The Undergraduate Law Review at The Ohio State University

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ARTICLES

EDITOR'S NOTE

Dear Reader,

As the 2016 general election nears, it is important to expand the dialogue on free speech and voting rights. In our spring publication, we bring to you articles that not only explore these relevant issues, but also that cover other topics from the past and the present. From an examination of the original meaning of the bill of attainder clause of the Constitution to a discussion about how the internet is changing taxation, this journal reignites important discussions from the past and expands upon the current legal conversations of our dynamic and complex society.

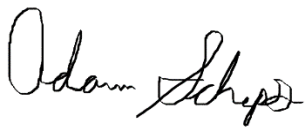
We now have a blog (ohiostateulr.webbly.com/blog) that is updated weekly with stories covering pressing legal issues and law school admissions – both topics that are constantly on the minds of pre-law students. The blog also contains interviews that we have had with distinguished legal professionals. In maintaining a constant stream of legal and pre-law dialogue, our aim is to engage undergraduate students around the country.

I would like to thank the authors for their willingness to share their ideas with fellow undergraduate students and other readers. Their patience and eagerness to work with the editorial team were invaluable to making the journal as polished and fluid as possible. As students from an assorted collection of universities and academic disciplines, the authors whose articles are published herein bring to the discussion unique knowledge and perspectives – two elements which are vital to an informed conversation about any legal issue.

I would also like to thank the editorial team for their dedication and drive in working on the articles in this publication. The newly expanded team has demonstrated a commendable ability to learn how to work with technical writing in such a short period of time.

In the couple of years since the creation of the Undergraduate Law Review at The Ohio State University, we have witnessed the growth of our editorial team in both size and experience. We hope to continue learning how to most effectively bring issues of critical importance to a wide and diverse audience.

Very Respectfully,



Adam Scheps
Editor-in-Chief

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EDITORIAL TEAM

MISSION STATEMENT

This journal was created with the intent of giving undergraduate students the opportunity to have their work published in a journal edited by fellow undergraduate students. We hope to give college students an outlet through which they can discuss and consider a variety of important legal issues. In addition, it is our hope that we can publish articles that are accessible to a wide audience and that encourage critical thinking, so as to reach many and inspire change.

PICTURING DEMOCRACY: ANALYZING RELIGIOUS EXEMPTIONS TO VOTER ID LAWS

Elise Kostial

Stanford University

CONTENTS

Abstract

"Voter ID laws," which require voters to present photo identification before casting their ballots, represent a highly controversial trend in electoral policy. Voter photo ID requirements exist in seven states. While supporters maintain that voter ID laws prevent fraud, opponents fear that these regulations disenfranchise some segments of the voting population. Typically, these concerns focus on voting populations less likely to possess photo identification, such as minorities, students, the elderly and the poor. However, less familiar are the impediments to democratic participation created by voter ID laws for members of certain religious minorities. In this paper, I discuss how "strict" photo voter ID laws compromise the voting and religious-freedom rights of Americans with religious objections to being photographed. I examine voter ID requirements based on the criteria commonly used by courts to evaluate religious exemption claims. I analyze the government's interest in imposing voter ID requirements, the sincerity of voters' religious objections to being photographed, and the significance of the burden created by voter ID laws upon these voters. Finally, I explore judicial precedent, ultimately concluding that voter ID laws create significant and unconstitutional burdens on voters with religious objections to being photographed and that states have not taken sufficient measures to mitigate these burdens.

Introduction

"You probably would not have Amish people voting" if a voter photo ID requirement were established, claimed Amish voter Freeman Miller, in reference to his rural Ohio community.[1] The Amish objection to being photographed is based upon their religious beliefs. Miller was even filmed from behind in order to avoid showing his face on camera. "[Voting is] something that we take pretty seriously … it gives you the right to select who you feel believes in our way of life," he asserted.[2] Also interviewed for the segment was State Senator Tim Grendell, who provocatively defended his Amish constituents and even suggested that Ohio's proposed voter ID law would condemn them to the position of "second class voters."[3]

Unfortunately, the rights of Amish voters are not frequently at the center of the political dialogue regarding voter ID laws. Amish communities are not traditionally politically active.[4] Typically, the Amish are more likely to vote in local elections that directly impact their communities.[5] Nonetheless, the potential influence of this voting bloc has gained some candidates' notice. In the "swing states" of Ohio and Pennsylvania, for example, the Amish vote has been actively pursued, most notably by President Bush in 2004.[6] That year, in Lancaster County, Pennsylvania, Old Order Amish and Mennonite voters turned out at a rate of approximately 62%,[7] very near the national voter turnout rate of 64%.[8]

Regardless of turnout statistics, however, in a democracy, the rights of all eligible voters must be protected. Voter ID laws, which require voters to present photo identification before casting their ballots, threaten the enfranchisement of Freeman Miller and other voters who share his beliefs. Members of certain religious minorities, including the Amish, Mennonites, and Molokans, object to being photographed based upon tenets of their faiths. Therefore, they do not have, and cannot obtain, photo identification. Without statutory exemptions, these voters would have to compromise their religious beliefs in order to comply with voter ID laws and vote in-person. Thus, voter ID requirements counter-pose two fundamental rights: the right to vote and the right to religious freedom.

The impact of voter ID laws on voters with religious objections to being photographed seemingly has not been holistically reviewed. Numerous articles address the merits of voter ID laws in general. Additionally, a few articles discuss the relationship between religious freedom and other photo id requirements. For example, Harris argued that driver's license photo requirements are justified for public safety reasons.[9] However, I have found only one article, Szulewski, which examined religious objections to voter ID laws.[10] The article specifically examined the effect of Indiana's voter ID law on Amish voters and suggested that greater accommodations should be offered. My article takes a broader, more comprehensive approach to

[1] Beres, T. (2011, Apr 4). Middlefield: Proposed voter ID law could hurt Amish. *WKYC*.
[2] *Id*.
[3] *Id*.
[4] Kraybill, D. B., & Kopko, K. C. (2007). Bush Fever: Amish and Old Order Mennonites in the 2004 Presidential Election. *Mennonite Quarterly Review 81* at 168.
[5] Szulewski, E. A. (2013). Forgotten Voters: the Constitutionality of Indiana's Voter ID Law and its Effect on Amish Voters. *Rutgers Journal of Law and Religion* at 120.
[6] The Associated Press (2004). GOP courts Amish votes in swing states. *NBC News.*
[7] Kraybill & Kopko at 191-192.
[8] Holder, K. (2006). Voting and Registration in the Election of November 2004. *U.S. Census Bureau*.
[9] Harris, L. N. (2009). You Better Smile When You Say Cheese: Whether the Photograph Requirement for Drivers' Licenses Violates the Free Exercise Clause of the First Amendment. *Mercer Law Review*.
[10] Szulewski, *supra*.

this question at a national level.

I contend that the strict voter ID laws in seven states infringe upon the voting and religious freedom rights of Americans with religious objections to being photographed. Two states have established no religious exemptions to their strict voter ID requirements. In the five states where religious accommodations have been instituted, the procedures by which the exemptions must be claimed are quite cumbersome. However, it appears that no voter ID law has been legally challenged on religious freedom grounds. Because judicial precedent regarding religious exemptions is somewhat ambiguous, it is difficult to predict how such a case would be decided. First, I will examine the legal history of religious exemptions in the United States. Next, I will consider photo voter ID requirements using the conventions, based on constitutional and statutory rights, with which the courts evaluate religious exemption claims: the importance of the government's interest in establishing the requirement, the sincerity of the religious belief in question and the significance of the burden imposed upon free religious exercise. Additionally, I will explore relevant court precedents regarding other photo ID requirements and voter ID laws in general. Ultimately, I conclude that states that statutorily protect religious freedom have an obligation to create religious exemptions to voter photo ID requirements.

I. The History of Religious Exemptions in the United States

The freedom of religion is enshrined in the First Amendment, which states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…"[11] However, the question of whether Americans are entitled to special legal protections based on their religious beliefs is the subject of ongoing controversy. In the 1963 case *Sherbert v. Verner*, the Supreme Court granted the petitioner a legal exemption based upon her religious beliefs.[12] The Court created the "*Sherbert* test" to evaluate potential infringements on religious liberty by determining whether a regulation created a substantial burden upon the exercise of religious freedom and whether the government had a "compelling interest" in enforcing the regulation.[13] The *Sherbert* Test was used until 1990, when the Supreme Court established a new standard in the case *Employment Division v. Smith* (1990).[14] [15] In *Smith*, the Supreme Court determined that the *Sherbert* Test could not be applied to neutral, generally applicable.[16] Instead, according to the *Smith* doctrine, regulations impacting free religious exercise must simply be "rationally related to a legitimate government purpose," an easily met standard.[17] The *Smith* ruling significantly limited the breadth of religious exemptions and seems to effectively preclude constitutional protections for voters with religious objections to photo ID requirements.

Notably, however, the Court designated, as an exception to the *Smith* doctrine, "hybrid rights." Hybrid rights may exist when a "free exercise claim is made in conjunction with another

[11] The Bill of Rights (1791).
[12] Laycock, D & Thomas, O.S. (1994). Interpreting the Religious Freedom Restoration Act. 73 *Texas Law Review 209* at 225.
[13] Adamczyk, A., Wybraniec, J. & Finke, R. (2004). Religious Regulation and the Courts: Documenting the Effects of Smith and RFRA. *Journal of Church and State* 46.2 at 240.
[14] *Id*.
[15] *Employment Division, Department of Human Resources of Oregon v. Smith*, Oyez (1990). Last Visited 07 March 2016.
[16] Brougher, C. (2012). Legal Analysis of Religious Exemptions for Photo Identification Requirements. Congressional Research Service.
[17] *Id*.

constitutional claim," such as freedom of speech.[18] Even if a religious freedom claim alone is insufficient to warrant protection, if another right is also infringed, the alleged infringement should be examined under a "higher level of scrutiny."[19] In theory, the hybrid rights doctrine could protect voters with religious objections to being photographed. Photo voter ID requirements infringe not only on the religious freedom rights of citizens obligated to obtain photo identification, but also their right to vote if they refuse to be photographed. While I contend that such a claim has merit, relying on the hybrid rights doctrine is a shaky strategy at best. The definition of hybrid rights is extremely vague,[20] and the application of the doctrine has been inconsistent. Some courts have completely ignored the doctrine, others have required that the second constitutional claim be "independently viable" and still others only require that the second claim be a "colorable claim" for the doctrine to apply.[21] Therefore, it is uncertain whether a claim against a voter ID law based upon the constitutional protections of religious freedom and voting rights would succeed under the hybrid rights doctrine.

In response to the Supreme Court's ruling in *Smith*, Congress passed the Religious Freedom Restoration Act (RFRA) of 1993.[22] RFRA created the statutory right to religious exemptions from laws in an attempt to restore the *Sherbert* doctrine after the Supreme Court ruled that constitutional rights offer no protection.[23] It required that any regulation impacting religious freedom must be the "least restrictive means" of achieving a "compelling government interest."[24] In order for an exception to be granted, RFRA states that the government's interest must not be compelling, sincere religious beliefs must be infringed upon, and the burden created by the restriction must be significant.[25]

However, in the 1997 decision of *Boerne v. Flores*, the Supreme Court ruled that RFRA could not be applied to state laws because the federal government lacked the general authority to regulate state laws.[26] Because voter ID laws are instituted at the state level, they are exempt from the provisions of RFRA. Nonetheless, following *Boerne*, a number of states established versions of RFRA that applied to state laws.[27] Of the states with strict voter ID laws, four have versions of RFRA and one has an equivalent constitutional provision "interpreted to require strict scrutiny."[28] [29] Due to a patchwork of legal doctrines, state courts would apply different standards when considering claims for religious accommodations to voter ID laws in each state. However, I will next evaluate voter ID laws based upon the standard enshrined in RFRA.

[18] Akers, R. M. (2004). Begging the High Court for Clarification: Hybrid Rights Under Employment Division v. Smith. *Regent University Law Review* at 4.
[19] *Id.*
[20] *Id.* at 2.
[21] *Id.*
[22] Hensley, H. B. (2000). Approaches to the Hybrid-Rights Doctrine in Free Exercise Cases; Hensley, Jonathan B. 68 Tenn. L. Rev. 119 at 120.
[23] *Id.*
[24] Laycock & Thomas, *supra* at 221.
[25] *Id.*
[26] Adamczyk et al., *supra* at 256.
[27] Volokh, E. (2014). Religious exemptions — a guide for the confused. *The Washington Post*.
[28] Underhill, W. (2014). Voter Identification Requirements | Voter ID Laws. National Conference of State Legislatures.
[29] Volokh, *supra*.

II. A Sufficient Government Interest

What legally constitutes a sufficient government interest has not been consistently defined by the courts. However, in laying out how the law should be applied, RFRA cites pre-Smith doctrines that define a "compelling government interest" relatively.[30] Specifically, the creation of an exception must jeopardize the "compelling interest" in order for the restriction to be acceptable.[31] I argue that photo voter ID requirements do not fulfill a compelling government interest and that the creation of exemptions would not significantly harm the government's interest.

"Strict" voter photo ID laws require that voters present photo identification at the polls. Any voter without photo identification must cast a provisional ballot and take "additional steps after Election Day for it to be counted."[32] Voter ID proponents claim that these laws are necessary to prevent electoral fraud, specifically in-person voter fraud. They believe that current voter identification standards are inadequate. In some states, for example, a voter may prove his identity on Election Day simply by bringing a utility bill to the polls or by signing his name (Underhill, 2014). Consequently, state legislatures across the country have considered voter ID laws. Indiana instituted the first "strict" voter photo identification requirement in 2006.[33] Currently, seven states, Georgia, Indiana, Kansas, Mississippi, Tennessee, Texas and Virginia, have "strict" voter photo ID laws.[34]

Because voter ID laws are meant to prevent electoral fraud, the prevalence of fraud is a question central to the voter ID debate. Unfortunately, electoral fraud undeniably occurs. For example, voter ID supporters have cited certain precincts in Pennsylvania that have reported voter turnout rates greater than 100%.[35] However, critics are not convinced that such examples justify the implementation of voter ID laws. They contend that in-person voter fraud, although existent, does not constitute a serious threat to American elections. *Washington Post* writer Philip Bump argues that the type of fraud targeted by voter ID requirements is not likely to alter the outcome of an election because "almost no [federal] general election race in recent history has been close enough to have been thrown by the largest example of in-person voter fraud on record."[36] According to an investigation by the *New York Times*, only 70 people were convicted of crimes related to federal elections between 2002 and 2005.[37] Therefore, I argue that the evidence of in-person voter fraud is not sufficient to justify the burden imposed by voter ID laws upon voters with religious objections to being photographed.

[30] Laycock & Thomas, *supra* at 224.
[31] Laycock & Thomas, *supra* at 222.
[32] Underhill, *supra*.
[33] Lee, S. (2012). Everything you need to know about voter ID laws. *PBS*.
[34] Underhill, *supra*.
[35] Tobin, J. S. (2012). Voter ID laws are inherently reasonable, not racist or Republican. *The Christian Science Monitor*.
[36] Bump, P. (2014). The disconnect between voter ID laws and voter fraud. *The Washington Post*.
[37] Lipton, E. & Urbina, I. (2007). In 5-Year Effort, Scant Evidence of Voter Fraud. *The New York Times*.

III. Sincere Beliefs

Members of some religious groups object to being photographed based on their religious convictions. Many members of the Amish,[38] Mennonite and Molokan faiths,[39] [40] Christian sects that follow traditional ways of life, are prominent examples. These groups represent small, but culturally rich, American communities. In the United States, the Amish and Mennonite populations total 300,000 and 500,000,[41] [42] respectively. Molokans number about 30,000-50,000 in the states of California, Oregon and Arizona.[43] Many members of these faiths believe in a literal interpretation of the 2nd Commandment,[44] [45] [46] which states "You shall not make unto yourself any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth."[47] They consider photographs to be examples of the "graven images" prohibited by the Bible and manifestations of vanity.[48]

Because members of these sects object to being photographed, they are unable to obtain photo identification without violating a fundamental tenet of their belief systems. Existing photo ID regulations, particularly driver's license photo requirements, have had demonstrable impacts upon such communities in the past. While most Amish Americans do not drive,[49] Mennonites and Molokans may operate vehicles without violating their religious beliefs.[50] [51] The ability to drive is often critical to the livelihoods of these Americans, many of whom live in rural areas.[52] Some communities have been forced by changes in driver's license regulations to choose between adhering to their faiths and obeying the law.

