www.ers.usda.gov/topics/farm-economy/farm-sector-income-finances/farm-sector-income-forecast/.

Varinsky, Dana; "*The $66 billion Bayer-Monsanto merger just got a major green light—but farmers are terrified*," May 29, 2018, https://www.businessinsider.com/bayer-monsanto-merger-has-farmers-worried-2018-4.

Vernon Bowman, Indiana Grain Farmer: Monsanto 'Grabbing at Straws', February 20, 2013, online at {http://www.huffingtonpost.com/2013/02/20/vernon-bowman-farmer-vs-monsanto_n_2727067.html} (visited April 10, 2020)

Wiltermuth, Joy. "U.S. farmers, battered by low commodity prices and trade war, brace for things to get worse," *MarketWatch,* September 11, 2019. https://www.marketwatch.com/story/us-farmers-battered-by-low-commodity-prices-and-trade-war-brace-for-things-to-get-much-

worse-2019-09-11.

Wirtz, Johannes, Peter Kunz, and Ueli Hurter. "Seed as a Commons: Breeding as a Source for Real Economy, Law and Culture." Section for Agriculture – Goetheanum, October 2017. https://www.sektion-landwirtschaft.org/fileadmin/SLW/Literatur/Saatgutstudie/seeds_as_a_commons.pdf

"Our Home and Native Land": Aboriginal Land Title in British Columbia, 1763-2020

Xiaoyu Huang | Brown University

Edited by: Andrea Schlitt, Jessica Cuadro, Gabriel Gonzalez, Max Kwass-Mason, Anna Nuttle

Abstract

This article examines the interaction between colonial and Aboriginal law in the contest for fee-simple land ownership and sovereignty under Canadian common law. In the course of the Canadian nation-building project, Aboriginal sovereignty was in turn affirmed, nullified, litigated, and restored via treaty. The example of the Nisga'a First Nation, an Aboriginal group of northwestern British Columbia, frames this examination, as it is the first and only group to date to enter into a fee-simple land transfer treaty with the Crown. The resulting Nisga'a Final Agreement (NFA) not only offers a template for future treaty-making, but also confers a compelling legal framework for understanding a recent dispute between the Wet'suwet'en First Nation and the natural gas company Coastal GasLink, which involved multiple levels of government. This article connects the legal history of the Nisga'a with the legal issues arising out of the Wet'suwet'en confrontation, the most prominent First Nations land dispute in recent decades. I trace the legal history of Aboriginal land ownership in the federal and British Columbia contexts as well as the Supreme Court of Canada's judicial activism, leading ultimately to the conclusion of the NFA in 1997. I attempt to show that Aboriginal sovereignty, so long denied under the Westphalian conception of nationhood and common law prototypes of property ownership, is intimately tied to and even presupposes land ownership in practice. Importantly, a First Nation cannot possess land unless that Nation is also sovereign over it. Ultimately, several legal sources challenge colonial Canada's conception of its territorial confines as "home" and "Native," the latter of which carries contradictory implications as the Nisga'a and Wet'suwet'en Nations compete for legal recognition under Indigenous,

federal, and international frameworks, the latter of which can only act on the situation from afar.

I. Introduction and Background

Do Indigenous peoples in common law jurisdictions have discretionary power over access to and use of their unceded traditional territory? The answer lies in whether government practice and judicial decisions lend credence to their claims to nationhood and attempts to control their territories in the manner of common law fee-simple land, or outright, ownership. Only in recent history has Aboriginal fee-simple ownership started to be codified. On August 4, 1998, the Nisga'a Final Agreement (NFA) was signed in Gitlaxt'aamiks, a village of the Nisga'a First Nation in the western Canadian province of British Columbia (BC).[1] The Nisga'a is one of Canada's more than six hundred First Nations, or groups of Indigenous peoples who inhabited Canada's landmass before the arrival of any European.[2] The NFA is the first Aboriginal land settlement established by joint negotiation in Canadian history, in which the federal and BC governments acknowledged that the Nisga'a Nation enjoys fee-simple ownership over its traditional territory.[3] It was celebrated as the high-water mark of a hundred-plus-years' process of petitioning, politicking, governmental dismissal, and legal acceptance of the Nisga'a's claim.

The NFA settlement is unique: the majority of other First Nations in Canada live on reserve lands and relate to their land in a manner more akin to permanent noncommercial lease rather than outright ownership. The principle legislative instrument that confers this relationship is the Indian Act of 1867, which allots to First Nations "any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, but which is unsurrendered."[4] The unresolved tension between ownership and recognition of

historical title reaches beyond theory into the very letter of law.

There is also a surprising terminological confusion that exists in the literature, which indicates that distinctions between colonial, international, and Aboriginal legal sources have not been taken seriously. Commentators regularly use the term "Aboriginal law" to mean any interjurisdictional legal activity to do with a First Nation. Grammatically, Aboriginal law refers to the positive and customary laws of First Nations themselves. It is puzzling, therefore, that leading authors also use it to refer to any legal treaty or topic to do with First Nations and colonial institutions, and also common law that was issued from the Crown (federal) and provincial governments. Government as well as private practice lawyers who deal with First Nations issues on behalf of non-Aboriginal entities regularly refer to themselves as practitioners of Aboriginal law. To avoid confusion, in this article, Aboriginal law refers solely to the coded and customary laws of a First Nation, which are binding only on members of that Nation. I emphasize here that the very fact that the term itself has been appropriated to apply to non-Aboriginal legal sources points to the difficulty of decolonizing Canada's common law regime, whose academic and practical function it has been to displace Indigenous law.

The legal, particularly litigational, experiences of the Nisga'a Nation help contextualize a recent situation involving the Wet'suwet'en, another First Nation in British Columbia. In early 2020, the Wet'suwet'en received international press coverage for its protests against a twin pipeline project called Coastal GasLink, which was approved by Prime Minister Justin Trudeau's Liberal federal government and slated to run through the Wet'suwet'en reserve. Earlier in December 2019, TC Energy, the corporation behind the project, had obtained an extended injunction from the British Columbia Supreme Court (BCSC) to remove Wet'suwet'en protestors who had erected semi-permanent roadblocks along Morice River Forest Service Road near Houston, British Columbia.[5]

The Wet'suwet'en claimed that enforcement action by the Royal Canadian Mounted Police (RCMP) violates Aboriginal and international law and transgresses on traditional territory. In light of the current arrangement, under which the Crown in right of Canada has exclusive power to use Wet'suwet'en land as it wishes, the Wet'suwet'en claim is implicitly built upon the achievement of the Nisga'a Nation with the NFA. Comments made by Wet'suwet'en leaders to the press suggest that they consider themselves to have fee-simple ownership over their traditional territory. The final section of this article evaluates this claim to ownership in light of Canada's legal history and Supreme Court of Canada (SCC) jurisprudence in the late 1990s. It will attempt to demonstrate that the Wet'suwet'en claim has sufficient legal merit. It remains to be seen what lower courts will make of future Wet'suwet'en actions, which would likely have a shelf life of years and finish in the SCC. For now, a counter-injunction or any other form of injunctive relief against TC Energy is unlikely, which underscores the tenuousness of legal precedent in the face of impending irreversible actions such as pipeline construction through land that could very well be rightfully, sovereignly-held Indigenous land.

II. Pre-colonial Times – 1871: Early Interactions with the Crown

The Nisga'a Nation's traditional territory is situated in northwestern British Columbia, adjacent to the Alaskan Coast. Legal determination of the extent and locations of traditional territory usually relies upon verbal testimony, oral histories, and any available colonial-era written sources. Up to the conclusion of the NFA, the size of Nisga'a land was disputed.[6] Most commentators agree that the territory encompasses approximately twenty-five thousand square kilometers, although estimates vary widely.[7] This difficulty is also compounded by the fact that in general, European settlers were

reluctant to acknowledge that Aboriginal inhabitants held rightful prior occupation, thus depriving Aborigines of possibility of proof for much of the twentieth century. Western legal culture presupposes a culture of writing; however, contractual land ownership and territorial integrity in Aboriginal law is implicit and not always written, which complicates the determination of the extents of demonstrable territory during any treaty process. The common law conception of property, which results in such semantic artifacts as the very term "Aboriginal land claims," shifts the dialogue in favor of European émigré nation-building participants and places the burden of proof on First Nations when they have few and unwieldy legal tools to furnish such proof. The Nisga'a, to be sure, had always attempted to reach an equitable land settlement ever since they came into contact with Europeans.[8] However, through assimilation projects and continual insinuations that Aborigines had relinquished, or at least failed to resist, colonial advances and thus had acquiesced to conquest, European settlers disseminated their influence through systematic denial of existing Aboriginal legal systems. They also, surprisingly and paradoxically, positioned themselves as bulwarks of Aboriginal rights.[9] This conflicted understanding is projected by dicta from the colonial power center in London and by the practice of its agents in North America. From the very onset, Britain asserted a Westphalian system, which presupposes fixed territorial confines and the existence of a permanent and immovable population as prerequisites for nationhood. This understanding does not take into account peoples that most historians agree to be nomadic, whose understanding of land ownership differs substantially from that of expatriate Britons. The latter, who exerted superior commercial and military power, superimposed Westphalian nationhood onto British North America. To this day, Aboriginal land restitution still takes place within the common law conceptions of territoriality, although Aboriginal law is beginning to be codified as positive law.

In 1763, following Britain's conquest of New France, King

George III issued the Royal Proclamation, which set out laws for the conquest of Aboriginal territories during the repopulation of North America. In the context of the contestation between European and Aboriginal land claims in Canada, the Proclamation is the most significant instrument issued by the Crown. To this day, it has not been repealed or altered. At first, its express wording in favor of Aboriginal land ownership actually prompted Aborigines to rally behind the Crown, who thought that European agents intended to honor land sovereignty.[10] The treaty says that settlers could acquire Aboriginal lands only if individual First Nations cede their control via treaty or cession; otherwise, Aboriginals "should not be molested or disturbed in the Possession of such Parts of Our Dominions… not having been ceded to or purchased by [the Crown]."[11] The passage contains two subtle points. First, while "Possession" is not defined, it is unreasonable to read this clause to mean that the Crown may assert ownership over those lands Europeans did not *originally* possess. Second, the law does not say that *all* of North America belongs to First Nations, allowing the possibility that Europeans could legally possess those parts not belonging to First Nations. In the least expansive reading, the word "Parts" suggests that the drafters did not realize the nomadic practice of First Nations. Every "Part," in practice, is an Aboriginal part.

The Proclamation also posits a complicated relationship between land ownership and subsumed subjecthood. Members of "Indian tribes and nations" are referred to as "loving Subjects" under the aegis of the Crown.[12] Legally, the vocabulary of subjecthood at large effectively establishes modern Canada's Commonwealth legal character and subsumes all people within its territorial extent, or the whole of continental Canada, underneath British allegiance. Aborigines, then, became not-quite-citizens whose land "Possession" cannot be fully effectuated.

Reading these excerpts together, we begin to unpack the Proclamation's legal innovation, or sleight of hand. Can subjects of

the Crown enjoy fee-simple land ownership? Absolutely so, under common law. But what can we make of subjects who are properly members of "tribes and nations"?[13] The lowercase on "nations" appears to have altered the course of history. Under the Westphalian conception of law, there is no such thing as two concurrent national legal systems, since constitutive statehood requires recognition by another state and no state can be recognized as two states arising out of the same cumulative population, territory, and government. To take up Canadian Aborigines as British subjects is to extinguish their nationhood and weaken their corporate identity, making de facto recognition of legal possession no more than codified fiction. Under the common law, ownership is dependent upon the validation of sovereignty. The common law of eminent domain illustrates the principle that the power to possess land emanates from the Crown, to which its subjects owe allegiance. Without an operative sovereign, there is no operative ownership for any Aborigine. The practical implication of the Proclamation is therefore conflicted. On one hand, it acknowledges that Aboriginals possess land and ostensibly deploys unambiguous language to protect against encroachment of that ownership. On the other hand, it extinguishes Aboriginal jurisdiction and eliminates Aboriginal nationhood through characterizing all inhabitants of British North America as subjects of the British Crown.