For example, Kentucky had once unofficially allowed residents with religious objections to being photographed to obtain non-photo driver's licenses, but, after the 9/11 terrorist attacks, the state changed its policy.[53] Joseph Borntrager, an Amish-Mennonite bishop, described the dilemma faced by his community, "We feel we are obligated to submit to the authority and to the laws of the land, providing it does not overstep biblical principle."[54] Cora Beachy, an Amish-Mennonite whose family owns a cattle farm in Kentucky "realize[d] the growing possibility the state may one day force her to break her religious convictions."[55] Similarly, in 2004, Missouri revoked the religious exemption to its driver's license photo requirement.[56] In response, some members of a Mennonite community in north-central Missouri moved to Arkansas, where they

[38] Szulewski, *supra* at 121.
[39] The Associated Press (2007). Mennonites Are at Odds With License-Photo Rules. *The New York Times.*
[40] Liu, C. (2003). DMV Puts No-Photo Driver's Licenses to the Test. *The Los Angeles Times*.
[41] Diebel, M. (2014). The Amish: 10 things you might not know. *USA Today*.
[42] The Associated Press (2007), *supra*.
[43] Liu, *supra*.
[44] Szulewski, *supra*.
[45] The Associated Press (2007), *supra*.
[46] Liu, *supra*.
[47] The Bible, Exodus 20:4-5, King James 2000.
[48] Szulewski, *supra* at 121-122.
[49] Diebel, *supra*.
[50] Biesk, J. (2003). Amish-Mennonites face dilemma of faith vs. national security.
[51] Liu, *supra*.
[52] PBS, (n.d.). Who's Amish & Who's Not. *American Experience*.
[53] Biesk, *supra*.
[54] *Id.*
[55] *Id.*
[56] The Associated Press (2007), *supra*.

could still obtain non-photo driver's licenses.[57] These families decided to sell their homes and businesses, a choice Leo Kempf said that he and his fellow Mennonites "don't take lightly."[58]

Clearly, followers of these faiths are not simply attempting to avoid the law by seeking religious exemptions to photo ID requirements. On the contrary, they have demonstrated a willingness to make significant personal sacrifices in order to comply with both the law and their religions. While it is possible for dishonest voters to abuse religious exemptions, the importance of protecting the enfranchisement of sincere voters outweighs this risk. Without accommodating exemptions, voter ID laws could effectively exclude Americans with religious objections to being photographed from the opportunity to vote in-person on Election Day.

IV. A Significant Burden

Concerns regarding voter disenfranchisement have given rise to significant opposition to voter ID laws. Voting populations known to be less likely to possess photo identification, such as minorities, the poor, students, and the elderly, are usually the focus of public debate. In particular, voter ID opponents claim that, because minorities make up a disproportionately large percentage of the population without photo identification, voter ID requirements are racially discriminatory.[59] Similarly, I argue that, because voters with religious objections to being photographed cannot obtain photo identification, voter ID laws discriminate against certain religious minorities. Critics of voter ID laws also reference the challenges faced by voters attempting to obtain the "free" photo IDs issued by states with strict voter ID laws. Likewise, I argue that voters with religious objections to being photographed face significant challenges when attempting to claim the religious exemptions to voter ID laws offered by some states. I contend that strict voter ID requirements abridge the rights of these voters in every state in which they have been implemented without reasonable exemptions. The legal case for granting exceptions to photo voter ID requirements is particularly strong in states that have enacted versions of RFRA.[60]

According to the National Conference of State Legislatures, seven states have "strict" photo ID requirements.[61] Each of these states has a different policy towards voters with religious objections to being photographed. Table 1 explains the procedure by which a religious exemption, if offered, can be obtained in each state. Five states have instituted policies to accommodate in-person voting by residents with religious objections to being photographed. However, voters in these states must still take measures that are, I argue, unreasonable, in order to cast their ballots. Unlike voters who simply must obtain and then renew their photo IDs, voters who qualify for religious exemptions must take specific actions before or after every election. In three states, requirements that voters appear before an election authority pose a significant burden, particularly for Amish voters, whose religion also prohibits them from driving.[62] The election authorities' offices are likely to be located a greater distance from voters' homes than are their local polling places. Finally, Virginia and Georgia, which have no statutory religious exemptions to their voter ID laws, fail entirely to accommodate voters with religious objections to being photographed.

[57] *Id.*
[58] *Id.*
[59] Rocha, R. R., & Matsubayashi, T. (2014). The Politics of Race and Voter ID Laws in the States: The Return of Jim Crow? *Political Research Quarterly*, 67 (3), 666-679.
[60] Brougher, C. (2012). Legal Analysis of Religious Exemptions for Photo Identification Requirements. Congressional Research Service.
[61] National Conference of State Legislatures (2015).
[62] Diebel, *supra*.

Because Virginia has also enacted a version of the RFRA,[63] the lack of accommodation is an especially clear violation of voters' statutory rights.

Voter ID laws restrict the ability of voters with religious objections to being photographed to vote in-person on Election Day. However, it is important to note that, with the exception of Kansas, voter photo ID requirements do not apply to absentee voting in most states with strict voter ID laws. Thus, voters with religious objections to being photographed usually may vote by mail without additional accommodations. Nonetheless, in-person voting is the traditional method of political participation in the United States, and otherwise eligible voters should not be excluded from voting at "the polls." Arguably, the experience of voting has a social significance beyond that of merely casting a ballot. Some view voting as a patriotic experience and "the vote as expressing support for one or other electoral options, rather like cheering at a football match."[64] No American should be denied the right to actively participate in our democracy based on his or her religious beliefs.

Court precedent seems to support this interpretation. In *Kerrigan v. Philadelphia Board of Election*, a US District Court ruled that the board had to make neighborhood polling places accessible to voters with physical disabilities under the Americans with Disabilities Act, even though alternative voting methods, such as absentee voting, were available to those voters.[65] The court recognized that these citizens should have the opportunity to vote in-person alongside other members of their communities and that absentee ballots did not provide a sufficient accommodation for disabled voters who would prefer to vote in-person.[66] A parallel argument would imply that absentee ballots are not sufficient accommodations for voters with religious objections to being photographed.

Table 1: Religious Exemptions to Voter ID Laws by State

	In-Person Voting Procedure	Additional Requirements	Deadline	Photo ID Required for Vote-by-Mail	State RFRA or Equivalent
Georgia	No statutory exemption or in-person voting accommodation exists.	NA	NA	No	No
Indiana	Voters must vote by provisional ballot.	Voters must "visit the county election office and affirm that an exemption applies."	10 days after the election	No	Yes

[63] Volokh, *supra*.
[64] Brennan, G., & Hamlin, A. (1998). Expressive voting and electoral equilibrium. *Public Choice*, *95* (1-2), 149.
[65] *Kerrigan v. Philadelphia Board of Election*, 248 F.R.D. 470 (E.D. Pa. 2008).
[66] *Id*.

Kansas	Voters must complete a Declaration of Religious Objection before each election.	Voters may submit the DRO before an election by mail, fax, or email or in-person at a polling place.	Election Day	Yes	Yes
Mississippi	Voters must vote by "affidavit ballot."	Voters must sign "a separate affidavit before the Circuit Clerk."	5 days after the election	No	No
Tennessee	Voters must execute an "affidavit of identity" before each election.	Voters may complete the affidavit in person at their polling places.	Election Day	No	No
Texas	Voters must vote by provisional ballot.	Voters must "appear at the voter registrar's office" and "sign an affidavit swearing to the religious objection."	6 days after the election	No (Note: qualification for absentee voting is extremely limited.)	Yes
Virginia	No statutory religious exemption or in-person voting accommodation exists.	NA	NA	No	Yes

(Sources: see Appendix 1)

V. Legal Implications

I have located no court ruling specifically related to the impact of voter ID laws upon voters with religious objections to being photographed. However, existing court precedents provide insight into relevant legal arguments. Therefore, I will examine the legal implications of two related topics, the creation of religious exemptions to driver's license photo requirements and the constitutionality of voter ID laws. Based on these precedents and prevailing laws in many states with voter ID laws, I contend that religious objectors have a valid legal claim against these laws.

A. The Constitutionality of Driver's License Photo Requirements

Photo ID requirements, such as photo requirements for driver's licenses, are among the most significant policy restrictions faced specifically by Americans with religious objections to being photographed. The Supreme Court has never issued a decision on religious exemptions to

driver's license photo requirements, but the matter has been contested in court.[67] State courts delivered conflicting decisions - the Indiana Supreme Court declared driver's license photo requirements unconstitutional in *Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc.* (1978), but the Colorado Supreme Court declared an equivalent statute constitutional in *Johnson v. Motor Vehicle Division* (1979).[68] In 1984, the Eighth Circuit Court of Appeals heard a significant case, *Jensen v. Quaring*. Although Frances Quaring did not belong to an "organized church," she believed in a literal interpretation of the 2nd Commandment.[69] The court held that the state of Nebraska had unnecessarily burdened Quaring's First Amendment rights by refusing to grant her an exemption to the state's driver's license photo requirement.[70] The case was appealed to the U.S. Supreme Court in 1985, but no decision was issued because one justice did not rule and the Court's decision was split four-to-four.[71] Thus, the Eighth Circuit Court's ruling was automatically affirmed.[72]

However, the precedent established in *Quaring* did not endure. After the *Smith* decision, religious freedom claims received less strict scrutiny. More than a decade later, the attacks on 9/11 prompted the courts to recognize a greater need for accurate photo identification in the interest of public safety.[73] The 2005 case *Valov v. Department of Motor Vehicles* represented the change in reasoning seen since the *Quaring* decision. The state of California refused to renew a Molokan's non-photo driver's license. Because the driver's license requirement was neutral and generally applicable, the court found no first amendment claim under the *Smith* precedent. Additionally, California does not have a RFRA law.[74]

Nonetheless, multiple important factors differentiate voter ID laws from driver's license regulations. Most importantly, as the California Court of Appeals noted in *Valov*, driving, as opposed to voting, is a privilege rather than a right.[75] Even under a strict scrutiny evaluation, a driver's license photo requirement is more acceptable than a photo voter ID requirement. While a driver's license photo requirement poses a significant burden on sincere religious beliefs, the government's interest in the requirement is more compelling. As the court noted, photo identification serves to prevent fraud, identity theft and terrorism.[76] In the interest of protecting public safety, there is no sufficient alternative to quickly verify a person's identity in an emergency.[77] However, public safety arguments made for driver's license photo requirements are not necessarily applicable to voter ID laws. For example, Texas' "Election Identification Certificate," a special voter ID card, includes an explicit disclaimer that the card is "for election purposes only" and "cannot be used as identification."[78] Clearly, non-photo "voter ID cards" could be issued without compromising public safety. Court precedent relating to driver's license photo requirements, therefore, is not necessarily indicative of a potential ruling on the impact of voter ID laws upon religious freedom.

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[67] Brougher, *supra* at 5.
[68] Harris, *supra*.
[69] *Jensen, v. Quaring*, 427 U.S. 478 (8th Cir. 1985).
[70] *Id*.
[71] Brougher, *supra* at 2.
[72] Brougher, *supra* at 5.
[73] Brougher, *supra* at 8.
[74] Volokh, *supra*.
[75] *Valov v. Department of Motor Vehicles* 132 Cal.App.4th 1113 (2005).
[76] *Id.*
[77] *Id.*
[78] Texas Department of Public Safety (n.d.).

B. The Constitutionality of Voter ID Laws

The Supreme Court has heard cases challenging voter ID laws from multiple states. In *Crawford v. Marion County Election Board* (2008), the Supreme Court upheld Indiana's voter ID law and indirectly addressed how the law impacted voters with religious objections to being photographed.[79] While the *Crawford* ruling does not serve as binding precedent on this issue, the justices' opinions provide relevant legal insight.[80] Indiana's voter ID law states that voters with religious objections to being photographed may vote by provisional ballot and "execute[] an appropriate affidavit before the circuit court clerk within 10 days following the election."[81]

The Court addressed Indiana's interest in enforcing a photo voter ID requirement. It recognized that Indiana had an important, legitimate interest in preventing voter fraud. However, the majority opinion acknowledges that there is no evidence of in-person voter impersonation, "the only kind of voter fraud [the law] addresses," in that state.[82] If reviewed under strict scrutiny in a religious freedom claim, I argue that the state's interest should not be considered compelling.

The court also inconclusively addressed the burden that the law imposed upon certain voters. Writing for the majority, Justice Stevens noted that, as a result of the state's voter ID law, "a somewhat heavier burden may be placed on a limited number of persons," including voters with religious objections to being photographed.[83] Considering the evidence presented, he concluded that such a burden upon "a few voters" was not sufficient to overturn the entire law.[84] However, Justice Stevens noted that "on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters [voters who do not have birth certificates and voters who must cast provisional ballots] or the portion of the burden imposed on them that is fully justified."[85]

Justice Souter expressed his concerns in his dissenting opinion. "Indiana's 'Voter ID Law' threatens to impose nontrivial burdens on the voting right of tens of thousands of the State's citizens … and a significant percentage of those individuals are likely to be deterred from voting," he wrote.[86] Further, Justice Souter asserted, "Indiana's chosen exception does not amount to much relief."[87] He mentioned that voters with religious objections to being photographed must take special measures after every election and travel to their county's "only … county seat."[88] As evidence of the effect of this requirement, he cited a 2007 municipal election in Marion County, where the voter ID law was in effect. "Thirty-four provisional ballots were cast, but only two provisional voters made it to the County Clerk's Office within the 10 days," Justice Souter claimed.[89]

Although the Supreme Court upheld Indiana's voter ID law and the principle of voter photo ID requirements, it did not conclusively address the law's impact on voters with religious objections to being photographed. In analyzing the case, attorney Cynthia Brougher, writing for

[79] *Crawford v. Marion County Election Board,* Oyez (2008). Last visited 07 March 2016.
[80] Brougher, *supra* at 13.
[81] *Crawford.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*

the Congressional Research Service, claimed, "[I]t appears probable that the Court may reach a different result if that law were challenged as it was applied to religious objectors. Such a challenge would involve a more substantial burden than that imposed on non-objectors, according to the opinions."[90] Thus, the legal implications of voter ID laws for voters with religious objections to being photographed are still undetermined.

Conclusion

Voting and free religious exercise are both fundamental American rights. Unfortunately, the Supreme Court has recently applied a lower standard defining Americans' religious freedom rights in cases relating to religious exemptions. Based upon a vague "hybrid rights" doctrine and statutory rights that vary by state, the legal claims of voters with religious objections to being photographed against voter ID laws are uncertain. However, court rulings on related issues, specifically the constitutionality of driver's license photo requirements and voter ID laws, provide relevant insight. Most notably, the Supreme Court's ruling in *Crawford v. Marion County Election Board* indicates that a relevant "as applied challenge" to a voter ID requirement might lead to a decision in favor of greater accommodations.

Additionally, statutory rights in many states provide some protection. While state-level religious freedom statutes vary across the country, at least in states with RFRA protections, I argue that voters with religious objections to being photographed should receive exemptions to voter ID laws. According to the criteria often used by the courts to evaluate religious exemptions under RFRA, these voters deserve reasonable accommodations. Evidence of electoral fraud does not seem to constitute an interest sufficient to justify the clear burden imposed by voter ID laws upon religious minorities who object to being photographed. These Americans are sincere in their beliefs and willing to make personal sacrifices in order to remain in compliance with both the law and the mandates of their religions. I argue that voter ID laws impose significant burdens upon these voters and that the accommodations provided by states are inadequate. Voters with religious objections to being photographed must take special measures every election in order to vote. In some states, voters are required to travel to appear before election authorities and answer personal questions about their faiths. Virginia and Georgia have established no accommodations for in-person voting at all. Therefore, I argue that voters with religious objections to being photographed should be granted exemptions to voter ID laws in states with RFRA protections. The ideals of electoral integrity and religious liberty are not necessarily mutually exclusive, as non-photo identification alternatives could be implemented to protect both the interests of states and the rights of voters.

[90] Brougher, *supra* at 12.