Throughout the early years of British administration of Canada, London exercised fee-simple land ownership by individuals and corporations (legal persons), without relying on local government. The remotely administered system perpetuated private abuses and was later replaced by the modern system of tripartite government. In 1849, a five-year "royal land grant," relative to the United Colony of Vancouver Island of southwestern British Columbia, was issued to the Hudson's Bay Company (HBC), which assumed exclusive rights over all aspects of colonial governance.[14] James Douglas, chief factor of the HBC, became Governor of Vancouver Island. Douglas entered

into fourteen formal purchase agreements with regional Aboriginal nations, creating a body of treaties whose volume and specificity was neither expected nor desired by British authorities.[15] Previously, officials in London had instructed Douglas to consider land to be privately held by Aboriginals only if they had cultivated it or built domiciles on it. Douglas instead read the possession provision of the Proclamation literally. He included in his treaties the right of Aboriginals to hunt and fish on Vancouver Island's "uncultivated… waste land," as was their traditional practice.[16] Where he could have taken the language of the Proclamation to mean that Aborigines were not to be disturbed only on those areas considered to be within the territories of particular First Nations, he instead took the clause "those Parts… not ceded to or purchased by Us" to mean any area *not* under claim by British settlers. Douglas thus distorted the putative ability of the Proclamation to give wide latitude of land use to First Nations with which he entered into agreements. London thoroughly reprimanded Douglas for perceived overreach, although he was not relieved of his post, for the HBC created great economic value.[17] Although Vancouver Island lies far from the territory of the Nisga'a Nation, the impact of Douglas' interpretation of the Proclamation and treaty-making, actions guided by his understanding that First Nations were entitled to non-European-held land, influenced subsequent provincial and federal jurisprudence. Crucially, in the landmark *Delgamuukw v British Columbia*, Douglas' treaties gave compelling evidence that the Crown acknowledged Aboriginal ownership.

III. *Regina v White and Bob*: An Anachronistic Case Study

An SCC case from the early 1960s helpfully illustrates how Douglas' legacy first materialized in British Columbia case law. In 1963, Clifford White and David Bob, two Aborigines from Nanaimo, British Columbia, were arrested for hunting on Vancouver

Island out-of-season, an offence under sec. 25 of the Game Act of 1960.[18] White and Bob argued before the Nanaimo County Court that Governor Douglas had entered into an agreement in 1854 that affirmed comprehensive Aboriginal hunting rights in the area with the Nanaimo Nation, in which they contended they were members. Arguing that this agreement is a treaty, they claimed next that their activities are legitimized by sec. 87 of the Indian Act. That section, in a complicated double negative, provides that all federal laws that contradict the Indian Act are of no force and effect "subject to the terms of any treaty" reached between Aborigines and the Crown.[19] In other words, treaty language nullifies federal laws that run counter to the Indian Act. The case hinged on whether the Nanaimo Nation *could* enter into a treaty. The Nanaimo County Court ruled in favor of White and Bob and federal prosecutors appealed. The case reached the SCC and was dismissed in *Regina v White and Bob* (1965), handing Canadian Aborigines an important first victory. The justices ruled unanimously that the Game Act was inoperative due to the above-mentioned "exclusion clause" of sec. 87 of the Indian Act. While the text of the decision mainly deals with why the Game Act was of no force and effect in this context, the key innovation is that for the first time, a First Nation is considered a sovereign. Since under the Westphalian assumption, only nations are able to enter into treaties with one another, the SCC's characterization of the agreement between Nanaimo and the Crown as a treaty begins a period of judicial activism that ushered in the resurgence of Aboriginal law. While *White and Bob* did not explicitly recognize Nanaimo nationhood, the SCC's affirmation of the existence of a Nanaimo *Nation* foregrounds the majority view in *Delgamuukw* that First Nations can be sovereign.

Two ideas from *White and Bob* reach into the future to clarify *Delgamuukw*, as we will see. First, contrary to claims made in British Columbia and Canadian media and learned journals between 1998 and 2000, treaties were indeed concluded between the Crown

before the conclusion of the NFA.[20] The SCC explicitly affirmed the existence of a treaty between Douglas and Nanaimo, and many more existed. Second, *White and Bob* traces a direct line from the Proclamation to Aboriginal fee-simple land ownership. *White and Bob* was the first in a string of cases that relied on this document to assert affirmative ownership, and it appears copiously in the bodies of subsequent opinions.[21] While critics of the Royal Proclamation are prone to claiming simplistically that its only function is to lend an air of credibility to the colonialism project, it instead actually codifies Aboriginal sovereignty into positive law. The Proclamation's language reveals the conflicting policy objectives the Crown faced in the eighteenth century as Europeans aimed to control the North American landmass through a path of least resistance. The truth of the matter—a truth repeatedly acknowledged at the level of the SCC—is that Aboriginal fee-simple land ownership was woven into the very fabric of colonial Canadian law. Aboriginal nationhood, reified in the actions of occupational sovereignty, has never been positively extinguished.

IV. 1867 - 1913: Early Land Settlement Attempts in British Columbia

Canada's Confederation in 1867 fundamentally altered the dynamic between Aboriginals and Europeans. The British North American Act (BNAA), enacted that year, stipulates that Aboriginal matters would no longer be decided by provinces but federally in Ottawa. The BNAA would later form the backbone of Canada's Act of Constitution. British Columbia joined the Confederation in 1871, placing itself under "the trusteeship… [of] the Dominion Government."[22] Aboriginal matters in British Columbia, however, continued to be conducted at the local level, with periodic federal intervention. Curiously, despite British Columbia not being a founding member of Canada's Confederation, the Royal Proclamation

has consistently been held to apply to British Columbia, despite the fact that the instrument did not extend to the region at the time of drafting.

In 1887, a travelling Royal Commission was convened to investigate Indigenous affairs. When the Commission reached the Nisga'a in northwestern British Columbia, it told the Nisga'a that the Canadian government did not consider them to have "legal rights to their lands" although previous European-Nisga'a interactions in the Nass Watershed involved only basic trading of commodities.[23] Aboriginal secession, much less conversion, was never discussed. At first, the Nisga'a chiefs reacted with scorn, but soon the gravity of the situation dawned on them. Nisga'a Chief Charles Russ lamented, "We took the Queen's flag… to honour [the Europeans]... we never thought… that she was taking the land away from us."[24] Then-Attorney General, the Honorable Alexander E.B. Davie, was concerned that Commission members would be swayed by the objections of the Nisga'a: "Be careful to discountenance, should it arise, any claim of Indian land title."[25] Chief Russ attempted to strike a compromise with the Commission by "giving up most of the land" the Nation considered its traditional territory, in exchange for "a promise on paper" that fee-simple ownership would be protected via treaty.[26] Like many First Nations, the Nisga'a has its own traditional customary laws and practices, called *Ayuuk*, which contain customary right to land which is shared by the community and includes no map or notation of territorial extent.[27] Negotiating in the foreign language of colonial law, Chief Russ was inherently disadvantaged, if not downright discounted. He was soundly rebuffed and no protections were given.

The years immediately following the Royal Commission's visit were guided by the Government's stance that Aboriginal land was now Canadian (Crown) land. George Vancouver, the ebullient Royal Navy officer, led several Northern Expeditions in the late eighteenth century. These adventures involved, among other activities, what

one scholar drily calls "some slaughter."[28] The turn of the century is marked by growing encroachment of rights protected under the Declaration, as well as disavowal of Aboriginal property and human rights. These invasions did not always appear in the form of outright conquest. By the late nineteenth century, European settlers started to arrive on Nisga'a lands in significant numbers, purportedly to trade but often to build their own settlements and to populate them with Europeans.[29] In response, in 1906, the Nisga'a Nation formed the Nisga'a Land Committee, retained an attorney, and submitted a petition to reclaim its traditional territory to the provincial legislature in Victoria, British Columbia.[30] Half of the petition quoted verbatim from the Royal Proclamation. Provincial legislators saw no reason to act. Two years later, the Cowichan Tribes, a First Nation whose traditional territories reside on Vancouver Island and whose lands were threatened under similar circumstances, retained and sent lawyers to London to make their own case for land ownership before the Privy Council. In January 1913, the Nisga'a also presented its case before the Council, represented by the London firm Fox & Preece.[31] Neither was granted any relief.

Seeing that simple possession or even the enactment of reasonable limitations on European access was not likely to materialize through judicial channels, the Nisga'a Nation began in the twentieth century to advocate for treaty negotiations. They sought not only limited self-governance on designated parcels of Crown-owned land (as were created by the Indian Act of 1867), but also outright ownership, only possible through state sovereignty.[32] Only through treaties–which affirm nationhood–can Nisga'a law be exercised and land ownership legally affirmed. Nisga'a control is not only important for the wholesale exercise of economic rights that accompany outright ownership, but also necessary for the exercise of Nisga'a law. At issue is not only the relationship of land to Nation, but also that of land to individuals. Nisga'a law displays "a bias towards community property [rather than private

property]… [that] goes in the face of… Canadian practice."[33] Land ownership and Nation corporeality therefore create a feedback loop in which the role of the individual factors differently than in the common law context. In the Canadian paradigm, "private land" means land owned, or held in fee-simple, by any legal or natural person; "public land" means land managed by federal or provincial governments and held by the Crown. Sec. 117 of the Constitution Act of 1867 provides that "all Provinces shall retain all their Public Property… subject to the Right of Canada to assume any Lands," which implicitly creates the class of private property.[34] This binary is legible neither in the context of Nisga'a law nor in the context of a hybrid legal arrangement (as some scholars have suggested an alternative to the NFA) in which the Canadian Constitution and common law are to apply concurrently in the Nass Valley. But any such attempt would be one in which common law is foisted or superimposed upon preexisting Indigenous legal systems, a practice which most modern day theorists would completely denounce. The use of common law institutions and laws to create redress, to the extent that it does not validate Aboriginal law, is hardly redress.

The problem is compounded by the fact that different First Nations utilize different legal systems. When, in 1913, Prime Minister Wilfred Laurier pledged to a gathering of BC First Nations (including the Nisga'a and the Cowichan) that collectively "their rights would be protected," it was ambiguous whose rights exactly were to be protected, as many First Nations advanced overlapping territorial claims and understood land ownership differently from one another.[35] Starting in the early 1900s, the Nisga'a and other First Nations had realized that they require comprehensive and individualized treaties within the Canadian legal framework in order to assert sovereignty, which is required for the assurance of fee-simple land ownership.

V. 1955 - 1999: *Calder, Delgamuukw,* and their Consequences

Three SSC decisions influenced the political and legal landscape that informed the signing of the NFA. These are *Calder v British Columbia* (1973); *Regina v Van der Peet* (1996); and, most important, *Delgamuukw v British Columbia* (1997). Negotiations for the draft NFA took place while *Van Der Peet* and *Delgamuukw* were argued before the SCC, and the process of the NFA was implicitly guided by the SSC's decisions. Also noteworthy are some alterations to the original Constitution, contained within the amending Constitution Act of 1982.

Calder arose out of the single-handed advocacy of Frank Calder, a member of the Nisga'a Nation and the first Aborigine elected to a parliamentary body in Canadian history.[36] In 1949, he was elected on an one-issue platform that aimed to "settle the Nisga'a land dispute", establishing the Nisga'a Land Council in 1955.[37] Still serving in the House by 1959, he produced a new version of the 1913 London petition which, through his persistent lobbying, resulted in a Joint Senate-House of Commons Hearing held in the following year. There, Calder argued that the Nisga'a Nation has never been conquered. Nisga'a nationhood thus exists because its sovereignty and territory had never been compromised. Conservative member of Parliament Henry C. McQuillan replied militantly that the Nisga'a "soon would be conquered if Aboriginals tried to [assert land rights] in every place in BC."[38] Calder responded that we "are not after the taking back of the land and then being rulers over it… we only want our title recognized."[39] This formulation discards the question of sovereignty, offering a gentler reorientation than national sovereignty; acknowledgement of ownership suffices. (Calder's comment should not be stretched too far, as it was an oral statement pronounced during debate and not construed to be legally rigorous.) In any case, the proposition did not interest the Progressive Conservative government.