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Appendix 1: Table 1 Sources

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A TRICKY NEGOTIATION: FREE SPEECH VERSUS INSENSITIVITY

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CONTENTS

Abstract

The central question presented in this paper is whether specialty license plates constitute government speech, and are thus subject to disapproval by the Board of the Texas Department of Motor Vehicles. The core concerns reviewed in this research, largely focus on defining whose speech specialty license plates are. The purpose is to investigate and analyze the precedent established as a result of a recent case, *Walker v. Texas Division, Sons of Confederate Veterans*. The paper thoroughly reviews the arguments made in the majority opinion, as well as those of the dissenting opinion, with an interdisciplinary approach. The argument presented is in favor of the defendants, Sons of Confederate Veterans, which is commonly referred to as SCV throughout the paper. Hence, the paper opposes the current stare decisis that renders specialty license plates government speech. The claim made is that the Court's decision to reverse the lower court's verdict falls short of success. This is primarily because it fails to identify specialty plates as hybrid speech. It is true these plates include the name of the state and are issued by the state, however, they are also personal messages requested and paid for by private entities. The alternative solutions presented to the current precedent include a return to previous specialty license plate programs, gathering of more relative data, and removal of such programs that blur the line of government and private speech.

Introduction

When taking into consideration the recent flooding of media with headlines involving the words "Confederate flag," it becomes clear that this symbol of Southern pride and racial insensitivity remains a critical societal issue. It has even extended to acts of civil disobedience, like that of Bree Newsome, and both violent and non-violent events throughout communities. Being mindful of the escalation of racial tensions, it is critical that cases like *Walker v. Texas Division, Sons of Confederate Veterans* are properly decided. This case regards the approval and usage of specialty license plates in the state of Texas. It primarily involves the First and Fourteenth Amendments, and the central questions of whether specialty license plates constitute government speech or private speech, and if the Texas Department of Motor Vehicle Board's rejection of the SCV design qualifies as unconstitutional viewpoint discrimination. The idea is that if these license plates are not government speech, then the government is required to maintain a neutral viewpoint by approving even those designs seen as offensive. However, if this is government speech, then they may deny requests and designs on a reasonable basis. The U.S. Supreme Court ruled in favor of the Board, or Walker, and established the precedent that these license plates are government speech, and they may refuse a design with which they do not want the government to be associated. In a thorough analysis of both the majority and dissenting opinions, this paper opposes the precedent set by the Court and offers other possible solutions in maintaining both cultural sensitivity and constitutional rights.

I. Texas Application Process

The State of Texas, much like other states in the U.S., has programs that allow its municipality to have personalized or specialty license plates upon application and an extra fee. Different states will have different methods of approving and publishing these license plates, and Texas provides three ways to do so. Interested citizens must complete an application, have a design that meets the requirements, and submit a deposit. Once these demands are met, the proposed license plate design will move forward to a vote by the Board. The different ways that specialty license plates may be published in Texas include: the state legislature requesting a specific license plate, individuals and for-profit organizations creating a design through a state-approved private online vendor that is subject to approval by the DMV Board, or the Board may approve a license plate on its own merit or one from an application submitted by a non-profit organization. In this particular case, the focus is in the third method, because the Sons of Confederate Veterans is registered as a non-profit organization dedicated to the preservation of the history and traditions of the South and the Confederacy.[91]

II. Case Introduction

The Texas Division of Sons of Confederate Veterans applied to have the state publish a specialty license plate that included an image of a confederate flag and the inscription "Sons of Confederate Veterans" at the bottom. Prior to the approval meeting, the Board opened the design for public comment. The majority of the public opposed the design and elected officials addressed letters, urging the Board to reject the proposal. The Board unanimously rejected the design and

[91] *Walker v. Texas Division, Sons of Confederate Veterans*, 576 U.S. No. 14-144. Supreme Ct. of the US. (2015).

refused to issue these personalized plates. Their basis for this decision was that the design, particularly the image of a confederate flag, was offensive to certain members of society, and they had the right to do so based on the Texas specialty license plates regulations. The Board also made the point that, in addition to being offensive, the specialty plates could result in dangerous situations for drivers. The Sons of Confederate Veterans took their case to the District Court, arguing that the Board's decision violated their constitutional rights to free speech, expression, and equal protection. According to the SCV, free speech was violated because they were being prevented from displaying this message, and equal protection was violated because other controversial designs had been approved. SCV believed these personalized license plates are not government speech and that the government and the Board engaged in viewpoint discrimination by only approving designs they favored. The Board argued that the free speech clause was not applicable to the case, because these license plates are government speech; therefore, they have the right to choose what this government platform expresses. The District Court ruled that this was private speech, but the Board's denial was reasonable given the contents of the design. The case was appealed to the United States Court of Appeals for the Fifth Circuit, which ruled in favor of the SCV, thus reversing the District Court's ruling. The Court of Appeals decided that the Board engaged in viewpoint discrimination, found these license plates to be private speech, and said this violated the SCV's constitutional rights. The Board subsequently appealed the case to the United States Supreme Court, with the hopes of reversing the lower court's decision.[92]

III. Supreme Court Rulings

The United States Supreme Court granted the Board certiorari and reversed the lower court's verdict in favor of the Texas Board, or Walker, with a vote of 5-4. Justices Breyer, Sotomayor, Kagan, Ginsburg, and Thomas agreed with the petitioners. Justices Roberts, Scalia, Kennedy, and Alito dissented with the majority, in agreement with the position of the respondents. There were no concurring opinions for this case. In its ruling, the Supreme Court declared that specialty license plates ultimately amount to government speech; therefore, the Board has the right to refuse any proposals for publication. The precedent makes it clear that license plates are associated with the state and any phrase or image that the plates include constitute government speech. The Court in its decision also ruled that the SCV's constitutional rights granted in the First and Fourteenth Amendments were not violated.[93]

IV. Majority Opinion

Justice Breyer delivered the majority opinion, in which he makes it clear that usually when the government speaks, it has the right to promote policies and positions it sees as representative of constituents. Also, the content of its speech is not regulated via the free speech clause. Essentially, the freedom that is provided to government speech stems from an accepted democratic electoral process that works as a check on government speech. Furthermore, given that government officials are elected, their speech and actions should be representative of the people. Justice Breyer makes the point that if the government was unable to select the messages it conveys, then society as we know it would fail to function.[94]

[92] *Walker* 576 U.S.
[93] *Walker v. Texas Division, Sons of Confederate Veterans, Inc., Oyez. (last visited March 30, 2016).*
[94] *Walker* 576 U.S.

The majority opinion also made reference to a recent case that involved a similar question in identifying the disparity between government and non-government speech platforms. In *Pleasant Grove City v. Summum,* a religious organization sought to erect a monument in a park where the city allowed monuments donated by private entities to be erected. The city refused to allow the erection of this monument and the religious organization sued, arguing that by previously accepting other permanent exhibitions, the city had created a space for private speech represented in the form of monuments. In this case, the U.S. Supreme Court ruled against Summum for various reasons. For instance, they referenced history of governments using monuments to convey messages that they want to be seen as supporting. They also noted that observers were likely to attach the message of the monument to the owner of the park or the city. They even referred to "selective receptivity" as the city exercised control over the selection, especially since there is a limited space in a park.[95] Justice Breyer compares the similarities of this case to the license plates, with the exception that theoretically, the State of Texas can issue an unlimited number of license plates. In terms of the the cost of plates paid for by individuals, Justice Breyer alludes to the Summum decision, where private parties were the ones to bear the costs of the monument, even though the city still had to permit the erection. Similarly, in the Walker case, while those wishing to display the plate would have to pay extra, the state still had to approve of it. In other words, this is not a forum for the public to display any message they choose simply because they are paying for it.[96]

The opinion then explains the three primary reasons that result in the precedent that has been established. The first is the idea that states have been using license plates to promote their respective states. For instance, Texas has a license plate template that celebrates "150 Years of Statehood."[97] The second reasoning refers to the assumption that, in general, the public will affiliate the state with the message transcribed on the license plate. They believe this happens because the word "Texas" is on every plate issued, the state requires all vehicles to display a license plate, and all of the license plates are issued by the state itself. In addition, the State of Texas owns all of the designs, including those proposed by private entities. In a sense, these license plates also double as a form of government identification. Justice Breyer points out that if someone wants a private message displayed via a specialty plate, they are likely doing so to show government agreement with their message. The third and final reasoning lies in the process to have a design approved and issued. Given that Texas law places final authority of approval in the control of the Board, the idea of this being a platform for private speech is demoted. This is because, by law, the Texas DMV Board may reject or approve a design that does not comply with the standards, and this allows Texas to have the power to select how it wants to be represented and how it will represent the constituency. The opinion provides an example of this as one where Texas may issue a license plate that praises the state's citrus industry, but by no means is it required to issue one that praises the citrus industry of another state. The majority of the justices concluded that these license plates belong to the government and they are government speech independent of the free speech clause, with the ability to reject submissions not meeting any of the set standards.[98]

The arguments and decision of the majority opinion mainly interpret the case in the eyes of the law and policies established. They rely on past precedent and the state's policies to guide their decision and explain their reasoning for declaring licenses as government speech. However,

[95] Pleasant Grove City v. Summum. 555 U.S. No. 07-665. Supreme Ct. of the US. 25 February 2009.
[96] *Walker* 576 U.S.
[97] *Walker* 576 U.S.
[98] *Walker* 576 U.S.

there could be a concern about whether this ruling has an ideological dimension to it. All four liberal justices were included in the majority and they ruled in favor of the Board, which aligns with the Democratic ideology that usually supports centralized power and government intervention. The conservative justices, with the exception of one, all agreed in the dissent, which aligns with the Republican ideology that prefers less government intervention and power. The burden of the deciding vote fell on the shoulders of Justice Thomas, who voted in the majority despite being a conservative. There is no evidence to suggest that Justice Thomas's vote was largely based on his background as an African-American, even though all of his conservative colleagues dissented. The article "Justice Thomas's Vote in Walker v. Sons of Confederate Veterans," references the *Capital Square Review Bd v. Pinette* case, in which Justice Thomas voted in support of Ku Klux Klan to display a cross in a public space. Therefore, while all of the justices' votes reflected their political ideology, Justice Thomas was the outlier and neither his African-American background nor his Republican ideology seem to have played a role in his vote.

V. Dissenting Opinion

The dissenting opinion was delivered by Justice Alito. The opinion finds the precedent dangerous because it threatens the security and preservation of private speech, which they consider specialty license plates to be. The idea behind this argument is that the First Amendment prevents regulation of government speech, yet at the same time, it protects the speech of private parties by requiring government to exercise a neutral viewpoint. Justice Alito addresses the argument that people naturally affiliate the design to the state by referring to arbitrary designs. For instance, Texas has license plates that promote certain academic institutions, drinks, and foods, and he makes the point that people would not consider that food to be Texas's favorite or preferred snack, but rather the person who has purchased and displayed the plate. The opinion agrees that license plates do have some government speech, such as the state's name and a license number, but the remaining is a limited public forum, because it is sold for people to display a private message of their choosing. In this case, the Board rejected the message they found displeasing or inappropriate. He also makes the point that while license plates originated to function as a form of government identification, their evolution has led them astray from that purpose. Through the decades, they came to include words and images that the states had chosen and designed, which rightfully constituted government speech. However, recently, when Texas opened this space for private entities to place their own individual messages and designs, they created a space where private speech was promoted.[99]

The dissenting opinion then goes on to review the main case referenced in the decision, *Pleasant Grove City v. Summum.* Justice Alito makes the argument that the characteristics of this case do not apply to the Walker case because of the stark contrasts in all three arguments made in the Summum case. While in the former a historical aspect shows the primary use of monuments throughout history by governments, this is absent in the Walker case. Specialty license plates are a new phenomenon of the late 20th and early 21st century. It also claims that there is no selective receptivity as the Board does not select by design and is mainly focused on "readability and reflectivity."[100] In addition, the attempt by the Board to prove selective receptivity, by mentioning their rejection of a "Pro-Life" license design fails, because it only proves other cases of viewpoint

[99] *Id.*
[100] *Id.*

discrimination.[101] Finally, the opinion argues Texas has created a limited public forum by selling this space to private entities. Justice Alito notes that Walker, who is the current Chairman of the Texas DMV Board, stated that they encourage these personalized license plates to 'generate additional revenue for the state.'[102] In conclusion, Justice Alito, and the remaining Justices who dissented, find the Court to be in error with its judgment by infringing upon speech that they deem private and unrelated to government.[103]

VI. Applications and Implications of the Case

Upon research and review of the case and implications, it can be inferred that the precedent established by this case is endangering the fundamental idea of free speech. The majority opinion advances the argument that a government would fail to function if its speech was limited, provided that they are elected to represent their constituency's voice and vision. While this holds true, it does not validate the denial of the SCV design, because it does not identify whose speech personalized plates are. It is true that government speech is not subject to regulation, but that applies to cases where the platform is clearly government speech. In this case, the very core question is whether this is private or government speech.

In the referenced Summum case, while the issues in question are similar, the contrasts are too blatant to base the decision largely from that precedent. Specialty licenses are not traditional and are unexplored. Also, in their evolution, license plates are commodities Texas is selling to express speech.[104] In terms of the public affiliating a license plate with the state, it does not hold true. In general, when observing a vehicle, one does not affiliate the items in it or placed on it with the state, but rather with the person driving the vehicle. In Summum, this differed because a park belongs to the city and it represents the entire municipality, not just one individual or group. The idea of a park clearly being a public space, paired with it being a limited space, justifies denying certain permanent exhibition requests. However, with specialty plates, this is not the case. The license plate is not for the entire public, but merely for the person willing to purchase and display it. Also, the idea of issuing any design provides people the option of availability, should they want to purchase it. In issuing the license, Texas is not forcing people to display the license or promoting it, but is rather allowing for the views of all of its citizens to be represented. The license plates also do not have the limited space issue, because as mentioned in the dissenting opinion, theoretically, the state can issue many. The State of Texas has approximately 350 specialty license plates issued already.[105] In addition, the Board stated repetitively that the purpose of these personalized plates is to attract additional revenue for the state. This fact shows that the state is not looking for a new way of promoting its speech, but is rather selling an additional space where citizens can display their personal messages for an extra cost. It is hard to believe that people would pay a large fee to display a government message rather than their own personal message. As Justice Alito mentions, if government is seeking to promote its message, then why must it sell to do so?

In terms of the Board's arguments, there are additional shortcomings. Chiefly, their reasoning that displaying such images or symbols would be dangerous to the safety of drivers is dubious. People who display this symbol are aware of the implications of doing so and that most

[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] Rowland, Lee. ACLU Senior Staff Attorney, author of ACLU amicus curiae. 13 Nov. 2015. E-mail Interview.
[105] *Walker* 576 U.S.

disagree with the symbol. Therefore, the risk they run of displaying it is a personal choice and, while it is reasonable to be concerned for the safety of people, it does not validate their argument. People can still display the image in ways other than a personalized plate. A vehicle may have a sticker of the confederate flag. People can even put an actual flag of it on their car, and if one was to follow the Board's safety argument, then the state would have to ban such displays as well, because they may enrage drivers. Parade permits offer another example, because the ruling allows the government to reject a parade it finds displeasing since governments approve parade permits.[106] It becomes evident how this can quickly lead to the fallacy of a slippery slope that misinterprets the many nuances of free speech. Later on in *Pro-Football Inc. v. Amanda Blackhorse*, the Court referenced the Walker case and allowed government to deny a displeasing registered trademark.[107] Furthermore, Texas has license plates like "Choose Life," which advocates a pro-life approach to abortion.[108] This design takes a side on a controversial issue and it can be said that it may cause anger and reckless behavior among drivers. Hence, there comes forth the idea that the Board in that reasoning should not have issued such a controversial specialty design either. In addition, the Board made these safety arguments without providing any form of statistical data supporting the theory that this can be dangerous. In fact, the article "A Test of Free Speech and Bias, Served on a Plate from Texas," provides images of nine other Southern states that have issued licenses with the Confederate flag. Justice Alito points out that in the years since the Confederate specialty plates have been in use in those states, there have been no reports of violence resulting from the displaying of this symbol.[109]

Furthermore, the Board is not consistent in its issuing of specialty plate designs. For instance, in the same meeting that the Board unanimously rejected the SCV proposal, they approved a proposal that celebrated the Buffalo Soldiers. The Buffalo Soldiers represent the African-American soldiers that served in the Indian Wars.[110] This design is offensive to the Native Americans who suffered and lost their lands as a result of the U.S. quest of Westward expansion. A representative of the Native American community stated that this was offensive to them given the historical context.[111] This creates confusion and casts doubt on the reliability of the process, because if the Board's primary motive for rejecting the proposal was to refrain from being offensive, then they should not have approved the Buffalo Soldiers design either. This inconsistency also addresses the issue that the SCV's right to equal protection has been violated, provided that the Confederacy flag is to African-Americans as the Buffalo Soldiers symbol is to Native Americans. Yet, the former was rejected and the latter approved.[112] The duplicity in this case is also evident in that the Texas's State Capitol building gift shop includes items for sale that have the Confederate flag on them. This is an issue because this is a government establishment that is selling and displaying items with the very symbol the state is denying. Naturally, there is a rebuttal that the government can overturn the Board's decision to allow the Buffalo Soldiers plates, and stop the sale of items that include the Confederate flag from the State Capitol gift shops. While

[106] Rowland, Lee. ACLU Senior Staff Attorney, author of ACLU amicus curiae. 13 Nov. 2015. E-mail Interview.
[107] Knutsson, Maurine L. "Federal District Court Affirms Cancellation of Redskins Marks on Summary Judgment." *Lexology*. Globe Business Publishing Ltd, 15 July 2015. Web. 23 Nov. 2015.
[108] *Walker* 576 U.S.
[109] *Walker* 576 U.S.
[110] *Walker* 576 U.S.
[111] Scharrer, Gary. "Indian Group Objects to Buffalo Soldier Plates." *Houston Chronicle*. Hearst Newspapers LLC, 26 Nov. 2011. Web. 20 Nov. 2015.
[112] *Walker* 576 U.S.

those are potential possibilities, the reality is that they have not been enacted, therefore, resulting in inconsistencies in how the case has been handled.

The approval of the Buffalo Soldiers proposal and the rejection of the Sons of Confederate Veterans proposals also highlight the dichotomies present in symbolism. It is clear that symbolism is subject to interpretation and what it may mean to one may not be the same for another. In his book, *Cultural Anthropology: A Toolkit for A Global Age*, Guest defines symbols as "anything that signifies something else."[113] This definition is testament that symbols are misleading in interpretation and are subject to constant change over time and through different cultures. Anthropologist Clifford Geertz invented the interpretivist approach, where one studies a system of symbols. He points out that to us, a cockfight may symbolize violence and backward thought, but to the communities in Asia, a cockfight symbolizes the centuries of competition among villagers for prestige.[114] In a sense, the Confederate symbol works in similar terms. It is part of the culture of the South, which contributes to the culture of the U.S. as a whole. To many, it is a symbol of racism and white supremacist agenda and ideology, but to others, it is a symbol of their forefathers' heritage and courage. Similarly, the Buffalo Soldiers symbolize pride for African Americans as a sign of equality in the U.S. military, but to Native Americans, it is a symbolic reminder of atrocities committed against them. A symbol's vulnerability to interpretation makes it difficult to pinpoint exactly how it is perceived, because often times it is both seen as negative and positive.

A critical rebuttal to the arguments in this paper is that if this design was approved, then other groups would have the right to ask the publication of designs that included other controversial symbols like swastikas and obscenities. In his article published in June of 2015, Mauro explains that when the justices brought forth this concern during the court proceedings, the SCV attorney, Mr. George, replied that the state indeed would have to permit those symbols.[115] While this is disheartening, the reality is that people can put swastikas and images and symbols affiliated with other controversial groups on their cars, in other ways, if not through license plates. The program that Texas has currently instilled makes specialty plates private speech, and that allows people to place on them what they desire.

Conclusion

It is certainly difficult to identify the speaker of the message in the issue of personalized license plates. The majority opinion fails to acknowledge that specialty plates are hybrid speech. They include the government as the publisher of the plate, and the private entity that designs and requests it. The word "personalized" is, in its very name, emphasizing that these messages belong to the driver. In its attempt to raise revenues, Texas blurred the line distinguishing government and private speech. The dissenting justices believe private speech is violated when allowing government to engage in viewpoint discrimination by removing speech they disagree with. This belief is dangerous because the First Amendment exists to protect unpopular speech.[116] The

[113] Guest, Kenneth J. *Cultural Anthropology: A Toolkit for a Global Age*. New York: W. W. Norton & Company, 2014. Print.
[114] Guest, Kenneth J. *Cultural Anthropology: A Toolkit for a Global Age*. New York: W. W. Norton & Company, 2014. Print.
[115] Mauro, Tony. "A Big Fuss Over the First Amendment." *The National Law Journal*. N.p., 22 June 2015. Web. 15 Nov. 2015. <http://www.nationallawjournal.com/id=1202730075499/A- Big-Fuss-Over-the-First-Amendment?mcode=0&curindex=0&curpage=1>.
[116] George Jr., R. James. Partner at George Brothers Kincaid and Horton LLP, represented Texas Division, Sons of Confederate Veterans. Personal Interview. 18 Nov. 2015.

American Civil Liberties Union, or ACLU, states that in order to preserve constitutional rights for all, even the most repulsive speech must be protected because, often it is this unorthodox speech that governments are likely to suppress.[117] Emphatically, many will disagree with the symbol in question, but its denial is not justified in the given circumstances. Frankly, there are solutions far better than the stare decisis of the Court. Justice Roberts made the suggestion to simply remove the program of personalizing plates. Another solution can be to simply revert to previous methods that allowed the state to issue certain specialty plates available, but none that were proposed by private entities. This allows the state to maintain the specialty license program and generate revenue while avoiding the complicated nature of private entity proposals. In their submitted amicus curiae, the ACLU suggested placing a phrase that indicated that messages on the plates were not endorsed by the state. In an attempt to shine light on the implications, one can even conduct a study to collect data indicating if people attribute messages on licenses to the owner or the state. Regardless of one's views, this issue requires further research and discussion, but the current precedent falls short of success.

[117] Rowland, Lee. ACLU Senior Staff Attorney, author of ACLU amicus curiae. 13 Nov. 2015. E-mail Interview.

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THE INTERNET AND TAXATION: HOW THE SUPREME COURT HAS CHANGED THEIR COMMERCE CLAUSE ANALYSIS

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CONTENTS

Abstract

In his concurring opinion in Direct Marketing Association v. Brohl (2015),[118] Justice Kennedy said, "the Internet as cause far-reaching systemic and structural changes in the economy… given these changes in technology and consumer sophistication, it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*." Has the Court already based their decisions on this technological advancement? In this thesis, I examine the trends in Commerce Clause and Dormant Commerce Clause decisions by the Supreme Court since 1937. This research showed that the theories that the Court uses for the original and Dormant Commerce Clauses are affected by the justice's ideological score and time period of the decision. Also, the cases that are chosen to be decided are affected by the time period in which the case is placed on the desk of the Court. However, they are not chosen based on the individual ideologies of the justices.

[118] *Direct Marketing Association v. Brohl.* 2015. 735 F. 3d 904.

Introduction

With the availability of purchasing items online rather than in store, it is important to see how the government is adapting to this trend. Sales and use taxes have been analyzed at both the state and federal levels, utilizing the Commerce and Dormant Commerce Clauses to rule on the constitutionality of these taxes. Even before the advent of the internet, sales and use tax was "regulated" primarily with the use of these clauses. My research intends to answer the question: Is there is a significant difference between the Supreme Court's decision making on Commerce Clause and Dormant Commerce Clause cases before and after the advent of the internet? The focus of the research will be on cases that involve taxation.

I. Literature Review

A. History of the Dormant Commerce Clause

Article I, Section VIII, Clause III of the Constitution states, "[Congress shall have the power to] regulate commerce with foreign nations, and among the several states, and with the Indian Tribes." This small sentence is a very powerful one. The Commerce Clause safeguards the interests of those that do business across state lines. In addition, the Clause has a reverse meaning that is just as powerful as the literal interpretation. The Dormant Commerce Clause sets the level of restraint on states from regulating interstate commerce, with or without federal legislation in the area of business.[119] This mandate is reinforced by the Supremacy Clause of the Constitution,[120] which makes federal legislation greater in Constitutional power than state legislation (Stewart 2014). The Dormant Commerce Clause is more important to taxation than the Commerce Clause because there is no federal internet purchase tax, leaving it to the states. While taxation and commerce are not one in the same, they do greatly work hand in hand (*Gibbons* v. *Ogden* 1824).[121] The Dormant Commerce Clause, in general, ensures that a state is not favoring one United States citizen over another, regardless of which state that they call home.

The Dormant Commerce Clause became a written Supreme Court rationale around the time of the New Deal.[122] Two early Dormant cases important to tax law were *McLeod v. J.E. Dilworth Co.*[123] and *General Trading Co. v. State Tax Commission,*[124] both of which occurred in 1940.[125] These cases created the distinction between sales and use tax (which becomes of importance by the time of Internet sales). Due to these cases, a tax on the sale of an item brought into a state by a traveling salesman or shipped into the state is unconstitutional. However, a tax on the use of this item after it comes into the state is constitutional. The Court expanded the understanding of these different taxes through subsequent cases. In the case of *Miller Bros, Co. v. Maryland* (1954),[126]

[119] Empie, Derek E. 2002. "The Dormant Internet: Are State Regulations Of Motor Vehicle Sales by Manufacturers on the Information Superhighway Obstructing Interstate and Internet Commerce?" *Georgia State University Law Review*. 18(Spring): 827-849.
[120] Supremacy Clause. U.S. Constitution. Art 6.
[121] *Gibbons v. Ogden*. 1824. 22 U.S. 1.
[122] Fatale, Michael T. 2012. "Common Sense: Implicit Constitutional Limitations on Congressional Preemptions of State Tax." *Michigan State Law Review*. 2012: 41-89.
[123] *McLeod v. J.E. Dilworth Co.* 1944. 322 U.S. 327.
[124] *General Trading Co. v. State Tax Commission*. 1944. 322 U.S. 335.
[125] Allen, Scott T. 2013. "Adapting to the Internet: Why Legislation is needed to Address the Preference for Online Sales that Deprives States of Tax Revenue." *Tax Lawyer*. 66(4): 939-961.
[126] *Miller Bros, Co. v. Maryland*. 1954. 347 U.S. 340.

Maryland attempted to regulate Delaware's use tax collection based on solicitation and advertisement (Allen 2013). The Court struck this down and upheld the proposition that one state cannot regulate a different state in their collection of taxes.

One of the most important, landmark cases in interstate taxation transactions was *National Bellas Hess v. Illinois* (1967).[127] Illinois attempted to impose a use tax on Bellas Hess (Swidler 2006). The state taxed the products sold to people in Illinois, even though Bellas Hess had no employees located in the state. Bellas Hess sued Illinois under the Commerce Clause and Due Process Clause. The Court decided that the tax was unconstitutional. Very important to interstate tax law, the Court established a "bright line nexus" rule in their decision. This rule requires that for a state to tax a company, the company must have a physical presence within the state; there needs to be a "nexus." The physical presence nexus necessitated that there were a minimum number of connections within the state, such as offices, employees, contractors, and stores.

The overall standard in state regulation of interstate activity was refined in *Pike v. Bruce Church*[128] in 1970 (Stewart 2014). *Pike* involved an Arizona state order to a cantaloupe farmer which prohibited him from shipping his cantaloupes to California to be packaged. The farmer claimed that this violated the Commerce Clause. The Court applied the 1970 standard for interstate commerce from *Bellas Hess*, and ruled that the order passed the "bright line nexus test." There was no discrimination by the state against out of state individuals in issuing the order. However, it still seemed unconstitutional to require the farmer to process his cantaloupes in Arizona. The Court added on a step to the requirements for state regulation of interstate commerce because of this issue in *Pike*; the local benefits need to be weighed against the burdens on interstate commerce. The state has a duty to prove that there is a legitimate state interest they are serving, without a less discriminatory way to do so (Empie 2002).

The "bright line nexus test" was made more complex seven years later in *Complete Auto Transit v. Brady* (1977).[129] *Complete Auto* established a four-prong test for states to be able to tax commerce and not violate the dormant Commerce Clause. The four prongs are:

- The business must have a substantial nexus (physical presence) within the state
- The tax is fair to the purchase/use price
- The tax cannot discriminate against those outside or inside the state
- The tax is related to the services of the state

The first prong is directly related to the physical presence needed in *Bellas Hess* and *Quill.* [130] One of the greatest reasons for the revised *Complete Auto* test was to avoid double taxation of businesses, which was a growing issue that still exists today.

Fifteen years after *Complete Auto Transit v. Brady* (1977), the Court revised the bright line test in *Quill Corp. v. North Dakota* (1992).[131] The precedents in *National Bellas Hess v. Illinois* (1967) and *Complete Auto Transit v. Brady* (1977) were upheld and further explained. The decision in *Quill* referenced *Complete Auto Transit*[132] and its four-prong determination of the constitutionality of a tax under the Dormant Commerce Clause (Handel 2014). The court

[127] *National Bellas Hess v. Illinois.* 1967. 386 U.S. 753.
[128] *Pike v. Bruce Church, Inc.*. 1970. 397 U.S. 137.
[129] Handel, Rick. 2014. "A Conceptual Analysis of Nexus in State and Local Taxation." *Tax Lawyer*. 67(Summer): 623-711.
[130] Bass, Corey. 2014. "Taxation of Internet Transactions: Developing a Clear Rule to End State Law Inconsistencies in the Aftermath of Amazon.com v. N.Y. Department of Taxation and Finance." *Cumberland Law Review*. 44(2013-2014): 119-150.
[131] *Quill Corp. v. North Dakota.* 1992. 504 U.S. 298.
[132] *Complete Auto Transit v. Brady*. 1977. 430 U.S. 274.

highlighted its first and third prong in that there must be a substantial nexus and that the state cannot discriminate against interstate commerce. These two guidelines helped shape the nexus requirement for *Quill*. The facts of *Quill* are that Quill Corp.[133] was a corporation in Delaware, doing business through the mail in North Dakota. Quill did not have offices or employees in North Dakota, but they had contacts in the state that they did business with on a regular basis. North Dakota mandated that Quill Corporation[134] collect taxes on purchases to those in the state of North Dakota. Quill claimed that this violated the Commerce Clause. The Court found that the North Dakota legislation did violate the Dormant Commerce Clause because Quill did not have a physical presence in the state. Their decision upheld *Bellas Hess.* The tax on a business outside of the state was ruled unconstitutional. The connection between *Bellas Hess* and *Quill* are very important as they are the most commonly referenced Supreme Court decisions in scholarly articles as the standard nexus determinant for interstate purchase regulation.[135]

The decisions in *National Bellas Hess v. Illinois* (1967) and *Quill Corp. v. North Dakota* (1992)[136] have been manipulated in more modern cases of internet tax law, stretching the nexus requirements to justify actions by the state. The federal courts have affirmed these decisions and given the state greater Commerce Clause power through modern cases like *Amazon.com, LLC v. N.Y. Department of Taxation and Finance* (2010)[137] and *Borders Online, LLC v. State Board of Equalization* (2005).[138]

B. The Newest Regulations – Borders and Amazon

National Bellas Hess v. Illinois was decided in 1967, *Complete Auto Transit v. Brady* in 1977, and *Quill Corp. v. North Dakota* in 1992.[139] To put all the decisions together creates the standard in sales taxation for states that are attempting to regulate interstate commerce. Looking at the dates of *Bellas Hess*, *Complete Auto Transit*, and *Quill*, they do not encompass the time of the Internet. This time gap begs the question: do the current standards reflect the era?

While neither completely encompassing the new dawn of internet sales tax nor providing a new litmus test, *Amazon.com, LLC v. N.Y. Department of Taxation and Finance* (2010) and *Borders Online, LLC v. State Board of Equalization* (2005) provide valuable insight into the judicial system's standards for states' taxation of internet purchases. Both cases expanded the states' ability to tax purchases of citizens who do business with major retailers online.