In 1969, buoyed by the success of *White and Bob*, Calder and the Nisga'a Nation Tribal Council brought an action against the Province of British Columbia in the British Columbia Supreme Court (BSCS), seeking a governmental declaration that Aboriginal land title existed before colonization and was never extinguished.[40] After the BC Provincial Court ruled that Aboriginal title had in fact been extinguished (if it ever existed) and the BC Court of Appeals rejected Calder's appeal, Calder appealed to the SCC. The resulting case, *Calder v Attorney-General of British Columbia* (1973), was dismissed on the grounds that the Royal Proclamation did not apply to British Columbia since it did not enter into Confederation until the nineteenth century. JJ. Martland, Ritchie, and Judson delivered this view.[41] However, all in all, six of seven Justices affirmed that Aboriginal title existed at the time of the Royal Proclamation in British Columbia regardless of the scope of its application.[42] Writing on behalf of Spence and Laskin, Hall notes in the lengthy and important dissent, "The Nishgas were never conquered nor did they at any time enter into a treaty or deed of surrender as many other Indian tribes did throughout Canada and in southern British Columbia…"[43] The dissenting justices based their argument on the historicity of the Nisga'a claim, noting that the absence of the Royal Proclamation at the time of its application to other parts of the Confederate did not preclude Aboriginals from retaining land title. Neither did land laws in British Columbia have the intent of extinguishing Aboriginal land title, a title which was not invalidated by British Columbia joining Confederation. *Calder* was "a moral victory."[44] The decision was an ideological battle which was ultimately decided by Justice Pigeon, who ruled narrowly on the technicality that the case was not brought properly before the SCC. Ironically, the dissent from *Calder* is heavily cited in the subsequent *Delgamuukw* decision and almost entirely guides the reasoning therein. *Calder* became an important legal deferral.

In 1982, the Canadian Parliament passed the Constitution

Act, amending the 1867 document. The new sec. 35(1), which subtends appellants' arguments in *Delgamuukw*, reads, "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[45] Sec. 35(3) clarifies, "For greater certainty, subsection (1)… includes rights that *now exist* by way of land claims agreements or so may be acquired" (emphasis added).[46] The drafters were almost certainly echoing the language of *Calder*, of which they were certain aware. In that majority opinion, Justice Judson had written unambiguously:

> [The] fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a 'personal or usufructuary right'. What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished.[47]

Judson trained his attention on the difference between private and communal land ownership. This language would eventually guide the judicial thinking in *Delgamuukw*, a case that, though unrelated to the Nisga'a, influenced the course of the NFA negotiations. Its result, reached through SCC precedents *Calder* and *White and Bob*, compelled the BC government into action.

The *Delgamuukw* case is the most important Aboriginal litigation in Canadian history. Appellants were Earl Muldoe (Delgamuukw) and more than 20 Gitxsan and Wet'suwet'en First Nation clans, who sued British Columbia to attempt to regain jurisdiction over fifty-eight thousand square kilometers of land. Having been dismissed at the BCSC, the appellants appealed to the SCC. Procedurally, the court was tasked not with settling the matter

of whether Aboriginal title exists but with deciding whether or not to allow a retrial over improper denial of admission of evidence during the provincial trial. The SCC did order a retrial which to date has not yet taken place, but also considered the legal merits of Aboriginal land title claims in a highly activist opinion. Lamer and others used sec. 35(1) to defend the Constitutionality of land claims, drawing from a 1996 decision that interpreted the sec. 35 phrase "existing aboriginal and treaty rights" to encompass Aboriginal title. This decision was *Regina v Van der Peet*, in which Lamer wrote that sec. 35(1) "provides a solid constitutional base upon which subsequent [land treaty] negotiations can take place."[48] This view implies that the Constitution's language of "existing aboriginal... rights" encompasses uncodified but nevertheless existent jurisdictional rights such as that at issue in Delgamuukw's provincial action. To Lamer, the section represents "reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown" (para. 31, *Van der Peet*)—in other words, a bifurcated Aboriginal-Canadian nationhood, which is not synonymous with Aboriginal sovereignty.[49] Finding that the Gitxsan and Wet'suwet'en have established long-term residence over areas under claim, Lamer returned to the issue in *Delgamuukw* to find that Aboriginal title encompasses an "exclusive right to the use and occupation of the land, *i.e.* to the exclusion of both non-aboriginals and members of other aboriginal nations."[50] Here, Lamer advanced his position on Aboriginal title from sovereign deference in *Van der Peet* to fee-simple ownership, approaching sovereignty. He consistently used a textualist reading of sec. 35 of the updated Constitution to support Aboriginal land rights and to differentiate between Canadian and Aboriginal sources of law, clarifying that "[from] a theoretical standpoint, Aboriginal title arises out of prior occupation of the land by Aboriginal peoples and out of the relationship between the common law and pre-existing systems of Aboriginal law."[51] In other words, the historical sequence of claims to title lends merit to title.

Lamer is responsible for one of the most editorialized lines in Canadian jurisprudence: "Let us face it, we are all here to stay…"[52] In addition to appealing to collaborative lawyering, Lamer makes the much more consequential contribution of bringing federal case law to the precipice of affirming Aboriginal sovereignty—the surest legal concept to protect the Aboriginal land title that since *White and Bob* has never been cast in slightest doubt.

VI. The NFA and its Legacy

The Nisga'a continually dialogued with the federal government as *Calder, Van der Peet,* and *Delgamuukw* moved through the courts. In fact, in 1976, before the introduction of the new constitutional language specifically upholding Aboriginal right to negotiate land settlements with the federal government, Calder and the Nisga'a Tribal Council formally entered into negotiations with Ottawa to work toward a formal land settlement.[53] British Columbia initially refused to join negotiations, holding that since the SCC was split 3-3 on the issue of the existence of Aboriginal land title in *Calder*, the finding of the BCSC that Aboriginal land title did not exist in British Columbia limited the government in the scope of its activities. It was not until 1990 that British Columbia joined negotiations at Ottawa's behest, begrudgingly recognizing that its involvement was necessary to solve issues regarding natural resource extraction and other local minutiae.[54] With British Columbia's participation, the original aim of *Calder*, which was simply to simply extract the expression of a legal position in support of the Nisga'a land title from the provincial court, was materialized and broadly furthered.[55] After reaching a preliminary agreement-in-principle in February 1996, the NFA, a binding treaty, was signed and ratified on March 22, 1996, concluding a century-long process of strikingly resilient Aboriginal legal advocacy.

Detractors of the NFA voice two main concerns: that the

Canadian Constitution does not support fee-simple land transfer to Aborigines, and that the settlement is disproportionately generous given that British Columbia had previously reached land settlements with First Nations that did not explicitly afford Aboriginal title.[56] The first detraction fails to take into account that the sec. 35(3) protection of treaty rights was codified into the 1982 Constitution Act. This point does not require further elaboration. The second detraction seems concerning on its surface and does not stand up to further scrutiny. The nature of the NFA, a treaty, is different from that of earlier provincial-Aboriginal settlements, which do not use binding treaties. Treaties, under the Westphalian system, require recognition of statehood—a recognition that, in effect, reinstates Nisga'a sovereignty. The NFA now serves as a model for land settlements being pursued under the British Columbia Treaty Commission (BCTC), which was established during the Nisga'a process.[57] Additionally, some critics, notably conservative academics and politicians to the right of progressive New Democratic Party provincial premier Glen Clark, clamored that the NFA forwards a "racist approach" that disproportionately disfavors other First Nations.[58] Such comments require sociopolitical rebuttals that lie outside of the scope of this article. More typical remonstrations were made in such fora as the Select Standing Committee on Aboriginal Affairs on the NFA. A witness argued there that the former Nisga'a reserve area, established legally as public Crown land, should never be "converted" to fee-simple land and then transferred.[59] But nowhere in federal law is such transfer disallowed. Furthermore, customary international law does not forbid the transfer of land from one sovereign to another. Prior to the transfer, the Crown still held the highest possible ownership interest; now, the Nisga'a holds it. A reasonable reading of the NFA would find the legal nature of this action a simple conferral of property.

The significance of the NFA is primarily its implications for future negotiations; its practical effects are smaller. The Nisga'a

population was around 5,500 persons at the signing of the NFA, with only 2,500 among them having permanent residence within the eventually ceded area; historical population figures are not available.[60] This figure ranks Nisga'a among one of the least-populated First Nations which were in negotiations with federal and provincial governments at the time of the signing.[61] The legal ramifications are much more consequential.

VII. 2019-2020: The Wet'suwet'en Confrontation Raises Resurgent Questions

The Nisga'a land settlement contextualizes a present-day jurisdictional conflict, which took place in the territory of the Wet'suwet'en First Nation, adjacent to the Nisga'a. In protest to the construction of twin natural gas pipelines by TC Energy, the Wet'suwet'en had deployed "land defenders," or long-term protestors, along a Crown-owned forest access road to their territory. On February 6, 2020, near Houston, a small community 384 miles northeast of Vancouver, the Royal Canadian Mounted Police (RCMP) raided their semi-permanent roadblocks and arrested at least six protestors.[62] A flurry of criticism of the paramilitary methods that were deployed to make these arrests, including the use of tactical police and the removal of journalists from the site, appeared in subsequent news coverage.[63] Most commentators, however, did not remark on the legal argument raised by the Wet'suwet'en, who claimed that Coastal GasLink was violating the rights they held in perpetuity to their traditional territories. The RCMP and BC government claimed that they were simply enforcing an expanded injunction granted by the BCSC, issued in December 2019, which allowed Coastal GasLink to continue construction of the pipeline and remove protestors by means which include lethal force.[64] However, the seemingly straightforward question of access to Wet'suwet'en land is complicated by *Delgamuukw* and the legal history of the Nisga'a

transfer. The Wet'suwet'en has support from at least three sources of law: Canadian federal case law, British Columbia legislation, and customary international law. The Wet'suwet'en will be able to lean strongly on *Delgamuukw* as well as recent codification of customary international law before any BC or federal court.

Although the reach of *Delgamuukw* cannot protect the Wet'suwet'en in anything but theoretical terms until written into case law, allowing Coastal GasLink to continue construction runs counter to the conclusion of the SCC reached in *Delgamuukw* by the SCC. By distinguishing between fee-simple sovereignty based on prior occupation, and political and legal sovereignty of the Crown which importantly does not preclude Aboriginal sovereignty, Lamer affirmed in *Delgamuukw* that Crown access to a First Nation's territorial extent is dependent solely on the discretion of the Nation. Coastal GasLink claims to enjoy the unanimous consent of the band council, a consultative group established under the Indian Act.[65] However, consent from representatives of twenty First Nations, including Wet'suwet'en appointees, does not necessarily mean that the Wet'suwet'en Nation had given its consent. Under Indigenous law, hereditary chiefs have jurisdiction over matters to do with their respective Nations. In this case, the Wet'suwet'en chiefs are unanimously opposed to the project, on bases including breach of sovereignty, environmental endangerment, among others. Coastal GasLink relied on the antiquated pre-*Delgamuukw* structure of tribal councils, an artifice of the colonial legal regime, to sidestep legitimate Wet'suwet'en objections. Elected by members of First Nations, band council members are accountable to a federal agency, Indigenous and Northern Affairs Canada, and not to their Nations. In any case, Coastal GasLink could not derive power to use one Nation's land from the approval of a multi-Nation, non-jurisdictional consultative group.

Opponents correctly claim that the Wet'suwet'en had never entered into a land treaty with the Crown. Based on that defect,

the federal and provincial government can approve or disapprove infrastructural projects, since the current nature of Wet'suwet'en land is a federal Indian (Aboriginal) reserve. Theoretically, there is no barrier. Treaty negotiations often occur over a span of decades, incurring incalculable legal, political, and administrative costs. The Government of Canada, which is currently involved in over fifty such negotiations with various First Nations without reaching a significant result since *Nisga'a*, must make policy calculations regarding these negotiations, some of which involve overlapping territories or densely populated metropolitan areas. In the meantime, case law doctrine only weakly protects land ownership and easily be dissipated by the paramilitary enforcement methods of the RCMP. While objectionable, the separation of the judiciary and the legislative predictably reaches this uncomfortable result.

To reiterate, the Wet'suwet'en councilmen's preference for the possibility of job creation and increased local economy could easily and reasonably lead to the erroneous extrapolation that the Wet'suwet'en, as a whole, prefers the project. While they were elected to the tribal council by an uncoerced vote of members of the Nation, they may not subscribe to the same priorities as Wet'suwet'en hereditary chiefs. Structurally, they belong to an institution of the Crown and operate outside the framework of Indigenous law. By issuing the injunction, the British Columbia Supreme Court falls in line with the legal artifices of the Government.

Outside of the domestic framework, Coastal GasLink violates norms of customary international law, which are enforceable when evidenced in certain non-binding international instruments. Canada is a recent signatory to the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), a resolution of the UN General Assembly which recognizes broad Aboriginal rights and codifies State responsibility.[66] Article 29 of the UNDRIP reads, "Indigenous peoples have the right to the conservation and protection of the environment of their lands…States shall take effective

measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent."[67] These provisions can become binding when adopted into provincial legislation. In November 2019, the BC Legislature codified the UNDRIP into provincial law.[68] Now operative as a source of positive law, this new legislation affords even greater protections that could be taken up in provincial and appellate courts. Wet'suwet'en leaders have persistently made reasonable, material, and public statements about possible irrevocable environmental ramifications of a natural gas leak in Wet'suwet'en territory.[69] Whether the language of "storage or disposal" applies to a natural gas-carrying pipeline, however, remains to be tested in courts.

In conclusion, Westphalian legal sources, including federal case law and customary international law, in addition to Indigenous law, all support the Wet'suwet'en in objection to the project. In the meantime, *Delgamuukw* and the precedence of sovereignty seen in the Nisga'a case at least posits a possible way forward for First Nations in Canada. It remains to be seen whether the support proffered by legal theories can remain in the face of economic pressures.

VIII. Conclusion

The opening lines to Canada's national anthem proclaim, "O Canada / Our home and native land! / True patriot love / in all of us command." These words take on a new meaning when read in the context of Aboriginal legal rights, especially since the word "native" is a common substitute for "Aboriginal," even in the scholarly literature, until very recently. These words also foreshadow Lamer's famous pronouncement in the *Delgamuukw* decision that all occupants of Canada's landmass are "here to stay," arousing fanciful sentiments of reconciliation and goodwill. It is much more difficult to wade out of the legal and rhetorical quagmire. For whom is the

land Native? It is impossible to reverse the outcomes of generations of colonial intervention, and to extinguish large metropolises that currently sit on Aboriginal land (the cities of Vancouver and Victoria, both in British Columbia, being cases in point). The number of land negotiations currently being negotiated in British Columbia alone, and the massive combined area under claim, mean that complete restoration of traditional lands is unlikely to take place. Negotiations which transfer a smaller extent of land in exchange for cash transfers or other considerations may be necessary, considering the urbanization of the Lower Mainland, which includes the dense areas mentioned above, and other populated localities which are currently under claim.

John Ralston Saul has claimed that Canadian national identity is based upon the "triangular foundation [of] aboriginal, Francophone, Anglophone."[70] If such is true, then the Aboriginal side is perilously shortchanged. Aboriginal title and legal systems were not considered integral to Canadian nation-building; it was not until very recently that First Nations became adept at working within the common law framework, and sovereign protections were introduced into caselaw and legally binding instruments. European colonizers applied the Westphalian conception of international law in British North America, while also displacing existing systems of Aboriginal law and inflicting the common law understanding of land as private property upon the Nisga'a Nation and other groups. As these historical wrongs become addressed over protracted government-Aboriginal negotiations, legal changes will likely continue to take place even as entrenched attitudes still influence present-day policies and enforcement actions. New bodies of law will doubtlessly emerge. As Canada looks ahead to its two-hundredth anniversary, issues of Aboriginal land rights will continue to challenge the colonial legal regime as well as contemporary legal conceptions of home and Native land.

[1] Anglicized nomenclature for First Nations evolves as linguistic preferences of Nations become better known. The name of the Nisga'a First Nation has been variously spelt as "Nishka", "Niska", "Nisqa'a", "Nisgha", "Nishga", and "Nisga'a". Throughout, I use the conventional Anglicized "Nisga'a", although sources adapt a variety of spellings.
[2] Strictly speaking, "Indian law" is the legal term for legislation to do with Canada's Aboriginal peoples. Using the term "Indians" to refer to Canadian Aborigines is a prevalent practice, even among liberal academics, until at least the early 2000s.
[3] Nisga'a Tribal Council, *Understanding the Nisga'a Treaty* (New Aiyansh: Nisga'a Lisims Government, 1998): 2.
[4] *Indian Act*, 1876, sec. 6.
[5] Sean Boynton, "11 more arrests made as RCMP expand enforcement area for Wet'suwet'en pipeline opponents," *Global News*, February 18, 2020, https://globalnews.ca/news/6525742/wetsuweten-enforcement-rcmp-day-3/.
[6] See Gordon Gibson and Neil Sterritt, "Map 1: Aboriginal territories in the Nass Watershed," in "Competing Claims Ignored!" *BC Studies: The British Columbian Quarterly* 120 (Winter 1998/1999): 76. Gibson, a Canadian Indigenous scholar, is a leading critic of the NFA. Within the context of disavowing the treaty process generally, Gibson rejects the Nisga'a claim from their1908 petition that they had a territory "about 140 miles in extent" and maintains that the NFA encourages on the claimed territory of the Gitanyow, a neighboring First Nation.
[7] The undulating geography of the Nass Watershed, and conflicting accounts by Nisga'a leaders themselves, makes it difficult for commentators to authenticate official figures. Tracie Lea Scott estimates that the traditional territory is approximately 26,000 sq. km., Melvin S. Smith 25,000, and then-BC Premier Glen Clark 24,000. Many commentators have revised this figure over time, including the eventual signers of the NFA. See Gordon Gibson and Neil Sterritt, "Competing Claims Ignored!", 74.
[8] For a detailed account of this process, see Douglas Sanders, "The Nishga Case," *BC Studies* 17 (Autumn 1973), 3-20.
[9] Hamar Foster, "Honoring the Queen's Flag: A Legal and Historical Perspective on the Nisga'a Treaty," *BC Studies: The British Columbian Quarterly* 120 (Winter 1998/99): 13.
[10] Ibid.
[11] His Majesty's Most Honorable Privy Council, *A Proclamation* (London: George R., 1763).
[12] Ibid.

[13] Ibid.
[14] Christopher McKee, *Treaty Talks in British Columbia: Negotiating a Mutually Beneficial Future*, 2nd ed. (Vancouver: UBC Press, 2000), 12.
[15] Tracie Lea Scott, *Postcolonial Sovereignty? The Nisga'a Final Agreement*, ed. Donald Ward (Saskatoon: Purich Publishing, 1996): 47.
[16] Ibid.
[17] Ibid.
[18] The full circumstances of the case can be found in Thomas Isaac, *Aboriginal Law: Cases, Materials and Commentary*, 2nd ed. (Saskatoon: Purich Publishing, 1999), 144.
[19] Ibid.
[20] For one such factual error, see Melvin H. Smith, "Aboriginal Land Claims in British Columbia: Serious Concerns about the Nisga'a Deal," *Public Policy Sources* 16 (1998): 4.
[21] The case, although not widely known, is widely cited in Aboriginal litigation. See Daniel Raunet, *Without Surrender, Without Consent: A History of the Nisga'a Land Claims*, 2nd ed. (Vancouver: Douglas & McIntyre, 1996): 149.
[22] Melvin H. Smith, *Our Home or Native Land: What Governments' Aboriginal Policy is Doing to Canada* (Toronto: Stoddart Publishing, 1996): 94.
[23] Raunet, *Without Surrender*, 86.
[24] Quoted in Foster, "Honoring the Queen's Flag," 12.
[25] Quoted in Raunet, *Without Surrender*, 86.
[26] Quoted in Foster, "Honoring the Queen's Flag," 12.
[27] Samuel V. Laselva, "Aboriginal Self-Government and the Foundations of Canadian Nationhood," *BC Studies: The British Columbian Quarterly* 120 (Winter 1998/99): 51.
[28] Scott, *Postcolonial Sovereignty?* 46.
[29] Ibid.
[30] Tom Molloy and Donald Ward, *The World is Our Witness: The Historic Journey of the Nisga'a into Canada* (Calgary: Fifth House Ltd., 2000), 24.
[31] Ibid
[32] Ibid.
[33] Gordon Gibson, "Comments on the Draft Nisga'a Treaty," *BC Studies: The British Columbian Quarterly* 120 (Winter 1998/99): 57.
[34] Department of Justice, *A Consolidation of the Constitution Acts: 1867-1982* (Ottawa: Minister of Public Works and Government Services, 2012): 36.
[35] Foster, "Honoring the Queen's Flag", 20. For one such instance of alleged overlap involving the Gitanyow tribe, see Neil Sterritt, "The Nisga'a Treaty," 85. Deliberation on the veracity of such claims is beyond the scope of this

article. For a similar opinion of Indian rights to an area which evokes the same situation involving the Gitanyow, see Neil Sterritt, "'It is an act of aggression'," *The Vancouver Sun*, November 21, 1998, sec. A21. Gordon Gibson, ever the vigorous critic of BC Aboriginal land settlement, goes even further, once calculating that 111% of BC's landmass is under some sort of claim.

[36] Raunet, *Without Surrender*, 144.

[37] Ibid.

[38] Ibid.

[39] Raunet, *Without Surrender*, 146.

[40] Edward Allen, "Reflecting on the 40th Anniversary of the *Calder* Decision," *Northern Public Affairs,* September 2013), 16.

[41] *Calder et al. v. Attorney-General of British Columbia*, 1973, CanLII 4 (SCC), [1973] SCR 313, http://canlii.ca/t/1nfn4.

[42] Robert Mainville, *An Overview of Aboriginal and Treaty Rights and Compensation for their Breach* (Saskatoon: Purich Publishing, 2001), 21.

[43] *Calder*.

[44] J. Rick Ponting, *The Nisga'a Treaty: Polling Dynamics and Political Communications in Comparative Context* (Peterborough: Broadview Press, 2006), 20.

[45] *The Constitution Act, 1982,* being Schedule B to the *Canadian Act 1982* (UK), 1982, c.11.

[46] Ibid.

[47] *Calder*.

[48] *Regina v Van der Peet*, [1996] 2 S.C.R. 507, at para. 186, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1407/index.do.

[49] Ibid, at para. 31.

[50] *Delgamuukw v British Columbia*, [1998] 1 C.N.L.R. 14 (SCC) at para. 185, quoted in Isaac, *Aboriginal Law,* 84.

[51] Ibid, at para. 145.

[52] *Delgamuukw*, 97.

[53] Allen, "Reflecting," 16.

[54] Government of Canada, "History of the Negotiations with the Nisga'a Tribal Council," September 15, 2010, https://www.rcaanc-cirnac.gc.ca/eng/1100100031298/1543410196156.

[55] Allen, "Reflecting," 14.

[56] For a representative view that advances both counterarguments, see Charles Taylor, "On the Nisga'a Treaty," *BC Studies: The British Columbian Quarterly* 120 (Winter 1998/1999): 37.

[57] Government of Canada, "History."

[58] For a representative sample of these debates, which typically remain rhetorical, see Gordon Campbell and Glen Clark, "Clark vs. Campbell: Faceoff," *Times Colonist*, October 17, 1998, sec. A6.
[59] Thirty-sixth Parliament of the Legislative Assembly of British Columbia, *Towards Reconciliation: Nisga'a Agreement-in-Principle and British Columbia Treaty Process* (Victoria: Select Standing Committee on Aboriginal Affairs, 1997), 34.
[60] Ibid.
[61] Ponting, *The Nisga'a Treaty*, 19.
[62] Leyland Cecco, "Canadian police arrest activists at anti-pipeline camp," *The Guardian*, February 6, 2020. https://www.theguardian.com/world/2020/feb/06/canadian-police-arrest-activists-blocking-gas-pipeline-indigenous-land-wetsuweten#maincontent
[63] Ibid.
[64] Jaskiran Dhillon and Will Parrish, "Exclusive: Canada police prepared to shoot Indigenous activists, documents show," *The Guardian*, December 20, 2019. https://www.theguardian.com/world/2019/dec/20/canada-indigenous-land-defenders-police-documents
[65] Jillian Kestlers-D'Amours, "Understanding the Wet'suwet'en Struggle in Canada," *Al Jazeera*, March 1, 2020. https://www.aljazeera.com/news/2020/03/understanding-wet-struggle-canada-200301200921070.html
[66] *Resolution adopted by the General Assembly on 13 September 2007. 61/295. United Nations Declaration on the Rights of Indigenous Peoples.* https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf
[67] Ibid.
[68] "UN Indigenous rights bill approved unanimously in B.C.," *CBC News*, November 26, 2019, https://www.cbc.ca/news/canada/british-columbia/b-c-first-nations-leaders-worry-u-n-indigenous-rights-bill-may-be-in-trouble-1.5374095.
[69] Kestler-D'Amours, "Understanding the Wet'suwet'en Struggle in Canada".
[70] John Ralston Saul, foreword to *The World is Our Witness: The Historic Journey of the Nisga'a into Canada* (Calgary: Fifth House Ltd., 2000), 1.