Borders Online, LLC v. State Board of Equalization (2005) is a landmark case that stood for the proposition that agents of a company are subject to the use tax of where that company is located[140] (Webb 2007).[141] Two issues were present in the case: if Borders, Inc. was an agent of Borders Online and if Borders Online has a substantial nexus in California. The Court of Appeals of California found that Borders Online and Borders, Inc. were two different companies, but had

[133] *Supra* at 14.
[134] *Id.*
[135] Payne, Michael J. 2012. "Selling the Main Street Fairness Act: A Viable Solution to the Internet Sales Tax Problem." *Arizona State Law Journal.* 44(Summer): 927-958. [B] supra 10.
[136] *Supra* at 14.
[137] *Amazon.com, LLC v. N.Y. Department of Taxation and Finance*. 2010. 81 AD3d 183.
[138] *Borders Online, LLC v. State Board of Equalization*. 2005. 129 Cal.App.4th 1179.
[139] *Supra* at 14.
[140] Webb, Ronnie E. 2006. "Borders Online, LLC v. State Board of Equalization: It's Time for Congress to Weigh the Possibilities of this California Decision." *John Marshall Journal of Computer & Informational Law.* 24 (Summer): 641-671.
[141] *Id.*

business practices that made them agents of one another. On the second issue, the court decided that Borders Online did have a substantial nexus in the state of California. Since the company had a substantial nexus within California, Borders Online was subject to the use tax without violating the Commerce Clause. In response to *Borders Online, LLC*, other states have reformed their taxes to apply greater pressure to sister and parent companies to collect use taxes. This tax scheme makes it more difficult for companies to avoid taxation.

The Court expanded its decision in *Borders Online, LLC* in *Amazon.com, LLC v. N.Y. Department of Taxation and Finance* (2010). The court in *Amazon* decided how far the substantial nexus can be stretched in online purchases. Amazon did not have any offices, employees, or property in New York; however, they did do business with residents of New York.[142] New York passed a law[143] requiring that out-of-state retailers collect sales tax on purchases if these purchases were from the website of in-state commissioned companies. Amazon had paid websites, which they called "associates" to maintain links to Amazon's website to purchase items. Amazon paid these associates a percentage of every sale stemming from the associate's website. In the case of sales by Amazon to New York state residents, less than 1.5% of these sales stemmed from the associates websites.

Amazon sued the state of New York for their tax law on three issues: the constitutionality under the Commerce Clause to force out-of-state retailers to collect taxes without a substantial nexus, the constitutionality under the Due Process Clause because of vagueness and overbreadth, and constitutionality under the Equal Protection Clause because it specifically targeted Amazon (Minkevitch 2012). The New York Supreme Court dismissed all three claims and granted summary judgment to New York. The court stated that Amazon did have a substantial nexus due to case precedent in *National Geographic Society v. California Board of Equalization* (1977),[144] which established that the collection requirement does not have to come directly from the seller's in-state activity. The court dismissed the Commerce Clause argument based on *Scripto v. Carson* (1960),[145] which stood for the proposition that tax requirements did fall upon out-of-state retailers that had independent contractors within the state. Amazon's associates were independent contractors.

What does the *Amazon* decision mean? New York's Amazon law was really the first of its kind, but now other states will extend taxation to out-of-state online retailers that have a relationship to an in-state online company, even if the relationship is remote. The Amazon law taxation scheme is like a growing trend that will probably encompass a greater number of states in the years to come (Minkevitch 2012). Amazon responded to the decision by trying to avoid establishing nexus' within states. When other states created Amazon laws, they removed themselves from the state by getting rid of their associates in that state (Tehrani 2014).[146] Eventually, the process of removing themselves from states gave Amazon major organizational problems. Smaller retailers were retaining their business, creating a war between small and large online retailers. Amazon had to find a way back into these states, so they agreed to comply with sales tax collection as long as these states delayed their collection of sales tax from Amazon. Also,

[142] Minkevitch, Hannah V. 2012. "To Tax or not to Tax? That's not the Question: The Role of Tax within the Maturing World of E-Commerce." *Berkeley Technology Law Journal.* 27(Annual Review 2012): 705-735.
[143] N.Y. Tax Law. 2008. 1101(b)(8)(vi).
[144] *National Geographic Society v. California Board of Equalization*. 1977. 430 U.S. 551.
[145] *Scripto, Inc. v. Carson.* 1960. 362 U.S. 207.
[146] Tehrani, Sherry. 2014. "Welcome to the Amazon: Leading Online Retail from Local Tax Avoidance into your Backyard." *Tax Lawyer*. 67(Summer): 875-902.

to compete with brick-and-mortar stores, Amazon is now doing faster shipping and toying with the idea of drone delivery.[147]

II. Hypothesis

As stated previously, the question that this research seeks to answer is if there is a significant difference between the Supreme Court's decision making on Commerce Clause and Dormant Commerce Clause cases before and after the advent of the Internet. Specifically, the research is regarding online internet shopping. My hypotheses are as follows:

- From 1937 until 2015, there will be a distinctive pattern of Supreme Court case type arguments and this pattern will shift (or change) after 1990 and the advent of the Internet.
- From 1937 until 2015, there will be a distinctive pattern of the Commerce/Dormant Commerce Clause theory applied by the Court and this pattern will shift (or change) after 1990 and the advent of the Internet.

These hypotheses help directly answer my research questions. By examining trends in the Supreme Court over the length of the existence of sales and use tax, the research will show that, over time, the Supreme Court changes which cases are argued before them. A pattern can be considered any grouping of cases that occur within a ten-year timeframe, but then disappear from the Court's argumentation calendar after this period of time. Such patterns will also be explored by looking at the Commerce or Dormant Commerce Clause theories applied. Looking at the 1990s, specifically, will be pivotal to understanding if there is a change in the Supreme Court due to the advent of the Internet. The Internet was first introduced to the public in 1994. Comparing the types of cases pre- and post-1994 will help determine if there is a change in the Supreme Court's decision making. I will examine the theories that are used in the decisions of the cases according to year.

III. Data Analysis

To obtain the cases that would become my data, a search of the Westlaw database[148] of all United States Supreme Court cases was performed for cases after 1937 involving either the Dormant Commerce Clause and original Commerce Clause. A population of 325 cases were found. Since these concepts could be used by justices as mere dicta, I selected only the cases that had "Commerce Clause" or "Dormant Commerce Clause" written in the description of the case within its "synopsis." The synopsis of the case is arrived at by the Westlaw[149] database, operated by Thomson Reuters Corporation. The headnote and synopsis fields are prepared by West attorney-editors using consistent and current legal terminology, using descriptive terms instead of proper names and adding alternative terms for ambiguous, regional or outdated words.

This process gave me a sample size of 118 cases. In order to capture the data needed from each case, multiple variables were used. After drilling down and figuring out what would work best for capturing the information needed to answer my research question, I combined and created new variables which were, in effect, a clearer and more concise re-categorization of variable types. Certain variables were too specific while others were too broad. In the end, ten variables were used for my original data analysis. The variables focused on in the research were as follows:

- Year: The year in which the case was decided by the Supreme Court.

[147] French, Sally. 2015. "6 Myths about Amazon Prime Air and drone delivery, debunked." December 2.
[148] WestLaw Classic Database. 2015. Thomson Reuters.
[149] Supra 31

- Case Type: A very short description of what the case is about.
- Justice Ideological Score: Often used in Supreme Court analysis, I chose the Martin-Quinn ideological scores to determine the ideology for each justice for each case. Each justice receives a Martin-Quinn ideological score each year that they are on the Court. This ideological scoring system is more precise and fluid than the Segal-Cover scores which look at such factors as journalists' reflection on a Justice at the time of the justice's nomination to the Court. For cases in 2015, I used their 2014 scores as 2015 have not be completed. For justices that left mid-year, I used their previous year score.
- Commerce Clause/Dormant Commerce Clause Theory Applied: In each case decided by the Court, the Justice's opinion reflects their reasoning. I took their main reason/theory applied to determine if there was a trend in reasoning by either justice or time period.

I analyzed each of the 118 cases to pull the information for the variables specified above. Each variable was coded, with some variables recoded to consolidate data and re-categorize data for analysis. These variables were: Case Type, Commerce Clause Theory, Justice Role, Year, Justice Ideological Score, and Natural Court. All final coding can be found in the codebook.

A. Limits and Problems with the Research

While the research that I did is thorough there were a few problems that could produce margins of error. Fortunately, these problems may be able to be remedied in future research or through additional statistical measures. But, as such, the design of this research can be easily edited or extended.

When running the search Dormant and original Commerce Clause cases, it gave me the population of cases that involved the two clauses. However, I only used the cases that had "Dormant Commerce Clause" or "Commerce Clause" in their description. I did use the entire population of those that had either clause in the description, but this could be expanded to cases that merely involve the clauses in the specific case's dicta. Expanding beyond the description may provide more cases to examine and use in yet the importance of these cases to a direct analysis of the commerce clauses is doubtful.

The largest problem with my research, and with all research dependent on fluid concept categorization schemes, is the ambiguity in terms in the Commerce Clause Theory and Case Type variables. What may seem like case type to one person may be different for another. The same can be said with the theory and reasoning that given for the justice's decision. Often justices give multiple reasons for their decision. These two variables, specifically, are about the researcher's perception of what seems important to the Justice and the Court. But this need for precision is difficult to achieve for any juridical research as cases that come to the U.S. Supreme Court, specifically, involve a multitude of constitutional, state, federal, international, regulatory, or other areas of law and a specific case may be chosen by the Court so that they can render a multivariate decision. To resolve this in future research, multiple variable options could be utilized in order to capture the subject of the case and justice reasoning applied in the decision.

B. Descriptive Statistics

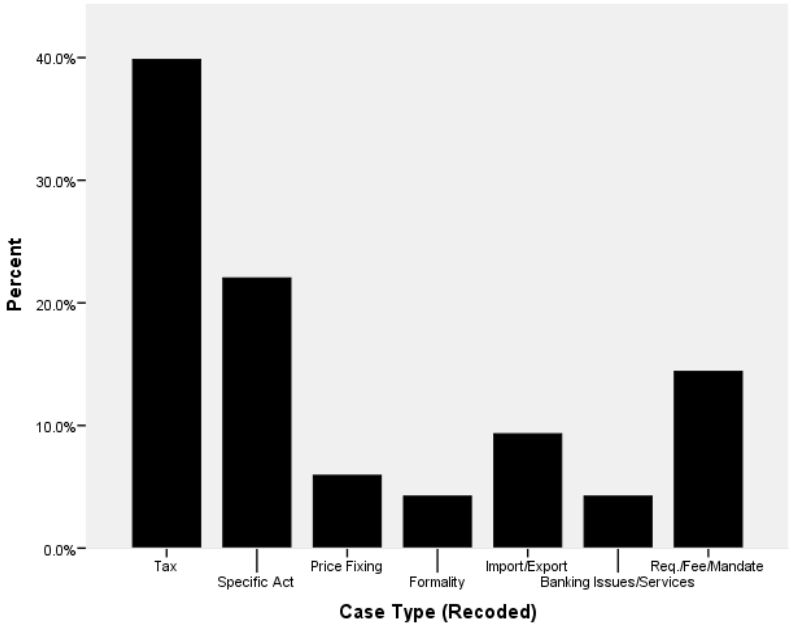
In order to do an analysis of each variable, I ran frequencies. For my research, it was especially important to see if there were changes within the variable, not in between variables. The amount of cases per year, the amount of use of particular theories, and how natural courts voted

affect my hypotheses. I did not run frequencies on "Name," "Case Code," and "Justice Ideological Score" as they would not provide any insight into how cases and justices compared. However, after running frequencies for my other variables using SPSS, I found some interesting patterns.

For my "Years" variable, I found that the most cases were decided in the early 1980's. The 1980's and 1990's were heavy in Dormant and original Commerce Clause analysis, as 1994 was the only year in those two decades without a case. The Court decided on 35 cases in the 1980's and 26 cases in the 1990's, according to my data. This changed by the 2000's, with only 13 cases in front of the Court regarding the Commerce Clause. However, it is unlikely that this is due to the advent of the Internet; there is not a large difference in the amount of cases per year before and after 1994. From 1990 until 1993, there were 11 cases. From 1995 until 1998, there were 8 cases. A difference of three cases is not substantial. Another finding of note, there are no cases within my data for the years 1943-1950. This could have affected the ability to find a pattern of case type and theory applied in that decade or wartime or post-war federal provisions squelched Dormant or Commerce Clause challenges to government regulations of the economy.

My "Case Type" variable did not have surprising findings. The most prevalent case type was an issue directly related to federal or state laws, with 13.6% and 8.5% of cases respectively. Originally, the federal law case type existed as an answer to the issue of how to code cases that were an issue with Congress' power under the Commerce Clause. As I started to code more cases, I realized that some cases had no other problem with a law other than it simply running against the Commerce Clause. There was no additional detail in the case that specifically fit into a category like "taxation" or "export/import;" it was simply a matter of the law. This forced me to create the "state law" case type as well. Outside of these two case types, income tax was the third largest case type with 7.6% of cases. However, when I recoded the "Case Type" variable to combine cases into broader subjects, taxation as a whole accounted for 39.8% of cases (see Graph A).

Graph A



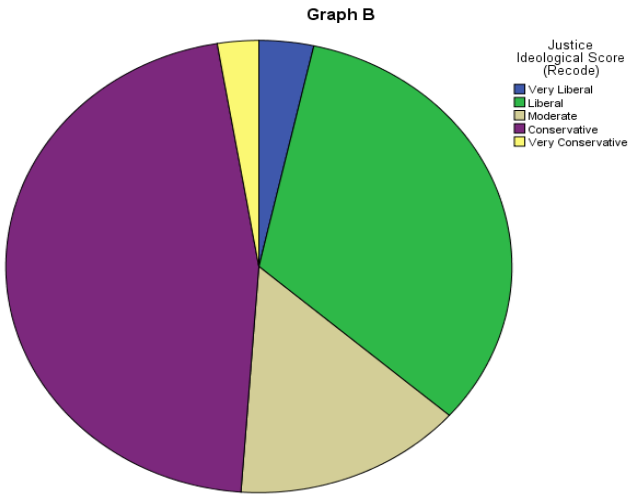
Because of the recode, taxation outnumbered state and federal law by 21 cases out of 118 total cases. As the most prevalent topic in analysis, my research shows that taxation is a substantial part of both Dormant and original Commerce Clause analyses by the Supreme Court. This makes my research into the Court's interpretation of online sales taxation relevant to the analysis of the Dormant and original Commerce Clauses.

Arguably the most valuable variable, "Commerce Clause/Dormant Commerce Clause Theory Applied" produced fascinating results when running frequencies. There are many theories coded that stretch out the data. However, the largest percentage of cases, 9.9%, were decided based on a local processing fee, requirement, or mandate. Coding the

Commerce Clause theory applied as a local processing fee, requirement, or mandate is a different distinction than the coding of the "Case Type" variable as such. A case can be about regulation and requirements, but be decided on different grounds, or vice versa. For example, a case can be about a recycling fee, but decided on the grounds that it is, in fact, a tax benefit to local producers. Other common theories and reasoning that was applied to analysis were: protectionism (6.1%), burden on the right to participate in commerce to those outside the state (8.5%), and a tax benefit to local producers (7.4%). These four theories are very closely related and show that Supreme Court decision-making overlaps with extremely slight variations.

I recoded the "Commerce Clause/Dormant Commerce Clause Theory Applied" variable in order to combine and reduce the number of theories used. As stated, a number of these theories overlapped perfectly. After recoding, I found that 28.9% of cases were decided based on an issue of local interest versus the interest of the entirety. Surprisingly, only 2.3% of cases were decided on state market participation. I was expecting this theory to be used more heavily in Dormant Commerce Clause interpretations. Unfortunately, the second most prevalent reasoning was the conglomeration of those cases decided on different grounds. At 27.8%, this recode took 18 different reasons for the decision and put them into one. Decisions on different grounds do not help answer my research question, so it is problematic that so many cases fall into this category but does reflect the multivariate nature of Supreme Court decision making.

I did not run the "Justice's Ideological Scores" variable for frequencies, as they are scale variables with a multitude of options. However, I did recode the variable to become ordinal to run frequencies. Significant to note, these scores are not based on the decisions of these cases specifically, but of all of the Justice's decisions for that year. I found that from 1937-2015, the Supreme Court has been generally conservative in decision making rather than liberal. The ideology score of the Justices have been: Conservative 491 times, Very Conservative 28 times, Moderate 156 times, Liberal 350 times, and Very Liberal 27 times (see Graph B). These numbers are enticing to apply to entire Court, but they do not capture the ideological waves within the Court. For example, the Warren Court seemed to be liberal in their decision making in keeping with judicial scholarship's understanding of this Court. However, the individual votes of the justices determine the numbers of the overall.