Works Cited

Allen, Edward. "Reflecting on the 40th Anniversary of the *Calder* Decision." *Northern Public Affairs*, September 2013, 14-21.

Boynton, Sean. "11 more arrests made as RCMP expand enforcement area for Wet'suwet'en pipeline opponents." *Global News*, February 18, 2020. https://globalnews.ca/news/6525742/wetsuweten-enforcement-rcmp-day-3/.

Calder et al. Attorney-General of British Columbia, 1973, CanLII 4(SCC), [1973] SCR 313. http://canlii.ca/t/1nfn4.

Campbell, Gordon, and Glen Clark. "Clark vs. Campbell: Faceoff." *Times Colonist*, October 17, 1998, sec. A6.

Cecco, Leyland. "Canadian police arrest activists at anti-pipeline camp." *The Guardian*, February 6, 2020.https://www.theguardian.com/world/2020/feb/06/canadian-police-arrest-activists-blocking-gas-pipeline-indigenous-land-wetsuweten/#maincontent.

Constitution Act, 1982, being Schedule B to the *Canadian Act 1982* (UK), 1982, c. 11.

Delgamuukw v. British Columbia, [1998] 1 C.N.L.R. 14 (SCC). https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1569/index.do

Department of Justice. *Consolidation of the Constitution Acts: 1867-1982.* Ottawa: Minister of Public Works and Government Services, 2012.

Dhillon, Jaskiran, and Will Parrish. "Exclusive: Canada police prepared to shoot Indigenous activists, documents show." *The Guardian*, December 20, 2019. https://www.theguardian.com/world/2019/dec/20/canada-indigenous-land-defenders-police-documents.

Government of Canada, "History of the Negotiations with the Nisga'a Tribal Council," September 15, 2010. https://www.rcaanc-cirnac.gc.ca/eng/1100100031298/1543410196156.

Foster, Hamar, "Honoring the Queen's Flag: A Legal and Historical Perspective

on the Nisga'a
Treaty." *BC Studies* 120 (Winter 1998/1999), 61-84.
Gibson, Gordon. "Comments on the Draft Nisga'a Treaty." *BC Studies* (Winter 1998/1999):
55-72.
Gibson, Gordon and Neil Sterrit, "Competing Claims Ignored!" *BC Studies* 120 (The Nisga'a
Treaty) (Winter 1998/1999), 72-86.
His Majesty's Most Honorable Privy Council. *A Proclamation*. London, George R., 1763.
Indian Act. R.S.C., c.1-5 (1985). https://laws-lois.justice.gc.ca/eng/acts/i-5/
Isaac, Thomas. *Aboriginal Law: Cases, Materials and Commentary*, 2nd ed. Saskatoon: Purich
Publishing, 1999.
Kestlers-D'Amours, Jillian. "Understanding the Wet'suwet'en Struggle in Canada." *Al Jazeera,*
March 1, 2020.
https://www.aljazeera.com/news/2020/03/understanding-wet-struggle-canada-200301200
921070.html.
Laselva, Samuel V. "Aboriginal Self-Government and the Foundations of Canadian Nationhood." *BC Studies* 120 (Winter 1998/1999): 41-54.
McKee, Christopher,.*Treaty Talks in British Columbia: Negotiating a Mutually Beneficial Future*, 2nd ed. Vancouver: UBC Press, 2000.
Molloy, Tom, and Donald Ward. *The World is Our Witness: The Historic Journey of the Nisga'a*
into Canada. Calgary: Fifth House Ltd., 2000.
Nisga'a Tribal Council, *Understanding the Nisga'a Treaty*. New Aiyansh: Nisga'a Lisims
Government, 1998.
Pointing, J. Rick. *The Nisga'a Treaty: Polling Dynamics and Political Communications in*
Comparative Context. Peterborough, ON: Broadview Press, 2006.
Raunet, Daniel. *Without Surrender, Without Consent: A History of the Nisga'a Land Claims*, 2nd ed. Vancouver: Douglas & McIntyre, 1996.
Regina v. Van der Peet, [1996] 2 S.C.R. 507.
https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1407/index.do.
Resolution adopted by the General Assembly on 13 September 2007. 61/295. United Nations

Declaration on the Rights of Indigenous Peoples. https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf

Sanders, Douglas. "The Nishga Case." *BC Studies* 19 (Autumn 1973): 3-20.

Saul, John Ralston. *The World is Our Witness: The Historic Journey of the Nisga'a into Canada*. Calgary: Fifth House Ltd., 2000.

Scott, Tracie Lea. *Postcolonial Sovereignty? The Nisga'a Final Agreement*, ed. Donald Ward. Saskatoon: Purich Publishing, 1996.

Smith, Melvin H. "Aboriginal Land Claims in British Columbia: Serious Concerns about the Nisga'a Deal." *Public Policy Sources* 16 (1998): 3-18.

Sterritt, Neil. "It is an act of aggression." *Vancouver Sun*, Nov. 21, 1998, sec. A21.

Taylor, Charles. "On the Nisga'a Treaty." *BC Studies* 120 (Winter 1998/1999): 37-40.

Thirty-sixth Parliament of the Legislative Assembly of British Columbia. *Towards Reconciliation: Nisga'a Agreement-in-Principle and British Columbia Treaty Process.* Victoria: Select Standing Committee on Aboriginal Affairs, 1997.

"UN Indigenous rights bill approved unanimously in B.C." *CBC News*, November 26, 2019. https://www.cbc.ca/news/canada/british-columbia/b-c-first-nations-leaders-worry-u-n-indigenous-rights-bill-may-be-in-trouble-1.5374095.

Identity Speech—A Not So Risky Argument

Griffin Jones | Columbia University

Edited By: Olivia Choi, Julia Cosgrove, Grayson Hadley, Michael Rubin, Natalia Vasylyk

Abstract

In the search for LGBTQ+ protections under constitutional law, many LGBTQ+ equality activists have turned to the Equal Protection Clause for guidance. However, the Supreme Court has not expanded equal protection in decades. Potential reasons for this vary from a pluralism anxiety over deciding what is and is not a protected class to an anti-antidiscrimination agenda held by the Court's conservatives. Instead, a new equal protection of liberty has emerged. While liberty claims have their value, they do not provide the stalwart defense LGBTQ+ individuals need. Some scholars recommend claiming discrimination on the basis of sexual orientation to be a type of sex discrimination, as sex discrimination is forbidden under the Equal Protection Clause. However, history shows that such an approach has rarely proven effective. Others suggest a "risky argument approach," raising both a controversial sex discrimination claim alongside other more effective claims in the hopes of a victory through the more radical sex discrimination claim. The argument also makes more moderate, though still progressive, claims more palatable. This article examines these approaches and weighs their merits before ultimately suggesting that First Amendment claims for protection of "identity speech," the core ways in which one expresses one's sexual orientation or gender, can be used as an effective method for protecting LGBTQ+ individuals. An analysis of both case law and the history of the LGBTQ+ equality movement, which relied a great deal on the protection of LGBTQ+ identities under the First Amendment, proves that such an approach is consistent with the Supreme Court's decisions and the liberty jurisprudence adopted by the Court. Thus, identity speech provides a path to achieving LGBTQ+ protections under constitutional law.

I. Introduction and Background

There is no doubt that the LGBTQ+ community faces a number of critical challenges. While same-sex marriage has successfully been achieved, many obstacles remain. Of particular note is the plight of transgender individuals, who often face a tragic rejection of their identities through restrictive "bathroom bills" and an inability to easily change their driver's licenses to reflect their new identities. For many activists, the temptation is to seek legal recourse through the promise of the Fourteenth Amendment's Equal Protection Clause, which 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."[1] The phrase "equal protection of the laws'' is tempting, but is not quite what it appears.

Despite the challenges LGBTQ+ Americans face, the case law currently maintains that sexual orientation is not among the suspect classifications awarded strict or intermediate scrutiny and thus has little in the way of protection. While some advocates, as in *Baehr v Lewin* (1993), seek to circumvent this precedent by arguing that discrimination on the basis of sexual orientation is discrimination on the basis of sex, which is subject to intermediate scrutiny, that logic has not proven useful in courts. Assuming no changes to equal protection jurisprudence will occur in the near future, we must find an alternative path. Considering sexual orientation as a First Amendment issue, rather than one under the Fourteenth, may prove useful. The concept of "identity speech" that is the expression of one's identity, including sexual orientation, can be protected under the First Amendment, offering much needed support to the LGBTQ+ community.

II. The Failure of the Equal Protection Clause

Currently six classes receive strict or intermediate scrutiny, tests used to determine a law's consitutionality, from the Supreme Court—race, nationality, citizenship status, sex, religion, and legitimacy of birth.[2] The last time a class was given such status was in 1977 to birth legitimacy in *Trimble v Gordon* (1977).[3] The fact that the legitimacy of one's birth is given protection while sexual orientation is not is unusual, given the struggles LGBTQ+ people face. Equal protection is meant to protect "discrete and insular minorit[ies]" with a "curtail[ed]...operation of those political processes ordinarily to be relied upon to protect minorities." These grounds seem more applicable to the LGBTQ+ community than to illegitimate children.[4] New York University School of Law constitutional law scholar Kenji Yoshino explains the discrepancy as a result of the Court's pluralism anxiety. He defines pluralism as "an apprehension of and about [America's] demographic diversity."[5] That fear has manifested in the Court's decisions as a reluctance to grant protected status to any group for fear of needing to accommodate every group. In 1985, Justice Byron White exemplified this view when he wrote for the majority in *City of Cleburne v Cleburne Living Center Inc* (1985), which denied a higher level of scrutiny to the mentally disabled. He wrote:

> [I]f the large and amorphous class of the mentally retarded were deemed quasi-suspect...it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally

> ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.[6]

The hesitation that Justice White expresses reflects the unwillingness of the Court to make sweeping changes. Rather than risk drawing too many lines, the Court instead opts to draw none at all. However, this risk-averse approach is a willfully ignorant one. The United States is a pluralistic nation by design and a system of law that ignores such differences only serves to reify a harmful status quo. In this case, refusal to act may do more harm than trying and failing.

On the other hand, Jed Rubenfeld, a constitutional law scholar at Yale Law School, sees a sinister motive in the Court's refusal to create additional suspect classes. While many scholars see federalist or textualist ideologies reflected in the Court's decisions—a deference given to states or a strict adherence to the written word of law—Rubenfeld looks across doctrines and argues they actually evince an "anti-antidiscrimination" agenda, a belief that anti-discrimination law and policy has gone too far.[7] He compares this agenda to the judicial activism of the *Lochner* era, in which numerous economic regulations were regularly struck down by the Court using a broad interpretation of the Due Process Clause, including a "freedom of contract."[8] Two cases stand out as examples of this agenda—*United States v Morrison* (2000) and *Boy Scouts of America v Dale* (2000). Although both cases were decided in the same year and both reached decisions opposed to liberal antidiscrimination interests, the two cases reached that end in vastly different ways. *Morrison* invalidated part of the Violence Against Women act on what seem to be textualist and federalist concerns. The opinion characterized the offending sections as infringing on the rights of states, saying, "[t]he Constitution requires a distinction between what is truly national and what is truly local," and "the regulation and punishment of intrastate violence that is not direct[ly]...involved in interstate commerce has

always been the province of the States."[9] Additionally, as Rubenfeld points out, the case also heavily relied on a textualist interpretation of the Fourteenth Amendment's Section 5: "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[10] The Court ruled that Congress was overstepping its bounds to enforce the Fourteenth Amendment.

Yet, the Court veers outside the realms of both textualism and federalism in *Dale.* There, the First Amendment right to expressive association was found to allow the Boy Scouts to fire a scoutmaster for being gay, exempting them from New Jersey's antidiscrimination laws.[11] While *Morrison* was a textualism-heavy case, here there is no such concern shown. Rubenfeld points out that the unwritten rule of expressive association, created in *NAACP v Alabama* (1958), was given greater weight than the explicit rights written in the First Amendment.[12] Giving preference to unwritten rules over the written is the exact opposite of textualism. Furthermore, while *Morrison* showed a deep regard for the rights of states to legislate as they see fit, *Dale* invalidated the efforts of a state, New Jersey, to determine the lines of antidiscrimination. Given that polar opposite reasonings were used to reach similar results in both cases, Rubenfeld's argument does hold some merit.

Yoshino also acknowledges the restriction of Section 5 of the Fourteenth Amendment as one of the ways in which the Supreme Court has fallen prey to pluralism anxiety with dire consequences for civil rights cases like *Morrison.*[13] However, while he says that "[a]t least with respect to federal equal protection jurisprudence, this canon has closed," he acknowledges a new way in which the Supreme Court has replaced equal protection—with liberty claims.[14]

Several cases focusing on sexual orientation prove Yoshino's point. In *Romer v Evans* (1996), an equal protection claim was brought before the Court arguing against an amendment to the Colorado constitution that prohibited the passing of laws or enactment of policies granting lesbians, gays, and bisexuals protected status

or the ability to raise discrimination claims on the basis of their sexual orientation. While the Court held that this was a violation of the Equal Protection Clause, it did not declare sexual orientation a protected class that would receive increased scrutiny. Instead, it found the amendment "at once too narrow and too broad" and "unprecedented in our jurisprudence," and as such was invalidated for demonstrating "animus" towards the LGBTQ+ community and no compelling state interest.[15] According to Yoshino, lower courts did not see *Romer* as setting a precedent, as the Colorado amendment was so unique in scope.[16] *Romer* led scholars to believe that the Court would take an equal protection argument in *Lawrence v Texas* (2003) and clarify sexual orientation classifications.[17] However, the Court instead decided to follow a liberty approach. The opinion, written by Justice Anthony Kennedy, begins with sweeping language about liberty, saying, "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[18] He addresses the Equal Protection Clause rather briefly, claiming that the Equal Protection argument against *Lawrence* is "tenable" but that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."[19]

Obergefell v Hodges (2015), the landmark case that legalized same-sex marriage, also continues the trend of using liberty rather than Equal Protection claims. While the Fourteenth Amendment is the focus, it is the Due Process Clause and the liberties it protects, rather than the Equal Protection Clause, that is the focus, though the Court also found the right of same-sex couples to marry under the Equal Protection Clause. The opinion, which was also written by Justice Kennedy, explains the relation between liberty and equal protection. He writes, "[r]ights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to

the meaning and reach of the other."[20] However, he also explains that "the Equal Protection Clause can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution."[21] Thus, it seems clear that while the Court nominally views Equal Protection as equal to liberty interests in strength, it can only "help to identify" inequalities in the service of liberty. Yoshino would thus seem to be correct in his argument that liberty claims have come to replace Equal Protection ones.

However, while Yoshino argues that the move towards liberty is a good thing, doubt remains. He says that pluralism anxiety and the move towards liberty concerns "stresses the interests we have in common as human beings rather than the demographic differences that drive us apart" and that the shift "can be seen as a movement from group-based civil rights to universal human rights."[22] While there are traces of human rights language present in both *Lawrence* and *Obergefell,* particularly in *Lawrence's* references to the European Court of Human Rights and the extensive discourse on rights in *Obergefell,* this argument is not fully convincing.[23] Liberty is a far more vague concept than equal protection and thus far more vulnerable to misuse. Further, Rubenfeld's convincing argument that the Supreme Court has an anti-antidiscrimination agenda gives further pause. Whether Rubenfeld or Yoshino is correct about the reason for the stagnation of Equal Protection doctrine, and both may be correct in some measure, the fact remains that it is no longer a reliable line of defense. While Equal Protection should certainly be resurrected some day, there are many groups that are currently vulnerable, such as the LGBTQ+ community. The question remains then, how do we protect such groups now?

III. Sexual Orientation Discrimination as Sex Discrimination—A Flawed Approach

Deborah Widiss, among other gender law scholars, suggests that sex discrimination claims can be used as a means of achieving equality for LGBTQ+ Americans. She says that discrimination against LGBTQ+ people is based, in part, on a "traditional" view of the family reliant on negative sex sterotypes that subordinate women, making sexual orientation discrimination a sex discrimination issue as well.[24] She compares the argument to *Loving v Virginia* (1967), which overturned restrictions on interracial marriage. *Loving,* she says, did not only recognize a freedom to marry protected by the Due Process Clause and find the restriction on interracial marriage unlawful under the Equal Protection Clause, it did so by finding the equal application test invalid because the laws were "measures designed to maintain White Supremacy."[25] Thus, she argues, because discrimination based on sexual orientation maintains male gender supremacy, they can be classified as sex discrimination using *Loving* as a guide.[26]

Another approach can be seen in the opinions and arguments of several cases, such as *Baehr v Lewin* (1993), which was brought before the Hawaii Supreme Court. The Hawaii Supreme Court found that the prohibition of same-sex marriage was sex-based discrimination under the Hawaiian Constitution's Equal Protection Clause, a near mirror of the Fourteenth Amendment's equivalent.[27] In Justice Steven Levinson's opinion, the court wrote that the statute in question "on its face and as applied, regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex.... As such, [it] establishes a sex-based classification."[28] Essentially, because a man would be free to marry a woman, but not another man, and vice versa, that discrimination on the basis of sexual orientation was discrimination on the basis of sex. Additionally, because Hawaii's Equal Protection Clause is

so similar to the Fourteenth Amendment's, there is some reasoning that could justify its application to the larger context. Indeed, in *Latta v Otter* (2014), which challenged bans on same-sex marriage in Idaho and Nevada, the Ninth Circuit used that same logic. In his concurrence, Circuit Judge Stephen Reinhardt wrote, "Idaho and Nevada's same-sex marriage prohibitions facially classify on the basis of sex. Only women may marry men, and only men may marry women."[29] Though this was just a concurrence, and the argument was not found in the opinion proper, the reasoning has made it to the federal level.

However, while such a roundabout method of approaching sexual orientation discrimination may seem tempting, other scholars argue it may have an adverse effect, resulting in less adequate protections in decisions. Sexual orientation law scholar Edward Stein, a professor at Cardozo School of Law, argues that pursuing such arguments not only regularly fail, but they miss the point entirely. He compares such arguments to *Loving*, noting that anti-miscegenation laws like those overturned in *Loving* were often specifically targeted at preventing white women from marrying Black men and thus while a sex discrimination argument could have been made, it would have missed the very obvious racial discrimination that was present and that the Court confronted.[30] Further, had the Court not directly confronted the racial discrimintaion at the heart of *Loving,* further cases countering race-based discrimination would not have had such a strong precedent backing up their claims. A sex-based discrimination argument in *Loving* would have undermined the ability to achieve more equality. Parallels between the legal battles for racial marriage equality and LGBTQ+ equality may serve as a forewarning. It is possible that following such a path in sexual orientation cases may not provide the strength needed for future cases nor confront the issue at hand—homophobia.[31]

Stein also claims that advancements brought about by successful sex discrimination claims against sexual orientation

discrimination have only been temporary. Although *Baehr v Lewin* did use sex discrimination under the Equal Protection Clause successfully and was remanded to the lower court, it was still going through the system when Hawaii passed a referendum allowing the legislature to restrict marriage to opposite-sex couples in 1998.[32] The Hawaii Supreme Court then heard the issue again in *Baehr v Miike* (1999) and found that because of the referendum "whether or not in the past [the statute] was violative of the equal protection clause in the foregoing respect, [it] no longer is."[33] Thus, what seemed like an exemplar of the sex-based discrimination argument's application to sexual orientation discrimination is actually a showing of one of its great weaknesses.

Columbia Law School gender law scholar Suzanne Goldberg also acknowledges the relative failure of such claims, which she calls "risky arguments" in marriage equality cases, writing, "[t]he argument that is so clearly right to its proponents turns out to be either wrong or unworthy of engagement in the view of nearly every other judge to whom it has been presented," both those in favor of and opposed to marriage equality.[34] While same-sex marriage has been settled by *Obergefell,* such cases still make for excellent case studies demonstrating how such arguments are received. However, Goldberg does not reject such risky arguments, despite the fact that very few opinions rely upon them. She says that sex-based discimination claims, which are likely rejected, in part, because they highlight and challenge gender norms ingrained in society and the minds of judges, are valuable for precisely that reason.[35] She argues that their norm-challenging nature can help elucidate the nature of the injustices present and, because they seem radical to judges, make other arguments seem more moderate in comparison and thus more tempting a road to follow.[36] A risky argument approach thus uses one "risky" claim that, if accepted, would challenge established norms in a progressive way, and a claim that appears more moderate, though still progressive. The goal of such an approach is to hopefully

get the risky argument accepted. Failing that, however, the other claim, which still provides robust protections, will look moderate in comparison and thus is more likely to be accepted. If we consider the classification of LGBTQ+ individuals as a suspect classification under the Equal Protection Clause the goal, then risky sex-based discrimination arguments could help accomplish that. However, the failure to expand the Equal Protection Clause makes it clear that such an outcome is not likely to happen in the near future, if at all. What, then, can be done?

Goldberg makes an excellent point about risky arguments: they can indeed make other ideas far more palatable. In the current jurisprudence, equal protection arguments are the risky ones. Therefore, an appealing "end of the road" must be found that achieves the desired goal, as sex-based discrimination claims obviously do not work. The First Amendment may provide such a path. Returning to Rubenfeld's argument, while he saw an anti-antidiscrimination agenda at play in the discrepancy between *Dale* and *Morrison,* there is something more there—*Dale* demonstrates the appeal of the First Amendment for even the most conservative and textualist of justices. The deference given to it is so strong that even its unwritten principles must be given heavy weight. Further, the First Amendment evokes strong liberty principles, which should also be appealing to courts given Yoshino's observation that the Court has moved away from equal protection towards liberty principles. More specifically, the concept of "identity speech" could be of use in this argument.

IV. Identity Speech—The Path Forward

Identity speech is essentially the speech and expression one uses to define oneself; it is a statement of being. For a gay man or lesbian woman, that would include "coming out" and publicly acknowledging their sexual orientation and living accordingly. For a transgender person, it would be dressing as the gender they feel truly

reflects themselves, the process of transitioning, and changing the terminology they use to describe themselves. But it is more than that. According to Georgetown Law feminist legal theorist Nan Hunter, identity speech is critical to the LGBTQ+ identity itself. She writes that "[identity speech] is a major factor in constructing identity…. That is even more true when the distinguishing group characteristics are not visible, as is typically true of sexual orientation. Therefore, in the field of lesbian and gay civil rights, much more so than for most other equality claims, expression is a component of the very identity itself."[37] Essentially, it is a statement to oneself and the world. Yale Law professor and sexual orientation scholar William Eskridge Jr. elaborates on the importance of identity speech to LGBTQ+ people. Namely, he explains that repressing one's identity, that is not engaging in identity speech, can produce great harm. He claims that doing so can stunt one's psychological development to devastating effect, demonstrated in the high suicide rates of LGBTQ+ teens.[38] Similar data can be seen regarding transgender individuals: several mental health and suicide prevention hotlines saw spikes in activity following the rescission of President Barack Obama's policy ordering public schools to allow transsexual students to use the bathroom that matches their gender identity, a matter of identity expression.[39] Given such dire and severe harms are evident, the state surely has a compelling interest in acting against such a threat.