In this research, the ideological score may not be predictive of a justice's decision. Decisions on economics are not like decisions in topics in areas such as civil liberties or civil rights. Those types of cases tend to be Equal Protection and Due Process Clause claims whereas economic questions tend to fall to the Commerce Clause. Equal Protection and Due Process tend to yield a better prediction for a justice's decision making based on their stance on issues (ex. abortion). Generally, people do not as definite of a stance on interstate economics as social welfare issues.

While the stance of the justice on issues is relative to their decision, it is not the end all, be all. When observing these ideological statistics, no matter the subject of the case, the ideological

scores of Supreme Court justices have nothing to do with their political affiliation. When talking about the Court's liberal or conservative nature, it is how much they are adhering to *stare decisis*. If a Court or justice is being conservative, they generally do not go against previous decisions and thus show judicial restraint -- they conserve what is already the norm for the Court. If a Court or justice is being liberal, they go against these decisions to create a new norm or reflect judicial activism. Ideology could affect a potential decision under the Commerce Clause due to the Court make-up.

C. Crosstabular Analysis

For my cross tabular analysis, I used the variables: Commerce Clause Theory 2, Year 2, Justice Ideological Score 2, and Case Type 2. I used the recoded variables instead of the originally coded variables because it would reduce the amount of lines of data for easier, efficient analysis. Additionally, the recoded data for Theory and Case Type created a broader categorization of data. This generalization made fewer categories regarding the same types of cases; trends in these two variables would be easier to find, as specificity did not help in analysis. For Ideological Score and Case Type, I recoded from an interval/ratio variable type down to an ordinal variable type. This aided in creating general groups rather than specific numbers that did not do much good in analysis. For example, grouping Ideological Score on a scale of 4 different options was easier to interpret than over one thousand different numbers.

I ran the following tests in SPSS to determine the relationship between two variables related to my hypotheses:

Variables and Tests Run

(Graph C)

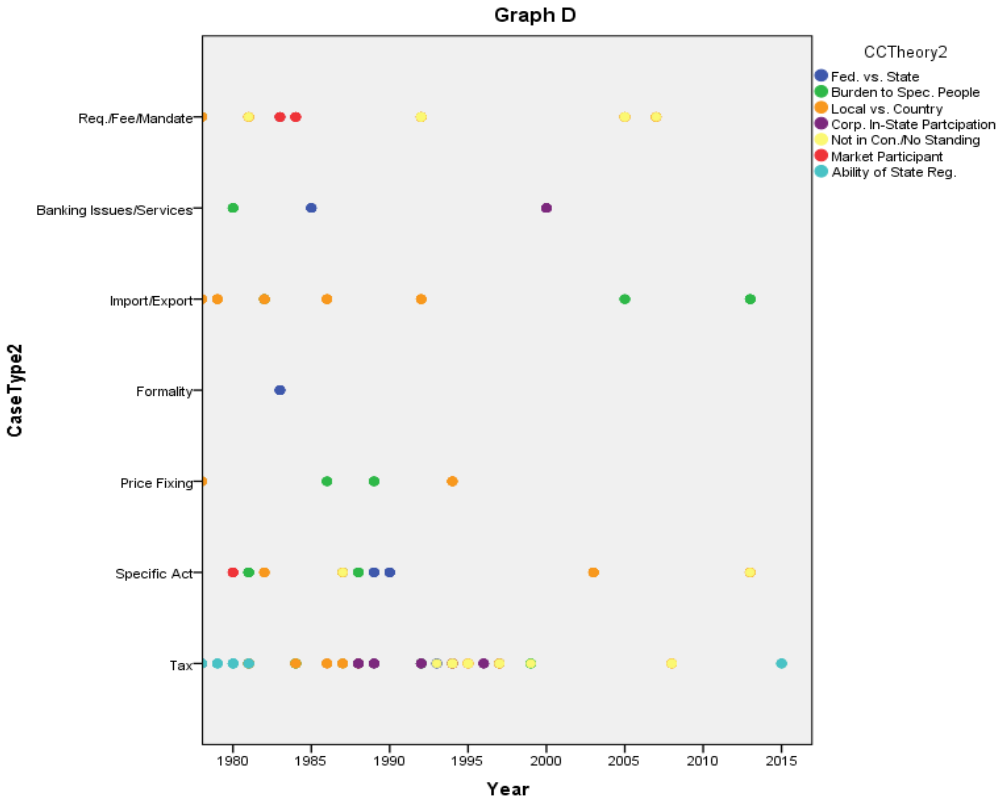
Independent Variable	**Dependent Variable**	**Tests**
Ideological Score 2	Commerce Clause Theory 2	Chi-Square, Lambda, and Crammer's V
Year 2	Commerce Clause Theory 2	Chi-Square, Lambda, and Crammer's V
Ideological Score 2	Case Type 2	Chi-Square, Lambda, and Crammer's V
Year 2	Case Type 2	Chi-Square, Lambda, and Crammer's V

The Year and Ideological Score were used as independent variables to determine if they had an effect on the theory used or type of case decided by the Court. Both of these would help determine if the Court's case choice and decision making altered by the advent of the Internet in the 1990's. Chi-Square, Lambda, and Crammer's V were used for each relationship because of the type of variables that were being analyzed. Because Commerce Clause Theory 2 and Case Type 2 are both nominal variables, Lambda and Crammer's V had to be used in order to find a linear relationship and its direction. Chi-Square can be used to find any relationship, regardless of the variable type.

In running cross tabular analysis to determine the validity of my hypotheses, I found that the Case Type and Commerce Clause Theory did not appear to change due to the Internet. Graphs D and E use a scatterplot analysis in a nontraditional way, but are effective in looking at a time

line analysis. Each value on the Y-axis should be thought of as an individual timeline, as they are independent nominal variables. However, each point is color coded based on the Commerce Clause Theory used. This graphic type combines three variables into one chart to see the relationship between the three. Both Case Type and Commerce Clause Theory depend on the Year (Graph D) or the Ideological Score (Graph E). In looking at the analysis based on year, I limited the graph from 1980-2015, as that is the time frame that I wanted to observe change. Observing Graph D shows that there is not a change in Commerce Clause Theory or Case Type in the 1990's, making it seem that the Internet did not have a correlation to cases decided by the Supreme Court. The only visible change would be that tax cases decrease around 1995. While this may be due to the Internet, I have already touched upon this change in case numbers in my frequencies section of the thesis. It seems as if this is due to a change in the make-up of the Court rather than the advent of the Internet. The Internet should still be left open, as a possible alternate reason as the Court may have shied away from the topic until the right case surfaces to make a strong decision on tax in an Internet-driven world.

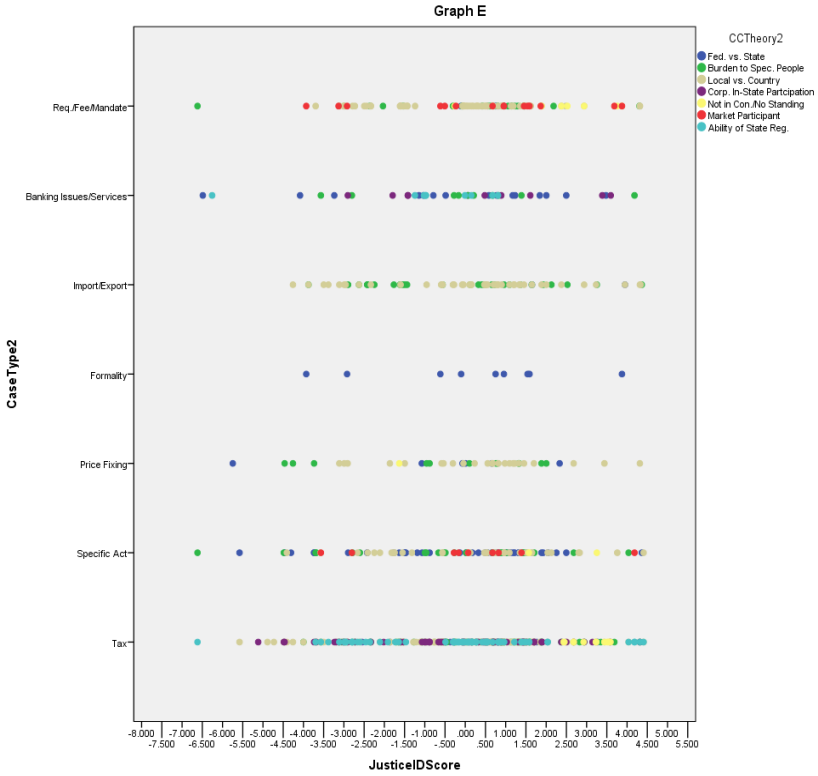
For both graphs, it is obvious that the points overlap in tremendous amounts. However, where they overlap and what colors overlap is key to the research at hand. The individual dots are not necessarily important to finding a trend in the 1990's. For example, in Graph E, "Ability of



State Regulation" is heavily used in cases of taxation for moderate justices. Interestingly, "Formality" cases all use a federal vs. state theory in deciding, regardless of the ideology of the justice.

While lost data may be a concern for Graphs D and E, they are not in running the tests for the relationship between variables. These relationships are not necessarily focused on changes in the 1990's, but the relationship between variables overall. This relationship is important because

if one does not affect the other (or, at least, seem to occur simultaneously) then a change in one will not result in a change in the other. For example, if the Ideological Score never affects the Case Type, then there is no conclusive evidence that as the Court make up changes, the types of cases in which the Court decides will change as well.



For the cross tabular analysis of Commerce Clause Theory 2 and Year 2, I found that Chi-Square, Lambda, and Crammer's V were all statistically significant (below .05). This finding means that Commerce Clause Theory 2 and Year 2 have a linear relationship. However, I was not quick to rejoice because this may be due to the fact that Crammar's V was found to be a weak, positive, linear relationship at a value of 0.266. This makes sense because of the small amount of cases in the 1940's, which gradually augment to the largest amount of cases in the 1980's. The amount and dispersion of cases may have caused this significant relationship.

For the cross tabular analysis of Commerce Clause Theory 2 and Ideological Score 2, I found that Chi-Square and Crammer's V both had statistically significant data, while Lambda did not. This split between Crammer's V and Lambda is extremely interesting because both calculate the same thing, linear association. The only difference between the two is that Crammer's V calculates direction of the relationship, while Lambda simply determines if there is a linear relationship present, not its direction. Of importance is that Crammer's V did determine a positive linear relationship, but it was very weak (.260). This relationship may not have been captured by Lambda because of its lack of strength.

Overall, the tests show that there is a relationship between Commerce Clause Theory 2 and Ideological Score 2. As the Ideological Score raises, the Commerce Clause Theory used may increase in number, depending on if Crammer's V or Lambda is utilized. Looking at the data in a graph does not seem to follow these findings (Graph F). The graph seems to reflect the number of

cases in each category, as the "Liberal," "Moderate," and "Conservative" categories have the most percentages. I observed this in frequencies as the number of those justices in the "Very Liberal" and "Very Conservative" categories seem to be outliers. The same can be said for the Commerce Clause Theory. This pattern in the graph shows that tests do not always capture what is going on under the surface of the explicit data.

For the cross tabular analysis of Case Type 2 and Year 2, I found that the data was statistically significant for Chi-Square, Lambda, and Crammer's V (all less than .05). The value of Crammer's V was .236, meaning that there is a weak, linear, positive relationship between Case Type and Year. This is similar to the findings of Commerce Clause Theory 2 and Year 2. The same problems of case distribution can be said for this relationship. However, it seems as though year does affect the cases taken on by the Supreme Court and how they decide. This may be due to Court make up.

Graph F

% within JusticeIDScore2

		JusticeIDScore2					Total
		Very Liberal	Liberal	Moderate	Conservative	Very Conservative	
CCTheory2	Fed. vs. State	23.1%	10.3%	10.7%	13.0%	4.8%	11.9%
	Burden to Spec. People	23.1%	18.8%	24.6%	20.5%	23.8%	20.8%
	Local vs. Country	34.6%	45.5%	32.8%	42.8%	38.1%	41.5%
	Corp. In-State Participation	11.5%	11.6%	9.0%	8.7%	4.8%	9.6%
	Not in Con./No Standing		0.4%	0.8%	5.8%		3.0%
	Market Participant		3.1%	3.3%	3.5%	4.8%	3.2%
	Ability of State Reg.	7.7%	10.3%	18.9%	5.8%	23.8%	9.9%
Total		100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

For the cross tabular analysis of Case Type 2 and Ideological Score 2, I found that none of the tests yield statistically significant results since they were all above .05. This means that there is no relationship between Case Type 2 and Ideological Score 2. For Commerce Clause analysis, justices do not pick cases based on their liberal or conservatism. This makes sense, as I stated previously in frequencies that Commerce Clause cases are not as ideologically based as Civil Rights or Civil Liberties cases.

Conclusions

The research in this paper has shown that my hypotheses are incorrect as there is not a distinctive shift of theories used and case type in the 1990's. While there seems to be a shift away from taxation cases in the mid-1990's, it cannot be determined if this is a direct result of the advent of the Internet. I did find that there are relationships between my variables. The theories that the Court uses for the original and Dormant Commerce Clauses are affected by the justice's ideological score and time period of the decision. The cases that are chosen to be decided are affected by the time period in which the case is placed on the desk of the Court. However, they are not chosen based on the individual ideology of the justices. Being affected by the "time period"

means the social, political, and relevant issues in the world at the time as well as the current collective makeup of the Court. This is important in the overall function of the government as they take on cases that are important during that period of time. This predicts that the Court will decide on an Internet taxation case in the coming years.

Future Research

The research and data utilized in this work can easily be reformatted and expanded to include future cases and more elements in decision making. Until the Court decides on the matter, the overall formatting of the dataset could be used to ask the same type of question of different Clauses or Amendments. When the Supreme Court finally takes on the issue of internet sales taxation, the model can be reformatted with additional variables to encompass that and future decisions. I would suggest employing a variable that asks if they case decision and theory applied runs parallel or against the decision in the future internet sales taxation case.

Appendix I

Variable One: Case Name
Shortened name of the case for quick reference

Variable Two: Case Code
Supreme Court case number with no spaces

Variable Three: Year
Year that the case was decided by the Supreme Court

Variable Four: Natural Court
The Chief Justice plus number of that court according to the date creates the natural court. The number changes based on justices leaving/joining the Court. Each natural court has been coded into a number In order to create easier to use ordinal variables.

- 1.1= Stone1
- 2.1= Vinson3
- 3.1= Warren1
- 3.2= Warren5
- 3.3= Warren6
- 3.4= Warren7
- 3.5= Warren8
- 3.6= Warren9
- 3.7= Warren10
- 4.1= Burger2
- 4.2= Burger4
- 4.3= Burger5
- 4.4= Burger6
- 4.5= Burger7
- 5.1= Rehnquist1
- 5.2= Rehnquist3
- 5.3= Rehnquist4
- 5.4= Rehnquist5
- 5.5= Rehnquist6
- 5.6= Rehnquist7
- 6.1= Roberts2
- 6.2= Roberts4

Variable Five: Case Type
What the topic and subtopic of the case is. They are broken up based on topic.

- Tax
    - 1.1= Alcohol Tax
    - 1.2= Income Tax
    - 1.3= Severance Tax
    - 1.4= Use Tax
    - 1.5= Transportation/Trucking
    - 1.6= Franchise/Occupation tax

    - 1.7= Tax Breaks/Credits
    - 1.8= Stock Tax
    - 1.9= Gas Tax
    - 1.11= Privilege Tax
    - 1.12= Insurance Tax
    - 1.13= Telecommunications Tax
- Specific Act against the Constitution or another law
    - 2.1= state law
    - 2.2= federal law
- Price Fixing
    - 3.1= Alcohol Price
    - 3.2= Gas Price
    - 3.3= Recycling Price
    - 3.4= Concrete Price
- Formality
    - 4.1= Regulatory Jurisdiction
    - 4.2= Retrospective/Prospective Application
    - 4.3= Suit Against the State
    - 4.4= Private Canal
    - 4.5= Patent Infringement
- Import/Export (health, safety, welfare)
    - 5.1= Water Export
    - 5.2= Fish Import/Export
    - 5.3= Recycling Import
    - 5.4= Alcohol Export
    - 5.5= Milk Import
    - 5.6=Power Export
- Banking Issues/Services
    - 6.1= Bank Holdings
    - 6.2= Investment Services
    - 6.3=Loan Sharking
    - 6.4= Rolling Stock
    - 6.5= Interest Expense Deduction
- Requirement/fee/mandate
    - 7.1= Interstate Trucking Fee
    - 7.2= Truck Size Requirement
    - 7.3= In State Natural Resource Requirement
    - 7.4= Licensing Requirement
    - 7.5= Milk Requirements
    - 7.6= Recycling Mandate/Fee
    - 7.7= Workforce Requirement
    - 7.8= Airport User Fee
    - 7.9= Product Labeling

Variable Six: Justice Number

Each Supreme Court Justice serving during and after 1937 has a number assigned based on alphabetical order

- 1= Alito, Samuel A., Jr.
- 2= Black, Hugo Lafayette
- 3= Blackmun, Harry A.
- 4= Brandeis, Louis Dembitz
- 5= Brennan, William J., Jr.
- 6= Breyer, Stephen G.
- 7= Burger, Warren Earl
- 8= Burton, Harold Hitz
- 9= Butler, Pierce
- 10= Byrnes, James Francis
- 11= Cardozo, Benjamin Nathan
- 12= Clark, Tom Campbell
- 13= Douglas, William Orville
- 14= Fortas, Abe
- 15= Frankfurter, Felix
- 16= Ginsberg, Ruth Bader
- 17= Goldberg, Arthur Joseph
- 18= Harlan, John Marshall
- 19= Holmes, Oliver Wendell
- 20= Hughes, Charles Evans
- 21= Jackson, Robert Houghwout
- 22= Kagan, Elena
- 23= Kennedy, Anthony
- 24= Marshall, Thurgood
- 25= McReynolds, James Clark
- 26= Minton, Sherman
- 27= Murphy, Frank
- 28= O'Connor, Sandra Day
- 29= Powell, Lewis F., Jr.
- 30= Reed, Stanley Forman
- 31= Rehnquist, William H.
- 32= Roberts, John
- 33= Roberts, Owen Josephus
- 34= Rutledge, Wiley Blount
- 35= Scalia, Antonin
- 36= Sotomayor, Sonia
- 37= Souter, David H.
- 38= Stevens, John Paul
- 39= Stewart, Potter
- 40= Stone, Harlan Fiske
- 41= Sutherland, George
- 42= Thomas, Clarence
- 43= Vinson, Fred Moore

- 44= Warren, Earl
- 45= White, Byron Raymond
- 46= Whittaker, Charles Evans[150]

Variable Seven: Justice Ideological Score
The Martin-Quinn score of the Supreme Court justice for the year of the case is used to determine the ideology of each justice. If no score is listed for that year, the score of the previous year is used. This will occur in the year in which the justice leaves the Court as well as any case for the current year (2015).

Variable Eight: Justice Vote
Each justice's response to the question "Did the act violate the DCC or CC?" is recorded. This is determined by their opinion or the opinion that they agree with.

- 1= Yes
- 2= No
- 9= Did not Participate in the Case
- 15= Other Rationale

Variable Nine: Justice Role
Each justice's part in the opinions of the Court in each case is recorded.

- 1= Majority Opinion
- 2= Agreed with Majority Opinion
- 3= Concurring Opinion
- 4= Agreed with Concurring Opinion
- 5= Dissent
- 6= Agreed with Dissent
- 9= Did Not Participate in the Case
- 10= Part Concurring/Dissent
- 11= Agree with Part Concurring/Agree with Part Dissent
- 12= Per curium

Variable Ten: Justice's Primary Commerce Clause Theory Applied
The main reasoning or theory that the justice applied in deciding the case. This is determined by using the first reasoning listed in the opinion. Those justices that agree with an opinion instead of writing their own opinion have the theory used in that opinion coded in that case.

- 1= Issue of health, safety, welfare
- 4= Exclusive/concurrent power
- 5= Federal silence
- 6= Local interest/protection
- 7= Congress override of states interest
- 8= Burden on commerce to other state
- 9= Burden on commerce to those outside state
- 10= Local processing fee/requirement/tax
- 11= Tax benefit to local producers

[150] Evans, Gregory R. 2006. "Separate but Taxed: A Rejection of the Streamlined Sales Tax Project through a Commerce Clause and Federalist Analysis." *American University Law Review*. 56(December): 421-450.

- 12= Market participant
- 13= Intrastate commerce
- 14= Not specifically in Constitution (Constructionist)
- 15= Decided on different grounds
- 16= Monopoly
- 17= Double taxation
- 18= §1893
- 19= Prohibit on exportation
- 20= Purely revenue raising
- 21= Item not product of that state – imported
- 22= Nexus
- 23= Based on corporate participation in interstate commerce – substantial equivalence
- 24= Native ability to tax
- 25= Stare Decisis
- 26= No standing
- 27= Substantial effect
- 28=Burden on intrastate commerce
- 29= Apportionment
- 50= §1513
- 51= 21st Amendment
- 52= Equal Protection
- 53= Laws of Native territory
- 54= Webb-Kenyon Act
- 55= Different test should be used for international
- 56= No standing
- 57= Decision on applicability of the Commerce Clause to the case
- 58= Due Process Clause
- 59= Not moot
- 60= Issue of public vs. private
- 61= Congress has the power under the Commerce Clause
- 62= Overreach of power under the Commerce Clause
- 63= Retrospective application
- 64= Tax Injunction Act
- 65= 1St Amendment
- 66= 11th Amendment
- 67= Anti Injunction Act
- 99= Did Not Participate in the Case

Variable Eleven: Case Type 2

A recode of "Case Type," Case Type 2 consolidates the types into their categories

- 1= Tax
- 2= Specific Act
- 3= Price Fixing
- 4= Formality
- 5= Import/Export
- 6= Banking Issues/Services

- 7= Requirement/Fee/Mandate

Variable Twelve: Justice Role 2
A recode of "Justice Role," Justice Role 2 consolidates the roles of the justice into fewer categories for the sides taken in the case.

- 1= Majority (combination of 1, 2, 3, and 4 from "Justice Role")
- 2= Dissent (combination of 5 and 6)
- 3= Part Majority/Part Dissent (combination of 10 and 11)
- 4= Per Curium (recode of 12)
- 9= Did not take part in the case (unchanged)

Variable Thirteen: Commerce Clause Theory 2
A recode of the "Justice's Primary Commerce Clause Theory Applied," the Commerce Clause Theory 2 consolidates the reasoning of the justices in order to try to capture trends in decision making.

- 1= Federal vs. State (combination of 4, 5, and 7 from "Justice's Primary Commerce Clause Theory Applied")
- 2= Burden to Specific People (combination of 13, 27, 28, 8, and 9)
- 3= Local vs. Country Interest (combination of 10, 11, 19, 21, 1, and 6)
- 4= Corporate In-State Participation (combination of 22, 23, and 16)
- 5= Not in Constitution/No Standing (combination of 26 and 14)
- 6= Market Participant (recode of 12)
- 7= Ability of State Regulation (combination of 20, 29, and 17)
- 8= Different Grounds (combination of 24, 25 , and 50-67)
- 9= Did not Participate in the Case (recode of 99)

Variable Fourteen: Year2
Recode of "Year," in order to make it into an ordinal variable. Years are recoded into decades.

- 1= 1940's
- 2= 1950's
- 3= 1960's
- 4= 1970's
- 5= 1980's
- 6= 1990's
- 7= 2000's
- 8= 2010's

Variable Fifteen: Justice Ideological Score 2
Recode of "Justice Ideological Score" in order to make the variable ordinal.

- 1= Very Liberal (-7.000 - -4.000)
- 2= Liberal (-3.999 - -0.500)
- 3= Moderate (-0.499 - 0.499)
- 4= Conservative (0.500 - 3.999)
- 5= Very Conservative (4.000 – 7.000)

Variable Sixteen: Natural Court 2
Recode of "Natural Court" to consolidate the variable. They are recoded into the Chief Justice without the number distinction.

- 1= Stone (Recode of 1.1)
- 2= Vinson (Recode of 2.1)
- 3= Warren (Combination of 3.1 – 3.7)
- 4= Burger (Combination of 4.1 – 4.5)
- 5= Rehnquist (Combination of 5.1 – 5.6)
- 6= Roberts (Combination of 6.1 – 6.2)

Variable Seventeen: Commerce Clause Theory 3

- 1= Most Federal Government Control (Recode of 1 from Commerce Clause Theory 2)
- 2= Large Federal Government Control (Combination of 3, 6, and 7)
- 3= Some Federal Government Control (Recode of 4)
- 4= Least Federal Government Control (Recode of 2)
- 9= Not Included: Outside the Idea of Federal Control with the Commerce Clause (Combination of 5, 8, and 9)

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A LILY BY ANY OTHER NAME WOULD NOT BE AS SWEET: SALVAGING THE REMAINDERS OF THE BILL OF ATTAINDER CLAUSE'S ORIGINAL MEANING

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CONTENTS

Abstract

By analyzing debates in the federal convention, influential legal treatises, lectures, casebooks, and state statutes and constitutions, this note argues that the framers of the United States Constitution originally intended the bill of attainder clause to apply only to statutes that targeted one or a few individuals, declared them guilty of a crime, and specified a punishment that they must suffer. The findings contained within this piece are significant for two reasons. First, this note deviates from nearly all previous scholarship on the bill of attainder clause because it does not attempt to connect the framers' intentions to a current public issue. This non-political approach allows the piece to employ accepted historical methods that distinguish it from 'law office history.' Second, it incorporates the bill of attainder clause, which has been widely regarded as a sleeper provision, into the wider and more abstract constitutional framework maintaining the separation of powers among the national government's different branches and the protection of individual rights. The note begins by surveying the framers' debates in the Philadelphia Convention and concludes that the delegates associated the bill of attainder clause with punishment throughout the proceedings. The note then turns to examine contemporaneous legal treatises and state practice and finds that these sources influenced and reinforced the framers' conception of the bill of attainder clause. Finally, the paper surveys the framers' private letters, law lectures, ratification propaganda, case books, and state statutes and constitutions to prove that the framers also believed that bills of attainder, by definition, targeted one or a few individuals and declared them guilty of a crime without a formal judicial trial.

Introduction

On the morning of November 11, 1640, John Pym, a prominent critic of Charles I, rose from his seat in the House of Commons, and moved that the chambers' doors be shut and the public escorted out of the press gallery. In the ensuing minutes, Pym hastily facilitated the appointment of a committee which returned articles of impeachment against Sir Thomas Wentworth, the Earl of Strafford and a member of the House of Lords, to the floor. The articles accused the Earl of high treason and "endeavoring to subvert the fundamental laws of the realms of England and Ireland."[151] Strafford's unmitigated support of the crown earned him the ire of parliamentarians, notwithstanding both the fact that Charles I did not fully trust him, and that Queen Henrietta disliked him. This situation left Strafford cornered by a Parliament that was finally ready to oust him from office. The impeachment articles were rushed to the House of Lords minutes after the Commons approved them. After discovering the plot, the Earl calmly walked into the Lords' chamber expecting to convince his fellow peers of his innocence. He was sorely mistaken. As soon as he entered the chamber, all the Lords exclaimed "Withdraw! Withdraw!" from every side.[152] Strafford was imprisoned in the Tower of London two weeks later to await trial.

There was one problem with impeachment, however. Strafford may have been unpopular, but unpopularity alone was not enough to establish treasonous behavior.[153] In fact, during the Middle Ages, treason was literally defined as acts that were "committed against the person or authority of the king."[154] Yet, Parliament disliked Strafford precisely because he was too close to Charles I. The House managers did their best to try to twist the definition of treason but, after three weeks, the Lords became exasperated, yelling "adjorn! adjorn! [sic]" and were forced to acquit Strafford.[155] The lower house was furious. Strafford may not have been a traitor to Albion, but the Commons would get rid of him one way or another. On April 10, 1641, the same day of the acquittal, the Commons approved a bill of attainder, a legislative act that targets one or a few individuals, declares them to be guilty of a crime, and specifies the punishment that they must suffer, against Strafford.[156] The bill found that Strafford "did slander the House of Commons to his majestie…for which hee deserves…such paine of death [sic]."[157] The Members of Parliament [MPs] apparently were not particularly proud of their behavior and did not want this ordeal to establish a precedent because the bill "provided that no judge…shall adjudge…any act…to be treason…in any other manner than he…ought to have done before the making of this act."[158] In other words, the Commons implicitly recognized that it was using the impeachment and execution process as an illegitimate proxy for removing Strafford. The Earl died two days later on the scaffold.

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[151] Thomas W. Strafford, *Depositions, and Articles of Impeachment Against Thomas Earl of Strafford, February 18, 1640: With a Reply to Them and Other Learned Notes, Observations and Reflections Upon the Proofs In Fact and Points In Law, Suppos'd to Be Writ by the Said Earl's Own Hand* (1715).
[152] Thomas W. Strafford & John Rushworth. *The Tryal of Thomas, Earl of Strafford ..: Upon Impeachment of High Treason by the Commons Assembled In Parliament ... Begun the 22 of March 1640, and Continued ... Until the 10th of May 1641 ...* (1700).
[153] Zechariah Chafee, *Documents On Fundamental Human Rights* 656 (1951).
[154] Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminall Causes* 262 (1644).
[155] See supra 1 at 70.
[156] Michael S. Paulsen, et al., *The Constitution of the United States* 283-294 (2013).
[157] *The Bill of Attainder That Passed Against Thomas Earle of Strafford* [London: s.n.] 1.
[158] *The Bill of Attainder That Passed Against Thomas Earle of Strafford,* 3-4.

I. A More Proper Bill of Attainder

Most Englishpersons in the Isles and North American colonies did not shed any tears over Strafford's demise. But with the passage of time, the incident turned into a national embarrassment as many political elites lamented the lack of formal judicial protections given to Strafford along with his hasty execution. In the newly independent colonies this led many political elites to ask what was a bill of attainder's proper definition. Why was a bill of attainder repugnant to traditional English constitutional understandings of due process of law and separation of powers in criminal proceedings? How could the colonies design a national constitution that would prevent the federal legislature from passing bills of attainder? Previous constitutional law literature on the bill of attainder clause has covered the provision's relationship to modern day problems involving human rights and the separation of powers.[159] But, this emphasis has distracted scholars from focusing on the original meaning of the clause divorced from its implications in the present.[160] This approach is beneficial for constitutional historians because it is more faithful to proper historiographical methods than other interdisciplinary approaches are, such as 'law office history.' As the debates in the Constitutional Convention of 1787, influential legal treatises, and state experiences with bills of attainder demonstrate, the framers of the United States Constitution intended the bill of attainder clause to apply only to statutes that targeted one or a few individuals, declared them guilty of a crime, and specified a punishment that they must suffer. The framers' intention was motivated by their desire to preserve the separation of powers and individual procedural due process protections because they believed that legislatures were not designed to conduct criminal proceedings in an equitable manner.

The available record of debate at the Federal Convention of 1787 supports the notion that the delegates associated bills of attainder with punishments. On August 6, 1787, a tentative draft of the bill of attainder clause was presented to the delegates at the Philadelphia Convention when the Committee of Detail returned a provisional version of the Constitution to the chamber sitting in Committee of the Whole.[161] Article VI § II, the relevant provision of the draft constitution, did not explicitly prohibit bills of attainder. However, the provision targeted punishments for treason that were typically associated with bills of attainder such as "corruption of blood," which was the inability of the attained party's heirs to inherit his property.[162] This early inclusion suggests that the delegates were hostile towards treasonous punishments that resembled bills of attainder. The preceding statement on the delegates' aversion toward certain punishments is corroborated by the fact that the Convention decided to make the prohibition explicit on August 22, when Elbridge Gerry of Massachusetts "moved to insert…the legislature shall pass no bill of attainder" into the document because he wanted to limit the potential for congressional intrigue. All twelve states, with the exception of Rhode Island, who neglected to send delegates to the conference, voted for

[159] [A] Zechariah Chafee, *Three Human Rights In the Constitution of 1787* 90-162 (1956). [B] Roger J. Miner, *Identifying, Protecting, and Preserving Individual Rights: Traditional Federal Court Functions*, 23 Set. Hall L. Rev. 821, 830.