Also included within identity speech is religion, according to Eskridge, who argues that sexual orientation and religion are very similar in nature as both are invisible definitions of one's identity, only made visible if openly acknowledged and practiced. He writes, "[w]e reveal our religious or sexual identities only by what we say and in what religious- or sexual-specific conduct we engage…[they are] dependent upon the ability and willingness both to express the identity and to engage in activities characteristic of the identity."[40] For example, one's proclamation that one is Catholic defines one's identity as a Catholic and is expressed by performing certain rites,

such as taking Communion. Similarly, when a transgender woman comes out, she constructs herself as a woman and expresses it in various ways, such as wearing dresses or other feminine apparel. The comparison has even been made by the Court itself. In Justice John Stevens's concurrence in *Christian Legal Society Chapter of the University of California v Martinez,* he wrote in a footnote that "[a] person's religion often simultaneously constitutes or informs a status, an identity, a set of beliefs and practices, and much else besides. (So does sexual orientation for that matter...)"[41]

Given the great deference applied to religious liberties through the First Amendment, there is room for its identity speech companion to receive such liberties as well, particularly given that the Court has recognized such a similarity in the relatively recent past. *Obergefell* also demonstrates the Court's willingness to accept the identity speech argument on liberty principles. Justice Kennedy began the opinion stating that the Constitution provides "a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity."[42] He connects this idea of defining and expressing identity to same-sex marriage, making clear it is one way of expressing identity. Defining and expressing one's identity is identity speech. Surely, a transgender indiviudual must have the liberty to engage in identity speech without fear, defining themselves as they see fit and expressing that identity through changes in appearance and behavior.

Eskridge further explains that identity speech such as coming out is not just personal expression but political speech as well. He says, "[t]he gay experience reinforces the feminist idea that the personal is political; coming out of the closet as a gay person is also an explicitly political act."[43] He explains that because LGBTQ+ people stayed closeted during the 1950s, they were able to be "political[ally] marginalized" and discriminated against because no extensive political movements could form to advocate or organize against discrminatory practices.[44] Such reasoning has

been adopted by courts as well. In *Gay Law Students Association v Pacific Telephone and Telegraph Co.* (1979), the California Supreme Court acknowledged coming out as an integral part of the LGBTQ+ identity and political in nature. Recognizing the political nature of the fight for equality, Justice Matthew Torbriner continued on to say "one important aspect of the struggle for equal rights is to induce homosexual individuals to 'come out of the closet,' acknowledge their sexual preferences, and to associate with others in working for equal rights."[45]

Political speech has long been considered the heart of the First Amendment and given the utmost protection, as demonstrated in the opinion by Justice Stevens in *McIntyre v Ohio Elections Commission* (1995)—"[t]he First Amendment affords the broadest protection to such political expression in order to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[46] Even if we were to assume that identity expression is a relatively minor, even miniscule, form of political speech, it is still given that same protection. In *Roth v United States* (1957), Justice William Brennan wrote in the majority that "[a]ll ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties [sic] of freedom of speech and freedom of the press, unless excludable because they encroach upon the limited area of more important interests."[47] Therefore, if being out and identity speech have even the smallest contribution to the public debate on LGBTQ+ rights, then they must be awarded the fullest protection the First Amendment can offer. The evidence demonstrates that identity speech has indeed had an impact on the political process. Sexual orientation legal scholar Dale Carpenter, a professor at the Southern Methodist University School of Law, cites data that shows that those who have interacted with openly LGBTQ+ individuals are far more likely to support policies protecting them.[48] Therefore,

identity speech is reasonably entitled to the protections of political speech.

V. The First Amendment as Historical Protector of LGBTQ+ Communities

Although protecting the LGBTQ+ community may appear unprecedented, history suggests otherwise. Carpenter claims that "[t]he Equal Protection Clause has been impotent" while "[t]he First Amendment created gay America."[49] Before equality claims could be made, rights secured by the First Amendment were outlined, making it possible for organizations to gather and advocate politically in the face of overwhelming hostility.[50] In many ways, the gay rights movement is the inheritor of the First Amendment protections won by the civil rights movement in cases such as *NAACP v Alabama,* which gave activists the right to openly oppose state policies.[51] The gay rights movement, still young, followed the example of the civil rights movement and worked to gain those rights and liberties for itself. Its work began to pay off in *Stoumen v Reilly* (1951)*,* which Arthur Leonard, a sexual orientation legal scholar at New York Law school, says "may have been the first significant appellate victory of the young gay rights movement."[52] There, the California Supreme Court reversed a lower court decision to rescind a liquor liscense to a gay bar simply for being a gay bar. Justice Phil Gibson, writing for a unanimous court, said "In order to establish 'good cause' for suspension of plaintiff's license, something more must be shown than that many of his patrons were homosexuals and that they used his restaurant and bar as a meeting place."[53] Though not explicitly a First Amendment case, the right of gay people to meet together in bars can be seen as a form of expressive association critical to the formation of later political movements.

Reilly was followed by *One Inc v Olesen* (1957), the first Supreme Court case to explicitly find LGBTQ+ speech protected

under the First Amendment, according to activist and journalist Jonathan Rauch.[54] The Ninth Circuit had found *One Magazine*, a gay publication, obscene of the basis of the short stories and articles contained within, though there was no pornography.[55] The Supreme Court granted certiorari and reversed that decision in a single sentence citing the recently decided *Roth,* which changed the test for obscenity: material is obscene if "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[56] The inferred message would seem to be that gay material is not obscene simply because it is gay.

Following the Stonewall riots of 1969, the fight for gay rights became fiercer, and the movement won more victories. In *Gay Alliance of Students v Matthews* (1976) the Fourth Circuit found that even if allowing the Gay Alliance of Students "does increase the opportunity for homosexual contacts that fact is insufficient to overcome the associational rights of members of GAS," allowing more politically active LGTBQ+ students groups to be created.[57] In *Aumiller v University of Delaware* (1977) a district court in Delaware found under the First Amendment that a university could not fail to renew a lecturer's contract for talking about his sexual orientation, seemingly a recognition that being out has a political role.[58] Colorado Law sexual orientation legal scholar Scott Skinner-Thompson says these cases, and others like them, are critical components of the gay rights movement. Not only did they make LGBTQ+ people visible, and thus "[pave] the way for the expression of equality demands that would follow," they also "compelled, or at the very least facilitated, consideration of the *sexual* and *political* components of queer identities by courts and the American public."[59] In essence, these cases prove that not only has the First Amendment been a critical component of the fight for LGBTQ+ equality from the very beginning, the concept of identity speech has been as well. The adoption of identity speech to address current inequalities is not

a revolutionary concept, but a return to the well-tested roots of the legal struggle for LGBTQ+ rights.

VI. Conclusion

The First Amendment remains a powerful protection for the LGBTQ+ community. Hunter says that her "experience as a litigator tells [her] that the First Amendment has provided the most reliable path to success of any of the doctrinal claims utilized by lesbian and gay rights lawyers."[60] While an interesting anecdote, evidence from legal scholars and opinions of the courts supports her conclusion. When functional, the Equal Protection Clause is an excellent shield for the disadvantaged; however, despite the hopes of many, the Equal Protection Clause has proven no ally to the LGBTQ+ community. Instead, a "new equal protection," to use Kenji Yoshino's phrase, focused on liberty has emerged.[61] While some seek to use the Equal Protection Clause's protection against sex-based discrimination to combat sexual orientation discrimination, such approaches have been largely ineffective. However, they illuminate a path forward: the path of the "risky argument." Rather than use "risky" sex-based discrimination claims to make sexual orientation discrimination claims under the Equal Protection Clause more appealing, a better method may be to use "risky" equal protection arguments to convince courts to turn to the First Amendment and the concept of identity speech. Whether a court takes the familiar path of the First Amendment or chooses to resurrect the latent Equal Protection Clause, both are wins for equality. While the First Amendment is also used to justify sexual orientation discrimination on the basis of religious liberties, the First Amendment is a familiar path for the LGBTQ+ equality movement, which has long relied on its protections to build political strength and demand justice. Identity speech, which has long undergirded LGBTQ+ First Amendment jurisprudence, continues to hold relevance today in the wake of the surge in liberty

interests. *Obergefell* proves that the Court is open to adopting identity speech discourse. Further, identity speech can be identified with political speech, already given the highest level of protection under the First Amendment. Given that First Amendment arguments have a long history of working for the LGBTQ+ community, there is no reason to suspect that they cannot work in the future. While a return to the Equal Protection Clause would be welcomed, if such a time ever comes it will not be in the near future. Instead of looking to the future for a solution in the Equal Protection Clause, the best bet may be to look to the past and the First Amendment victories that made Equal Protection arguments possible in the first place.

[1] U.S. Constitution, amend. XIV, sec. 1.
[2] Kenji Yoshino, "The New Equal Protection," *Harvard Law Review* 124, no. 3 (January 2011): 756.
[3] Ibid, 757.
[4] United States v. Carolene Products Co., 304 U.S. 144, 58 S. Ct. 778, 82 L. Ed. 1234, 1938 U.S. LEXIS 1022 (Supreme Court of the United States April 25, 1938, Decided): 152, https://advance-lexis-com.ezproxy.cul.columbia.edu/api/document?collection=cases&id=urn:contentItem:3S4X-8RX0-003B-709T-00000-00&context=1516831.
[5] Yoshino, 751.
[6] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313, 1985 U.S. LEXIS 118, 53 U.S.L.W. 5022 (Supreme Court of the United States July 1, 1985, Decided): 445-446, https://advance-lexis-com.ezproxy.cul.columbia.edu/api/document?collection=cases&id=urn:contentItem:3S4X-9Y50-0039-N48B-00000-00&context=1516831.
[7] Jed Rubenfeld, "The Anti-Antidiscrimination Agenda" *Yale Law Journal* 111, no. 5 (March 2002): 1142.
[8] "Lochner Era," LII / Legal Information Institute, https://www.law.cornell.edu/wex/lochner_era.
[9] United States v. Morrison, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658, 2000 U.S. LEXIS 3422, 68 U.S.L.W. 4351, 82 Fair Empl. Prac. Cas. (BNA) 1313, 77 Empl. Prac. Dec. (CCH) P46,376, 2000 Cal. Daily Op. Service 3788, 2000 Daily Journal DAR 5061, 2000 Colo. J. C.A.R. 2583, 13 Fla. L. Weekly Fed. S 287 (Supreme Court of the United States May 15, 2000, Decided): 617-618 https://advance-lexis-com.ezproxy.cul.columbia.edu/api/document?collection=cases&id=urn:contentItem:408B-6MN0-004C-200F-00000-00&context=1516831.
[10] Rubenfeld, "The Anti-Antidiscrimination Agenda," 1154; U.S. Constitution, amend. XIV, section 5.
[11] Boy Scouts of Am. v. Dale, 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554, 2000 U.S. LEXIS 4487, 13 Fla. L. Weekly Fed. S 520 (Supreme Court of the United States June 28, 2000, Decided: 648, https://advance-lexis-com.ezproxy.cul.columbia.edu/api/document?collection=cases&id=urn:contentItem:40KP-M0W0-004B-Y03K-00000-00&context=1516831.
[12] NAACP v. Ala. ex rel. Patterson, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488, 1958 U.S. LEXIS 1802 (Supreme Court of the United States June 30, 1958, Decided): 460-461, https://advance-lexis-com.ezproxy.cul.columbia.edu/api/document?collection=cases&id=urn:contentItem:3S4X-J2N0-003B-S55G-00000-00&context=1516831; Rubenfeld, "The Anti-

Antidiscrimination Agenda," 1158.
[13] Yoshino, "The New Equal Protection," 770-772.
[14] Ibid, 757.
[15] Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855, 1996 U.S. LEXIS 3245, 64 U.S.L.W. 4353, 70 Fair Empl. Prac. Cas. (BNA) 1180, 68 Empl. Prac. Dec. (CCH) P44,013, 96 Cal. Daily Op. Service 3509, 96 Daily Journal DAR 5730, 9 Fla. L. Weekly Fed. S 607 (Supreme Court of the United States May 20, 1996, Decided): 632-633, https://advance-lexis-com.ezproxy.cul.columbia.edu/api/document?collection=cases&id=urn:contentItem:3RHM-BW90-003B-R0KN-00000-00&context=1516831.
[16] Yoshino, "The New Equal Protection," 778.
[17] Ibid, 777.
[18] Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508, 2003 U.S. LEXIS 5013, 71 U.S.L.W. 4574, 2003 Cal. Daily Op. Service 5559, 2003 Daily Journal DAR 7036, 16 Fla. L. Weekly Fed. S 427 (Supreme Court of the United States June 26, 2003, Decided): 562. https://advance-lexis-com. ezproxy.cul.columbia.edu/api/document?collection=cases&id=urn:contentItem:48XS-PXV0-004C-100T-00000-00&context=1516831.
[19] Ibid, 575.
[20] Obergefell v. Hodges, 135 S. Ct. 2584, 192 L. Ed. 2d 609, 2015 U.S. LEXIS 4250, 83 U.S.L.W. 4592, 99 Empl. Prac. Dec. (CCH) P45,341, 115 A.F.T.R.2d (RIA) 2015-2309, 25 Fla. L. Weekly Fed. S 472 (Supreme Court of the United States June 26, 2015, Decided): 2603 https://advance-lexis-com.ezproxy. cul.columbia.edu/api/document?collection=cases&id=urn:contentItem:5G9F-J651-F04K-F077-00000-00&context=1516831.
[21] Ibid, 2604.
[22] Yoshino, "The New Equal Protection," 793.
[23] *Lawrence v. Texas,* 573.
[24] Deborah A. Widiss, Elizabeth L. Rosenblatt, and Douglas NeJaime, "Exposing Sex Sterotypes in Recent Same-Sex Marriage Jurisprudence," *Dukeminier Awards: Best Sexual Orientation and Gender Identity Law Review* 7, no. 1 (2008): 483.
[25] Ibid, 481-482; Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010, 1967 U.S. LEXIS 1082 (Supreme Court of the United States June 12, 1967, Decided): 11, https://advance-lexis-com.ezproxy.cul.columbia.edu/api/document?collection=cases&id=urn:contentItem:3S4X-FV50-003B-S3VW-00000-00&context=1516831.
[26] Widiss, 481-482.