[160] Leonard W. Levy, et al., *Encyclopedia of the American Constitution* 111-112 (2000).

[161][A] Henry M. Roberts, *Robert's Rules of Order Newly Revised* 531 (10th ed. 2000). [B] 2 Max Farrand, *The Records of the Federal Convention of 1787* 182 (1911). Hereafter referred to as *Records II*.

[162] [A] *Id.* at 182. [B] Edward Coke & Thomas Littleton, *The First Part of the Institutes of the Lawes of England, Or, A Commentary Upon Littleton, Not the Name of a Lawyer Only, but of the Law it Selfe: Haec Ego Grandaevus Posui Tibi Candide Lector* 565 (3rd ed. 1634). [C] See supra 9A at 96.

the measure.[163] That the Committee of Style, a group of delegates tasked with writing the final version of the Constitution, retained the clause in Article VII § II of the Constitution, a provision concerned solely with punishments for treason, from mid-August until early September also reinforces the claim that the delegates connected punishments for treason with bills of attainder.[164]

The *Records from the Federal Convention of 1787* are not the only materials which support a reading of the bill of attainder clause that associates the provision with punishment. Contemporaneous bills of attainder passed by the state legislatures and English bills of attainder all imposed some form of punishment. This statement's validity is confirmed by prominent legal digests written during the period. In Books Three and Four of his *Commentaries on the Laws of England*, Sir William Blackstone declared that "the immediate and inseparable consequence… of attainder…[was the punishment] of death" and that punishment could "consist in exile, banishment, abjuration of the realm, transportation, or other losses in liberty."[165] A substantial majority, if not all, of the delegates would have been familiar with Blackstone's legal treatise because thirty-four of the fifty-five delegates were lawyers, and Blackstone's *Commentaries* was the text of choice for late eighteenth century young lawyers 'reading law' in a private law office.[166] Parliamentary practice corroborated Blackstone's account of English bills of attainder. Under the ninth and tenth statutes passed during the reign of King William III, any Christian minister who denied the truth of religion by "writing, printing, teaching, or speaking" was punished by being "rendered incapable of hold[ing] office."[167] Similarly, the first statute passed during George I's reign punished those who "refused…to take certain prescribed oaths" by taking away their right to "prosecute any suit."[168] But, bills of attainder were not unique to England. From 1776 to 1783, all the state legislatures passed several bills of attainder punishing loyalists by suppressing, quartering, or banishing them. Therefore, punishment was seen as an indispensable component of a bill of attainder. This understanding of the bill of attainder clause's original meaning is supported by the works of several prominent nineteenth century American jurists. Timothy Farrar, a judge serving on the New Hampshire Court of Common Pleas in the 1820s, wrote that "a bill of attainder by the common law, as our fathers imported it from England and practiced it themselves, before the adoption of the Constitution, was an act of sovereign power in the form of a special statute…by which a man was pronounced guilty or attained of some crime, and punished by deprivation of his vested rights, without trial or judgment *per legem terrae* [literally on behalf of the law of the land].[169]

The delegates prohibited the states from passing bills of attainder in Article I § X of the Constitution.[170] For most states, the inclusion of this clause was not an innovation. The state constitutions of Maryland and Massachusetts prohibited bills of attainder by declaring that "no

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[163] [A] See supra 11 at 375-376. [B] Daniel A. Farber & Suzanna Sherry, *A History of the American Constitution* 36 (2005).
[164] *Id.* at 571.
[165] William Blackstone, *Commentaries On the Laws of England: Book the Third By William Blackstone, Esquire Solicitor General to Her Majesty* 343 (1770).
[166] [A] Max Farrand, *The Framing of the Constitution of the United States* 14-41 (1913). [B] Lawrence M. Friedman, *A History of American Law* 21, 112 (3rd ed. 2005) 21,112. Hereafter referred to as *History of American Law*.
[167] 9 & 10 Will. III ch. 32.
[168] 1 Geo. I ch. 13.
[169] [A] Timothy Farrar, *Manual of the Constitution of the United States of America* 419 (1867). [B] Joseph Story, *Commentaries On the Constitution of the United States* 216 (1987). [C] Thomas M. Cooley, *A Treatise On the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 536 (1987). Hereafter referred to as *A Treatise On the Constitutional Limitations*.
[170] United States Constitution Art. I § X.

person ought, in any case, or in any time, to be declared guilty of treason or felony by the legislature. New York's Constitution of 1777 stated that "no acts of attainder should be passed by the legislature for crimes other than those committed during the present war.[171] While the perils of speculating over drafter intent have been well documented, this reaction was likely a response to a bill of attainder that the New York legislature passed against fifty-nine Tories in 1779.[172] An examination of this controversy provides further light into components that were necessary for a legislative act to constitute a bill of attainder during the Critical Period. State legislatures did not hesitate to pass bills of attainder against Tories during the Revolutionary War. But, these bills quickly lost their popularity among the political elite. In the words of Thomas Jefferson, the term 'Tory' was defined rather expansively to include "traitor[s to the revolutionary cause] in thought as well as deed."[173] In the late-1770s, this negative perception prompted many colonial legislatures to pass laws defining Tories as aliens, which deprived them of the right to hold both real and personal property as well as initiate suits in colonial courts.[174] However, the New York statute was unique from its counterparts in other states because it named a select group of Loyalists, which included all the prominent royal officials in the colony and targeted women as well. The New York state legislature declared the fifty-nine named individuals guilty of "intent to subvert the government and liberties of this state" and held that they were "to be banished…and that each and every one of them, if found in New York at any time thereafter [should] suffer death as in cases of felony."[175] From its passage, the law was very unpopular among American political elites because it violated traditional English conceptions of due process and the separation of powers by not being generally applicable and by imposing punishment without a judicial trial.[176] Indeed, John Jay, a native New Yorker who had been serving as the U.S.'s minister to Spain at the time, wrote that "New York is disgraced by injustice to[o] palpable to admit even of palliation."[177]

However, this begs the question as to why the New York law was unjust. A searching review of contemporaneous writings reveals that it was the legislature's determination of guilt without a judicial trial and its singling out of a few individuals that revolted Americans. Aside from punishment, these two features were the remaining components that the framers deemed necessary for a statute to constitute a bill of attainder. Jay was not the only American who was revolted by the New York statute. During the ratification debates of 1787-1788, the framers made clear that one of the national Constitution's primary goals was to guard against the violation of separation of powers in the form of a legislative criminal trial. These 'trials' often culminated in the passage of punitive private bills, special penal legislation that was not generally applicable to all citizens. These components were two hallmarks of a bill of attainder. In Federalist 47, James Madison argued that "in a representative republic…where the legislative power is exercised by an

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[171] Francis N. Thorpe, *The Federal and State Constitutions Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America Compiled and Edited Under the Act of Congress of June 30, 1906* (1909).

[172] [A] Max Radin, *Statutory Interpretation*, 43 Harv. L. Rev. 863, 870 (1930). [B] Abner J. Mikva & Eric Lane, *Legislative Process* 106 (2009). [C] Jack N. Rakove, *Original Meanings: Politics and Ideas In the Making of the Constitution* 317, 329 (1996). [D] Christopher L. Eisgruber, *Constitutional Self-Government* 25-46 (2001). [E] Claude H.Van Tyne, *The Loyalists In the American Revolution* 121 (1959). [F] James W. Thompson, *Anti-Loyalist Legislation During the American Revolution*, 3 Ill. L. Rev. 81, 147 (1947). [G] Alison Reppy, *The Spectre of Attainder in New York*, 23 St. John's L. Rev. 1 (1948).

[173] Thomas Jefferson, *Notes On the State of Virginia* 161 (1788).

[174] Virginia Laws, 1779, "*An Act Concerning Escheats And Forfeitures From British Subjects*."

[175] New York Laws, 1777-1783, chapter 25, pp. 85-91 (October 22. 1779).

[176] See supra 9A at 92, 93.

[177] John Jay to George Clinton, May 6, 1780.

assembly…which is sufficiently numerous to feel all the passions…[of a] multitude; yet not so numerous as to be incapable of pursuing the objects of its passions…barriers had to be erected to ensure that the legislature would not…perform the functions of other departments." The framers also sought to preserve the separation of powers in government because they were concerned about the potential for tyranny.[178] Thus, the division of the national government into legislative, executive, and judicial departments, as well as the checks that each branch had on the other, was meant in part to prevent the legislature from assuming judicial functions and swallowing the other departments into its "impetuous vortex."[179]

II. Bills of Attainder as they Challenge Due Process Rights

Several framers believed that the interpretation of criminal laws and criminal sentencing were actions reserved exclusively for the judiciary because the legislature was not institutionally designed to try individuals fairly or provide due process protections. In Federalist 78, Alexander Hamilton declared that "the interpretation of the laws…is the proper and peculiar province of courts."[180] James Wilson, a fellow delegate at the Convention and the first law professor at The Academy and College of Philadelphia, echoed Hamilton when he argued that "the judicial authority consists in applying,…the laws to the facts and transactions in cases."[181] This division of labor was not simply dogmatic – there were prudential reasons for judicial exclusivity as well. Publius maintained that "nothing is more common than for a free people…to gratify passion…by letting into government principles…which afterwards prove fatal in themselves such as legislative punishment." The framers were well aware of the punitive legislative policies the state governments pursued from 1776 to 1787 and were eager to prevent similar mistakes in the new national government. Indeed, this legislative punishment, Publius continued, could give rise to tyranny by allowing the legislature to "banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial."[182] Legislative trials were also unjust because lawmakers might respond to popular pressure and not reasoned argument when deliberating bills of attainder. In Federalist 44, Madison lamented that the federal and state legislatures had to be prevented from passing bills of attainder because "the public councils [were susceptible to] sudden changes, and legislative interferences, in cases affecting personal rights, becom[ing] snares to the more industrious and less informed part of the community."[183] The similarity between the concerns raised in Federalist 44 and James Madison's indictment of the several states in his *Vices of the Constitution of the United States* is striking. Madison's distaste for bills of attainder was related to structural constitutional design.

However, bills of attainder also violated traditional notions of individual due process rights because procedural due process required judicial trials with petit juries, not legislative trials. Americans in states as diverse as Massachusetts and North Carolina clung to the belief that "the trial by juries of the vicinity is the only lawful inquest that can pass on the life of a British subject and that it is a right handed down to us from… Magna Charta…that no freeman…shall be hurt or

[178] The Federalist No. 47 (Publius).
[179] The Federalist No. 51 (Publius).
[180] The Federalist No. 78 (Publius).
[181] James Wilson, *Lectures on Law*, in *The Works of James Wilson* 296-297 (1967).
[182] 3 John C Hamilton, *History of the Republic of the United States of America: As Traced In the Writings of Alexander Hamilton and of His Cotemporaries* 34 (1864).
[183] The Federalist No, 44 (Publius).

injured unless by the legal judgement of his peers."[184] Hence, the legislative trials that preceded the passage of a bill of attainder offended natural justice because respect for the separation of powers required that only courts interpret and apply criminal laws. Since a legislature needed to discover facts to impose a punishment, some judicial determination of guilt was necessary for a statute to constitute a bill of attainder and the opinions of various framers reflect this.

Bills of attainder also violated English notions of due process of law because they required the legislature to single out an individual or a small group for punishment. John Marshall, a delegate to the Virginia Ratification Convention of 1788, shared this conception of due process. In the *Yazoo Land Case* (*Fletcher v. Peck*), Marshall asserted that "it is the peculiar province of the legislature to prescribe *general* rules for the government of society [emphasis added]."[185] While Marshall was in the Virginia House of Delegates during the Philadelphia Convention, his opinion on legislative power was derived from a large corpus of legal sources which the delegates would have been familiar with. In Volume One of his *Commentaries*, Blackstone affirmed that a 'law' which singled out an individual was not really a law because law was "not a transient sudden order from a superior to or concerning a particular person; but something permanent, uniform, and universal." This conception can be traced back to the thirty-ninth chapter of Magna Charta which states that "No freemen shall be taken or imprisoned or disseised [sic] or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land."[186] In England and America, due process required that the legislative power not extend to the issuance of punitive special or partial laws.[187] During the House of Lords' debate on the repeal of the Stamp Act in 1766, Lord Camden argued that there are some things that the legislature "cannot do…they cannot take away private property…without compensation. A proof of which is the many private bills…They have no right to condemn any man by bill of attainder."[188] Camden's statement demonstrates that he understood a bill of attainder to be a statute that singles out an individual by "condemn[ing] a man" to punishment.[189] This association suggests that Camden believed that a key mark of a bill of attainder was the peculiar classification of one that it employed. Naming the individual who was to receive punishment was a *sine qua non* for a bill of attainder.

In truth, a bloodthirsty chamber bent on extracting justice through a bill of attainder would find that a bill without a name would not be as sweet because a generally applicable criminal statute would not apply retroactively and would be over-inclusive. These restrictions were present because criminal laws could not be applied to individuals who engaged in the prohibited activities before the acts were passed, and a generally applicable law would not only target the party the legislature despised but others who committed the act outlined in the statute as well. The delegates to the Constitutional Convention would have been familiar with Camden's views because of many reasons: his judicial opinions were hailed in the colonies during the revolutionary period, many young lawyers studied them religiously, and the Marshall Court later relied on this view

[184] [A] 3 James Burgh, *Political Disquisitions: Or, An Enquiry Into Public Errors, Defects, and Abuses* 253 (1774). [B] The House of Representatives of Massachusetts to the Governor, January 26, 1773. [C] Resolution of the First Provincial Convention or Congress of North Carolina held at New Bern, August 27, 1774. [D] 9 In William Laurence Saunders, *The Colonial Records of North Carolina* 1045 (1886).
[185] *Fletcher v. Peck* 10 U.S. 87, 6 Cranch 87, 3 L. Ed. 162 (1810).
[186] [A] See supra 15 at 44. [B] George Ferrers, *The Great Charter Called I[n] Latyn Magna Carta: With Diuers Olde Statutes Whose Titles Appere In the Next Leafe Newly Correctyd. Cum Priuilegio. Ad Imprimendum Solum* 3 (1541).
[187] Lawrence M. Friedman, *History of American Law*, 143 (3rd ed. 2005).
[188] 16 T.C. Hansard, *The Parliamentary History of England From the Earliest Period to the Year 1803* 168 (1806).
[189] *Id*.

extensively in a major case involving a redistributive private bill passed by a state legislature.[190] Therefore, the delegates to the Philadelphia Convention likely associated bills of attainder with the singling out of individual citizens and thought that the latter was one of three elements required to constitute the former.

Conclusion

The bill of attainder clause is one of the more specific provisions of the U.S. Constitution because the expression is truly a term of art. The delegates to the Federal Convention of 1787 used the phrase to describe a particular statute that targeted one or a few individuals, declared them guilty of a crime, and specified a punishment that they must suffer. This prohibition was the product of a long intellectual and legal tradition that embraced more enlightened conceptions of criminal procedure and punishment, the separation of powers, and due process of law. Old controversies in the mother country, abuses in the states, and treatises by influential jurists convinced the framers that bills of attainders would be antithetical to free government in the union, and the delegates acted accordingly. Bills of attainder did not fit the bill in America.

[190] [A] Bernard Bailyn, *The Ideological Origins of the American Revolution,* 33 (2nd ed. 1992). [B] *Trustees of Dartmouth College v. Woodward* 17 U.S. 518 (1817).

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The Undergraduate Law Review will be looking to publish our next journal in December of 2016. Our team is looking for quality papers written by undergraduate students in any topic pertaining to the law.

Any previously written papers that have not been published elsewhere are welcome, as are papers of any length. Citations should be formatted in Bluebook style. Students should include a title page with their name, undergraduate institution, and year of graduation.

Students should send their articles to **ohiostateundergradlr@gmail.com**. The deadline for submissions for our **autumn 2016** publication is **September 25, 2016**, and submissions will be considered on a rolling basis. Details regarding the criteria for submission can be found at **ohiostateulr.weebly.com**. Students will be notified via email when our team has decided whether or not to extend an offer of publication. More details about the editing process will be sent to students upon submission.