[27] Hawaii Constitution art. 1, sec 5. Directly echoing the Equal Protection Clause of the Fourteenth Amendment, Article 1, Section 5 of the Hawaiian Constitution reads as follows: "No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry."
[28] Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44, 1993 Haw. LEXIS 26, 93 Cal. Daily Op. Service 3657 (Supreme Court of Hawaii May 5, 1993, Filed): 572, https://advance-lexis-com.ezproxy.cul.columbia.edu/api/document?collection=cases&id=urn:contentItem:3RX4-14T0-003F-G0G0-00000-00&context=1516831.
[29] Latta v. Otter, 771 F.3d 456, 2014 U.S. App. LEXIS 19152 (United States Court of Appeals for the Ninth Circuit October 7, 2014, Filed): 280, https://advance-lexis-com.ezproxy.cul.columbia.edu/api/ document?collection=cases&id=urn:contentItem:5D9M-4181-F04K-V181-00000-00&context=1516831.
[30] Edward Stein, "Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights," *UCLA Law Review* 49, no. 2 (2001): 496-497.
[31] Ibid, 503-504.
[32] Ibid, 512.
[33] Baehr v. Miike, 1999 Haw. LEXIS 391 (Supreme Court of Hawai'i December 9, 1999, Decided): 6, https://advance-lexis-com.ezproxy.cul.columbia.edu/api/document?collection=cases&id=urn:contentItem:3Y2X-J460-0039-44H1-00000-00&context=1516831.
[34] Suzanne B. Goldberg, "Risky Arguments in Social-Justice Litigation: The Case of Sex Discrimination and Marriage Equality Essay," *Columbia Law Review* 114, no. 8 (2014): 2113-2114.
[35] Ibid, 2134, 2151.
[36] Ibid, 2151-2152.
[37] Nan D. Hunter, "Identity, Speech, and Equality," *Virginia Law Review* 79, no. 7 (1993): 1718.
[38] William N. Jr. Eskridge, "A Jurisprudence of Coming Out: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law Symposium: Group Conflict and the Constitution: Race, Sexuality, and Religion," *Yale Law Journal* 106, no. 8 (1997 1996): 2444.
[39] Avalon Zoppo, "Transgender Hotlines Reports Flood of Calls After Trump Walks Back Federal Protections," *NBC News,* Feb. 6, 2017, https://www.nbcnews.com/feature/nbc-out/transgender-hotline-reports-flood-calls-after-trump-walks-back-federal-n725796.
[40] Eskridge, "A Jurisprudence of Coming Out," 2418-2419.

[41] Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 130 S. Ct. 2971, 177 L. Ed. 2d 838, 2010 U.S. LEXIS 5367, 78 U.S.L.W. 4821, 57 A.L.R. Fed. 2d 573, 22 Fla. L. Weekly Fed. S 667 (Supreme Court of the United States June 28, 2010, Decided): 699, https://advance-lexis-com. ezproxy.cul.columbia.edu/api/document?collection=cases&id=urn:contentItem:7YTH-R840-YB0V-916S-00000-00&context=1516831.
[42] *Obergefell v. Hodges,* 2593.
[43] Eskridge, "A Jurisprudence of Coming Out," 2443.
[44] Ibid.
[45] Gay Law Students Ass'n v. Pac. Tel. & Tel. Co., 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14, 1979 Cal. LEXIS 268, 19 Fair Empl. Prac. Cas. (BNA) 1419, 19 Empl. Prac. Dec. (CCH) P9268 (Supreme Court of California May 31, 1979): 488, https://advance-lexis-com.ezproxy.cul.columbia.edu/api/document?collection=cases&id=urn:contentItem:3S11-S1C0-003C-R0S2-00000-00&context=1516831.
[46] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426, 1995 U.S. LEXIS 2847, 63 U.S.L.W. 4279, 95 Cal. Daily Op. Service 2853, 95 Daily Journal DAR 4972, 23 Media L. Rep. 1577, 8 Fla. L. Weekly Fed. S 721 (Supreme Court of the United States April 19, 1995, Decided): 346, https://advance-lexis-com.ezproxy.cul.columbia.edu/api/document?collection=cases&id=urn: contentItem:3S42-78H0-003B-R3NN-00000-00&context=1516831. Internal quotations omitted.
[47] Roth v. United States, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498, 1957 U.S. LEXIS 587, 1 Media L. Rep. 1375, 14 Ohio Op. 2d 331 (Supreme Court of the United States June 24, 1957, Decided): 484, https://advance-lexis-com.ezproxy.cul.columbia.edu/api/document?collection=cases&id=urn:contentItem:3S4X-J5Y0-003B-S270-00000-00&context=1516831.
[48] Dale Carpenter, "Expressive Association and Anti-Discrimination Law after Dale: A Tripartite Approach Symposium: The Freedom of Expressive Association," *Minnesota Law Review* 85, no. 6 (2001): 1553.
[49] Ibid, 1524-25.
[50] Ibid, 1527.
[51] Ibid, 1524.
[52] Arthur S. Leonard, *Sexuality and the Law: American Law and Society* (Routledge, 2013): 191.
[53] Stoumen v. Reilly, 37 Cal. 2d 713, 234 P.2d 969, 1951 Cal. LEXIS 325 (Supreme Court of California August 28, 1951): 717, https://advance-lexis-com.ezproxy.cul.columbia.edu/api/document?collection=cases&id=urn:contentItem:3RRK-R130-003C-H4R2-00000-

00&context=1516831.
[54] Jonathan Rauch, "The unknown Supreme Court decision that changed everything for gays," *Washington Post,* Feb. 5, 2014, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/ 05/the-unknown-supreme-court-decision-that-changed-everything-for-gays/
[55] One, Inc. v. Olesen, 241 F.2d 772, 1957 U.S. App. LEXIS 3517 (United States Court of Appeals for the Ninth Circuit February 27, 1957): 777-779, https://advance-lexis-com.ezproxy.cul.columbia.edu/api/ document?collection=cases&id=urn:contentItem:3S4W-VHH0-003B-0060-00000-00&context=1516831.
[56] One, Inc. v. Olesen, 355 U.S. 371, 78 S. Ct. 364, 2 L. Ed. 2d 352, 1958 U.S. LEXIS 1661 (Supreme Court of the United States January 13, 1958, Decided): 1, https://advance-lexis-com.ezproxy.cul. columbia.edu/api/document?collection=cases&id=urn:contentItem:3S4X-J500-003B-S17S-00000-00&context=1516831. ; Roth, 489.
[57] Gay Alliance of Students v. Matthews, 544 F.2d 162, 1976 U.S. App. LEXIS 6495 (United States Court of Appeals for the Fourth Circuit October 28, 1976, Decided):176, https://advance-lexis-com.ezproxy.cul. columbia.edu/api/document?collection=cases&id=urn:contentItem:3S4X-1GF0-0039-M1H7-00000-00&context=1516831.
[58] Aumiller v. University of Delaware, 434 F. Supp. 1273, 1977 U.S. Dist. LEXIS 15317 (United States District Court for the District of Delaware June 21, 1977). https://advance-lexis-com.ezproxy.cul. columbia.edu/api/document?collection=cases&id=urn:contentItem:3S4N-TV50-0054-71VG-00000-00&context=1516831.
[59] Scott Skinner-Thompson, "The First Queer Right," *Michigan Law Review* 116, no. 6 (2018): 889.
[60] Hunter, "Identity, Speech, and Equality," 1695.
[61] Yoshino, "The New Equal Protection," 750.

Works Cited

Carpenter, Dale. "Expressive Association and Anti-Discrimination Law after Dale: A Tripartite Approach Symposium: The Freedom of Expressive Association." *Minnesota Law Review* 85, no. 6 (2001): 1515–90.

Eskridge, William N. Jr. "A Jurisprudence of Coming Out: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law Symposium: Group Conflict and the Constitution: Race, Sexuality, and Religion." *Yale Law Journal* 106, no. 8 (1997): 2411–74.

Goldberg, Suzanne B. "Risky Arguments in Social-Justice Litigation: The Case of Sex Discrimination and Marriage Equality Essay." *Columbia Law Review* 114, no. 8 (2014): i–2154.

Hunter, Nan D. "Identity, Speech, and Equality Commentary." *Virginia Law Review* 79, no. 7 (1993): 1695–1720.

Leonard, Arthur S. *Sexuality and the Law: American Law and Society*. Routledge, 2013. Rubenfeld, Jed. "The Anti-Antidiscrimination Agenda Essay." *Yale Law Journal* 111, no. 5 (March 2002): 1141–78.

Stein, Edward. "Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights." *UCLA Law Review* 49, no. 2 (2001): 471–518.

Skinner-Thompson, Scott. "The First Quee Right" *Michigan Law Review* 116, no. 6 (2018): 881–904.

Widiss, Deborah A., Elizabeth L. Rosenblatt, and Douglas NeJaime. "Exposing Sex Sterotypes in Recent Same-Sex Marriage Jurisprudence." *Dukeminier Awards: Best Sexual Orientation and Gender Identity Law Review* 7, no. 1 (2008): 1–46.

Yoshino, Kenji. "The New Equal Protection." *Harvard Law Review* 124, no. 3 (January 2011): 747–804.

Case Law Cited

Aumiller v. University of Delaware, 434 F. Supp. 1273 (1977)
Baehr v. Lewin, 74 Haw. 530 (1993)
Baehr v. Miike, 1999 Haw. LEXIS 391 (1999)
Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661 (2010)
City of Cleburne v. Cleburne Living Ctr, 473 U.S. 432 (1985)
Gay Alliance of Students v. Matthews, 544 F.2d 162 (1976)
Gay Law Students Ass'n v. Pac. Tel. & Tel. Co., 24 Cal. 3d 458, 595 (1979)
Latta v. Otter, 771 F.3d 456 (2014)
Lawrence v. Texas, 539 U.S. 558 (2003)
Loving v. Virginia, 388 U.S. 1 (1967)
McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995)
NAACP v. Ala. ex rel. Patterson, 357 U.S. 449 (1958)
New Orleans v. Dukes, 427 U.S. 297(1976)
Obergefell v. Hodges, 135 S. Ct. 2584 (2015)
One, Inc. v. Olesen, 241 F.2d 772 (1957)
One, Inc. v. Olesen, 355 U.S. 371 (1958)
Romer v. Evans, 517 U.S. 620 (1996)
Roth v. United States, 354 U.S. 476 (1957)
Stoumen v. Reilly, 37 Cal. 2d 713 (1951)
United States v. Morrison, 529 U.S. 598 (2000)